APPENDIX G—EPA LETTER ADDRESSING HAZARDOUS RUNOFF

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

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

SEP 17 1999

Randolph G. Laye
Team Leader, Chemical Weapons
Improved Response Team
U.S. Army Soldier and Biological Chemical Command
5183 Blackhawk Road
Aberdeen Proving Grounds, MD 21010

Dear Mr. Laye:

Thank you for your letter dated April 19, 1999, concerning the impact of contaminated run-off water resulting from mass casualty decontamination. In your letter, you requested the Environmental Protection Agency (EPA) to address two issues: the first responders' liability for spreading contamination while attempting to save lives and the acceptable level of contamination that could enter the Chesapeake Bay without being considered a threat to the ecosystem.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Section § 107 (d) Rendering Care or Advice, addresses this issue. Section 107 (d) (1), often known as the "good Samaritan" provision, states: "No person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan (NCP) or at the direction of an On-Scene Coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof." This provision does not preclude liability for costs or damages as a result of negligence. CERCLA §107 (d) (1) would apply to releases of chemical and biological warfare agents due to a terrorists incident, to the extent that there is a release or threatened release of a hazardous substance.

In addition, §107(d)(2) provides that state and local governments are not liable under CERCLA "as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." Section 107(d)(2) would insulate State and local governments from potential CERCLA liability arising from first responder actions. However, the provision does not apply to costs or damages caused by "gross negligence or intentional misconduct by the State or local government."

EPA will not pursue enforcement actions against state and local responders for the environmental consequences of necessary and appropriate emergency response actions. During a

Internet Address (URL) • http://www.epa.gov
Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 25% Postconsumer)

hazardous materials incident (including a chemical/biological agent terrorist event), first responders should undertake any necessary emergency actions to save lives and protect the public and themselves. Once any imminent threat to human health and life is addressed, first responders should immediately take all reasonable efforts to contain the contamination and avoid or mitigate environmental consequences and an expanded scope of work for mitigative response actions.

First responders must be aware that EPA cannot prevent a private person from filing suit under CERCLA. Defenses to such an action are described above. In addition, first responders could be subject to actions under other law, including State tort laws. A State's tort law allows individuals and businesses to seek compensation for losses or harm caused by another. The extent of tort liability of a state or local governmental jurisdiction, as well as individual employees or representatives of that jurisdiction, is established by the tort law of each state. The liability of governmental jurisdictions and their employees may be shaped by factors such as negligence, statutory and discretionary immunity, etc. First responders should consult legal counsel in their state to discuss authority, status as an agent of the state, immunities, and indemnification.

We also recommend first responders to involve state and federal officials as soon as possible to reduce potential liability concerns. For example, under CERCLA an on-site emergency response action does not have to comply with federal or state environmental regulations determined to be impracticable by the federal on-scene coordinator (FOSC). In addition, FOSCs have an expanse of federal resources of the National Response System described in the NCP available to support the local incident commanders and will support the state and local responders in determining a solution which best addresses protectiveness of human health and the environment.

With regards to your second question, there is no one "acceptable level" of contaminated run-off which does not pose a threat to the environment. The threat is dependent upon many variables, including contaminant, concentration, point of entry, and size and characteristics of the primary receiver stream. Contaminated run-off should be avoided whenever possible, but should not impede necessary and appropriate actions to protect human life and health. Residual contamination can be addressed immediately after or while human life and health are protected.

Please let me know if you want to further discuss these issues or have any additional questions. You can reach me directly at (202) 260-8600 or call Ken Stroech, EPA's Counter-Terrorism Program Coordinating Chair, at (202) 260-3434 or Awilda Fuentes at (202) 260-4514.

Sincerely,

Jim Makris
EPA Emergency Coordinator