



# About Ability to Pay!!!

2018 National Tanks Conference, Louisville, KY

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BELLE + LOUISVILLE

# Look what the Stork Bought US?

- The purpose of an Ability to Pay (ATP) Settlement is to resolve an Undue Financial Hardship.
- Undue Financial Hardship is defined as a payment obligation so great that it will cause:
  - A business to fail;
  - A family to lose their home;
  - A city to stop providing necessary services.





# As long as you live under my roof, you'll do as I say.

EPA's Guidance on Determining a Violators Ability to Pay a Civil Penalty

- <http://www.epa.gov/enforcement/documents/policies/civilpenalty-violators.pdf>

EPA's Superfund Ability to Pay Guidance can be found at

- <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>

Other EPA Ability to Pay Documents are referenced at

- <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/payshortsht-mem.pdf>
- Delaware Department of Natural Resources and Environmental Control, Ability to Pay Policy dated July 1, 2016

**I'm doing this for your own good.**



**Two step Analysis**

**Balance Sheet  
Phase**

**+**

**Income Statement  
Phase**



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- **Balance Sheet Phase**

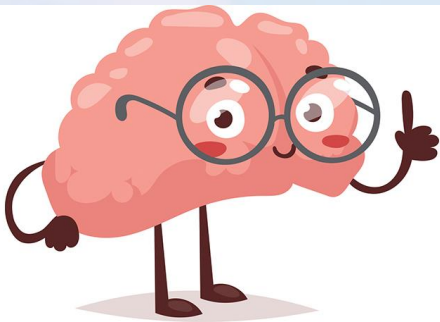
- Split assets into two groups;
  - Necessary Assets
  - Unnecessary Assets
- Balance Sheet Phase looks for the value of the Unnecessary Assets, and
- Considers the potential to borrow on necessary assets.

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- **Income and Cash Flow Statement Phase**

- Revenues that are expected to be earned over the next 3 – 5 years;
  - Less Ordinary and Necessary Cash Expenses;
- = Available Income

SMILE!  
It's Good  
For You



# Your Mind Works In Mysterious Ways.

- What will you ReCeIvE
  - Request the information
  - Confirm a complete Response
  - Verify the Response
  - Evaluate the Ability to Pay

# **Receive** **Request the Information**

- Ability to pay is a settlement option, so you can ask what you want, but be reasonable.
- At the same time, some statutes have information request authority.
- If your matter is under that authority, verify that your questions fall within that authority.



# Eat all of your vegetables!



- Ask for enough information;
  - There is often a standard request used by each Office
  - Follow-up questions are often needed to
    - Update the financial submission;
    - Confirm that assets still exist and still have value (Fraudulent Transfers); and
    - Resolve questions before the final amount is determined.
  - Follow-up questions should include the input of the financial analyst.

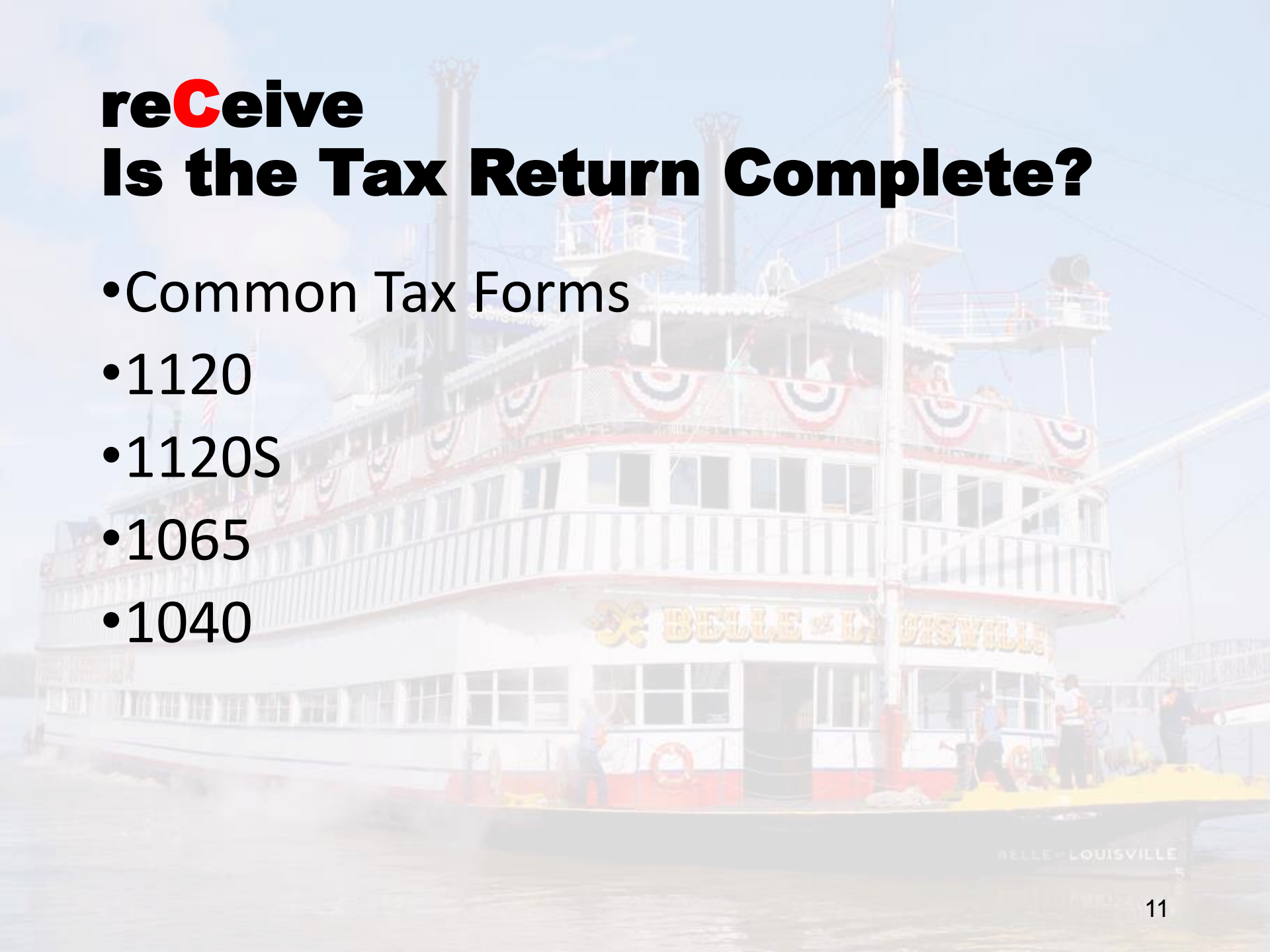
# Never Leave Home Without Enough Money To Make A Call Home?

- For Corporations
  - [Questions](#)
  - [Financial Form](#)
- For Individuals
  - [Questions](#)
  - [Financial Form](#)
- For General Partnerships
  - Combination of both

**reC**eive

# Is the Tax Return Complete?

- Common Tax Forms
- 1120
- 1120S
- 1065
- 1040



# 1120 Corporate Income Tax Return

- Four or Five page form, plus attachments.
- Important sections
  - Header - Income
  - Expenses - Balance Sheet
  - Schedules M1 and M2
  - Attachments

# Corporate Income Tax Return

- Generally, liability remains with the Corporation and does not migrate to the shareholders or affiliated corporations.
- Verify that Date Incorporated agrees with the same date as recorded with the Secretary of State where the corporation was created.
- Check for related party Transactions.
- Verify that it is not a consolidated tax return.

# U.S. Income Tax Return for an S Corporation, Form 1120S

- Four or Five page form, plus attachments.
- Important sections
  - Header - Income
  - Expenses - Balance Sheet
  - Schedules M1 and M2
  - Attachments
  - Schedule K-1

# Subchapter S Corporation

- Generally, liability remains with the entity (LLC, LP, LLP, PA, etc.) and does not migrate to the shareholders or affiliated entities.
- Some states require a member of an LP or LLP to have unlimited liability.
- Verify that Date Incorporated agrees with the Secretary of State where the entity was created.
- Check for related party Transactions.
- Verify that it is not a consolidated tax return.
- Check the K-1s. Many times additional income from the business but not recognized by the business will appear. E.g. Royalties, interest income.

# U.S. Return of Partnership Income, Form 1065

- Four or Five page form, plus attachments.
- Important sections
  - Header - Income
  - Expenses - Balance Sheet
  - Schedules M1 and M2 - Attachments
  - Schedule K-1

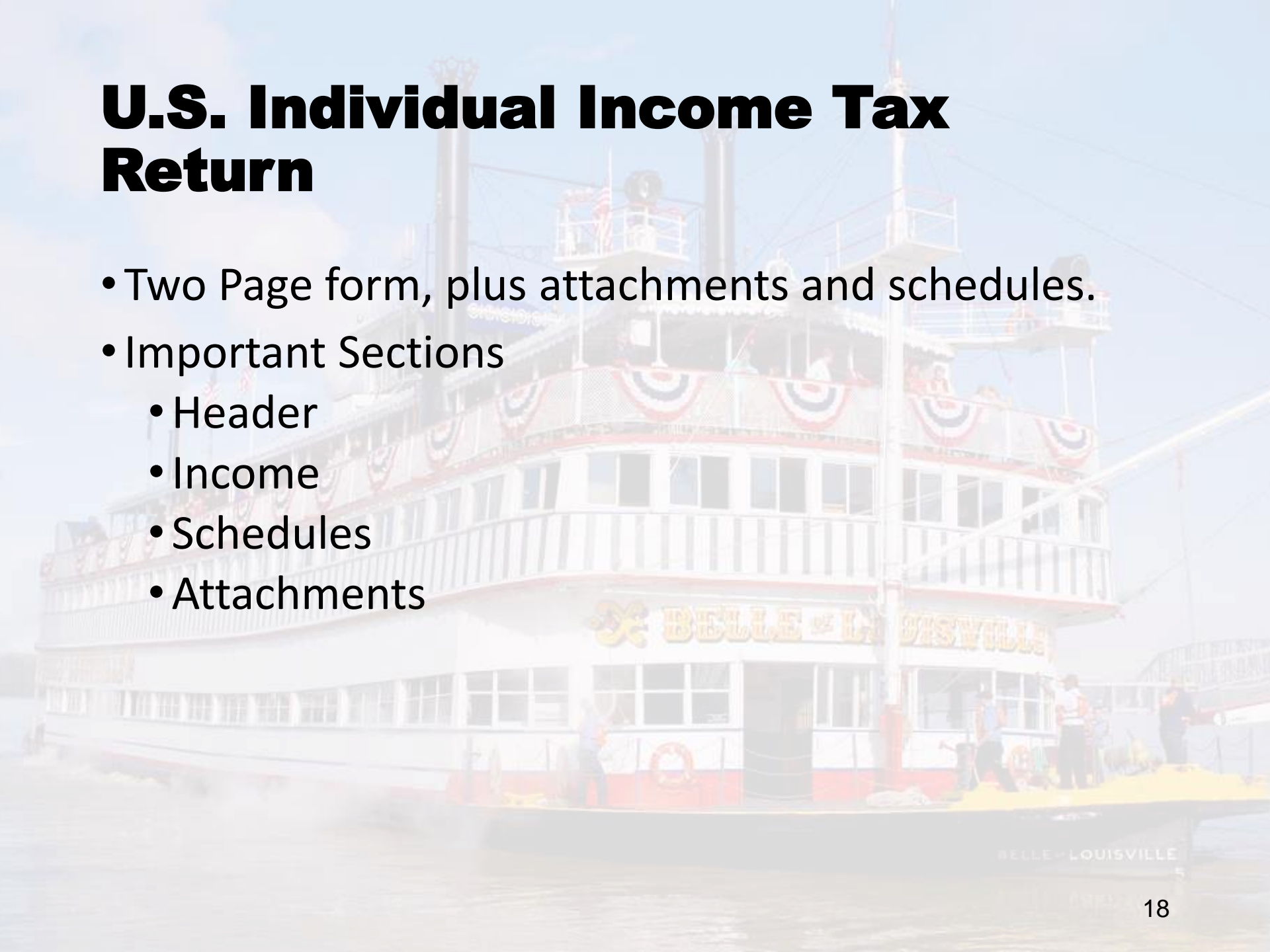


# Partnership Tax Filings

- Many partnerships do not need to file with the State Secretary of State Offices.
- If the business is registered with the Secretary of State Office, Liability may be limited to the business entity.
- If there is no filing with the Secretary of State, the business and each partner may have liability.
- If each partner has liability, the ability to pay is the sum of the ability to pay of the business and all partners.

# U.S. Individual Income Tax Return

- Two Page form, plus attachments and schedules.
- Important Sections
  - Header
  - Income
  - Schedules
  - Attachments



# I'm doing this for your own good.

- Additional Adjustments for ATP
  - Uncertainties relating to future events
  - Insurance Recovery
  - Contribution/Cost Recovery/Indemnification claims
  - Future Work Obligations.
- Less a safety factor adjustment



IF ALL YOUR FRIENDS  
JUMP OFF A BRIDGE...

Hell Yeah I Would.

ICRNRHSCHEEZEURIGER.COM

**I don't care what "everyone"  
is doing.  
I care what YOU are doing!**

- The amount of the claim is important.
- Equitable concerns are not part of the ATP Analysis.
- The Ability to Pay amount assumes a single payment but the case team can make adjustments when it is appropriate.
- Adjustments can reduce the settlement amount but should not change the ATP Recommendation.

# Look at me when I'm talking to you. Part 1

- The Case Team should give the Financial Analyst an idea of the amount of EPA's Claim, including:
  - The dollar amount of the Environmental claim;
  - Additional Injunctive Relief Obligations;
  - Other actions that may have costs to the ATP Party.
    - Pursuing Insurance claims,
    - Responding to information requests,
    - Implementing Institutional controls.





# Look at me when I'm talking to you. Part 2

- The Financial Analyst should give the case team an understanding of the impact of the Environmental Claim, including:
  - Is a hardship probable?
  - Is the information reliable?
  - What dollar amount will not create a hardship?
  - Can the payment be made immediately or will it require deferred payments?
  - Are the amounts exact or flexible?
  - Are there additional future costs that must be considered?

# Look at me when I'm talking to you. Part 3



- The Ability to Pay Analysis needs to be explained to:
  - the Responsible Party who claims the hardship
  - other Responsible Parties
  - Decision Makers (State EPA and Attorney General Office)
- How to explain the analysis:
  - Written communication;
  - Verbally, during an interview with the liable party.
- Plain English is helpful
- Explain what the settlement will not require.
- Maintain the confidentiality of the information.

# **You can't find it? Well, I can't find it for you I'm not the maid!**



- The financial information may identify other potentially liable parties.
- Case Team may have knowledge about assets, businesses, and related companies that are not mentioned in the financial information.
- The Financial Analyst may be able to help estimate the value of assets or companies.



# **It's not that I don't trust you, it's that I don't trust everyone else.**

- Documentation is important.
- Hearsay information is helpful but often inaccurate.
- Are all assets and liabilities disclosed?
- Are assets and liabilities valued accurately?
- For assets, can the expected value be converted to cash?
- For liabilities, is someone else responsible for the liability?

# Don't forget to clean behind the ears.



- Inconsistencies need to be resolved.
- All material assets need to be considered.
- Some assets are unique to the Environmental Claim
  - Insurance
  - Indemnification
  - Contribution Claim
  - Cost Recovery Claim
- Some assets have an unknown value
- Settlement is only with the person who can document the hardship.

# You're too young to date... 30's a good age.



- Timing for the Ability to Pay Settlement is important.
- The Settlement may include future obligations such as:
  - Sale of Property
  - Subsequent Institutional Controls
  - Insurance Recovery.
- There is a cost to verify these actions.
- Make sure there is an agreement on who needs to approve these future actions.

# Clean up your room, or you will get pests

- Do not disclose without the necessary approval. This includes:
  - Other Federal and State Agencies that are not authorized to accept this information;
  - Federal and State Environmental Staff that are not authorized; and
  - Government contractors.





- Keep a list of documents that are considered with the analysis.
- Keep a record of meeting notes where representations were made that are important to the analysis.
- Settlement information may not be admissible in trial.

# Put away your toys, before someone trips on them!

- Do not disclose Confidential Business Information (CBI) to other liable parties without authorization. But you can:
  - Explain the standard of review;
  - Discuss public information;
  - Ask for opinions on the value of assets.
  - Provide a list of the documents that were considered.



# **"Friends" will tell you what you want to hear, but your parents tell you the truth.**

- When you communicate the analysis remember;
  - Visual works better
  - Keep it simple
  - Give people time to absorb the information
  - Keep the audience small
  - This is personal



# Don't sit too close to the television, it'll ruin your eyes.



- Trust each other
- Know enough to work as a team
- But not so much that you become the expert or second guess the expert



# Eat every Bean and Pea on your Plate!!!



- Define your terms
- Try not to use jargon
- Do not assume
- Every dollar amount is important to someone

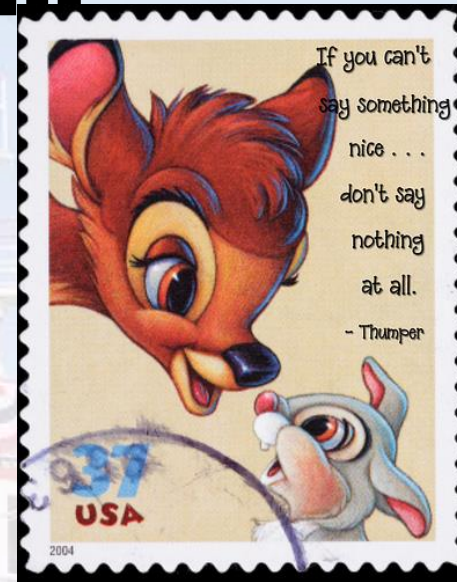


# I don't buy snacks to Feed the neighborhood!

- Other Liable Parties are asked to work at the Site for up to 30 years; Why should the ATP Settler pay for only 5?
  - Explain the significance of the payment in terms of what is available;
  - Do not disclose CBI unless authorized;
  - Consider asking the ATP Party for a limited release of information;
  - Ask for the opinion of others (ATP, Other Liable Parties).

# If you can't say something nice, don't say anything at all.

- This is a settlement option
- Do not accuse
- Explain that the burden is on the ATP Party to educate your office,
  - so that you can understand the reason why a hardship will be created
  - Explain that although this is a difficult standard, the ATP Settlement will provide finality, and allow the ATP party to get back to business.



# Think of those poor starving Children In...



After explaining what must be paid;  
discuss what the settlement is not taking away.  
The advantage of putting this in the past.  
How other creditors could approach the claim.