



COMPTROLLER GENERAL OF THE UNITED STATES
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AUGUST 3, 1984

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To the President of the Senate and the
Speaker of the House of Representatives

Subject: Assessment of the Adequacy of the Environmental
Protection Agency's Indemnification Study Required
by Section 25(a) of the Toxic Substances Control
Act (GAO/RCED-84-170)

Section 25(a) of the Toxic Substances Control Act of 1976 (15 U.S.C. 2624) required the Administrator, Environmental Protection Agency (EPA), to conduct a study of all federal laws administered by EPA to determine whether and under what conditions, if any, indemnification (compensation for loss) should be accorded any person as a result of actions the Administrator may take under any such laws. Furthermore, if the Administrator should recommend any new indemnification programs the study should include an estimate of the probable cost of and an examination of all viable means of financing the recommended programs. The study was to be completed and submitted to the Congress by January 1, 1979. Because of delays and difficulties experienced in conducting the study, the study results were not provided to the Congress until February 3, 1984. EPA's study results consisted of two documents--the Indemnification Report to Congress and the Background Report for the Indemnification Report to Congress.

Section 25(a) of the Toxic Substances Control Act also required that the General Accounting Office review the adequacy of EPA's study and report its results to the Congress within 6 months of the date that EPA submits its study to the Congress. This report presents our assessment of the adequacy of EPA's indemnification study. We found that the study provides a comprehensive examination of the legal and policy issues involved in indemnification and adequately satisfies the legislative requirement.

OBJECTIVES, SCOPE, AND METHODOLOGY

We directed our review toward analyzing the information presented in EPA's reports to determine whether the study adequately satisfied the legislative requirement and included reasonable judgments and conclusions. In conducting our review, we interviewed EPA's project officer for the study and representatives

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from EPA's Office of Toxic Substances and Office of Pesticide Programs which are responsible for EPA's implementation of the Toxic Substances Control Act and the Federal Insecticide, Fungicide, and Rodenticide Act, respectively. We also interviewed members of the indemnification study workgroup which consisted of representatives from EPA offices of Solid Waste, Water, Toxic Substances, Pesticide Programs, General Counsel, Enforcement, Economic Analysis, Legislation, and Intergovernmental Liaison. EPA established this work group to provide a peer review of the indemnification study and to check the accuracy of the information related to each member's respective areas of responsibility.

We also discussed the study with contractor and subcontractor representatives involved with the study and discussed the concept of indemnification and the need for new indemnification programs with representatives of several companies and trade groups that are affected by or concerned with EPA regulations. We also reviewed EPA contract files and information developed by contractor and subcontractor personnel related to the indemnification study. We did not, because of the limited time frame, attempt to verify the information presented in EPA's report. We did not consider this to be necessary because the background report provides extensive supporting information and is well documented. Our review was done in accordance with generally accepted government auditing standards.

BACKGROUND INFORMATION ON THE EPA INDEMNIFICATION STUDY

The legislative requirement for the study provided no guidance on what actions by EPA might justify indemnification and did not define the term. The focus of EPA's study was to determine whether EPA causes harm for which the government should pay. The definition of indemnification that EPA adopted for the study was "compensation by the U.S. government to those injured by government action under the laws administered by EPA." Such instances could include reimbursement by EPA to chemical manufacturers for existing stocks of a pesticide which has been banned by EPA regulation.

The study makes a distinction between indemnification and other types of payments made by EPA. These other types of payments, which were outside the scope of the study, include payments for goods and services, subsidies such as those to build sewage treatment plants, and compensation for victims of environmental disaster.

EPA decided to contract out the indemnification study. In response to EPA's Request for Proposal, eight bidders submitted proposals and five of these were found to be technically

qualified. EPA negotiated with the three bidders receiving the highest technical evaluations. Based on technical and price factors, EPA awarded a contract to American Management Systems that became effective on September 29, 1978. The contract called for a final report in 10 months at a cost of \$115,261. In addition, EPA required a draft final report 2 months before the final report was due.

The EPA project officer, after reviewing the draft final report, decided that the study's review of the legal aspects of indemnification needed to be expanded. With EPA's agreement, American Management Systems subcontracted with The Research Group, a legal consulting firm, to conduct an expanded legal study. This action led to a major revision in the study's approach and scope and increased the contract cost to \$428,000. Also, the contract completion date was extended to December 1982.

American Management Systems had initially tried to develop standard approaches which could serve as a model for indemnification and be applied to varying indemnification situations in order to determine if indemnification was warranted. However, this approach did not prove successful. The Research Group's involvement led to a shift from the standard procedure approach to a case-by-case analysis of relevant statutes and the different situations at EPA which could potentially warrant indemnification.

EPA's internal organization for the study consisted of a project officer, a peer review work group, and internal review and approval procedures. The project officer spent approximately 50 to 70 percent of her time working on the study and worked with the prime contractor and subcontractor on a day-to-day basis. EPA also established a work group of nine members, each of whom represented different Agency programs. The work group operated as a peer review group and its members were responsible for reviewing and commenting on drafts of the study and ensuring that the facts in the study accurately reflected conditions in each program area. In addition, the study was coordinated within EPA and reviewed by senior officials responsible for different EPA programs.

GAO's ASSESSMENT

The study and its background report thoroughly discuss and analyze

- the history and general nature of indemnification by the federal government;
- the availability of alternatives to an indemnification program including

- administrative options for minimizing losses, such as public participation in agency decision-making, phasing in a regulation, as well as waivers and exemptions from regulatory actions granted to affected parties by EPA, and
- private legislation enacted by the Congress which consists of either (1) private bills which grant compensation that is funded by a special appropriation or (2) bills that grant special jurisdiction to the U.S. Claims Court (formerly the Court of Claims) to hear a claim and, if the Court rules in favor of claimant, to render a judgment that would be payable from the permanent judgment appropriation established by 31 U.S.C. 1304;
- existing indemnification provisions in EPA-administered environmental laws and their legislative history, EPA's experience in applying these provisions, and the possible application of these provisions in other EPA programs;
- the evaluation of EPA-administered laws and regulations to determine categories of losses that might be suitable for indemnification, including proposed criteria and factors that need to be considered when assessing the need for and desirability of establishing specific indemnification programs; and
- general issues concerning cost and financing of indemnification.

The study concluded that no new indemnification programs are needed because established procedures will cover potential indemnifiable losses. This is supported by the study's description and analysis of EPA's actual experiences under existing environmental laws and hypothetical indemnification situations.

We believe that the study provides a comprehensive examination of the legal and policy issues involved in indemnification and provides an adequate framework and sufficient detailed information to assist the Congress in deciding, as a matter of public policy, whether EPA needs new indemnification programs. The study does not address the cost and financing of specific new indemnification programs because none were recommended; however, it does present a discussion of the general issues concerning the cost and financing of indemnification programs. Based on our review, we believe that EPA's indemnification study adequately satisfies the legislative requirement.

In addition to providing you our assessment of EPA's indemnification study, we are advising you that we are currently reviewing the payment of claims from the permanent judgment appropriation for indemnification authorized by Section 15 of the Federal Insecticide, Fungicide, and Rodenticide Act.

The Claims Court, which was established by the Congress, hears and adjudicates contract and certain other monetary claims against the government. The permanent indefinite judgment appropriation provided by 31 U.S.C. 1304 was established by the Congress for payment of various money judgments against the government which are not otherwise provided for, including those issued by the Claims Court. GAO is responsible for certifying these judgments for payment, including a determination of the proper appropriation to charge.

The EPA study discusses several claims for indemnification made to EPA under the Federal Insecticide, Fungicide, and Rodenticide Act that resulted from EPA's 1979 decision to ban the use of certain pesticides containing the chemical Silvex. The indemnification study states that EPA had acknowledged the validity of the claims but advised the claimants that EPA did not have the funds to pay the claims. As a result, the claimants filed suit in the Claims Court and a number of settled claims have been paid from the Judgment Appropriation. We are currently assessing whether these claims and similar future claims should be paid in this manner or from EPA's appropriated funds.

This report was sent to EPA for review. In a letter dated July 11, 1984, the Assistant Administrator for Policy, Planning and Evaluation advised us that EPA agreed with our report. (See enclosure.)

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We are sending copies of this report to the Director, Office of Management and Budget; the Administrator, Environmental Protection Agency; and other interested parties.



Comptroller General
of the United States

Enclosure