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OA/ID Number:	29189
Folder ID Number:	29189-009

Folder Title:
Reilly (EPA) (1990) [1]

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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Ede Holiday to John Sununu Re: EPA "Cost of Clean" Report (1 pp.)	12/17/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
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WHORM Cat.:
File Location: Reilly (EPA) (1990) [1]

Open on Expiration of PRA
 (Document Follows)
 By *JP* (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29189-009
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AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
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THE WHITE HOUSE

WASHINGTON

December 17, 1990

THE CHIEF of STAFF
has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: EDE HOLIDAY 

SUBJECT: EPA "Cost of Clean" Report

 EPA has advised us that its report on "Environmental Investment: The Cost of a Clean Environment," which has been reviewed and cleared by OMB and was scheduled to go to the Congress last Friday, has been delayed until early January. We have advised EPA that the tone of the documents accompanying the report should be neutral and not overly laudatory of the costs incurred for environmental protection over the last few years. EPA staff has told us that EPA's intent is to demonstrate to the Hill how much has been spent in the past to comply with its mandates and to project the extent of future costs.

Transcript of Opening Remarks by

William K. Reilly

Clean Air Act Press Conference

November 15, 1990

I am accompanied here by two of the giants of the Clean Air odyssey--Bob Grady, Assistant Director of OMB and Bill Rosenberg Assistant Administrator for EPA for Air and Radiation.

Let me just start this off and we'll then invite each of them to make a statement and respond to your questions.

This really is a great day for the environment. And it's a great day for the country. It's a great day for this agency, for EPA.

We started this effort a long time ago. The Agency saw administrations come go and Clean Air bills come and go.

The Clean Air Bill reauthorization has been stalemated for the better part of ten years. Those of us who have just endured the past eighteen months understand I think much better than we did when we began this effort why that has been so.

It is an extremely difficult and contentious question that has been resolved today. It has involved regional tradeoffs and conflicts of very great size. It has involved very significant costs to every sector of the American economy. It will involve some pain personally to everybody. It is in our view, however, an expense that is more than compensated by enormous benefits, benefits to health and benefits to ecology.

I said not long ago that the environmental movement and its force and staying power in this country have come from the fact that in the late 1960s we say a merger of two strains of American history--the conservation strain on the one hand, which produced the national park and nation forest systems--the public health concerns and the public health community on the other. And when those two joined together they created a force of irresistible power. Both of those elements, both of those contributions are very much present in the Clean Air Act.

We have scarcely ever seen a bill that has as much benefit for the natural systems of the country, with the possible exception of the Clean Water Act. The acid rain title of this bill--I think you all know that before this Administration there had never been a Presidential proposal to address the acid rain problem or the go beyond study of it--is really unprecedented.

The permanent cap limit on sulfur dioxide emissions is something we haven't really done before and given that those emissions are to be brought down about 50% that is a very ambitious commitment indeed.

The health benefits the President mentioned a few minutes ago in the White House--billions of pounds of pollutants are to be reduced, the risk from air toxics is to be dropped some 75%-90%, the reduction in ground level smog and the very practical steady dependable initiatives that we have to bring cities into attainment--commitments of steady progress which will be monitored by this Agency and vigorously enforced-- all give us the promise of a healthier and cleaner country in the very near future.

I think that much has been made about some conflicts that attended the resolution of issues in this bill. Let me just say for my part that today is a day for celebration. The various interests that spoke fairly for their concerns were heard--no one completely satisfactorily probably--but the ultimate result is a significant precedent shattering piece of legislation.

We at EPA recognize that it places enormous demands on us with difficult to achieve milestones. This bill reflects milestones we ourselves proposed and the Clean Air Act that was signed today I think is 75%-80% the President's Bill.

We are under even more obligation to ensure that we do effectively implement this and we fully intend to. We began more than a year ago to anticipate the needs of administering this bill. It will require very good cooperation with Bob Grady and his staff at OMB. We have in place already hundreds of new employees that will be working within the Clean Air Office itself, but within other parts of the Agency cooperation will be necessary too. We anticipate bringing on hundreds more. They are going to be administer a law that I think will set a pattern not just for the future environmental legislation in this country--with its emphasis on market incentives and very specific and ambitious commitments--but also for other nations .

We have already seen the British white paper, produced three or four weeks ago, reflect some of the same concepts, some of the same ideas, that are reflected in the Clean Air Act.

We will I think do everything we certainly can to be worthy of the investment of trust that the President has made in us. I think more than anyone else we should recognize that this bill would have not been signed into law today without the President's strong commitment and consistent backing and without the cooperation of his senior advisors, including John Sununu and Roger Porter.

It has been a very satisfying thing for us to identify very closely with the President and with the Administration's efforts on this bill. I doubt that history records any more success for collaborations in that respect than this one. So if you see that we are moved here I think you have to appreciate what this represents both for the environment and for EPA.

Let me now introduce two of the people without whom it would not have come off as it did and invite them to make statements as well and answer your questions.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OCT 26 1990

THE ADMINISTRATOR

*EPA
Boskin*

The Honorable Michael Boskin
Chairman
Council of Economic Advisers
Executive Office of the President
Washington, D.C. 20500

Dear Michael:

As you proceed with the analysis the President has requested of the economic costs of the Clean Air Act conference report, I wanted to assist this process by communicating to you the intention of this Agency with respect to implementation of the Act. Any attempt to calculate the cost of various provisions of the Act involves some interpretation of how those provisions will be implemented in the development of rules and guidelines. I thought a clear statement of how we intend to proceed would allow you to give the President the most accurate picture possible of the Act's economic implications.

As a general matter, the Agency intends to exercise the discretionary authority which it is granted under various sections in a manner consistent with the principles upon which the President's Clean Air proposal was based. This means that, to the maximum extent made possible by the actual statutory language, we will make use of the flexible, market-based approaches that are the hallmark of the President's successful initiative. For example, we will attempt in the rulemaking process to make maximum use of such concepts as banking and trading, as we have done both in the development of the acid rain proposal and in the proposed Federal Implementation Plan for California.

Moreover, as we did during the debate on the bill itself, we will embrace where ever possible a performance standard approach to achieving our environmental objectives, rather than the command and control approaches that have not been successful in the past. When not specifically prohibited by the statute, we will attempt in our decisionmaking to achieve environmental objectives in the most cost effective way to ensure that our national aspirations for economic growth are not compromised.

There are a number of issues on which the Administration as a whole reached consensus during the development of our proposal and the legislative debate on the bill. In some cases, of course, the Congress has reached a somewhat different position. On these, needless to say, we will follow the law, including meeting statutory deadlines. Others remain subject to interpretation in the rulemaking process. On these, it would be our intention to adopt as the basis for regulatory and administrative actions the position reached by the Administration during the clean air debate.

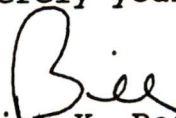
In several instances, implementation of the Act will require determination of the workability, feasibility, or cost of various actions. We, of course, will work closely with the relevant economic and line agencies, such as CEA, Treasury, OMB, Transportation, and Energy, in the design and application of such determinations.

Decisions related to permitting and enforcement are some of the most important in the Act. We have worked in the development of the legislation for a permitting and enforcement regime that reduces unnecessary administrative burdens for permittees. It is our intent to implement the provisions which have been enacted with the same goal in mind. We worked to develop a comprehensive permitting section that reduces redundant paperwork requirements and the potential for "double jeopardy" in the Agency's permit review process; we recognize that micromanagement by EPA of permitting decisions is unnecessary and likely to be extremely costly.

I believe that the Clean Air Act Amendment of 1990 is a landmark achievement for the President which can be implemented in a way that is consistent with his principles of balance, flexibility, and support for market mechanisms. I have attached to this letter a more detailed statement of our intent in implementing the Act. I hope it is helpful to you as you prepare your final cost estimate for the President.

I look forward to working with you as the Administration continues to promote both economic growth and environmental protection.

Sincerely yours,


William K. Reilly

Attachment

1. Netting/New Source Review -- Where there is legislative discretion, EPA will allow sources to use netting to the maximum extent possible, in accordance with the President's original proposal.

2. WEPCO/General Modification Rules -- To the extent permitted by law, EPA will revise the Agency's draft interpretative rule on WEPCO within 4 months to conform to the Administration's recent legislative proposal, as indicated in Administration responses to recent queries from Senator Ford. To the extent permitted by law, EPA will issue an interpretative ruling to apply the same basic principles to pollution control projects undertaken to meet requirements imposed pursuant to other titles of the bill.

3. Pilot Regulatory Budget -- To the extent permitted by law, the EPA will develop an innovative pilot program for a regulatory budget for CTGs (Control Technology Guidelines) consistent with CEA's cost analysis.

4. Permit Program Implementation and Regulatory Budget -- EPA will implement the permit program in the following ways: (a) use the discretion of the bill to phase-in the permit program starting with major sources; (b) establish a policy of reliance on review of state permit programs, rather than the individual permit veto, as the primary oversight tool; and (c) ensure that modifications to install pollution controls do not in and of themselves trigger the issuance of a new permit, to the extent allowed by law.

5. NOx Control in Nonattainment Areas -- Before requiring NOx controls in nonattainment areas, the EPA will provide areas with a fair opportunity to show that these controls will not contribute to ozone attainment, and thus should not be required.

6. Realistic Assumptions for Estimating Risk -- EPA will continue to ensure that it uses realistic assumptions in its risk models, including accurate exposure modeling and maximum use of actual data. When allowed by law, EPA will base risk assessment on actual data and reasonable assumptions to the maximum extent possible.

7. Top Down BACT Policy Revision -- EPA will undertake a rulemaking on its BACT policy on an expedited basis to replace current guidelines. The rulemaking, to be proposed to OMB within 120 days, will be based on a cost-effective approach, and the current guidelines will not be binding precedent.

8. Utility MACT Decision -- EPA will base its utility MACT decision for particulates and mercury on the study undertaken pursuant to statutory requirements.

9. Mobile Source Air Toxics Control -- EPA will ensure coordination of increased air toxics controls with the existing regulatory requirements on autos and fuels.

10. Enforcement Discretion -- EPA and DOJ will develop an enforcement policy which provides incentives for company internal compliance audits which result in early detection and correction of problems. To the extent allowed by law, EPA and DOJ will also establish a criminal enforcement policy that focuses on significant violations.

11. Maximum Use of Subcategorization -- EPA will make maximum reasonable use of sub-categories for MACT determinations. In defining sub-categories, it will consider issues like technology, process differences, emissions potential, and exposure potential.

12. Certifying Reformulated Fuels -- EPA will act within 180 days, as required by the statute, to certify reformulated fuels.

13. Expedited Permitting of Refineries -- To the extent allowed by law, EPA will attempt to expedite permitting for refineries to meet the ambitious schedules for reformulated and oxygenated fuels in the statute.

14. EPA Policy Office Review -- EPA will ensure that the policy office within the Agency has reviewed all major regulations and guidelines before submitting them to OMB.

15. Oxygenated Fuel Waivers -- EPA will act promptly on waiver requests. In considering availability, EPA will not assume that oxygenate can be backed out of existing markets in which its use is currently subsidized by State programs.

16. Allowance Trading Program -- EPA will consult with economic agencies, particularly OMB, CEA, OPD (Office of Program Development), and Treasury, before issuing guidelines on the allowance trading program.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Letter	From William Reilly to POTUS Re: Background on the Budapest Center for the Central and East European Campaign (4 pp.)	10/17/90	P 5	

Collection:

Record Group: Bush Presidential Records
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

October 17, 1990

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THE CHIEF of STAFF
has seen

THE ADMINISTRATOR

Memorandum for The President

SUBJECT: *Background on the Budapest Center for the Central and East European Environment*

I am on the campaign trail for Pat Saiki in Hawaii at the moment, but learned that you are to meet with Prime Minister Antall of Hungary tomorrow (Thursday) and wanted to get you a few items of background on the environment in Hungary and our help through the Budapest Center.

As I mentioned briefly a few weeks ago, we initiated the new Center on a bright, sunny (unpolluted) day in Budapest on September 6. President Goncz planted a tree, and Prime Minister Antall spoke, as did the Environment Ministers of Hungary, Czechoslovakia, Poland, Austria, Italy, the European Community Director General and a representative of Canada. I spoke, delivering the attached remarks. USIA Director Gelb and Peace Corps Director Coverdell were also there. World Bank President Barber Conable was present for the reception the evening after the ceremony.

Charter signatory nations as of the opening included 12 countries and the European Community. Eight made cash contributions of \$10 million and two provided equipment and property valued at more than \$2 million. The U.S. with a \$5 million commitment over three years provided the largest support, followed by the EC with \$2.6 million over two years. Prime Minister Mulroney agreed when I visited Canada in August to commit \$1.5 million Canadian over three years.

The Center's 14 member board met following the ceremonies and elected an impressive Polish professor, an economist, as chairman. The U.S. has one official and two nongovernmental board members (Deputy Counsel to the President John Schmitz, Ford Motor Vice President Helen Petrauskas, who is Ukrainian born, and Frank Loy, Chairman of the Environmental Defense Fund and also President of the German Marshall Fund of the U.S.). The EC also has an official and two nongovernmental board members, and one each from Hungary, Poland, Yugoslavia, Czechoslovakia, Bulgaria and Austria. Canada may get the remaining open seat.

The Center is commonly referred to in Europe as the "Bush Center." Your personal role in conceiving and creating it is widely understood and very much appreciated. EC officials have even expressed some concern about excessive U.S. involvement and influence but all others are tremendously grateful for U.S. help in attending to one of the most serious cases of environmental degradation ever experienced anywhere. In my travels in Hungary and Poland I was told repeatedly, "We are victims of geography." Even Polish Silesia, which is the source of grotesque emissions of sulfur oxides and heavy metals, gets half of the pollution to which its people are exposed, from Czechoslovakia and East Germany. This makes regional cooperation absolutely essential on the environment and that is why the Bush Center is the object of so much attention and high expectations.

In fact, the very high expectations for the help the Center can provide create a bit of a problem. I've advised the Center's program director, who is one of EPA's very best career people, to look for early, straightforward successes to ward off any disillusionment and to put the Center in a stronger position to exert its influence and to raise more money. The Center Director, a Hungarian, has proposed to the Board that the priority issues at the beginning be energy policy, public health and pollution control, and planning for chemical and nuclear accidents and emergencies. The Center has already held a conference on the latter subject.

The Eastern Europeans confront an extremely difficult energy problem now. Anti-government agitation in Hungary began over environmentalists' criticism of a proposed hydroelectric dam on the Danube. The Hungarians have since withdrawn from the project but the Austrians are still backing it, which led to hostile questions at a joint press conference from Hungarian reporters to the Austrian Environment Minister. (She grandly dismissed the criticisms by pointing out that her party had always been opposed to the dam. Coalition government must be great fun.) With reunification the Germans will shut down all four East German nuclear reactors as unsafe. They feature Soviet design and technology and are identical to reactors in other nations of Eastern Europe, which will result in enormous pressure on governments there to shut their reactors. Poland has ceased construction on one such reactor.

This comes at a time when the USSR is not fulfilling its existing energy commitments and has served notice it will charge for oil at the world price beginning in January 1991. Large amounts of oil owed Hungary, Czechoslovakia and Poland by Iraq in return for arms supplied during the Iran-Iraq War will not be forthcoming. And the public is deeply angry about the pollution levels associated with continuing to burn coal without pollution controls. Incidentally, Poland anticipates it will reduce its consumption of coal from 225 million tons to 175 million tons without any loss of industrial output, merely through efficiency improvements and restructuring.

Add to the energy problem the cleanup and pollution control needs. Hungary has 60 bases left contaminated by the Soviet Army, on which they hope the U.S. will help with technology and treatment. I promised missions to advise on treatment priorities and technologies but said we could probably not provide any funding: we have 1246 Superfund sites of our own we can scarcely afford to clean up. A U.S. company, Markov, has encouraged the Hungarians to believe they can clean up bases for \$500,000 apiece and the U.S. can be lobbied for funding. The State Department has written Markov to discourage these representations. The Hungarian press repeatedly put questions to me about U.S. willingness to provide funds for cleanup work and it is conceivable the Hungarians will raise the issue with you.

Three Eastern European ministers asked me for information about trustworthy U.S. companies capable of assisting them. All know they have expectant and demanding publics, horrendous cleanup, and high worker absenteeism due to respiratory disorders. The Poles estimate that pollution has created a 15 percent drag on GNP. Emphysema is rampant in some areas.

All thus look to our help on the environment as responsive to one of their most urgent problems. Havel of Czechoslovakia said recently that restoring his country's environment is his number one priority.

The only concern I am aware Hungarians have about the Budapest Center is that it is not oriented exclusively to their country. Nevertheless they have been totally committed to getting a building for it, restoring the building and getting the center launched. We have strengthened our bilateral science and technology agreement with them and will make sure that their own specific needs receive attention.

Although the Budapest Center has not received much press attention in the U.S., it has been heavily covered throughout Europe, both East and West. That has served to offset the extensive negative press we have received in Europe on global warming and on our early resistance to additional funding for developing countries under the Montreal Protocol (ozone treaty). The Center may well be worth highlighting as expressive of the environmental priority we are asserting in our foreign policy. The 30 percent increase in AID's environmental budget, to nearly \$400 million, the elephant ivory ban, support for the Basel Convention (banning hazardous waste shipments to developing countries unless we're confident of their disposal capability), the proposed acid rain accord with Canada, the proposed renegotiation of Latin American public debt applying some interest to nature conservation, the proposal for a world agreement on forests -- all these add up to a pretty good story you may wish to consider putting in a single speech. We are likely to receive another round of negative press in connection with the World Climate Conference in Geneva at the end of the month. Prime Minister Thatcher, Chancellor Kohl and President Mitterand are all scheduled to address the conference, stressing their

commitments to reduce carbon dioxide emissions in order to avert global warming. Your trip to Latin America a few weeks later could offer an occasion for a major statement reminding the world of your record on international environmental issues. Such a speech would be very well received in Brazil, I think, where the press is increasingly attentive to the environment. (There are now 2000 environmental organizations in Brazil, hardly any more than 10 years old.)

A handwritten signature in dark ink, appearing to read "Reilly". The signature is fluid and cursive, with a large initial "R" and "i" followed by "lly".

William K. Reilly

Enclosure

Regional Environmental Center—Opening Ceremonies

Keynote Address by William K. Reilly
Administrator, U.S.EPA

Budapest, Hungary
September 6, 1990

U.S.EPA

Communications And Public Affairs (A-107)

20Z-1010

This could not be a more joyous, exciting, or promising occasion—for me personally, for the U.S. Environmental Protection Agency, or for my colleagues in the U.S. government, especially the U.S. Peace Corps, the Agency for International Development, the U.S. Information Agency, and the Department of State.

We are, with this event, celebrating both the joy and excitement of freedom and the vibrant promise of a cleaner, healthier, better way of life for the people of Eastern and Central Europe.

When President Bush announced in July of last year that he would be asking the U.S. Congress to support the establishment of this Center, he noted that "our shared heritage is the earth, and the fate of the earth transcends borders." Securing that heritage for future generations will require creative, cooperative efforts among nations to promote harmony, stability, and sustainable, environmentally sound economic development.

This Regional Environmental Center is one such effort. We at the Environmental Protection Agency are extremely pleased and proud to have had a role in the President's outreach to Eastern Europe; and I am delighted to see so many prominent and environmentally concerned people from throughout the world here today to help inaugurate this Center.

Clearly the environmental restoration of Eastern and Central Europe is a monumental, and monumentally important, challenge. The environmental problems of this part of the world are enormous. In some places, they are catastrophic.

All around us are cities blackened by thick dust; rivers heavily contaminated by chemicals. Nearly two-thirds of the length of the Vistula, Poland's principal river, is unfit for even industrial use. The Oder River, which forms much of Poland's border with East Germany, is useless over 80 percent of its length.

Rain in the mountains of southwestern Poland has been found with a pH of as low as 3.0—approximately

the same as vinegar. Less than half of the population of Hungary is served by adequate sewage systems. The water in nearly 800 towns and villages is believed to be unfit for human consumption.

The splendor of this city, Budapest, is nearly obscured at times by the exhaust from cars and buses. In Czechoslovakia, an average of 25 tons a year of sulfur dioxide is deposited on every square kilometer. Over half of the forests are dying or damaged. Some 75 percent of the hazardous waste generated in Czechoslovakia is inadequately and unsafely stored.

Eastern and Central Europe are plagued by premature deaths, high infant mortality rates, chronic lung disorders and other disabling illness, and worker absenteeism. Infant mortality in Poland is 20 per 1,000; across the Baltic, in Sweden, it is just six per 1,000. Average life expectancy in Poland is some ten years less than in Sweden.

And the economic drain from these environmental burdens, in terms of lost productivity, disability benefits and health care, are enormous. Czechoslovak officials, for example, estimate that economic losses from environmental degradation now equal seven percent of the country's gross national product.

Let those who believe that pollution control is too expensive come to Eastern Europe to see what policies based on that premise have wrought.

Let those who say that some nations cannot afford environmental protection look at the economic drag of ravaged environments and wrecked lives.

Let those who believe that productivity and pollution control are in conflict come and see places where river waters are too corrosive even to cool machinery; where economic growth is hobbled by sick workers and dying forests; where contaminated environments have relieved huge areas of their productivity and their usefulness.

In places where some of the basic resources of life are not protected—the soils and the trees, the rivers, lakes,

In July 1989, President Bush proposed the establishment of an independent, nongovernmental Regional Environmental Center for Eastern and Central Europe in Budapest, Hungary, to serve the environmental needs of countries in that region. The Support for Eastern European Democracy Act (SEED Act) provided United States funding to establish the Center, and EPA was given the lead in supervising the Center's start-up phase. The United States, Hungary, and the European Community (EC) were among the founders of the Center, which is receiving support from many countries around the world.

and the air—economies founder and growth cannot occur.

As I see it, our success in meeting the enormous environmental challenges ahead will rest on three key developments.

The first will be the consolidation of freedom and the creation of sound, stable democratic institutions in Eastern and Central Europe.

The opening of this Center today is only the latest in a remarkable series of events that history will record as the "Revolution of 1989." This largely peaceful revolution has profoundly changed the lives and destinies of millions of people.

I recall serving in the 1960s as an Army officer in Germany, with responsibilities for providing intelligence and security along the border between East and West Germany. In just four weeks, on October 3, that border will no longer exist!

Lenin once called liberty a "bourgeois dream." The brave and determined people of Eastern and Central Europe have dared to dream the dream of liberty—and to turn that dream into reality.

But *achieving* freedom, thrilling and uplifting as it is, is only the beginning. The hard work now begins of building the stable social and political institutions that will both secure the blessings of liberty and insure that the will of the people is heard and heeded.

I recall asking one minister from an Eastern European country early last year: Why the sudden new priority given the environment by governments long insensitive to the issue? He replied, "We've never really had to pay any attention to the people before. Now that we do, we find they are deeply angry about pollution."

(That minister, incidentally, as well as his government, is now gone.)

Genuine democracy will be the best guarantor of a sound environment. Where people have a voice, they raise it on behalf of clear skies and clean water. And market economies will prove a far more effective and efficient means to protect environmental values and to generate the wealth to pay for cleanup than centrally planned systems, whose failures here are so shocking.

This Regional Center can help. It can help by assembling the knowledge and experience—both good and bad—of other nations, while serving as a catalyst in the development of creative new approaches to environmental management.

The economic, social, and political changes now under way offer a unique opportunity to weave environmental protection and stewardship into the very fabric of the

region's new social, political, and economic institutions. Working with other nations and international organizations, the Center can provide information, expertise, and technical assistance both to correct the environmental abuses of the past, and to insure that new industries are able to take advantage of the cleanest, most efficient technologies available.

The Center will focus its attention on three major issues: energy conservation—an area of heightened urgency because of the current Mideast crisis—the protection of the public health, and the *prevention* of pollution before it is created in the first place.

So that is the first requirement: freedom and an openness to new ideas about both the economy and the environment.

The second key element in the environmental restoration of Eastern and Central Europe will be the successful transition from socialism to healthy, growing market economies.

The lifting of the Iron Curtain has revealed to the world that authoritarian, centrally planned societies are much greater threats to the environment than capitalist democracies. The same policies which ravaged the environment—the pursuit of all-out, no-holds-barred economic development, without regard for either human or natural resources—also wrecked the economy.

There is a good reason that no economic benefits have been identified from all the pollution control costs the nations of Eastern Europe have avoided: healthy natural systems are the foundation for *all* human activity, including economic activity.

To overcome the bitter legacy of decades of environmental neglect, the new democracies of Eastern and Central Europe must encourage environmental investment in their new free economies. Here as elsewhere, economic growth must be the *engine* of environmental improvement; it must pay for the technologies of protection and cleanup. But it must be environmentally sound, *sustainable* economic growth; growth consistent with the needs and constraints of nature.

And the third essential factor in the region's environmental renewal will be individual action.

Environmental protection is as much an individual duty as it is a responsibility of government and industry. People everywhere, in developed and developing nations alike, must embrace a new ethic of conservation and stewardship of nature. And they must *apply* this vision in their daily lives—in home and workplace, during leisure time, as family members, as community residents, as producers, as consumers.

I look to the private conservation and environmental groups to play a leading role in fostering this ethic of environmental stewardship throughout society. Many courageous members of these organizations are here today, from Hungary and other countries. You have been in the vanguard not only of environmental action but of basic political reform.

I have been struck by the critical role environmental groups played in promoting democracy in the face of authoritarian oppression. Environmental protests by groups like the Danube Circle here in Hungary, Ecoglasnost in Bulgaria, and the Polish Ecology Club helped to galvanize public demands for the transformation of the old order.

And now, many of the leaders of environmental organizations hold elected or appointed positions in government. These private organizations are part of the new democratic structures now being erected. They will continue to train the leaders of the future. And they will nurture the environmental concerns that already have taken root, and foster sustainable democracies as well as sustainable economic growth.

The Regional Environmental Center can help to bring these groups together to work on issues of common concern, and it can provide information and assistance whenever needed.

To those who fear that nongovernmental organizations may be excessively idealistic or insensitive to economic realities, I suggest you engage such groups genuinely in the collaborative job of solving problems. Groups invited to participate within the councils of decision tend to share the disciplines of governance and to be a source of creative proposals. Kept out, such groups can become hostile and extremist. That is a lesson hard learned in some countries, and Eastern and Central Europe can enjoy the advantage of that experience.

I must also stress the importance of regional cooperation to address the many shared environmental problems and common environmental concerns of Eastern and Central Europe.

Every country in the region shares with its neighbors the environmental problems of transboundary air and water pollution. For several countries of Europe, more than half of all air pollution comes from beyond their own borders. What a powerful incentive to work together!

The Regional Environmental Center will be well positioned to provide information and assistance in dealing with all of these issues. It will also be available

to serve as a neutral forum for discussion of difficult transboundary problems. And it will provide a contact point for working with such international organizations as the International Labor Organization, the World Health Organization, the International Energy Agency, and the Organization for Economic Cooperation and Development.

I want to conclude by expressing my deep appreciation to all of the individuals and organizations whose commitment and efforts have made today's opening possible. And to our partners in this endeavor, let me say how privileged we feel to join you in this historic enterprise.

I also want to express my confidence in Peter Hardi [Executive Director of the Center], Steve Wassersug [Program Manager of the Center], and the Center's trustees. Under their able leadership, this Center should prosper.

I once ran an environmental organization. Each year it fell to me and our staff to design a program and projects and then to try to raise money to support them. I never had the luxury of being given funds and then being entrusted to design a program to spend them. So I envy you in the Center who have a blank tablet, a universe of important problems, and an invitation to write a critical chapter in the history of this region—to play a leading role in the long-awaited and desperately important reconciliation of people and nature.

Henry David Thoreau, the spiritual and intellectual prophet of the American environmental movement, once defined independence this way: "To breathe after your own fashion; to live after your own nature."

That is the promise of this Regional Environmental Center, and of the democratic revolution that made it possible: the promise of living in freedom, and breathing freely. We in the United States look forward to working with all of you to make this promise a reality. □

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From Andy Card to John Sununu Re: EPA Report (1 pp.)	9/26/90	b5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Cabinet Agencies Files
WHORM Cat.:
File Location: Reilly (EPA) (1990) [1]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29189-009
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE
WASHINGTON

DATE: 9.26.90

TO: Gov. Sumner.

FROM: ANDY CARD

THE CHIEF of STAFF
has seen

re. Asbestos Report.

EPA's report was
good. I have contacted
Demarests shop to get
the word out, esp. to
parochial school district.



THE WHITE HOUSE
WASHINGTON

Date: September 25, 1990

FOR: Governor Sununu

FROM: ANDY CARD

- ☐ Action
- ☐ Your Comment
- ☐ Let's Talk
- ☒ FYI

THE CHIEF of STAFF
has seen

Gov. S-
FYI
Andy

THE WHITE HOUSE
WASHINGTON

AC HAS SEEN
9/25

September 21, 1990

MEMORANDUM FOR ANDY CARD

FROM: EDE HOLIDAY 
SUBJECT: Boston Harbor Tunnel Project

EPA has informed us that on September 24 it will recommend an environmentally unsatisfactory rating for a planned third harbor tunnel in Boston proposed by the Federal Highway Administration. The project involves widening I-93, the Central Artery, and extending I-90.

The Boston regional office of EPA has raised two main concerns: first, it objects to plans to dispose of over nine million cubic yards of excavated and dredged material in a 100-acre area around Spectacle Island in the harbor; and, second, it has concerns about air quality impacts, both during construction and with regard to tunnel ventilation.

Proponents of the project have recently begun to address the problems EPA has cited, and EPA is confident that the problems can be resolved prior to the completion of the final environmental impact statement, which is expected next year. For instance, EPA believes that adequate alternative inland sites exist for the disposal of dredged materials, which would avoid damaging harbor water quality and tidal habitats.

We thought you might be interested in this one because of its relevance to your home state and the President's upcoming trip to Boston.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
04a. Letter	From William Reilly to John Sununu Re: Procymidone (3 pp.)	9/19/90	P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Cabinet Agencies Files
WHORM Cat.:
File Location: Reilly (EPA) (1990) [1]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29189-009
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P-2/P-5 Review Case #:		Disposition Date:	
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AR Disposition:		MR Disposition:	
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 19 1990

AC/ER

THE CHIEF of STAFF
has seen

THE ADMINISTRATOR

MEMORANDUM TO GOVERNOR SUNUNU
CHIEF OF STAFF

SUBJECT: Procymidone

After a great deal of thought and consultation, including conversations with Secretary Yeutter and Trade Representative Hills, I have reached a decision on Procymidone and want to apprise you of this before **it becomes public on Friday** (there is some chance, as I notify our Ambassadors and others ahead of time that the decision will leak).

I have decided to seek public comment on a petition by Sumitomo Chemical Corporation of Japan, Ltd. to establish a tolerance which would allow the importation of wines containing Procymidone to resume. The absence of a tolerance effectively blocks the import of any wines containing detectable levels of this fungicide.

Residues of Procymidone in imported wines were detected by the Food and Drug Administration (FDA) in February (FDA revised its analytical methodology thus detecting what before had gone unnoted). These shipments were detained because no tolerance or allowable residue level for this pesticide has been established in this country. In April, Sumitomo petitioned the EPA for a tolerance and requested expedited consideration of the petition. A preliminary review of the 55 volumes of data submitted by the company indicated several deficiencies which Sumitomo has verbally agreed to address through additional testing and data submissions. Preliminary review of the available studies indicates that Procymidone is carcinogenic, but the studies do not raise expectations of serious risks from exposure to the levels of Procymidone found by FDA in wine. As a whole, the data base is not considered adequate to provide definitive conclusions about the effects of Procymidone residues.

EPA's primary responsibility in establishing tolerances for residues is to ensure the protection of public health. At the same time, we realize that the lack of EPA approval of a tolerance can cause significant trade problems both for countries exporting products to the U.S. and for U.S. businesses. In this particular case, numerous shipments of imported wine have already been detained by FDA and future

shipments may also be jeopardized. As nearly as we can tell from our economic analysis, about \$100-200 million in annual trade in European wines may be involved. This compares to the total trade value of imported wine of approximately \$1.2 billion.

We have expedited our preliminary review of the data supporting the petition in order to mitigate possible trade impacts. Normally, it would take the Agency at least one year to complete its review of a tolerance petition for a chemical such as Procymidone. Some U.S. interests have complained about the special treatment being given to the Sumitomo petition.

Sumitomo and various members of the EC requested the Agency take extraordinary action to grant interim relief to allow wines containing Procymidone to continue to come into the United States. Before such a decision is normally made by the Agency, several factors are taken into consideration such as the potential impact on the food supply; the adequacy of the data base; the ability of EPA to ensure that data gaps will be promptly filled; the degree to which the circumstances leading to the need were unanticipated; and the relative fairness to other parties with pending petitions.

Neither EPA nor FDA believe that extraordinary action is appropriate at this time for several reasons. The available Procymidone data base is seriously deficient and does not meet EPA's normal standards. Sumitomo has agreed to submit additional data and information to the Agency, some of which will be available next spring; the results from some major toxicological studies will not be available for several years. Given EPA's limited resources, granting extraordinary relief to one petitioner would delay Agency action on other petitions. (In this case, we were being asked to grant expedited review to a foreign manufacturer when we would not, under similar circumstances, normally do so for a U.S. firm.) We ordinarily require all petitioners, whether the petition involves a domestic or foreign use of a pesticide, to meet the same substantive data requirements and standards.

In order to focus public debate on the unusual issues raised by the Sumitomo petition, we plan to issue a Federal Register notice in the next few days and will solicit public comment for 30 days on key scientific and policy issues raised by this request. In addition, it will present the Agency's preliminary assessment of the risk posed by Procymidone residues in wine and set out EPA's options for future actions.

As one option to reduce trade impacts, we are considering proposing an interim (time-limited) tolerance for Procymidone in the spring or summer of 1991. At that time, we will have completed a review of all available data submitted with the petition and will have subjected our risk assessment to internal and external peer review. This proposal should trigger debate on the public policy issues raised by this situation, where the detection of an unregistered pesticide on an imported food product may have a significant impact on trade. In this notice, we indicate we will assess the comments received before deciding how to proceed.

In fact, the third alternative, and the one I may well be criticized for not selecting, would be to await the completion of all required tests and then grant or withhold a permanent tolerance. That, as I said, would take four to five years during which time no Procymidone-containing wine could be sold here.

Why, you may ask, do we not merely accede to the Codex provisional maximum residue level? Well, it seems our toxicologists have a fundamentally different approach to testing for cancer. I gather the Europeans consider it overstates risk. Our people have deep reservations about the risk assessment methodology on which Codex Maximum Residue Level's rest. That is not a dispute we can resolve with a single test case.

I assure you I will provide all this information to our public and to our friends in the European Community, in France, and in Italy, and hope they understand. Ultimately we do need to harmonize our approach to such issues.

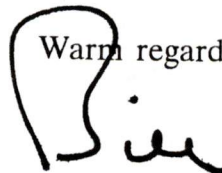
I have sent Linda Fisher, Assistant Administrator for Pesticides and Toxic Substances, to Brussels to brief officials on this decision. We are also significantly shortening the timeframe and proposing to grant an interim tolerance in the spring or summer of 1991. I hope that is appreciated in Europe; it may well be criticized as exceptional treatment here.

Finally, I will present the issue in as responsible, careful a manner as possible, with concern to avoid creating anxiety about wine in general or French and Italian wine in particular. I myself will continue to enjoy French and Italian wine.

The issue here is uncertainty and the question is, who should bear the burden of uncertainty, the wine drinking public or the chemical manufacturer and the growers? Under our law, that burden must fall on the applicant and, unfortunately, on the growers who have used his product. Sumitomo deliberately ignored our law and got caught. If Sumitomo had applied for a tolerance in 1986 when the Chilean grapes were excluded, they would likely have it by now and this problem would not have arisen.

We are a government of laws, not of men, and I read the law to compel the result I have reached. Let me know if you need any more information. Various documents are on their way to you. As I mentioned to you by phone I deeply regret the harm that may come to French growers and others in the wine trade and I have asked FDA to clarify its procedures for testing to ensure a minimum of disruption.

Warm regards,

A handwritten signature in black ink, appearing to read 'Bill', with a large, stylized initial 'B'.

William K. Reilly

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
04b. Letter	From William Reilly to Walter Curley Re: Procymidone (3 pp.)	9/19/90	P 5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Cabinet Agencies Files
WHORM Cat.:
File Location: Reilly (EPA) (1990) [1]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29189-009
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 19 1990

THE ADMINISTRATOR

Honorable Walter J. P. Curley
Ambassador
American Embassy
Paris, France
APO New York 09777

Dear Walter:

As you know from our breakfast conversation in Paris, in July, I have been confronted by a difficult regulatory decision involving the fungicide Procymidone. I want you to have the benefit of my thinking on this, particularly in view of the fact that I have reached a conclusion somewhat different from what I indicated preliminarily to you in July.

In brief the story began in 1986 when the Food and Drug Administration, which monitors food safety, detected residues of Procymidone in grapes from Chile. Procymidone had not been granted a tolerance in the United States and the grapes therefore were returned to Chile.

The curious thing is that the manufacturer of Procymidone, Sumitomo, did not then apply for a tolerance. The company is quite experienced with our laws and interacts regularly with EPA. They can be presumed to have made a conscious decision not to try to register the chemical with us.

FDA next detected Procymidone in February, 1990 in wine from Italy and then in wine from France. Recently one Spanish product has been detained. Given that the chemical has never been registered in the United States the situation was unambiguous and the legal consequence straightforward. Absent a tolerance, no food products containing Procymidone can be imported, according to our pesticide laws.

Sumitomo belatedly submitted information on Procymidone in April, and completed their application in May. The company first gave us illegible materials in numerous volumes. Finally we were provided with 55 volumes of data. Our toxicologists discovered from the submitted data that tests indicate Procymidone causes reproductive disorders in test animals and is carcinogenic. This may well explain why the company had never filed for a tolerance. (Had FDA not changed its detection methodology, doubling its effectiveness in January, the residues in wine would not have been discovered.)

I asked my experts early in the summer whether, according to their best judgements the residue levels detected posed more than a negligible risk to wine drinkers: "Will I in your opinion eventually be able to grant a tolerance to Procymidone at the detected levels?" They indicated that the data were inconclusive and the tests incomplete. Five of the seven tests in fact are seriously flawed and will have to be redone, requiring four or five years. However, our people believe that ultimately these tests are likely to vindicate Procymidone at the levels we have detected in wine. Moreover, the Codex Alimentarius provisional Maximum Residue Level in grapes, which is recognized by European Community Countries, is well above the level we have detected.

So I have sought an acceptable alternative. Essentially there are, or were three alternatives: (1) exercise enforcement discretion based on our preliminary assessment of risk and provide an early interim tolerance, and so advise FDA. FDA quite reasonably wanted EPA's explicit public judgement prior to setting an action level for enforcement purposes. Under our procedures and FDA's, the publication, comment period, and review and response to comments would require two to three months. The earliest date when the wine could begin to flow would be December 1.

A second alternative is to do a reasonably thorough job of following our procedures, taking public comment on the range of issues, including the desirability of setting an interim tolerance, convening our Science Advisory Panel (customary when dealing with a cancer causing chemical on which data are inconclusive), but short-circuiting the process to publish an interim tolerance next spring, say sometime between April and July. This is the course I have decided to follow.

The third alternative is to treat this as we do when confronted by a chemical made by a U.S. manufacturer. Last spring, we discovered that a chemical not registered for use on apples had nevertheless been used on apples. We required the destruction of \$10 million of apples, causing great distress to a family owned apple business. Apparently, there was no indicated health risk, and the chemical had been approved for use on other food products. I was not involved in that decision and find it a bit hard to justify. I mention it merely because it reflects the strict application of the law as we apply it to our own manufacturers and growers.

I expect mixed reactions to this proposal. Parties most distressed by our action today will be foreign wine exporters and U.S. wine importers and merchants. Detention of wines containing Procymidone will affect their sales during the peak Thanksgiving to Christmas season, when they report their highest sales. Domestic wine producers and petitioners awaiting Agency decisions on their chemicals will view this proposal as fair and reasonable, though they may consider my willingness to grant an interim tolerance exceptional treatment. In the chemical world it is well understood that Sumitomo tried to beat the system, got caught, and now is being made to play by the rules.

In view of the public concerns about food safety following the Alar incident last year, I believe that we must move carefully in order to protect the integrity of EPA's pesticide regulatory program. I will also be concerned to present this decision as responsibly and prudently as possible in order to avoid damaging wine in general or French and Italian wine in particular.

I have briefed Carla Hills and Clayton Yeutter on this and both fully understand and I think appreciate the basis for this course. (Clayton commented that I had exercised far more care and concern than our European friends could ever be expected to give our growers were the situation reversed.)

A handwritten signature in black ink, appearing to be 'W. Reilly', with a stylized 'R' and a small dot above it.

William K. Reilly

P.S. I enclose a letter to Walter Curley, which he requested. I alerted our Ambassadors to the European Community, France, and Italy, and their counterparts here. I also sent my Assistant Administrator for Pesticides and Toxic Substances, Linda Fisher, to Brussels yesterday.

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r w AP-Reilly-CleanAir

06-19 0417

^AP-Reilly-Clean Air

^EPA Chief Will Recommend Veto If Jobs Aid Provision Stands

^By MARTIN CRUTSINGER=

^AP Economics Writer=

THE CHIEF of STAFF
has seen

WASHINGTON (AP) - William K. Reilly, administrator of the Environmental Protection Agency, said Tuesday that he would recommend President Bush veto landmark clean air legislation if the proposal contains a controversial jobs protection amendment when it reaches the White House.

"I consider it bad environmental policy, bad social policy and bad economic policy," Reilly said in discussing a provision that would assist workers who lose their jobs because of the tougher air pollution requirements.

Both the Senate and House are preparing for a conference committee to work out differences in largely similar bills to strengthen federal clean air laws for the first time in 13 years.

One of the differences involves an amendment in the House bill that would allow for \$250 million to be spent in added unemployment compensation and retraining for workers if forced out of their jobs by the new legislation.

The administration says this could force industry spending well above the \$21 billion or so annually called for by the Senate version, partly because it would be extremely difficult to tell if a job had been lost because of the provisions of the legislation.

Reilly said his objections to this jobs proposal, sponsored by Rep. Bob Wise, D-W.Va., were strong enough that he would recommend that the president veto the entire bill if that section is not removed by the conference committee.

Stressing that the administration is "not insensitive to people losing their jobs," Reilly said that of the 17,000 to 20,000 jobs estimated to be lost by the tougher legislation, only 4,000 of those job losses would occur by 1995.

He said the major impact would not come until the next century, giving society time to prepare through use of current job retraining programs.

The jobs issues is certain to be one of the main battles in the conference committee debate. An aid package in the Senate sponsored by Sen. Robert Byrd, D-W.Va., lost by only one vote. Byrd's amendment would have helped only coal miners while the less costly Wise amendment expands the assistance to workers in all industries.

Reilly, briefing economics writers on the economic impacts of environmental legislation, said the United States spends between \$80 billion to \$90 billion annually on pollution control, counting in both government enforcement efforts and clean-up costs borne by industry and consumers.

He said the administration projected that environmental spending, which already amounts to 1.5 percent to 1.7 percent of the total U.S. economy, would rise to 2.5 percent of the gross national product by the year 2000. He said this figure would be 3 percent if the costs of cleaning nuclear waste sites is included.

Reilly said the administration understood the need "to do all we can to protect the environment, but to do it in a cost-effective way."

AP-NP-06-19-90 1940EDT(-

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Report	From Office of the EPA Inspector General Report of Audit Survey of the Alternative Remedial Contracting Strategy: Contract Bidding and Award Process (51 pp.)	4/90	P2 , P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Cabinet Agencies Files
WHORM Cat.:
File Location: Reilly (EPA) (1990) [1]

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(Document Follows)
By SP (NLGB) on 5/12/05

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(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

Sent from EPA - no note
attached

tection

Office of the Inspector General
Internal Audit Division (A-109)
Washington, DC 20460

April 1990



Report of Audit

E1SGB9-11-0021-0100274

SURVEY OF THE ALTERNATIVE REMEDIAL CONTRACTING STRATEGY: CONTRACT BIDDING AND AWARD PROCESS

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 20 1990

OFFICE OF
THE INSPECTOR GENERAL

MEMORANDUM

SUBJECT: Audit Report E1SGB9-11-0021-0100274
Survey of the Alternative Remedial Contracting
Strategy: Contract Bidding and Award Process

FROM: Kenneth D. Hockman *Kenneth D Hockman*
Divisional Inspector General for Audit
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TO: David J. O'Connor, Director
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SCOPE AND OBJECTIVES

We conducted an audit survey of the Agency's bidding and award process for the Alternative Remedial Contracting Strategy (ARCS) contracts. The objectives of our survey were to determine if: (1) ARCS contracts were awarded in accordance with Federal and EPA acquisition regulations; (2) ARCS contracts were awarded timely; and (3) the ARCS program resulted in a greater number of firms participating in the remedial program. Our fieldwork was performed primarily from April to September 1989. We judgementally selected two ARCS contracts from the second cycle of the ARCS procurement process for review. Contracts were selected in this middle cycle based on our assumption that Procurement and Contracts Management Division (PCMD) and Office of Emergency and Remedial Response (OERR) personnel would have identified areas in the first cycle that could improve the procurement process in subsequent cycles. The survey's intent was to identify control weaknesses or make observations for change early in the ARCS process.

To accomplish our objectives, we conducted our work in the: OERR, PCMD, Administrator's Office of Small and Disadvantaged Business Utilization (OSDBU), and Office of General Counsel. At our request, auditors from the Mid-Atlantic Division, Office of Inspector General, conducted work in Region 3 to determine the projected and actual ARCS workload and the status of ARCS implementation in Region 3.

We interviewed various senior officials from the above Headquarters offices who were involved in the ARCS program and senior regional managers in Superfund who were responsible for administering ARCS contracts in Regions 3, 4, 5, 7 and 8. We reviewed contract files and other ARCS records we deemed necessary that were located at Headquarters and Region 3. To assess actions to introduce new firms into the remedial program, we reviewed ARCS bidding and award requirements and PCMD records regarding firms with prior experience in the program. Concerning timeliness of contract awards, we reviewed PCMD records to determine when each Request for Proposal was issued in the Commerce Business Daily and the date each contract was awarded. Finally, we reviewed General Accounting Office (GAO) reports and studies from other agencies related to the Superfund procurement process.

We evaluated the steps taken during the procurement process with the acquisition steps and other requirements contained in the Federal Acquisition Regulations (FAR), the EPA Acquisition Regulations (EPAAR), EPA's Contract Management Manual (CMM), Superfund Amendments and Reauthorization Act of 1986 (SARA), and other relevant guidance and procedures.

We conducted our survey in accordance with the Government Auditing Standards (1988 revision) issued by the Comptroller General of the United States. Our examination included tests of the general internal controls that were in place for awarding contracts and other auditing procedures we considered necessary in the circumstances. The internal control documents we reviewed were in compliance with current EPA Internal Control Guidance for Managers and Coordinators. Within the scope of this survey, we had no indication of further weaknesses beyond those described in the Findings and Recommendations section of the report.

The scope of our work was limited primarily to the procurement process leading up to award of an ARCS contract. We did not review the implementation of ARCS contracts in the regions.

SUMMARY OF FINDINGS

The ARCS was a major procurement process which involved a tremendous amount of planning, coordination and effort by various EPA officials. The ARCS procurement process resulted in 45 contract awards with a potential contract value of \$6.6 billion. ARCS contracts are to provide EPA with the necessary resources to obtain project management and technical services supporting EPA's remedial response activities at uncontrolled hazardous waste disposal sites.

With one exception, the ARCS bidding and award process complied with Federal and EPA acquisition regulations. We also concluded that the ARCS contracts were awarded timely and resulted in new firms (11 prime contractors and 52 team subcontractors) working in EPA's remedial programs. In addition to these positive aspects resulting from the ARCS procurement process, we are making recommendations that, if implemented, will:

- (1) further increase the future assurance that a fair and reasonable price was obtained by independently preparing a Government cost estimate as is required by FAR;
- (2) enhance management's planning decisions by documenting initial estimates of regional technical hours and contract costs as a base against which periodic analysis and measures of program success and problems can be made; and
- (3) ensure that EPA contracting officers use consistent criteria and procedures for evaluating a prime contractor's "good faith" effort in complying with its subcontracting plan goals for use of small and disadvantaged businesses.

We are also providing other comments and suggestions EPA management should consider, if an opportunity is available, for further improving the cost effectiveness of the remedial contracting program. These comments involve working with Congress to amend the Superfund Amendments and Reauthorization Act of 1986 to allow the use of cost competition as a key selection criteria in awarding future ARCS contracts. In addition, we believe EPA should request that the Civilian Agency Acquisition Council grant the Agency a waiver from the Federal Acquisition Regulations inspection clause for cost reimbursement contracts which requires the Government to reimburse a contractor's cost to repeat unacceptable work. However, since these two areas are part of a Government-wide procurement policy and require action outside EPA for implementing changes, we are not recommending specific action by Agency management. However, we are making suggestions for Agency management to consider.

SUMMARY

Agency Comments and OIG Evaluation

We received informal comments from OERR, on November 13, 1989, and met with senior PCMD officials on November 17, 1989, to informally discuss the draft report findings. Comments from both program offices were incorporated in the draft report issued on December 27, 1989.

The Directors of the OSDBU and the PCMD provided formal written comments on our draft audit report on January 16 and 26, 1990, respectively. The Assistant Administrator for Solid Waste and Emergency Response (Assistant Administrator) also provided formal written comments on March 5, 1990. We discussed our conclusions with Agency officials in an exit conference on April 4, 1990.

The Director, PCMD, agreed with our recommendation that, for future architect-engineer (A&E) contract awards, PCMD officials would comply as necessary to ensure independently prepared government cost estimates are prepared in accordance with FAR requirements.

Concerning our findings and recommendations on documenting estimated ARCS requirements, both the Director, PCMD and the Assistant Administrator believed no useful purpose would be served by providing additional support for planning estimates of labor effort needed and cost estimates for previously awarded ARCS contracts. For future procurements, however, the Director stated that PCMD officials would endeavor to ensure that adequate planning estimates are prepared as early in the procurement process as practicable and meaningful.

The Assistant Administrator stated that: (1) detailed documentation was not available to support past planning estimates, (2) the present ARCS workload is substantially different than was originally envisioned and (3) the OIG's focus should be on improving future performance. Accordingly, his office was not willing to recreate historical records. Further, the Assistant Administrator said his office was in the process of analyzing current workload to achieve a better balance within the existing ARCS contracts.

The Director, OSDBU agreed with our findings and recommendations regarding the utilization of small and disadvantaged businesses in the Agency's ARCS activities. The Director believed that the recommendations, if implemented, would help maximize the use of small and disadvantaged firms in all areas of the ARCS program.

The Assistant Administrator agreed in principle with our findings and recommendations but had concerns about the practical effects of implementing changes in light of the diminished workload since the inception of the ARCS program. Accordingly, any evaluation of contractor performance in the use of small and disadvantaged

businesses would have to be flexible and take into consideration changing workloads and budget realities.

The Director, PCMD, generally disagreed with our findings and recommendations on guidance for use of small and disadvantaged business. The Director believed there was no need to define "good faith effort" or to establish additional guidance in this area because of the many variables involved by an ARCS contractor and the types of work assignments issued. Concerning the evaluation of an ARCS contractor's performance in complying with the goals of subcontracting plans, the Director believed existing evaluation procedures were sufficient to monitor such compliance.

Finally, concerning our other comments on Government-wide procurement policy issues, the Director, PCMD, believed further effort by EPA management would not result in changed legislation by Congress. Accordingly, the Director believed the Congress would not add cost competition to A&E contracts and the Civilian Agency Acquisition Council would not grant EPA a waiver from the inspection clause which requires the Government to reimburse a contractor's cost to repeat unacceptable work.

The Director believed that contractors were responsible for delivering their "best efforts" in providing the specified level of effort. If the Government could demonstrate that a contractor did not provide its "best effort" then EPA could disallow any costs that are not reasonable, allowable and allocable. The Director believed that the key to good contractor performance would not be found in contract clauses but rather in the quality and skill of Agency officials charged with the responsibility for monitoring contractor performance.

The Assistant Administrator intended to publicize our issue on adding cost competition in future A&E procurements to Agency staff and management during Superfund reauthorization activities. However, he did not anticipate undertaking an initiative to lobby the Congress for changes to the Brooks Act or other Government-wide procurement policy issues. He believed that such an initiative was the role of OMB's Office of Federal Procurement Policy. Concerning the FAR inspection clause, the Assistant Administrator acknowledged problems with this clause. He agreed with our **suggestion** to monitor the implementation of the inspection clause and document instances in which EPA is required to pay for **poor** quality work.

After evaluating the responses from the three offices, we have retained our recommendations for obtaining independent cost estimates and establishing additional guidelines for evaluating contractor performance in meeting subcontracting plan goals. In addition, we have modified our recommendations on documenting resource needs to focus on documenting the planning estimates of hours and costs for future procurements and the current analysis

of contract workload. We have also retained our suggestions that EPA management should consider for improving the cost effectiveness of the remedial contracting program.

To provide a balanced understanding of these issues, we have summarized managements' positions and our evaluation at appropriate locations in the report. The verbatim comments are provided in Appendix 1 for PCMD, Appendix 2 for OSDBU, and Appendix 3 for the Office of Solid Waste and Emergency Response (OSWER).

ACTION REQUIRED

In accordance with EPA Directive 2750, the primary action official is required to provide this office with a written response to the audit report within 90 days of the audit report date. The Director, PCMD is designated the primary action official for this report. OERR and OSDBU officials should coordinate with the primary action official in resolving the findings and recommendations. For corrective actions planned but not completed, the response should include specific milestone dates. This will assist in closing the report in the Prime Audit Tracking System. We would also appreciate receiving final response to the issues raised in the other comments section of this report.

BACKGROUND

SARA provided EPA with an additional \$8.5 billion for a 5-year period, of which a substantial amount will go to contractors for site cleanups. Past audits have identified various contractual problems that, according to OSWER personnel, were caused by the length of time required to process a Superfund contract or to change a task order. Additionally, the General Accounting Office and Office of Inspector General audits of Superfund contracts have identified problems related to the lack of competition in the award of contracts and the heavy use of subcontractors.

Overview of ARCS

ARCS is EPA's updated approach for providing the necessary resources to obtain project management and technical services in support of EPA's remedial response activities at uncontrolled hazardous waste disposal sites. Superfund provides for two types of cleanups. Removal actions are short-term responses that are not necessarily permanent solutions. On the other hand, remedial actions are long-term, usually more expensive projects aimed at permanent remedies for sites that are on the National Priorities List. ARCS services include site management, remedial investigation and feasibility studies, engineering services in design of remedial actions, and construction management for

implementing remedial actions, including support in subcontracting for the construction of the selected remedy and engineering services in overseeing construction.

All ARCS contracts have a 10-year period of performance for two functional activities: program management (performed as a completion effort) and remedial planning (performed on a level of effort term basis). The 10-year period of performance is to provide site continuity, increase accountability, and reduce the number of "hand offs" of assignments to other contractors during the average 7-year site clean-up time. ARCS contracts will supplement and eventually replace the existing national and zone Remedial Planning Contracts (REM) which will expire in September 1990.

ARCS contracts differ from the previous REM contracts in that the ARCS contracts provide EPA with support by one contractor during all phases of site cleanup. According to EPA managers, ARCS contracts also incorporate innovative performance incentives that are intended to maintain competitive pressures on contractors throughout the 10-year period of performance. ARCS performance incentives include award fee incentives and increased work assignments. Unlike REM, EPA will issue work assignments to ARCS contractors based on past contract performance and the region's/zone's workload for the coming year. Work assignments will be distributed to the ARCS contractors when the contracts are awarded and annually when assignments are made for new projects. In addition, work may be assigned to enable contractors to continue their efforts at ongoing projects.

ARCS contracts are awarded under a cost-plus-award-fee arrangement, a standard incentive contracting vehicle under the FAR. This arrangement allows for a base fee that is fixed at the time of contract award and an additional award fee above the base fee that is allocated based on EPA's subjective evaluation of the contractor's performance.

At the end of the first year and each subsequent year of the contract term, EPA contract managers will use the performance evaluations to determine not only how much award fee a contractor has earned, but also to determine how many new site assignments will be made to contractors.

OERR management believes that the ARCS concept of allowing site managers to order discrete work elements under a very broad contract statement of work achieves two important goals: (1) flexibility - the Agency only orders needed services from the ARCS contractor; and (2) continuity - ARCS' 10-year period of performance and broad technical scope will help ensure that a contractor who is performing successfully during early remedial activities can be retained through site completion.

Another key element of ARCS' performance-based strategy is regional contract management. The major technical and administrative contract management responsibilities for most Superfund contracts are retained by EPA Headquarters personnel in Washington, D. C. However, under ARCS, all direct contract administration authority and responsibility is delegated to EPA regional offices.

ARCS contracts represent the most significant procurement area within the Superfund program. By July 1989, EPA awarded 45 ARCS contracts with a potential value of about \$6.6 billion. These contracts were awarded in three cycles (several regions in each cycle) beginning January 1, 1988 and ending June 28, 1989.

FINDINGS AND RECOMMENDATIONS

1. ARCS CONTRACTS WERE AWARDED CONSISTENT WITH ACQUISITION REGULATIONS

PCMD's procurement process for awarding ARCS contracts was in accordance with the applicable Federal and EPA Acquisition Regulations (EPAAR). With the exception of preparing an independent cost estimate, PCMD complied with or obtained an approved deviation from FAR.

To accomplish our objectives, we evaluated the steps taken during the procurement process with the acquisition steps contained in FAR, EPAAR, EPA's Contract Management Manual (CMM), SARA, and other relevant guidance and procedures. For example, PCMD and/or OERR:

- o Synopsized the proposed contract actions in the Commerce Business Daily for each of the three cycles (per FAR 5.002);
- o Developed and approved the acquisition objectives in a written plan addressing the technical, business, management and other significant considerations controlling the acquisition (per FAR 7.105);
- o Developed and approved the acquisition objectives in various steps in the process such as the Architect and Engineer Evaluation Board (AEEB) Chair and members for the technical evaluation of proposals and source selection and reports (EPAAR 1515.612 and 1536-602);
- o Obtained cost or pricing data from proposed contractors (FAR 15.804-2);
- o Requested preaward audits of cost proposals by the Cost Review and Policy Branch, PCMD [CMM, Chap. 10, Section 4.C.(2)(b)(3)];
- o Conducted pre- and post-award reviews of all 45 contracts; and
- o Ensured a legal review of contract terms and clauses by the Contracts Law Branch, Office of General Counsel [CMM, Chap. 10, Section 2.b.(2)(d)].

In addition, the two contract files reviewed contained the required documentation such as the summary of negotiations, the approved deviations from prescribed regulations, and determinations and findings statements. The contracts also contained the clauses required by the FAR for cost-plus-award-fee

contracts. PCMD further enhanced the ARCS acquisition process by requiring all AEED members to complete separate financial interest statements. Both OSWER/PCMD personnel held several symposia to brief industry about the new contracting strategy.

2. ARCS CONTRACTS WERE GENERALLY AWARDED TIMELY

Although PCMD's time goals were exceeded, the ARCS contracts were generally awarded timely. Additionally, the awards exceeded Superfund program requirements to have a new contract mechanism in place before the REM contracts expired in September 1990.

PCMD established three procurement cycles and a timeliness milestone of 9 elapsed months from receipt of acceptable procurement rationale documents to the first ARCS contract award in each of the three procurement cycles. Included in the overall milestone of 9 months were interim milestones for: (1) conducting industry symposia explaining EPA's new contracting mechanism; (2) issuing requests for proposals; (3) evaluating and ranking offerors' statements of interest and technical qualifications; (4) obtaining cost proposals and conducting cost analysis; (5) negotiating a fair and reasonable price; and (6) reviewing and awarding a contract. The entire ARCS bidding and award process lasted 26 months; beginning with the April 1987 receipt of a planning procurement request and ending in June 1989 with the final ARCS contract award.

PCMD's 9-month goal was exceeded in all three cycles from 5 days to 3 months. Although the self-imposed milestone of 9 months was not strictly met, OERR and regional officials involved with each of the three cycles (Regions 3, 4, 5, 7 and 8) could not identify any adverse effects to the remedial program. In fact, OERR officials and regional officials were generally complimentary of PCMD's efforts to award ARCS contracts as quickly as possible. Any exceedance of PCMD milestones was likely lessened by the fact that the REM contracts were still active. PCMD awarded 45 contracts beginning January 1, 1988 and ending June 28, 1989, an elapsed time of 18 months. PCMD met its overall time goal for awarding all ARCS contracts despite the complexities inherent in a new contract mechanism and the tremendous effort to conduct cost and price analysis of over 100 firms associated with the prime ARCS contractors.

3. ARCS INCREASED COMPETITION

EPA met an overall goal of increased competition in awarding 45 ARCS contracts to 23 firms. Although a majority of ARCS contract awards went to firms that had EPA remedial experience under the previous REM contracts or other Superfund contracts, a number of firms new to Superfund were awarded an ARCS contract. According to PCMD statistics, of 23 prime contractors awarded contracts, 11

of these firms were new to Superfund. The 11 firms were awarded 13 ARCS contracts. Additionally, 52 team subcontractors new to Superfund were associated with ARCS prime contractors.

The ARCS program was structured to ensure a much larger number of contracts than existed under the three large REM contracts (one nationwide and two zone contracts). Under ARCS, each region or zone of regions had two sizes of contracts with multiple contract awards for each contract size. However, prospective offerors could bid on only one size of contract and could receive only one contract per zone. EPA's 10 regions were divided into seven zones with each region being a zone except for Regions 6, 7 and 8 which were combined as one zone, and 9 and 10 as one zone. Five different sizes of ARCS contracts were awarded by EPA. Each zone received from 17 to 48 interest statements (SF 254/255 Qualifications and Experience Statements) from firms, and, nationwide, EPA reviewed and evaluated 195 interest statements. As was expected, ARCS increased the industry base of firms available to perform remedial response services.

ARCS was also structured so that after award, competitive pressure would be maintained because the annual assignment of work would be based on the quality of past performance. Each ARCS contractor was told that its performance, as judged by the subjective award fee evaluation process and the associated analysis of project and cost management, would influence EPA decisions on rewards of additional work assignments and the exercise of contract options. Conversely, if a contractor performs poorly, EPA would not provide additional work assignments and will not exercise available contract options. Because each ARCS contract is intended to have built-in excess capacity, other contractors in a zone should be able to absorb the workload of poor performing contractors. By having multiple contractors within a zone, EPA officials believed that additional cost savings should result because of reduced management and learning curve expenses when work must be switched from one contractor to another due to poor performance or organizational conflicts of interest.

4. INDEPENDENT COST ESTIMATE FOR FUTURE ARCS CONTRACTS NEEDED

OERR personnel did not independently prepare cost estimates for ARCS contracts, as required by the FAR. Doing so would have provided additional assurance that a fair and reasonable price was negotiated. PCMD should request OERR to prepare an independent estimate prior to future contract awards. If this is not possible, PCMD should obtain a deviation from the FAR requirement.

Part 36, Section 605(a) of the FAR requires that:

An independent Government estimate of the cost of architect-engineer services shall be prepared and furnished to the contracting officer before commencing negotiations for each proposed contract or contract modifications expected to exceed \$25,000. The estimate shall be prepared on the basis of a detailed analysis of the required work as though the Government were submitting a proposal.

OERR prepared a one page analysis of the major cost categories for various sizes of ARCS contracts prior to negotiations, but it did not include sufficient detail to be considered an independent Government estimate. Essentially, EPA contract negotiators relied on other means to negotiate what they considered to be a fair and reasonable price. Each cost proposal received a technical review and was compared with other offerors' cost proposals submitted for a region or zone. In addition, as was brought to our attention by a senior placement contracting officer, the solicitation of cost proposals from 23 different firms could be construed as a nationwide market survey. According to Attachment A of EPA's Contracts Management Manual, a comparison of established market prices can be used to determine a "fair and reasonable" price. Contract negotiators believed that the cost analysis work performed was sufficient to reach a "fair and reasonable" price.

We recognize the substantial amount of cost analysis work done prior to contract award. However, the preparation of a detailed EPA cost estimate, as if the Agency were bidding on an ARCS contract, would have provided additional assurance that the price negotiated was "fair and reasonable".

AGENCY COMMENTS AND OIG EVALUATION

The Director, PCMD agreed to comply as necessary with the requirements of FAR 36.605 for future remedial procurements. The Director also provided important background information and the circumstances under which the original estimate was prepared. The Director believed that the process EPA followed for determining cost reasonableness resulted in a reliable estimate of cost for ARCS contracts.

Although we recognize the significant amount of work done to obtain a reliable estimate of cost for ARCS contracts, the process followed by EPA was not completely in accordance with the FAR provisions for procuring A&E services. Since the FAR requires an independent estimate be prepared and additional ARCS awards are expected, we are making the following recommendation.

RECOMMENDATION

We recommend that, for future architect-engineer contract awards, the Director, PCMD complies with, or requests a deviation from, the FAR requirement for conducting independently prepared Government cost estimates.

5. BETTER DOCUMENTATION OF ESTIMATED ARCS ZONE REQUIREMENTS IS NEEDED

Documentation supporting OERR's calculations of annual technical hours needed and estimates of contract costs for each ARCS zone was not available. Additionally, individual acquisition plans (IAPs) prepared jointly by OERR and PCMD for each of the three ARCS procurement cycles did not consistently identify estimated resource requirements. Without this information, EPA managers lack basic data for justifying contract needs or for comparing estimated planned program requirements with actual contract award results and analyzing the reasons for variances. Sound management practice requires that planning decisions and information be documented and retained to serve as a base against which periodic analysis and measures of program success and problems can be made.

A. Calculation of zone requirements

OERR officials did not retain documentation supporting each zone's estimated technical hour requirements and the details supporting the cost estimates for the different sizes of ARCS contracts. However, a senior OERR official advised us of the information and factors used in calculating regional technical hour needs and estimating contract costs for each zone. These factors included:

- historical cost data from current remedial contracts,
- SARA mandated goals of annual remedial projects,
- projected growth of sites on the National Priority List,
- Superfund Comprehensive Accomplishment Plan goals of remedial activities to be achieved each year,
- input from regional officials on their regions needs, and
- arbitrarily determined excess regional capacity of 50 percent or more in order to:

- 1) absorb the work of poor performing contractors if necessary,
- 2) provide for unanticipated capacity needs,
- 3) absorb work assignments due to organizational conflicts of interests of ARCS contractors within a given zone, and
- 4) offset past criticisms of using up all technical hours before a contract's period of performance expired.

EPA made certain assumptions about the estimated technical hours, labor category mix and other costs to perform various remedial activities. The estimate of hours needed was used in determining what contract sizes and how many contracts would be needed to fulfill the regions' capacity. Since neither PCMD or OERR could provide documentation supporting how the regions' contract hour needs and estimated contract costs were calculated, we contacted three regions and asked how their regional needs were calculated. The Superfund officials we spoke to in Regions 3, 5 and 8 could not tell us the number of level-of-effort (LOE) hours agreed upon for the region, and only one official could remember participating in any discussion involving regional needs.

We recognize the tremendous amount of planning throughout the ARCS procurement process by OERR and PCMD. ARCS was a major EPA undertaking which required strong coordination between all groups involved. Despite the close coordination, a few steps may not have been as well documented as planned, or the need to document was not apparent at the time. We believe the calculation of LOE hours needed and planned contract cost estimates for each region should have been documented and retained to justify contract needs and provide for information that might be useful in the next ARCS cycle. We believe that documenting this type of information is critical and provides an important historical base in analyzing EPA's success in structuring and implementing the remedial response program.

B. Individual Acquisition Plans Were Inconsistently Prepared And Reasons For Not Meeting Objectives Were Not Documented

IAPs developed for Cycles II and III did not contain the estimated contract value and/or the estimate of technical hours needed by the regions. In addition, the reasons for large variances in planned versus actual procurement awards were not sufficiently documented. This information would be useful for EPA management to measure their success in planning and implementing the ARCS procurement process and to decide what changes, if any, would enhance subsequent contract awards.

Section 7.105 of FAR outlines the various procurement information to be supplied for costly and complex procurements. EPA followed FAR in preparing the IAP for Cycle I. The approval of the Cycle I IAP on July 1, 1987, also constituted approval for all three ARCS procurement cycles. After completion of Cycle I, EPA found it necessary to amend the IAP for the subsequent cycles but only in specific sections. These amended sections related to RFP numbers for that cycle, changes in contract sizes and LOE hours, and sources of potential offerors through the scheduling of industry symposia. For Cycle II, the addendum of November 2, 1987, was silent on the annual LOE needs of the five regions in that cycle, and in the Cycle III addendum of March 11, 1988, both the LOE hours and estimated costs were omitted. Neither addenda or other documents explained the reasons why the estimated planned hours/costs were so vastly different from the actual contract awards made, and we are unaware of any requirements to do so.

We developed the following table from the IAP, the addenda and actual award information.

<u>Cycle</u>	<u>Estimated Planned LOE Hours</u>	<u>Estimated Planned Contract Dollars</u>	<u>Actual Potential LOE Hours Awarded</u>	<u>Actual Potential Contract Dollars Awarded</u>
I	.7 billion	\$0.4 billion	.4 billion	\$1.9 billion
II	Unstated	\$0.5 billion	.6 billion	\$2.7 billion
III	Unstated	Unstated	<u>.5 billion</u>	<u>\$2.0 billion</u>
Totals			<u>1.5 billion</u>	<u>\$6.6 billion</u>

We believe a subsequent memorandum to the file, prepared shortly after the last contract negotiation for each cycle, would be appropriate to explain the differences and changes pertinent to the cycles. When comparing Cycle I planned hours and dollars with actual results, we noted 50 percent less LOE hours was obtained costing 400 percent more than was planned. We asked PCMD officials why they thought there was such a difference in actual potential costs versus planned contract cost estimates. They attributed it to the special subcontracting pools (said to account for 80 percent of all contract costs) and the fact that multiple contractors rather than one were providing technical services. We believe an explanation to the files for such a noticeable variance would have been useful.

In a meeting with senior PCMD officials, they indicated they could not project in the IAP the number of contracts actually needed. At the time the IAP was prepared, there was no indication of the number of firms who would submit offers.

CONCLUSIONS

Although most of the events in the ARCS procurement process were well documented, decisions on regional needs and why adjustments to the cycles were necessary should have also been documented. The lack of this relevant information hampers management's analytical process in deciding why, where and what adjustments are needed, particularly when the contracts are to be recompeted in a few years. The documentation also provides historical reference which EPA has relied on in other decision-making activities. Such documentation would also identify significant elements of the negotiations upon which the contracting officers' decisions were made and provide an official record of key decisions, thus preventing a loss of knowledge should key personnel leave the Agency.

AGENCY COMMENTS AND OIG EVALUATION

The Director, PCMD, did not completely agree with our recommendations. The Director believed that the incorporation of planning estimates of LOE hours needed and cost estimates for Cycles II and III, after the completion of procurement cycles, would serve no useful purpose. The Director stated that the planning estimates which could be compiled today would in no way reflect the Agency's actual knowledge at the time the procurement cycles were initiated. Further, the Director believed that incorporating such data at this time would serve only to confuse the exhaustive process of cost analysis employed to determine a reasonable estimate of contract performance costs. Nevertheless, in future remedial procurements, the Director stated that PCMD would endeavor to ensure that adequate independent estimates are prepared as early in the process as practicable and meaningful.

The Assistant Administrator did not agree with our recommendation to provide additional support for planning hour/cost estimates for ARCS Cycles II and III. The Assistant Administrator stated it would not be an efficient use of resources to recreate such documentation. He stated that EPA intentionally did not try to define precise technical hour requirements that would then require extensive documentation, because external variables (such as fluctuations in budget allocations and policy approaches) always affect the Agency's ability to predict workload with accuracy.

The Assistant Administrator specifically mentioned three factors that affect the ARCS workload and ARCS contractors' utilization. First, the Agency's new "One Program/Enforcement First" approach will encourage potentially responsible parties to take the lead role in an increasing number of response actions. Second, the policy establishing a stable, long-term relationship between the Agency and the U.S. Army Corps of Engineers (COE) will allow the COE to take the lead role on all remedial designs that cost more than \$5 million. Finally, budget constraints and a reduction in RI/FS activities to fully support ongoing projects will decrease the number of response actions undertaken, as a whole.

The Assistant Administrator stated that the present ARCS workload was substantially different from that envisioned at the ARCS program's inception. He also stated that his office was in the process of analyzing current workload to achieve a better balance within the existing ARCS contracts.

As stated in our finding, neither PCMD or OERR officials could provide documentation supporting calculations of contract hour needs and estimated contract costs. Additionally, officials from three regions could not tell us the number of hours agreed upon for each region.

We believe good planning requires estimates and decisions to be documented and retained as a historical reference point in time, especially for a \$6.6 billion program. As circumstances such as budget restraints, policy changes and increased costs come into play, then a comparison with past decisions can be made to analyze the appropriateness of current decisions. We believe it is very important to document, as soon as possible, the LOE hours needed, cost estimates and the number of various phases of site cleanups expected to be completed by EPA. Such estimates clearly relate to the number of work assignments and amount of contract effort expected to be used for site clean-up effort during the ARCS contracts 10-year life.

Given that the Assistant Administrator confirmed that documentation was not available to support past planning estimates, we believe the current analysis of ARCS contract workload should be documented and retained as a reference point to aid future management analysis and decisions. Accordingly, we are modifying our recommendations to focus on future improvements.

Concerning our recommendation that the reason for variances between planned hours/costs and the actual ARCS contracts awarded be documented, the Director, PCMD stated such documentation already exists in the summaries of negotiation which specifically address all differences between the Government's recommended costs and those costs actually negotiated for each cost element.

We agree with the Director that the summary of negotiation documents contain information on the difference between the pre-negotiation cost objectives and the actual cost for individual contracts. However, this document does not address the differences or variances between the overall estimated planned LOE hours and estimated planned contract dollars for the entire procurement cycle. The overall estimates for each cycle were established before establishing pre-negotiation cost objectives on an individual contract basis.

As part of sound management practices, we believe it is important to document the reasons for the variances in each cycle of ARCS awards. Significant variances between overall planned hour/cost estimates and actual overall procurement results should be documented and retained as a historical reference point. Accordingly, we are making the following recommendations.

RECOMMENDATIONS

We recommend that the Director, PCMD, for future procurements:

- o Require OERR to provide support for planning estimates of LOE hours needed and cost estimates before accepting the procurement planning request.
- o Document and retain as a historical reference point the reasons for variances between overall planned hour/cost estimates and the actual overall procurement results of potential hours/costs obtained in ARCS contract awards.

We recommend that the Director, OERR require that the current analysis and decisions on ARCS contract workload be documented and retained to assist future management analysis and decisions.

6. GUIDANCE NEEDED FOR USE OF SMALL AND DISADVANTAGED BUSINESSES

While EPA required every firm bidding on an ARCS contract to submit a subcontracting plan addressing the use of small or disadvantaged businesses, criteria and procedures were not established to define and evaluate a contractor's "good faith" efforts and to ensure consistency of EPA actions when actual performance is determined. Unless specific guidance is provided, the regions may evaluate the same quality performance differently or inconsistently reach award fee determinations.

Small or Disadvantaged Businesses Are Involved In ARCS

Each firm bidding on an ARCS contract was required to submit a subcontracting plan. EPA's OSDBU reviewed the plan. The 45 ARCS contracts resulted in 113 team subcontractors, of which 49 (or 43

percent) were small or disadvantaged businesses. While this number is encouraging, there are no guarantees that these firms will actually be assigned work.

Recent Legislation

The need for specific guidance for evaluating "good faith" efforts becomes more important for ARCS contracts awarded after August 15, 1989. On that date, subpart 19.705 of FAR became effective. This subpart describes the amount of liquidated damages which can be assessed, and other remedies which can be taken, when contractors fail to make a "good faith" effort to comply with their subcontracting plan. The subpart was to implement a requirement of Public Law 100-656 entitled the Business Opportunity Development Reform Act (Reform Act). This legislation required a liquidated damages clause be included in all contracts in order to encourage prime contractor compliance with their subcontracting plan. A senior PCMD official told us that the division had not developed guidance to implement the FAR requirements, and that future contracts would contain a liquidated damages clause. The present 45 ARCS contracts were awarded before the effective date for the FAR subpart and do not contain a liquidated damages clause.

Award Fee Determinations Should Address The Use of Small and Disadvantaged Businesses

The existing ARCS award fee evaluations could be used as a means of documenting and rewarding a contractor's "good faith" efforts in fulfilling the subcontracting goals during the 10-year life of the contracts. The determinations of award fee and provisions for additional work assignments are subjectively determined incentives by EPA contract managers that are not subject to contract disputes or appeals by the contractors. These subjectively determined evaluations could be modified to include subcontracting incentives as rewards for exceeding goals. The evaluations could also be used by the contracting officer when making decisions on future contract awards with these contractors as is required by the new FAR provisions implementing the Reform Act [Section 19.705-4(d)].

A mandatory section of EPA's award fee evaluation of a contractors' performance should be devoted to a brief discussion of the contractors' compliance with the subcontracting plan and the actual use of small and disadvantaged businesses. Additionally, because the current ARCS contracts do not have a liquidated damages clause for failure to meet the goals for subcontracting plans, we believe that the Director, PCMD, in conjunction with officials from the OSDBU and OERR should consider implementing an appropriate level of incentives as encouragement for current as well as future ARCS contractors to exceed their subcontracting goals.

BUSINESS

USE OF SMALL &
DISADVANTAGED

During our fieldwork, both PCMD and OERR officials commented that the evaluation is sufficiently covered during the trimester contractor performance reviews by the contracting officers. PCMD also said the OSBDU receives regular reports from the contractors, which are also considered by the contracting officers, and that the subcontracting goals are presented to the evaluation board. OERR's informal comments also pointed out that the expected funds for the ARCS contractors has been reduced, and accordingly, their ability to give subcontracting work to small and disadvantaged businesses will also be limited.

Nevertheless, we note that the present Performance Evaluation Board's report does not contain a mandatory section requiring specific comments on the subcontracting plan goals. Providing a section in this report would ensure contractors were aware of a need to provide "good faith" efforts in this area.

AGENCY COMMENTS AND OIG EVALUATION

The Director, OSDBU, agreed with our findings and recommendations regarding the utilization of small and disadvantaged businesses in the Agency's ARCS activities. The Director believed that the recommendations, if implemented, would help maximize the use of small and disadvantaged firms in all areas of the ARCS program.

The Assistant Administrator agreed in principle with our findings and recommendations but had concerns about the practical effects of implementing changes in light of the diminished workload for ARCS contractors since the inception of the ARCS program. He stated that the ability of the contractor to accomplish subcontracting plans were often obsolete because of the drastic workload fluctuations which occur frequently in the ARCS program. Therefore, any evaluations of performance in this area would have to be flexible and take into consideration changing workloads and budget realities.

The Director, PCMD, generally disagreed with our recommendations. The Director believed there was no need to define "good faith effort" or to establish additional guidance in this area. The Director believed each CO must exercise considerable judgment in evaluating a prime contractor's "good faith" efforts based on the types of work assignments available for using small and disadvantaged businesses. Concerning the evaluation of an ARCS contractor's performance in complying with the goals of subcontracting plans, the Director believed existing evaluation procedures were sufficient to monitor such compliance.

Without specific criteria and guidelines, we are concerned that a contractor's performance in meeting subcontracting goals will be evaluated differently by Agency personnel in the seven zones of ARCS contract performance. Most ARCS contractors have contracts

in more than one ARCS zone. It is because of the multiple contracts, the many variables involved, and the types of work assignments, that we believe evaluations of contractor performance in meeting subcontracting goals must be consistent in all seven ARCS zones.

A mandatory section in EPA's Performance Evaluation Board's report on award fee determination will focus attention on the importance of subcontracting goals. Current evaluation procedures consider subcontracting goals as a subsection under overall program management and is not otherwise highlighted by EPA management. A mandatory section will enable EPA personnel, with minimal effort, to quickly determine the overall success and problems in meeting subcontracting goals throughout the ARCS program and to quickly capitalize on the success of some contractors that might be applicable to other contractors. By focusing attention on subcontracting goals, Agency personnel will also demonstrate to the Congress the high importance EPA places in providing procurement opportunities to small and disadvantaged businesses.

By considering an appropriate level of incentives to encourage ARCS contractors to exceed realistic subcontracting goals, EPA might lessen the possible adverse impact of future ARCS contracts which will contain a liquidated damages clause compared to current ARCS contracts which do not have this clause.

It has long been a government policy (FAR Subpart 19.2) to place a fair proportion of its acquisitions with small and disadvantaged businesses. Such businesses shall also have the maximum practicable opportunity to participate as subcontractors in contracts, consistent with efficient contract performance. Heads of contracting activities are responsible for achieving program goals in this area and for ensuring contracting and technical personnel take all reasonable action to increase small business participation in their activities' contracting processes.

We note that President Bush supports strongly increased minority business development efforts by the federal government. In a speech at Central State University's Commencement exercises (Wilberforce, Ohio, June, 1988), President Bush stated:

We must bring Black Americans and other minorities into the free enterprise system, as we must into the government -- not just because it is right, but because it is good for us -- all of us. As we prepare for the year 2000, America will have to field a full team if we're going to remain competitive. It's not just in the interest of Blacks; it's not just in the interest of Hispanics; it's

not just in the interest of women; it's in the interest of America to help economically empower all.

In conclusion, the actions we propose for the potential \$6.6 billion ARCS program are reasonable, can be implemented with minimal effort and are consistent with government policy and the thrust of recent legislative initiatives.

RECOMMENDATIONS

We recommend that the Director, PCMD:

- o Establish written evaluation criteria, with the advice of the Director, OERR and the Director, OSDBU, for defining what constitutes "good faith" efforts towards meeting subcontracting goals.
- o Provide written guidelines to assist contracting officer evaluations of a contractor's compliance with a subcontracting plan consistent with the new FAR provisions.
- o Require all Performance Evaluation Boards to include a mandatory section in each award fee evaluation of a contractor's performance. The mandatory section should include a brief discussion of the contractor's compliance with the contract's subcontracting plan including specific comments on factors affecting the contractor's "good faith" efforts.
- o Coordinate with the Director, OSDBU, the Director, OERR and other appropriate officials and determine the desirability and feasibility of providing current and future ARCS contractors with additional incentives (consistent with the new FAR provisions) as encouragement to exceed subcontracting plan goals.

OTHER COMMENTS

ADDITIONAL INITIATIVES COULD BE EXPLORED TO INCREASE THE COST EFFECTIVENESS OF THE REMEDIAL CONTRACTING PROGRAM

We noted two areas that EPA management should consider for further improving the cost effectiveness of the remedial contracting program. These areas are:

- o requesting the Congress to amend SARA to allow EPA to use cost competition in future Superfund A&E procurements.
- o requesting, from the Civilian Agency Acquisition Council, (CAAC), a deviation from the FAR inspection clause which

requires that the Government must reimburse a contractor's cost to repeat work that was determined unacceptable.

By exploring these initiatives, we believe EPA could enhance the cost-effectiveness of the remedial and other EPA programs. A leadership role by EPA management in these areas would demonstrate to the Congress, the contract community, and the public, that EPA was attempting every reasonable option, including legislative changes, for curtailing unnecessary cost growth in cleaning up the nation's hazardous waste disposal sites. These areas are discussed in greater detail below.

1. Cost Competition Not Used as a Selection Factor in Awarding ARCS Contracts

EPA, consistent with the SARA requirements to follow the Brooks Act requirements under the FAR, did not use cost competition as a selection factor in evaluating offerors with which to negotiate ARCS contracts. PCMD officials believed fair and reasonable prices were negotiated and obtained for each ARCS contract consistent with FAR requirements. Without cost competition as a selection factor, we believe assurance is lessened that the resultant ARCS contracts were awarded at the lowest possible cost consistent with receiving high quality technical services. In light of current fiscal realities, we believe that the Congress should reexamine the SARA requirement to follow the Brooks Act in awarding ARCS contracts. Such a reexamination should consider allowing EPA to include cost competition as a selection factor in awarding Architect-Engineer (A&E) contracts, at the lowest possible cost, consistent with obtaining high quality technical services.

The Comptroller General made a similar recommendation that the Congress considered and rejected in 1972. The Comptroller General recommended that the selection process for A&E services follow a competitive pricing procedure under which the fee to be paid would be considered a selection factor.

In rejecting the Comptroller General's recommendation, the House Committee on Government Operations observed that "The system favors selection of the most skilled and responsible members of these professions Under this system, A&E's are under no compunction to compromise the quality of the design or the level of effort they will contribute to it in order to meet the lower 'fee' quotations of other A&Es. They are free to suggest optimum design approaches that may cost more to design, but can save in construction costs and otherwise increase the quality of the building or facility to be constructed."

Notwithstanding the committee's deliberations on this matter, we believe the absence of cost competition represents a potentially inefficient and uneconomical use of limited funds available for cleanup of numerous sites and could have adverse financial effects on the Trust Fund in future periods.

Section 119(f) of SARA requires that response action contractors and subcontractors be selected in accordance with Title IX of the Federal Property and Administrative Services Act of 1949. Public Law 92-582 of October 27, 1972, amended Title IX (also referred to as the Brooks Architect-Engineers Act) and declared a Government policy of negotiating contracts for A&E services on the basis of demonstrated competence, qualifications, and at fair and reasonable prices. Cost was not a factor in the six selection criteria for evaluating potential A&E contractors (FAR 36.602-1). The selection criteria were:

- professional qualifications;
- specialized experience and technical competence;
- capacity to do the work in the required time;
- past performance on other contracts in terms of cost control, quality and compliance with schedules;
- location in the general geographic area of contract assignment; and
- other appropriate criteria.

During an informal discussion with PCMD officials, the Agency's representative on the CAAC advised us that several other agencies proposed similar exemptions from the Brooks Act in 1983 or 1984 but were rejected; and presently the CAAC is seeking to add (rather than subtract) more professions to the Act. PCMD officials suggested that they lacked the resources to devote to lobbying Congress. In light of the past Congressional rejection, PCMD would not devote resources even if resources were available.

PCMD personnel, including placement contracting officers, said they followed FAR 36.602-1 selection criteria in negotiating the ARCS contracts. Interest statements from firms were solicited by the RFP, evaluated by the EPA A&E Evaluation Board (AEED), and the most technically qualified firms singled out (short-listed) to continue the selection process. If the short-listed firms were successful in presenting their management proposals to EPA, they were invited to submit a cost proposal.

The technical ranking factors and available points EPA used in evaluating ARCS proposals were:

- Adequate capacity to perform, 20 points;
- Corporate experience and capability, 25 points;
- Key personnel experience and availability, 25 points; and
- Management plan, 30 points.

PCMD personnel advised us that in the A&E evaluation process there was no correlation between a technical score and cost in arriving at decisions for awarding a contract. If a firm was considered technically qualified by the AEED, the firm was short listed for conducting negotiations. Once short-listed, all firms were considered capable of performing as an ARCS contractor regardless of individual technical scores. Each firm's cost proposal was then evaluated individually based on that firm's way of conducting business. PCMD negotiators told us that additional Government savings were negotiated when offerors bid on more than one contract. Negotiators also advised us that for each ARCS contract they negotiated a lower price than was originally submitted by an offeror; and we commend EPA negotiators for the potential cost savings they were able to obtain.

A firm's cost proposal will be reflective of how they conduct business, and we realize that each company has its own way of doing business. For example, it may be standard operating procedure for a company to use overnight Federal Express service when communicating with its clients instead of regular postage. Another firm may maintain extremely luxurious furnishings and accommodations for office space, and may provide bonuses or higher salaries to employees compared to another firm. Our position is that some of the firms' methods of conducting business, although fair and reasonable for an individual firm, may be too costly for Government use when other equally technically qualified firms with less costly ways of doing business are available. We understand that some private sector firms obtain a few price quotes and then select the contractor based on both technical and cost considerations.

Analysis of Technical Scores and Potential ARCS Contract Costs

We reviewed contract award information after all 45 contracts had been awarded to determine the types of observations we could make relating to the potential \$6.6 billion cost. We did not conduct a full analysis; we did not evaluate the individual details that make each contract and each firm's costs different. Our intention was to broadly look at the technical scores, negotiated potential contract costs, and contract sizes to determine what observations we could make. We made the following observations:

- By comparing the same size contracts awarded in each zone, we noted 12 instances, amounting to \$115.1 million, representing the total potential difference between the highest cost contract awarded and the lowest cost contract awarded. (Nationwide, the maximum cost differences for all 45 contracts could be \$404.3 million if all contracts were awarded using the lowest price for each of the five contract size categories.)
- By region and contract size, there were six instances where the firms that received the lowest technical scores were awarded a higher dollar contract than the firms that received the highest technical scores. The potential difference between the contract awards totaled \$22 million.
- By region and contract size, there was one instance where a firm with a low technical score will potentially cost EPA \$21 million more than a firm with a higher technical score.
- By contract size, the lowest technical score did not always result in the lowest contract price for that contract size; in two instances, firms with the lowest technically qualified scores received contract awards with potential costs of \$160,000 and \$9.5 million more than the highest technically qualified firms.

During our informal discussions, PCMD officials pointed out that some potential cost variances may be due to some firms proposing fewer or no subcontractors; and that having subcontractors will increase the cost. Additionally, they pointed out that if a firm has standard operating procedures that would not be favorable to the Government, these items could be brought up and negotiated out of the contract. They also advised us that having cost as a selection criterion may have prevented EPA from introducing new firms to the remedial program, thus limiting the Agency's ability to increase competition.

CONCLUSIONS

From our observations of potential contract costs and technical scores of awarded ARCS contracts, we noted substantial variances in potential costs among firms awarded the same size contract even in the same region. We also confirmed PCMD's statements that there was no correlation between a technical score and cost for awarding an ARCS contract.

We are unable to project or determine potential cost savings in the remedial contracting program if EPA were to add cost competition as a key selection criteria. To do so, EPA would have to

conduct parallel acquisition strategies, one strategy using fair and reasonable price, the other using cost competition. Nevertheless, cost competition should be considered in light of fiscal realities. If cost competition provided as little as a one percent reduction in the potential \$6.6 billion costs, EPA could potentially have \$66 million more to fund additional site clean-ups.

AGENCY COMMENTS AND OIG EVALUATION

The Director, PCMD, strongly disagreed with our conclusion that the lack of cost competition lessened the assurance that the resultant ARCS contracts were awarded at the lowest possible cost consistent with receiving high quality technical services. The Director repeated many of the same arguments that we presented above and concluded that he did not intend to pursue this issue through the active lobbying of the Congress.

The Assistant Administrator intended to publicize our issue on adding cost competition in future A&E procurements to Agency staff and management during Superfund reauthorization activities. However, he did not anticipate undertaking an initiative to lobby the Congress for changes to the Brooks Act or other Government-wide procurement policy issues. Such an initiative was the role of OMB's Office of Federal Procurement Policy. The Assistant Administrator also stated that we did not provide adequate proof that changing the Brooks Act would produce quality work at a lower cost.

Both the Director and the Assistant Administrator believed we had made a specific recommendation addressing this issue. Our draft report did not contain a recommendation on this issue. We made a suggestion because we recognize that EPA management is not solely responsible for changing Government-wide procurement policy. Nevertheless, we believe our comments on this issue warrant attention and possible further study by senior level EPA management.

We continue to believe that cost competition should be considered in light of fiscal realities and the multi-billion dollars involved in the ARCS program. Accordingly, we are pleased that the Assistant Administrator intends to publicize this issue during Superfund reauthorization activities. Perhaps the Congress will allow EPA, in the next reauthorization of Superfund, to experiment with acquisition strategies that allows cost competition in A&E procurements. An experiment might provide stronger evidence that a change to the Brooks Act was or was not warranted.

We suggest that the Director, PCMD and the Director, OERR continually assess the need to amend SARA to add cost competition as a selection factor in A&E procurements.

2. Inspection Clause Could Be Strengthened

EPA might pay contractors unnecessary costs for poor quality work that must be redone. A standard FAR inspection clause included in all ARCS contracts states that if a contractor's work is not acceptable and must be redone, the Government must pay the contractor in order for the Government to obtain acceptable quality work. As a result, the Government absorbs the cost no matter how many times it takes the contractor to provide an acceptable product or service.

All ARCS contracts, which are cost-reimbursable contracts, have a standardized FAR inspection clause, Inspection of Service-Cost Reimbursable, Part 52.246-5. This clause provides that if any of the services performed do not conform with contract requirements, the Government may require the contractor to perform the services again in conformity with contract requirements. If the services must be redone, the Government will reimburse the contractor's cost without an additional fee.

Cost-reimbursable contracts provide that whenever work or service is performed, the Government bears all the cost risks and the contractor bears all the performance risks. In fixed-price contracts, however, the FAR inspection of services clause requires the unacceptable work to be redone at no additional cost to the Government. PCMD officials advised us that the reason that the services can be redone at no cost to the Government under fixed-price contracts is because everything is known about the kind of services needed (i.e., specifications for a building design has a known quantity and quality of materials needed). An inspection by a qualified person under these circumstances could determine if the contractor complied with specifications.

We are aware of the many existing administrative aspects in the ARCS contracts which provide incentives to do quality work. These aspects include base fee, award fee and additional work assignments for demonstrated high performance. For poor performance, EPA can terminate the contract if necessary. The Government's interests could be better protected if the inspection clause was changed so that clear instances of mistakes or poor or unacceptable quality work would be done over at no cost whatsoever to EPA. We note that the Brooks Act requires the selection of the most skilled and responsible members of these professions. Accordingly, these members should be held accountable for the quality of their services.

We believe such a change would also encourage EPA remedial project managers, project officers and contracting officers to monitor contracts more effectively if the managers knew adverse consequences could result from unacceptable contract work. A change would also appear prudent in light of current fiscal constraints. Likewise, if contractors were aware that poor or unacceptable quality work had a real cost consequence, the contractors would take more care in assigning and performing work to ensure that poor or unacceptable work is not done. In circumstances where both parties - the contractor and the Government - were to blame for unacceptable services, then a negotiation could be entered into that would share the cost for redoing the work in an equitable manner between the Government and the contractor.

GAO and OTA Evaluations of Superfund Contracts

In GAO's audit of Superfund contracting costs (Superfund Contracts: EPA Needs to Control Contractor Costs, July 1988, GAO/RCED-88182), GAO reported EPA's views that inadequate contractor performance led to increased costs of performing remedial studies at 22 of 43 sites reviewed. GAO found no evidence that EPA challenged the increased costs at 18 of the 22 sites, because EPA employees believed cost-reimbursable contracts required that all costs incurred be paid.

In a February 1989 hearing before the Subcommittee on Federal Services, Post Office, and Civil Service (Committee on Governmental Affairs, U.S. Senate), the Project Director, Office of Technology Assessment, U.S. Congress, testified on the Office's background paper entitled Assessing Contractor Use in Superfund. The Project Director expressed concerns with contractor performance including:

" . . . when mistakes are made at Superfund sites the contractors essentially make more money because the work is constantly being repeated."

In his prepared statement he also stated:

" . . . contractor mistakes are not prevented or caught early, and . . . contractor work that is too often poor, requiring work to be repeated . . . "

More recently, GAO performed an audit of civilian agency procurement and noted improvements were needed in contracting and contract administration (September 1989, GAO/RCED-89-109). GAO found that nearly all of the contracts it reviewed (EPA contracts were not included in their review), had either time increases, cost increases, or a contract item that was not completed. Recurring deficiencies in the contracts were in planning contract

work and writing the specifications and contract clauses; program and contracting office contract administration; and contractor performance.

Although GAO concluded additional rules and regulations were not required, they believed that the identified deficiencies warranted attention. GAO recommended that the Administrator, Office of Federal Procurement Policy, work with the heads of civilian agencies and initiate a concerted effort to improve civilian agency contracting and contract administration.

During our fieldwork, PCMD officials stated that, as with the cost competition argument previously discussed, this issue would also fail to be waived by the CAAC for the same reason--lack of Congressional support. In addition, PCMD officials stated if site conditions were known, EPA could use fixed-price rather than cost-reimbursable contracts and would not need this clause. PCMD suggested use of more appropriate existing administrative remedies other than denying costs.

CONCLUSIONS

We recognize that, in cost-reimbursable contracts, the risk of performance rests with the contractor, while the Government assumes the risk of cost. However, studies by GAO and other have shown that contractors are rewarded for their continued poor performance.

AGENCY COMMENTS AND OIG EVALUATION

The Director, PCMD stated that our discussion of this issue revealed a lack of understanding of the contractor's responsibility under a cost-reimbursement contract, and he disagreed with our contention that the "Government absorbs the cost no matter how many times it takes the contractor to provide an acceptable product or service."

The Director explained that EPA employs the use of level-of-effort, term-type contracts for these types of remedial services since the exact nature and extent of activities to be performed cannot be determined prior to contract performance. Given this limitation, contractors are responsible for delivering their "best efforts" in providing the specified level of effort. If the Government can demonstrate that the contractor did not provide its "best effort" then the Government can disallow any costs that are not reasonable, allowable and allocable.

The Director believed that the key to good contractor performance is not found in the clauses of the contract but rather in the quality and skill of Agency officials charged with responsibility for monitoring the performance of the contractor. The project

officers and site managers work closely with the contracting officer to insure that the contractors are providing their best efforts. PCMD, together with OERR and Regional program officials has long focused on this aspect of contract management in the training and guidance provided to the contracting officer's technical representatives. For these reasons, the Director did not find it appropriate to request a deviation from the CAAC.

The Assistant Administrator acknowledged problems with the FAR inspection clause and was aware that a change might be contrary to the philosophy of cost-reimbursement contracts and existing regulations. In an attempt to resolve this issue, the Assistant Administrator strongly suggested that PCMD incorporate into all ARCS contracts the "responsibility of the A&E contractor" clause (FAR 52.236-23). The Assistant Administrator believed this clause would provide EPA with a contract requirement that unacceptable work could be redone without additional compensation. PCMD however, rejected this suggestion for various reasons.

The Assistant Administrator agreed with our suggestion to monitor the implementation of the inspection clause during the performance of contract requirements and to document instances in which EPA is required to pay for poor quality or unacceptable work. If it was found that paying for such work was a regular practice, appropriate action would be taken at that time. The Assistant Administrator noted that FAR requires EPA to pay allowable, allocable, and reasonable costs incurred in cost-reimbursement contracts. FAR provisions state that if the services provided do not conform to the contract requirements, the contractor must perform them again without receiving an additional fee. The Assistant Administrator explained that the term "contract requirements" refers to "scope of work" in level-of-effort contracts. The OIG finding, however, does not refer to scope of work, but to the quality of work. In addition, contractors are obligated only to deliver their "best effort" hours. If their best efforts result in poor quality work, EPA must still pay for the work. The Agency's only recourse in such a situation is to prove that the contractor did not provide his best efforts, which requires an expenditure of resources beyond what EPA can usually afford to bear.

During our fieldwork, we discussed the omission of FAR clause 52.236-23 from ARCS contracts with PCMD's general counsel. We were advised that this clause was legally enforceable only in fixed-price contracts. Accordingly, counsel recommended that this clause not be included in the ARCS cost-reimbursement contracts.

Notwithstanding the many legal and contract technicalities surrounding this issue, the bottom line is that the inspection clause requires that if a contractor's work is not acceptable and

must be redone, the Government must pay the contractor in order for the Government to obtain an acceptable quality of work. In our discussion of this issue we cite GAO and OTA evaluations which expressed concerns with the quality of contractor performance.

We are pleased that the Assistant Administrator agreed with our suggestions to monitor this situation. As we stated in the previous issue, we are making the following suggestions for EPA management to consider.

We suggest that the Director, PCMD and the Director, OERR, monitor implementation of the inspection clause during the performance of ARCS contracts. We also suggest that the Director, PCMD, and the Director, OERR, request the CAAC to grant EPA a deviation from the FAR inspection clause, if the results of analysis warrants such action.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 26 1990

OFFICE
OF
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MANAGEMENT

MEMORANDUM

SUBJECT: Draft Response to Audit Report No. E1SGB9-11-0021
Alternative Remedial Contracting Strategy:
Contract Bidding and Award Process

FROM: David J. O'Connor, Director *David J. O'Connor*
Procurement and Contracts Management Division

TO: Kenneth D. Hockman
Divisional Inspector General for Audit
Internal Audit Division

I appreciate the opportunity to respond to your draft audit of the Alternative Remedial Contracting Strategy bidding and award process and have attached my response to each recommendation pertinent to the Office of Administration and Resources Management.

I noted with satisfaction the observations that the ARCS contracts were awarded consistent with acquisition regulations and that they were awarded in a timely fashion. We were also pleased to note that the ARCS procurements increased competition as this was one of our fundamental goals during the acquisition process.

I also appreciate your interest in focusing our attention on some important issues that will improve our future solicitations for remedial activities.

Attachment

RECOMMENDATIONS FROM ARCS DRAFT AUDIT REPORT
E1SGB9-11-0021

4. INDEPENDENT COST ESTIMATE FOR FUTURE ARCS CONTRACTS NEEDED

RECOMMENDATIONS:

We recommend that, for future architect-engineer contract awards, the Director, Procurement and Contracts Management Division complies with, or requests a deviation from, the FAR requirement for conducting independently prepared Government cost estimates.

We will comply in the future as necessary to insure that the requirements of FAR 36.605 are met for future remedial procurements.

The circumstances under which the original independent government estimate was prepared, however, should be examined to determine if the lack of detail in the independent estimate was detrimental to the determination of cost reasonableness. This is clearly not the case.

Because the ARCS process was fundamentally different from the previous remedial strategy which employed large national and zone contracts, relying on historical data to establish an independent government estimate for multiple region-specific contracts was undesirable. During the early planning stages of the ARCS process, the final reauthorization of Superfund was still under debate in Congress. The Superfund Amendments and Reauthorization Act (SARA) was finally enacted in December, 1986. SARA established new mandates as to the number of specific remedial actions to be completed within given time frames. Given the impending expiration of the first and second generation remedial contracts, it was critical to have adequate contract capacity to perform the required work. While an independent government estimate was prepared prior to the issuance of the RFP, the placement contracting officers understood that additional steps would be needed to update the estimate to changing government requirements.

Subsequent action was taken by PCMD, OSWER and regional program officials to use other methods to increase the accuracy of the original independent estimate. One of these methods was the technical review of cost proposals. The evaluation was conducted in each Region/Zone by the HQ PCO, regional contracting officers, regional project officers and auditors. While cost proposals from the technically most highly qualified firms had been received, the evaluation panel reviewed specific regional needs before reviewing the costs proposed by offerors. This fine tuning of the original Government estimate resulted in a much more accurate and reliable estimate of cost. It should be noted that the regional infrastructure which permitted this evaluation

process was not in place when the original cost estimate was prepared. Further, the multiple-award aspect of the ARCS procurements in which multiple firms submitted cost proposals addressing a common contract delivery schedule allowed the PCOs to conduct what was, in fact, a market survey which further enhanced the cost information available to the PCO in determining cost reasonableness.

5. BETTER DOCUMENTATION OF ESTIMATED ARCS REQUIREMENTS IS NEEDED

- A. Calculation of zone requirements
- B. Individual acquisition plans were inconsistently prepared and reasons for not meeting objectives were not documented

RECOMMENDATIONS:

We recommend the Director, Procurement and Contracts Management Division:

- 1. Request OERR to provide additional support for planning estimates of LOE hours needed and cost estimates for Cycles II and III; and, in future procurements, ensure this information is provided prior to accepting the procurement planning request.
- 2. Document the reasons for variances between planned hours/costs and the actual ARCS contract award for the above ARCS acquisition plans and future procurements.

Concerning the recommendation that PCMD request that OERR provide additional support for planning estimates of LOE hours needed and cost estimates for Cycles II and III, the incorporation of such estimates after the completion of both procurement cycles would serve no useful purpose as the data which could be compiled now would in no way reflect the Agency's actual knowledge at the time the procurement cycle was initiated. The independent government estimate provided in the procurement rationale document is a standard of measurement and comparison. It serves no other purpose. Further, the incorporation of such data at this time would serve only to confuse the exhaustive process of cost analysis employed to determine a reasonable estimate of contract performance costs. In future remedial procurements, PCMD will endeavor to insure that adequate independent estimates are prepared as early in the process as practicable and meaningful.

Concerning the recommendation that variances between planned hours/costs and the actual ARCS contract awards be documented, such documentation already exists in the

summaries of negotiation which specifically address all differences between the Government's recommended costs and those costs actually negotiated for each cost element.

6. GUIDANCE NEEDED FOR USE OF SMALL AND DISADVANTAGED BUSI-
NESSES

RECOMMENDATIONS:

We recommend that the Director, Procurement and Contracts Management Division:

- o Establish written evaluation criteria, with the advice of the Director, Office of Emergency and Remedial Response and the Director, Office of Small and Disadvantaged Business Utilization, for defining what constitutes "good faith" efforts towards meeting subcontracting goals.
- o Provide written guidelines to assist contracting officer evaluations of a contractor's compliance with a subcontracting plan consistent with the new FAR provisions.
- o Require all Performance Evaluation Boards to include a mandatory section in each award fee evaluations of a contractor's performance. The mandatory section should include a brief discussion of the contractor's compliance with the contract's subcontracting plan including specific comments on factors affecting the contractor's "good faith" efforts.
- o Coordinate with the Director, Office of Small and Disadvantaged business Utilization, the Director, Office of Emergency and Remedial Response and other appropriate officials and determine the desirability and feasibility of providing current and future ARCS contractors with additional incentives (consistent with the new FAR provisions) as encouragement to exceed subcontracting plan goals.

Concerning the recommendation that written evaluation criteria be established to define "good faith" efforts towards meeting subcontracting goals it should be noted that FAR 19.705-4(A) states that "no detailed standards apply to every subcontracting plan. Instead, the contracting officer must consider each plan in terms of circumstances of the particular acquisition." FAR 19.705-7 states that "in determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan." This section

further defines what constitutes a "good faith effort" generically. While it might appear that an improved "class" definition of good faith efforts might be developed and applied to all ARCS contractors, this would be a misconception. The SB/SDBE opportunities available to an individual ARCS contractor vary greatly as a result of the type of work assignments issued. For example, an ARCS contractor conducting a Remedial Investigation/Feasibility Study (RI/FS) would have significantly greater opportunities to let subcontracts with SB/SDBEs than an ARCS contractor conducting a Remedial Design (RD). Given this and other variables, the ACO needs to retain a judgmental role in establishing the sincerity of a firm's "good faith" efforts.

It should also be noted that the Civilian Agency Acquisition Council (CAAC) has specifically refused to define "good faith" efforts in this area beyond the guidance provided by FAR.

Concerning the recommendations that PCMD provide written guidance to assist contracting officer evaluations of a contractor's compliance with a subcontracting plan consistent with the new FAR provisions and that PCMD coordinate with the Director, OSDDBU and the Director, OERR and other appropriate officials to determine the desirability and feasibility of providing current and future ARCS contractors with additional incentives as encouragement to exceed subcontracting plans, we believe that a review of our Regional Contracting Officers' award fee performance evaluations will evidence our continual effort to monitor such compliance. Accordingly, I do not believe this recommendation is necessary.

Concerning the recommendation that all Performance Evaluation Boards include a mandatory section in each award fee evaluation of a contractor's performance relating the contractor's compliance with the established goals of the subcontracting plan, such a process already exists and is an integral part of the evaluation criteria.

The evaluation of all contractor subcontracting efforts, including an evaluation of a contractor's "good faith" effort to achieve the goals of the SB/SDBE subcontracting plan, is a specific subcriteria of overall program management which is evaluated by the contracting officer each trimester. Specific recommendations are then made to the PEB. We feel that this is the most appropriate method to evaluate this aspect of contractor performance and do not feel the need to mandate a special and separate consideration of this issue by the PEB.

7. OTHER COMMENTS:

This area contains two recommendations concerning additional initiatives that could be explored to increase the cost effectiveness of the remedial contracting program. Specifically, the report recommends:

1. requesting Congress to amend the Brooks Architect-Engineers Act by adding cost competition as a key selection criteria.
2. requesting, from the Civilian Agency Acquisition Council, a deviation from the FAR inspection clause which requires that the Government must reimburse a Contractor's cost to repeat work that was determined unacceptable.

Concerning your first recommendation, the report, itself, notes that PCMD procured the required services consistent with the SARA requirement that Brooks Act A/E procedures be followed. We strongly disagree with your conclusion that the lack of cost competition lessened the assurance that the resultant ARCS contracts were awarded at the lowest possible cost consistent with receiving high quality technical services. We have already chronicled the exhaustive process used to review and analyze costs associated with ARCS contract performance. This process satisfied the PCOs that the costs and fees negotiated for each ARCS contract were fair and reasonable. The lack of cost competition in Brooks Act A/E procedures is deliberately designed to remove cost as a factor to insure that offerors are free to propose the highest quality A/E services at costs that are determined to be fair and reasonable after the offeror has been selected on the basis of technical quality. Congress has consistently rejected recommendations that cost competition be included in the evaluation of A/E firms under the Brooks Act. We do not intend to pursue this issue through the active lobbying of Congress.

Concerning your second recommendation, the current clause incorporated into the ARCS contracts, and all cost reimbursement contracts, is that prescribed in FAR 52.246-5. The report's discussion of this issue reveals a lack of understanding of the contractor's responsibility under a cost reimbursement contract. It is not true, as the report contends, that "the Government absorbs the cost no matter how many times it takes the contractor to provide an acceptable product or service."

EPA employs the use of level-of-effort, term type contracts for these types of remedial services since the exact nature and extent of activities to be performed cannot be determined prior to contract performance. Given this limitation, our contractors are responsible for delivering their "best efforts" in providing the specified level of effort. If the government can demonstrate that the contractor did not provide its "best effort" then we can disallow any costs that are not reasonable, allowable and allocable.

The key to good contractor performance is not found in the clauses of the contract but rather in the quality and skill of Agency officials charged with responsibility for monitoring the performance of the contractor. The project officers and site

managers work closely with the contracting officer to insure that the contractors are providing their best efforts. PCMD, together with OERR and Regional program officials, has long focused on this aspect of contract management in the training and guidance provided to the contracting officer's technical representatives.

For these reasons I do not find it appropriate to request a deviation from the Civilian Agency Acquisition Council.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

JAN 16 1990

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Draft Report EISGB9-11-0021 Survey of the Alternative Remedial Contracting Strategy; Contract Bidding and Award Process

FROM: John M. Ropes, Director
Office of Small and Disadvantaged
Business Utilization (A-149C)

TO: David O'Connor, Director
Procurement and Contracts Management
Division (PM-214F)

We have carefully reviewed the subject report and concur with its purpose, scope and recommendations regarding the utilization of Small and Disadvantaged Businesses in the Agency's Alternative Remedial Contracting (ARCS) activities.

We believe that the proposed recommendations if put into effect, will go a long way towards maximizing the utilization of small and small disadvantaged firms in all areas of the ARCS program.

We would like to have the opportunity to meet with you or a designated member of your Policy Staff to discuss the appropriate language for incorporation into the evaluation criteria for defining what constitutes "good faith" efforts towards meeting subcontracting goals. It is our view that the evaluation criteria will be a critical factor in strengthening the involvement of these concerns in ARCS program.

We greatly appreciate your assistance in the past and look forward to the continuing cooperation in the months ahead to further small and small disadvantaged subcontracting utilization in the ARCS program.

cc: Diane Bazzle



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAK 5 1990

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: OIG Draft Report, "Alternative Remedial Contracting Strategy: Contract Bidding and Award Process" (Audit Number #1SGB9-11-0021)

FROM: Don R. Clay *[Signature]*
Assistant Administrator

TO: Kenneth D. Hockman
Divisional Inspector General for Audits
Internal Audit Division (A-109)

The purpose of this memorandum is to transmit our comments to the subject draft report. We have restated the findings and recommendations that pertain to OSWER and have provided our response after each OIG statement. A copy of this response will be transmitted to the Procurement and Contracts Management Division.

Finding 4. Independent Cost Estimate for Future ARCS Contracts Needed (page 11)

OERR personnel did not independently prepare its own cost estimates for ARCS contracts, as required by the FAR. Doing so would have provided additional assurance that a fair and reasonable price was negotiated. PCMD should request OERR to prepare an independent estimate prior to future contract awards or obtain a deviation from the FAR requirement.

OSWER Response

OERR personnel did not independently prepare cost estimates for ARCS contracts, as required by the FAR. Doing so would have provided additional assurance that fair and reasonable prices were negotiated.

Finding 5. Better Documentation of Estimated ARCS Zone Requirements Is Needed (page 13) and Conclusions (page 16)

Documentation supporting OERR's calculations of annual technical hours needed and estimates of contract costs for each ARCS zone was not available. Additionally, individual acquisition plans (IAPs) prepared jointly by OERR and PCMD for each of the three ARCS procurement cycles did not consistently identify estimated resource requirements. Without this information, EPA managers lack basic

- 2 -

data for justifying contract needs or comparing estimated planned program requirements with actual contract award results and analyzing the reasons for variances. Sound management practice requires that planning decisions and information be documented and retained to serve as a base against which periodic analysis and measures of program success and problems can be made.

Although most of the events in the ARCS procurement process were well documented, decisions on regional need and why adjustments to the cycles were necessary should have also been documented. The lack of this relevant information hampers management's analytical process in deciding why, where, and what adjustments are needed, particularly when the contracts are to be recompeted in a few years. The documentation also provides historical reference which EPA has relied on in other decision-making activities. Such documentation would also identify significant elements of the negotiations upon which the contracting officers' decisions were made and provide an official record of key decisions thus preventing a loss of knowledge should key personnel leave the Agency.

OSWER Response

We do not accept this finding. The Agency deliberately established excessive capacities within each Region to ensure that contractors who perform poorly could be identified and denied future awards. Furthermore, the Agency did not try to define precise technical hours requirements that would then require extensive documentation, because external variables, such as fluctuations in budget allocations, always affect the Agency's ability to predict workload with accuracy. The present workload is substantially different from that envisioned at the ARCS program's inception. The number of hazardous waste problems in need of remediation is large and appears to be increasing, but it is not always possible for Agency managers to predict fluctuations in policy approaches or budget allocations that impact the Agency's ability to address them.

Although detailed documentation is not presently on file, each Region had clear concepts of reasonable costs to be incurred during negotiations, and the contracting officer's summary of negotiations is available for review. We believe that the OIG's focus should be on what we can do to improve performance in the future; we are, therefore, not willing to recreate our historical Regional ARCS records. We are presently analyzing our current workload to achieve a better balance within the existing contracts. Looking to the future, we agree that the contract files should reflect the rationale for each decision made during negotiations. We feel that the contracting officer's summary of negotiations should be revised to assure that each decision and its rationale are adequately documented.

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OIG Recommendation (page 16)

That the Director, Procurement and Contracts Management Division:

1. Request OERR to provide additional support for planning estimates of LOE hours needed and cost estimates for Cycles II and III; and, in future procurements, ensure this information is provided prior to accepting the procurement planning request.

OSWER Response

We do not accept this recommendation. We believe this recommendation would create superfluous records, and it would cause an inefficient expenditure of resources to implement the recommendation. We are presently developing and evaluating a strategy to manage the ARCS contracts in light of the present constraints on the capacity of the remedial pipeline, which present a significantly different situation from the one that existed during the ARCS procurement process.

OIG Recommendation (page 16)

That the Director, Procurement and Contracts Management Division:

2. Document the reasons for variances between planned hours/costs and the actual ARCS contract awards for the above ARCS acquisition plans and for future procurements.

OSWER Response

We do not accept this recommendation. Three factors effect the ARCS workload and ARCS contractors' utilization. First, the Agency's new "One Program/Enforcement First" approach will encourage potentially responsible parties to take the lead role in an increasing number of response actions. Second, the policy establishing a stable, long-term relationship between the Agency and the U.S. Army Corps of Engineers (COE) will allow the COE to take the lead role on all remedial designs that cost more than \$5 million. Finally, budget constraints and a reduction in RI/FS activities to fully support ongoing projects will decrease the number of response actions undertaken, as a whole. Currently, we are developing a multi-year implementation strategy for the ARCS contracts to utilize them effectively in light of the current constraints on remedial project workloads.

Finding 6. Guidance Needed for Use of Small and Disadvantaged Business (page 17)

While EPA required every firm bidding on an ARCS contract to submit a subcontracting plan addressing the use of small or disadvantaged businesses, criteria and procedures were not established to define

- 4 -

and evaluate a contractor's "good faith" efforts and to ensure consistency of EPA actions when actual performance is determined. Unless specific guidance is provided, the regions may evaluate the same quality performance differently or inconsistently reach award fee determinations.

OSWER Response

While we agree conceptually with this finding, we have concerns about its practical impact. The use of award fees to promote minority business subcontracting is normally addressed by the Performance Evaluation Board. It is important to acknowledge that both the amount and type of work envisioned for prime and subcontractors have fluctuated radically since the inception of the ARCS program. Recently, the workload has diminished. Thus, the overall ARCS workload must be balanced and assigned accordingly. Evaluations of how well contractors are complying with their plans must include considerations of the diminishing ARCS workload.

OIG Recommendation (page 18)

That the Director, Procurement and Contracts Management Division:

- o Establish written evaluation criteria, with the advice of the Director, Office of Emergency and Remedial Response and the Director, Office of Small and Disadvantaged Business Utilization, for defining what constitutes "good faith" efforts towards meeting subcontracting goals.

OSWER Response

We agree in principle with this recommendation, but we have concerns about its practical effects. We will continue to use award fees to subjectively assess and encourage minority business subcontracting, but we need to maintain flexibility in this endeavor to respond to changing workloads and budget realities.

OIG Recommendation (page 19)

That the Director, Procurement and Contracts Management Division:

- o Provide written guidelines to assist contracting officer evaluations of a contractor's compliance with a subcontracting plan consistent with the new FAR provisions.

OSWER Response

We agree conceptually with this recommendation. However, drastic workload fluctuations, which occur with some frequency in the ARCS program, would make any such plans obsolete. Therefore, there is a need to maintain a high degree of flexibility in this area.

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OIG Recommendation (page 19)

That the Director, Procurement and Contracts Management Division:

- o Require all Performance Evaluation Boards to include a mandatory section in each award fee evaluation of a contractor's performance. The mandatory section should include a brief discussion of the contractor's compliance with the contract's subcontracting plan including specific comments on factors affecting the contractor's "good faith" efforts.

OSWER Response

We believe that such a process is already in place. The contracting officer's evaluations of contract performance address the issue of "good faith" efforts.

We also would like to note that both the amount and type of work envisioned for prime and subcontractors has fluctuated radically since the inception of the ARCS program. Recently, the workload has diminished. Thus, the overall ARCS workload must be balanced and assigned accordingly. Evaluations of how well contractors are complying with their plans must include considerations of the diminishing ARCS workload.

OIG Recommendation (page 19)

That the Director, Procurement and Contracts Management Division:

- o Coordinate with the Director, Office of Small and Disadvantaged Business Utilization, the Director, Office of Emergency and Remedial Response and other appropriate officials and determine the desirability and feasibility of providing current and future ARCS contractors with additional incentives (consistent with the new FAR provisions) as encouragement to exceed subcontracting plan goals.

OSWER Response

We accept this recommendation with comment. The ability of the contractor or subcontractor to accomplish plan goals is often dictated by external circumstances beyond his control. Any evaluation of performance must include an assessment of these circumstances.

Other Comments - Additional Initiatives Could Be Explored To Increase the Cost Effectiveness of the Remedial Contracting Program (page 20)

We noted two areas that EPA management should consider for further improving the cost effectiveness of the remedial contracting program.

- 6 -

These areas are:

1. requesting the Congress to amend the Brooks Architect-Engineers Act by adding cost competition as a key selection criteria.

OSWER Response

We do not accept this recommendation. The OIG report does not provide adequate proof that changing the Brooks Act will produce quality work at lower cost. However, regardless of the cost issue, we do not feel it is appropriate for the Agency to request that Congress amend procurement legislation. This is the role of OMB's Office of Federal Procurement Policy and not the role of a single Agency.

Other Comments - Additional Initiatives Could Be Explored To Increase the Cost Effectiveness of the Remedial Contracting Program (page 20)

We noted two areas that EPA management should consider for further improving the cost effectiveness of the remedial contracting program. These areas are:

2. requesting, from the Civilian Agency Acquisition Council, a deviation from the FAR inspection clause which requires that the Government must reimburse a contractor's cost to repair work that was determined unacceptable.

OSWER Response

While this is a PCMD issue, we believe that this recommendation may be contrary to the philosophy of cost reimbursement contracts and existing regulations. Nevertheless, we are aware that many Agency staff have interpreted the inspection clause to mandate the Agency must pay for unacceptable work to be done again. In order to resolve this issue, we drafted a memorandum to PCMD in which we strongly suggested that the "responsibility of the architect-engineering contractor" clause (FAR 52.236-23) be incorporated into all ARCS contracts. While PCMD has rejected this suggestion for various reasons, we continue to believe that the acceptance of the suggestion is necessary. It would provide for unacceptable work to be redone without additional compensation by the Government.

Other Comments 1. Cost Competition Not Used as a Selection Factor in Awarding ARCS Contracts (page 21)

EPA, consistent with the SARA requirements to follow the Brooks Act requirements under the FAR, did not use cost competition as a selection factor in evaluating offerors with which to negotiate

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ARCS contracts. PCMD officials believed fair and reasonable prices were negotiated and obtained for each ARCS contract consistent with FAR requirements. Without cost competition as a selection factor, we believe assurance is lessened that the resultant ARCS contracts were awarded at the lowest possible cost consistent with receiving high quality technical services. In light of current fiscal realities, we believe that the Congress should re-examine the SARA requirement to follow the Brooks Act in awarding ARCS contracts. Such a re-examination should consider allowing EPA to include cost competition as a selection factor in awarding Architect-Engineer (A&E) contracts, at the lowest possible cost, consistent with obtaining high quality technical services.

OSWER Response

We concur with this finding and intend to make this known to Agency management and staff during the Superfund reauthorization activities. However, it is not our intent to lobby Congress for changes to the Brooks Act or other government-wide procurement policies.

CONCLUSIONS 2. Inspection Clause Could Be Strengthened (page 25)

EPA might pay contractors unnecessary costs for poor quality work that must be redone. A standard FAR inspection clause included in all ARCS contracts states that if a contractor's work is not acceptable and must be redone, the Government must pay the contractor in order for the Government to obtain an acceptable quality of work. As a result, the Government absorbs the cost no matter how many times it takes the contractor to provide an acceptable product or service.

OSWER Response

We concur with comments to this finding. We are willing to monitor the implementation of the standard FAR inspection clause during the performance of contract requirements. We also will monitor and document instances in which the Agency is required to pay for what we believe to be poor quality products and services. If we find that it is not only in the exception cases that the Agency is paying for such work, but, instead, that paying for such work is a regular practice, we will take appropriate action at that time. However, it is important to note that to be in compliance with the FAR, the Agency must pay allowable, allocable, and reasonable costs incurred in cost-reimbursement contracts. The FAR states that if the services provided do not conform to the contract requirements, the contractor must perform them again, without receiving an additional fee.

The OIG should note that the term "contract requirements" refers to "scope of work" in level of effort contracts. The OIG

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finding, however, does not refer to the scope of work, but to the quality of work. In addition, our contractors are required to provide their "best effort." If their best efforts result in poor quality work, the Agency must still pay for the work. The Agency's only recourse in such a situation is to prove that the contractor did not provide his best efforts, which requires an expenditure of resources beyond what the Agency can usually afford to bear.

Thank you for the opportunity to provide our comments to this draft report. If you have questions, please contact Jose Acevedo, OSWER Audit Follow-up Coordinator, at 382-4510.

cc: Mary Gade
Henry Longest
Sonya Stelmack
Jose Acevedo
Jim Maas
David O'Connor, PM-214F

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Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
06a. Note	From John Sununu to William Reilly Re: Extracted baby teeth (1 pp.)	6/1/90	P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Cabinet Agencies Files
WHORM Cat.:
File Location: Reilly (EPA) (1990) [1]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29189-009
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
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 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

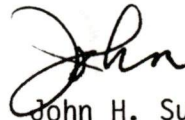
June 1, 1990

Dear Bill,

This is typical of what goes on over there that raises my blood pressure!

Have a nice day.

Sincerely,



John H. Sununu
Chief of Staff

THE WHITE HOUSE
WASHINGTON

Honorable William Reilly
Administrator
Environmental Protection Agency
Washington, D.C. 20460

PERSONAL/EYES ONLY

bcc: Honorable James D. Watkins

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
06b. Note	From James Watkins to John Sununu Re: Extracted baby teeth (1 pp.)	5/31/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
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Subseries: Cabinet Agencies Files
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AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

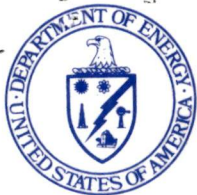
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 (b)(9) Release would disclose geological or geophysical information



THE SECRETARY OF ENERGY

WASHINGTON, D.C. 20585

May 31, 1990

The Honorable John H. Sununu
Chief of Staff to The President
The White House
Washington, D.C. 20585

Dear John:

I knew you would want to see this extremely important item which far outshadows the many issues currently on your plate. Our lawyers are working on a defense strategy in case the tooth fairy gets arrested by EPA for unlawfully collecting a chipped tooth.

All the best,


James D. Watkins
Admiral, U.S. Navy (Retired)

Enclosure

UNHAPPY CHILDREN, ANGRY TOOTH FAIRY



Not long ago the Environmental Protection Agency (EPA) declared that extracted baby teeth were "hazardous waste" and therefore couldn't be returned by dentists to their young patients for magical under-the-pillow transformations. This resulted in a lot of unhappy children and one angry tooth fairy, according to an Academy of General Dentistry report.

Now the EPA has clarified its regulations: Only teeth that are badly infected or broken up must be discarded. Youngsters can still take healthy baby teeth home for compensation, a ruling that should leave kids feeling good again about visits to the dentist.

J

THE CHIEF of STAFF
has seen MAY 23 1990

THE WHITE HOUSE

WASHINGTON

April 29, 1990

5/21 copy sent to Bromley

THE CHIEF of STAFF
has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: ROGER B. PORTER *RB*

SUBJECT: EPA Report on Cancer Risks From Electromagnetic Radiation

EPA's Office of Research and Development recently completed a draft report on the potential carcinogenicity of electromagnetic fields (EMFs) at frequencies associated with electrical power generation and use. The most significant evidence comes from studies of childhood cancers (leukemia and lymphomas) in children living close to transmission lines. Of six major studies completed; three show a statistically significant increase; two show an increase which is not statistically significant; and one shows no increase.

Most of the data presented in the EPA report have already been presented in other reports, notably a recent OTA report on the subject. Although the data on children raises concerns, there are important uncertainties. In most cases, there is poor data on actual exposure levels. Similarly, where exposure levels have been documented, there is no clear dose-response curve. Finally, there is little animal data to support the human evidence, and no scientific theory of how EMFs cause cancer.

Currently the national average risk for children to develop leukemia in the first 12 to 14 years of life is 1 in 1,000. If the studies are correct, children exposed to higher levels of EMFs would have a risk of 2 in 1,000 of developing leukemia.

DOE, DOD, and OSTP are now reviewing the report. After this review is completed, a small panel will peer review the report. Once EPA has incorporated the comments of the review panel, it will release the document for public comment. Before a final document is produced, EPA will also send the report to the Science Advisory Board for review.

Two weeks ago, Phil Shabecoff interviewed officials at EPA with the intent of writing a story for the Science section of the New York Times. Attached is an internal document prepared by EPA to help answer questions which may surface over the next few weeks.

Attachment

Should get NAC sent

April 13, 1990

Why did ORD do this report?

The Office of Radiation Programs (ORP) requested an analysis of the potential carcinogenicity of EMFs. The Office of Research and Development (ORD) provides this type of scientific assessment for program offices with the Agency. In 1984, ORD evaluated the biological effects of radiofrequency (RF) radiation, one part of the electromagnetic radiation spectrum. At that time, there was little information about potential cancer risks or other chronic effects. More recent studies have focused attention on the potential carcinogenicity of EMFs, especially at frequencies associated with electrical power generation and use. The report will be used to evaluate the need for both future research and operational programs relating to non-ionizing radiation.

What is new in this report compared to the recent OTA report (and others)?

The OTA report focused on electric and magnetic fields from electric power systems. Under its authorities and responsibilities, EPA's concerns cover the entire electromagnetic radiation spectrum. Therefore, the ORD report focuses on a broader data base that includes many frequencies or sources of electromagnetic radiation. Also, the ORD report includes some more recently published data. EPA's report goes beyond the OTA report in strengthening the link between EMFs and cancer, but reaches similar conclusions regarding our ability to assess risks at this time. It also confirms the need for additional research.

What is the "broader data base" addressed by the EPA report?

The EPA report includes analysis of studies of humans and animals exposed to radiofrequency (RF) fields and mixed fields rather than only focusing on power frequency (called extremely low frequency or ELF) fields, as the OTA report did. There is some, but not well established evidence, that higher frequency components of EMFs (like RF or mixed fields) have different effects than lower frequency components (like ELF). These effects may qualitatively (different cancer sites, other health effects, or different populations at risk) or quantitatively (different magnitude of response) affect any estimate of hazard or risk. More research will be needed to address this issue.

What are the major areas of uncertainty in defining a carcinogenic hazard to EMFs at this time?

Our concern for a potential carcinogenic hazard is based primarily on observations in humans. While these data avoid the need for extrapolation from animal studies, a common source of large

uncertainty for many chemicals which we assess, they also present uncertainties by their very nature. They represent a statistical association between two observations: specific cancer types and exposure to higher as opposed to average levels of exposure to EMFs. Despite this statistical association, it is impossible to estimate the level of response that might be expected from measurements of EMFs at this time. The numbers of observations in the positive studies are small and the increase in risk is estimated to be two- or three-fold. This level of increase may never be able to be resolved with great certainty using human studies because chance or the contribution of other agents is difficult to rule out. Animal data do not yet exist to support these observations either because the appropriate studies have not been done, or because the few results we have are equivocal. Also, we do not yet understand the characteristics of the EMFs which might be responsible for the observed effects. More research will be needed to clarify these issues and reduce the uncertainties.

If EMFs do increase risks of cancer in children, how serious of a problem could this be?

All agents which do cause increased risk of cancer are serious. However, since cancer rates in children have not risen dramatically with electrification of the United States, it is unlikely that EMFs are a major contributor to childhood cancer. If the epidemiological studies are accurate, children exposed to higher levels of EMFs in their homes may be more likely to develop cancer than those not exposed to similar conditions. The national average risk for children to develop leukemia between birth and 12-14 years is approximately 1 in 1,000. The results of the studies on EMFs would increase that estimate to approximately 2 in 1,000 for those children who are at risk. Since we do not yet know the characteristics of the exposure which may be responsible for the effects which were observed, we cannot yet estimate the numbers of children who may be at risk.

What research is planned and when would you hope that definitive information will be available?

The report briefly summarizes ongoing research and outlines research needs. For example, several major epidemiological studies are in progress and will be completed in the next few years. Much laboratory-based work also is underway. In science, it is always difficult to pinpoint when there is fully "definitive" information. Rather, the weight-of-the-evidence continues to grow and will aid in reaching conclusions regarding the potential carcinogenicity of EMFs which are supported by much of the scientific community. The ongoing research will undoubtedly add much to our understanding of the effects of EMFs. The EPA is not conducting its own health effects research at this time. Once the ORD report has been reviewed by the scientific community and the public, the Agency will determine its role among other Federal agencies, research institutions and the electric power industry in the conduct of additional research and data collection.

What recommendation is EPA making to the general public as a result of this report?

At this time, the Agency is not making any recommendations to the general public in the report or as a direct consequence of the report. There are many uncertainties about the degree and extent of any hazard posed by exposure to EMFs. We are in the process of determining what actions the Agency should undertake with respect to EMFs. One action may be the establishment of a public information program to assist the public in understanding our current state of knowledge regarding potential health hazards associated with exposure to EMFs.

Tentative Schedule for Review and Release of the
EM Carcinogenicity Document

- 1) Document ready to be sent out for agency and limited interagency review on March 19, 1990.
- 2) Agency senior executive level briefings completed by March 23, 1990. Comments due back to authors between April 1 and April 13, 1990.
- 3) Review comments incorporated into the document by April 27, 1990. This satisfies the ATS requirement for a document suitable for external review.
- 4) Document sent out to small peer review panel by May 11, 1990. The document is also sent to other Federal Agencies for their information at the same time.
- 5) Peer review panel meeting during the week of June 4, 1990.
- 6) Authors revise the document based on peer review comments by July 6, 1990.
- 7) ORD approval and printing of the document for public release by July 30, 1990.
- 8) Public FR notice of availability of document on or about July 30, 1990. This is the start of a two-month public review process.
- 9) Review by the Science Advisory Board on a date to be arranged early in September 1990.
- 10) Public comment period ends 60 days after announcement of public availability.
- 11) Authors incorporate public and Science Advisory Board comments by mid-November 1990. This constitutes the final version of this document.

THE WHITE HOUSE
WASHINGTON

TO: GOVERNOR SUNUNU

FROM: DAVID Q. BATES



☒ FYI

☐ Action

☐ Comment

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
07. Memo	From Barry McBee to David Bates Re: Pending EPA Matters (1 pp.)	5/7/90	B5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Cabinet Agencies Files
WHORM Cat.:
File Location: Reilly (EPA) (1990) [1]

Open on Expiration of PRA
 (Document Follows)
 By *JP* (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29189-009
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE
WASHINGTON

May 7, 1990

MEMORANDUM FOR DAVID BATES

FROM: BARRY MCBEE *Bar*
SUBJECT: Pending EPA Matters

THE CHIEF of STAFF
has seen

*To Governor
Jimmie
Dick Darman
Boyden Gray
Roger Porter
Steve Hart
F-41
D-213
5/10*

Two items in EPA's Cabinet report last week may warrant special attention:

Report on Methanol -- Resources for the Future has conducted a study under EPA sponsorship of the use of methanol as an alternative motor fuel. A draft of the report has been delivered to EPA for internal review, which will be followed by peer review (at which time the report will likely become public). The report shows that improvements in ambient ozone quality are possible through the use of methanol, although the extent of any improvements is uncertain. It also suggests that using methanol, which will be more expensive than gasoline on an energy equivalent basis, is a relatively costly method to reduce ambient ozone pollution when compared to other possible methods. Thus the report could have an adverse effect on the Administration's push for alternative fuels. EPA is arranging briefings on the report for Boyden Gray and Roger Porter and for personnel at Energy, Transportation and CEQ.

★
Love Canal -- Bill Reilly is expected on Wednesday afternoon to sign the documentation evidencing EPA's determination that the habitability study of the Love Canal area funded by EPA meets the statutory requirements imposed under the 1986 Superfund amendments. This will open the door to possible action by the State of New York and local governments to pursue revitalization efforts in the area. EPA may assist in the funding for these activities, but the decisions as to whether, for example, to move persons back into the area will be made at the state and local level. The opposite conclusion by EPA would have required further habitability studies, which could have taken several years, delaying reoccupation of the area, and entailed considerable expense.

Issue Alerts prepared by EPA on both of these matters are attached. Call me if you want additional information.

★ Now expected the week of May 14

RESOURCES FOR THE FUTURE REPORT ON METHANOL

EPA is now internally reviewing an Agency-supported study of methanol undertaken by Resources for the Future. The study examines the ambient ozone benefits, costs, cost effectiveness, and energy security benefits of substituting methanol for gasoline as a motor fuel in 2000 and 2010. The report is the first of a series devoted to alternative fuels and supported by EPA to help provide a technical basis for possible new clean air regulations.

The draft suggests that ambient ozone improvements from methanol are likely but the magnitude of the improvements are uncertain. It also concludes that methanol is likely to be more expensive than gasoline on an energy equivalent basis. For example, in 2000, for dedicated methanol vehicles using M85 (85% methanol/15% gasoline) methanol will cost roughly 18 to 47 cents more than a comparable amount of gasoline.

The report suggests that methanol is a relatively costly way to reduce ambient ozone pollution. Cost estimates range from \$52,000/ton to \$253,000/ton of volatile organic compounds (VOC) reductions for dedicated methanol (M85) vehicles in 2000. The most favorable circumstances for the introduction of methanol result in a cost effectiveness in 2000 of \$13,000/ton of VOCs reduced; the picture is not much brighter in 2010. Under the most optimistic scenario, pure methanol vehicles still cost \$36,000/ton of VOC reduced.

After the internal EPA review, Resources for the Future will seek outside peer review of the draft. A final report will be released later this year. Briefings for the White House, Transportation Department, Energy Department and the Council on Environmental Quality are planned.

LOVE CANAL HABITABILITY STUDY

In 1983, EPA began a six-year, \$16 million study to determine the habitability of part of the evacuated residential area that adjoins the Love Canal Superfund site near Niagara Falls, New York. (This study area is referred to as the Emergency Declaration Area). It is beyond the actual Love Canal site and the first two rings of homes which were demolished. The 1986 amendments to the Superfund law required that a habitability study be undertaken.

The EPA-funded study provided extensive air, soil and water samples. The results of EPA's study were used, in part, as a basis for the New York State Commissioner of Health's decision on September 1988 that several of the areas within the Emergency Declaration Area were suitable for residential use. This decision is controversial and two citizen groups have alleged that the study does not fulfill the statutory requirements because it not assess the health risks of resettlement of these areas. EPA is currently reviewing their specific comments and evaluating whether the study legally fulfilled the statutory requirements. This review and related responses to these groups will be concluded in the next few weeks.

Since the issuance in 1978 of the first of two Presidential emergency declarations aimed at relocating Love Canal area residents, significant accomplishments have been made at the site -- including the isolation of the actual disposal site through capping and leachate collection and treatment; clean-up of contaminated drainage tracts; extensive monitoring; two habitability studies; an on-going enforcement and cost-recovery action (valued at over \$100 million) against the Occidental Chemical Corporation; and initial efforts to revitalize the surrounding neighborhoods.

If EPA concludes that the studies undertaken to date fulfill the requirements of the statute, further Federally-funded study of the Emergency Declaration Area to determine its suitability for resettlement will not be required. Continued funding of other related revitalization activities and remediation of contaminated areas within the Love Canal area will continue.

Should EPA conclude that further risk-based evaluations are required to fulfill the statutory mandate, planning for such studies will be initiated. Design and implementation of an appropriate study protocol could take several years and entail considerable additional expense. Further, a decision to conduct further studies would delay indefinitely the plans of State and local officials to revitalize the areas and therefore would be met with considerable state, local and community resistance.

Executive Memorandum

The Heritage Foundation

214 Massachusetts Avenue N.E. Washington, D.C. 20002 (202)546-4400

4/26/90

Number 264

RUSH!

HOW CONGRESS IS MAKING THE NEW ENVIRONMENT DEPARTMENT UNCONSTITUTIONAL

As the television lights and intense focus on Earth Day recede, the environment question is heating up a classic executive-legislative battle behind the scenes in Washington. The issue: who will control the new Department of Environmental Protection? Legislation to elevate the current Environmental Protection Agency (EPA) to a cabinet-level department passed the House of Representatives on March 28 and is headed for a Senate vote in early May. Contrary to custom and constitutional law, however, the House-passed bill would create an executive branch department firmly under the control of Congress and only nominally responsible to the President.

Section 111 of the House-passed bill would create within the new department a powerful Bureau of Environmental Statistics charged with collecting and analyzing environmental data. Far from simply collecting data, however, the new bureau is empowered to advocate federal environmental policy totally independent from the direction or approval of the Secretary of the Environment or the President. This is unprecedented, argues Representative Frank Horton, the New York Republican, who notes that the bill abandons principles that have guided this nation for more than 200 years. A leading proponent of such "good government" laws as the 1978 Inspector General Act and the 1989 Whistleblower Protection Act, Horton charges that the House is "creating an office, the head of which is answerable to no one, [and whose] work products — including policy analysis — can be reviewed by no one,... even the Inspector General."

Who's In Charge. The bill pointedly excludes the President and the Secretary of the Environment from having control over the Bureau. Instead, all functions "that relate to the gathering, analysis, and dissemination of environmental quality and related public health information" are vested in a newly created Director of Environmental Statistics. The proposed law requires that the \$75,000 per-year director be a career bureaucrat appointed by the Secretary of the Environment for a term of four years, and removable only for "malfeasance in office, maladministration, or neglect of duty." The meaning: neither the Secretary nor the President can fire the director.

Congress, by contrast, appears to have given itself adequate control over the director. While it prohibits the President and other executive branch officials from approving or previewing the bureau's reports, the bill requires that the director, upon request, shall "make special statistical compilations, surveys, and reports for Committees of the House of Representatives and the Senate" Congress it seems is not creating an executive branch department, nor even an independent agency, but a wholly owned congressional subsidiary that is merely housed within the executive branch.

Another way that Congress is seeking to control the new department is by limiting sharply the president's ability to appoint the senior policy staff of the new executive branch department. Section 103 of the bill, for example, requires that no fewer than two-thirds of the Deputy Assistant Secretaries of the new department "shall be filled by individuals who have at least five years of service in the Federal civil service." The meaning: non-bureaucrats need not apply. Section 113 imposes an even broader restriction, limiting unrestricted presidential appointees to no more than 10 percent of the department's total senior executive staff. Although the bill contains a clause that allows limited exceptions, the effect of the prohibition is to prevent the President from appointing policy makers who support his views. The result: senior level policy staff of the new department will be more likely to support and respond to Congress than to the President.

Non-civil servants appointed by the President to key executive branch policy positions are commonly referred to as political appointments. Such appointments are very important. They allow a President to employ a staff that is committed to his policies. Political appointees often come from the private sector where the range of creative thinking is not limited to such solutions as new government regulations or more government spending. Political appointees, moreover, represent a more democratic approach to governing since they usually support the policies that the President was elected to pursue. Career civil servants, by contrast, need have no commitment to the President's platform and are not accountable to the voters.

Bureaucrats' "True Employers." The notion of non-political bureaucrats is rooted in the dubious notion that politics can and should be separated from the "administration" of government. Yet experience has proved that bureaucrats are no less political than are presidential appointees. Rather than responding to a particular political party, however, bureaucrats are biased toward protecting and expanding bureaucracy. Bureaucrats quite naturally are most attentive to those who control their budgets: members of Congress and congressional staff. As noted in *The Imperial Congress* "...executive branch bureaucrats will respond to those who can most directly influence their long-term career advancement and prospects. In that sense it is clear that the professional bureaucracy of the federal government regards Congress as its true employer."

Rather than simply elevating the EPA to a cabinet-level department — a proposal that was strongly supported by George Bush and a bipartisan majority in Congress — the House has passed a bill that creates new bureaucracy that once again challenges and probably violates the constitutional separation of powers. It is a bureaucracy over which the President has very little control. Warns Representative Horton: "In Eastern Europe, government officials for the first time are becoming answerable to the people. In the House of Representatives, there seems to be a feeling that we should go the other direction."

Bush already has made clear his intention to veto the bill unless the offending provisions of the House bill are excised. As the bill nears consideration in the Senate, he should articulate his position to the public and be prepared to make good on his veto threat.

Mark B. Liedl
Director, U.S. Congress Assessment Project

For further information:

"The Tiff Over EPA," editorial, *The Washington Post*, April 1, 1990.

Robert Rector and Michael Sanera, eds., *Steering the Elephant: How Washington Works* (New York: Universe Books, 1987).

Gordon S. Jones and John Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books, 1989).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

MAR 1 1990

THE CHIEF of STAFF
has seen

THE ADMINISTRATOR

David Bates

MEMORANDUM FOR THE PRESIDENT

SUBJECT: New York/New Jersey "Floatables Action Plan"

Last year, you expressed an interest in our efforts to stop garbage, sewage and medical waste "washups" in the New York/New Jersey Harbor area. I am pleased to provide you with this update on our significant progress in the battle against floating debris and the resulting beach closings and economic losses.

In 1989, EPA coordinated the development and execution of a "Floatables Action Plan" to prevent significant washups of garbage, wood, seaweed, medical waste and sewage. The Plan, which enlisted the assistance of the New York and New Jersey state environmental agencies, the New York City Department of Sanitation, the Coast Guard, and the U.S. Army Corps of Engineers, consisted of four basic elements: surveillance, regular cleanups, non-routine cleanups, and a communications network to coordinate the joint resources.

The Plan was a great success; "slicks" of debris were intercepted in the harbor and "washups" were dramatically reduced. Nearly 550 tons of debris were "skimmed" off the water and 3,000 tons of debris were removed from the harbor shorelines. Not only did this reduce the number of beach closings in the summer of 1989, but when washups were unavoidable, near perfect predictions of where and when those washups would occur were available, allowing cleanup to proceed quickly.

Floating debris slicks occur most often after heavy rainstorms which cause sewer overflows that carry street litter and untreated sewage into the harbor. Slicks are also formed when debris already present on harbor shorelines is refloated by high tides, especially during full or new moons. The resuspended debris is flushed out to the ocean, where it concentrates into slicks. Particularly large slicks are formed when both a storm and high tides occur simultaneously.

EPA is working with the same agencies to continue and expand the Floatables Action Plan for the Summer of 1990.

Bill

William K. Reilly

Isn't it great when something works out just as planned!