United States
Environmental Protection
Agency

Office of Solid Waste
and Emergency Response
(OS-500)

May 1993

EPA

Enforcement Project Management Handbook

Printed on Recycled Paper

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

MAY 6 1993

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Transmittal of the FY 1993 Update of the Enforcement Project Management Handbook

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

TO: Distribution

This memorandum transmits the FY 1993 update of the Enforcement Project Management Handbook to Headquarters and Regional offices. This updated version of the Handbook supersedes the one published in January 1991.

The Handbook is intended to be a basic reference and training manual to assist Remedial Project Managers (RPMs) and On-Scene Coordinators (OSCs) in planning, negotiating, and managing Potentially Responsible Party (PRP) searches and PRP-lead actions. It provides an overview of each phase of the enforcement process and discusses specific roles and responsibilities of the RPM/OSC in the process.

Procedures and information contained in this document are based on existing and draft EPA policy and guidance. Specific documents are referenced as sources of additional information on particular topics.

For additional information on the Handbook or to obtain extra copies, contact Monica Gardner in the Contracts and Planning Branch of the CERCLA Enforcement Division at 703-603-8987.

Attachment

Printed on Recycled Paper

Disclaimer

The policies and procedures established in this document are intended solely for the guidance of employees of the U.S. Environmental Protection Agency. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. EPA reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Acknowledgments

This document was prepared by the Contracts and Planning Branch of the CERCLA Enforcement Division in EPA's Office of Waste Programs Enforcement. Monica Gardner and Debby Thomas served as EPA's Project Coordinators.

The following people provided significant input in the development or review of specific chapters:

EPA Headquarters

Jan Baker, Frank Biros, Nellie Boone, Linda Boornazian, Patty Bubar, Susan Cange, Carrie Capuco, Matt Charsky, Paul Connor, Walter DeRieux, Dan Dickson, Tony Diecidue, Allen Dotson, Bill Eckroade, Steve Ells, Frank Finamore, Donna Gerst, Bruce Gruenewald, Ed Hanlon, Jeff Heimerman, Johanna Hunter, Lee Jennings, Sven-Eric Kaiser, Randy Kaltreider, Julie Klaas, Emil Knutti, Jerry Lappan, Debbie Lebow, Marlene Lemro, Rashalee Levin, Charles Openchowski, Dottie Pipkin, Rick Popino, Lynda Priddy, Doug Sarno, Fred Seitz, Betsy Shaw, Sherry Sterling, Steve Suprun, Debbie Swichkow, Candace Wingfield, Jim Woolford, Brad Wright, Renee Wynn, and Betty Zeller.

In addition, the following staff participated in the FY 1993 update: Peg Andrews, Mark Badalamente, David Batson, Gerry Breton, Lori Boughton, Maria Bywater, Tai-ming Chang, Rick Colbert, Schatzi Fitz-James, Sharon Frey, Joanne Griffith, Lisa Harris, Rose Harvell, Tracy Hopkins, Lisa Jenkins, Kurt Lamber, Chad Littleton, Michael Miller, Matt Morrison, Ken Patterson, Bruce Pumphery, Dave Reynolds, Robin Richardson, Bill Ross, Neilima Senjalia, Cecilia Smith, Greg Synder, Joe Tieger, Luis Troche, Gary Worthman, and Fred Zimmerman.

EPA Regional Offices

Mike Bishop, Robin Coursen, Jody Crane, David Duster, D. Henry Elsen, Elizabeth Evans, Eric Finke, Barbara Hanson, Stan Hitt, Rick Karl, Lynn Kersher, Sharon Kersher, Kathy Land, Barry Levine, Carole Macy, Sam Marquery, Sharon Metcalf, Elizabeth Mullin, Doug Mundrick, Carole Peterson, Greg Phoebe, Peter Shaw, Kathleen Siftar, Alexis Struass, Ann Umphres, Sam Vance, Ann Vogel, Ken Wallace, and Carrie Wheling.

In addition, Region I staff, notably Ira Leighton, Dennis Hubner and Susan Siversky, produced a two-volume manual entitled *Enforcement and Remedial Activities under SARA* which was used as a model for several sections of this handbook.

The Lead Region Removal Workgroup provided comments for the FY 1993 update.

Department of Justice (DOJ)

Anna Swerdel coordinated the review and comment process at DOJ. For the FY 1993 update, Christine Skelley provided comments.

ENFORCEMENT PROJECT MANAGEMENT HANDBOOK

Contents

	Acronyms and Abbreviations
i.	Preface
I.	Introduction
II.	Removals
III.	Comprehensive Site Planning
IV.	PRP Search, Notification, and Information Exchange
V.	RI/FS Negotiations/Settlements
VI.	RI/FS Implementation
VII.	Selection of Remedy
VIII.	RD/RA Negotiations/Settlement
IX.	RD/RA Implementation
X.	Operation and Maintenance
XI.	Site Completion/Deletion
XII.	Cost Recovery
XIII.	Community Relations
XIV.	State Enforcement
XV.	Records Management
XVI.	Case Budget/Contracts
XVII.	SCAP/STARS Cycle
	Glossary
	Index

Acronyms and Abbreviations

A

AA, OSWER	–	Assistant Administrator for Solid Waste and Emergency Response
AAG	–	Assistant Attorney General
ADR	–	Alternative Dispute Resolution
AO	–	Administrative Order
AOA	–	Advice of Allowance
AOC	–	Administrative Order on Consent
AR	–	Administrative Record
ARARs	–	Applicable or Relevant and Appropriate Requirements
ARCS	–	Alternative Remedial Contracts Strategy
ATSDR	–	Agency for Toxic Substances and Disease Registry

B

BODR	–	Basis of Design Report
BUREC	–	Bureau of Reclamation

C

CA	–	Cooperative Agreement
CB	–	Case Budget
CD	–	Consent Decree
CEAT	–	Contract Evidence Audit Team
CERCLIS/ WasteLAN	–	Comprehensive Environmental Response, Compensation, and Liability Information System/Waste Local Area Network
CI	–	Civil Investigator
CLP	–	Contract Laboratory Program
CPM	–	Critical Path Method
CRC	–	Community Relations Coordinator
CRC	–	Cost Recovery Coordinator
CRI	–	Community Relations Implementation
CRP	–	Community Relations Plan
CWA	–	Clean Water Act

D

DOI	–	Department of the Interior
DOJ	–	Department of Justice
DQO	–	Data Quality Objective

E

EA	–	Endangerment Assessment
EE/CA	–	Engineering Evaluation/Cost Analysis

EERU	–	Environmental Emergency Response Unit
EES	–	Environmental Enforcement Support
EMSL	–	Environmental Monitoring and Systems Laboratory
EPCRA	–	Emergency Planning and Community Right-to-Know Act
EPIC	–	Environmental Photographic and Investigation Center
EPM	–	Enforcement Project Manager
ERNS	–	Emergency Response Notification System
ERS	–	Environmental Response Services
ESD	–	Environmental Services Division
ESD	–	Explanation of Significant Difference

F

FIT	–	Field Investigation Team
FMD	–	Financial Management Division
FMO	–	Financial Management Office
FR	–	*Federal Register*
FSP	–	Field Sampling Plan
FTE	–	Full-Time Equivalent

G

GFO	–	Good Faith Offer
GNL	–	General Notice Letter

H

HQ-FMO	–	Headquarters - Financial Management Office
HRS	–	Hazard Ranking System
HSCD	–	Hazardous Site Control Division

I

IAG	–	Inter-Agency Agreement
IDC	–	Indirect Cost
IFMS	–	Integrated Financial Management System
IMC	–	Information Management Coordinator

L

LOE	–	Level of Effort
LTRA	–	Long-Term Response Action

M

MSW	–	Municipal Solid Waste

N

NBAR	–	Non-Binding Preliminary Allocation of Responsibility
NCP	–	National Contingency Plan
NEIC	–	National Enforcement Investigation Center
NOAA	–	National Oceanic and Atmospheric Administration
NPL	–	National Priorities List
NRC	–	National Response Center
NSD	–	Negotiation Support Document

O

O&F	–	Operational and Functional
O&M	–	Operation and Maintenance
OE	–	Office of Enforcement
OERR	–	Office of Emergency and Remedial Response
OGC	–	Office of General Counsel
OIRM	–	Office of Information Resources Management
OMB	–	Office of Management and Budget
OMSE	–	Office of Management Systems and Evaluation
ORC	–	Office of Regional Counsel
OSC	–	On-Scene Coordinator
OU	–	Operable Unit
OWPE	–	Office of Waste Programs Enforcement

P

PDD	–	Preauthorization Decision Document
PNRS	–	Preliminary Natural Resource Surveys
PRP	–	Potentially Responsible Party

Q

QA/QC	–	Quality Assurance/Quality Control
QAPP	–	Quality Assurance Project Plan
QAPP/FSP	–	Quality Assurance Project Plan/Field Sampling Plan

R

RA	–	Remedial Action
RCRA	–	Resource Conservation and Recovery Act
RD	–	Remedial Design
RDT	–	Regional Decision Team
RI/FS	–	Remedial Investigation/Feasibility Study
ROD	–	Record of Decision
RP	–	Responsible Party
RRT	–	Regional Response Team

S

SACM	–	Superfund Accelerated Cleanup Model
SAIC	–	Special-Agent-In-Charge
SAP	–	Sampling and Analysis Plan
SARA	–	Superfund Amendments and Reauthorization Act
SCAP	–	Superfund Comprehensive Accomplishments Plan
SCORE$	–	Superfund Cost Organization and Recovery Enhancement System
SE	–	State Enforcement
SEAM	–	Superfund Exposure Assessment Manual
SETS	–	Superfund Enforcement Tracking System
SMOA	–	Superfund Memorandum of Agreement
SMP	–	Site Management Plan
SNL	–	Special Notice Letter
SOL	–	Statute of Limitations
SOW	–	Statement of Work
SPO	–	State Project Officer
SPUR	–	Software Package for Unique Reports
STARS	–	Strategic Targeting Activities Reporting System
START	–	Superfund Technical Assessment and Response Team

T

TAG	–	Technical Assistance Grant
TAT	–	Technical Assistance Team
TBC	–	To-Be-Considered Material
TBD	–	To Be Determined
TDD	–	Technical Directive Document
TDD-AOC	–	Technical Directive Document - Acknowledgement of Completion
TES	–	Technical Enforcement Support
TESWATS	–	Technical Enforcement Suppport Work Assignment Tracking System
TSC	–	Transportation Systems Center
TSCA	–	Toxic Substances Control Act
TST	–	Technical Support Team

U

UAO	–	Unilateral Administrative Order
USACE	–	U.S. Army Corp of Engineers
USCG	–	United States Coast Guard

W

WAM	–	Work Assignment Manager

PREFACE

Preface

Overview

This handbook has been prepared primarily to assist EPA Remedial Project Managers (RPMs) in planning, negotiating, and managing PRP-lead actions. However, other field personnel such as On-Scene Coordinators (OSCs) may also find the handbook useful for their purposes. It describes the roles and responsibilities of the RPM in identifying and communicating with Potentially Responsible Parties (PRPs); coordinating with the community, States, and natural resource trustees; negotiating for site cleanup; initiating administrative and judicial enforcement actions; selecting site remedies; recovering EPA's cleanup costs; and overseeing PRP-lead response actions. The description of roles and responsibilities is based on the usual progression of events at an average site. The handbook is also meant to complement EPA's *Superfund Federal-Lead Remedial Project Management Handbook* and *Superfund State-Lead Remedial Project Management Handbook* by serving as a reference guide on enforcement actions that may be taken or considered during each step of the removal and remedial processes.

Policies and Guidance

Procedures and information contained in this document are based on existing, draft, and, in some cases, proposed EPA policy and guidance. The handbook, however, is not intended to replace Agency guidance; nor is it intended to stand alone. Instead, the chapters that follow summarize in a single document information concerning EPA's national enforcement program and the role of RPMs/OSCs in that program. The reader should bear in mind that to keep this document to a moderate length, some oversimplification was necessary. Throughout the handbook, the reader is referred to specific, detailed policies and procedures. As appropriate, the reader should use these references to supplement the information presented in this handbook.

Role of RPMs

The emphasis of this handbook is on the role of the RPM in the enforcement process. It is recognized, however, that Regional differences exist in defining that role. For example, in many Regions, cost recovery activities are handled by staff without remedial project management responsibilities. Therefore, when the term "RPM" is used in this handbook in connection with specific activities, the reader should bear in mind that these activities are ones for which the RPM *may* be responsible. RPMs should consult with Regional management on the scope of their specific responsibilities.

Structure

The handbook addresses the removal enforcement process and the phases of the remedial planning and implementation process from the point of the baseline PRP search, which is generally conducted when the site is listed on the NPL or when the region determines that a response action may be warranted, to the point of completion of remedial activity at a site and the site's deletion from the NPL. The handbook has been organized to follow the overall progression of these phases.

In addition to chapters that discuss the various phases of the remedial process, the handbook includes eight additional chapters and an introduction. The additional chapters present enforcement topics that either are not a part of the remedial process or are relevant to many steps in the process. These chapters cover enforcement activities associated with cost recovery, community relations, State enforcement, records management, case budget and contracts, and the SCAP/STARS cycle and CERCLIS/WasteLAN.

Format

The chapters are organized to provide a description of the phase of site cleanup or specific enforcement activity; a chronology of procedures for which the RPM has responsibility; associated planning and reporting requirements; a discussion of potential problems and possible resolutions; and a reference section, which lists titles of relevant policies and guidance documents, and contacts for further information. This organization of information facilitates a pro-active management style of anticipating and resolving problems before they adversely impact project costs, schedules, or technical quality.

Applicability

Although the handbook is designed for both new RPMs and RPMs who have experience with the enforcement program, it is hoped that it will also help clarify for other EPA personnel the many technical, enforcement, and management tasks required to complete a PRP-lead site. This handbook is for internal EPA use only. It does not create rights in any party and may not be quoted as an authoritative source by any PRP.

I. INTRODUCTION

Introduction

This introduction provides a broad overview of the Superfund enforcement program. The chapter is divided into five major sections:

- Goals
- Background
- Overview
- Players
- Additional Enforcement Resources

Each of these is presented below.

Section I. Goals of the Enforcement Program

The overall goal of the Superfund program is to protect human health and the environment through timely and effective site remediation at the maximum number of sites. Enforcement plays a major role in the process.

Obtaining PRP Response

A primary goal of the enforcement program is to obtain voluntary settlement, or if necessary, to compel Potentially Responsible Parties (PRPs) to implement site cleanups. The primary tools used to meet this goal are the administrative order and judicial enforcement authorities of section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the settlement provisions of section 122. These authorities are discussed in more detail in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

Overseeing PRP Response

Once the PRP has agreed to take response actions at a site, the goal of the enforcement program is to ensure that the studies or cleanup activities are performed correctly and in accordance with the order or decree, and the statute, NCP and relevant guidance. In addition to their oversight, Remedial Project Managers (RPMs) use the authority in section 104 of CERCLA for third party oversight of PRP-conducted RI/FS activities to ensure that this goal is met. Oversight responsibilities are discussed in Chapter II, Removals; Chapter VI, RI/FS Implementation; and Chapter IX, RD/RA Implementation.

Recovering EPA's Costs

In situations in which EPA has performed removal or remedial activities at the site or incurred any enforcement costs, the enforcement program's goal is to recover those costs from the PRPs. Cost recovery actions are essential both to replenish the Fund and to deter other PRPs from trying to avoid responsibility for performing response actions themselves. The authority for recovering costs is provided by section 107 of CERCLA. Cost recovery is discussed further in Chapter XII, Cost Recovery.

Expediting the Process

In an effort to make Superfund cleanups more timely and efficient, EPA developed the Superfund Accelerated Cleanup Model (SACM). SACM will facilitate more focus on the front end of the cleanup process and better integration of all Superfund program components. Implementation of SACM will be consistent with the NCP and CERCLA. SACM is discussed in more detail in Chapter III, Comprehensive Site Planning.

Section II. Programmatic Background

CERCLA gives EPA a broad set of tools with which to clean up hazardous waste sites. These include a variety of enforcement tools, such as administrative order authority, judicial enforcement authority, strong liability provisions, and the authority and funding to take direct action to clean up sites.

Liability

Section 107 of CERCLA outlines the basic liability provisions of the enforcement program. It identifies four classes of PRPs:

- Current facility owners and operators
- Past facility owners and operators at the time of disposal of a hazardous substance
- Persons who arranged for treatment or disposal of hazardous substances (e.g., generators)
- Transporters of hazardous substances who selected the disposal site.

CERCLA is a strict liability statute, which means that PRPs are liable without regard to negligence or fault. In addition, the courts have held that anyone in the classes of liable persons set forth in section 107 of CERCLA may be held liable for the entire cost of site cleanup, unless it can be shown that the harm or threat is "divisible" (generally meaning that there are two or more physically separate areas of contamination). This concept, known as "joint and several liability," is a strong tool that EPA can use to encourage PRPs to agree to perform cleanups. It is discussed in more detail in Chapter IV, PRP Search, Notification, and Information Exchange, and Chapter XII, Cost Recovery.

Settlement and Enforcement Provisions

CERCLA provides a broad range of enforcement authorities or provisions that EPA can use to effectively meet the goals of the Superfund program. These include authorities to order PRPs to clean up sites, to negotiate settlements with PRPs to fund and/or perform site cleanup, and to take legal action if the PRPs do not perform and/or pay for cleanup.

Settlements for removals are usually finalized by administrative orders on consent (consent orders). Similarly, settlements for RI/FS are generally by consent orders. Settlements for RD/RA are more complex and are set forth in consent decrees that must be approved by the Department of Justice and a court.

Under CERCLA, EPA may use a variety of special settlement tools. In mixed funding settlements, settling PRPs and EPA contribute to the response action and EPA generally pursues viable non-settlors for the costs EPA incurred. In *de minimis* settlements, EPA may settle with relatively minor contributors when the settlement involves only a minor portion of the response costs and when the amount of waste represents a relatively minor amount and is not highly toxic compared to other substances at the facility. Additionally, EPA is authorized to utilize preliminary Non-binding Allocations of Responsibility (NBARs) to promote settlement. NBARs represent a recommended scheme for allocating costs among the PRPs for settlement purposes only, are not binding, and cannot be admitted as evidence in court. These settlement tools are discussed fully in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

Enforcement Authority

If the PRPs do not settle with EPA, section 106 of CERCLA gives the Agency the authority to unilaterally order the PRPs to conduct the response. In addition, with the assistance of the Department of Justice, EPA may sue the PRPs for a court order under section 106 that requires the PRPs to perform the cleanup. Under section 107, EPA may sue PRPs for cost recovery. These authorities are discussed further in Chapter VIII, RD/RA Negotiations, and Chapter XII, Cost Recovery.

Other Statutes

In addition to the authorities provided by CERCLA, the Agency may, in some instances, use authorities provided by other environmental laws (although the applicability of each of these other laws is subject to specific legal requirements which are beyond the scope of this handbook). For example, under the Resource Conservation and Recovery Act (RCRA), the Agency can order owners and operators of operating and closing hazardous waste facilities to investigate any potential leaks and to clean up the facility if necessary. The Toxic Substances Control Act (TSCA) and its regulations can be used by the Agency to impose conditions on the handling of particularly hazardous substances, such as asbestos and PCBs. In addition, in some cases where releases affect surface waters, the provisions of the Clean Water Act (CWA) can be used to impose fines and require cleanup. These other statutes also provide the basis for many of the applicable and relevant and appropriate standards (ARARs) on which cleanup levels are based in site records of decision. ARARs also are mentioned in Chapter VII, Selection of Remedy.

Administrative Dispute Resolution Act

The Administrative Dispute Resolution (ADR) Act, passed in 1990, explicitly authorizes and encourages all federal agencies to use alternative dispute resolution (ADR) techniques to assist in the resolution of federal disputes.

Primary types of ADR identified as potentially useful in EPA matters include:

- **Mediation** - Use of a neutral with no decision-making authority to aid the parties in their negotiations. This method is nonbinding.
- **Settlement Judge** - Use of a judge other than the one hearing the case to act as mediator of parties' settlement discussions; usually gives his/her opinion as to the probable outcome of the case.
- **Neutral Evaluation** - Use of a neutral to assist a negotiations team in evaluating the potential for settlement and/or use of ADR professionals.
- **Fact-finding** - Use of a neutral with substance-specific experience to resolve technical or factual issues. Can be done either in an investigatory or arbitration format. Can be binding or advisory.
- **Arbitration** - Similar to mediation although it can be binding or advisory. A judicial-type setting where the parties choose the arbitrator for his/her experience in the subject matter. Arbitrations are more streamlined in terms of procedures and evidence requirements than court.
- **Minitrial** - Use of a structured presentation of each party's case to a panel of party decision-makers before a neutral "judicial officer" so as to expedite settlement discussions.

The Office of Enforcement has dedicated staff to assist Regional offices, the Department of Justice, and members of the regulated community toward the goal of making the consideration and appropriate use of ADR techniques standard operating procedures in all Agency enforcement actions. OE offers training to Agency and DOJ staff; publication of a quarterly report on Agency ADR activities; assistance in reviewing case files for appropriate ADR actions; locating appropriate ADR professionals and preparing required procurement documents; and payment of government expenses related to Superfund ADR use.

The ADR mechanism of primary use in regional enforcement actions is mediation. The use of mediation has proven extremely helpful in decreasing Regional resources required to obtain Superfund cost recovery and RD/RA settlements. To ensure that mediation is used where possible, several Regional offices have established procedures which ensure that each Superfund enforcement action is reviewed for potential ADR assistance. Mediation has been discussed with settling parties in more than fifty enforcement actions and used in thirty. Mediation has been or is being used to facilitate many difficult settlements, including cost recovery and remedial actions in excess of $200 million and with more than 1,600 parties and actions with states and municipal parties.

In an effort to institutionalize the use of ADR, credit for its use has been specifically included in Agency management performance tracking systems. In the enforcement program, efforts are underway to provide equal status to the initiation of mediation or arbitration relative to that given for the initiation of legal action.

For more information, contact David Batson, ADR Liaison, at 202-260-8173.

Programmatic Goals

EPA has committed to several deadlines for construction completion. These deadlines include:

- 130 construction completions by the end of FY 92 (this has been exceeded)
- 200 construction completions by the end of FY 93
- 650 construction completions by the year 2000.

Because funding for EPA cleanups is limited, the Agency cannot meet these goals with Fund-lead cleanups alone. Thus, the enforcement program must ensure that PRPs commit to perform cleanups at a substantial portion of sites. If planned properly, negotiated settlements do not take longer to implement than Fund-lead activity; the key elements are good planning and effective deadline management.

The enforcement authorities provided by CERCLA offer a strong incentive to PRPs to settle with EPA. Settlement may be a faster and less-costly alternative to litigation and can alleviate the risk to the PRPs of becoming involved in costly litigation or being assessed treble damages.

Section III. Overview of the Process

The Superfund program involves an integrated process of both enforcement and Fund-financed activities aimed at achieving the overall goal of site cleanup. Exhibit I-1 presents a broad overview of the relationships between the various enforcement and Fund-financed activities. In general, EPA identifies PRPs that may be liable for site response, attempts to negotiate agreements with the PRPs to perform the studies or cleanup, enters into settlements with the PRPs if they agree, and oversees the site work that the PRPs perform under the settlement. If the PRPs do not settle, EPA may issue an order or sue the PRPs to perform and/or pay for the cleanup, or EPA may conduct the cleanup itself and later pursue cost recovery from the PRPs. Each of these steps is discussed briefly below and in more detail in the chapters that follow.

PRP Searches

When a site is proposed for listing on the NPL or as soon as the Region decides that a response action is likely to be required at the site, EPA initiates a PRP search to identify any companies or individuals that may be liable for the costs of cleaning up the site. In addition to the RPM and contractors, the PRP search also may involve civil investigators and Office of Regional Counsel. The search involves detailed reviews of State, EPA and site records; interviews with site operators and transporters; and requests for information from those who may have been involved with the site. The PRPs that are identified by this process are then notified of their potential liability and are informed that they will have the opportunity to negotiate with EPA to conduct site cleanup. Chapter IV, PRP Identification/Notification, contains a detailed description of the PRP search process.

Negotiations

Formal negotiations with PRPs usually begin at two stages in the cleanup process; before the Remedial Investigation/Feasibility Study (RI/FS) and after EPA releases the Proposed Plan for public comment, or generally no later than when EPA signs the Record Of Decision (ROD). The purpose of these negotiations is to reach agreement that the PRPs will perform the RI/FS or the Remedial Design/Remedial Action (RD/RA) and pay past costs. During the course of negotiations, EPA and the PRPs exchange information on site conditions, the PRP's liability, past costs, and the nature of the work that will be required. Based on this information, EPA and the PRPs try to reach an agreement that the PRPs will both finance and conduct the work. If no agreement is reached, EPA may (1) issue an order to compel the PRPs to do the work, (2) sue the PRPs to require them to perform the work, and/or (3) use Federal funds to perform the work and seek to recover its costs later. The negotiation process is described in detail in Chapter V, RI/FS Negotiations, and Chapter VIII, RD/RA Negotiations.

Settlements

If negotiations are successful, EPA and the PRPs must sign a legal document that sets forth the requirements for cleanup. If the work required is an RI/FS, an RD, or a removal action, EPA and the PRPs usually use an Administrative Order on Consent (AOC). An AOC is a legally-binding administrative document, authorized by CERCLA, that EPA and the PRPs both sign. Although a judicial Consent Decree (CD) may be executed, CDs are not the preferred mechanism for RI/FS or removal actions because administrative settlements may be processed more quickly. A CD is similar to an AOC, except that it is a judicial action which must be filed in court and be approved by a judge before it becomes final. If the settlement between EPA and the PRPs includes an RA, that settlement must be in the form of a consent decree. These settlement devices are discussed in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

Oversight

Once the AOC or CD takes effect, the PRPs can begin work at the site. In the case of RD settlements, PRPs may begin work at the site before the CD is entered. EPA closely monitors all work at the site. This monitoring may include on-site examination of the PRPs or their contractors, review of all reports, and parallel sampling and analysis to ensure accuracy. Under CERCLA, the PRPs must agree to pay for EPA's RI/FS oversight expenses as part of the settlement. EPA also generally requires reimbursement of oversight costs for removals and RD/RAs. Chapter VI, RI/FS Implementation, describes the oversight process for RI/FSs, and Chapter IX, RD/RA Implementation, discusses the process as it relates to RD/RAs.

Cost Recovery

If negotiations with the PRPs are not successful, EPA can choose to perform the work and seek to recover its costs later. To recover its costs, EPA usually issues a demand letter, and if the PRPs do not reimburse EPA's costs, EPA refers a judicial action to the Department of Justice (DOJ) to bear upon the PRPs. If less than a total of $500,000 in response costs is involved at a facility, EPA can settle with the PRPs directly using an administrative order. If more than a total of $500,000 in response costs is involved at a facility, written approval of the Attorney General is required and EPA may have to take judicial action to settle the case. The cost recovery process is described further in Chapter XII, Cost Recovery.

Timeline

Each CERCLA site is unique, and it is difficult to describe a typical site. The timeline in Exhibit I-1, however, depicts the general flow of enforcement and response activities at a CERCLA site. More detailed information on the Agency's expectations about how long each activity should take are described in the OSWER *Superfund Comprehensive Accomplishments Plan* (SCAP) manual for the current fiscal year. The time frames described in that manual represent overall planning goals for the entire Agency. Individual site conditions may lead to longer or shorter durations for each activity. RPMs should refer to both the SCAP-planning durations and the specific conditions at the site in developing an overall site management plan. Site planning is discussed in detail in Chapter III, Comprehensive Site Planning.

An example of a site that generally followed a common timeline exists in Region III. This site was proposed for listing on the NPL in October of 1984, the PRP search was completed in February of 1985, and the site was finalized on the NPL in June of 1986. In May of 1985, Region III completed unsuccessful negotiations with the PRPs for the RI/FS, and in June, a Fund-financed RI/FS was initiated for the first operable unit.

In March of 1988, the ROD for the first operable unit RI/FS was signed and RD/RA negotiations were initiated. Special notice letters were issued on March 29, and negotiations concluded within the 120-day moratorium at the end of July. A consent decree was agreed upon and was lodged with the court. Following public comment, the decree was entered in the second quarter of FY 89. The RD was begun in the second quarter of FY 89 and was completed in the fourth quarter of FY 89. The RA was begun in the fourth quarter of FY 89.

There are four other operable units at the site, which are at various stages of the cleanup process. In addition to the remedial activity at the site, a removal was performed in response to emergency conditions. In February of 1985, the Region referred the case to recover approximately $250,000 for the cost of the removal. The cost recovery case was settled in May of 1987.

Section IV. Key Players

The Superfund enforcement program requires close coordination among many different players within EPA, in other Federal agencies, and in the States. This handbook, however, focuses mainly on the roles played by technical enforcement staff. Although these roles vary greatly among the Regions, they generally include initiating negotiations, settlements, and cost recovery actions, and taking the lead in overseeing PRP response actions.

The RPM plays the lead role in planning and coordinating site remediation. To achieve programmatic objectives, the RPM must have effective plans and be a team builder and leader. In addition to personnel from Federal agencies and the States, other Regional staff, such as RPMs managing Fund-lead sites, staff from the Environmental Services Division (ESD), Community Relations staff, and Office of Regional Counsel (ORC), may play active roles. In Regions where enforcement and remedial responsibilities are divided, RPMs on Fund-lead sites may become involved in enforcement activities when the sites are ready for RD/RA negotiations, or they may become involved in litigation for cost recovery. Similarly, ESD staff may become involved at a site when the removal program is in that Division or when sampling and analysis work is required.

Attorneys from ORC act as the Region's primary legal advisors whenever an enforcement action is taken at a site, in addition to their non-enforcement duties. They often take the lead in negotiations with PRPs, review information exchanges between EPA and PRPs, and are the primary communication link between the Agency and the Department of Justice (DOJ) if EPA sues the PRPs for either site cleanup or cost recovery.

At Headquarters, there are two major offices that participate in the program. Within OSWER, OWPE takes the lead in managing the overall enforcement program. This includes developing budgets and out-year forecasts, managing the SCAP process, developing policy and guidance, and providing technical assistance and coordination when necessary. OERR has responsibility for NPL listing and, with regard to Fund-financed response actions, removal and remedial actions.

In addition to OWPE and OERR within OSWER, OE provides legal advice and coordination for all formal enforcement actions, with a particular focus on judicial cases. In major cases, OE reviews case referral packages before they are sent to DOJ. They also comment on major precedent-setting settlements, as does OWPE.

Other Federal Agencies

In addition to EPA, DOJ is significantly involved in the Superfund enforcement program. DOJ is involved in any enforcement action that must be filed in court and serves as a resource in all negotiations that may result in a consent decree. DOJ develops and presents legal positions that explain the Agency's goals to PRPs and the court and provides the only communication between EPA and the courts regarding site-specific litigation. In addition, it is the official representative of EPA in negotiations that take place while a case is pending before a court. As noted earlier, DOJ must also approve any claim that is compromised and settled, whether by Consent Decree or by Administrative Order on Consent, where the total response costs at the site exceed $500,000.

Other Federal agencies, such as the U.S. Coast Guard and the U.S. Army Corps of Engineers, also may become involved in the program when their technical expertise is required. For example, the Corps has extensive expertise in the management of large-scale construction projects and, therefore, can be helpful in the management of remedial actions.

States

The role of the States in the program is substantial. States usually participate in the ROD process and may participate in settlement negotiations with PRPs. In addition, States may take a lead role at a site by negotiating directly with the PRPs and issuing orders under State legal authority.

Natural Resource Trustees

At any site where natural resources may have been damaged, EPA must coordinate with the trustee of those resources. The trustee may be a Federal agency, such as the Department of Interior, the National Oceanic and Atmospheric Administration, or the Department of Agriculture, or it may be a State agency (designated by a governor), or there may be both Federal and State trustees for the site. EPA notifies natural resource trustees of settlement negotiations with PRPs and allows trustees to participate in negotiations regarding matters within their domain.

Section V. Additional Enforcement Resources

This handbook does not address enforcement issues specific to the emergency release notification provisions of CERCLA section 103 or to Federal Facilities. Available resources that address these specific issues are briefly highlighted below.

EPCRA

A detailed discussion of enforcement of CERCLA section 103 and the Emergency Planning and Community Right-to-Know Act (EPCRA) sections 302-312, which is related to emergency planning, notification, and right-to-know, can be found in the *Enforcement Reference Manual for the Emergency Planning and Community Right-to-Know Act (EPCRA) sections 302, 303, 304, 311, and 312, and CERCLA section 103* finalized by OWPE on August 8, 1990. Numerous administrative enforcement actions have already been brought against companies for failure to report releases in a timely manner. RPMs and OSCs who are aware of potential violations should contact their Regional EPCRA enforcement coordinator for further assistance or information.

OPA

The Superfund docket retains copies of a periodic publication, *Update on Implementation of the Oil Pollution Act of 1990* (OPA). An especially helpful overview of the statute and its implementation by the Agency can be found in *OPA Q's & A's: Overview of the Oil Pollution Act of 1990*, December 1991, Publication number 9360.8-OIFS, also available through the Superfund docket. A number of administrative actions have been brought seeking the higher penalties available since the enactment of OPA for violations of CWA section 311 regulations and for prohibited discharges of oil or hazardous substances. Also, judicial actions proposing millions of dollars in penalties have been initiated for the more serious violations of CWA section 311.

Federal Facilities

The Office of Federal Facilities Enforcement in Headquarters has prepared several guidance documents and has developed model provisions for CERCLA Federal Facilities agreements. A useful reference and guidance document on Federal Facilities is the *Federal Facilities Hazardous Waste Compliance Manual*, OSWER Directive 9992.4 (January 9, 1990).

II. REMOVALS

Chapter II
Removals

Section I. Description of Activity 1

Introduction 1

Definition 1

Authority 1

Types of Removals 1

Removal Activities 2

Statutory Limitations and Exemptions 2

Administrative Record and Public Participation 3

Written Response 3

Section II. Procedures and Interactions 4

A. PRP Search 4

PRP Response Policy 4

PRP Search Strategy 4

Emergency Situation 4

Time-Critical Situation 4

Non-Time-Critical Situation 5

All Removals 5

PRP Search Completion 5

B. Enforcement and Negotiations Planning 5

Site Lead 5

Enforcement Strategy — Addendum to Action Memo 6

C. PRP Notice 6

Notification in Emergency Situations 7

Notification in Time-Critical Situations 7

Notification in Non-Time-Critical Situations 7

D. AOC Negotiations and UAO Issuance 8

Administrative Orders on Consent (AOC) 8

Unilateral Administrative Orders (UAO) 9

Model UAO and AOC 9

Issuance of UAOs 11

Activation of Fund During AO Issuance 11

Replacement of UAO with AOC 11

Enforcement of AO 11

E. Oversight Of PRP Response 12

Oversight Costs 12

F. Criminal Investigation 12

G. Community Relations 12

Community Relations Plan 13
Community Relations Activities 13
H. **ARARs** 13

Section III. Planning and Reporting Requirements 14
A. **Contractor Support** 14
B. **Information Management Systems** 14
SCAP/STARS 14
ERNS 17
Notification System Process 17
EPA Regional ERNS Responsibilities 18
EPA Headquarters Responsibilities 18
ERNS Phase II 18
IFMS 18

Section IV. Potential Problems/Resolutions 19
A. **Civil Investigator Support** 19
B. **Determining PRP Financial Viability** 19
C. **Use of Information Request Letters** 19

Section V. References 20
Policy 20
Guidance 20
Manuals 20
Contacts 21

Section VI. Activities Checklist 22

Chapter II
Removals

Section I. Description of Activity

Introduction

This chapter discusses enforcement activities associated with removal actions. Generally, removal activity, including activity to secure and oversee potentially responsible party removal actions, is managed by On-Scene Coordinators (OSCs). This chapter was written primarily to assist OSCs in planning and conducting enforcement activities. However, depending on the particular circumstances at a site, other program personnel may assume lead roles in removal enforcement activities. At sites where remedial activity is ongoing, the RPM may play a key role in securing and overseeing PRP removal response. For convenience, only the term "OSC" is used throughout this chapter, although the information is the same for RPMs when appropriate. Exhibit II-1 provides a broad overview of the removal enforcement process.

Specific procedures and guidance for the Removal program are set forth in OSWER Directive 9360.3-06, the *Superfund Removal Enforcement Guidance*, (April 6, 1992). The *Superfund Removal Procedures* manual is being replaced by a series of stand-alone volumes. The "Action Memorandum Guidance" was revised on September 26, 1990.

Definition

Removal actions are defined in section 101(23) of CERCLA as "the cleanup or removal of released hazardous substances from the environment, (and) such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment..." This definition also includes actions necessary to:

- Monitor, assess and evaluate the actual or threatened release
- Dispose of removed material
- Protect public health or welfare or the environment from an actual or threatened release
- Investigate and gather information (as authorized by section 104(b) of CERCLA).

Sections 104(a) and (b) also authorize responses and studies regarding releases and threatened releases of pollutants or contaminants which may endanger human health, welfare or the environment.

Authority

Section 104(a) of CERCLA authorizes the President to act, consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP, 40 CFR 300), to remove or arrange for the removal of any hazardous substance, pollutant or contaminant if the President deems it necessary to protect the public health or welfare or the environment. Section 104(b) of CERCLA authorizes studies and investigations and section 106 of CERCLA authorizes the President to order measures necessary to abate imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. Section 106 also sets forth fines for any person who, without sufficient cause, willfully violates or fails or refuses to comply with a section 106 order. Specific standards and procedures for implementing CERCLA and for conforming with other statutes are set forth in the NCP.

Types of Removals

EPA has classified removals into the following three categories based upon the site evaluation and the urgency of the situation:

- **Emergencies**—removals where the release, or threat of release, requires that on-site cleanup activities begin within hours of the lead agency's determination that a removal action is appropriate
- **Time-Critical**—removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a period of less than six months available before cleanup activities must begin on site
- **Non-Time-Critical**—removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of more than six months available before on-site activities must begin. The lead agency must undertake an Engineering Evaluation/Cost Analysis (EE/CA), or its equivalent, for non-time-critical removals.

The urgency determination is a deciding factor in determining the amount of time that can be devoted to a PRP search prior to on-site action, negotiation length, the type and timing of public participation, whether an EE/CA must be conducted, and the extent of compliance with other environmental statutes.

Removal Activities

According to section 101(23) of CERCLA and section 300.415 of the NCP, the response activities listed below may be appropriate removal actions in certain situations. This list is neither intended to limit response officials from taking other actions deemed necessary under the circumstances, nor is it intended to preclude the lead agency from referring response actions to other appropriate Federal or State enforcement authorities.

- Fences, warning signs, or other security or site control precautions—where humans or animals have access to the release
- Drainage controls (e.g., run-off or run-on diversion)—where precipitation or run-off from other sources (e.g., flooding) may enter the release area from other areas
- Stabilization of berms, dikes, or impoundments—where needed to maintain the integrity of the structures
- Capping of contaminated soils or sludges—where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground water, or air
- Using chemicals and other materials to retard the spread of the release or to mitigate its effects—where the use of such chemicals will reduce the spread of the release
- Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas—where removal will reduce the spread of contamination
- Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants—where it will reduce the likelihood of spillage; leakage; exposure to humans, animals or food chain; or fire or explosion
- Containment, treatment, disposal or incineration of hazardous materials — where needed to reduce the likelihood of human, animal, or food chain exposure
- Provision of alternative water supply—where it will reduce the likelihood of exposure of humans or animals to contaminated water.

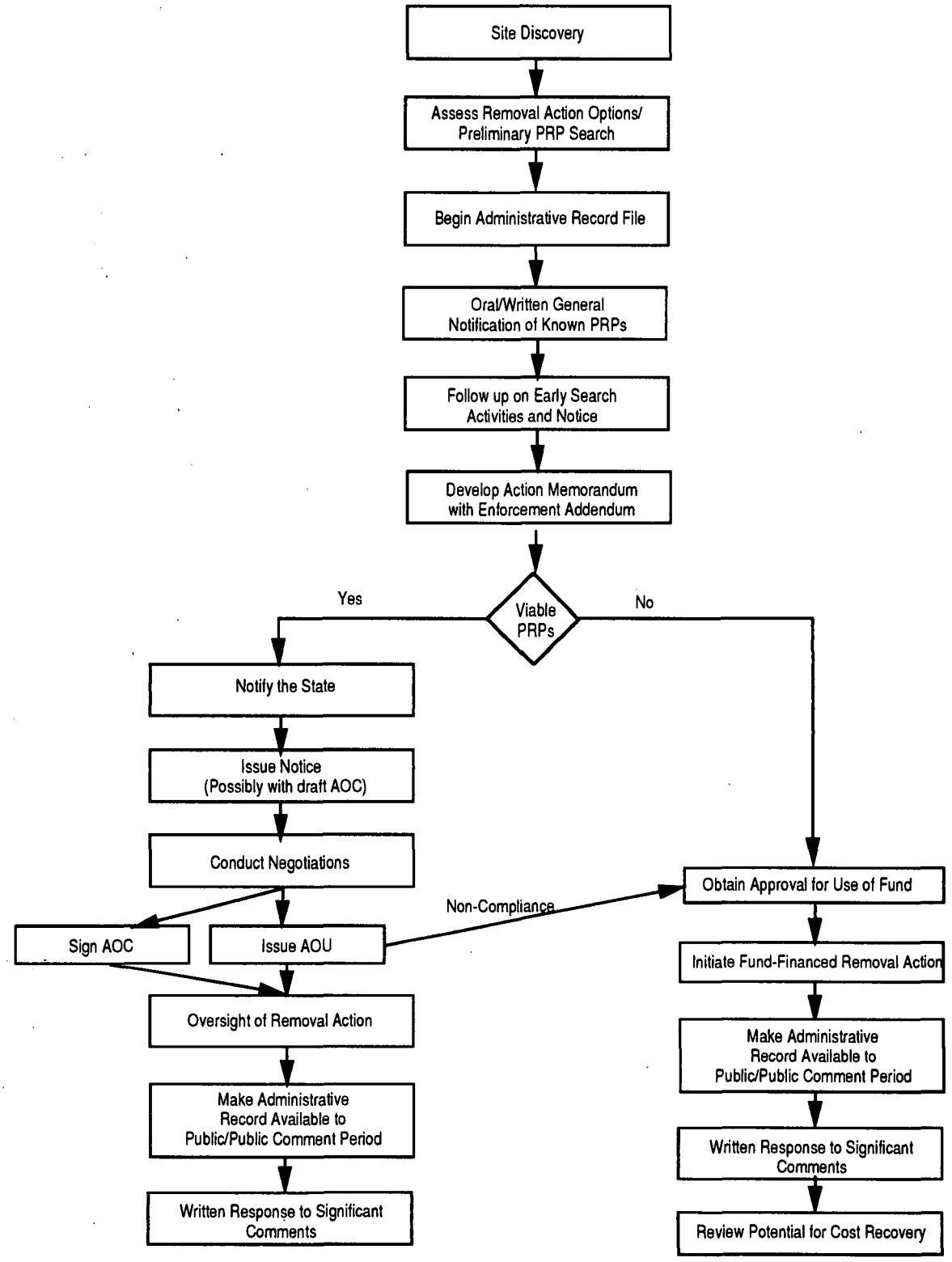
Statutory Limitations and Exemptions

Section 104(c) of CERCLA specifies that Fund-lead removals may not exceed either $2 million in cost or 12 months in duration. The criteria for exceeding the statutory limits (which do not apply to PRP-lead removal actions) include:

- An immediate risk to public health, welfare or the environment exists; continued response actions are immediately required to prevent, limit or mitigate an emergency; and such assistance otherwise will not be provided on a timely basis

Exhibit II-1

Overview Of Removal Enforcement Activities Relationship to Response Actions*



* This general overview of removal enforcement may not apply in all situations, especially emergencies

- Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

OSCs who request an exemption to the statutory limits on cost or duration for a Fund-lead removal action should first ensure that all potential avenues of securing PRP cleanup or funding for cleanup have been pursued. Headquarters carefully reviews all cost exemption requests for Fund-lead removal actions for evidence of activity to secure PRP participation in the cleanup. The following enforcement-related information should be included in the exemption request Action Memorandum:

- Extent of the PRP search
- Whether PRPs have been identified
- Financial status of PRPs, if PRPs have been identified
- Whether notice letters (special or general) have been issued
- Whether previous negotiations have been held with the PRPs and the results of those negotiations
- Whether an AO has been issued to the PRPs or previous demands for reimbursement have been made
- Status of the Administrative Record
- Enforcement history of the site
- Enforcement options, discussion and recommendations.

Specific procedures for obtaining exemptions to the statutory limits on Fund-lead removals are set forth in the *Superfund Removal Procedures*.

Administrative Record and Public Participation

Section 113(k) of CERCLA requires that the Agency establish an Administrative Record for selection of CERCLA response actions. The Administrative Record is the body of documents upon which the Agency bases its selection of a response action. Section 113(k)(2) of CERCLA requires that EPA develop procedures for appropriate participation of interested parties in the development of an Administrative Record for a removal action. The Administrative Record should consist of documents that the Agency considered or relied on to select the response action and when appropriate, include documents demonstrating the public's opportunity to participate in the selection of the response action. More information on the Administrative Record is contained in Chapter XV, Records Management.

Among the key components of the Administrative Record are the Action Memorandum and underlying inspection reports and data.

Section 300.800 of the NCP and associated preamble discuss Administrative Record and public participation requirements. In addition, guidance on Administrative Records is provided in OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions," (December 3, 1990). Exhibit II-2 depicts the various activities EPA considers as requirements when establishing an Administrative Record for each of the removal categories defined earlier in this chapter. The requirements for each removal category differ to ensure that the Administrative Record does not unduly create delays in emergency and time-critical removal actions. OSCs and RPMs should refer to the NCP and OSWER Directive 9833.3A-1 cited above, for information on the documents that should be included in Administrative Records for removal actions.

Written Response

A written response to significant comments received during the public comment period should be included in the Administrative Record file along with the comments. It serves to document how public comments have been considered during the decision-making process and to provide answers to significant comments raised.

Section II. Procedures and Interactions

A. PRP Search

PRP searches are discussed in detail in Chapter IV, PRP Search, Notification, and Information Exchange. The urgent nature of emergency removal actions may require response initiation prior to an extensive PRP search that goes beyond identifying the owner/operator. This section discusses PRP searches related to removal actions.

PRP Response Policy

Where PRPs are known and able to perform the removal, EPA prefers that they undertake the response action pursuant to an administrative order. A PRP investigation should be a part of the preliminary assessment that an OSC conducts under section 300.410 of the NCP. To the extent appropriate under the circumstances, the OSC is to search further for responsible parties and attempt to have them perform the necessary removal action. In addition, supplemental searches may be warranted during a stabilization action for PRP takeover of the disposal and for cost recovery if the removal is conducted with use of the Fund.

PRP Search Strategy

A PRP search strategy is important. As background to conducting removal PRP searches, the general steps in the PRP search process are described in Chapter IV. The level of effort of the PRP search and period of performance of search tasks in removals depend on the amount of time between discovery and the execution of the Action Memorandum, the urgency of the release situation, the likely expenditures on the removal, and available resources. For descriptive purposes, Exhibit II-3 shows how the level of effort tends to vary with urgency. Although the amount of removal expenditures affects the expenditures for a PRP search, this concept is not depicted by the chart. Information gathered during the PRP search, such as that indicated by the activities in Exhibit II-3, is essential to support an enforcement strategy at Superfund sites.

In many removal situations, effective PRP searches depend partially on the presence in the field of the personnel conducting the search. To realize the advantage of having PRP research conducted partially in the field, and as a matter of standard procedure, the enforcement project manager, if different from the OSC, should consult with the OSC on the PRP search as well as other aspects of the case. It is important that search activities be well-documented even if the result is that no viable PRPs are identified.

Emergency Situation

In emergency situations where the PRP is not immediately known, the OSC usually conducts the PRP search in two phases. Initially, streamlined procedures, consisting of oral inquiries of municipal officials and reasonably available on-site sources, as well as reviews of readily available site records are implemented. Oral inquiries should be documented as soon as practicable. Obvious visual information of possible PRP links to the site should be recorded if time permits. TAT or TES support under an expedited work assignment may be employed. The OSC should, to the extent possible, prioritize and expedite certain search activities to support the notice, negotiation and administrative order process before the removal begins. Once the site is stabilized, the second, and often more extensive, phase of PRP identification efforts should continue. This phase of the PRP search may support cost recovery efforts and partial-work orders. Depending on response expenditures, available resources and the site strategy, the civil investigator and contractor (e.g., TES) may provide assistance on the follow up search.

Time-Critical Situation

In time-critical situations, the OSC should follow procedures that expand upon the PRP search activities discussed for emergency situations. Title searches and on-site interviews also should be undertaken (OSCs should coordinate with civil investigators to determine

Exhibit II-2

Community Relations And Administrative Record Requirements For Removals

Activity	Time-critical[1] Where on-site activity lasts **less** than 120 days (includes emergencies)	Time-critical[1] Where on-site activity lasts **more** than 120 days	Non-time-critical[2]
Designate spokesperson	X	X	X
Notify affected citizens	X	X	X
Establish Administrative Record (AR) file	X	X	X
Make AR available when EE/CA approval memorandum is signed			X
Make AR available within 60 days of initiation of site activity	X	X	
Place AR in central location	X	X	X
Place AR at or near facility	X*	X	X
Notify public of AR	X	X	X
Provide a comment period of not less than 30 days from date AR is available	X**	X	X
Prepare written response to significant comments	X	X	X
Conduct community interviews		X	X
Prepare Community Relations Plan		X	X

1 Removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a period of less than six months available before on-site activities must be initiated.

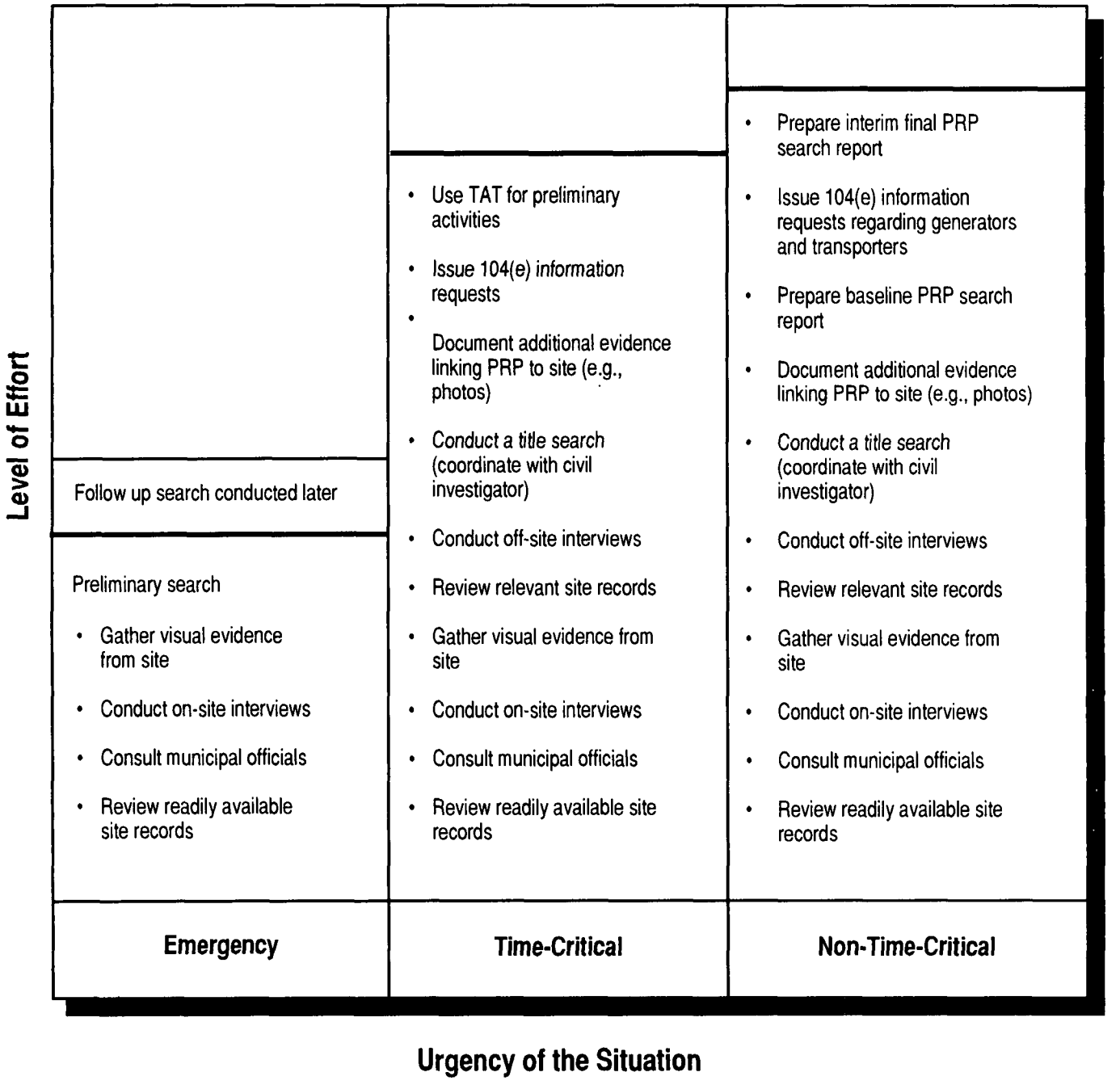
2 Removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of more than six months available before on-site activities must begin.

* The AR file for emergency removal actions where on-site activities cease within 30 days of initiation need only be available for public inspection at the central location.

** Where appropriate.

Exhibit II-3

PRP Search Activities



*Note: Example for descriptive purposes only; some work may follow response actions

what information needs to be obtained). OSCs also may use 104(e) information requests that include questions pertaining to generators and financial viability to obtain additional evidence during the PRP search.

Non-Time-Critical Situation

At a minimum, the OSC should conduct the same preliminary PRP search measures discussed above. In addition, depending on the level of expenditures and the amount of time available, the OSC may take additional steps, such as further questioning of persons on or near the site and on-site investigation for names of PRPs (e.g., records review). After the OSC has made a preliminary effort to identify PRPs, he or she may request Regional enforcement personnel to conduct a potentially responsible party search to identify generators and transporters. A baseline report as described in Chapter IV should be prepared and decisions should be made on specialized tasks. Where PRPs do not conduct the work, an interim final report will be necessary.

Technical Enforcement Support (TES) contracts, Technical Assistance Team (TAT) contract support, or civil investigators may be used to support PRP searches in non-time critical situations. Other support may be available through the use of 8(a) (i.e., minority or disadvantaged contractor set-aside) contractors. OSCs also may request the assistance of the National Enforcement Investigations Center (NEIC) in conducting a PRP search.

All Removals

OSCs should be prepared to obtain the necessary approval to conduct a Fund-lead response if no PRPs can be identified. However, the initiation of a Fund-lead response does not mean that the search for PRPs is discontinued. During a Fund-financed removal, OSCs should fully document possible evidence of liability at the site in anticipation of cost recovery litigation. Documentation activities include photographing the site to verify site conditions and obtaining evidence of PRP links to the site such as site records identifying owners/operators and generators. OSCs may utilize TAT contractors in gathering information that may help establish a party's status as a PRP. Efforts to locate PRPs should continue throughout the removal action to support cost recovery efforts and possible PRP involvement in any future response actions.

PRP Search Completion

As noted in Chapter IV, PRP search reports usually should not be viewed as complete PRP searches. In most multi-party cases where substantial funds are spent, specialized tasks also will be utilized to provide adequate information beyond the baseline report. Exhibit II-3 shows the information that the PRP search effort should include or yield to meet the target of a completed PRP search.

B. Enforcement and Negotiations Planning

After initiating the search for PRPs, but prior to issuing notice, decisions must be made regarding the site lead and enforcement strategy. Careful planning during this phase of the removal helps ensure that negotiations and other enforcement activities will be conducted with greater success.

Site Lead

When viable PRPs have been identified, every attempt should be made to secure PRP conduct of the removal activities. However, site lead decisions must be based on the exigencies of the particular situation. Primary factors to be considered in making a site lead decision include:

- Immediacy of the need to respond
- Strength of the case on PRPs' liability
- Financial viability of the PRPs.

Other criteria to be considered include:

- Ability and need to precisely define the removal
- Unique technical problems, including oversight
- Technical capability of the PRP to conduct the removal
- Willingness of PRPs to conduct the removal (lack of willingness does not preclude a UAO)
- Availability of the Fund
- Cost of the removal (very low-cost removals have low priority for enforcement).

In addition, consideration should be given to the workload of the Regional staff and the extent of oversight activities.

Enforcement Strategy — Addendum to Action Memo

Except in true emergencies, prior to initiating the PRP notification process, the OSC should prepare a brief strategy that details the information and activities needed to successfully plan a removal action. An "Enforcement Sensitive" attachment that includes information on the enforcement strategy, PRP response, and previous actions should accompany the Action Memorandum for the site. See OSWER Directive No. 9360.3-01 "Action Memorandum Guidance" Volume One of *Removal Procedures Manual* (September 26, 1990). If time permits, the enforcement staff should undertake the following activities when preparing for negotiations with PRPs:

- Review results of preliminary PRP search efforts for adequacy and accuracy and supplement as necessary
- Determine notification strategy
- Review problems posed by site
- Develop clear statement of work to be done consistent with draft Action Memorandum
- Prepare draft Administrative Order (AO)
- Develop negotiations strategy.

Preparing a brief negotiations strategy prior to the initiation of negotiations helps ensure that the OSC has considered various aspects of the situation which could affect removal activities. For example, at a drum site the OSC should attempt to establish the number of drums, how many are leaking, how many are overpacked, and any other information that would affect plans for removal activities. Obtaining this information also prepares the OSC for the first round of negotiations with the PRP, which can be jeopardized by inadequate preparation and unclear cleanup goals. The statement of work should be attached to the notice letter that advises PRPs of their potential liability and possibly initiates negotiations with EPA for conducting the removal.

C. PRP Notice

Where PRPs have been identified, EPA's general policy is to notify PRPs of their potential liability, advise them of the intended response action, and afford them opportunities to comment on the removal action. Where the circumstances allow, there often will be two notice letters: (1) notice of potential liability and (2) notice of an opportunity to negotiate to conduct the removal (negotiations are discussed in section D of this chapter). In emergencies and some time-critical removals, these notice letters and the negotiations processes may be combined. Moreover, in emergencies, the notification process may involve oral notification of identified PRPs, which should be confirmed with a written notice letter.

The content of notices vary depending on whether:

- The notice will be used simply to notify PRPs of their potential liability; it may further advise the PRP of an action EPA has already taken or is about to take. Regions have found that notices specifying the work to be performed have proven successful in getting the PRPs to do the cleanup
- The notice will be used to encourage a private party response through negotiations
- The notice will be used as a mechanism for invoking the section 122(e) special notice procedures which provide for negotiations with a formal moratorium on response. Emergency and time-critical removals do not follow special notice procedures due to the urgency of these situations.

Where possible, the Regional program office should send notice letters to all known PRPs prior to the initiation of the removal action. The OSC must consult and coordinate with Regional enforcement staff in notifying PRPs of their potential liability and requesting removal action by the PRP. Except in limited emergency situations, it is inappropriate to provide initial notice by a Unilateral Administrative Order. Exhibit II-4 identifies the steps involved in securing potentially responsible party action. OSCs should refer to OSWER Directive 9360.3-06 "Superfund Removal Procedures — Removal Enforcement Guidance for OSCs" (April 1992) and OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987) for policies and procedures concerning the notification process. Also, OSWER has distributed model notice letters (OSWER Directive 9834.10, "Model Notice Letters," February 7, 1989) and most Regions have their own models.

Notification in Emergency Situations

In emergencies, the OSC may notify known PRPs orally. The Regional program office then should prepare and send a general notice letter to the PRP confirming the oral notification of liability and any request for response. The Regional program office should send the notice letter as soon as possible following the oral notification. Although a written notice letter typically precedes the initiation of an Administrative Order (discussed in section D of this chapter), this is not necessary in emergencies, given the limited time available.

Notification in Time-Critical Situations

In time-critical situations, the OSC may initially notify PRPs orally and follow the same procedures as in an emergency. Whenever possible, it is preferable that notice letters be issued before the removal action. Moreover, the OSC should conduct a review of and follow up on preliminary PRP search activities to ensure all reasonably known PRPs have been identified. The extent to which PRP search activities may be reviewed and upgraded is dependent on the urgency of site conditions.

Notification in Non-Time-Critical Situations

In non-time-critical situations, procedures for obtaining PRP response are more likely to involve formal negotiations which may be invoked by issuance of a special notice or section 122(e) letter. First, the PRP search should be reviewed and any outstanding leads pursued during the drafting of the proposed EE/CA. The PRP search review and follow-up activities should include the use of section 104(e) information requests (see section IV of this chapter). Notice letters should be issued to PRPs and, depending on the response, an Agency team of Regional technical and legal personnel should quickly schedule negotiations aimed at securing PRP cleanup within an established period of time.

The use of the special notice procedure should only be considered for non-time-critical removal actions because the issuance of a special notice triggers a 60-120 day moratorium on EPA action and a specific time frame for negotiations. Therefore, CERCLA section 122(e) special notice procedures should be used only for those removals where site activity need not commence for 60-120 days following issuance of the notice letter.

D. AOC Negotiations and UAO Issuance

The site lead determination and enforcement strategy (see section B of this chapter) will determine the general approach to negotiating activity at the site. Where negotiations are part of the strategy and time allows, the preferred approach to negotiations is to send the PRP a notice letter specifying the work to be done and establishing a time frame for negotiation of an Administrative Order on Consent (AOC). Where possible, it is advantageous to send the PRPs a site-specific AOC, with the letter or as soon thereafter as possible. It is appropriate to advise PRPs that EPA may issue a Unilateral Administrative Order (UAO) if they do not consent to an AOC. For leverage in negotiating an AOC, it often is helpful to have a signed Action Memorandum. The preferred outcome of the negotiations is an AOC.

The time period for negotiations should reflect the exigencies of site conditions; the nature of the work being discussed; and the response of the PRPs to prior communications. In non-time-critical situations where EPA has issued a special notice and the PRP has responded with a good faith offer, an automatic 60-120 day moratorium on EPA activity at the site establishes a fixed period during which negotiations may occur.

Regions may consider the use of a detailed technical scope of work in negotiations and/or as an attachment to the order.

Enforcement staff may take the following steps when conducting negotiations with PRPs:

- Meet with PRPs
- Negotiate language in the Administrative Order
- Negotiate technical points and schedules in the workplan
- Enter into an AOC, to which PRPs agree and sign, or issue a UAO which PRPs do not sign.

Due to the time-sensitive nature of removal incidents, the negotiation process is often accelerated and certain steps described above may be eliminated. The negotiations schedule should be specified to PRPs.

The time period needed to conduct negotiations and sign an administrative order may vary from days to months, depending upon the specific circumstances. For simple removals, the order may detail work to be done. For more complex removals, the order often provides the scope of work for later response activities and requires the PRP to draft the detailed work plan as a deliverable if the OSC has not already written the work plan. This enables the AOC to be signed and the PRP to initiate stabilization measures at the site before a completed work plan has been agreed upon.

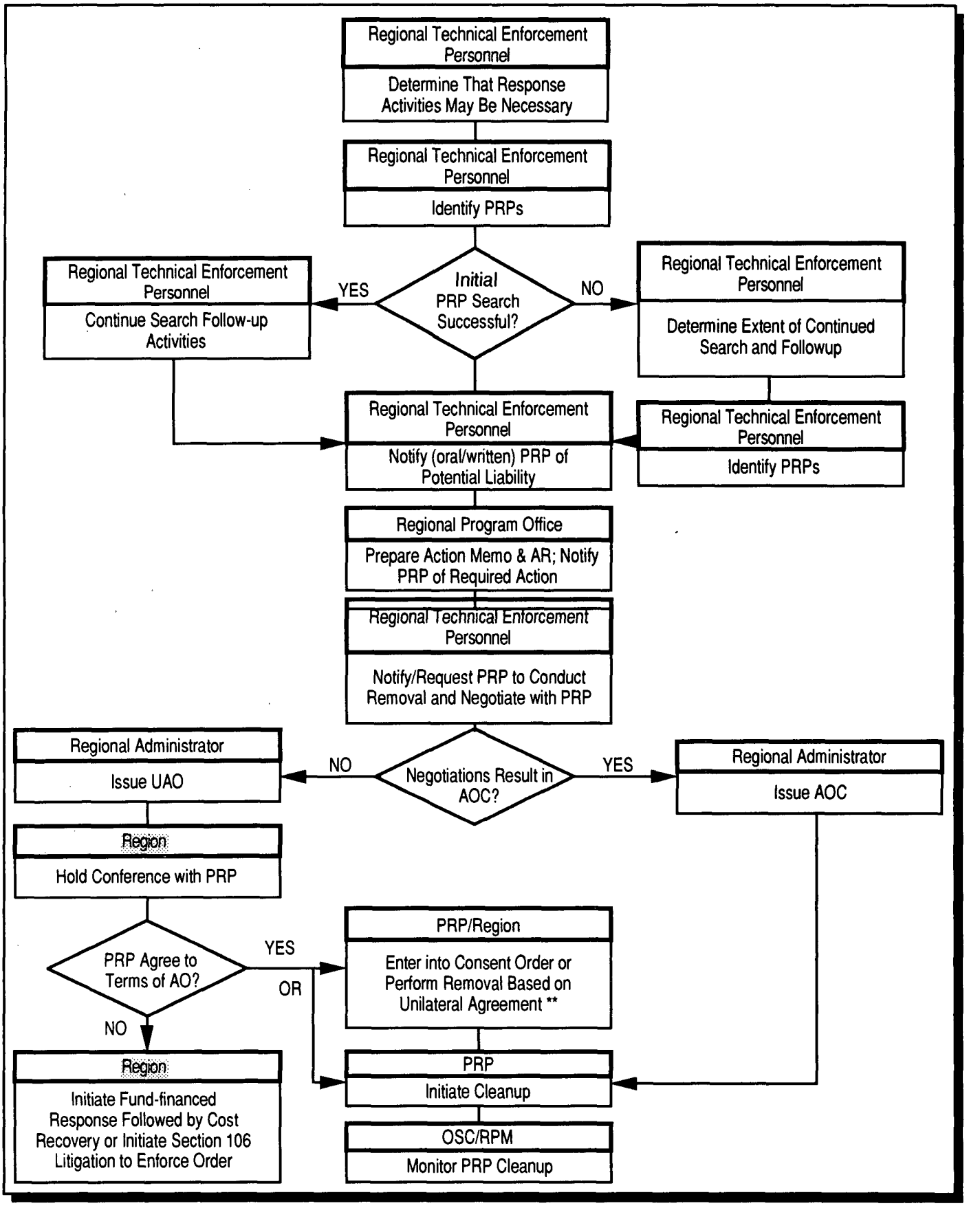
In some cases, Regional personnel may find that PRPs wish to negotiate to conduct a portion of the removal action. The PRP may be financially or technically unable to completely address some of the contamination at the site. It may be appropriate to have the PRP undertake simple tasks (e.g., security) as well as others that he can accomplish. Where the PRP appears to be incompetent or lacks substantial resources, it often is preferable to initiate a Fund-lead response. At some non-emergency removals, there may be viable PRPs that are willing to settle by conducting only a portion of the work so that EPA will pursue other PRPs for the remainder by unilateral order and/or cost recovery action. If the nature of the removal and the universes of PRPs warrant such an order, this is known as a "carve out" order. It should be noted that carve out orders may not be appropriate in a number of situations due to time, resources, and legal implications (e.g., extent of contribution protection).

Administrative Orders on Consent (AOC)

As noted earlier, the preferred product of negotiations is a CERCLA section 106(a) Administrative Order on Consent (AOC), also known as a consent order.

Exhibit II-4

Securing PRP Action for Removals



** UAO does not have to be converted to AOC for PRP to initiate response actions.

Unilateral Administrative Orders (UAO)

In emergency and some time-critical situations, Regional staff may find it necessary to bypass negotiations and immediately issue a Unilateral Administrative Order (UAO). In addition, if viable PRPs fail to respond appropriately to the oral/written notification and negotiation process described above, Regions should pursue issuing a CERCLA section 106 UAO unless there is good reason not to issue an order. The following criteria must be satisfied to issue an order:

- Potentially liable parties have been identified
- There is evidence of a release or threat of a release of a hazardous substance
- There is evidence that the release is from a facility
- Site conditions may present an imminent and substantial endangerment
- The affected State has been notified
- The removal is not inconsistent with applicable law (see CERCLA and the NCP).

Unilateral orders are an effective way to achieve PRP response in situations where there is insufficient time to pursue thorough negotiations, or the PRP is unwilling to conduct the cleanup pursuant to an AOC. Also, UAOs usually contain a provision requiring notice of intent to comply within a specified period which enables the OSC to determine the need for a Fund-lead response.

Model UAO and AOC

In an effort to streamline the order process and to ensure that removal orders represent a unified Agency position for removal actions, model removal orders have been developed. OSWER Directives 9833.06 and 9833.07 (March 1993) contain a model AOC and model UAO, respectively. Although not binding upon the Regions, the model orders contain easily understandable and standard language, so many sections require little or no additional information. However, the orders provide enough flexibility for site-specific factors.

The AOC and UAO were each designed to reach specific goals. The AOC is designed to encourage settlement, and thus contains incentives to reach that goal that are absent in the UAO. In certain sections, however, the orders contain similar or identical language.

Sections found in both the UAO and AOC:

- **Jurisdiction and General Provisions** - Both orders describe the legal authority for issuing the order.
- **Parties Bound** - This provision is found in the AOC and UAO. This section lists those parties related to the respondents who are subject to the terms of the order.
- **Definitions** - Both orders contain this section as optional. Terms which are ambiguous or may become a source of future confusion or challenge by the PRP should be defined.
- **Findings of Fact** - The order will contain the site-specific facts to provide background information and support an endangerment finding, i.e., identify the hazardous substance(s) present and the release or threat of release of the hazardous substance(s) that exist and that may present an imminent and substantial endangerment to the public health or welfare or the environment. In addition, where potentially liable parties are named in the order, facts should be provided to support such a finding. (See CERCLA section 107(a) for specific elements.)
- **Conclusions of Law and Determinations** - Both orders contain the legal determinations necessary to issue an order under section 106.
- **Order** - This section contains many sub-sections specifying the work objectives and the general parameters for performing the cleanup. These include:
  - Designation of contractor, work to be performed, health and safety plan
  - Quality assurance and sampling

- Reporting
- Access to property
- Record retention
- Off-Site shipments
- Compliance with other laws
- Emergency response and notification of releases

- **Authority of the EPA On-Scene Coordinator** - Both orders indicate that the OSC is responsible for overseeing the implementation of the order.
- **Reservation of Rights** - Both orders contain language indicating that EPA is not prevented from ordering or taking other actions necessary to protect public health and the environment.
- **Other Claims** - This section indicates that EPA is free to pursue an action against the PRP not covered by the order or a person not party to the order for any liability under CERCLA, other statutes or common law. *However, the ability to bring subsequent actions is limited by the language in the Covenant Not to Sue section of the AOC.*
- **Modifications** - This section, found in both the AOC and UAO, permits the OSC to make oral and written modifications. The OSC can modify any plan, schedule, or statement of work with respect to a given order. For UAOs, any other portion of the order may only be modified in writing by the EPA Regional designee. Any other requirement of the AOC may only be modified by mutual agreement of the parties.
- **Notice of Completion** - This section states that EPA will give the respondent(s) written notification when it has determined the order is to be completed.
- **Access to Administrative Record** - This section, found in the UAO, informs the PRP that the AR file is available for review at the Region.
- **Insurance** - The use of this provision in an order is a regional site-specific determination. If used, it requires the respondent to obtain standard form business liability insurance.
- **Additional Removal Actions** - Regional use of this section is optional. It permits EPA to require that a respondent perform additional removal actions not included in the EPA-approved work plan.
- **Severability** - A court may invalidate a provision of the order. If this action occurs, this section requires the respondent to comply with all other provisions of the order.
- **Effective Date** - This section contains the date the orders were issued and the effective date of the order.
- **Reimbursement of Costs** - The UAO requires reimbursement of oversight costs. The AOC requires reimbursement of past costs as well as oversight costs.
- **Notice of Intent to Comply** - This section requires the respondent to indicate in writing whether he/she intends to comply with the UAO.
- **Opportunity to Confer** - This section provides the respondent with the opportunity to request a conference with EPA in order to discuss information, arguments, or comments regarding the UAO.
- **Enforcement Penalties for Noncompliance** - This section paraphrases the statutory language found in CERCLA sections 106 and 107 regarding the violations of the order and penalties.
- **Post-Removal Site Control** - Respondent is responsible for implementing post removal site control activities.

Sections specifically found in the AOC:

- **Stipulated and Statutory Penalties** - The AOC provides for stipulated penalties in the event of noncompliance with the order. This provision is in addition to the language regarding statutory penalties.
- **Force Majeure** - This section establishes procedures and standards under which respondents' compliance obligations may be delayed if a *force majeure* event occurs.
- **Covenant Not to Sue** - In the AOC, EPA may provide the following covenants: not sue for judicial imposition of damages; not seek civil penalties; not sue for recovery of response costs; and not take administrative actions for failure to perform removal actions agreed to in the AOC.
- **Contribution Protection** - The AOC provides that the respondents are entitled to contribution protection to the extent provided by section 113 of the statute. Contribution protection protects a settling party against lawsuits from non-settlors concerning the removal for which it has settled.
- **Indemnification** - This section states that the respondent will not hold the US responsible for damages or costs or claims arising from an act or omission of respondent in carrying out an AOC.
- **Financial Assurance** - Respondent is required to provide periodic financial assurances. This section is optional.
- **Public Comment** - At least 30 days before any settlement regarding past costs, section 122(i) requires that EPA provide persons who are not parties to the settlement the opportunity to comment.
- **Dispute Resolution** - This section outlines the steps that will be taken should a disagreement over the implementation of the order need to be resolved.

Issuance of UAOs

Regional enforcement staff should issue a UAO before Fund activation but after preparation of an enforcement action memo as defined in OSWER Directive 9360.3-01, "Action Memo Guidance," whenever a PRP has been identified (unless the PRP is non-viable), provided the criteria for site lead discussed earlier in section B are met and the order is within Regional resources. The OSC and other Regional personnel should continue the process of obtaining approval for a Fund-financed action, providing the PRP does not comply.

Activation of Fund During AO Issuance

If site conditions warrant, the OSC should immediately initiate on-site response activities while the AO process continues. PRP takeovers of removals are limited. Where appropriate, at a convenient break in the response activities, EPA may demobilize its contractor and the PRP may assume responsibility for the remaining activities required. In such cases, the AO should be revised to reflect the PRP takeover.

Replacement of UAO with AOC

The recipient of the UAO may agree to comply with the terms of the order. In some cases, EPA may choose to withdraw the Unilateral Order when it is replaced by an Administrative Order on Consent or the Agency may convert a UAO to an AOC if significant enforcement advantages are achieved. EPA generally does not devote a significant amount of time to a second round of negotiations.

Enforcement of AO

Non-compliance with AOs is determined through the oversight process. There are two kinds of non-compliance: no major response to the order; and a response that does not satisfy the order.

If the recipient does not comply with the terms of the order, EPA usually will proceed with a Fund-financed response and subsequent suit for cost recovery under CERCLA section 107 (including treble damages if the PRP did not have sufficient cause for non-compliance with an AO and penalties under section 106(b) of not more than $25,000 per day of violation).

In certain situations EPA, with DOJ assistance, will enforce the terms of the order and compel PRP response through judicial enforcement actions under section 106 of CERCLA. Although the Agency has the authority to refer a section 106 action (e.g., filing a section 106 complaint), it is often preferable not to do so when Fund monies are available and the delays of litigation are inconsistent with program direction. Violation of a UAO will set up a treble damage and penalties action under section 107 of CERCLA.

E. Oversight Of PRP Response

An AO prescribes the activities the PRP must undertake. Regional personnel responsible for monitoring PRP compliance either should remain on-site or visit the site periodically, whichever is appropriate given the circumstances of the release and the nature of cleanup activities. Oversight activities by Agency personnel may be supplemented through the use of contract resources such as TAT or TES. Contractors may assist Agency personnel in overseeing field activities and conducting technical review of work plans, protocols, site data, and reports.

When the PRP agrees to undertake response action, but monitoring by the OSC or CERCLA enforcement personnel shows that the actions are not timely or appropriate, EPA may either enforce the AO by taking a CERCLA section 106 judicial action or take over the response and pursue cost recovery.

Oversight Costs

Costs associated with oversight of PRP response actions, including removal actions, are fully recoverable under section 107 of CERCLA. To facilitate the preparation of potential future cost recovery actions against either PRPs conducting the removal or other non-participating PRPs, OSCs and RPMs should comply with the cost documentation procedures described in Chapter XII, Cost Recovery.

Recoverable costs include both intramural (e.g., EPA payroll , travel, and indirect costs) and extramural (Agency contractors' costs) oversight costs. Detailed information on cost recovery is located in Chapter XII, Cost Recovery. Information on cost management and recordkeeping also is in the *Removal Cost Management Manual* (April 1988).

F. Criminal Investigation

If at any time before or during removal actions criminal activity is suspected, the Special-Agent-In-Charge should be notified immediately to begin criminal investigative activities. In situations where a criminal investigation has been initiated by NEIC, the OSC or RPM, and Regional Counsel should exercise caution on becoming involved in a criminal investigation while conducting a PRP search, administrative or civil investigation. Additional information on criminal investigations and the role of the NEIC and Regional personnel is provided in the memorandum "Functions and General Operating Procedures for the Criminal Enforcement Program" (Courtney M. Price, January 7, 1985).

G. Community Relations

Community relations activities are ongoing throughout removal actions, varying in extent with the urgency of the situation. The objectives of community relations during removal actions include:

- To identify citizen leaders, public concerns, and a site's social and political history and encourage citizens to express concerns and provide information
- To take into account community, including PRP, views and concerns regarding the decision-making process

- To provide information to the community on the health and environmental effects of releases and proposed response action.

By providing information as directly and quickly as possible, the OSC will ensure that the community receives the information it needs about the response action and the effects of the release on the community's health and safety. EPA/540/R-92/009 *Community Relations in Superfund: A Handbook* (January 1992), should be consulted for current policy on community relations during removal actions.

Community Relations Plan

NCP section 300.415(m)(3)(ii) states that a Community Relations Plan (CRP) shall be prepared within 120 days for all response actions where on-site action is expected to extend beyond 120 days. See NCP section 300.415(m)(2)(i) for requirements applicable to actions expected to take less than 120 days. Before preparing a CRP, program and community relations staff must meet with local officials and interested citizens to obtain information about the site and to identify public concerns. The plan should provide:

- Site background
- The nature of the community concern
- The key site issues
- The objectives of the community relations activities
- Specific activities to be undertaken at the site.

Responsible parties may participate in implementing elements of the CRP at the direction of, and with oversight by, Regional staff. The lead agency develops the community relations plan.

Community Relations Activities

Specific types of community relations activities during removals are likely to include meeting with citizens in the community, responding to inquiries from the media, and providing local officials with site status information.

H. ARARs

CERCLA does not require removal actions to comply with Applicable or Relevant and Appropriate Requirements (ARARs) of other environmental statutes. However, the NCP requires on-site CERCLA removal actions to attain Federal and State ARARs to the extent practicable, considering the urgency of the situation and the scope of the removal action to be taken. In some instances, EPA may require PRPs to identify potential ARARs as part of a deliverable under an order. As with any deliverable, the PRPs must receive EPA's approval. However, ultimately it is the lead agency that is responsible for determining the final list of ARARs that can be practicably attained.

Section III. Planning and Reporting Requirements

A. Contractor Support

Resources available to Regional personnel to conduct PRP searches include OSCs, the Technical Assistance Team (TAT) contract, the Technical Enforcement Support (TES) contract (until FY94 when the Environmental Enforcement Support Contract will replace TES), civil investigators, enforcement project managers, and the NEIC. Regional personnel should evaluate the contracting support options for conducting effective and efficient PRP searches for removals, and incorporate contractor support requirements into quarterly and annual budget planning procedures. When planning for this contract support, keep in mind that resources may be constrained by contract capacity or other factors.

Regional experience has shown that the TAT is an efficient resource for gathering information regarding property owners and site operators because the TAT is already in the field responding to the removal situation. Some Regions have open-ended TES work assignments that allow for limited PRP research to be conducted while the official paperwork for the work assignment is being processed. This approach has proven effective for limited research but does not allow and should not be used for the identification of a large number of generators/transporters. Regional personnel should note that the capacity of the TES contract may not allow its use for all removal PRP searches because of PRP search activities for the remedial program. Generally, a standard work assignment is used for PRP search work beyond the initial TAT work.

B. Information Management Systems

EPA has established several distinct but interrelated systems for documenting and tracking removal activities from the initial notification of the release through the completion of the response. This section identifies the various planning and tracking systems and discusses their relevance to enforcement removals.

The removal program responds to emergency, time critical and non-time critical situations at NPL and non-NPL sites. Because much of the removal work cannot be anticipated in advance, the planning horizon of these activities is significantly shorter than for remedial activities. Thus, quarterly commitments are not required. Site-specific removal funding needs are placed in WasteLAN the quarter prior to the expected obligation date. The annual removal commitments are placed in the Targets and Accomplishments portion of the CERHELP non-site data system. Credit will be given for NPL or non-NPL activities depending on the NPL status recorded in CERCLIS on the date accomplishment reports are pulled.

Removals are tracked by SCAP/STARS through CERCLIS/WasteLAN. OSCs should coordinate with their information managers to ensure that they are entering information into CERCLIS/WasteLAN correctly. All SCAP/STARS targets are established on an annual basis. Targets are planned site specifically prior to the quarter the removal is projected to begin. Exhibit II-5 summarizes SCAP/STARS Targets relevant to removals.

Exhibit II-5
SCAP/STARS Targets for Removals

Activity	STARS Targets	SCAP Target	Quarterly Target	Annual Target
NPL Removal Start		X		X
Non-NPL Removal Start		X		X
NPL Site Completions Through Removal Actions		X		X

Definitions for:

- **Removal Starts - NPL and Non-NPL** - A removal is a response action taken to prevent or mitigate a threat to public health, welfare or the environment posed by the release or potential release of a CERCLA hazardous substance, or an imminent or substantial risk posed by a pollutant or contaminant.

  In order for the NPL removal to be counted in the STARS target S/E-4, Number of Sites Where Activity has Started, First NPL Removal Actions or RI/FS, it must not have had previous Fund-financed or PRP removal or RI/FS activity at the site. The definition of accomplishment for a Removal Start depends on the lead.

- **Fund-financed** - A Fund-financed removal counts toward this target when on-site removal work is begun as documented in the POLREP. Prior to on-site work beginning, the following actions usually occur:

  - The Action Memorandum is approved by the OSC, Regional Administrator or AA SWER
  - A Delivery Order has been issued by EPA under the ERCS contract or a contract has been signed for a U.S. Coast Guard (USCG) on-site removal
  - An obligation for the removal has been recorded in WasteLAN and the Integrated Financial Management System (IFMS) or the OSC activates $50,000
  - On-site removal work has begun.

  The date the on-site work begins is the start date for the removal action.

- **PRP-financed** - A PRP removal counts when there is on-site removal activity financed by the PRP in compliance with an AO (unilateral or consent), CD or judgment. The start date, as recorded in WasteLAN, is the date the PRPs begin actual on-site work. If PRPs start the removal and subsequently become in substantial non-compliance and the Fund takes over the removal, credit will be given for a PRP start but the Fund will be credited for the completion, because PRPs have not met the terms of the AO or CD. If the PRPs do not comply with a UAO, credit for the removal is not given. Regions will receive credit under SCAP for issuing the UAO. No credit will be provided where a PRP is conducting a response without an enforcement document.

  Plans are made site-specifically prior to the quarter the removal is expected to begin; TBD sites are allowed. Removal starts are SCAP targets. First NPL removal starts or first RI/FS starts are targets under STARS. Separate targets are established in SCAP for RI/FS starts and removal starts. Regions cannot receive credit for a site under STARS S/C-4, Number of Sites Where Activity has Started, First NPL Removal Action or RI/FS, if an RI/FS or NPL removal began or was conducted at the site in a previous year. Regions also cannot receive credit for both an RI/FS start and a removal under STARS if they are started in the same year. Credit is given for the first activity started and a site can receive credit only once. Therefore, historical data needs to be reviewed prior to negotiating commitments and recording accomplishments in STARS. Regions can receive credit for both activities under SCAP.

- **NPL Site Completions Through Removal Actions** - An NPL site is completed through a removal action when conditions specified in the Action Memorandum or ROD have been met and all necessary remediation at the site has been completed. The definition of accomplishment for a Removal completion depends on the lead.

- **Fund-financed** - A removal completion that cleaned up an NPL site is credited when:

  - The contractor has demobilized and left the site as documented in a POLREP
  - A ROD that states that all necessary remediation is complete has been signed

- The ROD documents that the site meets the statutory requirements for site closeout.

◆ **PRP-financed** - A removal completion that cleaned up an NPL site is credited when

- The Region certifies that the PRPs or their contractor have completed the removal action and fully met the terms of the AO, CD or judgment
- A ROD that states that all necessary remediation is complete has been signed
- The ROD documents that the site meets the statutory requirements for site closeout.

The removal event qualifier that states the site is cleaned up (C2103=C) must be entered into WasteLAN. The date of the signature of the ROD that states that all remediation is complete must be entered in the removal completion and ROD completion data fields. The RA technology type (C3401=RT and C3402=NA) must also be entered into WasteLAN. The date of the Final Superfund Site Close-Out Report should be entered with the ROD subevent, Close-Out Report completion (C3401=CL). This is a SCAP target. It is planned site-specifically and includes Fund-financed and PRP removals. NPL site completions through removal are included in the STARS target S/C-3, NPL Sites That Have Been Completed.

Exhibit II-6 summarizes SCAP/STARS measures relevant to removals.

Exhibit II-6
SCAP/STARS Measures for Removals

Activity	STARS Reporting	SCAP Plan/Report	Quarterly	Annual
Removal Investigations at NPL Sites		X	X	X
NPL Removal Completions		X	X	X
Non-NPL Removal Completions		X	X	X
Federal Facility Removals/ ERAs (FFE-3(2))	X	X	X	X
Administrative Orders Issued for Removal and RI/FS		X	X	X

◆ **Removal Investigations at NPL Sites** - A removal investigation at an NPL site is the process of collecting field data at an NPL site for the purpose of characterizing the magnitude and severity of the problem to determine if a removal or quick response action is warranted. Investigations may be conducted by the State, EPA and/or the Technical Assistance Team (TAT), and must include an on-site component, such as a walk around survey or sampling, to be counted.

The start of the removal investigation at NPL sites is defined as the date of the site visit or the start of the review process if no site visit took place. The completion is defined as the signature of an Action Memorandum, the date of a memorandum to the file documenting the decision not to perform a removal action, or signature of the Site Evaluation Report. The removal investigation start and completion dates must be entered into WasteLAN. This is a SCAP reporting measure. Accomplish-

ments are reported site specifically in WasteLAN using event (C2101) type "RS". Removal investigations at NPL sites are tracked on a calendar year basis.

- **NPL and Non-NPL Removal Completions** - A removal is complete when the conditions specified in the Action Memorandum have been met even if the OSC determines that additional response work may be necessary. The definition of accomplishment for a Removal Completion depends on the lead.
- **Fund-financed** - Completions are counted when the actions specified in the Action Memorandum are complete, the contractor has demobilized and left the site, as documented in a POLREP, and no additional ERCS expenditures are anticipated for the action, as documented in a POLREP and recorded in WasteLAN.
- **PRP-financed** - Completions will count when the Region has certified, by entering a date in WasteLAN, that the PRPs or their contractors have completed a removal action and fully met the terms of an AO, CD, or judgment.

  This is a SCAP reporting measure. Accomplishments are reported based on combined Fund and PRP-financed and first and subsequent NPL and non-NPL removal completions. Projections on the number of NPL removal completions are placed in the Targets and Accomplishments portion of the CERHELP non-site data system. The removal event qualifier (C2103) is to be recorded in WasteLAN.
- **Administrative Orders Issued for Removal and RI/FS** - Administrative Orders (AOC and UAO) are enforcement tools through which PRPs agree to or are compelled to assume responsibility for removal actions. Section 104/106/122 Administrative Orders (AOC and UAO) issued by EPA for PRPs to conduct removal actions and/or RI/FSs should be reported. Credit for the order is based on the date the order is signed by the Regional Administrator as recorded in WasteLAN. Projections for AOs for removal actions are made in the Targets and Accomplishments portion of the CERHELP non-site data base. This is a SCAP reporting measure.

ERNS

The Emergency Response Notification System (ERNS) is a nationwide, centralized database supported by EPA, the U.S. Coast Guard (USCG) and the Department of Transportation (DOT) and maintained by the Transportation Systems Center (TSC). This information-sharing network documents every release notification received by the National Response Center (NRC), EPA Headquarters and Regional offices, and USCG.

ERNS is a documenting system, not a tracking system. Only the initial notification of release is documented, not the actions performed on the site. ERNS contains information on every reported release (including releases of non-hazardous substances and releases below RQ levels), not only those that result in removal action. ERNS also provides assistance to Regional enforcement personnel in supporting day-to-day response operations and enforcing release reporting requirements.

Notification System Process

Exhibit II-7 provides a diagrammatic representation of the ERNS release notification process. Responsible parties, private citizens, or State or local officials may report a release to the NRC. The NRC documents the notification and relays the data to the appropriate OSC for review and response determination. In the event that EPA or USCG is the first to be notified, the notified agency will document the release incident data and relay the information to the appropriate OSC for response determination. When the EPA Region is the notified agency, the release data must be transferred within two weeks of receipt to the TSC for compilation and input into the NRC database.

EPA Regional ERNS Responsibilities

EPA Regions and USCG field offices are responsible for:

- Taking calls from parties or NRC reporting oil spills or chemical releases
- Documenting the notification using standard data collection form
- Making response determination
- Making follow-up calls to gather additional information
- Inputting all information into the system
- Relaying the release notification report within two weeks of receipt to the TSC
- Coordinating with States to facilitate their reporting into ERNS

These responsibilities ensure the efficient functioning of ERNS.

EPA Headquarters Responsibilities

EPA Headquarters, in conjunction with USCG and DOT, are responsible for providing overall direction and guidance for the development and operation of ERNS.

ERNS Phase II

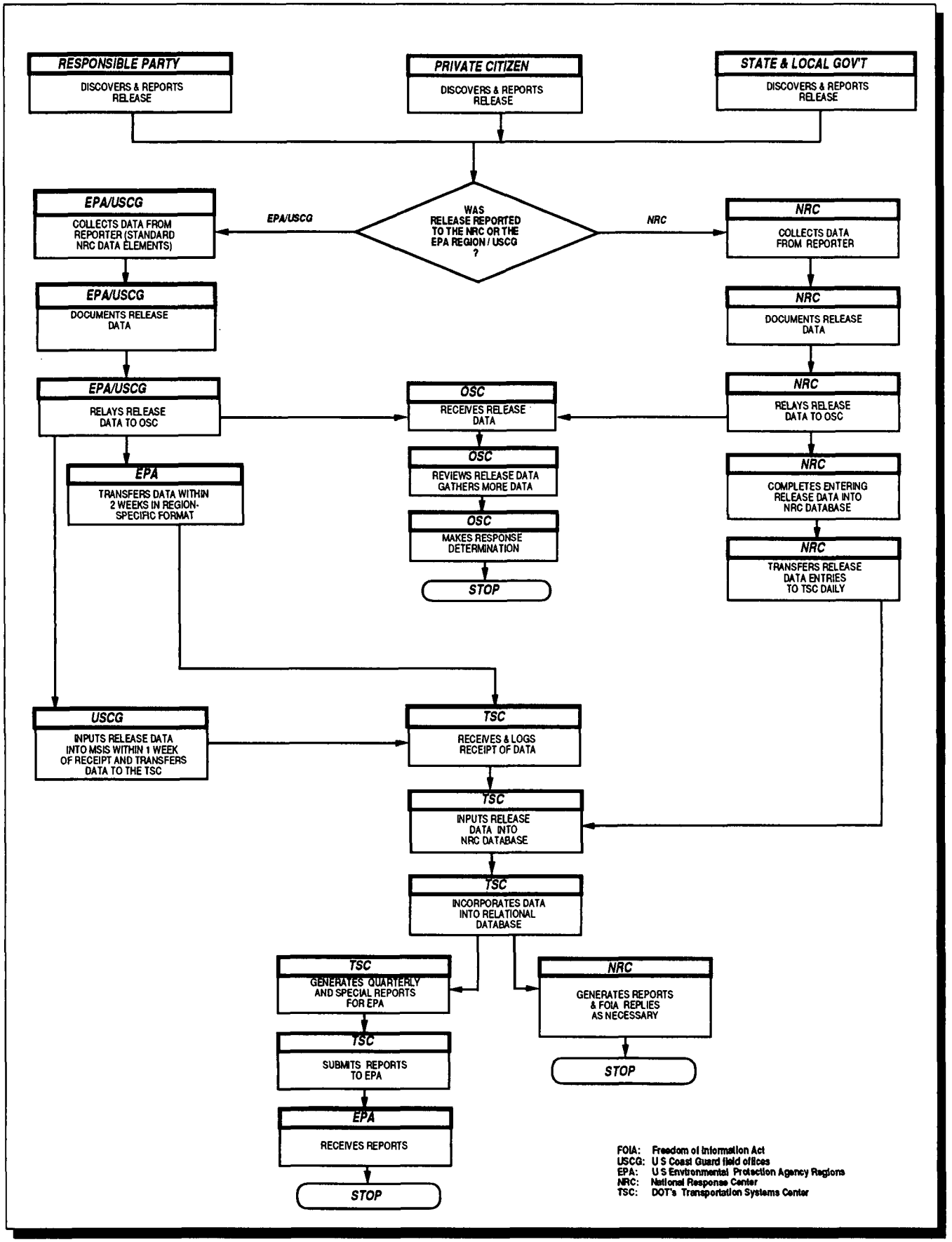
ERNS has been fully operational since October 1987. As of January 1989, a second phase of ERNS became operational. Phase II verifies notification data and provides a direct link to CERCLIS/WasteLAN.

IFMS

The Integrated Financial Management System (IFMS) is a computerized database which tracks costs associated with removal actions. Costs are categorized by site and type of activity (e.g., oversight costs). OSCs and RPMs should use the IFMS to help monitor costs at their site, especially if accumulated costs approach the $2 million limit on removal expenditures set by CERCLA.

Exhibit II-7

ERNS Notification Process



Section IV. Potential Problems/Resolutions

A. Civil Investigator Support

Many Regions have identified civil investigators as a timely mechanism for gathering PRP liability and financial information for removal cases. It has been noted that civil investigators are effective in a quality assurance capacity to oversee research being conducted by enforcement project managers.

Region III has recognized the need for a civil investigator to work exclusively on removal cases and has a full time civil investigator working in the field in the early stages of a case. Regions with removal programs large enough to sustain one civil investigator full time should investigate the possibility of creating such a position. This position allows the investigator to become familiar with the types of investigative situations that removals present and prevents conflicts in situations where priority is required by remedial cases. Additionally, assigning a civil investigator exclusively to removal cases ensures the investigator's availability to conduct PRP research when required immediately for a time-critical removal.

B. Determining PRP Financial Viability

Effective PRP searches should yield financial information on PRPs so that the determination can be made whether to pursue the CERCLA section 106 Administrative Order option. To ensure PRP searches yield the necessary financial information, Region IX includes a financial disclosure form with information request letters issued under section 104 (e) of CERCLA. Standard PRP search procedures in many Regions include a Dun and Bradstreet system financial report and a review of records for bankruptcy, property ownership, and financial status information.

C. Use of Information Request Letters

The 104(e) information request letter provides a means of gathering PRP liability and financial evidence, including information on site history, the identity of additional PRPs, and financial information. Financial information is necessary in determining whether to issue an Administrative Order. Therefore, enforcement personnel should be involved in removal cases at the outset to facilitate gathering as much information as possible before issuance of an Administrative Order. Section 104 (e) letters also may be used in conjunction with demand letters, issued approximately 12 months after removal completion during the cost recovery stage, to gather additional evidence and identify additional PRPs.

Section V. References

Policy

40 CFR, 55 Federal Register, "National Oil and Hazardous Substances Pollution Contingency Plan" (March 8, 1990).

Guidance

OSWER Directive 9833.06, "Model Administrative Order on Consent for Removal Response Actions" (March 1993).

OSWER Directive 9833.07, "Model Unilateral Administrative Order for Removal Response Activities" (March 1993).

OSWER Directive No. 9836.2 "CERCLA Community Relations Mailing List" (February 6, 1989).

Courtney Price, "Functions and General Operating Procedures for the Criminal Enforcement Program" (January 7, 1985).

OSWER Directive No. 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

OSWER Directive No. 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OSWER Directive No. 9834.10A, "Model Notice Letters" (February 7, 1989).

Lee Thomas, "Issuance of Administrative Orders for Immediate Removal Actions" (February 21, 1984).

OSWER Directive No. 9833.0-1A, "Guidance on CERCLA section 106(a) Unilateral Administrative Orders for RD/RAs" (March 7, 1990). [Although not specific to removals, this guidance contains useful, generally applicable guidance.]

OSWER Directive No. 9200.2-02, "Accelerated Response at NPL Sites Guidance" (December 15, 1989).

Manuals

EPA/540/R-92/009, *Community Relations in Superfund: A Handbook* (January 1992).

OSWER Directive 9834.6, *Potentially Responsible Party Search Manual* (August 27, 1987).

OSWER Directive 9360.0-02B, *Removal Cost Management Manual* (April 1988).

Office of the Comptroller, *Superfund Indirect Cost Manual for Cost Recovery Purposes FY 83 Through FY 86* (March 1986).

OSWER Directive 9360.3-01 "Action Memorandum Guidance" *Superfund Removal Procedures* (September 26, 1990).

OSWER Directive 9360.3-02 "Guidance on the Consideration of ARARs During Removal Actions" *Superfund Removal Procedures* (August 1991).

OSWER Directive 9360.3-06, "Removal Enforcement Guidance for On-Scene Coordinators" *Superfund Removal Procedures* (April 6, 1992).

OSWER Directive 9200.3-01A, *SCAP Manual* (updated annually).

Contacts

Removal Procedures

Office of Emergency and Remedial Response, Emergency Response Division, 703-603-8760.

Administrative Orders

Office of Waste Programs Enforcement, CERCLA Enforcement Division, Guidance and Evaluation Branch, 703-603-8940.

Cost Recovery and Indirect Costs

OWPE, CERCLA Enforcement Division, Cost Recovery Branch, 703-603-8920.

Section VI. Activities Checklist

The following checklist has been developed to assist OSCs in conducting and coordinating enforcement procedures between other enforcement personnel and contract support. OSCs should determine that the following activities are conducted at all removal sites when appropriate:

PRP Search, Identification, and Notification

___ Document or photograph visual evidence linking PRPs to a site, including drum labels, shipping records, and vehicle registration

___ Conduct oral inquiries with PRPs and other observers (e.g., public officials, reporters) at the site

___ Notify NEIC if criminal activity is suspected

___ Issue CERCLA section 104(e) information requests*

___ Prepare a baseline PRP search report

___ Initiate a title search*

___ Conduct off-site interviews*

___ Review relevant site records*

___ Prepare interim final PRP search report*

___ Notify PRPs orally of potential CERCLA liability (with written confirmation)

___ Notify PRPs in writing of liability*

___ Issue special notice letters*

Preparation for Negotiation

___ Establish the Administrative Record

___ Notify State prior to negotiations or issuance of an Administrative Order

___ Prepare negotiation strategy*

___ Draft Action Memo with enforcement addendum

___ Prepare draft Administrative Order on Consent (AOC)

___ Negotiate AOC or issue Unilateral Administrative Order (UAO)

Removal Action

___ Track daily costs and project future costs for Fund-lead removal actions

___ Make the Administrative Record publicly available within sixty days after the initiation of on-site activities (emergencies and time-critical actions) or when the Engineering Evaluation/Cost Analysis (EE/CA) is made available for public comment (non-time-critical actions)

___ Attend or coordinate oversight meetings including initial, status, and completion meetings, as well as site inspections

___ Oversee PRP compliance with the orders

---

* This activity should be conducted if time permits.

Cost Recovery

___ Issue demand for payment of past and future costs plus interest

___ Document decision not to pursue cost recovery (if applicable)

___ Refer cost recovery cases to Department of Justice within twelve months of completing the removal action

___ Complete Interim Final PRP Search Report

III. COMPREHENSIVE SITE PLANNING

Chapter III
Comprehensive Site Planning

Section I. Description of Activity 1

Introduction 1

SACM 1

Site Management Plan 1

Role Definitions 1

Accountability Framework 1

Activity Timelines 1

Team Commitments to Objectives 2

Section II. Procedures and Interactions 3

A. Develop Initial SMP 3

B. Develop Detailed Plans 3

C. Contents of the Overview Component 3

D. Review and Approval of SMPs 3

E. Overview of SACM 4

F. Objectives of SACM 4

Role Definitions 4

Authorities for Site Activities 4

Enforcement Considerations 4

Site Assessment Planning 5

PRP Search Activities 5

Planning Non-time Critical Removal Actions 5

Coordination Activities 6

Planning RI/FS - Related Activities 6

Planning RD/RA - Related Activities 6

Section III. Planning and Reporting Requirements 7

A. Planning Reflected in SCAP/STARS 7

B. Budget Projections Based on Schedule and Classification 7

Section IV. Potential Problems/Resolutions 8

A. Overly-Optimistic Forecasts 8

B. Realistic Division of Operable Units 8

Section V. References 9

Guidance 9

Manual 9

Memorandum 9

Appendix

Short Sheet Guidance of SACM A1

Chapter III
Comprehensive Site Planning

Section I. Description of Activity

Introduction

Comprehensive site planning is an on-going process of developing and refining an overall strategy to integrate removal, remedial, and enforcement activities at a site. It is a critical element in the effective management of Superfund sites.

SACM

EPA has recently adopted a model for managing sites called the Superfund Accelerated Cleanup Model (SACM). The goal of SACM is to make Superfund cleanups more timely and efficient through an increased focus on the front end of the process and better integration of all program components. SACM is a process change that should be considered for all Superfund activities during the site management planning phase. SACM will be discussed in more detail later in this chapter.

Site Management Plan

For most Superfund sites, it is critical to establish an overall plan that integrates the enforcement and response activities at the site and coordinates these activities in pursuit of the specific site objectives. This Site Management Plan (SMP) should provide a roadmap, including general site objectives and strategy. The lead Agency (EPA or the State) is responsible for developing the SMP.

Role Definitions

The SMP should define the roles and responsibilities of individual site team members. These definitions should clearly communicate how each participant's activities and deliverables contribute to the progress of the site strategy and should provide a structure within which steady manageable progress can be made toward case objectives.

A Regional Decision Team (RDT) is responsible for determining/recommending the approach that will be taken at a site. The RDT provides for broad participation across all program elements while placing emphasis on teamwork and Regional and staff empowerment for developing response strategies and solving site problems. The RDT also has the responsibility for ensuring that response actions are fully consistent with the requirements of CERCLA and the NCP and that an emphasis on early actions will not jeopardize the program's commitment to enforcement first. Regions have flexibility in designing an RDT process that meets their specific needs.

Accountability Framework

Individuals should be held accountable for their specific assigned responsibilities for component activities. This should include the responsibility for coordinating other team members' activities that are necessary to perform the component in question.

Activity Timelines

Careful planning of timelines is especially necessary to successfully integrate enforcement and response activities. To coordinate enforcement and response timelines, advance planning must be based on a clear understanding of the projected time requirements of each type of activity and a clear understanding of the interdependencies of the various enforcement and response activities.

For example, to promote PRP agreements to undertake response actions, general notice letters should be issued well in advance of RI/FS special notice letters. Moreover, to promote an RD/RA settlement, EPA needs to provide the PRPs with the draft feasibility study as soon as EPA approves it, updated PRP information as provided by the special notice provision, past cost information, a draft Consent Decree, and a negotiation schedule set by special notice. The preparation of these materials needs considerable lead time. To avoid delays in the overall project schedule, the lead activities for all of these milestones should be carefully planned out. All participants in these lead activities must be directing their efforts to complete them in a timely, coordinated manner so that later case activities dependent upon their completion are not delayed.

Team Commitments to Objectives

Because so many different participants are involved in moving Superfund cases and decision-making to successful conclusions, it is important to be sure that all participants are committed to common (or at least consistent) objectives for the site. To avoid last-minute vetoes of site activities, this commitment should be obtained early in the site development process; it should be ratified at high levels of management in all involved offices; and it should be reaffirmed frequently, especially if site objectives undergo revisions as site awareness and strategy develop.

Section II. Procedures and Interactions

A. Develop Initial SMP

It is important to develop and maintain a general roadmap to site activities to assure a coherent context for planning and conducting the specific site activities. The SMP evolves over time and becomes more precise as the site passes through different phases. Prior to the Agency's use of SACM, the initial plan was developed when the site team was first assigned to the site and the plan was keyed into the Region's long-term strategy as set forth by the Regional SCAP. The timeline in Exhibit III-1 presents what has been the Agency's view of key steps and optimum duration of phases in moving sites from identification to remediation.

The flowchart in Exhibit III-2 is an example of the level of specificity appropriate for the general timeline for a site management plan. Critical points where the timeliness of enforcement actions could affect response activity should be indicated on the timeline.

In adopting SACM, the Agency is looking to streamline and accelerate the cleanup process. Thus, the timeline presented in Exhibit III-1 will be in flux until the Agency has more experience with implementing SACM. SMPs, however, are still an important component of implementing SACM. Regions have established Regional Decision Teams (RDTs) that will develop response strategies for sites following receipt of initial site information and as the assessment stage advances. The site management team will still have day-to-day project management responsibility and the SMP will need to document the decisions made by both teams in coordination.

B. Develop Detailed Plans

At four key points in the Superfund process, more detailed plans should be developed and approved by team members. The specific plans are intended to perform the same functions as the overall roadmap — integrating enforcement and response planning in pursuit of clearly articulated case objectives, defining roles and responsibilities of site team members, establishing a framework for accountability for the specific activities, and obtaining commitments of all participants to the objectives, activities and schedules. The specific activity-oriented detailed plans are:

- PRP Search Plan
- RI/FS Negotiation Plan
- RD/RA Selection and Negotiation Plan, including Pre-Referral Litigation Report
- Litigation Management Plan.

C. Contents of the Overview Component

Each SMP should have a general information and objectives component, the overview, which is updated with current information at least as often as each new detailed plan is prepared. At each point where a major change or addition is made to the overview or to the detailed site plans, the items in the case overview should be reviewed, revised as necessary, and included as part of the current SMP. In general, the overview provides the site team and major PRP representatives, a response and enforcement history of the site, response and enforcement objectives, and a schedule of major activities.

D. Review and Approval of SMPs

The original SMP and all of its revisions and specific plans should be reviewed and concurred on by all team members. It is intended to be the primary vehicle for obtaining management concurrence on case objectives and strategy. Therefore, team members must be certain to obtain sufficient management review and approval to assure concurrence by their management. Site teams thereby should be empowered to operate within the con-

tours of approved SMPs with the expectation of complete management support for all details of the plan unless the facts or policies underlying such support change materially.

Each Region must develop a management review and concurrence process that is appropriate to its organizational structure and lines of authority. The involvement of Headquarters and DOJ should be built into the Regional process in accordance with the operative delegations or case-specific agreements.

E. Overview of SACM

Following is a brief description of the Superfund Accelerated Cleanup Model (SACM) recently adopted by EPA. The appendix to this chapter contains the "Short Sheet" guidances now available on SACM. The concepts discussed in this chapter are basic to the new approach. For more information, refer to the short sheets.

F. Objectives of SACM

The approach involves implementing:

- A continuous process for assessing site-specific conditions and the need for action;
- Cross program coordination of response planning
- Prompt risk reduction through early action
- Appropriate cleanup of long-term environmental problems
- Early public notification and participation
- Early initiation of enforcement activities.

SACM is expected to result in an increase of early risk reduction activities at both National Priorities List (NPL) and "NPL-caliber" sites.

Role Definitions

In using this Model it is important that the roles and responsibilities of individual site team members be defined. These definitions should clearly communicate how each participant's activities and deliverables contribute to the progress of the site strategy and should provide a structure within which steady manageable progress can be made toward case objectives.

A Regional Decision Team (RDT) is responsible for determining/recommending the approach that will be taken at a site. The RDT provides for broad participation across all program elements while placing emphasis on teamwork and Regional and staff empowerment for developing response strategies and solving site problems. The RDT also has the responsibility for ensuring that response actions are fully consistent with the requirements of CERCLA and the NCP and that an emphasis on early actions will not jeopardize the program's commitment to enforcement first. Regions have flexibility in designing an RDT process that meets their specific needs.

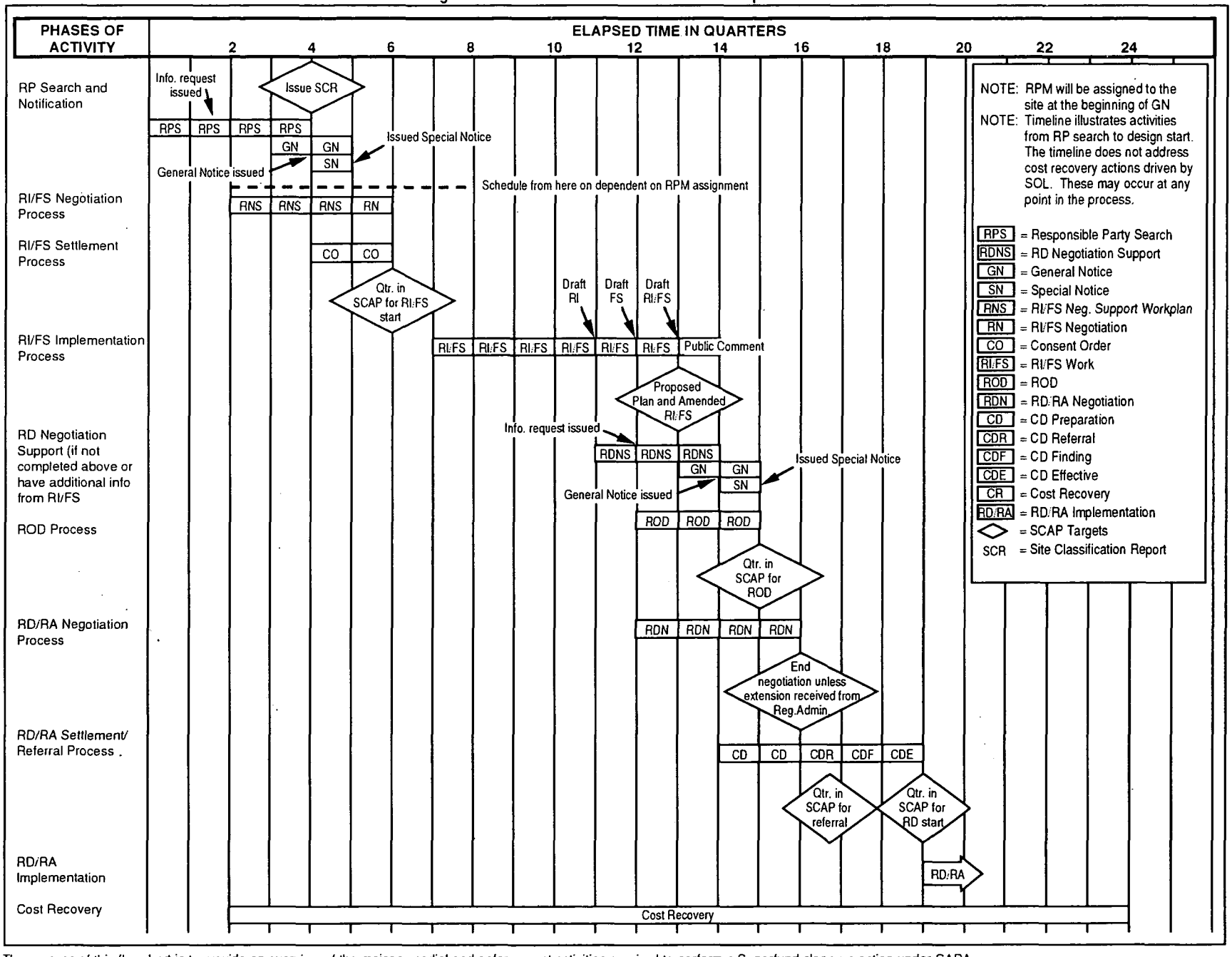
Authorities for Site Activities

The only response authorities under CERCLA are the removal and remedial authorities; any Superfund action that is taken must meet the requirements of one authority or the other. SACM encourages regions to think creatively about the way that these authorities may be used under the NCP to achieve prompt risk reduction (early action) or to conduct more complex, time-consuming remediations (long-term actions).

Enforcement Considerations

SACM does not change the Superfund Program's interest in Enforcement First. Coordination of site activities, including decisions and recommendations made by the Regional Decision Team (RDT), should anticipate the activities required for enforcement and ensure that they are carried out in a timely manner. EPA expects much of the early site assess-

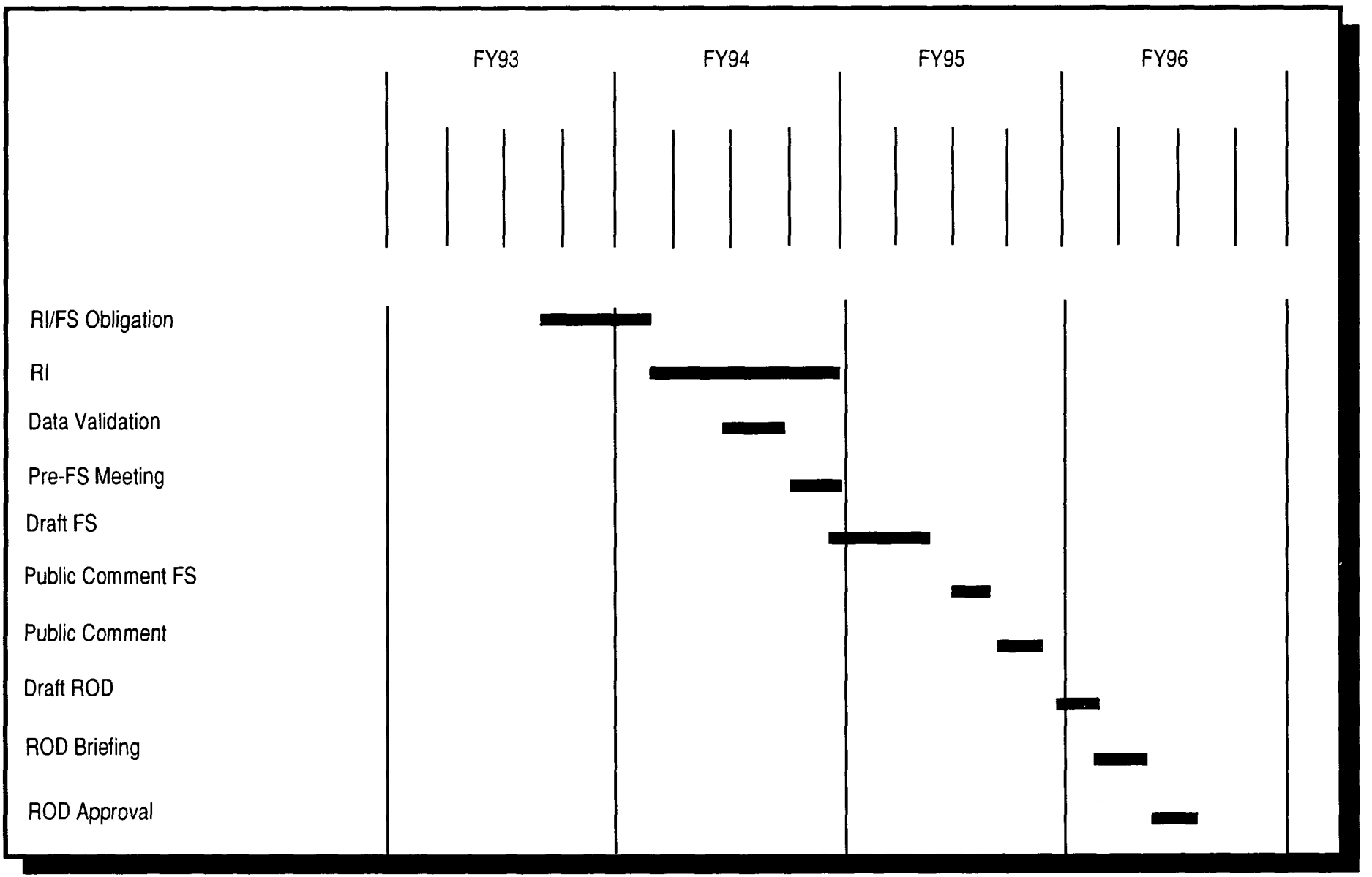
Exhibit III-1
Overview Flowchart of SARA Enforcement and Remedial Process
Timeline for Region I Enforcement and Remedial Process Elapsed Time in Quarters



The purpose of this flowchart is to provide an overview of the major remedial and enforcement activities required to perform a Superfund clean-up action under SARA.

Exhibit III-2

Sample Portion of Site Timeline*



* This example covers only a specific point in the process on the overall site timeline

ment activities to be Fund lead; however, response lead changes can occur at any of the following points in the process:

1. During the site assessment activities
2. Prior to development of an Engineering Evaluation/Cost Analysis (EE/CA)
3. Prior to a removal action
4. Prior to a remedial investigation/feasibility study (RI/FS)
5. Prior to a Remedial Design/Remedial Action (RD/RA)
6. Prior to an RA contract solicitation, when funding the RA would have significant implications for the Fund and when no significant delay will occur.

It is the RDT's responsibility to assure that the response lead can be passed to PRPs as early as possible without delaying work at the site.

Under all of these scenarios EPA retains the responsibility to perform risk assessments, to prepare Hazardous Ranking System (HRS) packages, and to make all response selection decisions.

Site Assessment Planning

Superfund assessment under SACM integrates previously separate removal and remedial assessments into a single process. Under SACM the assessment processes run concurrently. Sites receive the appropriate level of effort to make assessment decisions, and sites needing no further action under Superfund are designated as Site Evaluation Accomplished (SEA). Whenever possible, assessment activities are conducted concurrently with response and enforcement actions. The basic principles of SACM build upon the need to eliminate redundancy and expedite the Superfund process.

SACM promotes performing risk assessment and RI activities earlier in the assessment process for a site where data indicate remedial action will be needed. Once RI activities begin, assessment activities continue concurrently to collect sufficient information to determine the site score for possible listing on the NPL.

PRP Search Activities

As a general rule, PRP search activities should begin as soon as the Region decides that a response action is likely to be required at the site. Once Regions have decided to begin PRP search activities, they are encouraged to adopt a phased PRP search approach. The initial phase should focus on establishing liability for PRPs about whom information is most readily available from site assessment activities and other sources. The search should then be extended to address other PRPs. In conducting PRP searches, Regions should coordinate with other parts of the program and with the States.

Planning Non-time Critical Removal Actions

When identifying appropriate sites for non-time-critical removal actions, Regions may wish to consult with Headquarters. In order to assure consistent use of non-time-critical authority, Regions must consult with Headquarters on every non-time-critical removal costing over $5M (both Fund and PRP lead).

Because these removals are not time critical, in many instances PRPs will have been identified and negotiations for a PRP lead action will be part of the process. Regions should use special notice letters for non-time-critical removals when they believe that settlement would be facilitated.

For Fund lead, Regions must consult with Headquarters prior to taking an early action that will require funding beyond what the Region has in its allowance. Regions must also follow the existing rules for justifying and obtaining exemptions for removal actions estimated to cost over $2M or exceed one year in duration. When a State does not participate in the conduct and financial support of a Fund lead non-time-critical removal actions, the RDT must evaluate whether the urgency and need are great enough to justify the loss

of the State contribution. (Until such time as the authority for approving $2M waivers at non-NPL sites is delegated to the Regions, Headquarters will have to be involved in this decision on a site-by-site basis.) Until a final policy is developed, Headquarters will generally support projects costing less than $5M, as long as there is appropriate justification, even if a State is unable to participate. Headquarters will also consider projects costing more than $5M, but there will have to be a compelling case for undertaking the work in the absence of a State contribution.

Coordination Activities

The overall plan must also ensure good State coordination and suitable community involvement. SACM maintains Superfund's emphasis in these areas, so response action planning should incorporate appropriate timeframes for their implementation.

Planning RI/FS - Related Activities

When the Region is conducting an SI/RI/FS or any series of actions containing an RI/FS, the administrative record file must be made available at the point when work characteristic of an RI/FS begins. In order for the record to be ready at this point, Regions should begin the compilation process when the RDT decides that an RI/FS is a part of the activity to be undertaken.

CERCLA and current EPA guidance encourage the use of special notice letters or issuance of waivers for RI/FS. When Regions anticipate conducting these response actions combined with others, for example an SI/RI/FS, they should use special notice letters if they believe that settlement would be facilitated.

Planning RD/RA - Related Activities

CERCLA and current EPA guidance encourage the use of special notice letters or issuance of waivers for RD/RA. When Regions anticipate conducting these response actions combined with others, for example an RD/RA in conjunction with a non-time-critical removal, they should use special notice letters if they believe that settlement would be facilitated.

Section III. Planning and Reporting Requirements

A. Planning Reflected in SCAP/ STARS

Comprehensive site planning and the SCAP/STARS process serve a common purpose. Both ensure a steady flow of sites through the response process. Therefore, it is essential that the site planning process be merged with the yearly Superfund planning process. For detailed information on the SCAP planning process, use the annual SCAP manual.

B. Budget Projections Based on Schedule and Classification

RPMs are responsible for keeping data on the project up-to-date. Without accurate and current data, the Agency's planning tools will not work effectively. Specific reporting requirements for each phase of site response are outlined in the appropriate chapter of this handbook. For more information, contact the Regional Information Management Coordinator (IMC) or see the Enforcement Data Quality Manual.

Section IV. Potential Problems/Resolutions

A. Overly-Optimistic Forecasts

RPMs should carefully scrutinize task completion forecasts to determine whether they realistically project future enforcement activity. Overly-optimistic forecasts may create expectations that cannot be met. As a consequence, the orderly flow of resources to the Region could be disrupted.

B. Realistic Division of Operable Units

The Agency bases its budget allocation on the number of operable units at a particular site. RPMs must carefully follow Agency guidance in identifying and reporting the number of operable units at the site.

Section V. References

Guidance

OSWER Directive No. 9851.3, "Integrated Timeline for Superfund Site Management" (June 11, 1990).

OE/OWPE (Strock and Clay), "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases" (October 12, 1990).

OSWER Directive 9203.1-051, "SACM Short Sheets" (December 1992).

Manual

OSWER Directive 9355.1-1, *Superfund Federal-Lead Remedial Project Management Handbook*, Chapters 2 and 3 (December 1986).

Region I, *Enforcement and Remedial Activities Under SARA: A Training Manual*, Chapter 1 (May 1989).

Memorandum

"Draft Transmittal of the Final Report and Work Products of the Superfund Enforcement Management Issues Work Group," Attachment 1, "Introduction to Site Management Planning," Bruce Diamond, Glenn Unterberger (January 5, 1989).

Appendix

United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

Publication 9203.1-05I
December 1992

EPA

Status of Key SACM Program Management Issues — Interim Guidance

Office of Emergency and Remedial Response
Office of Waste Programs Enforcement
Office of Enforcement

Intermittent Bulletin
Volume 1 Number 1

The purpose of the Superfund Accelerated Cleanup Model (SACM) is to make Superfund cleanups more timely and efficient. This will be accomplished through more focus on the front end of the process and better integration of all Superfund program components. The approach involves:

- A continuous process for assessing site-specific conditions and the need for action;
- Cross-program coordination of response planning;
- Prompt risk reduction through early action (removal or remedial);
- Appropriate cleanup of long-term environmental problems;
- Early public notification and participation; and
- Early initiation of enforcement activities.

SACM is a process change that should be considered for all Superfund activities. Implementation of this policy will be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Overall Superfund priorities remain the same: deal with the worst problems first; aggressively pursue enforcement; and involve the public and relevant State agencies at all appropriate stages of the work.

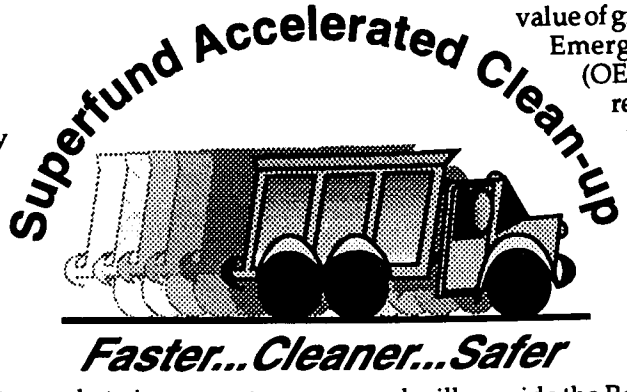
Status of Key SACM Program Management Issues - Interim Guidance

SACM raises a number of management-related issues which require reconsideration of the current ways Headquarters and Regions do business in budget planning and execution, reporting accomplishments, measuring performance, contracting, training, distribution of responsibility, and communications. This SACM Program Management Update will describe activities underway, planned, and recently completed to refocus Superfund's program management systems to support SACM implementation.

Regional Target (SCAP/STARS) Flexibility

To allow greater Regional flexibility in implementing Superfund site cleanups, SACM will require changes in the program's targets and measures under the Superfund Comprehensive Accomplishments Plan (SCAP) and the EPA Strategic Targeted Activities for Results System (STARS). FY93 program measures and targets were developed too early to incorporate key aspects of SACM. To prevent the FY93 STARS/SCAP measures from impeding the implementation of SACM, the Office of Policy Planning and Evaluation (OPPE) approved an Office of Solid Waste and Emergency Response (OSWER) request to allow the program maximum flexibility to grant target relief.

Granting FY93 target relief requires the Regions to provide, on a case-by-case basis, a good resource-based rationale which clearly shows work commensurate with the targeted measure. For example, the Office of Waste Programs Enforcement (OWPE) has proposed to grant SCAP/STARS target relief for Remedial Design/Remedial Action (RD/RA) settlement where the Region implements a non-time-critical removal with an estimated clean-up value of greater than $2 million. The Office of Emergency and Remedial Response (OERR) has proposed to grant target relief for remedial action starts where the Region conducts a large (>$2 million) non-time-critical removal instead.



Headquarters and the Regions have started developing new FY94 SCAP/STARS measures. These new measures will reflect the program changes brought by SACM, and will provide the Regions greater flexibility to clean up "NPL-caliber" sites more efficiently. Headquarters will transmit a proposal of draft FY94 measures to the Regions

for review in January 1993. This package will be a basis for discussion during the Program Management meeting in February 1993. The intention is to complete a comprehensive revision of STARS/SCAP targets and measures so that SACM implementation is fully supported while reducing the total number of Regional targets.

National SACM Evaluation Measures

Baseline national criteria need to be established to analyze and evaluate the success of SACM in improving the timeliness and cost-effectiveness of Superfund cleanup actions. Existing Superfund time duration trend measures will be reevaluated to ensure they effectively document the program's baseline and capture incremental changes. Development of Superfund risk reduction measures is critical to the program's ability to report achievements of early action and long-term site cleanups. Existing Superfund environmental indicators will be the starting point for measuring risk reduction consistently for both early actions and long-term responses. These measures will allow us to identify the extent to which SACM projects and overall program changes linked to SACM implementation are measuring up to the overall objectives of SACM. These measures may also identify areas in which the SACM approach can be refined as full implementation proceeds in 1994.

In addition, there is a need to reach agreement on overall measures of program performance that will communicate meaningful program results to Superfund's customers. Ongoing communication initiatives are being reexamined to consider any refinements that are called for with the SACM program changes.

Workload Model

The workload models were frozen in FY91 and FY92, and are frozen for FY93. With SACM, there is a need to determine the future relationship between FTE workload/pricing factors and future program goals. To date, Headquarters' efforts have focused on generating a consensus on revising/reopening the Superfund workload models.

The Regions provided input on whether the models should be reopened. Six Regions favored reopening/revising the models, two proposed that a new, less resource intensive mechanism for distributing FTE be pursued, and two opposed reopening/revising the models. The Regions also made two key recommendations: the models should not be reopened until FY95, and the family of Superfund models (program, enforcement, and Federal facilities) should be integrated.

In preparation for the February 1993 Program Management meeting, Headquarters plans to draft an approach for addressing the model changes based on the Regional and Headquarters correspondence to date. This proposal will be the point of departure for a break-out/discussion session during the meeting. The goal is to close the Program Management meeting with a joint approach to revising the Superfund workload models.

In addition, as was identified during the initial SACM planning meetings, it is critical that Regions evaluate their existing workforce skill mixes and identify cross-training and workforce development activities that are needed to effectively implement SACM.

Budget Flexibility

Beginning with the FY92 budget, Superfund monies have been apportioned between "Cleanup," "Enforcement," and "Support," with control subtotals for each category, and a narrow definition of cleanup. Regions need more flexibility in resource utilization than the budget process has provided to streamline and accelerate the cleanup of Superfund sites under SACM. One of the most critical areas involves the cleanup/support budget category. For FY94 OERR recast the Superfund Response budget, taking into account Sacm, in a way that considerably broadens the definition of cleanup.

Though the broader definition of cleanup was developed for the FY94 budget submission, it has been implemented in the FY93 enacted budget. A new advice of allowance (AOA) category has been added to the Cleanup category. The new AOA is site characterization; it includes all site assessment and remedial analysis (e.g., aerial photo, hydro-geo work) funding, and creates more Regional funding flexibility in these categories. This change significantly bolsters the Agency's ability to support the funding needs of the integrated assessments called for under SACM.

Greater flexibility among the various response activities is also needed. As an example, a Region that has planned a

remedial action at a given site and identifies an opportunity to more quickly reduce risks via an early action must have access to the funds required to implement this action. As such, the program has set aside $50 million of the remedial action budget to encourage increased risk reduction at NPL sites through early action activities. The FY92 removal budget was successfully increased to support SACM early action projects. As new opportunities for flexibility present themselves we will continue to work with the OSWER senior budget officer, comptroller, and Office of Management and Budget (OMB) to further increase budget flexibility.

Program Priorities

Implementation of SACM requires that overall Superfund program priorities be reexamined. The *Superfund Program Management Manual* and *Agency Operating Guidance* are the key documents that lay out these integrated program priorities. The FY93 *Program Management Manual* was revised to incorporate FY93 SACM implementation activities into overall program priorities.

SACM has modified the way we think of the Superfund universe. Traditionally, sites were distinguished primarily by whether or not they were listed on the National Priorities List (NPL). EPA typically conducts only emergency and time-critical responses at non-NPL sites. EPA does not intend to alter significantly its traditional approach to addressing non-NPL sites not expected to qualify for listing.

In contrast, the program will seek to invest resources earlier in NPL-caliber sites to conduct integrated assessments and early actions. For sites currently on the NPL, EPA intends to take advantage of opportunities to conduct early actions and accelerate long-term responses. Thus, it may be useful to think of the Superfund universe under SACM as consisting of (1) non-NPL sites which EPA screens and takes needed emergency/time-critical actions; (2) NPL caliber sites where EPA conducts integrated assessments and early actions; and, (3) NPL sites where EPA conducts the full range of Superfund responses.

Analysis is underway to assess what actions will be needed to achieve the Superfund program's long-term goal of 650 NPL construction completions by the year 2000. This analysis should help to determine the ability of EPA and State agencies to invest more resources into SACM integrated assessments and early actions at NPL-caliber sites without jeopardizing the NPL construction completion goal. Discussions during the February 1993 Program Management meeting will clarify program priorities and provide more specificity in appropriate resource investments and disinvestments to support SACM's implementation.

Federal Facilities

The Office of Federal Facilities Enforcement (OFFE) supports the focus on accelerated cleanup. OFFE, in conjunction with the Regions, has developed a draft guidance covering site assessment, impact of NPL listings, presumptive remedies, early actions vs. long-term actions, effect on existing Federal facility agreements, and Regional Decision Teams. The draft guidance is due out for final comment during the latter part of December and is expected to be final by February 1993.

OFFE has been working with the Superfund Revitalization Office (SRO) to communicate the Federal Facilities Accelerated Cleanup for Superfund (FFACS) policy and its Superfund impacts to the other Federal and State agencies.

OFFE will also be assessing the impacts of FFACS on SCAP/STARS targets and measures, workload model, and other program management issues.

Contracts

The Long-Term Contracting Strategy for Superfund (LTCS) was completed in September 1990. Implementation of the Strategy is ongoing. The Strategy analyzed the long-term contract needs of the Superfund Program and designed a portfolio of Superfund contracts to meet those needs over the next ten years.

Many of the underlying principles of SACM (e.g., increasing early action responses) were anticipated in activities under the LTCS (e.g., creating Emergency and Rapid Response Services (ERRS) contracts; combining site assessment and response technical assistance functions under a single Superfund Technical Assessment and Response Team (START) contract, etc.). Placement of new contracts has begun and will continue over the next several years. The LTCS itself and the scheduling of new procurements easily lend themselves to the phase-in of SACM.

Communicating Program Accomplishments

Considerable effort has been undertaken to communicate the goals/objectives, plans, and expectations for implementing SACM to other Federal and State agencies, other EPA Offices, critical external groups including Congress, environmental and trade groups, and others. We need to seek and incorporate feedback from these groups into our implementation efforts, and regularly communicate the program's progress to this audience.

◆ ◆ ◆

NOTICE: The policies set out in this fact sheet are not final Agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials should follow the guidance provided in this fact sheet, or may act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

Status of Key SACM Program Management Issues - Interim Guidance

This paper is one of five fact sheets published by EPA under publication number 9203.1-05I (Volume 1, Numbers 1-5) to describe the Superfund Accelerated Cleanup Model (SACM) and should be reviewed in conjunction with the other SACM fact sheets. Regions are encouraged to contact the following individuals for information on program management issues: Dave Evans (703) 603-8885 in OERR; Tai-ming Chang (703) 603-8965 in OWPE (SCAP/STARS and contracts); David Chamberlin (202) 260-4118 in OWPE (workload model and budget); or Rene Wynn (202) 260-3025 in OFFE for further clarification, suggestions or comments.

There are two other important sources of information: "SACM concept paper" (8/5/92) and *Guidance on Implementation of the Superfund Accelerated Cleanup Model Under CERCLA and the NCP* [OSWER Directive No. 9203.1-03 (7/7/92)]. General SACM information can be obtained by calling the Superfund Document Center (202) 260-9760.

United States Environmental Protection Agency | Office of Solid Waste and Emergency Response | Publication 9203.1-05I December 1992

EPA

Early Action and Long-Term Action Under SACM — Interim Guidance

Office of Emergency and Remedial Response
Office of Waste Programs Enforcement
Office of Enforcement

Intermittent Bulletin
Volume 1 Number 2

The purpose of the Superfund Accelerated Cleanup Model (SACM) is to make Superfund cleanups more timely and efficient. This will be accomplished through more focus on the front end of the process and better integration of all Superfund program components. The approach involves:

- A continuous process for assessing site-specific conditions and the need for action;
- Cross-program coordination of response planning;
- Prompt risk reduction through early action (removal or remedial);
- Appropriate cleanup of long-term environmental problems;
- Early public notification and participation; and
- Early initiation of enforcement activities.

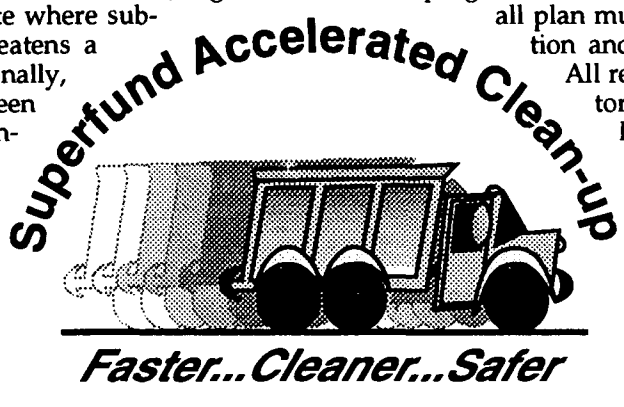
SACM is a process change that should be considered for all Superfund activities. Implementation of this policy will be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Overall Superfund priorities remain the same: deal with the worst problems first; aggressively pursue enforcement; and involve the public and relevant State agencies at all appropriate stages of the work.

Response Goals

The primary goals of an early action are to achieve prompt risk reduction and increase the efficiency of the overall site response. The main goal of a long-term action is to attain an effective, final site cleanup.

Prompt and Effective Risk Reduction

The only response authorities under CERCLA are removal and remedial. Any Superfund clean-up action that is taken must meet the requirements of one authority or the other. SACM encourages Regions to think creatively about the way these authorities may be used under the NCP to achieve prompt risk reduction (early action) or to conduct more complex, time-consuming remediations (long-term action). Take, for example, a site where substantial soil contamination threatens a drinking water aquifer. Traditionally, no response action might have been taken until the study of and planning for all the site work was complete. Under SACM, the Region should consider taking an early action to eliminate the soil problem through a non-time-critical removal or an early remedial response, as appropriate. Of course, if the soil poses a significant threat (e.g., human direct contact), an emergency or time-critical removal may be warranted. SACM is anticipated to result in an increase of early risk reduction activities at both National Priorities List (NPL) and "NPL-caliber" sites.



A Regional Decision Team (RDT) is responsible for determining/recommending the approach that will be taken at a site. The RDT should not be involved in response decisions for most emergency and some of the more time-critical removals, as these actions will be taken within the normal removal implementation process. However, the RDT should stay apprised of any emergency responses to factor information into future response plans. A primary consideration will always be what enforcement options are available. An emphasis on early actions will not jeopardize the program's commitment to enforcement first. The overall plan must also ensure good State coordination and suitable community involvement. All response actions must meet the statutory and regulatory requirements established in CERCLA and the NCP. In situations where a time-critical response is warranted, established removal mechanisms will continue to be used. In less urgent situations, non-time-critical removal actions or early remedial actions may be used to accomplish early risk reduction. Long-term actions using remedial authority are most appropriate

for sites requiring complex source control or surface or groundwater remediation.

Early Actions

Early actions are responses performed under removal or remedial authority to eliminate or reduce human health or environmental threats from the release, or threat of release, of hazardous substances, pollutants, or contaminants. These risk reduction activities can be conducted as emergency or time-critical removals, where quick response is necessary, or as non-time-critical removals or early remedial actions, in less urgent situations. These actions generally will take less than five years and will not always achieve complete site cleanup. The early action must meet all of the statutory and regulatory requirements of whichever authority is used (e.g., time and dollar limitations for removal actions and State assurances for remedial actions) and should generally not be started before the possibilities for enforcement are pursued, depending on the urgency of the situation. In some cases, more than one early action may be conducted during the course of work mitigating the threat at a site.

Time-critical actions will be taken when a removal site evaluation indicates that a response is appropriate and must be initiated within six months. Even when there is little time to get the response organized, Regions are always expected to consider enforcement options and to work with State and local officials in conducting the response. When a removal site evaluation indicates the need for an early response and a planning period of at least six months exists prior to the on-site initiation of the removal activities, a non-time-critical removal action is an option. A major change as a result of SACM will be that the number of non-time-critical removal actions (i.e., those where there is at least six months to plan) will likely increase because of the greater emphasis being given to early risk reduction. In order to ensure consistent use of non-time-critical authority, Regions must consult with Headquarters on potentially responsible party (PRP)-lead and Fund-lead non-time-critical removals costing over $5 million.

The NCP establishes some special requirements for non-time-critical removals, including the need to prepare an Engineering Evaluation/Cost Analysis (EE/CA). (See NCP Section 300.415 (m) (4) for additional requirements for non-time-critical removals.) An EE/CA is a study to identify and assess response alternatives. It is similar to, but less comprehensive than, what is done during the Remedial Investigation/Feasibility Study (RI/FS) phases of a remedial action. The EE/CA must go through a public notification and comment period to ensure all interested parties have an opportunity to have input to the proposed response. EPA is developing guidance on how to conduct a non-time-critical removal action.

Sometimes it may be more appropriate to undertake early actions with remedial authority. This may be likely for National Priorities List (NPL) sites already far down the remedial pipeline, enforcement lead sites where a consent decree may be appropriate, sites outside the scope (technical or financial) or authority of a removal action, or sites where State cost share, operation and maintenance or other assurances may be important considerations. These expedited remedial actions still require a Record of Decision (ROD). The work can be done through a variety of contracts discussed below under Response Selection Factors.

The RDT should ensure that an early action will be consistent with any long-term action that may eventually be required. This means that, especially for non-time-critical removals and early remedial actions, opportunities for treatment and permanence of remedy must be fully evaluated. Furthermore, potential differences that may exist between early action and long-term action data quality objectives and risk assessment goals must be reconciled at the outset. This can only happen if there is an emphasis placed on good program coordination, particularly among the participating Site Assessment Manager (SAM), On-Scene Coordinator (OSC), Remedial Project Manager (RPM), risk assessor, and enforcement/legal staff.

Long-Term Actions

Long-term response actions will usually be taken when there are conditions requiring extensive site characterization, where there are high costs, or where it will take more than approximately five years to complete the work. The majority of current NPL sites have some long-term response component. Most groundwater remediation efforts, many surface water remediation efforts, and most large-scale soil remediation efforts would be expected to take in excess of five years to complete or have complexities that preclude early action approaches, alone, from being used. In addition, remedies that require extensive operation and maintenance activities may fall into the long-term response category.

Identification of a remedial action as a long-term response does not mean that all of the work can or will be deferred. In many cases, even where there is no immediate threat, a quick start to the long-term response will be necessary to prevent site conditions from deteriorating (e.g., containment of a groundwater plume). In such circumstances, an early action is appropriate if the site meets the NCP requirements for a removal action or if an early remedial action can be initiated.

Response Selection Factors

Under SACM, the RDT has considerable flexibility for selecting/recommending the most appropriate approach for a site. Many factors will enter into its deliberations. The following is provided as a general overview of the differences between early and long-term actions.

Response Duration — A Region should be able to plan for, implement, and complete an early action in less than five years. Projects which will take more than five years should generally be done as long-term responses using remedial authority. If an action can be done quickly, but there are extensive operation and maintenance requirements to ensure the reliability of the response (regardless of the cost of the O&M), then early or long-term action under remedial authority should be considered. It is removal program policy that protracted and costly long-term post-removal site control is more appropri-

ately conducted by the affected State, local unit of government, or Potentially Responsible Party (PRP). In some cases, it may be done by the Superfund remedial program through a ROD. (For additional information on this removal policy see OSWER Directive 9360.2-02, *Policy on Management of Post-Removal Site Control*, December 3, 1990).

Cost — Since either removal or remedial authority may be used, there is no maximum dollar cap on the cost of an early action. Regions must always follow the existing rules for justifying and obtaining exemptions for removal actions estimated to cost over $2 million or exceed one year in duration. Also, Regions must consult with Headquarters prior to taking an early action which will require funding beyond what the Region has in its allowance. Regions are also strongly urged to discuss with Headquarters any situations which present particularly difficult issues or may be controversial with a State or other interested parties.

Enforcement — The "Enforcement First" policy will continue to be aggressively pursued under SACM. Regions must take appropriate enforcement steps consistent with removal and remedial policy and guidance. This includes, but is not limited to, conducting PRP searches, issuing notice letters, and negotiating with PRPs to conduct an action through the use of administrative orders (unilateral or consent) or consent decrees. The lead time available for non-time-critical removal actions should allow for comprehensive PRP searches and subsequent negotiations. For each site, an administrative record file must be established and made available to the public according to the schedule in the NCP.

Protection of Human Health and Environment — It is critical that removal actions conducted at non-NPL sites take into consideration the potential for future NPL listing to ensure consistent goals are achieved, where practicable. In cases where a non-time-critical removal action will be the only or last action taken to clean up an NPL or NPL-caliber site, the alternatives should be evaluated on their ability to achieve clean-up levels consistent with the remedial program and be protective of public health and the environment.

ARARs Compliance — Under the NCP, applicable or relevant and appropriate requirements (ARARs) must be met during removal actions to the extent practicable considering the exigencies of the situation. ARARs should be identified and factored into the non-time-critical removal process. Careful consideration of ARARs is a key to ensuring that early actions are consistent with possible long-term actions. (For additional information on ARARs compliance during removal actions, see the NCP section 300.415 (i) and *Superfund Removal Procedures, Guidance on the Consideration of ARARs During Removal Actions*, EPA/540/P-91/011, September 1991).

State Involvement — An early action must include appropriate State involvement. This means there needs to be continuing meaningful communication between a Region and each State in order to ensure the highest priority sites are being handled and there is no unnecessary duplication of effort. State ARARs must be met or waived for remedial actions and met to the extent practicable for removal actions. For non-time-critical removal actions costing over $2 million, Regions should request State participation in the response action (e.g., funding, in-kind services). Although a State cost share is not required under CERCLA section 104 (c) (3) for a removal action, the absence of a State's financial participation may limit the capacity of EPA to fully fund certain large dollar value non-time-critical removal actions. When a State does not participate in the conduct and financial support of a Fund-lead non-time-critical removal action, the RDT must evaluate whether the urgency is great enough to justify the loss of the State contribution. (Until such time as the authority for approving $2 million waivers at non-NPL sites is delegated to the Regions, Headquarters will have to be involved in this decision on a site-by-site basis.) Until a final policy is developed, Headquarters will generally support projects costing less than $5 million, as long as there is a good justification, even if a State is unable to participate. Headquarters also will consider projects costing over $5 million, but there will have to be a compelling case for undertaking the work in the absence of a State contribution. Response actions taken under remedial authority must comply with established procedures for State involvement, including securing State assurances for Fund-financed remedial actions. States may apply for a cooperative agreement to conduct non-time-critical removal actions (See 40 CFR Part 35 Subpart O, Cooperative Agreements and Superfund State Contracts for Superfund Response Actions).

Public Involvement — Early and frequent involvement of the public is pivotal to the success of expediting cleanups under SACM. All applicable community relations requirements in the NCP must be met at both removal and remedial actions. Site managers should make sure the public has an opportunity for meaningful input and that concerns are considered. As community interest and awareness increase, it may be appropriate to conduct additional community relations activities beyond those required in the NCP. For example, field personnel (OSCs, RPMs, SAMs, Community Relations Specialists) could make themselves available to the public, or meetings could be held in the community, during times outside those that are typical (e.g., prior to the initiation of or at the conclusion of on-site work).

Risk Management — Since removal and remedial action levels and clean-up levels may differ, when making risk management decisions for early actions it is important that potential long-term response actions be considered. For emergency and time-critical removal actions, Regional response personnel may utilize their Agency for Toxic Substances and Disease Registry (ATSDR) representative to obtain public health advice on potential action and clean-up levels in the form of a Public Health Advisory or a Health Consultation. In planning for non-time-critical removal actions, the Regional risk assessor should be consulted for similar advice. It is important that the RDT take into consideration the potential for NPL listing and subsequent remedial actions in order to achieve consistent risk goals, where

practical. For example, when performing a source removal to mitigate a direct contact threat at a site that also has a groundwater threat, it may be prudent to consider removal of additional soil contaminants consistent with projected groundwater clean-up goals. This could eliminate the need for additional source control actions during future response actions. Furthermore, it could reduce the ongoing release of contaminants to ground water, thereby reducing the time required to pump and treat ground water.

Contracting Mechanism — Available contracting vehicles and capacities will affect the strategy for conducting both early and long-term actions. Contract mechanisms potentially available are site-specific contracts (including the Pre-Qualified Offerors Procurement Strategy (PQOPS) contracts for incineration and solidification), the Emergency and Rapid Response Services (ERRS) contracts, the Alternative Remedial Contract Strategy (ARCS) contracts, the Technical Enforcement Services (TES) contracts, or accelerated contracting mechanisms accessible from the U.S. Army Corps of Engineers or the U.S. Bureau of Reclamation. The time and resources necessary to procure and administer these contracts, and the individual contract capacities, where applicable, are factors that must be considered when evaluating response options. A separate guidance short sheet is currently being developed on how to access the various contracts listed above.

Data Quality Objectives — When performing site assessment activities, appropriate data quality objectives should be used for decisions in support of removal and/or remedial actions. Historically, sampling investigations performed in support of removal actions and remedial actions have had dissimilar Quality Assurance/Quality Control (QA/QC) requirements and have focused on different media (i.e., wastes, ground water, soil, etc.). As an element of SACM implementation, the RDT should ensure that sampling activities are coordinated between removal and remedial actions. Site assessors may be able to take advantage of lower costs and quicker turn-around times if an adequate number of samples are also collected that will meet other anticipated data uses. Sample collection and analysis activities performed during removal actions should be coordinated such that the data generated will also support NPL listing and remedial actions, as appropriate.

Selecting a Response

A primary function of the RDT is to weigh what is known about a site and recommend/select those actions which address the threats in a timely and efficient manner. When time allows, the RDT with support of the designated site manager should consider all of the response options available, State and community concerns, and the need for future action before a response is initiated. The table below gives a conceptual outline of activities generally considered to be either early actions and/or long-term actions; however, it is not an exhaustive, definitive categorization.

◆ ◆ ◆

NOTICE: The policies set out in this fact sheet are not final Agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials should follow the guidance provided in this fact sheet, or may act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

Early Action	Either	Long-Term Action
Access Restrictions Source Removals/ Containment Surface Structures and Debris	Source Remediation Capping/Containment Permanent/Temporary Relocation NAPL Source Extraction Ground Water Plume Containment/Cleanup Alternate Water Supply Property Acquisition	Extensive Source Remediation Restoration: Groundwater Surface Water

Early Action and Long-Term Action Under SACM — Interim Guidance

This paper is one of five fact sheets published by EPA under publication number 9203.1-05I (Volume 1, Numbers 1-5) to describe the Superfund Accelerated Cleanup Model (SACM) and should be reviewed in conjunction with the other SACM fact sheets. Comments on this document should be directed to Mark Mjoness of the Emergency Response Division (703) 603-8770.

There are two other important sources of information: "SACM concept paper" (8/5/92) and *Guidance on Implementation of the Superfund Accelerated Cleanup Model Under CERCLA and the NCP* [OSWER Directive No. 9203.1-03 (7/7/92)]. General SACM information can be obtained by calling the Superfund Document Center (202) 260-9760.

United States Environmental Protection Agency
Office of Solid Waste and Emergency Response
Publication 9203.1-05I
December 1992

EPA

Enforcement Under SACM — Interim Guidance

Office of Emergency and Remedial Response
Office of Waste Programs Enforcement
Office of Enforcement

Intermittent Bulletin
Volume 1 Number 3

The purpose of the Superfund Accelerated Cleanup Model (SACM) is to make Superfund cleanups more timely and efficient. This will be accomplished through more focus on the front end of the process and better integration of all Superfund program components. The approach involves:

- A continuous process for assessing site-specific conditions and the need for action;
- Cross-program coordination of response planning;
- Prompt risk reduction through early action (removal or remedial);
- Appropriate cleanup of long-term environmental problems;
- Early public notification and participation; and
- Early initiation of enforcement activities.

SACM is a process change that should be considered for all Superfund activities. Implementation of this policy will be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Overall Superfund priorities remain the same: deal with the worst problems first; aggressively pursue enforcement; and involve the public and relevant State agencies at all appropriate stages of the work.

Overview

All actions taken under SACM must be consistent with CERCLA and the NCP, and each response selection must be adequately documented by an administrative record. EPA's enforcement first policy will continue under SACM. Potentially Responsible Parties (PRPs) are performing approximately 70 percent of the new work at NPL sites, and EPA remains committed to maximizing PRP involvement when applying the principles of SACM. Successful enforcement under SACM will require careful consideration of the nature and timing of PRP participation in particular.

Major enforcement areas affected by SACM include:

- The timing and methodology of PRP searches;
- The timing and content of negotiations with PRPs;
- Notice letters;
- Consultations for early actions;
- State involvement in enforcement;
- De minimis settlements;
- The availability and adequacy of administrative records; and
- Cost recovery and cost documentation.

This document highlights the need to maintain an enforcement first stance and discusses appropriate approaches for addressing the issues listed above.

Enforcement First

SACM does not change the Superfund program's emphasis on enforcement first. Coordination of site activities, including decisions and recommendations made by the Regional Decision Team (RDT), should anticipate the activities required for enforcement and ensure that they are carried out in a timely manner so that the response lead can be passed to PRPs as early as possible without delaying work at the site. EPA expects much of the early site assessment activities to be Fund-lead. However, response lead changes can occur at any of the following points in the process:

1. During the site assessment activities;

2. Prior to development of an Engineering Evaluation/ Cost Analysis (EE/CA);

3. Prior to a removal action;

4. Prior to a Remedial Investigation/Feasibility Study (RI/FS);

5. Prior to a Remedial Design/Remedial Action (RD/ RA); and

6. Prior to an RA contract solicitation, when funding the RA would have significant implications for the Fund and when no significant delay will occur.

EPA may take back the response lead from a PRP when the Agency deems a lead change would be appropriate to maintain response integrity or to protect human health and the environment.

The Region should identify the earliest point that the PRP search should begin and when negotiations should occur at each site.

PRP Searches: Timing and Methodology

Conducting adequate PRP searches can be crucial when preparing for negotiations and other enforcement activities. EPA does not anticipate that SACM will lead to changes in PRP searches for sites that require only emergency or time-critical removal actions. However, SACM's integrated site assessment process may lead to changes in PRP search methodology for non-time-critical removals and remedial actions for several reasons. First, because an RI may begin with or during a Site Investigation (SI), giving PRPs an opportunity to participate in the RI/FS will require that PRPs be identified earlier in the process than they are traditionally identified. Second, because the integrated site assessment is envisioned to require less time to complete than under the current process, there may be less time to develop liability information before a non-time-critical removal or remedial design begins. In addition, the greater emphasis on early risk reduction is expected to increase the use of non-time-critical removals to address some threats that previously were addressed with remedial actions. This will mean that there may be less time available before initiation of the response than in the past. For all of these reasons, there will be less time to conduct the PRP search and an increased emphasis on Regions' PRP search programs.

As a general rule, PRP search activities should begin as soon as possible after the Region decides that a response action is likely to be required at the site. PRP searches for some sites, such as multi-generator landfills, may require substantial effort. Early initiation of PRP search activities may be valuable at these sites to ensure adequate time for carrying out enforcement activities such as issuing general notice letters. Many other sites, however, may require no action beyond the initial site assessment activities. Expedited searches at these sites probably would be unnecessary and not cost-effective in most instances.

Once Regions have decided to begin PRP search activities, they are encouraged to adopt a **phased PRP search** approach that focuses first on establishing liability for PRPs about whom information is most readily available from site assessment activities and other available sources and then expands to address the remaining PRPs. If a core group of PRPs is identified before a discrete phase of a combined site assessment, negotiations may begin for the conduct of data collection associated with the site assessment activities (i.e., SI, RI, FS, etc.), even if the Region believes that additional PRPs may be found later. (Keep in mind that under the current policy, EPA has the lead responsibility for the site assessment activities - Preliminary Assessment (PA), SI, and Expanded Site Investigation (ESI). This should continue under SACM. PRPs may collect data, but final responsibility for interpreting that data in reports and making site decisions remains with EPA.) Similarly, negotiations for conducting a response action (i.e., RD/RA, removal, etc.) may be initiated with known PRPs even if all PRPs have not been identified. Once potential liability has been established for the core group, the PRP search can be extended to the remaining PRPs whose liability is more difficult or more time consuming to establish. Regions should share information with known PRPs as soon as possible to facilitate PRP organization.

In conducting PRP searches, Regions should coordinate and share information with other parts of the program and with States. Where the Regional office uncovers information on PRPs as part of an emergency or time-critical action, the RDT should make full use of the information from these activities to support later enforcement actions at the site. Similarly, site assessment should include PRP search activities such as the documentation of evidence that identifies owners, operators, and witnesses; the collection of drum label information; the identification of the location and condition of generator records; and other activities that may help establish liability or waste contribution. Site assessment activities might include a more detailed or targeted waste analysis to tie wastes to specific PRPs. Where available, Regions should make use of States' authority to search for and notice PRPs. Regions should

consider writing a generic PRP search work assignment that can be used for a number of searches, each of which is initiated with a separate technical direction memorandum. Coordination of the PRP search and other site activities will require close communication between the PRP search team and the RDT.

Negotiations: Timing and Content

Generally, it is anticipated that by using the phased PRP search approach and some of the additional techniques listed above, there will be sufficient time before initiation of non-time-critical removals and early remedial actions to allow those actions to be PRP-lead. For example, if the RDT decides, based on the early results of a PRP search, to initiate a Fund-lead EE/CA to support a non-time-critical removal action, the Region can continue PRP search activities during the EE/CA. Upon completion of the EE/CA, the RDT can decide, based on the supplemented PRP search, whether to seek PRP participation in the non-time-critical removal action. There may be even more time for the PRP search if it begins during an emergency or time-critical removal action, or during the SI.

With the exception of non-time critical removals, it may be appropriate in some cases to conduct additional PRP search activities before initiating a response action at a site if the Region believes that a more thorough PRP search will increase the likelihood of settlement (for example, by identifying more PRPs). Any delays in work should be brief. Establishing liability against additional PRPs may have other benefits such as similar treatment of all PRPs, reduced risk of contentious cost recovery actions, and conservation of the Fund.

The Region should identify logical points during the site assessment process when negotiations with PRPs should be considered. Some of the major criteria for this decision include:

1. PRPs:
   a. the availability of viable parties for which Regions have liability evidence;
   b. the degree to which the identified PRPs appear willing to settle; and
   c. the ability of PRPs to conduct response activities.

2. Site conditions and work to be performed:
   a. the risk posed by the site and the need to move forward with the response quickly;
   b. the probable sequence and nature of cleanup activities scheduled for the site; and
   c. the action to be negotiated.

3. Cost:
   a. if the activity to be negotiated is a removal costing more than $2 million, enforcement will minimize the need for waivers under CERCLA Section 104(c); and
   b. State matching funds for remedial actions at NPL sites are not required if PRPs conduct remedial actions under, for example, a consent decree or unilateral administrative order.

The following examples show some stages in the process where negotiations may be appropriate, and the possible scope of the negotiations:

1. The initial assessment indicates that there is a hazardous substance release at the site and there is a high probability that the site may be listed on the NPL. In addition, some removal action is needed. In this case, the Region could negotiate with PRPs to perform the site assessment data collection activities —including any necessary sampling— and the EE/CA or RI/FS. The Region could also include performance of the EPA-selected removal action in the negotiations. Keep in mind that although PRPs may conduct sampling and data collection, EPA retains responsibility for decision making.

2. The initial assessment indicates that a non-time-critical removal action should be taken. The Region could negotiate an order with the PRPs for the EE/CA, and in some cases could include the eventual non-time-critical removal action in the order.

3. The initial assessment shows that additional site evaluation is needed to determine if the site will require any action (early action or long-term action). In most cases EPA should continue performing the site assessment activities while continuing the PRP search. Negotiations should occur after a determination is made that a time-critical removal, an EE/CA, or an RI/FS is needed.

Under all of these scenarios EPA retains the responsibility to perform the risk assessment for removal and remedial actions, to prepare Hazard Ranking System scoring packages, and to make all response selection decisions.

Notice Letters

CERCLA and current EPA guidance encourage the use of special notice letters (or issuance of waivers) for RI/FSs and RD/RAs. When Regions anticipate conducting a com-

bined SI/RI/FS, they should use special notice letters if they believe that such letters could facilitate a settlement.

Regions also should use special notice letters for non-time-critical removals when they believe that such letters could facilitate a settlement.

A special notice letter initiates a moratorium on response activity and enforcement. Such moratoria generally last 90-120 days (if EPA receives a good faith offer from the PRPs within the first 60 days of the moratorium). Therefore, when Regions expect that they will be issuing special notice letters, the letters should be sent out far enough in advance of the planned activities so that work is not significantly delayed. Certain investigatory and planning activities set forth in Section 104(b) of CERCLA should occur during the negotiation moratoria.

Consultations for Early Actions

In implementing SACM, careful site and case selection is important. When identifying appropriate sites for non-time-critical removal actions, Regions may wish to consult with Headquarters.

Regions must follow the existing rules for justifying and obtaining exemptions for removal actions estimated to cost over $2 million or exceed one year in duration. Also, Regions must consult with Headquarters prior to taking an early action which will require funding beyond what the Region has in its allowance.

When a State does not participate in the conduct and financial support of a Fund-lead non-time-critical removal action, the RDT must evaluate whether the urgency and need are great enough to justify the loss of the State contribution. (Until such time as the authority for approving $2 million waivers at non-NPL sites is delegated to the Regions, Headquarters will have to be involved in this decision on a site-by-site basis.) Until a final policy is developed, Headquarters will generally support projects costing less than $5 million, as long as there is a good justification, even if a State is unable to participate. Headquarters also will consider projects costing over $5 million, but there will have to be a compelling case for undertaking the work in the absence of a State contribution.

In order to ensure consistent use of non-time-critical authority, Regions must consult with Headquarters on PRP- or Fund-lead non-time-critical removals costing over $5 million.

If an early action under SACM presents particularly difficult issues or may be controversial with States, PRPs, communities or other interested parties, the Regions are strongly encouraged to consult with the appropriate Regional coordinator at Headquarters. Regional staff responsible for public involvement may be consulted to assist in gauging the level of public interest.

State Involvement in Enforcement

State capabilities and authorities differ. Each Region should work with each of its States to develop a general strategy for enforcement and the manner in which the State will be involved. Actions planned under State enforcement-lead must be under documents enforceable under State law and overseen by the States. Sites may be designated as State-lead if the Region agrees and the State has the capability and authority under State law to undertake the action. States should be kept informed of negotiations concerning site assessment activities and early actions to the same extent that they are notified and kept informed currently under CERCLA Section 121(f) and the NCP.

Late-identified PRPs

When the decision is made to take either a Fund-lead or PRP-lead action, and the Region expects that additional PRPs will be identified subsequent to initiation of the action, the Region should take steps to provide some type of constructive notice to PRPs who may be found at a later date (that is, "late identified" PRPs). For example, Regions could send letters providing information about a site to prospective PRPs. Regions might also place an announcement of site activity or of availability of the administrative record file in a major local newspaper and the *Federal Register*. (A *Federal Register* notice generally would be more effective than newspapers for reaching PRPs located outside the area of the site and the newspaper circulation area.)

De Minimis Settlements

SACM is expected to produce more site information earlier than in the past, allowing Regions to develop de minimis settlements earlier. In some cases, Regions will pursue PRP-lead early actions before developing the waste-in lists and volumetric rankings normally needed for de minimis settlements, making de minimis settlements at that time less likely. In such cases, de minimis settlements may still be developed prior to a subsequent early action decision (Action Memorandum, Record Of Decision) when the required information becomes available. Regions should follow EPA guidance on early de minimis settlements (including OSWER Directive Number 9834.7-1C) and strive to develop such settlements as early in the process as possible.

The Department of Justice

SACM does not change the delegations under CERCLA. The Department of Justice (DOJ) should be consulted for enforcement strategy planning when judicial enforcement of an administrative order is likely, consent decrees are planned, and certain de minimis and cost recovery activities are contemplated (e.g., DOJ must concur on de minimis and cost recovery settlements where the total response costs for a site exceed $500,000).

Administrative Records

The administrative record, required under CERCLA, contains the documents that form the basis for the selection of a response action and serves as the basis for judicial review of EPA's response action. High quality administrative records are necessary to ensure the defensibility of response decisions made under the expedited procedures of SACM and are particularly important for SACM projects that may set precedents. Regions must establish an administrative record for each response action in accordance with CERCLA, the NCP, and OSWER administrative record guidance (OSWER Directive Number 9833.3A-1). All decisions concerning the selection of the appropriate response action should be documented in the administrative record file in accordance with EPA guidance. In particular, the administrative record should include documentation showing that the action taken is not inconsistent with the NCP.

CERCLA also requires that EPA provide the public (including PRPs) with an opportunity to participate in the development of the administrative record. According to the NCP Subpart I, the administrative record file for a non-time-critical removal must be available for public inspection when the EE/CA is made available for public comment. For time-critical removals, the administrative record file must be made available within 60 days after the start of on-site removal activity. The administrative record file for the selection of a remedial action must first be made available when the RI/FS begins. When the Region is conducting a combined SI/RI/FS, the administrative record file must be made available at the point when work characteristic of an RI/FS begins. In order for the record to be ready for public inspection when the RI/FS begins, Regions should begin compiling the administrative record file when the RDT decides a combined SI/RI/FS is needed.

Cost Recovery and Cost Documentation

SACM may increase the number of cost recovery actions subject to the removal statute of limitations (SOL) because more sites may be addressed with non-time-critical removals than in the past. The SOL for removals is three years from a removal completion, unless a remedial action is initiated within three years of the completed removal. Early remedial actions would fall under the remedial SOL which is six years after initiation of physical on-site construction of the remedial action.

Documentation of cost and work performed needs to be compiled whenever cost recovery actions are taken. EPA's past costs should be sought in all negotiations with PRPs for response work at SACM sites. The cost recovery rule is expected to assist in defining documentation requirements.

◆ ◆ ◆

NOTICE: The policies set out in this fact sheet are not final Agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials should follow the guidance provided in this fact sheet, or may act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

Enforcement Under the Superfund Accelerated Cleanup Model (SACM) - Interim Guidance

This paper is one of five fact sheets published by EPA under publication number 9203.1-05I (Volume 1, Numbers 1-5) to describe the Superfund Accelerated Cleanup Model (SACM) and should be reviewed in conjunction with the other SACM fact sheets. Comments on this document should be directed to Maria Bywater of the Office of Waste Programs Enforcement (703) 603-8929.

There are two other important sources of information: "SACM concept paper" (8/5/92) and *Guidance on Implementation of the Superfund Accelerated Cleanup Model Under CERCLA and the NCP* [OSWER Directive No. 9203.1-03 (7/7/92)]. General SACM information can be obtained by calling the Superfund Document Center (202) 260-9760.

United States Environmental Protection Agency | Office of Solid Waste and Emergency Response | Publication 9203.1-05I December 1992

EPA

Assessing Sites Under SACM — Interim Guidance

Office of Emergency and Remedial Response
Office of Waste Programs Enforcement
Office of Enforcement

Intermittent Bulletin
Volume 1 Number 4

The purpose of the Superfund Accelerated Cleanup Model (SACM) is to make Superfund cleanups more timely and efficient. This will be accomplished through more focus on the front end of the process and better integration of all Superfund program components. The approach involves:

- A continuous process for assessing site-specific conditions and the need for action;
- Cross-program coordination of response planning;
- Prompt risk reduction through early action (removal or remedial);
- Appropriate cleanup of long-term environmental problems;
- Early public notification and participation; and
- Early initiation of enforcement activities.

SACM is a process change that should be considered for all Superfund activities. Implementation of this policy will be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Overall Superfund priorities remain the same: deal with the worst problems first; aggressively pursue enforcement; and involve the public and relevant State agencies at all appropriate stages of the work.

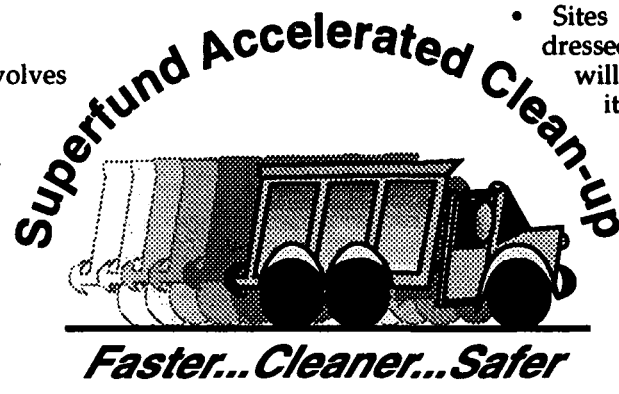
SACM Assessment

Assessing sites under SACM involves the following principles:

- The process integrates traditional site assessment functions to allow continuous assessment for high priority sites that proceeds until all necessary data are collected to screen sites or support any needed response actions. SACM goals include combining activities to support both removal and remedial assessments. The continuing assessment process supports both National Priorities List (NPL) listing and remedial actions.

- Response action decisions should be initiated as soon as evidence indicates that early action is warranted. Any appropriate enforcement actions should be initiated as well. Assessment work can continue concurrently with early actions.

- Assessment procedures are coordinated to ensure that data collected in one phase of assessment support other assessment, enforcement, and response activities.



- Sites posing the greatest threat are addressed first ("Worst Sites First"). All sites will be reviewed to determine site priority for continued assessment.

Superfund assessment under SACM integrates previously separate removal and remedial assessments into a single process. Under SACM the assessment processes operate concurrently; specific functions need not be completed before other functions can start. Integrating assessment functions will cut several years from the assessment and cleanup process. Sites receive the appropriate level of effort needed to make assessment decisions, and sites needing no further action under Superfund are designated as Site Evaluation Accomplished (SEA). Sites assigned an SEA designation are referred to the States or other regulatory authorities for further action, as appropriate. Whenever possible, Superfund assessment activities are conducted concurrently with response and enforcement actions. The basic principles of SACM assessment are built upon the need to eliminate redundancy and expedite the Superfund process.

The SACM assessment approach can screen out a large percentage of potential releases early in the process. Where

it is clear no CERCLA response action will be taken, the assessment is completed by documenting the basis of the decision through an SEA designation. If further data indicate that the site is likely to have a Hazard Ranking System (HRS) score of 28.5 or more, EPA (or the State, under a cooperative agreement) may initiate a Remedial Investigation (RI). Additional data needed to prepare the HRS package can be collected while the RI is underway. RI data can be used to support removal action decisions and HRS scores, as well as remedial action decisions. The Region must include documentation required by the NCP for moving from one phase of assessment to another.

The Regional Decision Team (RDT) is an integral part of the site assessment process. Under SACM, coordination among removal, remedial, and State agency personnel is critical, and fostering that coordination is a role of the RDT. At the point where assessment information is adequate for decision-making, the RDT convenes to consider options for sites. The RDT can then direct or recommend a response action (e.g. time critical removal), decide to collect additional data, develop an enforcement strategy, and recommend placing the site on the NPL.

The States have always played a critical role in site assessment, performing most of the Preliminary Assessments (PA) and many of the Site Investigations (SI). EPA expects that role to continue under SACM. The EPA Regions and the States will coordinate to develop two-way communication concerning Federal and State response actions. EPA Regions are responsible for working out the appropriate arrangement with each of their States.

Coordination of assessment and enforcement activities is also critical. When it is feasible, the site assessment reports should identify owners, operators, and witnesses, with the appropriate documentation. Likewise, they should describe generator records and other useful information, such as drum labels. The decision to start a Potentially Responsible Party (PRP) search requires a balancing of resources. Although many sites (i.e., those designated SEA) will not need PRP searches, rapid action under SACM may require that PRP searches begin early in the process for some sites. As a general rule, PRP search activities should begin as soon as possible after the decision is made that a response action is likely to be required at the site.

Experience has shown that early and frequent communication with local communities can enhance site response, and this will be particularly true under SACM. Where appropriate, EPA and the State should take the initiative in commencing community involvement early in the assessment process. The Agency is developing guidance for community involvement activities at the assessment stage of the process.

Consistent with the NCP, listing sites on the NPL will continue to be a prerequisite to spending remedial action funds to clean up sites. The HRS will continue to be the primary basis for selecting sites for the NPL. SACM does not change the role of the HRS and NPL, and in general SACM should not significantly affect the number of sites that EPA will place on the NPL.

Expediting Cleanup Through SACM Assessment

SACM promotes performing risk assessment and RI activities earlier in the assessment process for a site where data indicate remedial action will be needed. Once a decision has been made to conduct the RI in conjunction with HRS data collection, integrated assessment data collection and sampling efforts continue to:

- Obtain documentation for the HRS; and
- Characterize site sources, extent of contamination, and risks to determine appropriate cleanup actions.

Consistent data collection approaches and appropriate data quality objectives that serve the needs of early action, long-term action, and NPL listing will promote efficiency in Superfund. A single team should collect samples and select analytical methods to serve multiple program needs. A coordinated site mobilization eliminates duplication of tasks and reduces sampling and analyses, saving both time and money.

The scoping and planning of the RI should begin as soon as EPA determines that the site will most likely require remedial action. The RDT may decide to begin an RI at any time during the assessment process. Once RI activities begin, assessment activities continue concurrently to collect sufficient information to determine the site score for possible listing on the NPL. While a site might be designated as SEA during that process, the RDT should select sites for early RIs only where it appears the site will meet the criteria for the NPL. Removal actions can, of course, be taken at any time in the assessment process, and the RDT should consider an early action at any site selected for an early RI.

One key to the success of the SACM approach is to select the appropriate sites for starting the RI prior to HRS scoring. It is important to avoid committing high levels of resources to sites that may not be eligible for the NPL. Some site conditions, in particular where human exposure or contamination of a sensitive environment has been found, clearly indicate that the HRS score will be above 28.5 and that a response action will be needed (see Figure 1). These "NPL-caliber" sites will be a focus of integrated assessments and early actions.

Even where a site appears to warrant an early RI, there is some possibility that the site will not score high enough to be placed on the NPL. EPA recognizes this and is willing to proceed with the RI early in the assessment process to encourage faster response actions at the majority of cases. Moreover, sites with the conditions described above will often meet the criteria for removal actions anyway, and the RI will provide valuable information for any response that is ultimately selected.

FIGURE 1: Examples of NPL-caliber Sites

- Public drinking water supplies are contaminated with a hazardous substance.
- Private wells are contaminated with a hazardous substance above a health-based benchmark.
- Soils on school, daycare center, or residential properties are contaminated by a hazardous substance above background levels.
- A hazardous substance is detected above background in an offsite air release in a populated area.
- A highly toxic substance known to bioaccumulate (e.g., PCBs, mercury, dioxin, PAHs) is discharged into surface waters.
- Sensitive environments (e.g., critical habitats for endangered species) are contaminated with a hazardous substance above background levels.

In addition to the risk related conditions, the RDT should consider the following when evaluating whether an RI should be initiated at a site:

- Some sites may be excluded from Superfund consideration under policy, regulatory, or legislative restrictions. For instance, EPA policy is to defer from the NPL those facilities subject to corrective action authorities of the Resource Conservation and Recovery Act (RCRA)(see 54 FR 41000, October 4, 1989).
- At sites where receptors have been exposed to hazardous substances, but the source or sources are unknown, the decision to perform an early RI may depend on the nature of the potential sources. For example, if a RCRA facility is a potential source, an early RI should generally not be performed based on the RCRA deferral policy. However, in most other cases, an early RI may contribute to identifying the source or sources of contamination.

The PRP search and other enforcement actions should indicate whether ensuing site response will be Fund- or PRP-lead, under the policy that enforcement first is the preferred strategy. While the above serve as general guidelines, the RDT will need to evaluate individual cases to determine whether to proceed with an early RI and whether enforcement or the Fund offers the more appropriate course of action.

◆ ◆ ◆

NOTICE: The policies set out in this fact sheet are not final Agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials should follow the guidance provided in this fact sheet, or may act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

Assessing Sites Under SACM — Interim Guidance

This paper is one of five fact sheets published by EPA under publication number 9203.1-05I (Volume 1, Numbers 1-5) to describe the Superfund Accelerated Cleanup Model (SACM) and should be reviewed in conjunction with the other SACM fact sheets. Comments on this document should be directed to Janet Grubbs of the Hazardous Site Evaluation Division (703) 603-8833.

There are two other important sources of information: "SACM concept paper" (8/5/92) and *Guidance on Implementation of the Superfund Accelerated Cleanup Model Under CERCLA and the NCP* [OSWER Directive No. 9203.1-03 (7/7/92)]. General SACM information can be obtained by calling the Superfund Document Center (202) 260-9760.

United States Environmental Protection Agency | Office of Solid Waste and Emergency Response | Publication 9203.1-05I December 1992

EPA

SACM Regional Decision Teams — Interim Guidance

Office of Emergency and Remedial Response
Office of Waste Programs Enforcement
Office of Enforcement

Intermittent Bulletin
Volume 1 Number 5

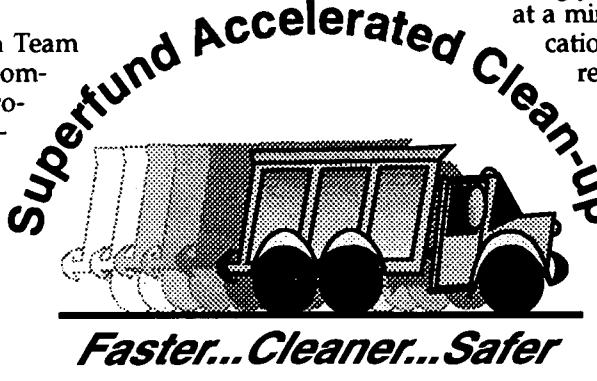
The purpose of the Superfund Accelerated Cleanup Model (SACM) is to make Superfund cleanups more timely and efficient. This will be accomplished through more focus on the front end of the process and better integration of all Superfund program components. The approach involves:

- A continuous process for assessing site-specific conditions and the need for action;
- Cross-program coordination of response planning;
- Prompt risk reduction through early action (removal or remedial);
- Appropriate cleanup of long-term environmental problems;
- Early public notification and participation; and
- Early initiation of enforcement activities.

SACM is a process change that should be considered for all Superfund activities. Implementation of this policy will be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Overall Superfund priorities remain the same: deal with the worst problems first; aggressively pursue enforcement; and involve the public and relevant State agencies at all appropriate stages of the work.

Regional Decision Team Goal

The goal of the Regional Decision Team (RDT) is effective coordination, communication, and integration of program authority, expertise, resources, and tools to solve problems that arise at Superfund sites. Close coordination of the site assessment and response processes and initiation of any appropriate enforcement responses through the RDT mechanism will enable the Superfund Program to achieve risk reduction and site response goals quickly and efficiently.



Implementation

The RDT concept offers a new approach for determining Superfund response actions. The RDT provides for broad participation across all program elements while placing emphasis on teamwork and Regional and staff empowerment for developing response strategies and solving site problems. The RDT also has the responsibility for ensuring that response actions are fully consistent with the requirements contained in CERCLA and the NCP. Regions have flexibility in designing an RDT process that meets their specific needs, recognizing that a specific formal structure is not as critical as the overall goal of program integration.

Accordingly, Regions should design a process that, at a minimum, ensures effective communication across the removal, site assessment, remedial, enforcement, and community involvement program elements, and provides for the full and active participation of the Office of Regional Counsel. Further, Regions should ensure that the RDT works in concert with the Region's management structure, and with those designated site managers (e.g., Site Assessment Managers (SAMs), On-Scene Coordinators (OSCs), Remedial Project Managers (RPMs), and/or individual site management teams) that are responsible for handling the site on a day-to-day basis. In addition, the Region should discuss and establish with the State a process for State involvement during the SACM decision-making process.

Each Region should develop guidelines for the operation of the RDT so that it will function as smoothly and effectively as possible, while facilitating the involvement of representatives from various offices, both within and outside the Regional office. In addition, it will be important for the Regional divisions to fully plan out what they hope to achieve with their RDT, and initiate early dialogue to establish roles and responsibilities throughout the re-

sponse process. The following list of possible start-up actions should be considered by each Region:

1. Assign roles and responsibilities of selected members;
2. Establish coordination process with the States;
3. Establish decision criteria for determining response decisions, including response authority;
4. Identify the universe of Superfund sites within the Region and the plan of action for integrated assessment of such sites;
5. Develop approach for designation of response priorities;
6. Establish a process for quick initiation of potentially responsible party (PRP) search activities and enforcement efforts; and
7. Develop process for early coordination with Headquarters, and support agencies/organizations (e.g., Agency for Toxic Substances and Disease Registry (ATSDR), Department of Justice (DOJ)) providing technical/legal assistance to the RDT.

RDT Operations

The RDT is empowered by the Region to make those decisions that are delegated to its level. This body serves as a tool to ensure early and effective communication and should provide input for the traditional line decision-making authorities. The RDT should provide policy and strategic direction to designated site managers (SAM, OSC and RPM), to ensure the integration of program authorities (Fund-lead vs. PRP-lead, removal vs. remedial), resources, and tools to solve site-specific problems. (The RDT is not responsible for true emergencies, which the removal program will continue to handle.) The RDT should convene either routinely or on an as-needed basis, to receive status reports and strategy options from the site manager(s), establish response priorities, and provide both advice and direction on appropriate response actions (e.g., scope and sequence of projects). RDT involvement in a site response should follow the process or recommend actions as described below:

1. Early Assessment Stage:

Following receipt of initial site information (e.g., Preliminary Assessment/Removal Assessment or Site Inspection), the RDT would convene to assess optional next steps for all sites where a Site Evaluation Accomplished (SEA) decision is not appropriate. Specific options available to the RDT include:

◆ **Recommend/Develop an Early Action Response Plan**

- **Emergency/Time-Critical Removal Action** — situations where prompt action is required to mitigate a risk to human health or the environment. RDT involvement initiating these actions may be limited based on the time available; however, the RDT should participate in evaluating the response after the action has been taken and identifying the next steps required to complete the response, if any. Time-critical actions, which must be initiated quickly to protect human health and the environment, should be reserved for situations where an action must be initiated quickly to protect human health and the environment.

- **Non-Time-Critical Removal Action** — less urgent action intended to stabilize the site and/or eliminate contamination. The RDT should assess the opportunity for response and initiate the preparation of the Engineering Evaluation/Cost Analysis (EE/CA) and Action Memo with prior public comment (and for Fund-financed removals, the required justification for exemptions to exceed statutory removal time and dollar limits). Also, the RDT should determine whether proposed actions are time-critical or non-time-critical, or whether the site requires remedial action (including expedited National Priorities List (NPL) evaluation if Fund-financed remedial action is expected).

- **Early/Interim Remedial Action** — actions at NPL sites intended to achieve site remediation and risk reduction. The RDT should initiate a Remedial Inves-

tigation/Feasibility Study (RI/FS) leading to an early or interim action Record of Decision (ROD).

◆ **Direct The Acquisition of Additional Data**

- The RDT may require that additional data be collected prior to deciding on a course of action for a site. If at any point in the process of collecting site information, the site appears to be an NPL-caliber site, the RDT should consider initiating RI activities, and, where appropriate, early actions.

◆ **NPL Listing**

- Where sufficient data exist to list a site and where remedial response actions are envisioned, the listing process should be concurrent with early response action or expanded Site Investigation/Remedial Investigation (SI/RI) data collection. Fund-lead early remedial actions can only be conducted after the site is on the NPL.

◆ **Enforcement Strategy**

- Initiate early PRP search activities to aggressively pursue enforcement first and define the role of PRPs in response action and/or data collection. Negotiations with PRPs should be conducted as appropriate during the assessment process as well as for removal or remedial response actions. The RDT will have input on the selection of the appropriate enforcement document (Administrative Order on Consent/Unilateral Administrative Order (AOC/UAO), consent decree, etc.) and maintaining coordination with Headquarters and DOJ, where appropriate, regarding the enforcement strategy.

2. Advanced Assessment Stage:

As additional site information is received (e.g., after or during either the early action, or the focused or expanded SI/RI part of the integrated site assessment), the RDT should assess next steps for sites warranting additional response action. Specific options would be similar to those identified above. At this stage, response actions generally would fall in the non-time-critical removal, early remedial action category, or in the long-term action category. The RDT should direct the initiation of the appropriate support actions. Also, the RDT should assess the relative priorities of the proposed response actions and allocate resources accordingly, if delegated this authority. If not, recommendations should be made if additional resources are necessary.

3. Public Participation/Community Involvement:

The success of SACM will depend to a large degree on public acceptance of our actions at the site level. Maintaining a strong focus on the local community (*our primary "customer"*) will contribute immensely to this success. The administrative record file, a primary vehicle for public participation, must be made available to the public for inspection according to the schedule set out in the NCP Subpart I. This is a necessary component for cost recovery.

The decisions that the RDT makes about the future of a site will be important to the local community. The RDT, therefore, should take community concerns into account when making decisions on a site response strategy. The community should be promptly informed once those decisions are made. Community relations planning should be included in the site response strategy as an equal element with technical and legal considerations, including due consideration of CERCLA and NCP requirements.

Using non-time-critical removal actions, as compared to time-critical removal actions, will allow prior public comment, and are encouraged where time allows.

4. Follow-up:

The Regions should develop protocols defining the role of the RDT in monitoring and evaluating ongoing response and assessment activities.

Organization

As described above, the RDT is designed to ensure effective communication and coordination across the Superfund program. The RDT provides policy advice and strategic direction to site mangers and sets priorities to promote efficient site response. RDT generally consists of manage-

ment level personnel, as opposed to the make-up of site management teams. The RDT generally will develop response strategies for sites (e.g., the decision to take a "removal" versus a "remedial" action). Individuals authorized to sign Action Memos or RODs may be on the RDT. The RDT will not have responsibility for the day-to-day site project management, which will remain with OSCs/RPMs and site-management teams.

Regions have flexibility in developing an organizational structure for the RDT, and may decide to develop multiple RDTs. In Regions where all program elements report to a single manager, (e.g., Deputy Director for Superfund), the RDT might consist of the line managers reporting to that manager, along with a representative from the Office of Regional Counsel. In Regions where program responsibilities are dispersed, a more formal arrangement would be appropriate. In these instances, a typical model for start-up might include the following senior level participants:

- Senior Manager
- Remedial Person
- Removal Person
- Site Assessment Person
- Cost Recovery Person
- Risk Assessor/Biological Technical Assistance Group (BTAG) Representative
- Attorney from Office of Regional Counsel
- Community Involvement Coordinator

The Regions should involve the States as often as possible in an appropriate manner. Typically, States would be consulted in concert with RDT deliberations or in preparation for an RDT meeting. The RDT also should meet periodically or on an as needed basis, with support agencies and organizations (i.e., ATSDR, Corps of Engineers, Office of Research and Development, BTAG, PRP search, contract management staff, DOJ, etc.) to receive advice and input on response options or enforcement actions as appropriate.

Headquarters Consultation

Regions must consult with Headquarters prior to taking an action which will require funding beyond what the Region has in its allowance. Regions must also consult before committing to a PRP-lead or Fund-lead non-time-critical action costing over $5 million. Regions must always follow the existing rules for justifying and obtaining exemptions for removal actions estimated to cost over $2 million or exceed one year duration. Regions are also strongly urged to discuss with Headquarters any situations which present particularly difficult issues or may be controversial with State or other interested parties.

◆ ◆ ◆

NOTICE: The policies set out in this fact sheet are not final Agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials should follow the guidance provided in this fact sheet, or may act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

SACM Regional Decision Teams - Interim Guidance

This paper is one of five fact sheets published by EPA under publication number 9203.1-05I (Volume 1, Numbers 1-5) to describe the Superfund Accelerated Cleanup Model (SACM) and should be reviewed in conjunction with the other SACM fact sheets. Comments on this document should be directed to Robin Anderson of the Hazardous Site Control Division (703) 603-8747.

There are two other important sources of information: "SACM concept paper" (8/5/92) and *Guidance on Implementation of the Superfund Accelerated Cleanup Model Under CERCLA and the NCP* [OSWER Directive No. 9203.1-03 (7/7/92)]. General SACM information can be obtained by calling the Superfund Document Center (202) 260-9760.

IV. PRP SEARCH, NOTIFICATION AND INFORMATION EXCHANGE

Chapter IV
PRP Search, Notification, and Information Exchange

Section I. Description of Activity 1

Introduction 1

Objectives of PRP Searches 1

Liability 2

Strict Liability 2

Joint and Several Liability 3

Limited Defenses Under CERCLA 3

General Approach to PRP Searches 3

Baseline Search Tasks 3

Specialized Search Tasks 4

Managing the Search Process 5

PRP Search Reports 5

Key Players in the PRP Search Process 5

RPMs 5

Regional Attorneys 6

Civil Investigators or PRP Search Staff 6

Contractors 6

Section II. Procedures and Interactions 8

A. Initiating a Preliminary PRP Search 8

B. Develop PRP Search Plan 8

C. Baseline Search 8

D. §104(e) Letters Issued to Owners/Operators and Follow-up 9

Statutory Authority 10

General Content of 104(e) Letters 10

Municipal Sites 11

Insurance Information 12

Written Response and Due Date 12

E. Compile, Organize, and Analyze 104(e) Letter Responses 12

Responding to FOIA Requests 13

Enforcement Strategy for Non-Compliance With Information Requests 13

Administrative Order to Compel Compliance 13

Judicial Action to Compel Compliance 13

F. Baseline Search Progress Review 14

G. Prepare Baseline Report 14

H. Management Review 14

I. 104(e) Letters to Generators and Transporters 15
Municipal Sites 15
J. Specialized Investigative Tasks 16
Administrative Subpoenas 16
K. Interim-Final Report 16
L. Interim Report Follow-up 17
M. General Notice Letters (GNLs) 17
N. Developing Information on PRP Waste Contribution 19
O. On-going Information Exchange 19

Section III. Planning and Reporting Requirements 21
A. Planning 21
B. Budget 21
C. Reporting Requirements 21

Section IV. Potential Problems/Resolutions 23
A. Timing 23
B. Clarifying Roles and Responsibilities 23
C. Examples of Enforcing Information Requests 23
The Cannons Sites 23
American Thio-Chem Site 24

Section V. References 25
Policy 25
Guidance 25
Manuals 25
Training 25
Contacts 26

Section VI. Activities Checklist 27

Appendix
PRP Search Plan A1

Chapter IV
PRP Search, Notification, and Information Exchange

Section I. Description of Activity

Introduction

The Potentially Responsible Party (PRP) search process is an investigation into the parties associated with a Superfund site who may be liable for the costs of remedying the release of hazardous substances. Effective PRP searches are fundamental to the Agency's enforcement strategies of obtaining increased PRP involvement in conducting response activities and cost recovery. For remedial sites, searches should be completed within one to one and one-half calendar years of the site's proposed listing on the NPL. In general, a PRP search should be initiated concurrently with the listing site inspection, or at the latest, by the initiation of the listing process.

Exhibit IV-1 presents an overview of the flow of activity during the PRP search.

Objectives of PRP Searches

PRP searches accomplish several primary objectives:

- Identify potentially responsible parties who may be liable under section 107 of CERCLA and provide the information needed to issue general notice letters
- Provide information for special notice letters and information release
- Provide names of PRPs to ensure that the Agency provides constructive notice on the proposed plan (for remedial actions)
- Provide names of PRPs to be included in community relations mailing lists
- Provide information to assess possible full settlements for litigation risks in light of the PRPs' liability and ability to pay response costs, partial settlements for the appropriateness of the settlement case remaining against the non-settlors, and statutory factors (e.g., *de minimis*, mixed funding, divisible harm)
- Provide information on disposal for the remedial investigation (RI)
- Provide information on whether wastes are RCRA hazardous wastes for assessing potential ARARs
- Gather waste contribution information in order to compile waste-in lists
- Document evidence that may be used in cost recovery (section 107), CERCLA section 106 actions, access actions and for liens.

Additionally, the Agency has found that a thorough PRP search enhances EPA's success in negotiating with PRPs to conduct the response activity under EPA supervision.

The extent of the initial search activities is determined by the nature of site activities. At time-critical removal sites, the initial search is limited in scope. In contrast, the initial search activities at long-term remedial sites generally are extensive. Although there may be differences in the scope of initial search activities at removal and remedial sites, the objectives of all PRP searches, as stated previously, are the same. This chapter is oriented primarily to PRP searches at remedial sites. At removal sites, evidence of liability must be obtained for section 106 Unilateral Administrative Orders and cost recovery. While the elements of a search at a removal are often similar to a search in connection with the remedial process, time constraints and the level of expenditures may warrant a modification of the approach. PRP searches at removal sites are discussed in Chapter II, Removals.

Early identification of PRPs enables the Agency to promptly issue General Notice Letters (GNLs). The early issuance of GNLs facilitates the formation of PRP steering commit-

tees. Also, provision of waste-in information facilitates the PRPs' agreement on allocations of costs. These negotiation techniques are discussed in detail in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

When PRPs are identified and notified early in the remedial process, there is a greater possibility that they will decide to undertake appropriate cleanup actions. Also, identified PRPs may help EPA locate other PRPs to share the costs of the response activity. PRP involvement in the clean-up is generally in the interest of both EPA, which can thereby conserve Fund money, and the PRPs, who avoid the transactional costs of litigation.

RPMs should utilize the expertise of Regional attorneys, civil investigators, and outside contractors to conduct the numerous tasks of the actual search. In theory, PRP searches should begin as early as possible. However, as a practical matter, the exigencies of the site determine the scope of the initial search activities. Search activities should continue during the response action until all reasonably identifiable parties have been located.

Liability

CERCLA imposes liability where there is a release or threatened release of hazardous substances from a facility. Liability is imposed on four classes of persons, these classes are defined as:

- Present owners and/or operators
  - Present owners or operators of a facility are liable even if they did not contaminate the property. This may include lessors.
- Past owners and/or operators
  - Past owners or operators are liable if they owned or operated the facility at the time hazardous substances were disposed of. Under CERCLA, disposal is not limited to direct deposits.
- Persons who arranged for either the treatment and/or disposal or the transportation for treatment or disposal of hazardous substances (e.g., generators). In the context of a generator, several elements must be proven to establish liability:
  - The generator disposed of or made arrangements for the disposal or treatment of hazardous substances
  - The generator's hazardous substances or hazardous substances of the same type were present at the site
  - An actual or threatened release of the generator's or any other hazardous substance occurred at the facility. This clarifies the general element of a release at multigenerator sites.

  RPMs should note that this class of parties includes parties such as waste brokers. The fact that the defendant can show that it arranged to have its waste dumped elsewhere is irrelevant so long as the Agency can prove that the waste was disposed of at the facility.
- Persons who accept hazardous substances for transport to disposal or treatment facilities that they selected (e.g., transporters).

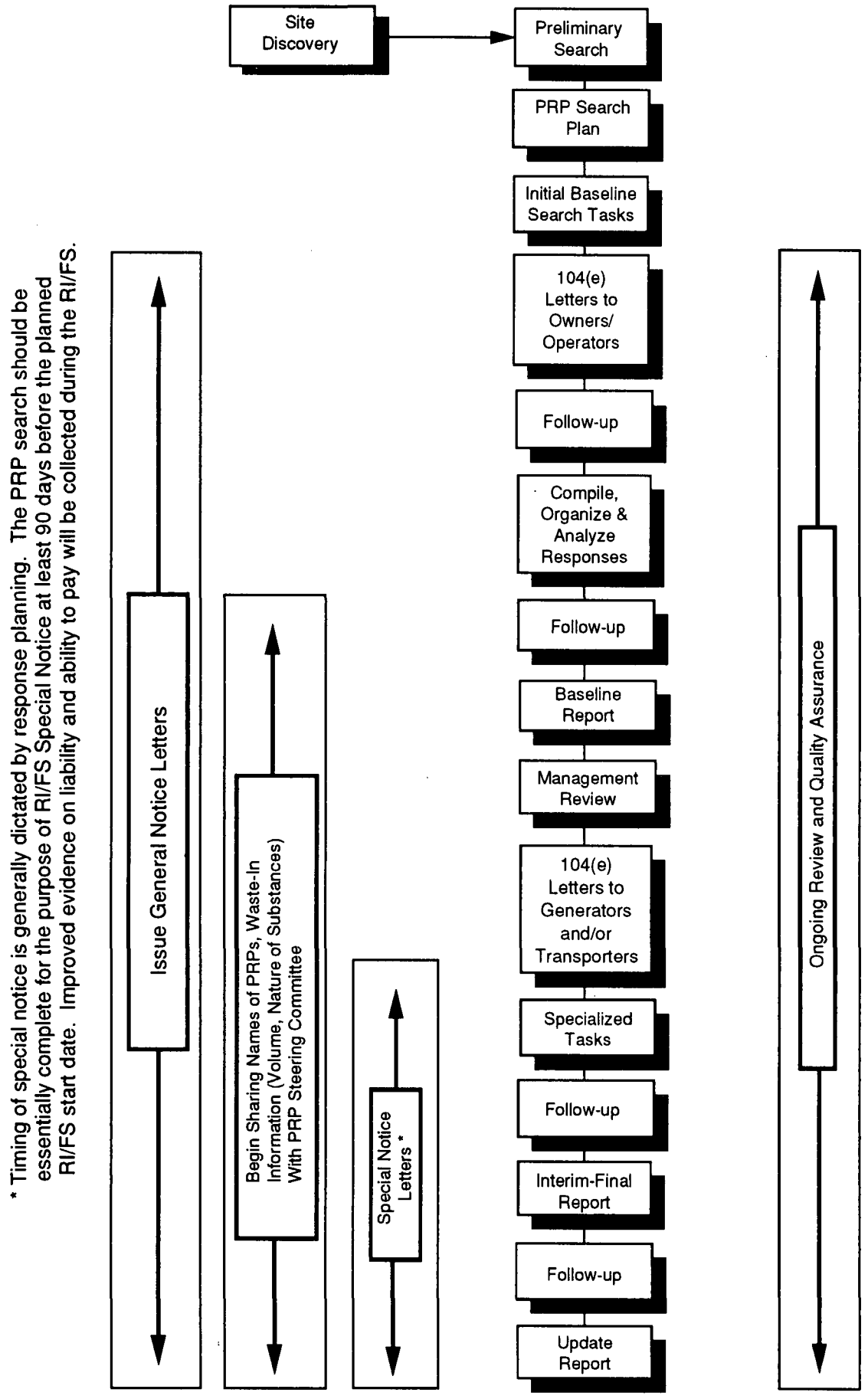
Additionally, in cost recovery actions, the release or threatened release of a hazardous substance from a facility must cause the Agency to incur response costs.

Strict Liability

If a person falls within one of the four classes of PRPs, section 107(a) of CERCLA imposes strict liability for all response costs incurred at the site. This means that PRPs are liable even if: the problems caused by the hazardous substance release were unforeseeable; the PRP acted in good faith; state-of-the-art management practices were used at the time the materials were disposed of. One of the most significant aspects of CERCLA is that PRPs are liable for both their past and present waste management practices.

Exhibit IV-1

Overview Of The PRP Search Process



Joint and Several Liability

When more than one PRP is involved at a site and the harm is indivisible, such as in the case of intermingled drums, commingled wastes and contaminated soil or ground water, the court may impose joint and several liability upon all parties involved at the site. If joint and several liability is imposed on the PRPs, each PRP involved at the site will be individually liable for the cost of the entire response action. EPA could collect all the costs from one PRP. The PRP who paid the costs would then have to seek contribution from the non-paying PRPs. However, EPA's practice is to attempt to identify and notify the universe of PRPs and to issue orders and litigate against the largest manageable number of parties.

Limited Defenses Under CERCLA

Under CERCLA, a PRP's liability is subject only to the very limited defenses listed in section 107(b). Thus, a PRP, who would otherwise be liable under section 107(a) of CERCLA, can escape liability only by proving that the release or threatened release was caused solely by:

- an act of God
- an act of war
- in certain narrow circumstances, by a third party who was not an employee and who did not have a contractual relationship with the PRP.

In cases where the PRP raises the defense that the release was caused by a third party, the PRP will be excused from liability only if the PRP exercised due care and took precautions against foreseeable acts or omissions of these third parties. Also, under section 101(35)(B) of CERCLA, a person who acquired property after the hazardous substance was disposed, may raise the innocent landowner defense. To assert this defense, the defendant must prove, among other things, that he/she acquired the property without knowing, or having reason to know, that hazardous substances were disposed of in, on, or at the property. A private party may also avoid liability by establishing that it is a subsequent owner of the land who acquired the site through bequest or inheritance, and that the party exercised due care and took precautions against the foreseeable acts and omissions of the third party.

General Approach to PRP Searches

Because the RPM is responsible for managing the response action at the site, it is vital for the RPM to understand the Agency's policies and procedures for completing a thorough PRP search.

It is important to develop a PRP search plan. In general, the initial stage of a PRP search will involve ten baseline tasks. These are followed by development of a baseline report, which summarizes the findings. Depending on the complexity of the site, one or more of 18 additional specialized tasks also may be required. Once these are complete, an interim-final report is issued.

Baseline Search Tasks

For reasons of budget, timing, and standardizing site management, EPA has selected a core group of tasks to be conducted at most sites. There are 10 core search tasks that should be executed during most "baseline" searches. The tasks are intended to provide the Agency with basic information about the site and the PRPs' involvement at the site. At some sites, such as manufacturing facilities where off-site generators were not involved, the search strategy may be tailored to fewer than 10 tasks. In most cases, the level of effort (LOE) for completing these 10 tasks ranges from 200 to 500 hours, depending on site complexity. These tasks are set forth below:

- Agency record collection and file review
- Records compilation
- Interviews with government officials
- Title search

- History of operations at the site
- PRP name and address update
- PRP status/PRP history
- Financial status
- CERCLA 104(e)/RCRA 3007 letters
- Report preparation.

Depending on the circumstances, it also may be appropriate to include specialized tasks such as aerial photographs and compliance history evaluations in the baseline tasks.

Specialized Search Tasks

At complex sites with multiple generators, the completion of these 10 basic investigative tasks does not conclude the PRP search. To conduct a thorough search, the search strategy should provide for additional tasks and document the rationale. Site-specific data gathering problems are addressed by using a combination of the 18 additional (i.e., "specialized") search tasks, in conjunction with the 10 basic tasks. The 18 specialized tasks provide further avenues of investigation that assist the RPM and contractors in uncovering additional information about the PRPs and information about their involvement at the site. While many of the specialized tasks may be useful in some PRP searches, the same tasks may not be useful in other searches. RPMs should consult with an attorney in the Office of Regional Counsel and one of the Regions' civil investigators. RPMs should exercise professional discretion in determining which of the 18 additional tasks are most applicable to a particular site.

The 18 additional search tasks are divided into four general categories:

- Sources of Information
  - PRP File Review
  - Private Citizen/PRP Interview
  - Field Survey
  - Site Sampling
  - Site Enforcement Tracking System
  - Aerial Photographs
  - CERCLA Subpoena Authority
  - Private Investigator
- Waste Stream Analysis
  - Industrial Surveys
  - Process Chemistry Analysis
  - Waste Stream Inventory
- Databases
  - Transactional Databases
  - Correspondence Tracking Databases
  - Document Inventory Databases
- Additional Miscellaneous Task
  - Compliance History
  - Financial Assessment
  - Generator Ranking
  - Property Appraisal.

Managing the Search Process

The RPM must ensure that all appropriate basic and additional investigative tasks are conducted at the site. Prior to initiating these tasks, RPMs should formulate a search plan designed to address site-specific situations (refer to the appendix at the end of this chapter) using a combination of the 10 baseline tasks with one or more of the 18 specialized tasks. The RPM should tailor the PRP search plan to the circumstances of each case instead of attempting to pigeon-hole the circumstances of each site into a fixed search format.

In conducting the search tasks, the RPM should manage the tasks in an iterative process; they are not discrete and insular tasks that are performed only once. When both the required and the necessary specialized tasks have been completed, an interim-final report will be issued. The investigation should continue after the interim-final report to follow-up on leads and to fill any data gaps. The PRP search process is described in greater detail in section II of this chapter.

PRP Search Reports

A PRP search report for a site should present the facts pertaining to the PRPs' liability. Generally at least two reports will be issued for every search (except in simple owner-operator situations where the baseline report will usually suffice): the baseline report and the interim-final report. Usually, the baseline report is issued after the basic investigative tasks have revealed information identifying site owners and/or operators. The interim-final report is issued after appropriate additional search tasks have been conducted identifying generators and transporters. Both reports should follow the format shown in Exhibit IV-2.

References

OSWER Directive 9834.6, *Potentially Responsible Party Search Manual* (August 1987).

OSWER Directive 9834.3-2a, "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 29, 1989).

Key Players in the PRP Search Process

In addition to the RPMs, there are three key groups of players involved in the PRP search process: Regional attorneys, Civil Investigators (CIs) or PRP search staff, and contractors. To achieve "early and better" PRP searches, RPMs must effectively coordinate their efforts with these other key players.

RPMs

The RPM or CI, depending on the Region, is responsible for managing the PRP search process. He/She oversees the search process and, for functions performed by contractors, provides direction to the contractor. RPMs and CIs generally perform the following functions:

- Establish the PRP search priorities
- Establish the PRP search strategy
- Manage contractor-conducted search tasks
  - Define the scope of the search, in consultation with ORC
  - Develop PRP search work assignments, budgets, and schedules
  - Review baseline, interim, and final contractor deliverables, in consultation with ORC
  - Introduce the contractor to State and local government contacts
- Issue information request letters
- Ensure follow-up on all tasks necessary for conducting a complete search
- Implement quality assurance/quality control procedures to ensure the accuracy of data gathered during the search

- Ensure that adequate information is gathered for special notice letters (including the universe of PRPs and waste-in information)
- Ensure that adequate evidence of a PRPs' liability and ability to pay is gathered
- Ensure that the universe of PRPs, viewed broadly, is included in community relations mailing lists.

RPMs must coordinate with ORC to determine whether the collected information contains sufficient information to establish the PRPs' liability.

Regional Attorneys

The ORC attorneys are responsible for directing case development for each site. Attorneys' level of involvement will vary from Region to Region. Some attorneys participate actively in the search activities. Other attorneys do not get involved in the process until the review of either the baseline or interim final PRP search report. RPMs should seek to involve the attorneys as early as possible to ensure that the search produces sufficient credible evidence of the PRPs' liability. For example, RPMs should consult with the attorneys about developing information request letters and devising appropriate PRP interview questions. Regional counsel also should be consulted on the scope of the PRP search.

In general, the attorneys can provide advice to the RPM on CERCLA-specific legal issues, which may have some bearing on the case in general and the search in particular. For example, the attorneys can provide advice about complex liability issues such as corporate successors, and possible legal defenses, such as the innocent landowner defense.

Civil Investigators or PRP Search Staff

There are at least two CIs in each Region. CIs have responsibilities in developing a Regional PRP search strategy that is consistent with EPA policy and overseeing the implementation of this strategy. The CIs bring a variety of skills to their position and can provide the Agency with investigative skills that are often lacking in the contractor community.

The CI's role in enforcement activitie varies from Region to Region. In general, CIs may:

- Manage the PRP search, including overseeing the contractor's work assignment
- Provide investigative assistance to RPMs and the PRP search work assignment manager.

CIs usually conduct crucial interviews or follow up investigation leads that were left open by the contractors. For example, CIs can be used when information is needed about additional parcels of land and there is insufficient time to assign a contractor to the task.

CIs can also assist the RPM in completing the PRP search in the following time-critical situations:

- Statute of limitations is about to expire
- Contractor has provided incomplete information.

In some Regions, CIs play an active role in enforcement activities. For example, CIs conduct preliminary field work and help define the scope of a contractor's work assignment. The CI's role may vary depending on the site, and RPMs should coordinate with Regional management to ensure the proper utilization of CI resources.

Contractors

The Agency secures the assistance of contractors to conduct activities, such as most baseline search tasks. By actively managing and overseeing the processes involved in the PRP search, the RPMs and CIs should ensure that the contractor produces a quality product. Contractors must not be assigned subtasks that are inherently governmental functions, such as deciding who is a liable/viable PRP, who receives a section 104(e) letter, or whether a response is adequate.

Exhibit IV-2(1)

PRP Search Report Format

I PRP Search Report

A. Concise site history including nature of activities during specified time periods and any sampling results

B. Identification of owners and operators

1. Describe the time periods during which the person owned and/or operated the facility and state whether the disposal of hazardous substances occurred during that period

2. Describe title search results

3. Provide copies of complex title analysis narrative plus a title tree and graphs representing title search results

4. Describe activities of various operators

5. Provide current addresses and corporate status

C. Identification of persons who arranged for either the treatment or disposal of the hazardous substances, e.g., generators

A. Summarize each of the PRPs' name and current address, volume and nature of the substances, and volumetric ranking. (This is for special notice and for identification of early *de minimis* candidates.)

B. Develop, by PRP, as necessary, a complete waste-in list with information on the period when the substances were sent to the site, volume and identity of the hazardous substances (40 C.F.R. section 304.2) and EPA's determination of any RCRA waste codes. Ensure that there are references to underlying documents and transporters in this list or in the evidence sheets in Appendix B. (This is a summary of evidence and is for internal purposes; it is based on the evidence sheets.)

D. Identification of transporters

1. Summarize each of the transporters' name and current address, volume and nature of the substances, and volumetric ranking. (This is for special notice.)

2. Develop by each transporter, as necessary, a list that

- links transporters to generators (and therefore hazardous substances) to the site, and
- addresses whether the transporter selected the site.

E. For owners, operators, generators and transporters, assess the identified PRPs' financial viability (if in question). Identify entities that have been or are in bankruptcy, corporations that are defunct (no longer in business but not dissolved), corporations that are dissolved, and individuals who have died, with a description of the status of their estate. Describe facts in corporate successorships, parent-subsidiary, and possible invidual liability situations.

Exhibit IV-2(2)

PRP Search Report Format

F. Information for Special Sites

1. Municipal landfills
2. Area wide groundwater contamination or stream contamination where sources are not clear (relies on special surveys and the RI)
3. Remote sites (company with multiple sites and transshipments)
4. Special financial and capacity issues

G. Other possible PRPs (list PRPs not included in parts B,C, or D above due to substantial evidentiary issues).

I. Search Report Appendix

A. Evidence evaluation sheet for each owner, operator, generator, and transporter (include source of information evaluation)

B. Summary of all work conducted during the PRP search

1. Document investigatory steps during the search, including "dead end" leads
2. Identify persons interviewed and corporations and individuals to whom information request letters were sent. In addition, identify each response to the information request letters and any follow-up actions that were taken. Clearly identify the dates of each of the above activities.
3. Identify leads that could still be pursued

C. Supporting Documentation; assign document control numbers consistent with information management plan

1. Title document
2. Government documents
3. Interview summaries
4. Manifests, contracts, invoices, etc. (if numerous, assign document control numbers)
5. Section 104(e) letters and responses (keep separate for purposes of FOIA, CBI, etc.)
6. Other

D. Location of supporting files.

Various contracts are available to provide PRP search support. Until FY 94, the Technical Enforcement Support (TES) contracts allow specific tasks to be assigned to contractors on an as-needed basis. After the TES contracts expire in FY 94, the regionally based Enforcement Support Services (ESS) contracts will replace them. Also available in 1994, will be the Superfund Technical Assessment and Response Team (START) contracts. In addition, Regions can use 8(a) contracts for PRP search support. Contract Evidence Audit Team (CEAT) contractors may conduct PRP search audits and provide results to the CI as well as conduct EPA seminars on PRP searches.

For any work assignment costing more than $25,000, an independent government cost estimate (IGE) must be developed by the Work Assignment Manager. For more information on IGEs, see Chapter XVI, Case Budget/Contracts.

The tasks assigned to the contractor should be well defined. The RPM and the CI should confirm that the contractor has performed the assigned tasks. One way of doing this is to require the contractor to submit interim deliverables (e.g., baseline report, status reports). By reviewing these deliverables, the RPM can confirm that the contractor has not lost sight of the defined search objectives.

Section II. Procedures and Interactions

This section is designed to assist the RPM in improving the timeliness and quality of the PRP search process. Throughout the PRP search process, RPMs must work toward the objective of locating and obtaining relevant information on the liability of the PRPs.

Exhibit IV-3 provides a flowchart of the specific activities discussed in this section. A PRP search activities checklist is included in section VI of this chapter.

A. Initiating a Preliminary PRP Search

A preliminary PRP search is conducted when a site is discovered. The object of a preliminary search is to determine obvious PRPs who may be available to conduct appropriate response activity at the site. Once the site has undergone a listing inspection, the RPM must conduct a more extensive PRP search to locate other PRPs.

B. Develop PRP Search Plan

An effective enforcement strategy requires the early and continuous involvement of all key players, including RPMs and civil investigators. The development of a search plan consists of four activities:

- Develop a plan for managing the PRP search, including the baseline search, issuance of information request letters, additional search tasks, investigative strategy for identifying generators and transporters, follow-ups, and evidence reviews. See the appendix and section VI of this chapter for an outline of possible considerations. In developing the plan, the RPM should:
  - avoid the use of generic work plans without considering the site specific circumstances
  - work with Regional attorneys to tailor the strategy so that it accurately reflects the actual search requirements of the particular site
  - take into account RCRA land ban information needs
- Identify special problems that require specialized strategies, such as:
  - municipal landfills
  - battery recycling sites
  - area-wide ground-water contamination or stream contamination where sources are not clear. The RPM should set forth special survey needs and special investigatory tasks for the remedial investigation
  - remote sites, such as situations in which one company owned or operated multiple sites and transshipped wastes between them
- Develop a detailed resource plan for EPA staff
- Develop a detailed scope of work for contractors that includes phased deliverables followed by RPM review and specification of the professional skill mix to be applied by the contractor.

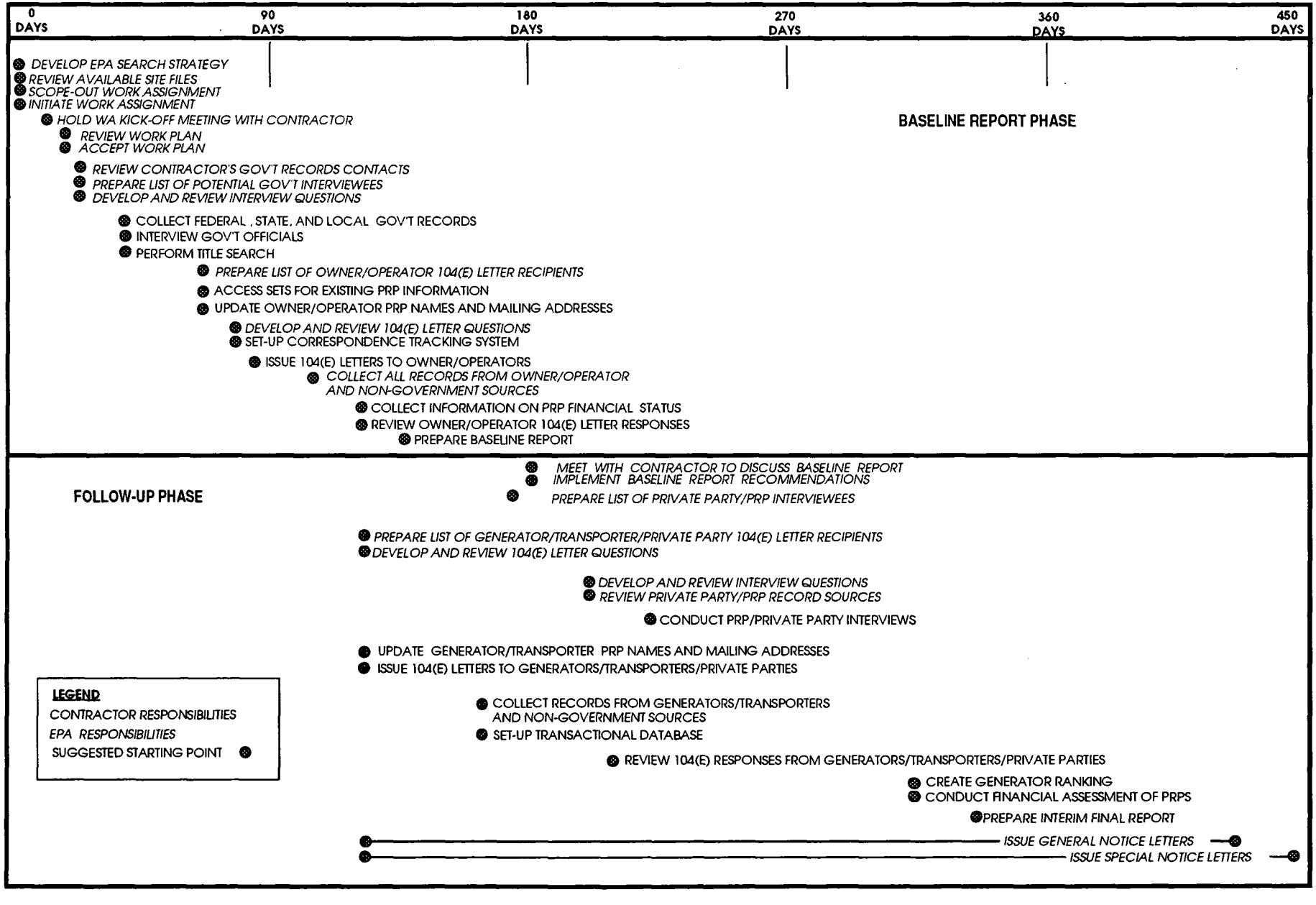
After the PRP search plan has been formulated, the RPM may begin to implement and manage the process of collecting and analyzing relevant information about the PRPs. The contents of a PRP search plan are discussed in Chapter III, Comprehensive Site Planning and are included as an appendix to this chapter.

C. Baseline Search

Referring to the flowchart presented in Exhibit IV-3, the preparation of a PRP search baseline report may, in a typical case, require six months. The initial steps include developing a PRP search plan, formulating the work assignment, and reviewing and accepting the contractor's work plan.

Exhibit IV-3

PRP Search Process Flow Chart



By structuring the execution of the 10 baseline tasks into inter-related and iterative steps, the RPM can effectively exercise his/her oversight authority. RPMs should note that this iterative approach is merely one of many logical methods for organizing search activities. Other approaches may be more appropriate in different situations.

A suggested structure for conducting the baseline tasks prior to the preparation of the baseline reports is presented below:

- Conduct preliminary records review (simultaneously)
  - conduct title search to identify past and present site owners and possibly to identify adjacent property owners for possible future reference
  - identify government agencies that may have relevant information and collect documents
  - conduct interviews with government officials to develop information on site operations that may not be recorded in documents
  - update and verify names and addresses
- Issue information request letters as authorized by section 104(e) of CERCLA and section 3007(a) of RCRA to owners and operators.
- Perform records compilation, organization, analysis, and follow-up
  - collect and copy all owner/operator records
  - organize files into a useful and easily accessible source of information
  - develop a concise history of the site and operations at the site; review for information gaps
  - obtain additional information about PRPs and their status, including financial status
  - develop a list of other possible PRPs, identifying generators and transporters
  - verify PRP names and addresses. Ensure that any name changes, mergers, acquisitions, and dissolutions are accurately recorded
    - .. for persons and unincorporated entities, this information should include association with other PRPs and involvement at the site
    - .. for corporations, this information should include the date of incorporation, whether corporation currently exists, names of parent or successor corporations. ORC should review all PRPs where liability is based on a parent/subsidiary or successor theory
  - follow up on all leads to ensure a comprehensive identification of PRPs involved at the site. Confirm that sufficient evidence has been collected to establish the elements of liability for each owner/operator.
- Prepare the baseline report. Refer to the format in Exhibit IV-2.

D. Section 104(e) Letters Issued to Owners/Operators and Follow-up

The initial steps in the baseline search, discussed above, will produce basic information about the PRPs at a site. The information will identify owners and operators and provide leads on generators. As part of the baseline search, the owner or operator should be required to provide information that is as complete as possible under the circumstances. Later, as part of the interim final report regarding generators and transporters, it will be necessary to follow up on time frames, amounts, and the hazardous substances in the materials.

The contractor can develop an initial list of people who should receive information request letters, however, the RPM, in consultation with Regional counsel, is ultimately responsible for selecting the recipients. Information request letters may be issued in one of two ways: as separate letters or as part of the general notice letter.

Typically, the information requested during the baseline search includes details concerning the waste operations and waste management practices of the past and present owners/operators. It also seeks particular information on the time period of disposal or treatment and on generators (PRPs, including transporters that may have contributed hazardous substances to the site), transporters, waste volumes, and the nature of the hazardous substances at and sent to the facility. The RPM should specifically request information on the RCRA designation of all the waste the PRP sent to the facility or site. The facts obtained from the recipients also will assist Regional management to identify additional PRPs, issue additional information requests, and conduct interviews.

The facts collected from the information request letter will help the RPM determine whether the respondent should receive a general notice letter. For this reason, the Agency has articulated a preference for using information request letters to gather the initial facts about PRPs.

Statutory Authority

Section 104(e) of CERCLA and section 3007(a) of RCRA authorize the Agency to issue information request letters. RCRA section 3007 includes sites with hazardous wastes as defined in section 1004(s) which is not limited to Subtitle C. The authority to conduct information gathering activities has been delegated to the AA, OSWER, and the AA, OE by Delegation 14-6, "Inspections, Sampling, and Information Gathering, Subpoenas and Entry for Response" (September 13, 1987). Under Delegation 14-6, the authority of Regional Administrators to issue compliance orders or subpoenas is limited by the requirement that they must first consult with AA, OE (or his/her designee). On November 19, 1987, AA, OE redelegated this consultation authority to the Associate Enforcement Counsel for Waste.

General Content of 104(e) Letters

The information request letter should identify the site and briefly describe it. The letter should cite EPA's statutory authority under section 104(e) of CERCLA and section 3007(a) of RCRA to request the information. The 104(e) letter should indicate that the Agency plans to vigorously enforce its information gathering authority. RPMs should specifically refer to the enforcement provisions in section 104(e)(5) of CERCLA. RPMs also should give a general statement setting forth the purpose of the request and its relationship to the overall case.

Recipients should be requested to provide information as indicated in OSWER Directive 9834.4A, "Final Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 1988). This includes the following categories of information:

- Owners
  - names and addresses, including updated information
  - periods of ownership and type of ownership
  - corporate successorship
  - site history during ownership including conditions, operations, disposal (including disposal and the substances disposed of during periods of past owners and operators of the facility [for liability], and information on amounts, nature, and locations for the remedial investigation)
  - information on whether wastes were RCRA hazardous wastes (for evaluation of potential ARARs)
  - lessors/lessees and the above information about them
  - information related to defenses; *de minimis* status
  - for small businesses, individuals with control

- Operators
  - similar to above, except operation
  - individuals in charge
- Financial Information
  - ability to pay
  - insurance (PRP's comprehensive general liability and environmental impairment insurance)
- Information that the owner/operator has concerning wastes at the site and possible generators/transporters
  - records of names/addresses, quantities, substances
  - any arrangements made with regard to materials sent to or from the site
- A description of information the owner/operator has on the total and each shipment of materials transported to, stored, treated, or disposed at the site including
  - dates of shipment or disposal
  - quantity and nature of the materials
  - hazardous substances (as defined in 40 CFR section 302.4) contained in the materials. This includes information on the waste and waste stream as possible RCRA hazardous wastes to enable the Agency to determine if RCRA may be an ARAR (e.g., land ban)
  - updated names and addresses
- Documents
  - copies of all business records relating to activities at the site, including customer lists, gate logs, ledgers, invoices, accounts receivable and back up income records for taxes, correspondence
- Names and addresses of individuals who have information regarding the above
- Any data or studies resulting from environmental investigations at the site
- A description of the files searched by the person (or corporation) in response to the Agency's request
- Special information for particular classes of sites, such as municipal landfills
- A description of the recipient's personal or corporate relationship to the site.

The response must be in writing. The letter also should indicate that the PRPs are responsible for informing the Agency if any information contained in the PRPs' response is confidential and subject to protection under section 104(e) of CERCLA.

The Agency's statutory information-gathering authority is not limited to collecting facts directly relating to the hazardous substance release. EPA has authority to seek any information that is reasonably calculated to lead to information about the release.

In some cases, the recipient will be unable to provide EPA with the information sought. Therefore, RPMs should include a request that the person (or corporation) submit an affidavit describing the scope of his/her investigation if the search does not disclose all of the information sought. The affidavit must be signed by a corporate officer. The information request letter should inform the recipient about opportunities for consultation with EPA.

Municipal Sites

As provided in the "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" (OSWER Directive 9834.13), all municipal and private party owner/operators and generator/transporters should be included in the information gathering

process. In the initial set of questions to owner/operators, it is important to request information on the nature of wastes disposed of at the site, including whether municipal solid waste and sewage sludge were deposited. The identities of transporters and persons who arranged for disposal should be sought. Records should be routinely collected and reviewed.

Insurance Information

Section 104(e)(2)(C) of CERCLA expressly grants the Agency authority to request information relating to a party's ability to pay for or perform a response action. In effect, the Agency has the authority to ascertain whether a PRPs' insurance policy may cover and is sufficient to pay for the costs of remedying the damage. RPMs should inquire about the PRPs' comprehensive general liability and environmental impairment insurance. RPMs should use two approaches to obtain information about the PRPs' insurance coverage:

- Ask general questions
- Request a copy of the policy.

RPMs should be as neutral as possible when requesting information about the PRPs' insurance policies. RPMs should avoid using terms such as "pollution exclusion," "sudden," "non-sudden," or "accidental." These terms have special meaning in environmental insurance law. RPMs should ask the PRP to provide information such as the name of the company(s), the policy number, the effective dates of the policy, and the "per occurrence" limits of each policy.

RPMs should request that the PRP provide a copy of his/her insurance policy. This is an effective way for RPMs to obtain necessary insurance information without having the PRP risk compromising his/her coverage. If the PRP does send a copy of the insurance policy, RPMs should consult with ORC to determine the extent of the PRPs' coverage.

Written Response and Due Date

The information request letter should require a written response under oath in an affidavit and contain a definite due date. This date should reflect the type and volume of information that the RPM anticipates will be necessary for the recipient's answers to be responsive. Generally, 30 days from the date of receipt is deemed to be an adequate time for responding.

RPMs should inform the recipient about the possible civil penalties that may be imposed if the recipient fails to respond. Under section 104(e)(5)(B)(ii) of CERCLA, the Agency may request that a court impose penalties of up to $25,000 per day for unreasonable noncompliance with the information request.

RPMs should send the letter by certified mail, return receipt requested. RPMs should avoid using post office box addresses because there may be no signature to indicate receipt of the letter. The information on the return receipt provides the Agency with proof (the signed receipt card) that a representative of the PRP received the letter.

E. Compile, Organize, and Analyze 104(e) Letter Responses

Owner/operator responses to information request letters should be available before the preparation of the baseline report. The information in the responses should be analyzed with an eye toward extracting information that can be presented in the baseline report and the PRP evidence sheets. Refer to Exhibit IV-2 to see the format for this information. The most important information request issue is review and follow-up; therefore, it should be noted that a more detailed information request may be issued after the baseline report has been prepared. In situations where the response to section 104(e) letters appears false, the RPM should refer the situation to Regional Counsel.

Responses to information requests should be organized alphabetically by PRP and placed in an appendix to the baseline report. The RPM should ensure that there is no unnecessary copying. References to the information contained in a response should be made to

this appendix. By organizing the responses in this manner, the RPM greatly simplifies the Freedom of Information Act (FOIA) response process in that the information request responses are readily accessible for review, copying, and dissemination at the proper time.

Responding to FOIA Requests

PRPs may request information under the Freedom of Information Act (FOIA). RPMs should agree to provide only the information and documents that are within the scope of a proper request. Under FOIA, the RPM can decline to provide "investigatory records compiled for law enforcement purposes, to the extent that the production of such records would interfere with enforcement proceedings." The RPM also may decline to provide pre-remedial deliberative process material under FOIA exemption 5. RPMs should provide *only* the information that the statute requires. PRPs who do not respond to information requests are not given information until they respond. RPMs should *not* send the PRPs an entire copy of either the baseline or interim-final reports. If RPMs have any questions as to the appropriateness of complying with the FOIA request, they should contact an attorney in ORC.

Enforcement Strategy for Non-Compliance With Information Requests

If recipients of section 104(e) letters ignore EPA's requests for information within the specified time (usually 30 days) or provide incomplete answers, the Region can implement the following enforcement strategies:

- Issue an Administrative Order to compel compliance with the request for responsive written information
- Initiate a judicial action seeking
  - a court order compelling the recipients to provide the requested information and/or documents
  - civil non-compliance penalties.

The RPM should consult with the Regional attorney to decide which enforcement strategy to implement at a particular site.

Administrative Order to Compel Compliance

Under section 104(e)(5)(A), the Agency can issue an Administrative Order to compel compliance with the information request. Administrative orders are issued by EPA and involve a notice and an opportunity for consultation. Consequently, EPA can respond promptly to a recipient's non-compliance. However, if the recipient continues to ignore the request for information, the Agency will have to refer to DOJ a petition to enforce EPA's Administrative Order. This process may be time-consuming.

Judicial Action to Compel Compliance

Section 104(e)(5)(B) of CERCLA provides the authority to initiate a civil lawsuit to compel a person to respond to the Agency's information request and substantial monetary penalties against a PRP who fails to respond. These civil penalties are based on strict liability. EPA does not have to prove that the PRPs intended to violate the law by not responding in a timely manner. Therefore, the fact that a recipient says that he/she did not intend to violate the law is irrelevant. The PRP is still subject to civil penalties imposed by the court.

When the Agency refers a case to DOJ to enforce an information request, the referral should be handled in accordance with the procedures set forth in "Expansion of Direct Referral of Cases to the Department of Justice" (OE, January 1988). In time-critical situations, the RPM should refer to "Procedures for Processing Oral and Other Expedited Referrals" (OE, December 1987) and "Waste Procedures for Processing Oral and Other Expedited Referrals" (OE, April 1988).

Section IV of this chapter discusses specific case examples of the Agency using judicial action to enforce its information requests.

F. Baseline Search Progress Review

The RPM is responsible for managing the search in accordance with the strategy, updating the strategy as necessary, and meeting schedules. Exhibit IV-3 shows these responsibilities in detail.

RPMs must ensure that sufficient follow-up is being made to site information so that the baseline report contains complete and accurate information in light of its limited purpose. This is particularly important with regard to owner/operator liability and financial viability; updated PRP names and addresses; information from owners, operators and the State about the volume and nature of substances sent to the site and the contributing parties; and the information that is being used to determine whether a person should receive a notice letter and the evidence of each PRP's liability. It is important to review responses to section 104(e) requests for completeness. RPMs also must ensure that the leads that are uncovered by the contractor during the investigation are followed up and that the action taken is properly documented. Follow-up letters to section 104(e) requests may be needed when the PRPs fail to respond adequately or EPA identifies other relevant pieces of information.

It is important that both the contractor and the RPM keep records of initial and follow-up actions and determinations so that a well-documented trail is maintained. Contacts with both interviews and records sources should be documented. This ensures that if in the future, due to needs for further evidence or changed personnel, the investigation were to be reconstructed, sufficient documentation would exist to determine what leads had been followed up and how all reasonably available sources of information had been exhausted. This written record will attest to the thoroughness and completeness of a particular PRP search.

G. Prepare Baseline Report

The baseline report presents a concise summary of the information obtained from the baseline search activities. Back-up information is set forth in supplemental appendices. In effect, the baseline report is an interim report that contains available information in the areas specified in Exhibit IV-2. It provides information on the owner/operators and provides leads on generators and transporters, enabling the RPM and Regional management to assess the extent and nature of gaps in the PRP data.

RPMs, with the input of ORC and the CI, should carefully review the report to determine whether it is likely that all possible PRPs have been listed, the completeness of waste-in information, and the sufficiency of the information documenting a PRP's liability and financial viability. All information in the report should be attributed to a specific source. Reports are enforcement confidential. RPMs should ensure that the cover of the report clearly states that it was prepared in anticipation of litigation. This enables the Agency to protect the information contained in the report. Any copies of reports should be numbered for tracking purposes.

H. Management Review

Regional supervisors, with ORC, RPM and CI input, will review the baseline report to determine whether the search activity at the site has generated the information needed to identify all PRPs, determine their contribution to the site, and establish their liability and viability. In addition, the review should consider the reasons for pursuing or not pursuing leads uncovered by contractors. The search strategy should be updated in view of the baseline report and management review. During the review process, RPMs should continue search activity, such as follow up on section 104(e) requests. The review is intended to facilitate, rather than impede, the information-gathering process. Once the review is complete, the person in charge of the search should ensure that the search personnel and contractors implement all suggested changes and follow-up activities.

I. Section 104(e) Letters to Generators and Transporters

The approach for issuing information request letters to persons who arranged for disposal, hereafter called generators, and transporters is similar in scope to the procedures involved in issuing letters to owners and/or operators. The section 104(e) letters issued to generators should request information regarding their liability. Special attention should be given to corporate parent/subsidiary and successor issues. In addition, RPMs should seek information to resolve the issue of whether the substance was a listed or characteristic hazardous waste as defined by RCRA.

Listed hazardous waste is defined in 40 C.F.R. section 261.30. Each listed waste has an EPA Hazardous Waste Number that precedes the name of the substance. Under 40 C.F.R. section 261.20, a substance also may be deemed to be RCRA waste if it exhibits any one or more of the following characteristics: ignitability, corrosivity, reactivity and TCLP (Toxicity Characteristic Leaching Procedure) toxicity. To determine whether the substances present at a particular site meet this criteria, RPMs should consider asking questions along the following line: "For all waste sent to the facility or site, identify any known RCRA listing designation as defined by 40 C.F.R. section 261.30. If it is unknown whether the wastes sent to the facility or site would be listed wastes if generated after 1980, describe the chemical processes of each waste stream in sufficient detail to enable EPA to determine whether the waste is listed, including information on 'characteristics' designation under RCRA."

Municipal Sites

A key feature of EPA's "Municipal Settlement Policy" (OSWER Directive 9834.13) is the notification procedures for municipalities and private parties who generate or transport municipal solid waste (MSW), sewage sludge, and trash from commercial, institutional, or industrial entities. It is necessary to understand the notification policy in order to ensure that the information needed in applying it is obtained.

Municipal and private party owner/operators generally will be notified if they were past owners or operators of facilities at the time of disposal of hazardous substances, or they are present owners or operators at a site where hazardous substances have been released or there is a threatened release.

In general, municipalities and private parties who generated or transported MSW or sewage sludge will *not* be notified as PRPs, unless:

- The Region obtains site-specific information that the MSW or sewage sludge contains a hazardous substance and
- The Region has reason to believe that the hazardous substance is derived form a commercial, institutional, or industrial process or activity.

EPA generally will not notify municipalities or private parties who are generators or transporters of MSW if only household hazardous wastes (HHW) are present. However, such parties may be notified as PRPs if the MSW contains hazardous substances from non-household sources. These sources include, but are not limited to, small quantity generator (SQG) wastes from commercial or industrial processes or activities, or used oil or spent solvents from private or municipally-owned maintenance shops.

In general, parties who generated or transported trash from a commercial, institutional, or industrial entity will *not* be notified as PRPs, if such parties demonstrate to the Region that:

- None of the hazardous substances contained in the trash are derived from a commercial, institutional, or industrial process or activity and
- The amount and toxicity of the hazardous substances contained in the trash does not exceed that which one would expect to find in common household trash.

Municipalities or private parties who are generators or transporters of "any other hazardous substance" will generally be notified as PRPs, if the Region obtains information that the substance is hazardous or that it contains a hazardous substance.

In view of the above, it is necessary to seek information regarding whether MSW or sewage sludge at the site contained a hazardous substance and the source (common household trash or waste from commercial, institutional, or industrial process).

Reference

OSWER Directive 9834.13, *Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes*, (referred to as the "Municipal Settlement Policy") (December 6, 1989).

J. Specialized Investigative Tasks

As part of the revised search strategy, RPMs should consider which of the 18 specialized tasks are needed to conduct a thorough search. Refer to "Managing the Search Process" in Part I of this chapter for a discussion of when to use these specialized tasks. RPMs should exercise their professional discretion when determining which tasks to conduct at a site. When appropriate, the specialized search tasks may be completed concurrently with the 10 baseline tasks.

Administrative Subpoena

Administrative subpoenas are authorized under section 122(e)(3)(B) of CERCLA. A subpoena compels an individual to answer questions under oath, and when requested, to produce documents. The Regional Counsel will secure issuance of the subpoena and select the location for the proceeding. If the witness ignores the subpoena, the Regional Counsel will prepare a referral to seek an order compelling the witness to respond.

As a practical matter, administrative subpoenas may be useful in obtaining information from the following types of persons: former employees of the PRP company, persons living near the site, and officers of the PRP company. When developing a list of potential witnesses, the RPM should confirm that the contractor has not overlooked any plausible source of information. For example, the person who works at the landfill and the truck drivers who drove the PRPs' trucks may be able to provide a wealth of information about the PRPs' waste management practices.

While there is no statutory authority prohibiting the use of administrative subpoenas for gathering initial information, RPMs should not use subpoenas for this purpose. The Agency has stated a preference for using information request letters to obtain initial information about a person's involvement at the site. Subpoenas inherently support the settlement process by increasing the amount of relevant information.

K. Interim-Final Report

As indicated by the name, the interim-final report is not viewed as an end in itself. Rather, the interim report is one of the many steps in the overall investigation. The investigation at a site should continue until all necessary reasonably obtainable information pertaining to a PRPs' liability and viability is collected.

The time at which the interim final report is completed varies, depending on the response activity schedule for the site and the progress that is being made on the PRP search. Ideally the report should be available in time for issuance of the SNLs and the release of information on the names and addresses of the PRPs, and the volume and nature of substances sent to the site (waste-in list). If possible, this takes place approximately six months before the RI/FS special notice letters are issued. In some cases, particularly multi-party sites, it may be necessary to prepare preliminary information in order to issue general notice letters, special notice letters, and to release information to the PRPs. Updated versions of the report can then be prepared for the RD/RA special notice and, possibly, for CERCLA sections 107 and 106 actions. The format that should be followed for all PRP search reports is shown in Exhibit IV-2.

As noted previously in subpart C, ORC should review instances in which a generator or transporter is designated as a PRP based on a parent/subsidiary or corporate successor theory.

RPMs/CIs should focus their attention on the facts contained in the report and not lengthy historical or other narratives. RPMs should consider using evidence summary sheets. This format focuses the research on the type of information needed for evidence. The evidence sheet format also standardizes the data presentation so that it is more readily transferrable to a tracking system or inventory data base.

When reviewing the interim-final report, the RPM must confirm that the contractor has carefully documented the rationale tying each PRP to the site and that the report substantiates the evidence.

L. Interim Report Follow-up

Information on new PRPs, as well as additional evidence on the liability of existing PRPs, is likely to be uncovered after the completion of the interim-final report. For this reason, a PRP search is an on-going investigation. The search does not end with the completion of the interim-final report, the issuance of general and special notice, or the release of the contractors from the PRP search work assignment. A PRP search is completed when reasonable leads concerning a person's involvement at a site have been exhausted, taking into account the amount obligated for the response action or a settlement. It should be noted that in many situations, circumstances may require that the search continue throughout the course of the RI/FS, and possibly, into the RD/RA.

The PRP search is an on-going investigation, in fact, in some cases, it is never really closed. To compensate for the on-going nature of search activities at a multi-party site, the interim-final report may be submitted on a preliminary basis in time for general or special notice, and on an interim-final basis when all search activity and follow-up for the preliminary report is completed.

M. General Notice Letters (GNLs)

General notice letters designate an entity as a PRP. These letters are preliminary determinations of potential liability, as opposed to absolute determinations of liability. Therefore, there is no requirement that the RPM must possess substantial evidence of a person's liability before a GNL can be issued. Besides designating a person as a PRP, the GNLs are used to encourage PRP coalescence, an important step prior to negotiations. Therefore, GNLs should be issued as early in the PRP search process as possible.

GNLs generally contain the following information:

- Notification of potential liability under sections 106 and 107(a) of CERCLA, including notification that
  - section 107 authorizes the Agency to initiate cost recovery actions to recover all costs not inconsistent with the NCP incurred in responding to the release or threatened release of hazardous substances
  - section 106 authorizes the Agency to issue Administrative Orders compelling the PRP to implement the response selected by EPA to abate an imminent and substantial danger caused by the release or threatened release of hazardous substances
- Discussion of any planned response measures, to the extent known; the Agency encourages PRPs to voluntarily perform or finance those response activities that EPA determines to be necessary at the site
- Information about the Agency's discretionary authority under section 122(e) of CERCLA to formally negotiate the terms of settlements pursuant to special notice procedures if EPA determines that such procedures would facilitate an agreement and would expedite remedial action at the site

- Information about the general opportunity to discuss any selected response measures and opportunities to undertake the selected response action, including
  - the merits of forming a PRP steering committee
  - a response date for the PRPs to respond, in writing, indicating their willingness to participate in the response activities at the site
  - a name and a phone number of the EPA contact for PRPs (or their attorneys) to call
- Information about the development of the Administrative Record pursuant to section 113(k) of CERCLA.

RPMs should use their professional judgment to tailor the contents of GNLs to accommodate the circumstances at a specific site. GNLs should be sent by certified mail, return receipt requested. A formal record documenting the PRPs' receipt of the letter should be created. RPMs should carefully document all subsequent correspondence (phone calls or letters) received from the PRP or the PRP's attorneys.

In general, the standard governing who receives a GNL is based upon a reasonable belief that a potential recipient may be a PRP. Certainty is not required. GNL recipients must be approved by both Regional management and ORC. RPMs should carefully consider the question of who receives a GNL. Once a person or corporation has been designated as a PRP and issued a GNL, their name will be released as a PRP in response to FOIA requests about the site.

At municipal sites, in particular, the issuance of notice is governed by EPA's Municipal Settlement Policy. The notification provisions of this policy are generally summarized in Part I, section 104(e) Letters, above. In addition, it should be noted that notwithstanding the above general policy, there may be truly exceptional situations where EPA may consider notifying generators/transporters of MSW that contains a hazardous substance derived only from households. Such notification may be appropriate where the total contribution of commercial, institutional, and industrial hazardous waste by private parties to the site is insignificant when compared to the MSW. In this situation, the Regions should seriously consider notifying the generators/transporters of MSW containing a hazardous substance from households as PRPs and include them in the settlement process where it would promote either settlement or response action at the site.

GNLs should be issued in "waves" as soon as the necessary information becomes available, and they should precede special notice for the RI/FS. The first wave is issued when owners and operators are identified. Subsequent waves are issued as groups of generators and transporters are identified. Finally, additional letters are sent to PRPs who have been identified by other PRPs through negotiations. If special notice letters for RI/FS are scheduled and general notice letters have not been issued, GNLs need not be sent if they would not advance the process.

Copies of GNLs should be sent to:

- Information Management Section of the Program Management and Support Office of OWPE at EPA Headquarters
- Regional Administrative Record Coordinator
- Regional Community Relations Coordinator for inclusion on the community relations mailing list
- Appropriate State representative(s)
- Federal and State Natural Resource Trustees.

References

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

OSWER Directive 9834.10A, "Model Notice Letters" (February 7, 1989).

OSWER Directive 9836.2, "CERCLA Community Relations Mailing Lists" (February 6, 1989).

N. Developing Information on PRP Waste Contribution

The collection and analysis of information on PRP waste contribution is part of the PRP search process. Information on PRP waste contribution can include manifests, waste tickets, logbooks, billing records, canceled checks, and process engineering information. In addition, PRPs may provide information on waste contribution in their responses to information requests issued under section 104(e) of CERCLA. Information on PRP waste contribution is commonly referred to as "waste-in information."

There is no specific point during the PRP search process when waste-in information is certain to become available. Possible sources of waste-in information include, but are not limited to, on-site files and government offices, particularly when a prior state or federal enforcement action has been taken. Waste-in information also can be developed through section 104(e) information requests. It is important to recognize that waste-in information may never be available at certain sites. Nevertheless, RPMs should be prepared to collect and analyze waste-in information as expeditiously as possible when it becomes available.

Transactional databases are developed to organize and analyze waste-in information. These databases are used to produce waste-in lists and volumetric rankings. A waste-in list provides the volume and nature of substances contributed by each PRP identified at a facility on a per shipment basis. A volumetric ranking is a ranking by volume of the hazardous substances at a facility. In most cases, however, a volumetric ranking refers to a ranking by volume of PRPs at a site.

Transactional database resources are available under the Technical Enforcement Support (TES) contracts and the National Enforcement Investigation Center's (NEIC's) Contract Evidence Audit Team (CEAT). Requests for transactional database support under TES are made through the usual TES work assignment process. CEAT support must be requested from NEIC.

The development of waste-in information helps the Agency to meet the special notice information release burden under CERCLA section 122(e)(1). If EPA invokes special notice procedures under CERCLA section 122(e)(1), the Agency must provide PRPs with waste-in lists, volumetric rankings and a list of PRP names and addresses "to the extent that such information is available." More importantly, the development and release of waste-in information promotes PRP organization which can streamline and expedite the settlement process. For additional information on waste-in lists and volumetric rankings, consult OSWER Directive 9835.16, *Guidance on Preparing and Releasing Waste-In Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA*, February 22, 1991.

O. On-going Information Exchange

Following general notice, RPMs may hold informal discussions with the PRPs (as distinguished from the formal negotiations pursuant to special notice procedures). If PRPs are represented by an attorney, Regional Counsel must be present. These informal discussions generally result in an on-going exchange of information. A PRP is generally provided a copy of any information EPA may have regarding that PRP following the PRP's response to an information request. More broadly, as soon as is reasonably possible, the RPM should provide the PRPs with information on the names, addresses, volumes, and nature of substances from all PRPs.

The policy governing information release to PRPs is quite flexible and provides for review on a case-by-case basis. The Agency has a strong preference toward information release in that it is believed, in most cases, to expedite settlement. In some cases, however, Regions should reserve the right to exchange information with PRPs on a reciprocal or conditional

basis if it is believed that reciprocal exchange is the appropriate action. See OSWER Directive 9835.12-01a, "Revised Policy on Discretionary Information Release Under CERCLA" (March 1993). This revised policy includes a more forceful statement on the value to the Agency of releasing information, particularly waste-in information, to PRPs. In addition, this policy makes clear that waste-in information, to the extent it is available, should normally be released well before special notice is issued.

One way to facilitate information exchange with PRPs is through a meeting. RPMs should propose a meeting when they believe that it will enhance the likelihood of successful negotiations. In the event that these informal talks break down, RPMs should work closely with Regional attorneys to develop a realistic negotiation strategy. In addition, RPMs should investigate the possibility of using alternative dispute resolution (ADR) techniques to resolve issues the RPM has with the PRPs or that PRPs have among themselves.

Reference

OSWER Directive 9834.13, *Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes*, (referred to as the "Municipal Settlement Policy") (December 6, 1989).

Section III. Planning and Reporting Requirements

The RPM should implement a management strategy that tailors the PRP investigative tasks so that the PRP search works in conjunction with the overall enforcement strategy at a particular site. The Agency has made a commitment to improve the timeliness and completeness of PRP searches. RPMs should seek the assistance of ORC attorneys and other key players early in the search process to achieve high-quality PRP searches early in the process.

A. Planning

In general, RPMs or CIs should initiate PRP searches before the site is proposed for inclusion on the NPL. Ideally, the PRP search should be initiated when EPA deems a response action may be warranted during the site assessment and completed shortly after the NPL proposed listing. The interim-final PRP search report should be completed at least 90 days before the funds are obligated for a projected RI/FS start. For SCAP reporting purposes, a PRP search is deemed to be complete when either the site classification report has been issued, or when the site classification has been otherwise determined.

B. Budget

The quality of a search is a function of planning, proper and focused utilization of contractors, oversight, and follow up. Sufficient money must be budgeted in the enforcement case budget. RPMs should consult with their management to determine the Region's limitation on the initial commitment of resources for a PRP search. This figure varies from Region to Region. The budget for initiating NPL PRP Searches is $25,000 for four quarters. On-going PRP Searches are priced at $24,000 for four quarters, with the assumption that the duration of on-going searches is 12 quarters. Note that Headquarters and the Regions have formed a workgroup which will assess pricing issues and recommend new pricing guidelines. The result of this study is expected to affect the pricing used in developing the FY 95 budget. The object of the search is to uncover all reasonably available evidence of the PRPs' liability. The RPM should ensure that the investigative process is planned and conducted properly the first time. If an RPM determines that the conditions at a particular site require supplemental work and funding, the RPM should ensure that these planned expenses are reported on the SCAP.

When planning the search budget, RPMs should avoid under-committing resources to the necessary search, and should be realistic in committing resources. Under-committing resources is as inefficient as over-committing resources. When RPMs under-commit, they limit the search activities. For instance, in a limited search, the contractor may only perform a records search and conduct several interviews with government officials. This limited search may not be adequate for a complex site. Poor-quality searches do not produce the type of evidence needed to establish a person's liability under section 107 of CERCLA. Without sufficient information, a second and more complete search must be conducted. Consequently, the Agency loses both time and money. Therefore, RPMs should work closely with Regional management in determining how to effectively commit resources for a particular site.

C. Reporting Requirements

NPL PRP searches are planned and funds requested on a site-specific basis. PRP searches should be planned for all sites listed on the NPL. This is a SCAP reporting measure.

A matrix of SCAP/STARS measures relevant to PRP Search activity is presented as Exhibit IV-4. RPMs are responsible for entering accurate data into CERCLIS/WasteLAN or providing that information to the IMC for entry into CERCLIS/WasteLAN.

Exhibit IV-4
SCAP/STARS Measures Relevant to PRP Searches

Activity	STARS Reporting	SCAP Plan/Report	Quarterly	Annual
NPL PRP Start		X	X	X
Non-NPL PRP Search Start		X	X	X
NPL Search Completion		X	X	X
Non-NPL Search Completion		X	X	X

Definitions for:

- **NPL Search Start** - If the search is being conducted by a contractor, the start date is considered to be the date the work assignment is procured. If it is conducted by EPA, the start date is the day EPA staff begins PRP search activities.
- **Non-NPL PRP Search Start** - See NPL Search Start
- **NPL Search Completion** - The PRP search is complete when PRPs at a site have been identified, all applicable activities described in the Agency's PRP Search Manual have been completed, and the date and the outcome of the search has been determined and entered into WasteLAN. If no PRPs are found, the date and the outcome of the search are entered into WasteLAN. This definition applies to both Phase I (single owner, operator site) and Phase II (multi-generator site) PRP search accomplishments. Possible outcomes of PRP searches are: NV (Search complete, no viable PRPs), VC (Viable PRPs - cannot do the work), VP (Search complete, viable PRPs)
- **Non-NPL Search Completion** - See NPL Search Completion.

For specific coding requirements into WasteLAN, see the Enforcement Data Quality Manual Chapter I, Non-NPL PRP Search (RP), and NPL PRP Search (NS) or see your IMC.

Section IV. Potential Problems/Resolutions

This section addresses several problems that RPMs may encounter when attempting to identify and document the involvement of PRPs at a particular site.

A. Timing

A comprehensive PRP search and notification process should be initiated early in the remedial process. Early searches facilitate PRP coalescence for settlement negotiations and promote increased PRP participation in ESI, early actions, RI/FS and RD/RA activity. Conversely, the failure to properly plan the search, oversee it, ensure follow up and "complete" it, may unnecessarily delay the RD/RA negotiations, stall cost recovery or CERCLA section 106 case development, delay the start of the response action, limit PRPs' ability to have due process, or cause EPA to implement a Fund lead response, which, in turn, may stop action at another site from being started or require costly litigation later.

B. Clarifying Roles and Responsibilities

The RPM should ensure that all parties involved in the PRP search process clearly understand their roles and responsibilities. This objective can be accomplished by:

- Developing PRP search management plans
- Tailoring contractor's work plan to site-specific requirements
- Assigning responsibility for follow-up
- Conducting an "evidence" review.

In some Regions, the RPMs spend time in the field gathering initial data to determine the appropriate scope for the search process. In other Regions, the RPM assigns initial data gathering tasks to the contractor and then uses this data to define the scope of the search process at the kick-off meeting.

RPMs may use meetings as a means of improving the cooperative efforts of the contractor and State and local officials. For example, these meetings could be used to provide the contractors with a list of State and local government contacts. Before issuing such a list, the RPM should provide the contractor with a letter of introduction. The purpose of the letter is to introduce the contractor to State and local government officials and to inform these officials that the contractor is working for EPA on a particular PRP search.

C. Examples of Enforcing Information Requests

The Agency has statutory authority to enforce its requests for information. There are several examples of the Agency's efforts to enforce its requests. Two cases are discussed below.

The Cannons Sites

The Agency sought to enforce its request for information about a PRPs' involvement at the Cannons sites in Massachusetts and New Hampshire, Region I. On March 28, 1986, the Agency sent letters to over 500 PRPs. Crown Roll Leaf, Inc. ("Crown") was one of the recipients. The return receipt card indicated that Crown received the letter on April 1, 1986. A complete response was due within 30 days of receipt (i.e., May 1, 1986). Crown failed, without justification, to provide EPA with the requested information and documents relating to the transportation of toxic waste. On August 18, 1986, the Agency sent Crown a reminder letter. Crown again failed to respond.

Section 3008(a) of RCRA was employed to enforce response to the notice letters (prior to SARA, a number of notice letters were issued pursuant to RCRA section 3007). On November 14, 1986, the Agency sent Crown the following:

- Administrative Order compelling a response
- Administrative complaint

- Proposed consent agreement.

The Administrative Order demanded Crown provide the requested information and documents. The administrative complaint notified Crown it could contest liability for failure to respond to the information request. The proposed consent agreement required Crown to submit responses to the information request and to pay a penalty in settlement for EPA's claims for failure to respond.

In December 1986, Crown's attorney telephoned a Regional attorney to discuss the matter. After this conversation, Crown still failed to submit a written response to the Agency's information requests. On February 16, 1988, the Agency initiated a judicial action against Crown. The Federal district court ruled that because the EPA information request form specifically requested a written request, Crown's phone conversation with the Regional attorney did not constitute adequate compliance.

This case is important because it supports the Agency's right to demand a written response to the information request letter.

American Thio-Chem Site

In December 1992, the U.S. District Court for the Northern District of Texas ordered Roger L. Tannery to pay EPA over $13 million, the largest penalty ever awarded for non-compliance with orders under CERCLA. EPA filed the suit to recover cleanup costs of $977,324 for a removal action conducted at the American Thio-Chem site and to recover almost $12.5 million in civil penalties for Tannery's failure to respond to a request for information issued under section 104(e). The civil penalty represents the maximum penalty of $25,000 per day for the 499 days of non-compliance with the order.

Section V. References

Policy

OSWER Directive 9835.0, "Interim CERCLA Settlement Policy" 50 FR 5034 (December 5, 1984).

OSWER Directive 9834.13, "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" (December 6, 1990).

Guidance

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 1987).

OSWER Directive 9834.3-2a, "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 29, 1989).

OSWER Directive 9834.0, "Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests" (January 26, 1984).

OSWER Directive 9834.10-1b, "Model Notice Letters" (February 7, 1989).

OSWER Directive 9836.2, "CERCLA Community Relations Mailing Lists" (February 6, 1989).

OSWER Directive 9835.12-01a, "Revised Policy on Discretionary Information Release Under CERCLA" (March 1993).

OSWER Directive 9835.16, "Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA" (February 22, 1991).

OSWER Directive 9834.4A, "Final Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 1988).

OSWER Directive 9835.1A, "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (May 1988).

OSWER Directive 9832.10, "Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)" (June 13, 1984).

OSWER Directive 9829.0, "Policy for Enforcement Actions Against Transporters Under CERCLA" (December 23, 1985).

OSWER Directive 9834.12, "Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions" (August 14, 1987).

Manuals

OSWER Directive 9834.3-1A, *Potentially Responsible Party Search Manual* (August 1987).

U.S. Department of Justice Reference Document, *The Elements of Liability under Sections 104, 106 and 107 of CERCLA* (December 1990).

Training

OWPE, CERCLA Enforcement Division, Guidance and Evaluation Branch and the Cost Recovery Branch conduct periodic PRP Search Workshops and CI Conferences. For additional information, contact 703-603-8940 or 703-603-8920.

Contacts

PRP searches: The CERCLA Enforcement Division's Guidance and Evaluation Branch: 703-603-4826 or the Cost Recovery Branch: 703-603-8642.

Information Requests: OE Attorney Advisor at 202-260-3586, or an attorney in ORC.

Administrative Subpoenas: OE Attorney Advisor at 202-260-8865, or an attorney in ORC.

Alternative Dispute Resolution: OE Alternative Dispute Resolution Liaison, David Batson at 202-260-8173.

Section VI. Activities Checklist

This section discusses the RPM's management functions in overseeing the PRP search process. The following checklist is not intended to present an exhaustive set of procedures. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

1)_____ Conduct a preliminary PRP search

2)_____ Develop a PRP search plan and assemble the resources needed to conduct the PRP search activities

- a)_____ Ensure that contractor dollars are budgeted for negotiations in the enforcement case budget
- b)_____ Develop search plan/strategy
  - ◆ Activities
  - ◆ Roles and responsibilities
  - ◆ Scheduling
  - ◆ Information management
- c)_____ Develop a detailed scope of work for the contractor
- d)_____ Develop a detailed resource plan for EPA staff

3)_____ Conduct baseline information and records collection, interviews with government officials, title search

- a)_____ Conduct initial baseline tasks
- b)_____ If appropriate, conduct additional (i.e., specialized) tasks concurrently with these baseline tasks

4)_____ Issue section 104(e) letters to owners and/or operators

- a)_____ Issue letters, even if there is only a single PRP or few PRPs and there is information on them, verify it with a section 104(e) letter
- b)_____ Obtain copies of documents

5)_____ Compile, organize, and analyze responses from section 104(e) letters

- a)_____ Track response to letters
  - i)_____ Establish the tracking system
  - ii)_____ Determine identities of non-responders and incomplete responders
- b)_____ Follow up on recipients who fail to fully comply with the request for information
  - i)_____ Send warning letters to recipients who provided incomplete or inadequate information
  - ii)_____ Determine whether an Administrative Order assessing penalties should be issued if recipient fails to respond to warning letter
  - iii)_____ Consider initiating a judicial action to enforce the information request order (also consider seeking additional penalties for violating the order) if recipient fails to respond to warning letter

6)_____ Update PRP status

a)_____ Determine current name and address

b)_____ Resolve status of corporations that are defunct, dissolved, bankrupt, merged, sold or had parent

7)_____ Analyze, follow up, and conduct additional research

a)_____ Resolve evidence evaluation sheets and financial viability of owners/operators

b)_____ Develop site history

c)_____ Request supplemental information and interviews regarding owner/operator liability

d)_____ List preliminary generators and transporters

8)_____ Draft the baseline report summarizing information obtained from the baseline search. RPMs should ensure that the information needed to document the PRPs' liability is sufficiently documented. The cover of the report should clearly state that the document is "ENFORCEMENT CONFIDENTIAL"

a)_____ All information in the report should be attributed to specific sources. Work done should be documented. Information should be managed per plan

9)_____ Regional management reviews the baseline report and approves revised search strategy

a)_____ Identify any data gaps and implement data collection procedures

b)_____ Adapt search plan for interim final report. Decide which of the 18 specialized tasks to perform

10)_____ Issue section 104(e) letters to generators and transporters

a)_____ Link generators to the site

b)_____ Resolve that generators wastes are hazardous substances under CERCLA

c)_____ Request information regarding the RCRA designation of all waste sent to the facility/site

d)_____ Seek to resolve the issue of whether the substance was a listed or characteristic hazardous waste as defined by RCRA [see 40 C.F.R section 261.30]

e)_____ Track, follow up, and enforce

11)_____ Update PRP status for generators and transporters

a)_____ Determine current name and address

b)_____ Resolve status of corporations that are defunct, dissolved, bankrupt, merged, sold, or had parent

12)_____ Conduct interviews as identified in plan and as necessitated by review and responses to section 104(e) letters

13)_____ Conduct other appropriate additional search tasks as identified in strategy and as necessitated by review of responses to section 104(3) letters

a)_____ Analyze information for completeness, ability to issue special notice (name and address; volume and nature of substances; volumetric ranking), evidentiary sufficiency and ability to plan

b)_____ Follow up as necessary

14)_____ Prepare the interim-final report. Ensure that all information obtained during the PRP search has been properly documented

a)_____ Review evidence evaluation sheets, assessing whether there is sufficient information to establish a person's liability under section 107 of CERCLA; review financial viability

b)_____ Array information for special notice

c)_____ Identify follow up work needed

d)_____ Management review

e)_____ Document persons against whom there is not enough information to be identified as PRPs

15)_____ Follow up report

16)_____ Determine when to issue GNLs

a)_____ Send a letter informing the individual (or corporation) that the Agency considers it to be a PRP. Send a copy to Headquarters for SETS

b)_____ Assemble back up documents

c)_____ Develop name and address list. Provide to community relations coordinator, and administrative record coordinator

17)_____ Initiate an information exchange with PRPs

a)_____ Meet with PRPs to provide them with information about the site and to explain the negotiations process

b)_____ Ensure that the contractor adequately updates the transactional database to reflect the information provided by PRPs. Provide waste-in information to PRPs, as appropriate.

Appendix

PRP Search Plan

1. PRP Search Planning and Initial Strategy

   a. Identify contractor and staff resource needs

   b. Summarize team roles and responsibilities for managing and performing PRP search tasks

   c. Discuss the schedule of the PRP search in relation to the overall site timeline

2. Initial Assessment and PRP Search

   a. Summarize information collected to date

   b. Develop strategy for collecting and using information

      - Develop PRP correspondence tracking system and evidence files

      - Follow up on recipients who fail to fully respond

   c. Conduct initial search, including title search and interviews with Federal, State and local government officials. (The usual focus is first on owners and operators and then on generators and transporters)

3. Interim Assessment

   a. Conduct analysis, identify issues, and project follow-up and additional PRP search needs, including unique strategies

   b. Ensure information regarding PRP liability is well-documented

   c. Describe steps for PRP notification and information exchange

   d. Develop a PRP list, including names and addresses

4. Conclusion of PRP Search

   a. Indicate actions to enhance inter-PRP and PRP-Government relations, such as: encouraging PRPs to form a steering committee, providing information to PRPs and encouraging PRPs to use a facilitator to resolve disagreements

   b. Assess ability to develop volumetric rankings and NBARs

   c. Complete information collection (including use of subpoenas), distribution of information (to include Administrative Record Coordinator and Community Relations Coordinator), documentation of evidence and notification (including special notice).

Chapter V
RI/FS Negotiations/Settlement

Section I. Description of Activity 1

Introduction 1

Statutory Authority 1

Overview of the Negotiation Process 1

Early *De Minimis* 2

Roles and Responsibilities 2

RPM Responsibilities 2

ORC Responsibilities 2

OWPE Responsibilities 2

OE Responsibilities 3

DOJ Responsibilities 3

Section II. Procedures and Interactions 4

A. Decision to Start the RI/FS 4

B. Intergovernmental Review 4

C. Formation of the Case Team 5

D. Review PRP Search 5

E. Issue General Notice 5

F. Steering Committees and Information Exchange 6

G. Follow up on PRP Search 7

H. Natural Resource Trustees 7

I. Preliminary Scoping of the RI/FS 7

PRP Issues 8

J. RI/FS Statement of Work (SOW) 8

K. Draft Administrative Order 9

L. Issue Special Notice Letter 11

Timing of Special Notice 12

M. Good Faith Offer 12

Notify DOJ 12

N. Conditions for PRP Conduct of RI/FS 13

O. Negotiations Outcome - PRP-Lead RI/FS 13

P. Negotiations Outcome - Fund-Lead RI/FS 14

Section III. Planning and Reporting Requirements 15

A. Planning Requirements 15

Contractor Support 15

B. Reporting Requirements 15

Section IV. Potential Problems/Resolutions 18
A. Stipulated Penalties 18
B. Past Costs 18
C. RI/FS Oversight Costs/Limits 18
D. Removals Required During RI/FS 18
E. Additional Work 18

Section V. References 20
Guidance 20
Manuals 20
Contacts 20

Section VI. Activities Checklist 21

Appendix
Remedy Selection and Negotiation Plan A1

Chapter V
RI/FS Negotiations/Settlement

Section I. Description of Activity

Introduction

This chapter discusses the process of negotiating for PRP conduct of the RI/FS and focuses on the RPM's role in the process. EPA policy is to encourage PRPs to perform the RI/FS under EPA oversight, when EPA determines that the PRPs are qualified to do the work and will carry out the activities in accordance with CERCLA requirements and EPA guidance.

EPA prepares for RI/FS negotiations from the time the listing site inspection is undertaken or, in terms of SACM, from the time the Regional Decision Team decides to begin the PRP search. EPA performs a PRP search, issues General Notice Letters (GNL), and may meet with PRPs prior to beginning RI/FS negotiations. EPA also scopes the project prior to initiating RI/FS settlement discussions. Formal negotiations begin when EPA issues the Special Notice Letter (SNL), continue if there is a Good Faith Offer (GFO), and conclude with the signing/issuance of an Administrative Order or Consent Decree, or referral for litigation or the obligation of Fund monies.

Statutory Authority

Although section 106 Administrative Orders may be issued, EPA usually relies on sections 104 and 122 of CERCLA to enter into agreements with PRPs to allow them to conduct all or part of RI/FS activities. The settlement procedures in section 122 of CERCLA are utilized when the Agency determines that the PRPs will conduct the RI/FS properly and promptly. Authority for RI/FS administrative settlements has been fully delegated to the Regions.

Overview of the Negotiation Process

The RI/FS negotiation process begins informally as soon as PRPs are given general notice. After initial identification of PRPs, EPA issues a general notice letter to advise the PRPs of their potential liability. The general notice letter is the mechanism by which parties are identified as PRPs and notified about the possible use of the CERCLA section 122(e) special notice procedures and the subsequent moratorium and "formal" negotiation period.

Following general notice, EPA continues to develop the PRP search. After EPA has received responses to information requests and has assembled information regarding waste types and volumes, EPA provides the information to PRPs and encourages them to organize as a group and form a steering committee. The organization of PRPs is an important element in achieving settlements. In addition, EPA, working with contractor support, scopes the focus of the RI/FS. The RPM should coordinate with the State as necessary on the scope of the RI/FS and any Administrative Order.

EPA may issue a special notice letter regarding the RI/FS. Issuance of the special notice provides a period of negotiation in situations where EPA determines that such a period would facilitate an agreement with PRPs and expedite response actions. The special notice letter is usually accompanied by a draft Administrative Order on Consent (AOC) and RI/FS Statement of Work (SOW). RI/FS negotiations that result in settlement are concluded with the signing of an Administrative Order on Consent (or entry of a Consent Decree, if the case has been filed in court) which incorporates a SOW.

Early *De Minimis*

In the past, settlement tools such as *de minimis* generally were not used early in the pipeline. In June 1992, however, the Agency published guidance on the use of "early *de minimis*." The guidance identifies the methodology whereby Regions may provide PRPs who are minor contributors of hazardous substances at a CERCLA site the opportunity to resolve their CERCLA liability as completely as possible early in the response process (i.e., prior to the signature of the ROD), without the need for extensive negotiation.

Entry into early *de minimis* settlements lowers transaction costs for *de minimis* parties and can increase case management efficiency at multi-generator sites. To consider an early *de minimis* settlement, Regions should compile waste contribution information for individual PRPs as soon as it is available and identify response costs for settlement purposes. For more information on waste contribution information, see Chapter IV, PRP Search, Notification, and Information Exchange. For further information on early *de minimis* settlements, see OSWER Directive 9834.7-1C, "Methodology for Early *De Minimis* Waste Contributor Settlements Under CERCLA Section 122(g) (1) (A)" (June 1992).

The RI/FS negotiation process is summarized in Exhibit V-1.

Roles and Responsibilities

This section describes the roles and responsibilities for the RPMs, assistant Regional counsel, and representatives from OWPE, OE, and DOJ. The primary activities for each phase of the negotiation process are summarized below. The primary responsibilities for RPMs and ORC are detailed in Exhibit V-2.

RPM Responsibilities

The RPM plays a central role throughout the RI/FS negotiation process and has primary responsibility for technical aspects of the case.

The RPM's role is to educate the PRPs on EPA's negotiation position as well as to provide pertinent PRP and site information. The RPM also may play a central role in assisting the PRPs to organize into a steering committee and should encourage the formation of a PRP steering committee in nearly all cases. The RPM, in conjunction with the assistant Regional counsel, should set up a correspondence file to track all communication with PRPs. Some of this correspondence subsequently will be entered into the Administrative Record for selection of response. The RPM's role in the timing of special notice letters and the ensuing formal negotiation period is discussed in detail later in this chapter. The RPM also participates in developing the case referral packages for section 106 and section 107 litigation cases. The RPM works jointly with the attorney to develop the technical information in support of a referral package for section 106 and section 107 litigation cases. Similarly, the RPM and the attorney work jointly to develop the Agency's negotiation strategy prior to negotiations with the PRPs and, as needed, to coordinate the negotiation strategy document with the settlement decision committee.

In some regions, an Enforcement Specialist assists the negotiation team by helping to prepare general notice and special notice letters, cost packages and documentation, and by participating in negotiations.

ORC Responsibilities

ORC, in partnership with the RPM, also plays a central role in all phases of the RI/FS negotiations. The assistant Regional counsel's primary role is to provide legal advice during the negotiation process to ensure that the process complies with CERCLA.

OWPE Responsibilities

OWPE is responsible for ensuring national consistency for negotiated settlements and consistency with national policy. OWPE representatives usually are not involved in RI/FS negotiations but may participate on any negotiations team where nationally significant issues are anticipated. OWPE assures necessary coordination with OE.

Exhibit V-1

RI/FS Negotiation Process

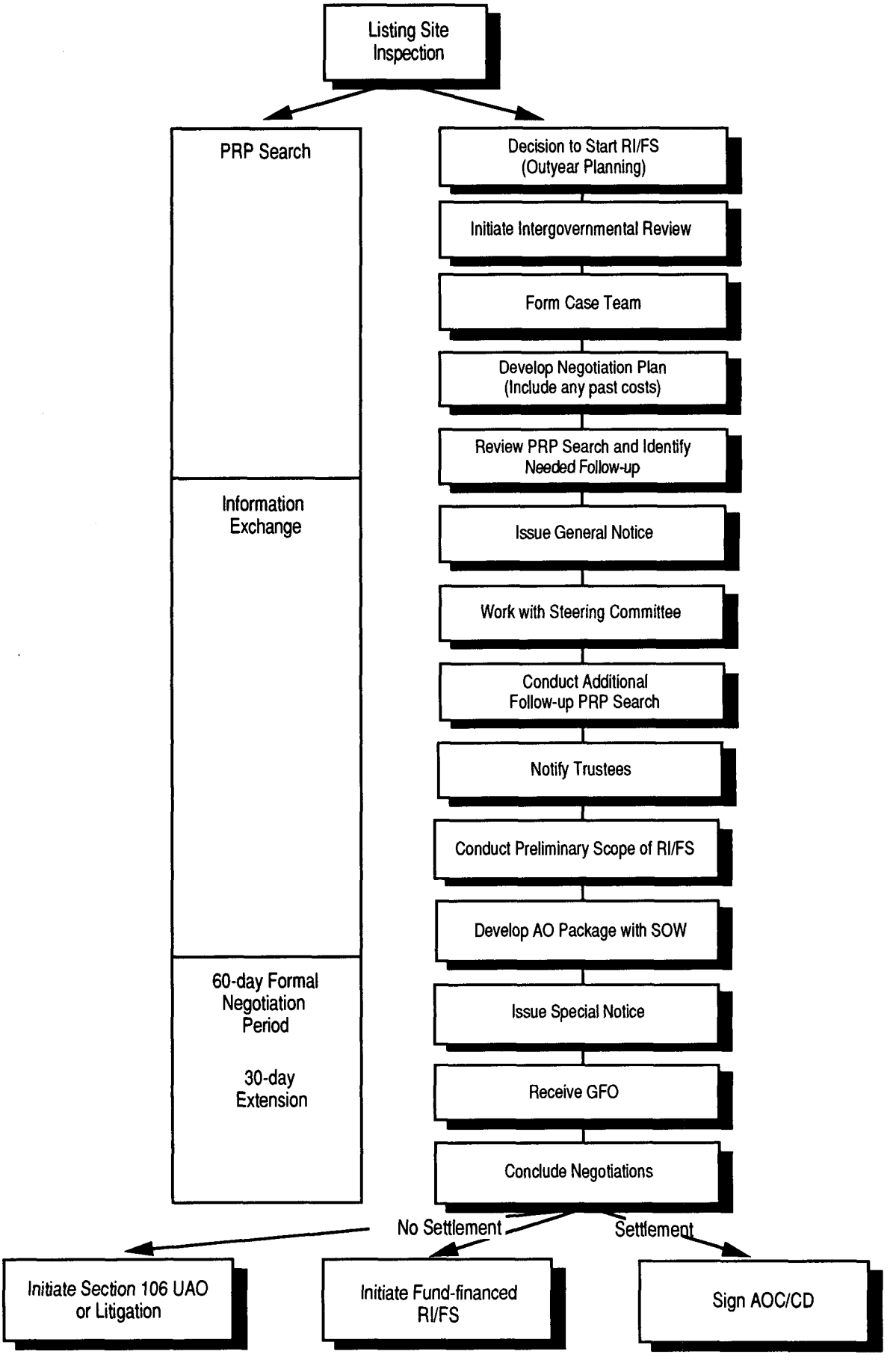


Exhibit V-2

Roles and Responsibilities

RPM

NEGOTIATIONS PLANNING

- Coordinate information exchange with the PRPs, including §104(e) letters, and provide the PRPs with information regarding other PRPs (in conjunction with assistant Regional counsel)
- Assemble cost documentation for any past removals
- Ensure PRP search review and follow up by civil investigator and ORC
- Send GNL
- Coordinate Site Scoping Activities
- Coordinate with State

INFORMAL AND FORMAL NEGOTIATIONS

- Provide information to PRPs
- Send SNLs
- Conduct negotiations as lead technical representative on the case team
- Maintain coordination between appropriate Headquarters and State offices
- Request extensions for negotiations from Headquarters
- Obligate funds from the Trust Fund if appropriate

ORC

NEGOTIATIONS PLANNING

- Review strength of evidence of PRP liability
- Coordinate with civil investigator regarding PRP search activities
- Draft initial Administrative Order
- Notify DOJ of the negotiations if past costs are involved

INFORMAL AND FORMAL NEGOTIATIONS

- Review the SNL
- Conduct negotiations as the lead legal representative
- Redraft the Administrative Order as the result of negotiations
- Coordinate with the State legal representative

OE Responsibilities

OE is responsible for ensuring that negotiated settlements are consistent across the Regions with national policy for legal matters. OE attorneys have expertise in the legal implications of RI/FS settlements. OE attorneys usually are not involved in RI/FS negotiations but may participate in negotiations where complex or nationally significant issues are anticipated. OE assists Regional counsel in prereferral matters, reviews referrals sent to DOJ, and also reviews Consent Decrees resulting from settlements.

DOJ Responsibilities

DOJ's representative from the Environment and Natural Resources Division's Environmental Enforcement Section is EPA's attorney for litigation of Superfund cases. DOJ usually is not involved in RI/FS negotiations because these are resolved by Administrative Orders rather than Consent Decrees. DOJ is involved in cases involving a compromise of past costs in a RI/FS order in accordance with section 122(h)(1) of CERCLA.

If a site is complex, with many PRPs and much paperwork, RPMs should consider consulting with DOJ's Litigation Support Group. This group is available for EPA to consult with regarding information management services that are available. Contacting the litigation support group early in the process can save time and energy later when preparing for litigation. For further information, call the Litigation Support Group at 202-616-3354.

Section II. Procedures and Interactions

This section discusses the procedures for negotiating PRP involvement in the RI/FS and focuses on the RPM's role in the negotiation process. Certain elements of this process are similar to elements of the RD/RA negotiation process, which is discussed in Chapter VIII, RD/RA Negotiations/Settlement.

A. Decision to Start the RI/FS

The decision to initiate RI/FS activities is made in the course of preparing the annual SCAP. The SCAP process is discussed in Chapter XVII, SCAP/STARS Cycle. The RI/FS start, as planned in the SCAP, affects the schedule for negotiations with the PRPs.

A PRP search generally should commence at least one to two years before negotiations are scheduled to begin except at sites without generators, where less time is necessary. Negotiation planning usually is initiated six to nine months prior to the planned RI/FS start date in SCAP. When planning an RI/FS start, RPMs should keep in mind that, in cases where the special notice letter procedure is implemented and a good faith offer is received by EPA within 60 days, RI/FS activity is unlikely to begin for at least 90 days after special notice issuance. When negotiating SCAP/STARS targets, the RPM, Information Management Coordinator (IMC), and other Regional personnel involved in SCAP negotiations should consider the following factors in proposing an RI/FS start at a site:

- **Budget** - Will funds be available to initiate activity at the site on the planned date?
- **Site classification** - Is the site targeted as PRP-lead or Fund-lead?
- **Length of time on SCAP** - How long has the site been identified on the SCAP as an NPL site?
- **Environmental priority of the site** - How great is the threat to human health and the environment posed by the site?
- **Status of the PRP search** - Is the PRP search near completion? How great is the possibility of identifying viable PRPs?
- **PRP capabilities** - Are PRPs qualified?
- **Willingness of the PRPs to cooperate** - What is the likelihood of settlement?

The decision to start an RI/FS involves the SCAP coordinator (or IMC), section chiefs, and branch chiefs. The division director grants final approval on RI/FS start decisions.

B. Intergovernmental Review

RPMs should initiate the intergovernmental review process during settlement negotiations, so that the review process is underway in the event Fund monies are used for site response activity. 40 CFR Part 29, "Intergovernmental Review of the Environmental Protection Agency Programs and Activities," addresses intergovernmental review of Federal financial assistance programs and directs Federal development activities as they relate to the Superfund program. This regulation applies to all remedial projects, including EPA-lead RI/FS projects, initiated under the authority of CERCLA for which EPA or the State designated agency is taking the lead. Responsible parties, however, are not subject to the regulation and their activities accordingly are not subject to the notification procedures outlined in the regulation.

Reference

OSWER Directive 9375.1-4-d, "State Participation in the Superfund Program," Appendix D, "Procedures for Implementing Intergovernmental Review for the Superfund Program" (June 2, 1988).

C. Formation of the Case Team

Primary responsibility for developing settlements rests with the case team, or negotiation team. The negotiation team usually consists of the RPM and the assistant Regional counsel. Additionally, the civil investigator works closely with the case team and manages or supports the PRP search. The primary responsibilities of the case team follow.

PRP Search

- Ensure that the PRP search is complete, including adequate information for special notice and evidence on PRPs
- Oversee continued investigations as necessary to gather further information on PRPs

General Notice and Information Exchange

- Ensure that PRPs are given general notice
- Ensure early information exchange with PRPs

Special Notice and Negotiation

- Develop and transmit draft settlement documents to PRPs, including technical scopes of work, Administrative orders or Consent Decrees, in advance of negotiations
- Conduct negotiations and maintain deadlines

The case team also assumes a general coordinating role in facilitating a site's progress through the enforcement process.

As part of their general coordinating role in negotiations, the case team should develop a negotiation plan. The negotiation plan documents EPA's approach to productive negotiations with PRPs; functions as a checklist of steps to be taken, including individual assignment of responsibilities; guides EPA's negotiation preparation process; resolves anticipated issues; and sets the bottom line for the negotiations. Negotiations where EPA is fully prepared and sets schedules and deadlines are much more likely to result in a signed Administrative Order on Consent. The RI/FS negotiation plan is also discussed in Chapter III, Comprehensive Site Planning, and is included as an appendix to this chapter.

D. Review PRP Search

When planning for negotiations, the case team should review thoroughly the PRP search report to ensure that the universe of PRPs has been identified and that PRP waste-in and liability information is complete enough to support the issuance of special notice letters. The information in the PRP search report also should be sufficient to support the preparation of volumetric rankings included in the special notice. Necessary follow-up work should be identified.

Information requests should be issued as early in the PRP search/negotiation process as practicable. Information requests may be issued as a separate letter during the PRP search process or as part of the general notice letter. Whenever possible, information request letters should be issued independently and well in advance of the general notice letter. Issuance of the information request letter prior to the general notice letter is especially encouraged in situations where information from PRPs is necessary to determine whether the issuance of a general notice letter is appropriate. Issuance of the GNL marks the point at which EPA determines that a party is a PRP.

Information request letters are discussed at length in Chapter IV, PRP Search, Notification, and Information Exchange.

E. Issue General Notice

The general notice letter informs PRPs of their potential liability, may begin or continue the process of information exchange, and initiates the process of "informal" negotiations. "Informal negotiations" refer to any discussions that are not conducted as part of the negotiation moratorium triggered by issuance of special notice under section 122 (e) of CERCLA.

General notice letters should be issued at all sites that are proposed for or listed on the NPL. However, it may not be appropriate to issue the general notice at sites where a notice pursuant to previous guidance was issued before the reauthorization of CERCLA or where the Region is ready to issue special notice at the site. These exceptions are important for minimizing any possible disruption to ongoing activities.

The general notice letter identifies a party as a PRP and informs the recipient of its potential liability for all response activities and costs incurred by the government. General notice letters should be sent to all parties for whom there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. The RPM, in consultation with ORC, should issue the general notice to PRPs as soon as possible. OWPE has developed a model general notice letter. The procedure for issuing general notice letters and the contents of the letter are discussed in detail in Chapter IV, PRP Search, Notification and Information Exchange.

References

OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Appendix A, "PRP Participation" (October 1988).

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations and Information Exchange" (October 19, 1987).

OSWER Directive 9834.10A, "Model Notice Letters" (February 1989).

OSWER Directive 9835.12-01a, "Revised Policy on Discretionary Information Release Under CERCLA" (March 1993).

OSWER Directive 9834.13, "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" (December 6, 1989).

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1987).

F. Steering Committees and Information Exchange

The case team should encourage PRPs to form a steering committee early in the negotiation process. This encouragement, however, should not suggest that EPA will negotiate only with one steering committee. Steering committees greatly facilitate negotiations in multi-party cases because the government may negotiate with one committee that represents the PRPs, and PRPs may resolve differences among themselves through the committee. The case team should encourage PRPs to form a steering committee at the time of the general notice letter or at the first meeting between the government and PRPs. If necessary, the case team should educate the steering committee in the Superfund enforcement process, including providing the committee with pertinent information such as PRP identification, waste-in lists, relevant policies, and technical data. As new PRPs are identified, the case team should refer them to the steering committee.

Establishment of PRP steering committees provides several logistical and tactical advantages to the negotiation process, including:

- Providing the government with a central point for dissemination of information and government decisions
- Providing a single point of issuance of PRP proposals and decisions
- Providing a forum in which PRPs may negotiate among themselves to determine allocations among their own members
- Providing the circumstances for experienced PRPs to educate less-experienced PRPs.

Although steering committees may be advantageous to reaching settlement, the case team should be aware of possible disadvantages of dealing with steering committees. Some PRPs may not trust the recommendations of the committee if they do not believe it fairly represents their concerns, and these PRPs may elect not to settle. If the committee leader-

ship is unfamiliar with CERCLA, or is internally fractious, the entire settlement can be jeopardized. The case team needs to be sensitive to these concerns in determining how it will relate to a particular steering committee.

G. Follow up on PRP Search

Before initiating formal negotiations with PRPs, the case team should review the PRP search report and correspondence from the PRP steering committee for any information that may lead to the identification of additional PRPs. Any such leads should be pursued and, in the event additional PRPs are identified, the new PRPs should be issued a general notice, advised of the status of informal negotiations, and informed of the existence of a PRP steering committee, if appropriate.

H. Natural Resource Trustees

Natural Resource Trustees and their responsibilities are identified in Subpart G of the NCP. EPA is not a trustee for natural resources under CERCLA. The trustees most frequently involved with CERCLA activities are the Department of the Interior and the Department of Commerce, which has delegated its responsibilities to the National Oceanic and Atmospheric Administration (NOAA). Section 104 (b)(2) of CERCLA requires that the trustees be notified of releases of hazardous substances that have the potential of causing damages to natural resources, and that EPA coordinate the assessments, investigations, and planning with the trustees. Section 122(j)(1) requires that the trustees be notified of settlement negotiations with the potentially responsible parties. CERCLA does not give EPA the authority to negotiate on behalf of the trustees. The RPM and the assigned ORC attorney, should ensure that coordination with the trustees is on-going throughout the remedial process. The coordination process established in the OSWER Directive 9295.0-02, "Memorandum of Understanding (MOU) between EPA and NOAA," (April 1992), should be followed when interacting with that Agency. Additional MOUs are being negotiated with the other Federal trustees. Until these MOUs are completed, the coordination sequence contained in the NOAA MOU should be used as the model for coordination with all of the natural resource trustees.

I. Preliminary Scoping of the RI/FS

Preliminary scoping is the initial planning phase of site remediation and should be initiated by the RPM with contractor support at least several months prior to the beginning of negotiations. By conducting preliminary scoping activities before negotiations with PRPs begin, EPA enters negotiations with a better idea of the nature and extent of the technical work that needs to be done at the site. When EPA has scoped the technical work and site management requirements at a site, negotiations with PRPs are more focused and the PRP-conducted work is likely to be of higher quality than when adequate scoping activity has not occurred.

The ability to develop a comprehensive site management strategy and site objectives is closely tied to the amount and quality of information available at the time. It should be recognized that the objectives and strategy may not be fully developed at this stage. As new information is acquired or new decisions are made, data requirements are reevaluated and, if appropriate, the site management strategy or objectives are modified.

The site objectives should specify the purpose of any activities to be conducted at the site including any interim actions that may be necessary, as well as the preliminary objectives of possible remedial actions (e.g., the preliminary cleanup goals). These objectives should identify preliminary contaminants and media of concern, the exposure pathways and receptors, and an acceptable contaminant level or range of levels for each exposure route. The site objectives are developed and based on existing site information; contaminant-specific ARARs, when available; and risk-related factors.

The site management strategy is developed once the objectives have been established and identifies the study boundary areas and the optimal sequence of site activities, including whether the site may best be remedied as separate operable units. The general manage-

ment approach should include: actual and potential site problems, any interim actions that are necessary to mitigate potential threats or prevent further environmental degradation, and the optimal sequence of activities to be conducted at the site. Also included in the site management strategy should be the decision as to whether the RI will serve as a continuation of the PRP search. This would be appropriate at sites at which all of the sources of contamination are not yet well defined.

PRP Issues

Determination of site boundaries may be a particularly significant issue for PRPs. The case team must carefully evaluate preliminary site information to determine if RI activities should occur in a more extended or restricted geographic area. This decision may be particularly difficult in situations that involve area-wide ground-water contamination or commingled ground-water contamination plumes, where contamination sources are identified off-site and indicate that additional PRPs may be identifiable. Scoping activities may thus uncover information that is valuable to following up PRP search efforts or identifying additional PRPs.

Site access also may be an issue significant to PRPs in negotiations. The case team should be aware of any potential site access issues when preparing for negotiations.

References

OSWER Dir. 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (October 1988).

OSWER Dir. 9355.3-01FS1, "Getting Ready - Scoping the RI/FS" (November 1989).

J. RI/FS Statement of Work (SOW)

The RI/FS SOW describes, in a comprehensive manner, the RI/FS activities to be performed as anticipated prior to the onset of the project. The SOW establishes the broad objectives, general activities to be undertaken, and deliverables to be submitted by PRPs in the RI/FS. The SOW should be prepared before issuance of special notice and included in the notice letter when issued to the PRPs. OSWER has prepared a model SOW for PRP-lead RI/FS activities (June 2, 1989). The major components of a SOW, as identified in the model, are set forth in Exhibit V-3. The model SOW is consistent with the revised RI/FS guidance (October 1988) and NCP. However, note that in June 1990, EPA decided that PRPs may not conduct risk assessments. See OSWER Directive 9835.15, "Performance of Risk Assessments in RI/FSs Conducted by PRPs" (August 28, 1990).

The draft site-specific SOW may be prepared by the RPM and other Regional personnel, with contractor help on scoping. Some circumstances may warrant EPA preparation of a work plan before or during negotiations. For a particular site, the RPM should add scoping information to the model SOW and should tailor the model, as necessary, to the site and PRPs. In limited circumstances, the PRP or EPA may prepare the SOW after the order is signed, but this approach may lead to major implementation problems and is not preferred.

The Work Plan describes the methodology for accomplishing the objectives set forth in the SOW. Work Plans usually are prepared by the PRPs as the first deliverable specified under the terms of the RI/FS settlement.

References

OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA," Appendix A, "PRP Participation" (October 1988).

OSWER Directive 9835.8, "Model Statement of Work for PRP-Conducted Remedial Investigations and Feasibility Studies" (June 2, 1989).

Exhibit V-3(1)

Major Components of the SOW

TASK 1: SCOPING

ACTIVITIES:
- Collect and Analyze Existing Site Data
- Document Need for Additional Data
- Project Planning, Including Refinement of Remedial Action Objectives, Documentation of Need for Treatability Studies and Preliminary Identification of Potential ARARs

DELIVERABLES:
- RI/FS Work Plan
- Sampling and Analysis Plan (SAP)
- Site Health and Safety Plan

TASK 2: COMMUNITY RELATIONS

TASK 3: SITE CHARACTERIZATION

ACTIVITIES:
- Field Investigation, Including Implementing Field Support Activities, Defining Site Physical Characteristics, Sources of Contamination and Nature and Extent of Contamination
- Data Analyses
- Data Management Procedures

DELIVERABLES:
- Technical Memorandum on Modeling of Site Characteristics (Where Appropriate)
- Preliminary Site Characterization Summary
  Draft Remedial Investigation (RI) Report

TASK 4: BASELINE RISK ASSESSMENT (To be prepared by EPA)

ACTIVITIES:
- Contaminant Identification and Documentation
- Exposure Assessment and Documentation
- Toxicity Assessment and Documentation
- Risk Characterization
- Environmental Evaluation

Exhibit V-3(2)

Major Components of the SOW

TASK 5: TREATABILITY STUDIES

ACTIVITIES:

- Determine Candidate Technologies and the Need for Testing
- Conduct Treatability Testing

DELIVERABLES:

- Technical Memorandum Identifying Candidate Technologies
- Treatability Testing Statement of Work
- Treatability Testing Work Plan (or Amendment to Original)
- Treatability Study SAP (or Amendment to Original)
- Treatability Study Site Health and Safety Plan (or Amendment to Original)
- Treatability Study Evaluation Report

TASK 6: DEVELOPMENT AND SCREENING OF ALTERNATIVES

ACTIVITIES:

- Refine and Document Remedial Action Objectives
- Develop General Response Actions
- Identify Volumes or Areas of Media
- Identify, Screen and Document Remedial Technologies
- Assemble and Document Alternatives
- Refine Alternatives
- Conduct and Document Screening Evaluation of Each Alternative

DELIVERABLES:

- Technical Memorandum Documenting Revised Remedial Action Objectives
- Technical Memorandum on Remedial Technologies, Alternatives and Screening

TASK 7: DETAILED ANALYSIS OF ALTERNATIVES

ACTIVITIES:

- Apply Nine Criteria and Document Analysis
- Compare Alternatives Against Each Other and Document Comparison of Alternatives

DELIVERABLES:

- Draft Feasibility Study (FS) Report

TASK 8: OVERSIGHT ACTIVITIES

K. Draft Administrative Order

The terms and conditions governing the RI/FS activities of PRPs should be specified in an Administrative Order on Consent (AOC). AOCs are the preferred settlement document for RI/FS activities because concurrence on AOCs takes place quickly. CERCLA authorizes the use of AOCs for RI/FS settlements under sections 104 and 122 and does not contain the requirement in section 106 of CERCLA that EPA must make a finding of imminent and substantial endangerment. In limited circumstances, EPA may compel a PRP to perform a RI/FS by a Uunilateral Administrative Order.

The case team should prepare a draft Administrative Order before special notice is sent. EPA has prepared a model Administrative Order, OSWER Directive 9835.3-1A (January 30, 1990). As applied, this version of the model order should be modified to provide that EPA performs the risk assessments. Moreover, most Regions have developed their own model orders.

In addition to settlement terms, the AOC must incorporate, by reference, the SOW. The AOC also should contain language that requires PRP conducted RI/FS activities to meet appropriate quality standards. The draft AOC thus provides a starting point for negotiations and should be prepared in time to include it in the special notice to the PRPs.

In addition to the SOW, which outlines the activities to be performed, the AOC also generally contains schedules, EPA or State oversight roles and responsibilities, and enforcement options that may be exercised in the event of noncompliance, such as stipulated penalties. The AOC also typically includes the following elements as agreed upon by EPA and the PRPs:

- **Introduction** - describes parties involved, response action covered, and identifies the site
- **Jurisdiction** - describes EPA's authority to enter into the Order
- ***Parties bound*** - describes to whom the Agreement applies and who it binds
- **Statement of Purpose** - describes the purpose of the Order in terms of mutual objectives in preparing a RI/FS
- **Findings of fact** - provides an outline of facts upon which the Agreement is based
- **Conclusions of Law and Determinations** - specifies that the site is a "facility"; wastes are a "hazardous substance"; and their presence constitutes a release
- **Notice** - verifies that the State has been notified of pending site activities
- **Work to be Performed** - describes, generally by reference to the attached SOW, the activities to be conducted pursuant to the AOC and provides a schedule for completion of activities and a schedule of deliverables
- **Modification of the Work Plan** - specifies that the PRPs are committed to perform any additional work or subsequent modifications which are not explicitly stated in the work plan, if EPA determines that such work is necessary for a complete RI/FS
- **Quality Assurance** - specifies that technical work at a site must comply with the requirements of CERCLA, the NCP, Agency guidance, and QA procedures
- **Final RI/FS, Proposed Plan, ROD, Public Comment and Administrative Record Requirements** - provides that EPA releases the RI/FS, prepares the ROD, and that all information upon which the selection of remedy may be based be submitted to EPA for public comment in fulfillment of the Administrative Record requirements of section 113 of CERCLA
- **Progress Reports and Meetings** - specifies the type and frequency of reporting that PRPs must provide to EPA
- **Sampling, Access and Data Availability/Admissibility** - stipulates that PRPs shall allow access to the site by EPA, authorized personnel, the State, and third party oversight officials. The clause in the settlement also should state what constitutes the PRPs' best efforts to gain access to the site or necessary off-site locations when the

property is not owned by the PRPs. This claim should also provide for access to the site by EPA contractors and specify actions EPA may take to gain access. In developing this clause in the settlement, the case team should consider access needs and the cooperativeness of the parties owning property to which access may be required. This section also stipulates that the PRP shall submit to EPA in the subsequent monthly progress report all results of sampling, modeling, tests, or other data. EPA may take split or duplicative samples as necessary.

- **Designated Project Coordinators** - specifies that EPA, the State, and PRPs shall each designate a project coordinator. The EPA coordinator may be the RPM
- **Other Applicable Laws** - states that PRPs shall comply with all laws that are applicable when performing the RI/FS
- **Record Preservation** - specifies that all records must be maintained by both parties for a minimum of ten years after commencement of the remedial action, if any, followed by a provision requiring PRPs to offer the site records to EPA before disposal.
- **Dispute Resolution** - specifies steps to be taken to resolve disagreements between the parties regarding the work to be performed
- **Delay in Performance/Stipulated Penalties** - provides for stipulated penalties for noncompliance with the terms of the order, and sets forth penalty amounts. This clause in the settlement may also address the applicability of statutory penalties
- **Force Majeure** - stipulates that the PRPs shall notify EPA of any event that occurs that may delay or prevent work and that is due to an unexpected or uncontrollable event that could not be avoided by exercise of due care
- **Reimbursement of Past Costs** - provides for reimbursement for past response costs incurred by the government
- **Reimbursement of Response and Oversight Costs** - provides for reimbursement of costs of the government in connection with the RI/FS, including review and oversight
- **Reservations of Rights and Reimbursement of other Costs** - provides EPA with the right to enforce past costs and cost reimbursement requirements
- **Disclaimer** - states that the PRPs' signature on the Consent Order is not considered an admission of liability
- **Other Claims** - states that any release from liability applies only to matters covered in the AOC and to no other claim or liability, except as provided in the reservation of rights section
- **Financial Assurance, Insurance and Indemnification** - specifies that PRPs should have adequate financial resources/insurance coverage to cover liabilities resulting from their RI/FS activities
- **Effective Date and Subsequent Modification** - stipulates that the Consent Order is effective on the date it is signed by EPA and that it may be amended by mutual agreement of EPA and the PRPs
- **Termination and Satisfaction** - states that the Consent Order shall terminate when the PRP demonstrates in writing that all work has been performed and EPA approves.

RPMs must coordinate closely with ORC in preparing the draft AOC. Region I has developed a step-by-step approach to developing Administrative Orders, the major points of which are summarized in Exhibit V-4. RPMs should note that the procedures in Exhibit V-4 are specific to Region I. However, they are included in this handbook as a guide for Regions without an established AO development process and as a source of comparison for Regions with different procedures.

References

OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," Appendix A, "PRP Participation" (October 1988).

OSWER Directive 9835.3-1A, "Model Administrative Order on Consent for RI/FS" (January 3, 1990).

OSWER Directive 9835.15, "Performance of Risk Assessments in RI/FSs Conducted by PRPs" (August 28, 1990).

L. Issue Special Notice Letter

The Special Notice Letter (SNL) procedure authorized by section 122(e) of CERCLA initiates the formal settlement process between EPA and the PRPs. The special notice procedure triggers a moratorium on EPA's conduct of the RI/FS and remedial action. However, certain investigatory and planning activities may occur during the negotiation moratorium, including any "additional studies" as set forth in section 104(b) of CERCLA. The purpose of the moratorium is to provide for a formal period of negotiation between EPA and PRPs where the PRPs will be encouraged to conduct response activities. The special notice procedure should be utilized whenever it would facilitate agreement. If EPA does not issue a special notice, the Region must provide PRPs with an explanation.

The RI/FS negotiation moratorium may last 90 days if EPA receives a Good Faith Offer (GFO) for conducting the work from PRPs within the first 60 days of the moratorium. The negotiation moratorium concludes after 60 days if the PRPs do not provide EPA with a GFO.

The special notice letter should specify the calendar date through which the moratorium runs. In instances where there is more than one PRP and PRPs are likely to receive the special notice on different days, the date the moratorium begins should be approximately seven days from the date the letters are mailed to the PRPs. In either case, the special notice must make clear when the negotiation moratorium ends.

In cases where EPA decides it is inappropriate to issue the special notice, the Region must notify PRPs in writing of the decision. Section 122(a) of CERCLA requires that the notice indicate the reasons why the Region determined that issuing the special notice and entering into formal negotiations was not appropriate. OWPE has prepared a model notice of decision not to use special notice procedures. This model should be used by the Regions when notifying PRPs that the special notice procedure will not be used. The notice or justification for not issuing the special notice should be provided to all PRPs that have been identified to date as well as to the Regional Administrative Record coordinator for placement in the Administrative Record. In any event, a list of PRPs should be provided to the community relations coordinator for inclusion on the mailing list.

In general, EPA policy is to issue special notice letters for RI/FS whenever possible. There are several circumstances where EPA generally would not use the special notice procedure:

- Past dealings with the PRPs strongly indicate they are unlikely to negotiate a settlement
- EPA believes the PRPs have not been negotiating in good faith
- No PRPs have been identified at the conclusion of the PRP search
- PRPs lack the resources to conduct response activities
- Notice letters were issued prior to reauthorization of CERCLA and ongoing negotiations would not benefit by issuance of a special notice.

The RPM also must notify the State of the negotiations and provide the State with the opportunity to participate.

Timing of Special Notice

The special notice should be sent sufficiently in advance of obligations for the RI/FS so that negotiations do not delay the initiation of the RI/FS by the Fund in the event the negotiations do not result in PRP conduct of the RI/FS. At the latest, PRPs should receive special notice 90 days prior to the scheduled date for initiating the RI/FS. The scheduled date for initiating the RI/FS refers to the date the AOC will be signed or the date funds will be obligated to commence response activities. The 90-day period allows an opportunity for the PRPs to undertake the RI/FS while also providing a timeline for initiating Fund-financed RI/FS activity if negotiations do not result in settlement.

M. Good Faith Offer

The initial 60-day moratorium may be extended to 90 days if the PRPs submit a GFO for conducting RI/FS activity. The special notice should identify a GFO as a written proposal that demonstrates the PRP's qualifications and willingness to undertake the RI/FS. A GFO for the RI/FS should contain the following elements:

- A statement of the PRP's willingness to conduct the RI/FS that is consistent with EPA's SOW or work plan and draft AOC and provides a sufficient basis for further negotiations
- A paragraph-by-paragraph response to EPA's SOW or work plan and draft AOC, including a response to any other attached documents
- A demonstration of the PRP's technical capability to undertake the RI/FS, including identification of the firm(s) that may actually conduct the work or a description of the process they will use to select the firm(s)
- A demonstration of the PRP's capability to finance the RI/FS
- A statement of willingness by the PRPs to reimburse EPA for costs incurred in relationship to the PRP's conduct of the RI/FS, including oversight
- The name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

If the GFO contains the above elements, and EPA determines that continuing negotiations will be beneficial, the Region may approve a 30-day extension to the negotiation period. Generally, the 30-day extension is utilized only when settlement is likely.

In some cases, it may be beneficial to extend negotiations beyond the 90-day moratorium period. In exceptional circumstances, the Regional Administrator may approve an additional extension of no more than 30 days to the 90-day moratorium. Extensions are granted only in very rare circumstances and for short duration where final agreement is imminent. Requests for extensions to the formal negotiation period should be made in writing by the case team to the Regional Administrator. This request may be prepared initially by the RPM and should specify: the length of extension requested; status of negotiations (issues resolved and those unresolved); justification for the extension; and actions to be taken in the event negotiations are unsuccessful.

The Regional Administrator will approve or deny the extension to the negotiation period based on the information presented in the request. If approved, the request then should be forwarded to the Director, OWPE.

Notify DOJ

Under section 122(h)(1) of CERCLA, the Agency may compromise and settle a claim under section 107 of CERCLA for past and future response costs if the case has not been referred to DOJ for further action. In cases where total response costs exceed $500,000 (excluding interest), claims may be compromised (i.e., settled for less than 100 percent) only after approval by DOJ. EPA seldom settles future claims under section 107 of CERCLA because future costs are often unknown and total costs often exceed $500,000. DOJ may review the compromise of a claim pursuant to section 122(h)(1) of CERCLA, where total response costs exceed $500,000 at the facility. DOJ is not required to review an Administrative Order for PRP conduct of an RI/FS.

N. Conditions for PRP Conduct of RI/FS

EPA must evaluate PRP offers against certain criteria to determine whether the PRPs possess the capabilities to perform the RI/FS properly and promptly. RPMs should consider whether the following conditions for PRP conduct of the RI/FS are met:

Scope of Activities

PRPs must agree to follow the site-specific SOW, including reasonable modifications acceptable to EPA, as the basis for conducting the RI/FS. EPA will reject any request for modifications to the SOW that are not consistent with CERCLA, the NCP, and requirements set forth in Agency guidance.

Demonstrated Capabilities

PRPs must demonstrate to EPA that they possess, or are able to obtain, the technical expertise necessary to perform all relevant activities identified in the SOW. PRPs also must demonstrate that they possess the managerial expertise and have developed a management plan sufficient to ensure that the proposed activities will be properly controlled and efficiently implemented. Additionally, PRPs must demonstrate that they possess the financial capability to conduct and complete the RI/FS in a timely and effective manner. Although it is always considered in negotiations, the PRP's demonstration of their technical, managerial, and financial capabilities may be the first deliverable under the settlement.

In addition to the PRP's technical and managerial capabilities, the Agency will have considered the PRP's ability to objectively address certain issues in drafting the order. Tasks which the Agency should pay special attention to and consider reserving for themselves include: determination of applicable or relevant and appropriate requirements and the effectiveness of institutional controls. For all AOCs or CDs signed after June 21, 1990, EPA will prepare the baseline risk assessment for all enforcement-lead sites.

Assistance for PRP Activities

If PRPs propose to use consultants for conducting or assisting in the RI/FS, the PRPs should specify the tasks to be conducted by the consultants and submit personnel and corporate qualifications of the proposed firms to EPA for review. EPA must verify that the PRPs' consultants have no conflict of interest with respect to the project.

O. Negotiations Outcome-PRP-Lead RI/FS

Negotiations that result in settlement are concluded by signature of an AOC or entry of a Consent Decree (CD) committing the PRPs to conduct the work and reimburse the Government's costs.

In cases where settlement issues require clarification, the Regional Administrator acts as the primary decision-maker on CERCLA settlement issues. This responsibility is often delegated to the Division Director. The case team should provide a written summary of any settlement issues requiring a decision by the Regional Administrator. The Regional Administrator holds full responsibility for resolving issues related to administrative settlements for the RI/FS.

Once PRPs have signed the settlement document, the agreement must go through the Regional concurrence chain and ultimately be signed by the Regional Administrator, unless his/her authority has been redelegated. If the settlement document is a Consent Decree, the case team also must coordinate with the Environmental Enforcement Section in DOJ to finalize the settlement. In cases where a GFO is rejected based on the criteria outlined in OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," Appendix A, "PRP Participation" (October 1988), the case team must determine whether the PRPs are indeed negotiating in good faith and then determine whether to continue negotiation efforts.

If negotiations do not lead to a signed AOC at the end of the formal negotiation period, EPA may initiate Fund-lead RI/FS activities. However, initiation of Fund-financed activity is possible only if provisions have been made for the activity in the SCAP. A

P. Negotiations Outcome-Fund-Lead RI/FS

planned date for the initiation of Fund-lead activity may be viewed as a drop-dead settlement date for PRPs, thus providing an incentive for settlement.

Although it is preferable not to have uncooperative PRPs conducting the investigatory work of the RI/FS, in limited circumstances section 106 Unilateral Administrative Orders (UAOs) may be issued to achieve PRP conduct of RI/FS activities.

Section III. Planning and Reporting Requirements

This section discusses the planning and reporting requirements associated with the RI/FS negotiation process.

A. Planning Requirements

Funds for RI/FS negotiations are made available to the Regions through the Case Budget. The Case Budget process is discussed in greater detail in Chapter XVI, Case Budget/ Contracts, and Chapter XVII, SCAP/STARS Cycle. Funds allocated to RI/FS negotiations are set forth in the current fiscal year SCAP manual.

The funds available for RI/FS negotiations cover the following activities:

- Scoping the RI/FS
- Development of the SOW
- Forward planning/records compilation
- Issuance of Special Notice
- Support for negotiations meetings
- Development and issuance of AOs.

This $50k allocation is not designed to support entire scoping activities and work plan development of a Fund-financed RI/FS.

When planning in the SCAP for RI/FS activities, RPMs should consider the advantages and disadvantages of targeting RI/FS activities as Fund or PRP-lead. If a Fund-lead RI/FS is targeted at a site, OERR sets aside extramural dollars to perform the work. In situations where money has already been appropriated for RI/FS activity at a site, EPA may be able to negotiate more effectively with the PRPs, since the possibility exists that EPA may choose to conduct the work immediately and sue for cost recovery later. PRPs generally prefer settling before RI/FS work is completed to avoid being sued for cost recovery at a later time. However, proper planning entails achieving a balance between Fund and PRP-lead targeted RI/FSs.

Contractor Support

RPMs should anticipate the extent of contractor involvement in the issuance of the general and special notice letters, development of the SOW, and evaluation of PRP engineering qualifications. Additionally, RPMs should note that separate work assignments must be initiated for RI/FS negotiation and oversight of PRP RI/FS. The initiation of separate work assignments is necessary for tracking and cost recovery of oversight costs.

Section 104 of CERCLA requires EPA to use third party assistance in oversight of PRP-lead RI/FS activities. Generally, this support is available through TES, ARCS, other Federal agencies (such as the Corps of Engineers) or States. Oversight resources are made available through the Case Budget process. At the time of settlement, the RPM should plan for oversight and identify in-house and extramural support needs. Oversight planning requirements are discussed in greater detail in Chapter VI, RI/FS Implementation. PRPs are required to pay for EPA's costs in connection with the RI/FS, including oversight.

B. Reporting Requirements

RI/FS negotiations are discussions between EPA and the PRPs on their liability, willingness, and ability to conduct the RI/FS. RI/FS negotiations are tracked by SCAP/STARS through CERCLIS. Exhibit V-5 summarizes SCAP/STARS measures relevant to RI/FS negotiations. RPMs are responsible for ensuring that accurate data are reported into CERCLIS/WasteLAN. The RPMs should enter in the data or provide the information to the IMC. If the Region does not plan to perform RI/FS negotiations at a site, negotiation

dates should not be placed in WasteLAN. The start of RI/FS negotiations should be planned site specifically. This is a SCAP reporting measure.

Exhibit V-5
SCAP/STARS Measures for RI/FS Negotiations

Activity	STARS Reporting	SCAP Plan/Report	Quarterly	Annual
RI/FS Negotiation Start		X	X	X
RI/FS Negotiation Completion		X	X	X

Definitions for:

RI/FS Negotiation Start: RI/FS negotiations start when the first Special Notice Letter (SNL) is signed, or a waiver of SNL is signed.

RI/FS Negotiation Completion: The RI/FS negotiation ends when:

- A Unilateral Administrative Order (UAO) for RI/FS is signed by the Regional Administrator (a UAO is not the preferred enforcement tool for RI/FS and should be used only under unique circumstances)
- An Administrative Order on Consent (AOC) for RI/FS is signed by the Regional Administrator
- A signed Consent Decree (CD) for RI/FS is referred by the Region to HQ or DOJ
- The Region decides to proceed with a fund-financed RI/FS, terminates negotiations, and obligates funds for the RI/FS.

The negotiations conclusion date is the date the Regional Administrator signs the order, the date on the transmittal letter referring the CD, or the funds for RI/FS are obligated.

The RI/FS negotiation outcomes are also tracked by SCAP/STARS. A matrix of SCAP/STARS measures relevant to RI/FS Negotiation Outcomes is presented as Exhibit V-6.

Exhibit V-6
SCAP/STARS Measures for RI/FS Negotiation Outcomes

Activity	STARS Reporting	SCAP Plan/Report	Quarterly	Annual
AC (AOC)		X	X	X
UA (UAO)		X	X	X
CD		X	X	X
State Order/CD		X	X	X

Definitions for RI/FS Negotiation Outcomes:

AOC & UAO: Administrative Orders (AOC and UAO) are an enforcement tool to compel the PRPs to assume responsibility for removal actions and RI/FS projects. Report section 104/106/122 AOs (AOC and UAO) issued by EPA for PRPs to conduct removal actions and/or RI/FSs. Credit for the order is based on the date it is signed by the Regional Administrator as recorded in WasteLAN. Projections for AOs for RI/FS are made site specifically.

CD: Judicial agreement between EPA and the PRPs compelling the PRPs to conduct the RI/FS. Credit is given based on the date the Regional Administrator signs the transmittal memo to HQ or DOJ. This is the CD start date as recorded in WasteLAN.

State Order/CD: Agreement between the State and the PRPs compelling the PRPs to conduct the RI/FS. Credit is given when the last State Official signs the agreement. This is the completion date as recorded in WasteLAN.

For specific coding requirements into WasteLAN, see the Enforcement Data Quality Manual Chapter I; RI/FS Negotiations (FN), Administrative Order On Consent (AC), Unilateral Administrative Order (UA), Consent Decree (CD), State Decree (SD), and State Order (SO), or see your IMC.

Section IV. Potential Problems/Resolutions

This section discusses specific issues the case team may confront during the course of RI/FS negotiations, and suggests methods for resolving these issues.

A. Stipulated Penalties

As an incentive for PRPs to properly conduct the RI/FS and correct any deficiencies discovered during the conduct of the agreement, EPA should include stipulated penalties in the terms of the agreement. Penalties should begin to accrue on the first day of the deficiency and continue to be assessed until the deficiency is corrected. The type of violation (i.e., reporting requirements vs. implementation of construction requirements) as well as the amounts per violation per day, should be specified as stipulated penalties in the agreement. Also section 122 allows EPA to seek or impose civil penalties for violations of Administrative Orders.

B. Past Costs

In many cases, EPA has incurred significant costs at a site prior to settling with PRPs for performance or finance of the RI/FS. Such incurred costs may include the conduct of one or more removal actions. EPA must decide whether to pursue recovery of these costs as part of the RI/FS settlement or delay attempting to recover pre-RI/FS costs until RD/RA negotiations. The case team should determine past costs prior to the special notice letter and include them in the letter as a demand. In negotiations, the case team should consider the numbers of settlors/non-settlors, the likely statute of limitations for the removal, the possible implications of cost recovery litigation on remedial activities, and possibilities of reallocation in RD/RA negotiations.

C. RI/FS Oversight Costs/Limits

The cost of EPA or State oversight generally is a major issue during RI/FS negotiations. PRPs typically prefer a settlement in which their financial responsibility for oversight costs is limited to a fixed dollar amount. EPA generally prefers no limit on the recoverable amount of oversight expenses.

The amount of EPA/State oversight also is often an issue during RI/FS negotiations. PRPs may prefer a settlement in which the extent of EPA's presence in the field during PRP conduct of RI/FS activities is predetermined. EPA policy, however, is to not limit the frequency or extent of oversight activities, because conditions may develop that were unanticipated at the time of settlement and require increased attention by the oversight agency. Oversight includes EPA costs, including contractors.

D. Removals Required During RI/FS

During the course of the RI/FS, site conditions may deteriorate to the point that removal activity is required. The case team should be prepared for the possibility that a removal may be required during the RI/FS and include provisions for such a situation in the settlement document. RPMs should ensure that appropriate language is incorporated into the AOC or CD to reserve liability for such costs.

E. Additional Work

Under the AOC or CD, PRPs agree to complete the RI/FS, including the tasks required under either the original work plan or a subsequent or modified work plan. This may include determinations and evaluations of conditions that are unknown at the time of execution of the agreement. Modifications to the original RI/FS work plan are frequently required as field work progresses. Work not explicitly covered in the initial work plan is often required and therefore provided for in the order. This work is usually identified during the RI and is driven by the need for further information in a specific area. In general, the agreement should provide for fine-tuning of the RI or the investigation of an

area previously unidentified. As it becomes clear what additional work is necessary, EPA will notify the PRPs of the work to be performed and determine a schedule for completion of the work.

EPA must ensure that the clauses for modifications to the work plan are included in the agreement so that the PRPs will carry out the modifications as the need for them is identified. To facilitate negotiation on these points, EPA may consider one or more of the following provisions in the agreement for addressing such situations:

- Defining the limits of additional work requirements
- Specifying the dispute resolution process for modified work plans and additional work requirements (this is particularly difficult if the State is involved)
- Defining the applicability of stipulated penalties to any additional work which the PRPs agree to undertake.

The order may not agree that there will not be an investigation of potential problem areas.

Section V. References

Guidance

OSWER Directive 9834.13, "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" (December 6, 1989).

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1987).

OSWER Directive 9335.3-01 "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA," Appendix A, "PRP Participation" (October 1988).

OSWER Directive 9355.01FS1, "Getting Ready — Scoping the RI/FS" (November 1989).

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OSWER Directive 9835.8, "Model Statement of Work for a RI/FS Conducted by PRPs" (June 2, 1989).

OSWER Directive 9835.12-01a, "Revised Policy on Discretionary Information Release Under CERCLA" (March 1993).

OSWER Directive 9835.15, "Performance of Risk Assessments in RI/FSs conducted by PRPs" (August 28, 1990).

OSWER Directive 9835.3-1A, "Model Administrative Order on Consent for RI/FS" (January 30, 1990).

Manuals

OSWER Directive 9355.1-1, *Superfund Federal Lead Remedial Project Management Handbook* (December, 1986).

OSWER Directive 9375.1-4-d, *State Participation in the Superfund Program*, Appendix D, "Procedures for Implementing Intergovernmental Review for the Superfund Program" (June 2, 1988).

Contacts

Administrative Orders and Consent Decrees

OE, Superfund Enforcement Division, Settlement/106 Branch, at 202-260-3110

OWPE, CERCLA Enforcement Division, Compliance Branch, at 703-603-8910

Model AOC for RI/FS

OWPE, CERCLA Enforcement Division, Guidance and Evaluation Branch, at 703-603-8940

Special Notice Procedures and Model Letters

OWPE, CERCLA Enforcement Division, Compliance Branch, at 703-603-8910

OWPE, CERCLA Enforcement Division, Guidance and Evaluation Branch at 703-603-8940

Model SOW

OWPE, CERCLA Enforcement Division, Guidance and Evaluation Branch, at 703-603-8940

Litigation Support

U.S. Department of Justice, Environment and Natural Resources Division, Litigation Support Group, at 202-616-3354

Section VI. Activities Checklist

This activities checklist is not intended to provide an exhaustive list of procedures. RPMs should use it as a guide when involved in RI/FS negotiations.

1)_____ Decision to start the RI/FS

- a)_____ Is the RI/FS start planned in the SCAP?
- b)_____ Initiate intergovernmental review process

2)_____ Form Case Team

- a)_____ Review PRP search and identify follow-up work
- b)_____ Begin developing negotiation plan

3)_____ Information exchange/general notice

- a)_____ Issue information request letters
- b)_____ Issue general notice letters
- c)_____ Encourage formation of PRP steering committee
- d)_____ Complete follow-up work identified during PRP search review
- e)_____ Notify State and Natural Resource Trustees of negotiations

4)_____ Preliminary Scoping

- a)_____ Develop site objectives
- b)_____ Develop site management strategy

5)_____ Negotiation Preparation

- a)_____ Develop SOW
- b)_____ Develop draft AO

6)_____ Formal Negotiations

- a)_____ Issue special notice letters
- b)_____ Evaluate good faith offer
- c)_____ Request negotiation extension, if appropriate

7)_____ Conclude negotiations

- a)_____ Prepare AO for signature
- b)_____ Initiate Fund-financed activity, if appropriate

Appendix

Remedy Selection and Negotiation Plan

1. Schedule and Staffing Requirements
   a. Provide a schedule for completing the negotiations (including activities, staff and contractor support)
   b. Describe coordination with State and other government offices
2. Negotiation Objectives
   a. Develop initial and bottom-line negotiation positions
   b. Assess the desirability of a PRP RI/FS relative to site and PRP history to date
   c. Identify potential for alternative settlements, including mixed funding, *de minimis* or partial settlements
3. Costs Incurred and Cost Recovery Plan
   a. Summarize costs incurred to date and estimate future response costs at the site
   b. Develop negotiation strategy for cost recovery, including the degree of compromise available on past and oversight costs and the linkage between recovery of past and oversight costs and PRP performance
   c. Describe the methods used to document costs for the site and identify sources for cost documentation requests
   d. Assess timing of demand, considering statute of limitations, etc.
4. Remedy Selection Process
   a. Discuss the methodology used in selecting a site remedy (identifying participants in RI/FS review; ROD preparation; RPR and public participation in the process; and compilation, review, updating and certification of the Administrative Record)
   b. Indicate how remedy selection affects the RD/RA negotiation process
5. Criteria For Good Faith Offer
   a. Include PRPs willingness to conduct or finance site clean-up activities and reimburse EPA for oversight activities, response to EPA's statement of work, demonstration of PRP capabilities, etc.
6. Enforcement Prerequisites
   a. Discuss the progress made in identifying PRPs and PRP willingness to cooperate with the government
   b. Assess enforcement potential including determination of imminent and substantial endangerment, strength of evidence/liability, financial viability of PRPs, etc.
   c. Assess use of enforcement tools including special notice, unilateral actions, actions against recalcitrants, etc.
7. Technical Requirements For PRP Performance
   a. Develop scope of work or work plan
   b. Describe key items required to conduct PRP oversight
   c. Assess the site access situation
8. Draft Administrative Order (AO) or Consent Decree (CD), as appropriate

Chapter VI
RI/FS Implementation

Section I. Description of Activity 1

Introduction 1

RI/FS Overview 1

Phases of RI/FS Activity 2

Pre RI/FS Negotiation Scoping 2

Post-AOC Scoping 2

Site Characterization 2

Baseline Risk Assessment 2

Treatability Investigations 3

Development and Screening of Alternatives 3

Detailed Analysis of Alternatives 3

Oversight Objectives 3

Roles and Responsibilities 4

RPM 4

Oversight Assistant 5

Natural Resource Trustees 6

ATSDR 6

Section II. Procedures and Interactions 7

A. Project Scoping 7

Pre-RI/FS Negotiation Scoping 7

Scoping After Agreement 8

Work Plan 8

Sampling and Analysis Plan (SAP) 9

Health and Safety Plan 9

B. Site Characterization 9

Collection and Analysis of Field Data 9

C. Risk Assessment 10

D. Treatability Investigations 11

E. Development and Screening of Alternatives 12

F. Detailed Analysis of Alternatives 13

Section III. Planning and Reporting Requirements 14

A. SCAP/STARS 14

Section IV. Potential Problems/Resolutions 17
A. Dispute Resolution 17
B. Corrective Measures 17

Section V. References 18
Regulation 18
Guidance 18
Manuals 18
Short Sheets 19
Training 19
Contacts 19

Section VI. Activities Checklist 20

Appendix
RI/FS Scoping Following AO A1
RI: Site Characterization, Baseline Risk Assessment, and RI Report A2
Treatability Investigations A3
Feasibility Study: Development and Screening of Alternatives A4
Feasibility Study: Detailed Analysis of Alternatives and FS Report A5

Chapter VI
RI/FS Implementation

Section I. Description of Activity

Introduction

This chapter focuses on the RPM's role in overseeing the implementation of a PRP-conducted RI/FS. To put the oversight responsibilities in context, a summary of the RI/FS process also is provided.

A PRP-conducted RI/FS is usually authorized by an Administrative Order under sections 104 and 122 of CERCLA and may be ordered unilaterally under section 106.[1] It is EPA's policy to allow the PRP to conduct the RI/FS when the PRP:

- Is technically qualified or otherwise capable of performing the necessary activities within the time constraints
- Agrees to conduct the RI/FS in accordance with the terms and conditions of the Administrative Order or Consent Decree
- Reimburses the Superfund for all EPA and qualified oversight assistant costs associated with oversight of the project.

RPM management of the RI/FS begins in preliminary scoping before a Special Notice Letter (SNL) has been sent out to the PRP. Actual PRP implementation of the RI/FS begins after the Administrative Order is signed during scoping. The process is complete once the Agency conducts a closeout meeting, approves the final RI/FS report as submitted by the PRPs or as amended by the Agency, and issues the Record of Decision (ROD).

For a more in-depth discussion of EPA oversight of PRP RI/FSs, refer to the "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies, Volumes 1 and 2" (OSWER Directive Nos. 9835.1(c) and (d), July 1991).

RI/FS Overview

In general, the RI/FS is an investigation designed to characterize a site, assess the nature and extent of the contamination at a site, evaluate the potential risk to human health and the environment, and develop and evaluate potential remedial alternatives. An RI/FS accomplishes two primary objectives:

- Provides information to assess the risks posed to public health and the environment by the site
- Evaluates a range of remedial alternatives (treatment controls, institutional controls, or a combination of these plus a no action alternative) based on specified site criteria.

The process is composed of the RI, which is the actual field data collection and in-house risk assessment process (corresponding to the first objective), and the FS, which develops and evaluates remedial alternatives. The RI and FS include iterative activities and will overlap in timing. Data collected in the RI influences the development of remedial alternatives in the FS, which in turn affects the data needs and the scope of treatability studies. The distinction between the RI and FS phases is made to emphasize the focus of the studies.

The specific tasks required to perform an RI/FS vary, and are phased in accordance with a site's complexity and the amount of available information. A phased RI/FS process

[1] The terms and conditions governing RI/FS activities also may be specified in a Consent Decree (CD). The AOC, however, is the preferred settlement document because it is not subject to court approval.

facilitates early identification of data collection requirements. These requirements are intended to characterize the site effectively by describing contaminant concentration, fate and transport, and exposure pathways so that sufficient information is available to determine risk and if necessary, evaluate and compare the remedial alternatives.

Phases of RI/FS Activity

There are seven major phases of RI/FS activity. Each phase is briefly summarized below and graphically depicted in Exhibit VI-1. In addition, the Oversight Guidance (referenced previously) has a chapter on each phase.

Pre-RI/FS Negotiation Scoping

Pre-RI/FS scoping begins several months before an SNL for an RI/FS has been sent out to the PRP and is completed when the RPM:

- Obtains a general understanding of the site using the existing information and determines, generally, the data needed to make a remedy selection decision
- Utilizes a Technical Support Team (TST) to assist on the RI/FS and in executing the tasks of future PRP oversight
- Visits the site to identify the conditions of the site, effects of contaminants, and the potential areas of concern
- Generates a preliminary site-specific SOW and draft AOC.

Pre-RI/FS negotiation scoping is the initial task performed internally by the RPM with the help of the support contractor. During this preliminary planning phase prior to negotiations between EPA and the PRPs, EPA develops a site-specific general plan to identify potential sources of contamination, pathways, and receptors. The Agency then establishes site-specific objectives of the RI/FS and a strategy for the general management of the site. The preliminary scope should utilize a TST to ensure that the objectives of the RI/FS are as clear as possible, there is sufficient understanding of the desired work to negotiate a statement of work, and resource needs can be defined.

Post-AOC Scoping

Post-AOC scoping is the activity planning and project plan development phase of the RI/FS. It occurs after negotiations are completed and an AOC, including a SOW, has been signed by EPA and the PRP. During this phase, the RPM, with the help of an oversight assistant and members of the TST, refines the site conceptual model and the preliminary site objectives and data needs that were developed in the pre-RI/FS negotiation scoping. This information is used to assist the PRP to develop project plans which are then subject to EPA's review, comment, and approval. Many of the activities begun during the scoping process (i.e., preliminary risk assessment, need for treatability studies, identification of ARARs) are continued and refined as site work progresses and new information is obtained.

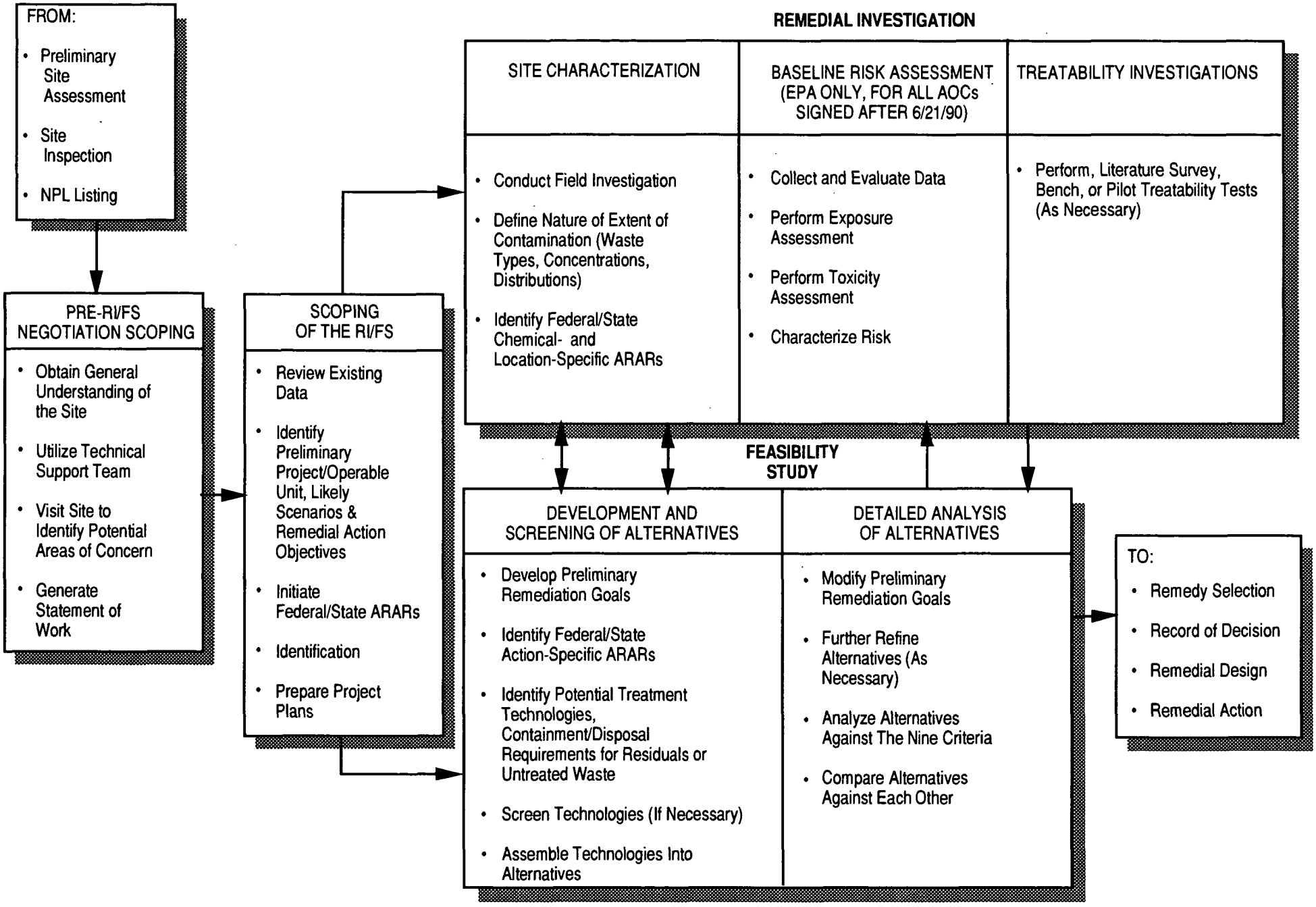
Site Characterization

Site characterization involves the collection and analysis of field data to determine the physical site characteristics, sources of contamination, and nature and extent of contamination. Data are gathered during the RI for other analyses (e.g., EPA's risk assessment, treatability study evaluation, and the natural resource trustee survey) which also are conducted during site characterization, so that the Feasibility Study can be completed and conducted without the need for additional information gathering.

Baseline Risk Assessment

The purpose of the baseline risk assessment is to characterize the current and potential risk that the site poses to human health and the environment. The results of the baseline risk assessment may indicate that the site poses substantial, little, or no threat, and that substantial, limited, or no further response activity is required. If the baseline risk assessment

Exhibit VI-1
Phased RI/FS Process



indicates that action is necessary, remediation goals are determined for the site contaminants with an evaluation of how each viable alternative carried through to the detailed evaluation addressed the risk(s). Beginning with all AOCs (or CDs) signed after June 21, 1990, EPA will prepare the baseline risk assessment at all enforcement-lead sites. See OSWER Directive 9835.15, "Performance of Risk Assessments in Remedial Investigation/ Feasibility Studies Conducted by Potentially Responsible Parties" (August 28, 1990), and OSWER Directive 9835.15a, "Supplemental Guidance on Performing Risk Assessments in Remedial Investigations/Feasibility Studies Conducted by Potentially Responsible Parties" (July 2, 1991).

Treatability Investigations

Treatability studies are conducted during the RI and should provide the data needed to evaluate one or more treatment technologies for potential analysis during the development, screening, and detailed analysis in the FS. RPMs should identify and encourage the PRPs to identify the need for treatability testing as early in the RI/FS process as possible. If remedial actions involving treatment have been identified by either EPA or the PRPs, the RPM should determine the need to conduct treatability studies. Testing during the RI of the most promising treatment technologies is often necessary to assess their effectiveness.

Development and Screening of Alternatives

Alternatives developed represent a range of response actions that, with the exception of the no action alternative, are protective of human health and the environment and meet ARARs or qualify for a waiver. The aim of this task is to devise a complete and concise list of remedial alternatives and screen this list according to cost, effectiveness, and implementability. Under some circumstances, such as when the site is a municipal landfill, developing a complete range of alternatives may not be practical. If site-specific conditions warrant the omission of a full range of alternatives, RPMs should ensure that the rationale for reaching this decision is well documented.

Detailed Analysis of Alternatives

During the detailed analysis, each alternative is assessed against EPA's set of nine evaluation criteria. The PRPs should present the results of this assessment in a format that allows the RPM to make reasonable comparisons among alternatives. By making these comparisons, the RPM can identify trade-offs among the various alternatives. See Chapter VII, Selection of Remedy, for the list of the nine evaluation criteria or refer to page 13 of this chapter. Appendix F of OSWER Directive 9355.3-01 "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" (October 1988) contains sample formats for arranging detailed analysis of alternatives. Also see the NCP section 300.430 (March 8, 1990) for a more detailed discussion of the nine criteria.

Oversight Objectives

Under section 104(a)(1) of CERCLA, the Agency is responsible for providing oversight of PRP-conducted RI/FS. The RPM has primary responsibility for managing RI/FS oversight.

The nature of oversight activity at a particular site depends upon the technical complexity of the site and possible remedies, the nature of the work being done, the Agency's level of confidence in the PRP's technical competence and, during the course of the project, the PRP's demonstration of quality work. In general, the RPM is responsible for accomplishing four primary objectives:

- Verifying that the work complies with the Administrative Order (AO) (or in some instances, the Consent Decree), the Statement of Work (SOW), work plan, and Sampling and Analysis Plan (SAP)
- Verifying that the RI/FS complies with CERCLA, the NCP and relevant Agency guidance

- Verifying that all work is performed according to generally accepted scientific and engineering methods
- Verifying that sufficient data of acceptable quality is being collected and analyzed to enable EPA to characterize the site, identify site risks, develop a range of alternatives, select a preferred remedial alternative, and write the ROD.

Achievement of these objectives depends, in part, upon the terms of the agreement between EPA and the PRP, guidance and direction provided to the PRP, and effective project review.

The agreement between EPA and the PRP will not be discussed in this chapter because it is covered in Chapter V, RI/FS Negotiations/Settlement. However, it is important to remember that the preliminary scoping conducted prior to negotiations, the PRP's qualifications, and the terms of the agreement establish a framework affecting oversight during the actual conduct of the RI/FS.

The RPM should provide as much guidance as possible to the PRPs early in the RI/FS process. Relevant EPA guidance documents and examples of deliverables are appropriate materials that should be provided. Guidance and expectations concerning format, technical content, mechanisms for incorporating Agency comments, and schedule of deliverables also must be clearly communicated. Frequent meetings with the PRPs during the course of the RI/FS facilitate PRP implementation that will satisfy Agency criteria.

Finally, the RPM must effectively manage the project to meet the RI/FS objectives within the time constraints specified in the AOC. To effectively manage the project, the RPM, with contractor support, must review all deliverables and oversee the on-going site activities of the PRP-conducted RI/FS. The level of oversight (i.e., frequency of site visits and meetings, number of split samples) should be determined site-specifically based on technical considerations (i.e., risk, treatability studies, use of innovative technologies, presence of hydrogeologic anomalies or contaminants of special concern) and Agency expectations related to the quality and timeliness of PRP field work, laboratory analysis, and deliverables.

Roles and Responsibilities

Following is a summary of the primary roles and responsibilities of the RPM, oversight assistant, Natural Resource trustees and ATSDR during the RI/FS. The appendix of this chapter contains exhibits which detail roles and responsibilities through the seven RI/FS phases.

RPM

The RPM has the primary responsibility for overseeing all response activities. Prior to the signing of the agreement between EPA and the PRP, the RPM will:

- Identify the preliminary scope of RI/FS activity
- Coordinate with the State and, as appropriate, other agencies (e.g., DOI, NOAA, ATSDR) on scoping
- Identify the site-specific activities and deliverables required from the PRP
- Prepare a project schedule for the Administrative Order
- Ensure necessary Regional management review and approval of scoping decisions, activities, schedule, etc.
- Identify persons/agencies/extramural resources with particular expertise that will provide technical review of activities and deliverables (these mechanisms also should be used for scoping) and agree to the scheduled time frames
- Budget intramural and extramural resources to support the project and finalize associated paperwork
- Verify that the planned activities will meet statutory requirements, satisfy the RI/FS objectives, and satisfy the provisions of relevant guidance.

Typically, the RPM will perform the following during the RI/FS:

- Conduct scheduled and unscheduled site inspections in conjunction with the oversight assistant
- Monitor PRP adherence to the agreement; consult with counsel
- Review all PRP and oversight assistant deliverables to ensure quality and provide related technical comments
- Obtain internal EPA input on specialized matters (e.g., ground water, contaminants, bedrock)
- Meet with the PRPs periodically to communicate the Agency's requirements and discuss progress, including good work and deficiencies in the work, and needed work
- Maintain Agency schedule for reviewing deliverables or meeting any other deadlines
- Ensure that information is updated in the Agency's tracking system (CERCLIS/ WasteLAN)
- Ensure that any aspects of the RI/FS performed by EPA are done in a timely manner (e.g., EPA's risk assessment or ARAR analysis)
- Manage intramural and extramural resources
- Maintain communication with the State throughout the RI/FS process with an emphasis on understanding State perspective, identifying ARARs, and coordinating community relations
- Coordinate intergovernmental interactions
- Ensure EPA management review at major stages (e.g., work plan, draft RI, proposed plan, ROD)
- Conduct community relations activities, with assistance of the community relations coordinator
- Maintain the site file, including cost recovery documentation
- Establish and update periodically the Administrative Record in conjunction with ORC and the Administrative Record Coordinator (ARC)
- Finalize any supplements to the RI/FS and write the proposed plan and ROD.

Oversight Assistant

Under section 104(a)(1) of CERCLA, EPA must procure the services of a qualified person to assist the Agency in overseeing PRP-conducted activities. The oversight assistant's role is to provide assistance to the RPM in overseeing PRP-conducted RI/FS activities. The RPM should use discretion in determining the roles and responsibilities of the oversight assistant.

Responsibilities that the RPM may assign to the oversight assistant include:

- Compiling and presenting existing information into a site conceptual model
- Monitoring PRP field activities to verify performance in accordance with the agreement with the PRPs and generally accepted scientific and engineering methods
- Reviewing deliverables submitted by the PRPs
- Conducting quality assurance tasks
- Conducting the risk assessment
- Drafting any necessary supplements to the RI/FS for Agency finalization
- Conducting contingency planning to protect human health and the environment in the unexpected event of an emergency
- Assisting in the reproduction of documents for the site file, and the Administrative Record in the Regional office and at the site. (Decisions on what documents to include are made by the RPM in conjunction with Regional counsel)

- Preparing and assisting in the implementation of community relations deliverables and tasks
- Providing site-specific information to the Regional IMC for input into CERCLIS/ WasteLAN.

Procurement of the oversight assistant's service is typically obtained through Technical Enforcement Support (TES) and the Alternative Remedial Contracts Strategy (ARCS) contracts.

The RPM also may seek assistance in executing his/her oversight responsibilities from the Department of the Interior (U.S. Fish and Wildlife Service and U.S. Geological Survey) and the Department of Defense (U.S. Army Corps of Engineers), among other Agencies.

The oversight assistant should perform tasks in a professional and non-confrontational manner. There are limitations on the oversight assistant's authority. The oversight assistant should not advise or issue directions regarding, or assume control over, any aspect of the RI/FS when communicating with the PRPs. The RPM should control the amount of direct communication between the oversight assistant and the PRPs. The oversight assistant has no authority to allow deviations from the site agreement, which includes the work plan, or any other project plans. Any deviations must be approved by the RPM.

Natural Resource Trustees

The natural resource trustees are responsible for assessing damages to natural resources within their domain. The Federal assessment begins with Preliminary Natural Resource Surveys (PNRS) which are typically initiated at the beginning of the RI/FS process. The surveys are designed to assist the Agency in reaching comprehensive settlements of all Federal natural resource claims under CERCLA. PNRS are conducted by the natural resource trustees. Trustees include the Federal and State governments and the Indian Tribes. The National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA) has jurisdiction over marine and coastal fisheries, and a shared jurisdiction over anadramous fish (e.g., salmon, striped bass) and catadramous species (e.g., eels). The area of their jurisdiction, generally speaking, is the coastal states and oceanic possessions, including the bays, estuaries, rivers, and wetlands that are the habitats of the species of concern. The Fish and Wildlife Service of the Department of the Interior (DOI) has jurisdiction over all migratory species and endangered and threatened species. For other generally non-migratory species the respective States, territorial governments, and Indian Tribes should be contacted. RPMs should confirm with Regional management procedures for notifying the trustees.

ATSDR

Under section 104(j)(6) of CERCLA, the Agency for Toxic Substances and Disease Registry (ATSDR) must perform a health assessment for all NPL sites. This assessment must be performed within one year of the site's proposed listing. The ATSDR's health assessment is intended to determine the potential risks to human health posed by the site.

After a site is proposed for listing on the NPL, the RPM should send the preliminary assessment and site inspection report to the ATSDR and maintain information exchange with them. However, RPMs must be cognizant of the fact that ATSDR may not withhold site-related draft documents requested by the public. Therefore, RPMs must be careful *not* to release confidential or enforcement-sensitive documents to ATSDR. RPMs are responsible for reviewing and commenting on the draft Health Assessment provided by the ATSDR. Data collected during the RI activities and reports generated as a result of that data collection also should be forwarded to ATSDR.

Section II. Procedures and Interactions

This section summarizes the process and deliverables associated with each phase of RI/FS activity. The specific procedures to follow in performing RI/FS oversight are described in OWPE's "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies" Volumes 1 and 2, OSWER Directive Nos. 9835.1(c) and (d), July 1991.

A. Project Scoping

Scoping is the planning phase of the RI/FS process. Project scoping for a site where it is anticipated that the PRP will conduct portions of the RI/FS occurs in two phases: before and during RI/FS negotiations, and after the PRP has signed an agreement with EPA. RPM responsibilities during each of these phases of project scoping also are discussed in section I of this chapter.

Pre-RI/FS Negotiation Scoping

Prior to the negotiations, the RPM begins defining the technical and administrative scope of the pending RI/FS and the requisite oversight.

It is helpful for the RPM with the assistance of the support contractor to sketch out a rough conceptual model of the site, including:

- Source areas
- Contaminants
- Possible extent of migration
- Media of concern
- Pathways
- Possible receptors
- Possible risks
- Possible acceptable contaminant ranges
- Possible remedies.

The RPM should ascertain what information is required to delineate these matters. Following general identification of this information, specific data needs should be defined. The RPM then needs to develop specific instructions to add to the model statement of work to ensure that necessary data is gathered. In particular, the site-specific objectives and general management strategy should be added to the model SOW.

It is particularly important that the statement of work be as specific as possible about what is needed in the work plan, but it should not be so specific as to limit generally required work. The RPM should also keep in mind that Technical Assistance Committees (TACs), which are internal EPA resources, or Technical Support Teams (TSTs) and contractor support can and should be used during preliminary scoping.

Preliminary information that is used to develop the technical scope includes (1) existing technical information, and (2) determination of decision points in the process and corresponding data needs.

Administratively, the RPM should (1) initiate and maintain information exchange with other Federal and State agencies, (2) identify enforcement concerns and provide technical information to Regional counsel for use in planning and conducting negotiations, (3) plan for intramural and extramural resources and initiate associated paperwork, and (4) procure an oversight assistant before the order is finalized to prevent unnecessary delays.

At this time, the RPM should also begin identifying oversight and review functions and time frames. The RPM, in conjunction with the Section/Unit Chief, determines what

oversight activities are to be performed by TES or ARCS contractors or by other government entities. One of the initial oversight activities that occurs during this phase is EPA's assessment of the PRP's ability to conduct portions of the RI/FS as demonstrated in their Good Faith Offer (GFO) submitted within 60 days of the issuance of special notice. This oversight activity is discussed in Chapter V, RI/FS Negotiations/Settlement. Another oversight planning activity is the scheduling of regular meetings with the PRPs that commence after an agreement has been reached.

Scoping After Agreement

Once the Administrative Order has been signed by EPA and the PRP, the RPM should:

- Conduct a project initiation meeting and site visit with the PRP and if procured, the oversight assistant
- Coordinate interagency and intergovernmental responsibilities and support functions, (e.g., Natural Resource Trustees, Army Corps of Engineers, etc.) and include the concerns of each in site-specific project plans
- Review and approve, as appropriate, PRP project plans
- Develop and begin implementing the community relations plan in conjunction with the Community Relations Coordinator. Any PRP participation in community relations activities is controlled by EPA.

The required deliverables for the scoping process include a work plan, sampling and analysis plan, and a health and safety plan.

It is very important to communicate with the PRPs at the beginning of the process to enhance prospects for quality work. At a meeting, the RPM should ensure that the PRPs understand the applicable guidances and that they understand what EPA expects of them in the RI/FS.

The RPM is responsible for coordinating review of project plans and for final approval of those plans. PRP-conducted RI/FS activity cannot be initiated until the RPM approves the plans. The RPM may conditionally approve sequential portions of project plans so that revisions concerning activities scheduled later in the project do not adversely impact the schedule of earlier activities. Conditions to the approval must be specific. Conditional approvals should be reviewed by the Section/Unit Chief.

In addition, due to the uncertainties associated with sites and as additional information is obtained, it may be necessary to modify or supplement the initial plans. The RPM must review and approve any modifications in writing.

Work Plan

The PRP's work plan expands the tasks of the Statement of Work (SOW) by detailing the work to be done in conducting the RI/FS.

The draft work plan is generally submitted by PRPs after the AO is signed. It must direct, in detail, the activities and deliverables specified in the SOW, including a schedule for all activities. Together with the Sampling and Analysis Plan (SAP), it ensures that PRPs gather all information and do the analyses needed in an RI/FS and for a ROD. Thus, it is important for the work plan to be carefully reviewed by the RPM. The draft work plan may also be reviewed by the Natural Resource Trustees and other divisions (programs) within the Regions, including the Quality Assurance Office (QAO). The aspects of the RI/FS that must be delineated in the work plan are described in the model SOW, which is discussed in Chapter V, RI/FS Negotiations/Settlement and also in this chapter. Once a work plan has been incorporated by reference into the AO, the RPM must ensure that the plan is available for public review as part of the Administrative Record.

Sampling and Analysis Plan (SAP)

The SAP details the procedures that the PRP plans to implement for conducting all field activities. It has two components: a field sampling plan (FSP) and a quality assurance project plan (QAPP). The FSP provides a detailed description of all RI/FS sampling and analytical activities. In some Regions, it may be part of the Work Plan. The QAPP describes the quality assurance and quality control protocols necessary to achieve required data quality objectives. Data quality objectives (DQOs) are established and ensure that the analyses are performed with sufficient detection limits to identify relatively low but significant concentrations of contaminants and to ensure that sufficient data are gathered. A pre-QAPP meeting is held between PRPs, PRP contractors and laboratory representatives, the RPM, QAO representatives, and the oversight assistant. The RPM should review the QAPP and FSP with the Environmental Services Division (ESD) to determine whether the PRP plans can achieve the DQOs.

Health and Safety Plan

The health and safety plan describes any special training, supervision, procedures, and protective equipment needed by field personnel. EPA reviews the plan to ensure that it provides for the protection of human health and the environment, but does not "approve" the PRP's health and safety plan. PRPs must comply with Occupational Safety and Health Administration (OSHA) requirements.

Exhibits VI-2 and VI-3 portray RI/FS oversight activities during the scoping phase and the other RI/FS phases.

B. Site Characterization

The objectives of this phase are to define the site characteristics, the source(s) of contamination, the nature and extent of contamination, and to determine possible fate and transport of contaminants as preparation for determining site risks. The major components are collection of field data, analyses of data and report preparation.

Collection and Analysis of Field Data

As an approach, RPMs may suggest that the PRPs direct their initial field data collection effort to developing a general understanding of the site. Once this understanding is achieved, RPMs should confirm that the PRPs focus more extensive efforts on filling gaps in the data. Implementing a phased sampling approach may ensure the efficient collection of data.

RPMs must have the PRPs establish the quality of old data through reliable means. Data quality objectives apply to all data—old and new. The required technical memorandum documenting the need for additional data should include the analysis and meaning of old data as the basis for establishing what additional data is needed.

It is imperative that the site characteristics, including physiography, geology, hydrogeology, and hydrology, be defined. This foundation is critical to subsequent defining of potential transport pathways. In addition, data gathered during site characterization are used in treatability analyses and in analysis of remedial alternatives.

Determination of the location of each source is often difficult, particularly at old sites. Aerial photographs from historical files and interviews often provide helpful insights. For each location, the area and depth of contamination are usually determined at incremental depths on a grid. Data on contamination are often gathered at various depths to show concentration gradients to health-based levels. It is important to gather data to define principal threat areas and volumes that may warrant treatment. It is also important to gather material for contaminant mobility, leaching and treatability testing.

The RPM must ensure that the PRP provides notice of the planned dates for field activities at least two weeks in advance. During the PRP conduct of field activities, the RPM must ensure that the PRPs collect sufficient information at the proper locations and follow QA and QC procedures. The oversight assistant should keep accurate records of site activities. This can be accomplished, in part, by having the PRP and the oversight assistant use:

- Field activity reports
- Field logbooks
- Photographic logs.

Field activity reports may include a checklist to remind the oversight assistant of the critical elements of the field activities and as a convenient means for documenting field activities. Samples of field activity reports are provided in the appendix of OSWER Directive 9835.1(c) and (d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies" Volumes 1 and 2, July 1991. Field activity reports should be used in conjunction with the SAP. By combining these two reporting tools, the oversight assistant will have a valuable tool to remind him/her of site-specific planned activities. These combined reports may also enable the oversight assistant to keep an accurate record of site activities that are not conducted according to plans.

Oversight assistants usually maintain an activity logbook. The logbook generally includes: records of pertinent conversations with either the PRP or its contractor, a list of potential or actual problems encountered at the site, an explanation for changes to the work plan, and a record of any field activities not included in the field activity reports as well as a description of daily activities and contacts with the public or press.

A photographic or video record of field activities may also be a useful tool for documenting field work for PRPs as well as the oversight assistant. If the oversight assistant elects to use one of these tools, he/she should keep detailed information about the location, date, time and subject matter of each photograph or tape.

If the RPM has not received sampling data within a month of analysis by the PRP's laboratories, he/she should contact the PRPs to determine the reason for the delay.

In addition to the progress meetings, reports, technical memoranda, and data summaries, the required deliverables for the site characterization process include the preliminary site characterization summary and, once the baseline risk assessment is complete, the draft Remedial Investigation (RI) report.

The preliminary summary is prepared after the results from sampling efforts are available. It provides information on contamination at various locations and depths, including contaminants of concern and associated concentrations. It may include fate and transport projections. It also provides information for the risk assessment and a reference for the RPMs to ensure that appropriate alternatives are being developed by the PRPs. The summary may be used to provide ATSDR with data to use in preparing health assessments. RPMs should ensure that the data satisfy QA/QC requirements and are accurately displayed.

The draft RI report documents the data collection and analysis and supports the FS.

C. Risk Assessment

A baseline risk assessment, which may be referred to as an endangerment assessment, is conducted during the RI. Regional management will use the baseline risk assessment to determine whether, in the absence of remedial action, a particular site poses a substantial danger to public health and welfare and the environment. There are two separate inquiries: human health and the environment. The human health evaluation addresses: all exposure pathways for each medium of concern; toxicity values for carcinogenic and noncarcinogenic effects; and the cancer risk and/or hazard index for each chemical of concern. The environmental evaluation addresses any critical habitats affected by site contamination and any endangered species affected by the contamination.

The baseline risk assessment process is cumulative in nature: the components of the assessment build on one another. For assistance in planning the conduct of the baseline risk assessment, the RPM should refer to EPA's *Superfund Human Health Evaluation Manual*, *Superfund Exposure Assessment Manual*, and *Superfund Environmental Evalua-*

Exhibit VI-2

Overview of RI/FS Oversight Activities During Scoping

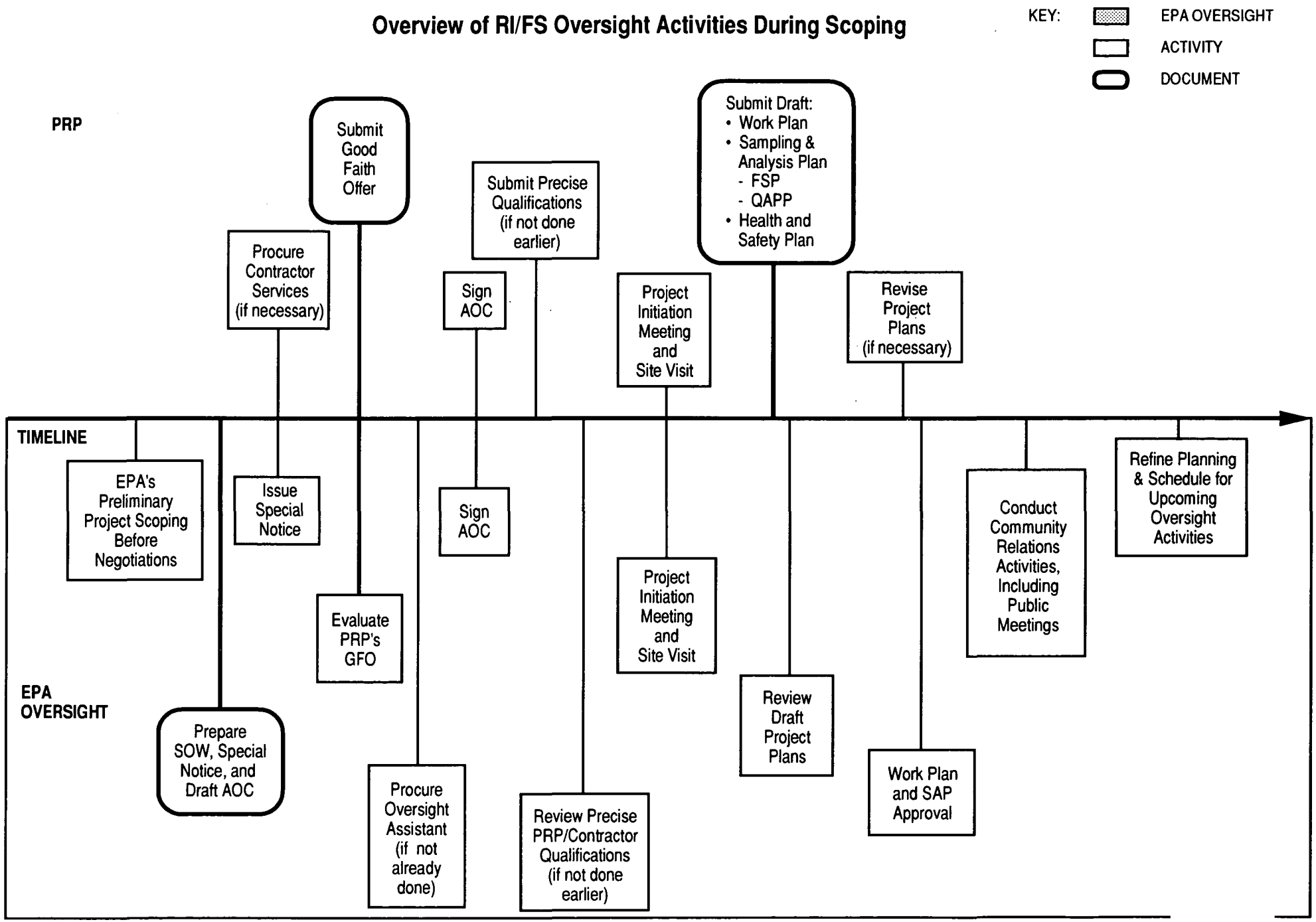
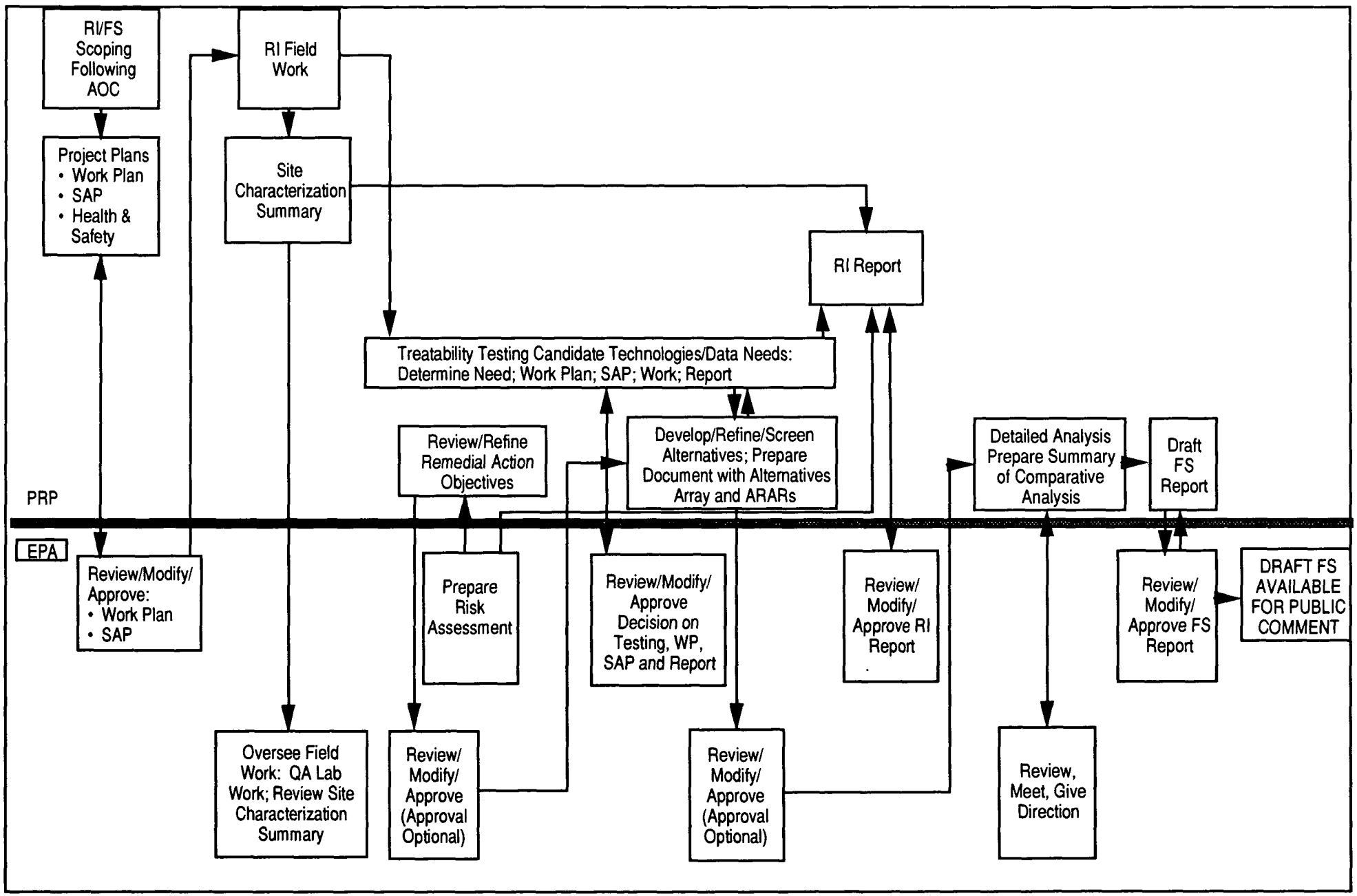


Exhibit VI-3

Overview of Major RI/FS Oversight Activities



tion Manual, and access the Integrated Risk Information System (IRIS) and the Public Health Risk Evaluation Data Base.

In the summer of 1990, EPA issued a policy stating that it will not enter into any new orders or decrees for PRP RI/FSs in which risk assessments are to be conducted by PRPs. That is, new orders or decrees for PRP RI/FSs must state that EPA (or a State whose oversight is Federally funded) does the risk assessment, and must not include risk assessment products or deliverables to be developed by the PRP. Such risk assessment products, including but not limited to identification of contaminants of concern, current and future exposure scenarios, and toxicity information, will be prepared by EPA. The FS and remedy selection shall be based on EPA's risk assessment. New orders or decrees should explicitly state that PRPs will use EPA's risk assessment as the basis of the FS. See "Performance of Risk Assessments in RI/FS, Conducted by PRPs, OSWER No. 9835.15, August 28, 1990".

This new policy does not change any responsibilities PRPs may have regarding the collection of site data relevant to the development of the baseline risk assessment. It is not expected, nor is it generally necessary, that EPA should independently collect data from the field in order to be able to develop the risk assessment. Rather, this data should be provided by the PRP's normal activities in conducting the RI under EPA oversight (of course, as part of oversight Regions should continue to conduct audits, engage in split sampling, etc. to ensure the accuracy of PRP-generated data).

New orders or decrees should stipulate that the PRPs will pay the costs for EPA (or a State) to develop the risk assessment.

Within the terms of orders or decrees existing before June 21, 1990, EPA will give a PRP an opportunity to complete the risk assessment correctly. PRPs are expected to consult with EPA early and throughout the risk assessment process so they can ensure that their work is in accordance with the NCP and Agency guidance and is of comparable quality. If the risk assessment delivered by the PRP is unacceptable, even after EPA has provided comments or after the parties have exhausted other procedural requirements (such as dispute resolution) as may be provided for in the order or decree, EPA will undertake its own risk assessment.

Depending on the terms of the order or decree, the Region may provide comments on drafts of an intermediate deliverable in those cases where orders require major intermediate deliverables for the risk assessment; if, after providing comments as required and pursuing other recourses as may be required under the order or decree, the intermediate deliverable from the PRP remains unacceptable, the Region may decide at that point to prepare its own risk assessment. These procedures will allow EPA to avoid numerous reviews throughout the development of the risk assessment, which can be costly in time and resources.

If the Region determines that the final PRP risk assessment is fully acceptable, the Region should document this finding in writing and place the written certification in the Administrative Record file. Such an explicit certification by EPA of a PRP risk assessment should help assure the public that EPA is providing necessary oversight.

If, on the other hand, a risk assessment is undertaken by EPA because the PRP's is unacceptable, EPA may use any part of the PRP's work deemed to be of high quality.

D. Treatability Investigations

Treatability studies are designed to provide information that EPA uses in the detailed analysis of alternatives to the maximum extent practicable. The decision of whether to conduct these activities is made in scoping and is based upon whether a treatment alternative is properly considered for the site, the nature and size of the site, the contaminants and media they are in, the potential for migration and possible site risks, available information in technical literature, and the uncertainties associated with selecting an appropriate site remedy. It is imperative that these activities should be initiated during scoping because

they may take over six months to complete (i.e., biotreatability tests). The final decision on the type (literature survey, bench, or pilot) and extent of treatability testing depends on uncertainties of treatment and the amount of work that should be deferred to the remedial design (RD) process.

In addition to the progress meetings and reports, the required deliverables for treatability investigations may include:

- Identification of candidate technologies
- Literature survey and determination of whether testing is necessary
- Treatability testing work plan, or revisions to the original work plan
- Treatability study SAP, or revisions to the original SAP
- Treatability study health and safety plan, or revisions to the original
- A treatability study evaluation report summarizing the results, evaluating the test, and describing the following:
  - Remedial technology
  - Test objectives
  - Experimental procedures
  - Treatability conditions to be tested
  - Analytical methods
  - Data management and analysis
  - Health and safety
  - Residual waste management

Following the completion of treatability testing, data should be analyzed and interpreted in a technical report to EPA. Depending on the sequence of activities, this report may be a part of the RI/FS report or a separate deliverable. The report should evaluate the technology's effectiveness, implementability, and actual results as compared to the predicted results. The report should also evaluate full-scale application of the technology, including a sensitivity analysis identifying the key parameters affecting full-scale operation.

E. Development and Screening of Alternatives

During the process of developing alternatives, RPMs should ensure that the PRPs undertake the following activities:

- Develop more specific remedial action objectives acceptable to EPA using all RI generated data. This is very important as it sets the goals of the FS
- Develop a range of general response actions
- Identify areas or volumes of the media to be treated, contained and/or subjected to institutional controls
- Identify, screen, and document technologies
- Assemble a number of alternatives depending on site type and characteristics
- Screen the remedial action alternatives, if necessary, on the basis of effectiveness, implementability, and cost
- Prepare an alternatives array document.

The information developed during these two activities is used in assembling remedial technologies into alternatives for either the site as a whole or for a specific operable unit.

At some sites, a number of potential remedial options may be developed early in the RI/FS process. In such cases, the RPM should screen alternatives to narrow the list of options that will be evaluated in detail. The screening process is necessary for two reasons. First,

it streamlines the feasibility study process. Second, it ensures that the most promising alternatives are being considered by EPA.

RPMs should either closely scrutinize the PRPs' conduct of the screening process or do this themselves. The alternatives development screening document, including the alternatives array, must be scrutinized. At this stage, ARARs should be given specific attention. RPMs should be wary of PRP proposals that are not effective—that treat too little or do not treat to appropriate levels. RPMs must ensure that Regional management will have a number of distinct options and alternatives from which to select an appropriate site remedy.

The information available at the time of screening should be used to identify and distinguish any differences among the various alternatives. If screening takes place, the technical memorandum should present the alternatives in such a manner that the RPM can evaluate each alternative with respect to its effectiveness, implementability, and cost and document the rationale for screening out any alternatives. RPMs should retain only the alternatives that are judged as the best or the most promising while retaining a range of alternatives broad enough to satisfy requirements of CERCLA and the NCP. These alternatives should be subjected to further consideration and analysis. Alternatives that are screened out will not receive further consideration unless additional information indicates that further evaluation is warranted.

In the event that there are only a limited number of viable alternatives for a particular site, the RPM should either minimize or eliminate the alternative screening process.

F. Detailed Analysis of Alternatives

Nine evaluation criteria have been developed to address statutory requirements, as well as the technical and policy considerations that have proven to be important for selecting from among the remedial alternatives. These evaluation criteria serve as the basis for conducting the detailed analyses during the FS and for subsequently selecting an appropriate site remedy. The criteria are:

- Overall protection of human health and the environment
- Compliance with ARARs
- Long-term effectiveness and permanence
- Short-term effectiveness
- Reduction of toxicity, mobility, or volume
- Implementability
- Cost
- State acceptance
- Community acceptance.

The detailed analysis process should include an evaluation of each alternative against the nine criteria. The evaluation criteria are discussed in more detail in Chapter VII, Selection of Remedy.

The PRPs will submit a technical memorandum summarizing the results of the comparative analysis. In addition, the PRPs must submit a draft FS report to the RPM for review and approval. This report, as adopted or modified by EPA, provides a basis for remedy selection. It documents the development and analysis of remedial alternatives. Once EPA's comments have been incorporated to the RPM's satisfaction, the final FS report may be bound with the final RI report.

Following the PRP's completion of the RI/FS report and the RPM's confirmation that there is sufficient information to support the selection of a preferred alternative, EPA begins the process of remedy selection which is discussed in Chapter VII, Selection of Remedy.

Section III. Planning and Reporting Requirements

A. SCAP/STARS

The RPM must review and update the information in EPA's automated data systems as events happen. That is, events should be tracked in the data base on a real time basis. Depending on the Region, RPMs are responsible for entering accurate information into CERCLIS/WasteLAN or providing that information to the IMC for entry into CERCLIS/ WasteLAN. For example, activities such as RI/FS starts, field work starts, and draft RI/FS completions must be entered into CERCLIS/WasteLAN. RI/FS events are tracked in SCAP/STARS. A matrix of SCAP/STARS Targets relevant to RI/FS implementation is presented as Exhibit VI-4.

Exhibit VI-4
SCAP/STARS Targets for RI/FS

Activity	STARS Target	SCAP Target/ Measure	Quarterly Target	Annual Target
Remedial Investigation/ Feasibility Study				
First RI/FS Start	X	X	X	X
Subsequent RI/FS Start		X	X	X
Start of Public Comment (RI/FS to Public)		X	X	X
RI/FS Comp (ROD) (S/C-2)	X		X	X
First RI/FS Comp. (ROD)		X	X	X
Subsequent RI/FS Comp. (ROD)		X	X	X

Definitions for:

RI/FS Start-First and Subsequent - In order for the RI/FS to be counted as a first start, it must not have had previous RI/FS activity at the site, a prior CERCLA settlement or prior Fund obligation for Remedial Investigation (RI), Feasibility Study (FS), or combined RI/FS. Fund-financed and PRP RI/FS are counted in the STARS target S/C-4, Number of Sites Where Activity has Started, First NPL Removal Actions and RI/FS, if it is the first action taken once the site is listed. Obligation of funds for forward planning, community relations and/or other support activities do not constitute an RI/FS start. A subsequent RI/FS is any RI/ FS that starts after the first one. The definition of accomplishment for an RI/FS start depends on the lead.

Fund Financed - (Includes F and S lead events) A Fund RI/FS start is counted when funds are obligated. Funds are obligated when:

- The contract modification for the RI/FS has been signed by the Contracting Officer (CO)
- An IAG has been signed by the other Federal agency (U.S. Army Corps of Engineers (USACE) or Bureau of Reclamation (BUREC)
- Obligations have been recorded or documented in WasteLAN.

PRP Financed - (Includes RP, MR, and PS lead events) A Responsible Party (RP or MR) lead RI/FS start counts when one of the following enforcement actions occurs:

- An AOC is signed by the Regional Administrator. The RI/FS start date is the AOC completion date (Regional Administrator signature date)
- A CD is referred by the Region to DOJ or HQ. The RI/FS start date is the last signature date by the appropriate official or party (Regional Administrator, DOJ, or HQ).

A PS lead RI/FS start counts when a State order or comparable enforcement document is signed by the last appropriate official or party and the site is covered by:

- A state enforcement CA
- A Superfund Memorandum of Agreement (SMOA) containing a schedule for RI/FS work at the site
- Another State/EPA agreement.

If a subsequent RI/FS is initiated without a new or amended AOC, CD, State order, or other comparable State enforcement document, the start date for the RI/FS is defined as EPA's or the State's approval of the work plan for the subsequent RI/FS.

If an AOC, a State order, or other comparable State enforcement document is amended for the subsequent RI/FS, the start date is the date the last official signs the amendment. If an EPA CD is amended, the start date is the last signature date by the appropriate official or party.

Federal Facility - The RI/FS first start date should coincide with the IAG effective date, however, for sites where RI/FS work starts prior to the IAG effective date, the earliest date reportable is the IAG completion date. For sites where RI/FS work is initiated under a Resource Conservation and Recovery Act (RCRA) order or permit, the RI/FS first start date should equal the date when the RCRA order or permit becomes effective.

Subsequent RI/FS starts count on the date of receipt of the work plan which addresses the subsequent RI/FS. For cases where the subsequent RI/FS is described in the same work plan as the first RI/FS start, the subsequent RI/FS start is the date of the RI/FS first start (which is generally the IAG effective date or IAG completion date, whichever is earlier).

In rare cases, with HQ approval, when the RI/FS has been initiated prior to the IAG completion date and there has been extensive Regional involvement with the facility, the RI/FS first or subsequent start date can be the receipt of the RI/FS workplan.

EPA-In House (EP) Lead - An EP lead RI/FS counts when the Region begins preparation of the workplans following the initial scoping meeting.

First Fund or PRP RI/FS start or first Fund or PRP NPL removal start is a target under STARS S/C-4, Number of Sites Where Activity Has Started, however, Regions cannot receive credit for a site if an RI/FS or NPL removal began or was conducted at the site in a previous year. Regions also cannot receive credit under STARS for both an RI/FS start and an NPL removal if they are started in the same year. Credit is given for the first activity started and a site can receive credit only once. Therefore, historical data must be reviewed prior to negotiating commitments and reporting accomplishments in STARS. Regions can receive credit for both individual events in SCAP.

Separate Fund-financed, RP-lead and Federal Facility RI/FS start targets will be established in SCAP prior to the FY. Targets are established site specifically. For first RI/FS starts, "to be determined (TBD)" sites are allowed.

RI/FS To Public - The RI/FS is released to the public when the contamination at the site has been characterized and alternatives for remediation have been evaluated. An RI/FS to public is accomplished the date the proposed plan is made available to the public. This date must be recorded in WasteLAN (C3101) with the RI/FS event under subevent code "CF". Accomplishments are based on the first proposed plan released to the public for each RI/FS regardless of lead. This is a SCAP reporting measure.

Remedies Selected (ROD)-First and subsequent - A remedy is selected at the completion of the RI/FS. Upon completion of the public comment period on a Fund-financed or RP-lead RI/FS, a ROD which identifies the Agency's selected remedy for a site or phase of site cleanup is signed by the Assistant Administrator for the Office of Solid Waste and Emergency Response (AA SWER) or the Regional Administrator/Deputy Regional Administrator.

For F, FE, and SE lead ROD - credit is given on the date the ROD is signed by the Regional Administrator/Deputy Regional Administrator or the AA SWER.

Upon completion of a Federal Facility RI/FS, the Federal agency selects a remedy for the site that is presented in a cleanup decision document (i.e., ROD, Corrective Action Decision Document). This document is concurred upon or approved by either the AA for the Office of Enforcement (OE) or the Regional Administrator/Deputy Regional Administrator.

For Federal Facilities - credit is given on the date of EPA approval/concurrence on the clean-up decision document pursuant to an IAG or other enforceable decision document, or the date of EPA's Letter of Concurrence.

The RI/FS completion date and the ROD completion date are the same. This date must be entered in WasteLAN as both the RI/FS and ROD completions.

OERR/OPM is currently developing coding guidance for events (RI/FS, ROD, RD/RA).

Section IV. Potential Problems/Resolutions

During the course of a PRP-conducted RI/FS, the PRP may encounter problems, or the RPM may identify unsatisfactory or deficient PRP performance. This section discusses some possible solutions to the problems commonly encountered by RPMs overseeing PRP-conducted RI/FSs.

A. Dispute Resolution

When disputes arise between the RPM and the PRPs' project manager, the RPM should attempt to informally resolve the matter. If informal efforts fail, the RPM should implement formal dispute resolution mechanisms after consultation with the site attorney.

The AO usually will set forth the formal dispute resolution procedures. This process is generally initiated by a written notice of disapproval by an appropriate manager within the Agency. Generally, the PRP must reach a negotiated agreement within 14 days of receiving the notice. For cases in which the negotiations fail, EPA will prepare a written record of the negotiation's outcome. Often the order is structured to require the PRP to appeal or do the work. This decision can be appealed to the Division Director, who is the final arbitrator of the dispute. If the PRP fails to comply with the decision, the Agency may take the following action:

- Seek stipulated and statutory penalties
- Take over the RI/FS and subsequently recover costs
- Take other action (e.g., court order to comply)

The RPM should work closely with Regional management and ORC to coordinate dispute resolution efforts.

B. Corrective Measures

If oversight investigations discover that the PRP, or its contractor, is performing field and laboratory activities in a manner inconsistent with the Work Plan or SAP, the RPM may need to implement corrective measures. For the most part, informal dispute resolution procedures should be sufficient to remedy the problem. The RPM can initiate this process by first talking with the PRP's designated technical coordinator. If this approach does not correct the problem, the RPM should then use the more formal approach of issuing a notice of deficiency.

To issue a notice of deficiency, RPMs should:

- Notify the PRPs in writing
- Describe the nature of the deficiency
- Request that the PRP undertake appropriate corrective action within a specific period.

Failure to respond to the deficiency notice could lead to penalties or EPA takeover.

Section V. References

Regulation

C.F.R. 40 "National Oil and Hazardous Substances Pollution Contingency Plan" (March 8, 1990).

OSHA Regulations, 29 C.F.R. section 1910.130 (45654 Fed. Reg., Dec. 19, 1986).

Guidance

OWSER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (October 1988).

OSWER Directive 9835.1(c) and (d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volumes 1 and 2 (July 1991).

OSWER Directive 9835.15, "Performance of Risk Assessments in RI/FSs Conducted by Potentially Responsible Parties" (August 28, 1990).

OSWER Directive 9835.15a, "Supplemental Guidance on Performing Risk Assessments in RI/FSs Conducted by PRPs" (July 2, 1991).

OSWER Directive 9835.3-01A, "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (May 1988).

OSWER Directive 9833.3-A1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

OSWER Directive 9285.4-00, "Guidance for Conducting ATSDR Health Assessment Activities with the Superfund Remedial Process" (April 1987).

OSWER Directive 9335.0-7B, "Data Quality Objectives for Remedial Response Activities" (March 1987).

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 1988).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan, Record of Decision, Explanation of Significant Differences and the ROD Amendment" (July 1989).

OSWER Directive 9335.0-14, "A Compendium of Superfund Field Operation Methods" (September 1987).

OSWER Directive 9835.8 , "RI/FS Model Statement of Work" (June 2, 1989).

OWPE, "Draft TES User Guide" (June 1987).

USEPA, "The User's Guide to the Contract Laboratory Program" (August 1982).

USEPA, "Selected Technical Guidance for Superfund Projects" (December 1988). This pamphlet is reproduced on the following pages.

Manuals

OSWER Directive 9285.7-01A, *Human Health Evaluation Manual: Volume 1* (December 1989).

OSWER Directive 9285.7-01B, *Human Health Evaluation Manual, Part B: Development of Risk-based Preliminary Remediation Goals* (December 13, 1991).

OSWER Directive 9285.7-01C, *Human Health Evaluation Manual, Part C: Risk Evaluation of Remedial Alternatives* (December 13, 1991).

OSWER Directive 9285.7-01, *Risk Assessment Guidance for Superfund - Environmental Evaluation Manual*, Volume 2, (March 1989).

OSWER Directive 9285.5-1A, *Superfund Exposure Assessment Manual* (April 1989).

OSWER Directive 9234.1-01 and -02, CERCLA *Compliance with Other Laws Manual* (August 1988).

OSWER Directive 9230.0-3B, *Community Relations in Superfund: A Handbook* (June 1988).

US EPA, *NEIC Policies and Procedures Manual* (revised November 1984).

Short Sheets

OSWER Directive 9355.3-01 FS1, "Getting Ready: Scoping the RI/FS" (November 1989). [Fund-lead RI/FS]

OSWER Directive 9355.3-01 FS2, "The Remedial Investigation — Site Characterization and Treatability Studies" (November 1989). [Fund-lead RI/FS]

OSWER Directive 9355.3-01 FS3, "Development and Screening of Remedial Action Alternatives" (November 1989).

Training

OSWER's Technology Innovation office conducts training on the RI/FS process as part of the CERCLA Education Center. For information, contact 703-308-8800.

OERR/OWPE conducts periodic training on the RI/FS process.

Contacts

Regional Toxics Integration Coordinator

Regional Biological Technical Assistance Groups (BTAGs)

OWPE, CERCLA Enforcement Division, Compliance Branch, at 703-603-8910.

OWPE, CERCLA Enforcement Division, Guidance and Evaluation Branch, at 703-603-8940.

OERR, Hazardous Site Control Division, at 703-603-8800.

Section VI. Activities Checklist

This checklist is not intended to present an exhaustive set of procedures. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

Preparation and Management

1)_____ If not previously done, identify the preliminary scope of RI/FS activity for the site. Establish site-specific objectives. Develop a general management strategy for site activity.

- a)_____ Ensure appropriate ESD and management review of scoping.

2)_____ Organize regional team and specialists as needed (e.g., hydrogeologist, human risk specialist, ecological risk specialist, and remedial engineer).

3)_____ Procure the services of qualified oversight assistant(s).

4)_____ Coordinate interagency and intergovernmental responsibilities, including those of the State, ATSDR, and Natural Resource Trustees.

5)_____ Ensure budgetary support in SCAP.

6)_____ Assess the PRPs' ability to conduct the RI/FS (financial, technical managerial).

Community Relations Plan

7)_____ Develop a community relations plan and define the PRPs' participation (if any).

Project Planning

8)_____ Ensure that PRPs have collected and considered available data.

9)_____ Conduct an initiation meeting and site visit with the PRPs.

10)_____ Prior to the PRP's development of a work plan, sampling and analysis plan, and site health and safety plan, meet with PRPs, and, as appropriate, ESD and oversight assistant, to assure that PRPs understand:

- a)_____ The objectives of SARA and, for the site, preliminary remedial action objectives and alternatives
- b)_____ The need for treatability studies
- c)_____ The RI/FS guidance and other guidances
- d)_____ What to include in the plans
- e)_____ The roles and responsibilities

11)_____ Review the work plan, with in-house (e.g., ESD and WMD specialists) and contractor support.

- a)_____ Background information
- b)_____ Objectives, preliminary conceptual model
- c)_____ Management plan, including general strategy, activity schedules, advance notice to EPA of field activities, reporting and meeting schedules (including data reporting), deliverables schedules, equipment and personnel, data management

d)_____ Site characterization

- Field support; preparation
- Physical characteristics (e.g., geology; hydrology); sources of contamination; nature and extent of contamination; information to be gathered; methods of gathering information; extent of field investigation and how it is determined (include off-site for hydrology, extent of contamination, etc.); sufficiency for multiple purposes (e.g., extent, fate and transport, risk, treatability, delineation of remedial alternative; methods of data analysis; information produced and format)
- Assure adequate off-site work (e.g., for hydrological setting, pathways)
- Supplemental field work
- Site characterization report requirements, data presentation

e)_____ Risk assessment (only for agreements predating June 1990)

- Federal and State ARARs (approach, primarily to contaminant specific and location specific)
- Human health
- Approach to contaminant identification; exposure assessment, use of SEAM, use of current and maximum reasonable use scenario assuming growth; exposure points with path-ways, media, exposure route, persons exposed and amount exposed to, fate and transport models; use of IRIS and other data on toxicity; risk characterization; deliverables in final report
- Environmental evaluation
- Plan, implementation, deliverables, report

f)_____ RI report

- Content, form, review, response to EPA's comments, approval

g)_____ Treatability studies

- Schedule early start
- Candidate technologies, approach to determining need for testing
- Work plan contents
- Implementation
- Evaluation report

h)_____ Development and Screening of Alternatives

- Development review/approval of remedial action objectives; contaminant specific ARARs
- Approach to developing and refining alternatives
- Approach to screening

- Methodology for developing and incorporating action specific ARARs
- Deliverables, including alternatives array document
- Review/approval

i)_____ Detailed analysis

- Nine criteria and comparative analysis
- Report on comparative analysis and presentation
- Response to EPA's comments

j)_____ FS Report

- Content, form, review, response to EPA's comments

12)_____ Review the sampling and analysis plan

a)_____ FSP

- Site background (including an evaluation of existing data)
- Sampling objectives
- Data quality objectives
- Sample media
- Sampling locations and rationale
- Sampling frequency and rationale
- Number of samples and justification
- Number of field blanks, trip blanks, and duplicates
- Sampling equipment
- Sampling procedures and rationale
- Sampling handling (including chain-of-custody procedures)
- Field analytical procedures
- Decontamination procedures
- Sample designation
- Laboratory analytical procedures, equipment, and detection limits
- Systematic requirements to fully delineate each source and the nature and extent of contamination to DQO levels.

b)_____ QAPP

DQOs for measurements - Ensure that soils, ground water measured to levels consistent with risk range in NCP

- Sampling procedures
- Sample custody procedures
- Calibration procedures and frequency
- Analytical procedures
- Data reduction, validation, and reporting procedures
- Internal quality control checks and frequency
- Performance and systems audits and frequency

- Preventative maintenance procedures and schedules
- Data assessment procedures
- Corrective action procedures
- Quality assurance reporting procedures.

13)_____ Receive the health and safety plan

14)_____ Draft comments; changes to PRP's plans

15)_____ Coordinate with State, trustees as necessary

16)_____ Management review of project plans

17)_____ Approve/modify plans

18)_____ Refine oversight plan

- ◆ Address what is to be done, when, by whom
- ◆ Assure oversight persons are informed of their duties and of schedules
- ◆ Budget resources
- ◆ Ensure other communications; (e.g., State, ATSDR, trustee)
- ◆ Anticipate common problems

19)_____ Open Administrative Record at Region and near site; add approved plans

20)_____ Community relations activities upon approval of plans

Oversee RI Field Work and Data Analyses

21)_____ Meeting of EPA team members, specialists, QA/QC person and oversight assistant to review work, schedules, roles and responsibilities

22)_____ Meet with PRPs' contractor to ensure that they understand work plan; requirements for notice to EPA; field methodology; QA/QC at site and in lab (methods, detection limit, etc.)

23)_____ Review PRP's field support preparation and resources

24)_____ Develop field check lists

25)_____ Site characterization, source definition, description of nature and extent of contamination. On an on-going basis:

a)_____ Assure compliance with work plan and sampling and analysis plan

b)_____ Oversee schedule, ensure advance notice by PRP of field work, schedule site inspections, have oversight assistant review data as developed by PRP for sufficiency, QA/QC trends

c)_____ Assure adequate locations, types, depths, numbers, etc. of samples

d)_____ For on-going fieldwork, check quality of methods, sampling, testing, ensure sample splits, spikes, blanks, etc. QA/QC of loss/analyses - ensure use of proper protocols; lab audit, compare splits, etc.

- Geology, physiography
- Ground water monitoring well construction/installation
- Ground water elevations and pump tests in various strata

- Soil sampling (surface/at depths)
- Ground water sampling
- Surface water sampling
- Sediment sampling

e)_____ Well and other receptor surveys

f)_____ Review field books, activity logs, etc.

g)_____ Review progress reports

h)_____ Review data management

i)_____ Hold progress status meetings

j)_____ Assess whether the data incrementally collected are sufficient for all purposes (site characterization, source definition, nature and extent of contamination, fate and transport, treatability, remedial alternatives (e.g., bedrock groundwater remediation)

k)_____ Based on available data, direct collection of additional data (e.g., source contamination to background, extent of plume to background)

26)_____ Ensure appropriate data provided to ATSDR, State, Trustees

27)_____ Review and comment on site characterization summary. Assure proper and accurate data presentation

28)_____ Update Administrative Record

29)_____ Ensure adequate oversight activity documentation (cost documentation)

30)_____ Identify interim actions as necessary

Perform Risk Assessment (EPA only for AOCs signed after June 21, 1990)

31)_____ Secure qualified contractor

32)_____ Identify any highly controversial substances that warrant HQ assistance

33)_____ Identify Federal and State Contaminant Specific ARAR

34)_____ Human health risk assessment/endangerment assessment

a)_____ Review contaminant identification/indicator chemicals memorandum

b)_____ Review exposure assessment (exposure scenarios, exposure assumptions, population at risk, fate and transport model, etc.)

c)_____ Review toxicity assessment (sources, application)

d)_____ Review human health risk characterization

35)_____ Environmental Evaluation

a)_____ Review environmental evaluation plan: discuss with Trustees

b)_____ Review environmental evaluation report, discuss with Trustees

36)_____ Obtain/review ATSDR health assessment; State views

37)_____ Ensure appropriate EPA management review

38)_____ Comment on/finalize risk assessment

a)_____ Gather additional data, as needed

Remedial Investigation Report

39)_____ Copy to State, Trustees, ATSDR, as appropriate

40)_____ Develop preliminary comments

41)_____ Ensure appropriate EPA managerial review

42)_____ Final comments

43)_____ Review and modify/approve interim RI report (possible additional work may be identified in FS)

44)_____ Update Administrative Record

45)_____ Fact sheets, public meetings as necessary

Treatability Testing

46)_____ Identify the need for treatability testing. If testing is done:

- a)_____ Obtain specialized support, as necessary
- b)_____ Discuss requirements with PRPs
- c)_____ Review/modify/approve proposal on need for literature search vs. testing
- d)_____ Review PRPs' work plan/SAP
- e)_____ Review PRPs' report
- f)_____ Require, if necessary, additional testing

Development and Screening of Alternatives

47)_____ Meet with PRPs to discuss remedial action objectives; alternative development and screening; detailed analysis; SARA - compliant remedies

48)_____ Review, modify, and possibly approve remedial action objectives submitted by PRPs

49)_____ Review work/report by PRPs, identifying potential technologies for areas of media, evaluation of process types

50)_____ Review range of alternatives developed by PRPs; focus on effective remedies, preference for treatment

51)_____ Advise State of alternatives

52)_____ Review the document submitted by PRPs on alternatives passing the screen, including alternatives array summary with associated ARARs and description of underlying work

53)_____ Confer with State

54)_____ Submit comments, ensuring appropriate alternatives passed the screen and the proper identification of ARARs, particularly action-specific ARARs. *If PRPs continue to lean improperly toward no-action, non-effective low-cost remedies, schedule a meeting. Consider enforcement and EPA takeover*

55)_____ Finalize approved identification of acceptable group of remedies that should be considered in the detailed analysis

56)_____ Assure updated Administrative Record

57)_____ Review the comparative analysis document prepared by PRPs (unless EPA reserved this)

58)_____ Assure that, to the extent possible, State, Trustees' views are known

Detailed Analysis

59)_____ Meet with PRPs

60)_____ Provide comments, direction to PRPs for FS

61)_____ Ensure updated Administrative Record

Feasibility Study

62)_____ Circulate PRP draft FS to State, Trustees, intra-EPA groups

63)_____ Develop preliminary comments

64)_____ Ensure internal EPA and management review, discuss proposed plan

65)_____ Finalize comments

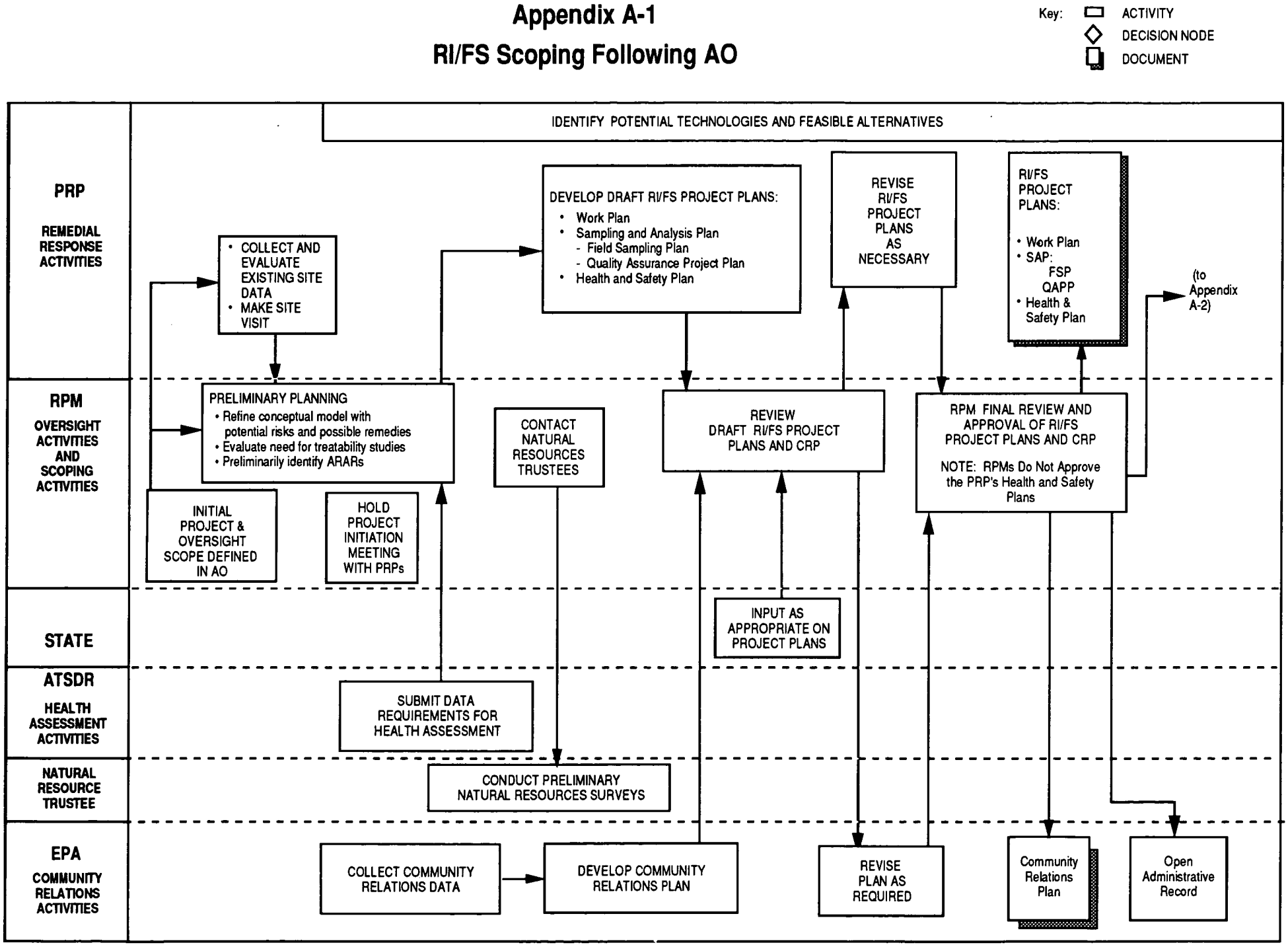
66)_____ Ensure development of an FS that supports proposed plan

67)_____ Update Administrative Record

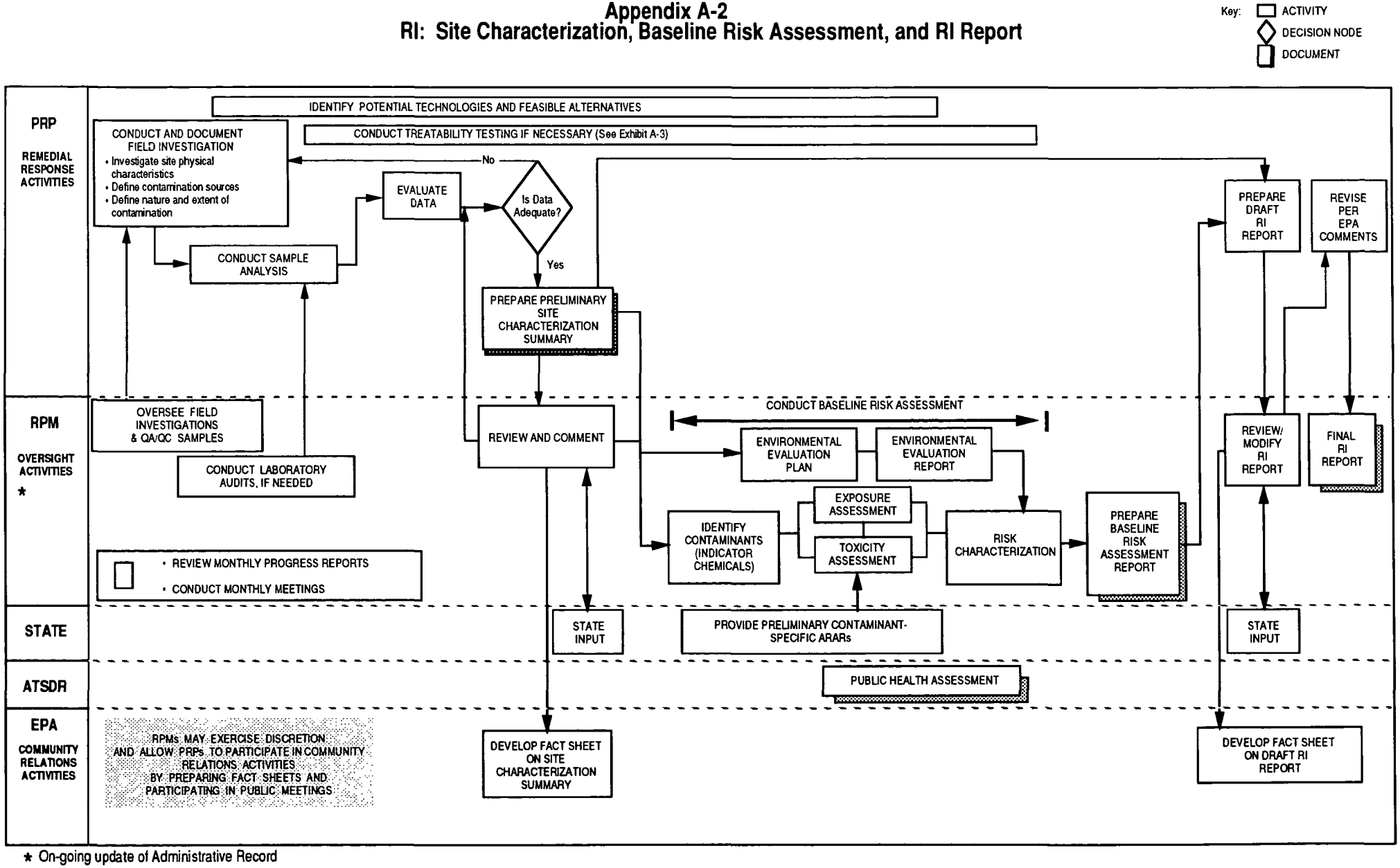
68)_____ Oversight/response cost billing

69)_____ Preparation for RD/RA negotiations.

Appendix A-1
RI/FS Scoping Following AO



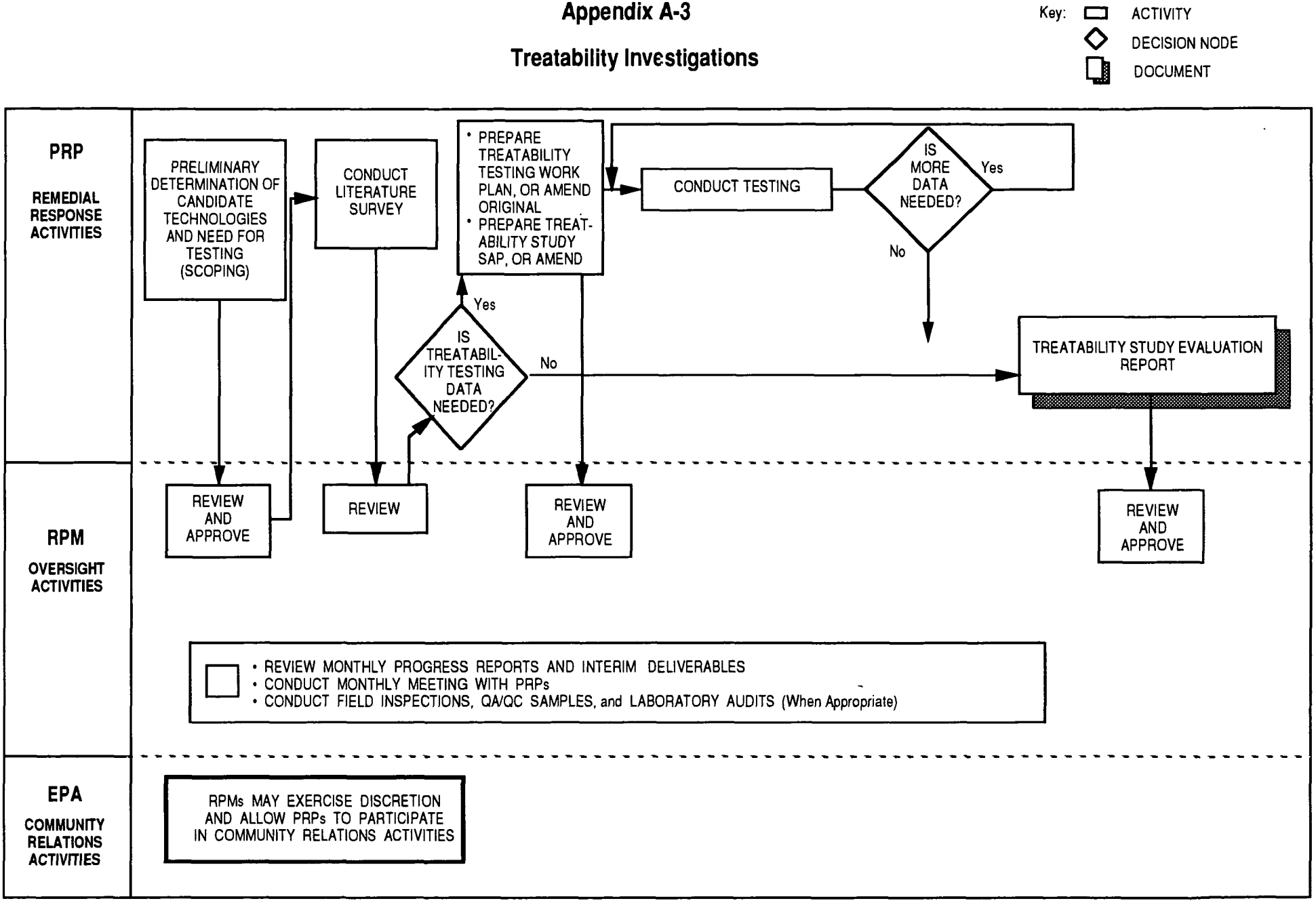
Appendix A-2
RI: Site Characterization, Baseline Risk Assessment, and RI Report



* On-going update of Administrative Record

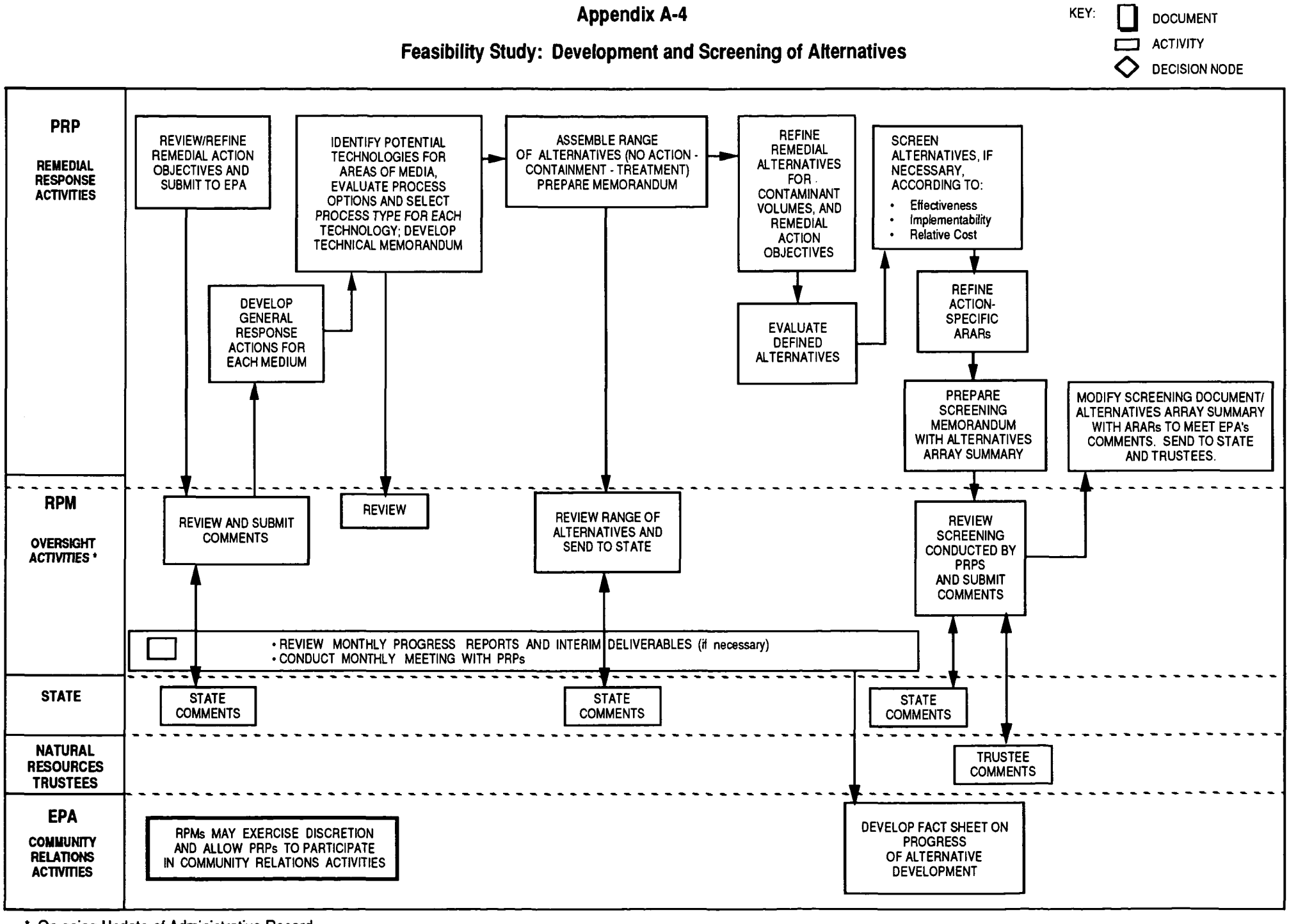
Appendix A-3

Treatability Investigations



Appendix A-4

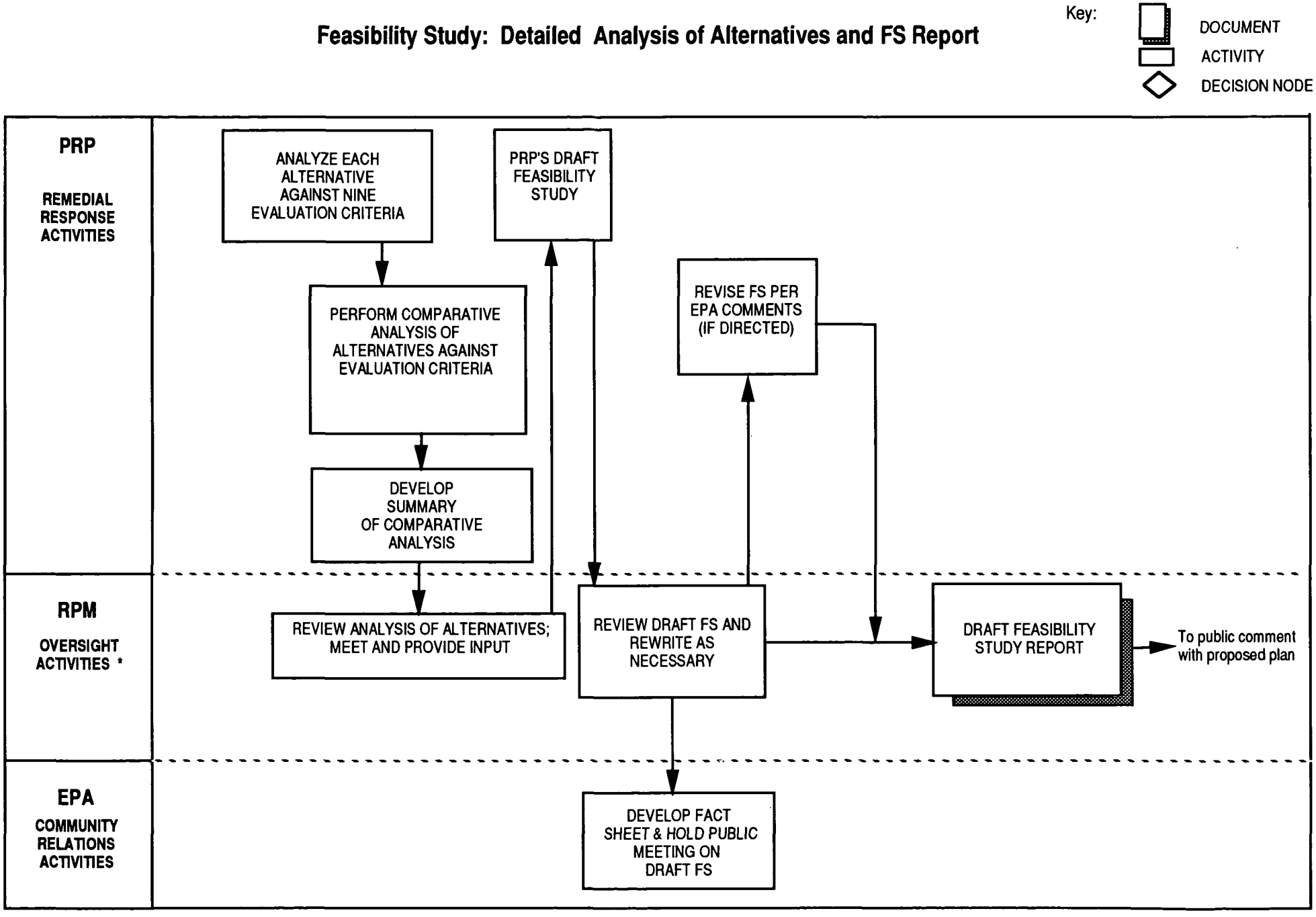
Feasibility Study: Development and Screening of Alternatives



* On-going Update of Administrative Record

Appendix A-5

Feasibility Study: Detailed Analysis of Alternatives and FS Report



On-going update of Administrative Record

VII. SELECTION OF REMEDY

Chapter VII
Selection of Remedy

Section I. Description of Activity 1

Introduction 1

Overview 1

Statutory Authority 1

Responsibilities 2

Evaluation Criteria for Comparing Alternatives 2

Threshold Criteria 2

Primary Balancing Criteria 3

Modifying Criteria 3

ROD Delegation, Consultations, and Briefings 4

Section II. Procedures and Interactions 5

A. Review of RI/FS 5

B. Preparation of Proposed Plan 5

Format of Proposed Plan 5

Contents of Proposed Plan 5

C. State/Federal and Public Input on Preferred Alternative 6

D. Finalization of Proposed Plan 7

E. Public Input on Remedial Alternatives 7

Public Notice 7

Public Meeting 7

Public Comment Period 7

Administrative Record 7

PRP Participation 8

F. Special Notice To PRPs 8

Required Notifications 8

G. Final Selection of Preferred Alternative 8

H. Prepare Draft ROD 8

Components of Record of Decision 9

Declaration 9

Decision Summary 9

Responsiveness Summary 9

Changes from the Proposed Plan to the ROD 10

Unanticipated Changes 10

I. State/Federal Consultation on Selected Remedy 10

Concurrence 10

J. Briefing and Signature 11
K. Notice 11
L. Post-ROD Changes 11

Section III. Planning and Reporting Requirements 12
A. Reporting Requirements 12
Submission of Documents 12
Information Databases 12
Implications of Submissions 12
SCAP/STARS 12
B. Planning Requirements 12
Contractor Participation 12

Section IV. Potential Problems/Resolutions 13
A. Inconsistent PRP Alternative 13
B. Extensive Public Comment 13
C. Disputes over ROD 13

Section V. References 14
Policy 14
Guidance 14
Manuals 14
Guides 14
Training 16
Contacts 16

Section VI. Activities Checklist 18

Chapter VII
Selection of Remedy

Section I. Description of Activity

Introduction

This chapter provides a general discourse on the process used by Federal agencies to select a final remedial action from among the options that undergo detailed analysis in the RI/FS. See Exhibit VII-1 for a graphic representation of the elements that comprise the remedy selection process. For more detailed information on the remedy selection process, consult the National Oil and Hazardous Substance Pollution Contingency Plan (NCP), "Guidance on Preparing Superfund Decision Documents" and other documents referenced at the end of this chapter.

Overview

The Agency has established the remedy selection process to fulfill the mandates of section 121 of CERCLA. Substantively, the remedy selection process involves the following: 1) an objective assessment of alternative approaches for remediating problems at sites with respect to nine evaluation criteria that encompass statutory requirements, and 2) a risk management decision as to which option provides the most appropriate solution for a site or site problem. Procedurally, the selection of a CERCLA remedial action from among alternatives is a two-step process. First, the lead agency, in conjunction with the support agency, reviews the analysis in the RI/FS and Administrative Record to identify a preferred alternative that is presented to the public in a proposed plan (along with the supporting information and analysis) for review and comment. Second, the lead agency reviews the public comments, consults with the support agency in order to evaluate whether the preferred alternative is still the most appropriate remedial action for the site or site problem, and makes a decision. EPA is the ultimate decisionmaker in selecting a remedy under CERCLA.

Statutory Authority

Section 121 of CERCLA requires that the chosen remedy meet certain standards. The lead agency must select a remedy that:

- Is protective of human health and the environment
- Attains legally Applicable or Relevant and Appropriate Requirements (ARARs), or provides grounds for invoking a waiver of ARARs
- Is cost-effective
- Utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable
- Addresses the preference for remedies that employ treatment that permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances, pollutants, and contaminants as a principal element.

Section 121 of CERCLA requires that Superfund remedies be consistent with the requirements of the National Contingency Plan (NCP). The NCP specifies the nine evaluation criteria used to compare remedial alternatives.

CERCLA also establishes procedures for the remedy selection process. The remedy selection process must include the opportunity for substantial and meaningful involvement of State officials. The Agency must comply with public participation requirements by allowing the public to comment and submit information on the remedy for inclusion in the

Administrative Record (see sections 113(k), 117, and 121(f) of CERCLA). The Agency must document its decision in an Administrative Record and make the record accessible to the public. EPA must notify PRPs, State personnel, and Natural Resource Trustees about negotiations for implementation of the remedy.

Responsibilities

Federal and State agencies conduct remedy selection activities as a cooperative effort. Section 121(a) of CERCLA states that the President (EPA) shall select appropriate remedial actions. EPA and the State agencies decide on a case-by-case basis which agency will become the lead agency. In some States, an agreement between the agencies, such as a Superfund Memorandum of Agreement (SMOA) or Cooperative Agreement (CA), embodies this decision. (For more information on the EPA/State partnership, see Chapter XIV, State Enforcement). In addition to designating itself or another agency as the lead agency for a site, EPA generally delegates lead responsibilities from Headquarters to the Regions. Regardless of whether the State is designated the lead agency, EPA is always responsible for deciding the remedy and signing the ROD.

In general, the remedy selection process is the sole responsibility of the agencies involved. However, contractors and potentially responsible parties may participate in particular aspects of the process.

Evaluation Criteria for Comparing Alternatives

EPA has structured a risk management decision-making process designed to satisfy the numerous requirements of CERCLA. This process involves the assessment of alternative hazardous waste management approaches and a comparison of these approaches using nine evaluation criteria. A remedy is selected by balancing the trade-offs between alternatives to identify the most appropriate protective solution which meets (or waives) ARARs for a given site. The nine evaluation criteria are used to develop the RI/FS detailed analysis, on which the remedy decision is based. The criteria include:

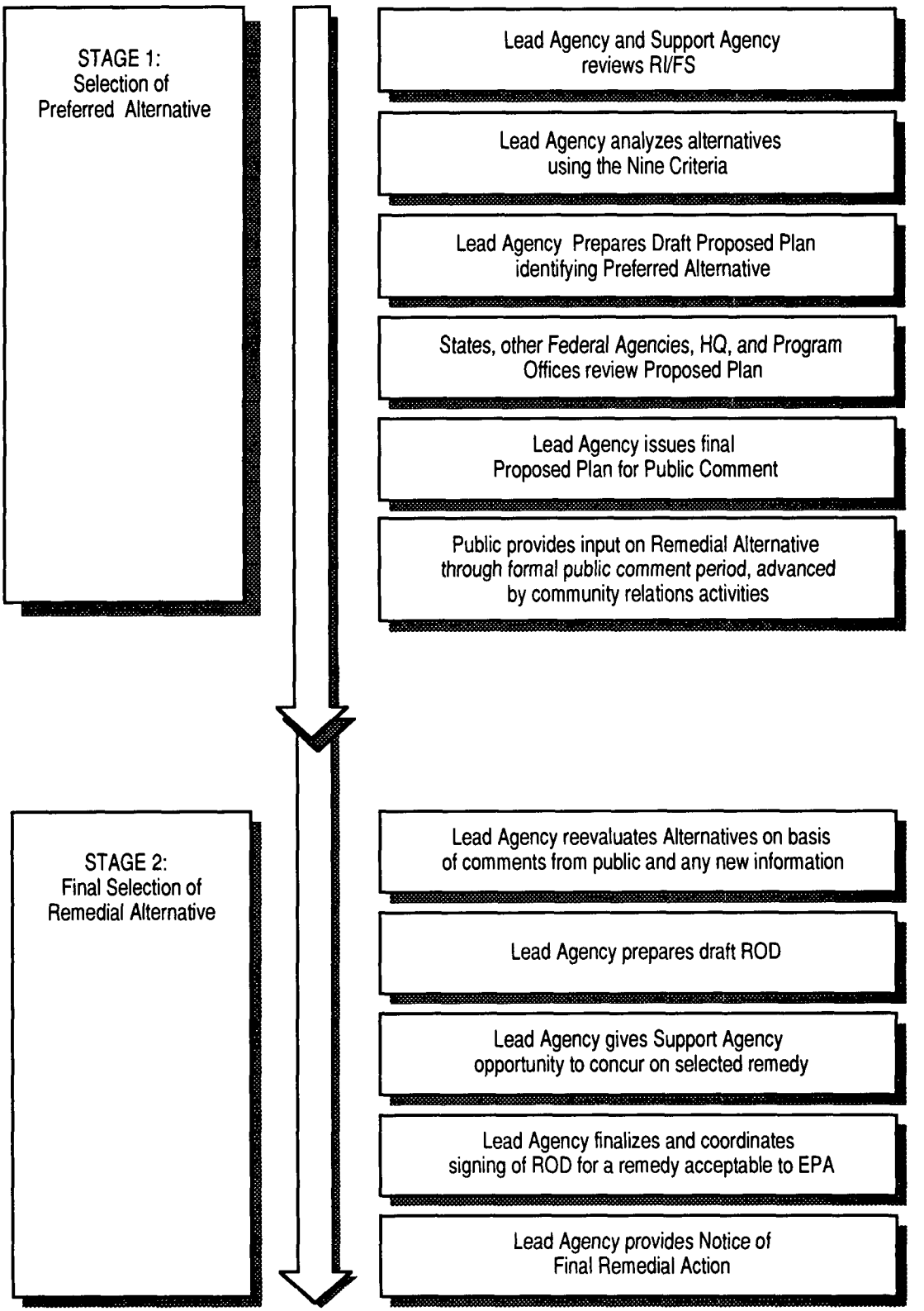
Threshold Criteria

The two threshold criteria which *must* be satisfied in order for an alternative to be eligible for selection are:

- **Overall protection of human health and the environment** - Protectiveness is the primary requirement that CERCLA remedial actions must meet. A remedy is protective if it adequately eliminates, reduces, or controls all current and potential risks posed through each pathway by the site. A site where, after the remedy is implemented, hazardous substances remain without engineering or institutional controls must allow for unrestricted use and unlimited exposure for human and environmental receptors. For those sites where hazardous substances remain such that unrestricted use and unlimited exposure is not allowable, engineering controls, institutional controls, or some combination of the two must be implemented to control exposure and thereby ensure reliable protection over time. In addition, implementation of a remedy cannot result in unacceptable short-term risks to, or cross-media impacts on, human health and the environment.
- **Compliance with Applicable or Relevant and Appropriate Requirements (ARARs)** - Compliance with ARARs is one of the statutory requirements for remedy selection. Alternatives are developed and refined throughout the CERCLA process to ensure either that they will meet all of their respective ARARs or that there is good rationale for waiving an ARAR. During the detailed analysis, information on Federal and State action-specific ARARs will be assembled along with previously identified chemical-specific and location specific ARARs. Alternatives will be refined to ensure compliance with these requirements or to begin to identify waivers that might be invoked.

Exhibit VII-1

Selection of Remedy
Overview of Decision-Making Process



Primary Balancing Criteria The five primary balancing criteria used to weigh major trade-offs among the different hazardous waste management strategies are:

- **Long-term effectiveness and permanence** - This criterion reflects CERCLA's emphasis on implementing remedies that will ensure protection of human health and the environment into the future as well as in the near term. In evaluating alternatives for the degree of long-term effectiveness and permanence they afford, the analysis should focus on the residual risks that will remain at the site after the completion of the remedial action. This analysis should include consideration of the following: the degree of threat posed by the hazardous substances remaining at the site; the adequacy of any controls (e.g., engineering and institutional controls) used to manage the hazardous substances remaining at the site; the reliability of those controls; and the potential impacts on human health and the environment, should the remedy fail based on assumptions included in the reasonable maximum exposure scenario. This evaluation criterion incorporates the statutory requirements to take into account the following: the uncertainties associated with land disposal; the goals, objectives, and requirements of RCRA; the persistence, toxicity, mobility, and propensity to bioaccumulate of the hazardous substances and their constituents; the long-term potential for adverse health effects from human exposure; long-term maintenance costs; the potential for future remedial action costs if the remedy were to fail; and the threats to the environment associated with redisposal or containment of the hazardous substances.
- **Reduction of toxicity, mobility or volume** - This criterion addresses the statutory preference for remedies that employ treatment as a principal element by ensuring that the relative performance of the different treatment alternatives in reducing toxicity, mobility, or volume will be assessed. Specifically, the analysis should examine the magnitude, significance, and irreversibility of reductions.
- **Short-term effectiveness** - This criterion includes the short-term impacts of the alternatives (i.e., impacts during implementation) on the neighboring community, the workers, or the surrounding environment, including the potential threats to human health and the environment associated with excavation, treatment, and transportation of hazardous substances. The potential cross-media impacts of the remedy and the time to achieve protection of human health and the environment also should be analyzed.
- **Implementability** - Implementability considerations include the technical and administrative feasibility of the alternatives and the availability of the goods and services (e.g., treatment, storage, or disposal capacity) on which the viability of the alternative depends. Implementability considerations often affect the timing of various remedial alternatives (e.g., limitations on the season in which the remedy can be implemented, the number and the complexity of materials-handling steps that must be followed, the need to obtain permits for off-site activities, and the need to secure technical services such as well drilling and excavation).
- **Cost** - Cost encompasses all construction and operation and maintenance costs incurred over the life of the project. Present worth of these costs are considered. EPA believes that the discount rate is an aspect of developing a realistic accounting of the future costs of remedial alternatives and an accurate comparison of the total costs, and the cost-effectiveness, of treatment and non-treatment remedies.

Modifying Criteria After the above criteria have been evaluated and public comment is received, the two modifying criteria are taken into account. They are:

- **State acceptance** - This criterion, which is an on-going concern throughout the remedial process, reflects the statutory requirement to provide for substantial and meaningful State involvement. Communication with the State throughout the RI/FS

will help to avoid problems at the time of the proposed plan or ROD. State comments may be addressed during the development of the FS, as appropriate, although formal State comments usually will not be received until after the State has reviewed the draft RI/FS and the draft proposed plan prior to the public comment period. The proposed plan that is issued for public comment along with the RI/FS report should indicate either that the State has commented on or concurred with EPA's preferred alternative or that State comments have not been received. The ROD should specifically address State concurrence or nonconcurrence with the response action that is selected, particularly noting State views on compliance or noncompliance with State ARARs.

- **Community acceptance** - This criterion refers to the community's comments, where the community is broadly defined to include all interested parties, on the remedial alternatives under consideration. These comments are taken into account throughout the RI/FS process through the communications that occur as the Community Relations Plan is implemented. Again, EPA can only preliminarily assess community acceptance during the development of the FS, since formal public comment will not be received until after the public comment period for the proposed plan and the RI/FS is held. The detailed analysis, however, may summarize preliminary comments on components of the alternatives received up to that point.

Reference

NCP pages 8719-8723 (March 8, 1990).

ROD Delegation, Consultations, and Briefings

The authority to sign the Record of Decision usually is delegated from EPA Headquarters to the Regions. Consultation with Headquarters continues to be required in certain circumstances.

Formal consultations with Headquarters generally are required where the proposed remedial action exceeds $60 million; utilizes Fund-balancing waivers; involves sites with soil lead cleanup levels derived by the Uptake Bio-Kinetic (UBK) model which fall outside the 500-1000 ppm range; involves sites with dioxin as a major contaminant; or involves national precedent-setting issues; ROD amendments as a result of new information from the PRPs or changes brought about by settlements; all Explanation of Significant Differences (ESDs); containment-only remedies; and technical impracticability waivers for DNAPLs in ground water and soil. Consultations are to occur prior to issuance of the Proposed Plan or Amended Proposed Plan. The consultation process outlined above also is applicable to Federal Facilities RODs, ROD amendments, and ESDs.

The lead agency will conduct a pre-ROD briefing for Headquarters staff if the site involves nationally significant or precedent-setting issues. Additionally, a pre-ROD briefing for Headquarters must be performed for all RODs that require Headquarters concurrence.

Section II. Procedures and Interactions

This section discusses the steps in the decision-making process required to fulfill the mandates of sections 113, 117, and 121 of CERCLA.

A. Review of RI/FS

The RI/FS provides the decision-maker with an assessment of the extent and nature of the contamination at the site, an assessment of current and potential risks posed by the site to human health and the environment, a description of alternatives, and comparison of alternatives based on the nine criteria. In addition, the RI/FS identifies the performance levels each alternative is expected to attain to ensure protection of human health and the environment. The lead agency must confirm that there is sufficient information to support the selection of a preferred alternative when reviewing the RI/FS data, and should require further study if the information is insufficient. PRPs must not be allowed to influence the remedy selection process such that less protective or permanent remedies are selected. It is the lead Agency (EPA or the State if it is a State-lead site with no Federal funding), and not a PRP, that must select the preferred alternative and the ultimate remedy. See the discussion in section IV, Problems and Resolutions, of this chapter.

EPA's RPM should ensure that proper remedial action objectives are chosen and that the proper alternatives pass the screening. Before completion of the final RI/FS report, EPA should consult with the State in examining the findings of the comparative analysis. EPA then makes a preliminary determination of the preferred alternative.

B. Preparation of Proposed Plan

Section 117 of CERCLA requires the lead agency to issue a proposed plan that identifies its preferred remedial alternative. The proposed plan highlights information about the site, remedial alternatives evaluated in the RI/FS report, and the preferred alternative. It also describes all opportunities for public input, and requests comments from the community on each of the remedial options.

Format of Proposed Plan

The lead agency may issue the plan in a fact sheet format. If, however, the plan presents complicated remedial options or involves a site that has sparked public controversy, the lead agency may consider issuing the plan in an expanded format. In either case, the agency should write it in a style that is informative and readily understandable by the public. It may be helpful to have the community relations coordinator review the format of the plan before it is issued. The plan must retain enough detail so that the problem to be addressed at the site and the options for solutions are clearly identified.

Contents of Proposed Plan

The proposed plan should address the following topics:

- Statement of Document's Purpose
  - Describes functions of plan
  - Directs public to RI/FS
  - Solicits input on *all* alternatives
- Site Background
  - Gives physical description
  - Explains site remedial, enforcement, and operational history
  - Identifies lead and support agencies
- Role and Scope of Operable Unit or Response Action

- Summary of Site Risks
  - Identifies chemicals of concern
  - Identifies exposure scenarios
  - Summarizes current and potential site risks
- Summary of Alternatives
  - Briefly describes alternatives evaluated in detail, including cost and implementation time and whether ARARs will be met or waived
- The Preferred Alternative and Evaluation of Alternatives
  - Identifies preferred alternative
  - Lists evaluation criteria
  - Profiles performance of preferred alternatives against evaluation criteria, highlights trade-offs with respect to other options
  - Describes and gives justification for any ARARs waivers
  - Describes means of implementing institutional controls
  - Indicates preliminary determination of compliance with statutory requisites
- Community Involvement
  - Identifies locations, times, and dates for comment periods and public meetings
  - Identifies location(s) of Administrative Record
  - Lists names and numbers of government contacts
  - States whether special notice was issued.

These topics are described in detail in OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan and Record of Decision" (July 1989).

C. State/Federal and Public Input on Preferred Alternative

Following is a general discussion of the process for coordinating State/Federal and public (including PRP) input on the remedial alternatives and preferred option described in the proposed plan.

When EPA selects a preferred alternative at a PRP-lead site, an opportunity for review and comment on all alternatives should be provided to Headquarters Program Offices, States and other Federal Agencies prior to the release of the proposed plan for public comment. The RPM also should seek substantial input from the State and State Agencies. Early State involvement improves the Superfund program's ability to identify and meet ARARs and address State issues and facilitate concurrence on the selected remedy.

State-lead sites fall into two categories: 1) sites where EPA has provided funding and has retained the right to select the remedy, and 2) sites where EPA is not involved. Regarding the first category, in the event that the State is the lead, and EPA does not concur on the selected remedy, EPA can assume the lead for the ROD and proceed through the design stage. Such instances are not expected to occur often.

In the second category, the State should be reminded that EPA is not bound by the remedy selection unless the Regional Administrator signs the ROD or concurs on it. The State should send copies of the RI/FS report and draft proposed plan to appropriate program offices. If the Regional Administrator is to sign the ROD, the RPM should ensure consistency with CERCLA and the NCP, the sufficiency of the Administrative Record, and technical backup for the RI/FS including QA/QC and treatability testing.

D. Finalization of Proposed Plan

EPA reviews the State's written comments, summarizes them in the plan, and provides a response. In evaluating the State's comments, EPA should consider State cost sharing and ARARs. The response may include revision of the preferred alternative. If the site is State-lead and EPA does not agree with the State's preferred remedy, EPA must advise the State, in writing, that EPA is not bound by the State's decision.

E. Public Input on Remedial Alternatives

Once the proposed plan is finalized, the lead agency must make the plan available to the public and announce its availability. A notice must be placed in a local newspaper of general circulation. In addition, the agency should notify the public of all opportunities and resources for community input in order to prepare concerned citizens for an upcoming public comment period.

Public Notice

The agency presents information to the general public on the proposed plan and upcoming public comment period primarily by placing a public notice or advertisement in a local newspaper. In addition, EPA guidance suggests announcing the availability of the RI/FS and proposed plan by sending notices to all persons on the community relations mailing list, including PRPs. The lead agency may also wish to send out fact sheets or letters to persons on the list or distribute copies of the proposed plan.

For detailed information, see OSWER Directive 9355.3-02, "*Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan and Record of Decision,*" (July 1989) and OSWER Directive 9836.2 "CERCLA Mailing Lists" (January 1989).

Public Meeting

Another source of public information is public meetings. Section 117(a)(2) of CERCLA requires that the lead agency provide an opportunity for a public meeting near the site. The meeting need not take the form of a public hearing. The agency should bear in mind that no one meeting format is appropriate for all Superfund sites. The agency is required to keep a transcript of public meetings concerning the RI/FS and proposed plan.

Public Comment Period

The lead agency solicits public opinion on a preferred alternative by holding a public comment period. During the comment period, the public, including PRPs, may submit, in the form of written statements or oral comments during a meeting, information for the lead agency to consider in selecting a remedial alternative.

For a detailed discussion of community relations requirements, consult EPA/540/R-92/009, *Community Relations in Superfund: A Handbook* (January 1992).

Administrative Record

At various times during the RI/FS and ROD process, public notices are issued that refer interested persons to the Administrative Record file for information so that they can input into the process in an informed manner. The Administrative Record, when completed, includes all documents that the agency considered or relied on to select the remedial action. The record file will be located at the Regional office and at a repository at or near the site to facilitate review. Chapter XV, Records Management, contains more information on the Administrative Record. In addition, Exhibit VII-2 identifies the documents that the agencies should place in the Administrative Record file during the remedy selection process.

The lead agency compiles and maintains the Administrative Record file. Complete documentation is essential to demonstrate that the agency considered all relevant information and provided a contemporaneous explanation of its decision-making.

A detailed list of information that should be included in an Administrative Record file is contained in OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

PRP Participation

The Agency, and not a PRP, must compile the Administrative Record, however, in some circumstances, PRPs may assist in maintaining the Administrative Record and in conducting community relations activities. With respect to the Administrative Record, PRPs may house the record file at or near the site. The Agency must, however, decide which documents to include in the record, which documents to transmit to the PRPs for inclusion in the record, and must maintain the record index. PRP activities with respect to community relations activities may include assisting at public meetings and providing fact sheets, subject to the lead agency's approval and oversight. The Community Relations Plan should reflect the fact that PRPs are helping to conduct public information activities.

F. Special Notice To PRPs

At a Federal-lead site, EPA may negotiate with the PRPs over implementation of the RD/RA, as appropriate. At a State-lead site, EPA is not required to conduct negotiations. However, if Fund monies will be requested by the State, negotiations will precede the obligation of funds unless there is good reason for not negotiating. In accordance with CERCLA, EPA may, at its discretion, send a special notice to the PRPs. The notice letter triggers a 60-day moratorium on EPA-conducted remedial action activities. If the PRPs submit a good faith offer for conducting the work during the 60-day time frame, the moratorium continues for another 60 days while EPA evaluates the offer and finalizes negotiations. It is important to prepare for negotiations before the ROD is signed. See Chapter VIII, RD/RA Negotiations/ Settlement, for a detailed description of the appropriate circumstances and procedures for conducting RD/RA negotiations.

Required Notifications

In addition to notifying the PRPs that the moratorium has been invoked, the RPM must notify other parties as well. The RPM shall notify State representatives and State or Federal Natural Resources Trustees. This notification should include a copy of the special notice letter and a list of the parties receiving it. The RPM should submit at this time the notice letter and list to the Administrative Record coordinator for inclusion in the Administrative Record.

G. Final Selection of Preferred Alternative

The final selection of a remedy is reflected in the draft Record of Decision (ROD). Before signing the ROD, however, EPA re-evaluates its chosen alternative, as follows.

At the end of the public comment period, EPA re-evaluates its preferred alternative on the basis of comments and new information received from the public, (including PRPs). As a result of this information, the Agency may elect to adopt the preferred remedy as originally proposed, modify a component of the preferred remedy, or select a different remedy.

If the Agency modifies its original preferred alternative, it must examine the extent of the change. Some changes must be discussed in the ROD, and some significant changes require additional opportunity for public comment.

For more detailed information, consult OSWER Draft Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents (July 1989).

H. Prepare Draft ROD

After Agency re-evaluation of the chosen alternative, the Agency prepares a draft ROD. The ROD serves as the official Agency decision document on the selection of a remedy that makes all determinations and findings required by statute and regulation.

Exhibit VII-2(1)

Contents of the Administrative Record

The record file for a response action will typically, but not in all cases, include the documents listed below. Documents that are relevant only to remedial or removal response actions are indicated in brackets.

Factual Information/Data

- Preliminary assessment report
- Site investigation report
- Approved RI/FS workplan [Remedial]
- Amendments to final RI/FS workplan [Remedial]
- Sampling and analysis plan consisting of a quality assurance project plan (QAPP) and a field sampling plan [Remedial]
- Validated sampling and analysis data
- Chain of custody forms
- Inspection reports
- Data summary sheets
- Technical studies
- Endangerment assessment/risk assessment
- Summary of remedial action alternatives (used in conjunction with early special notice letters) [Remedial]
- RI/FS [Remedial]
- Engineering evaluation/cost analysis (EE/CA) [Removal]
- Factual information submitted by the public (including PRPs)

Policy and Guidance

- Memoranda on policy decisions (site-specific, issue-specific)
- Guidance documents
- Technical literature

Public Participation

- Community relations plan
- Newspaper articles
- Proposed plan [Remedial]
- Public notices
- Community relations mailing list and documents sent to persons on this list
- Documentation of public meetings
- Public comments
- Transcript of public meeting on RI/FS and proposed plan [Remedial]
- Responses to significant comments
- Responses to State and other Federal Agency comments

Exhibit VII-2(2)

Contents of the Administrative Record

Other Party Information

- Documentation of State involvement
- ATSDR health assessment
- Natural Resources Trustees finding of fact and final reports

Enforcement Documents (Only if considered or relied on in selecting the response action)

- Administrative Orders
- Consent Decrees
- Affidavits
- Notice letters to PRPs containing relevant factual information not included elsewhere in the record file
- Responses to notice letters
- Section 104(e) information requests
- Responses to section 104(e) information requests

Decision Documents

- ROD, including responsiveness summary [Remedial]
- Amended ROD [Remedial]
- Explanation of significant differences [Remedial]
- Action Memorandum [Removal]
- Amended action memorandum [Removal]
- EE/CA approval memorandum [Removal]
- Other documents that embody the decision for selection of a removal action [Removal]

Components of Record of Decision

RODs consist of three basic components:

- **Declaration** - which functions as an abstract for the key information contained in the ROD and is the section of the ROD signed by the EPA Regional Administrator or Assistant Administrator when all sections have been completed
- **Decision Summary** - which provides an overview of the site characteristics, the alternatives evaluated, and the analysis of each option, and explains how the selected remedy meets the statutory requirements
- **Responsiveness Summary** - which provides an overview and analysis of information and comments received on the proposed plan, RI/FS report, and other information in the Administrative Record.

The following discussion presents highlights of the process for compiling a ROD and the elements of each section. For a complete discussion of RODs, consult OSWER Directive 9355.3-02 "Interim Final Guidance on Preparing Superfund Decision Documents (July 1989).

Declaration

The Declaration is the section of the ROD signed by the EPA Regional Administrator or AA, OSWER. It provides a brief description of the selected remedy and the scope and role of the response action. The Declaration should summarize information supporting the determination that the selected remedy meets all statutory requirements and preferences or provides an explanation as to why it does not. The Declaration should contain a statement regarding any ARARs waivers. The determination of imminent and substantial endangerment also should be included in the Declaration, unless the ROD is for a no action decision.

Decision Summary

The Decision Summary should provide an overview of the site-specific factors and analysis conducted that led to selection of the remedy. This section generally should include:

- Site name, location and description
- Site History and enforcement activities
- Highlights of community participation
- Scope and role of the operable unit or response action
- Site characteristics
- Summary of site risks
- Description of alternatives
- Summary of the comparative analysis of alternatives
- Selected remedy
- Statutory determinations
- Documentation of significant changes.

For no action RODs, this outline is abbreviated.

Responsiveness Summary

The final component of the ROD is the Responsiveness Summary, which serves two roles. It provides information on community acceptance of the preferred remedy, which is considered by Agency decision-makers in reaching a decision on a remedy. It also constitutes a freestanding document explaining how the Agency solicited and responded to community concerns, written after the Agency has chosen a remedy. The Responsiveness Summary should be both concise and complete.

It is important that each significant comment, received by EPA during the public comment period, get a thorough examination and response. Agency policy, discussed in response to comments, must be reviewed by management before it is incorporated into a final responsiveness summary.

Changes from the Proposed Plan to the ROD

Significant changes from the preferred alternative must be documented and explained in a Significant Changes section of the Decision Summary of the ROD. Non-significant changes should be documented in the Description of Alternatives section of the ROD Decision Summary. Significant changes may relate to the scope, performance or cost of the remedy as follows:

- **Scope** - changes that address a substantially greater volume of waste, a new environmental pathway or media, or that encompass a substantially greater physical area of the site.
- **Performance** - changes in treatment technologies or processes that alter the long-term effectiveness of the remedy, have different short-term effects, or provide a different level of performance.
- **Cost** - changes that significantly alter the capital or operation and maintenance cost estimates for the selected remedy.

Unanticipated Changes

If a change could not reasonably have been anticipated by the public, EPA must provide additional time for public comment. An example of a change that could not reasonably have been anticipated is selection of a new alternative not previously analyzed.

I. State/Federal Consultation on Selected Remedy

Once the draft ROD is complete, the lead and support agencies will brief their own management on the ROD. As outlined in the NCP, the lead agency will submit the ROD to the support agency, which should be allowed at least ten working days to examine the ROD, unless the CA or SMOA specifies a different time frame. Both agencies will submit the ROD for review by the support program offices. Each agency determines its own timeframe for interagency review.

In particular, lead and support agencies should get the input of Regional and State legal counsels. An area of potential dispute with the State is what requirements are relevant and appropriate. It should be stressed to the State that relevant and appropriate determinations should make sense in light of the circumstances of the release at the site. Regions will consult with Headquarters on all RODs involving nationally significant or precedent-setting issues, such as, sites at which the proposed remedy exceeds $60 million; that use a Fund-balancing waiver; that involve soil lead cleanup levels which fall outside the 500-1000 ppm range; that have dioxin as a major contaminant, "containment-only" remedies, ESDs, ROD amendments as a result of new information from the PRPs or changes brought about by settlements, or technical impracticability waivers for DNAPLs in ground water and soil.

Based on comments received, the lead agency may modify the selected remedy and revise the ROD.

Concurrence

The agency that takes the lead responsibility for preparing the ROD actively seeks concurrence from the support agency. State-lead remedial actions conducted under federal authority require EPA signature. State-lead remedial actions at an NPL site that are conducted under State authority and with State funding may, but need not, include an EPA concurrence. Federal-lead remedial actions at an NPL site that are conducted under EPA authority may, but need not, include a State concurrence. Concurrences become part of the ROD Declaration.

While EPA may execute a ROD with a remedy that the State will not agree to, or has yet to comment on officially, EPA should anticipate the consequences. First, for a Fund lead action, it is unlikely that a State will pay for part of the remedial action and operation and maintenance, if it disagrees with the remedy. Second, State non-concurrence may adversely affect settlement negotiations and a State may oppose entry of a Consent Decree premised upon a remedy with which it disagrees. Third, the State may testify on behalf of the PRPs in a section 106 judicial action. Fourth, the State may not grant necessary permits for offsite activities, (i.e., POTW disposal, transportation of wastes, and offsite treatment). Nonetheless, in some instances, EPA may sign a ROD over State objections. Refer to the Potential Problems/Resolutions section of this chapter for a discussion of possible approaches to be considered if the State and Federal Agencies prefer inconsistent alternatives and have difficulty reaching concurrence.

J. Briefing and Signature

When the State completes a ROD, preferably the State Director and the EPA Regional Administrator should sign it. Where there are disagreements and EPA provided funding for the RI/FS, EPA may assume the lead on a ROD and sign it without State agreement. No State signature is required on an EPA-lead ROD, although the State has a responsibility to provide the lead agency with a written declaration of concurrence or non-concurrence. All RODs conducted under Federal authority will be signed by the EPA Regional Administrator or the Assistant Administrator of OSWER, as specified in the delegation report.

K. Notice

Pursuant to section 117 of CERCLA, the lead agency will publish notice of the final remedial action plan. The notice will be published in a major local newspaper of general circulation. CERCLA also requires that the agency make the ROD available to the public before any remedial action begins. The final version of the ROD, including the Responsiveness Summary, should be included in the Administrative Record.

L. Post-ROD Changes

EPA may receive new information that leads it to alter the remedy specified in the ROD. When this occurs, EPA must evaluate the contemplated change to determine the procedures it must follow. Three categories of post-ROD changes exist:

- **Non-significant differences** - minor changes that do not significantly affect the overall scope, performance, or cost of the alternative, such as minor technical or engineering changes.
- **Significant differences to a component of the remedy** - changes that significantly affect the overall scope, performance, or cost of the alternative, but do not alter the overall waste management approach, such as changes to ARARs, timing, cost, or implementation.
- **Fundamental changes to the overall remedy** - changes that alter the overall waste management approach, such as substitution of a containment remedy for a treatment remedy.

Each category of change requires documentation or an opportunity for public comment. For further information on post-ROD changes, consult OSWER Draft Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (July 1989).

Section III. Planning and Reporting Requirements

A. Reporting Requirements

This section of the chapter discusses RPM planning and reporting requirements for the selection of remedy phase of the Superfund program.

Submission of Documents

In addition to referring documents to EPA program offices for review, the lead agency must submit them to Headquarters for purposes of receiving credit for their accomplishments. The lead agency must also send to Headquarters a hard copy of the ROD and a copy of the ROD text on disk in order to receive credit for an initial, subsequent, or final RI/FS completion.

Information Databases

The lead agency also has responsibility for enabling EPA to track accomplishments at the site, such as submission of the draft Feasibility Study to the public. The lead agency meets this responsibility by providing information on selection of remedy activities to EPA databases. The RPM is responsible for ensuring that accurate information on ROD start and completion dates goes into CERCLIS/WasteLAN.

Implications of Submissions

The information supplied by the lead agency about RI/FS completion/submission of the ROD has many important implications. The program planning and budgeting processes use this information. The planning processes for RD/RA negotiations, design funding, and section 106 injunctive cases also rely on this information. The lead agency must make every effort to ensure the accuracy of the date and to achieve ROD completion by that time.

SCAP/STARS

The Selection of Remedy process is tracked through CERCLIS/WasteLAN. For information on the SCAP/STARS targets and measures for selection of remedy, see the Planning and Reporting Requirements section of Chapter VI, RI/FS Implementation.

B. Planning Requirements

The case budget should include an estimate of dollars needed for implementation of a Community Relations Plan. The RPM must also work closely with the Office of Regional Counsel and DOJ to determine any budgeting needs to carry out case management strategy. This may include budgeting for a 106/107 action or specialized RD/RA negotiation tasks. Other budgeting requirements might involve a Federal Enforcement Remedial Design or a Fund-financed RD/RA. For further case budget information, refer to Chapter XVI, Case Budget/Contracts.

Contractor Participation

As provided in Chapter VI, RI/FS Implementation, EPA may reserve parts of the RI/FS for its own conduct or may perform parts when PRPs do not do so satisfactorily. Contractors may assist in these endeavors. Contractors also may assist in providing community relations activities, with the approval of the lead agency. Contractors may assist further by drafting straightforward portions of the ROD package (i.e., site history, description of contamination) and providing technical assistance in preparation of the Responsiveness Summary, although the accuracy of these documents remains the responsibility of the lead agency. Finally, contractors may assist the lead agency in providing meetings and briefings for agency management.

Section IV. Potential Problems/Resolutions

This section discusses problems commonly encountered by lead agencies during the selection of remedy process. It suggests methods that agency personnel have found helpful in solving these problems.

A. Inconsistent PRP Alternative

The FS should not recommend a remedy, that is the function of the Proposed Plan. The FS provides information on all viable alternatives considered. If one is favored and is not eventually selected, FS amendment would be required. More importantly, pre-selection of remedy is implied, which arguably causes due process issues since public participation and support agency input are still pending. The best means of avoiding this problem is prevention. The lead agency should provide effective oversight of the RI/FS process. See OSWER Directive 9835.1a "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (October 1988) and OSWER Directive 9835.1(c) and (d) "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 1 and 2 (July 1991). The lead agency may have to supplement the RI/FS to avoid bias. The lead agency must ensure that the selected remedy is well founded on data that exists in the Administrative Record.

B. Extensive Public Comment

The public may strongly advocate or discourage specific alternatives, due to health concerns, property value issues, or employment. The agency should anticipate this situation and plan community relations activities so as to receive input from many citizens at an early date, thus getting conflicts out in the open quickly and resolving issues. Otherwise, the public may provide a sizeable number of comments during the public comment period. The lead agency would need a substantial amount of time to respond to the comments, which might throw off its schedule for completing the ROD. In addition, the lead agency must allow adequate time for responding to public comments when scheduling financial commitments.

C. Disputes Over ROD

If the support agency does not concur on the remedy, the lead agency may choose not to proceed with the ROD. At a non-enforcement Federal-lead site, the ability to proceed with the RA is contingent upon the availability of the 10 percent (or 50 percent in the case of State-owned sites) State matching funds. At a State-lead site, the State may proceed with a State-funded RD/RA without EPA concurrence. However, since EPA must certify that the remedial action was performed in accordance with the NCP, in order to delete it from the NPL, the State is likely to have difficulty getting this certification if EPA did not concur on the ROD. At a PRP-lead site, the RD/RA may proceed without State concurrence. Reaching consensus on the remedial action at ROD signature generally precludes these difficult situations. However, there will be instances in which one of these approaches is appropriate.

Section V. References

Policy

National Oil and Hazardous Substance Pollution Contingency Plan (40 CFR) (March 8, 1990).

Guidance

OSWER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies" (October 1988).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (July 1989).

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

OSWER Directive 9835.1 (a), "Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (May 1988).

OSWER Directive 9835.1 (c) and (d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volumes 1 and 2, (July 1991).

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OSWER Directive 9355.3-06, "RI/FS Improvements: Phase II Streamlining Recommendations" (January 1989).

OSWER Directive 9836.2, "Community Relations Mailing List" (February 6, 1989).

Manuals

OSWER Directive 9200.3-01B, *Superfund Comprehensive Accomplishments Plan (SCAP) Manual* (Annual).

EPA/540/R-92/009, *Community Relations in Superfund: A Handbook* (January 1992).

OSWER Directive 9355.1-1, *Superfund Federal-Lead Remedial Project Management Handbook* (December 1986).

OSWER Directive 9234.1-01, *CERCLA Compliance with Other Laws Manual* (August 1988).

CERCLA Administrative Records: Compendium of Frequently Used Guidance Documents in Selecting Response Actions, 32 volumes (May 1989).

Guides

Applicable or Relevant and Appropriate Requirements (ARARs) (OERR, OPM, Policy and Analysis Staff)

9234.2-01FS, "ARARs Q's and A's" (May 1989).

9234.2-03FS, "Overview of ARARs: Focus on ARAR Waivers" (December 1989).

9234.2-04FS, "RCRA ARARs: Focus on Closure Requirements" (October 1989).

9234.2-05FS, "CERCLA Compliance with State Requirements" (December 1989).

9234.2-06FS, "CERCLA Compliance with the CWA and SDWA" (February 1990).

9234.3-001, "ARARs Short Guidance Quarterly Report" (December 1989).

9234.1-02FS, "Guide to Manual: CERCLA Compliance with Other Laws" (September 1989).

9234.2-08FS, "ARARs Q's and A's: Compliance with the Toxicity Characteristics Rule: Part I" (May 1990).

9234.2-07FS, "Summary of Part II: CAA, TSCA, and Other Statutes" (April 1990).

Land Disposal Restrictions (LDRs)

9347.3-01FS, "Superfund LDR Guide #1: Overview of RCRA Land Disposal Restrictions (LDRs)" (July 1989).

9347.3-02FS, "Superfund Guide #2: Complying With the California List Restrictions Under Land Disposal Restrictions (LDRs)" (July 1989).

9347.3-03FS, "Superfund LDR Guide #3: Treatment Standards and Minimum Technology Requirements Under Land Disposal Restrictions (LDRs)" (July 1989).

9347.3-05FS, "Superfund LDR Guide #5: Determining When Land Disposal Restrictions (LDRs) Are *Applicable* to CERCLA Response Actions" (July 1989).

9347.3-06FS, "Superfund LDR Guide #6A: (Second Edition), Obtaining a Soil and Debris Treatability Variance for Remedial Actions" (September 1990).

9347.3-06BFS, "Superfund LDR Guide #6B: Obtaining a Soil and Debris Treatability Variance for Removal Actions" (September 1990).

9347.3-07FS, "Superfund LDR Guide #7: Determining When Land Disposal Restrictions (LDRs) Are *Relevant and Appropriate* to CERCLA Response Actions" (December 1989).

9347.3-08FS, "Superfund LDR Guide #8: Compliance with Third Third Requirements Under the LDRs" (October 1990).

9347.3-09FS, "A Guide to Delisting of RCRA Wastes for Superfund Remedial Responses" (September 1990).

9347.3-10FS, "Superfund LDR Guide #10: Guide to Obtaining No Migration Variances for CERCLA Remedial Actions" (undated).

9347.3-11FS, "Superfund LDR Guide #11: CERCLA Compliance with the RCRA Toxicity Characteristics (TC) Rule: Part II" (October 1990).

Remedial Investigation/Feasibility Studies (RI/FS)

9355.3-01FS1, "Getting Ready: Scoping the RI/FS" (November 1989).

9355.3-01FS2, "The Remedial Investigation Site Characterization and Treatability Studies" (November 1989).

9355.3-01FS3, "The Feasibility Study Development and Screening of Remedial Action Alternatives" (November 1989).

9255.3-01FS4, "The Feasibility Study Detailed Analysis of Remedial Action Alternatives" (March 1990).

9380.3-02FS, "Treatability Studies Under CERCLA: An Overview" (December 1989).

9355.3-11FS, "Streamlining the RI/FS for CERCLA Municipal Landfill Sites" (September 1990).

Record of Decision (ROD)

9335.3-02FS-1, "A Guide to Developing Superfund Records of Decision" (May 1990).

9335.3-02FS-2, "A Guide to Developing Superfund Proposed Plans" (May 1990).

9355.3-02FS-3, "A Guide to Developing Superfund No Action, Interim Action, and Contingency Remedy RODs" (April 1991).

9355.3-02FS-4, "A Guide to Addressing Pre-ROD and Post-ROD Changes" (April 1991).

Remedy Selection

9355.0-27FS, "A Guide to Selecting Superfund Remedial Actions" (April 1990).

9355.4-01, "A Guide on Remedial Actions at Superfund Sites with PCB Contamination" (August 1990).

Ground Water

9283.1-2FS, "A Guide On Remedial Actions For Contaminated Ground Water" (April 1989).

Technology

9200.5-250FS, "Innovative Technology Soil Washing" (November 1989).

9200.5-251FS, "Innovative Technology In-Situ Vitrification" (November 1989).

9200.5-252FS, "Innovative Technology Slurry-Phase Biodegradation" (November 1989).

9200.5-253FS, "Innovative Technology BEST Solvent Extraction Process" (November 1989).

9200.5-254FS, "Innovative Technology Glycolate Dehalogenation" (November 1989).

Risk Assessment

9285.7-01FS2, "Risk Assessment Guidance for Superfund: Volume 1 — Human Health Evaluation Manual (Part A)" (December 1989).

9285.7-01BFS, "Risk Assessment Guidance for Superfund: Volume 1 — Human Health Evaluation Manual (Part B)" (December 1989).

9285.7-01CFS, "Risk Assessment Guidance for Superfund: Volume 1 — Human Health Evaluation Manual (Part C)" (December 1989).

9285.7-05FS, "Guidance for Data Useability in Risk Assessment" (September 1990).

Additional Short Sheets Planned

9355.5-12FS, "RPM Involvement"

"Superfund Sites Contaminated by Wood Treatment Residues"

"Wetlands Requirements That May be ARARs for Superfund Actions"

"Discharging CERCLA Wastewater to a POTW"

"Contaminated Media: Proposed Hazardous Waste Identification Rule"

Training

EPA's Technology Innovation Office conducts training for Regional personnel on the RI/FS process, including selection of remedy, as part of its CERCLA Education Center. In addition, a computer-based training on the RI/FS process is currently being developed. For information, contact 703-308-8800.

Contacts

Selection of Remedy Guidance

Contact Office of Emergency and Remedial Response, Hazardous Site Control Division, Remedial Operations and Guidance Branch, at 703-603-8820.

Site-Specific RODs

For Enforcement-lead, contact Regional Coordinator, Office of Waste Programs Enforce-

ment, CERCLA Enforcement Division, Compliance Branch, at 703-603-8910.

For Fund-lead, contact Regional Coordinator, Office of Emergency and Remedial Response, HSCD, Remedial Operations and Guidance Branch, at 703-603-8820.

State Concurrence

Contact Office of Waste Programs Enforcement, CERCLA Enforcement Division, Guidance and Evaluation Branch, at 703-603-8940.

Land Disposal Restrictions

Contact Office of Emergency and Remedial Response, HSCD, Remedial Operations and Guidance Branch, at 703-603-8820.

Also:

Office of Waste Programs Enforcement, CERCLA Enforcement Division, Guidance and Evaluation Branch, at 703-603-8940.

Office of Emergency and Remedial Response, Hazardous Site Control Division, Design and Construction Branch, at 703-603-8830.

Office of Emergency and Remedial Response, Hazardous Site Control Division, Remedial Operations and Guidance Branch, at 703-603-8820.

Section VI. Activities Checklist

The following checklist is not intended to present an exhaustive set of procedures. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

Selection of Preferred Alternative

1)_____ Review RI/FS report. Confirm that there is sufficient information to support the selection of a preferred alternative. Require further study if the information is insufficient.

2)_____ Make a preliminary determination on a preferred alternative.

3)_____ Produce draft version of proposed plan that identifies preferred remedial alternative.

4)_____ Review and comment on all alternatives by States and other Federal agencies for RP-lead sites.

5)_____ Review operative Remedy Delegation Report to ascertain if HQ review/ comment or consultation is needed.

6)_____ Send draft RI/FS report and draft proposed plan to appropriate program offices.

7)_____ Review State comments, summarize them in proposed plan and draft Agency response.

8)_____ Finalize proposed plan by lead Agency addressing support agency and other program office comments as appropriate.

9)_____ Submit RI/FS, proposed plan, comments, and responses to Administrative Record, along with any other information used in reaching decision.

10)_____ Publish newspaper notice of availability of proposed plan and RI/FS and other opportunities and resources for community input.

11)_____ Notify persons on mailing list that proposed plan and RI/FS are complete.

12)_____ Conduct public meeting.

13)_____ Conduct community relations activities.

14)_____ Hold 30-day public comment period. This may be extended by an additional 30 days upon timely request.

Preparation for RD/RA Negotiations (see Chapter VIII, RD/RA Negotiations/Settlement)

Final Selection of Remedial Alternative

15)_____ Re-evaluate preferred alternative on basis of comments and new information received from the public including PRPs and other sources.

16)_____ Prepare draft version of ROD Declaration and Decision Summary.

17)_____ Prepare Summary and Response to Comments for Responsiveness Summary.

18)_____ Conduct public comment period on any significant changes which were not logical outgrowths of the earlier remedial alternatives.

19)_____ Finalize ROD Decision Summary.

20)_____ Complete Responsiveness Summary.

21)_____ Brief lead agency management on ROD.

22)_____ Submit ROD to appropriate offices and support agency, which will brief its management on the ROD.

23)_____ Receive input from Regional counsel.

24)_____ Receive concurrence or non-concurrence from support agency on the selected remedy.

25)_____ Brief agency management and present ROD for signatures.

26)_____ Publish notice and make ROD available to public through Administrative Record.

27)_____ Provide information on ROD start and completion for entering into CERCLIS/WasteLAN.

28)_____ Send copy of ROD and disk to Headquarters.

VIII. RD/RA NEGOTIATIONS/ SETTLEMENT

Chapter VIII
RD/RA Negotiations/Settlement

Section I. Description of Activity 1

Introduction 1

Statutory Authority 1

Overview of the Negotiation Process 1

Roles and Responsibilities 2

RPM Responsibilities 2

ORC Responsibilities 3

OWPE Responsibilities 3

OE Responsibilities 3

OGC Responsibilities 3

DOJ Responsibilities 4

Delegations 4

Section II. Procedures and Interactions 6

A. Regional Decision to Pursue RD/RA Negotiations 6

Review PRP Search 6

B. Negotiation Planning 6

RD/RA Negotiation Plan 6

Draft Consent Decree 7

Covenants Not to Sue 7

Reopeners 8

C. Notification of States and Federal Natural Resources Trustees 8

D. Special Notice Letters 9

Contents 9

Cost Recovery 9

Timing the SNL 10

Section 122(a) Letters 10

E. Good Faith Offer (GFO) 10

Negotiation Extensions 11

F. Settlement Incentives/ Disincentives 11

G. CERCLA Settlement Policy 11

H. Settlement Tools 12

Mixed Funding Settlements 13

Preauthorization 14

Mixed Work 15

Cash Out 15

De Minimis 16
Criteria for Eligibility for De Minimis *Settlements* 16
Necessary Information for Generator De Minimis *Settlements* 16
Potential De Minimis *Generator Candidates* 16
Timing De Minimis *Settlements* 17
Reopeners 17
Finalizing Settlement 17
Non-Binding Allocation of Responsibility (NBAR) 18
I. Finalizing Settlement 18
Referral Package 19
J. Inducements to Non-Settlors/ Enforcement Options 19
Section 106(a) UAOs 19
Enforcement Discretion 20
Section 106 Litigation 20
Fund 20
Partial Settlements 21
K. Post-Referral Actions by DOJ 21

Section III. Planning and Reporting Requirements 22
A. Budget Requirements 22
B. Reporting Requirements 22

Section IV. Potential Problems/Resolutions 26
A. Poor Relationships Among the PRPs 26
B. Multiple Revisions to Draft CD 26
C. Settling with Majors Involved with *De Minimis* Settlements 26
D. Use of Public Relations 26
E. Inadequate PRP Searches 27
F. Late Challenges to Volumetric Ranking 27

Section V. References 28
Policy 28
Guidance 28
Memoranda 29
Contacts 29
Training 29

Section VI. Activities Checklist 30

Chapter VIII
RD/RA Negotiations/Settlement

Section I. Description of Activity

Introduction

This chapter discusses the process of negotiating for PRP conduct of the Remedial Design/Remedial Action (RD/RA) and focuses on the RPM's role in the process. In addition to discussing the RD/RA negotiation process, this chapter also discusses the settlement tools available to EPA and PRPs, including mixed funding, Non-binding Preliminary Allocations of Responsibility (NBARs), *de minimis* settlements.

Statutory Authority

Section 122 of CERCLA requires that all RD/RA settlements with PRPs be finalized as judicial Consent Decrees. Consent Decrees usually reference section 106 (Abatement Actions) and section 122 (Settlements). Settlements for RD/RA or RA only are never done administratively as an Administrative Order on Consent (AOC). Settlements for RD only may take the form of AOCs. Settlements with *de minimis* parties also may be finalized as AOCs.

Overview of the Negotiation Process

The RD/RA negotiation process requires cooperation and close coordination of the Regional program office, ORC, DOJ, OE and OWPE. Exhibit VIII-1 summarizes the RD/RA negotiation process.

The negotiation planning process begins with a Regional decision that there are Potentially Responsible Parties (PRPs) who are liable and financially capable of properly implementing the remedy and who may be willing to settle. The Region must evaluate the results of the PRP search, which should be complete well in advance of RD/RA negotiations, and other evidence when making this decision.

The first step in the RD/RA negotiation process is for the RPM and Office of Regional Counsel (ORC) staff person to develop an RD/RA negotiation plan outlining the negotiation objectives and strategy. This plan is part of integrated remedial and enforcement planning. As a management device, it will define roles and responsibilities for all participants, establish mutually agreed timelines for performance of individual responsibilities, establish a framework for accountability in tracking progress, and make it possible to obtain commitments from all participants to shared goals and objectives. Key areas where attention should be focused as part of the negotiation planning process are: ensuring a timely and high-quality PRP search, including information for special notice and evidence for litigation; ensuring that the Administrative Record is in order; documenting past costs; and establishing a substantive negotiating strategy. Use of settlement devices such as mixed funding and *de minimis* should also be evaluated for appropriateness.

By this stage, most or all PRPs have been notified of their status as PRPs with a general notice letter. Following general notice, EPA continues to look for more PRPs and for hard evidence of liability. If additional PRPs are identified, EPA issues general notice letters to them, unless special notice has been provided or waived as allowed under section 122(a). The RPM should encourage the new PRPs' involvement in the negotiations and should notify them of any PRP steering committees that may have formed.

The RPM should contact the Federal Natural Resources Trustees again (earlier contact will have occurred prior to the RD/RA negotiation planning process) when developing the negotiation plan to ensure their input to the plan. Coordination with the State is important when developing the RD/RA negotiation plan to ensure that their concerns are understood

and to determine the availability of State funding should negotiations fail to produce a settlement.

A pre-referral package should be submitted to the Department of Justice (DOJ) (with copies to OWPE and OE) before the commencement of the formal settlement process to ensure timely involvement and coordination with DOJ. Generally, the pre-referral package should be provided to DOJ at least 60 days prior to the issuance of the RD/RA special notice letters.

As a practical matter, it is advisable to commence dialogue with OE, OWPE, and DOJ, as early as possible and prior to providing the pre-referral for the 60-day review, by conducting a phone conference to get their input on a comprehensive settlement strategy from a national perspective. This perspective sometimes reveals problems that other regions are incurring with a certain settlement approach. Awareness of these problems may influence the overall settlement strategy resulting in a more efficient settlement process.

The formal settlement process begins with the issuance of special notice letters to the PRPs. Special notice letters are authorized by CERCLA when EPA determines that a period of negotiation would facilitate an agreement with PRPs for taking response action. Issuance of special notice should occur between the time the proposed plan and draft feasibility study are released to the public and the date the ROD is signed, or shortly thereafter. Exceptions to this are discussed later in this chapter. A draft Consent Decree (approved by appropriate EPA and DOJ management) and Proposed Remedial Action Plan or proposed or final ROD should be attached to the special notice letter.

With certain exceptions, the issuance of the special notice letter begins a 60-day moratorium period regarding action under sections 104 and 106 of CERCLA. PRPs have 60 days from the date of issuance to submit a good faith offer to EPA. If such an offer is received, the moratorium is extended an additional 60 days. If additional time is necessary, the Regional Administrator may extend the moratorium period by an additional 30 days. Requests for extensions of RD/RA negotiations beyond 150 days must be well justified and must be approved in advance by the Office Director, OWPE.

Once agreement has been reached, the PRPs and the Regional Administrator must sign a Consent Decree. Thereafter, the Consent Decree is forwarded to DOJ with a referral package developed by ORC. If the settlement falls under any of the categories of non-delegated settlements, OE and OWPE must concur on the signed Consent Decree before it is forwarded to DOJ. It should be noted that RD-only settlements may be in the form of an AOC or stipulation and can be used to expedite the initiation of response work. EPA does not encourage RD-only settlements without an expectation that the PRPs will agree to commit to conduct the remedy.

Should EPA fail to reach an agreement with the PRPs, Regions may issue a unilateral Administrative Order. If the PRPs fail to comply with the UAO, EPA may initiate a judicial action (referral to DOJ), and/or initiate Fund-financed activity. Referrals to DOJ for RD/RA are usually under the authority of section 106 of CERCLA. Regions provide litigation support for the case after it is filed in court by DOJ.

Roles and Responsibilities

This section describes the roles and responsibilities of the RPMs, assistant Regional counsel, and representatives from OWPE, OE, OGC and DOJ. The primary activities for each group are summarized for each phase of the negotiation process below and in Exhibit VIII-2.

RPM Responsibilities

The RPM plays a central role throughout the RD/RA negotiation process. The RPM is responsible for technical aspects of the case and for coordinating with ORC and OWPE during each phase of the negotiations. Planning, preparing for, and participating in the

Exhibit VIII-1

RD/RA Negotiation Process

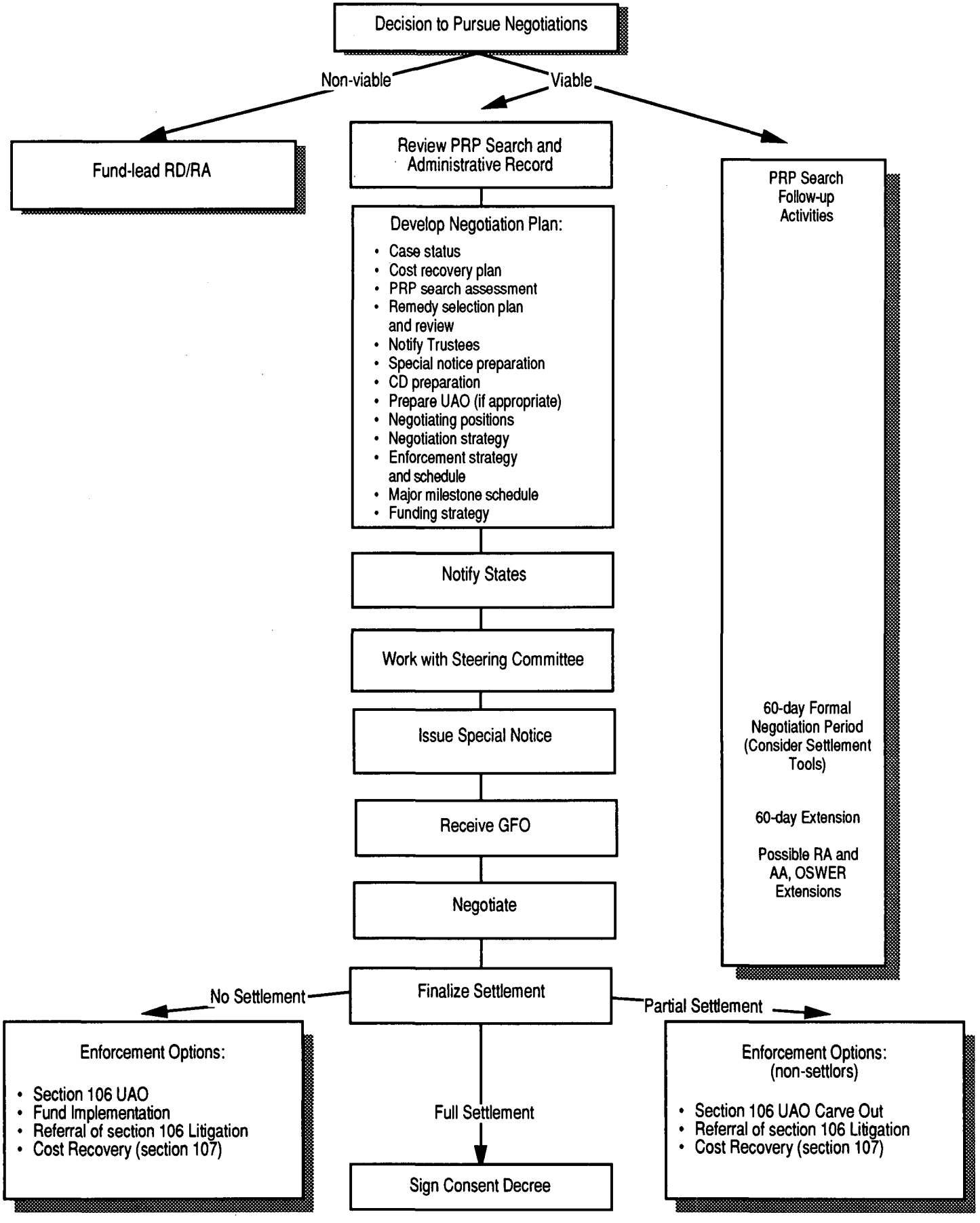


Exhibit VIII-2

Roles and Responsibilities

RPM

NEGOTIATIONS PLANNING

- Ensure PRP search review and follow up by civil investigator and ORC
- Send GNL, if necessary
- Coordinate updated information exchange with the PRPs, including section 104(e) letters and provide the PRPs with information regarding other PRPs (in conjunction with assistant Regional counsel)
- Assemble cost documentation
- Assist in preparation of negotiation plan and pre-referral litigation report
- Review Administrative Record
- Draft technical provisions of Consent Decree
- Develop remedial action plan (in conjunction with specialized technical teams (e.g., ground water, treatment, design) or contractors
- Notify State and Trustees

INFORMAL AND FORMAL NEGOTIATIONS

- Send Special Notice Letters (SNL)
- Conduct negotiations as lead technical representative on the case team
- Maintain coordination between appropriate Headquarters and State and Natural Resources Trustee offices
- Manage against time lines
  Request extensions for negotiations from Regional Administrator/Headquarters
- Obligate funds from the Trust Fund, if appropriate

ORC

NEGOTIATIONS PLANNING

- Review strength of evidence of PRP liability
- Assist in preparation of the RD/RA negotiation plan and pre-referral litigation report
- Review draft ROD and Administrative Record
- Draft initial Consent Decree
- Notify DOJ of the negotiations

INFORMAL AND FORMAL NEGOTIATIONS

- Draft EPA's negotiation strategy
- Review the SNL
- Conduct negotiations as the lead legal representative
- Redraft Consent Decree with changes resulting from negotiations
- Coordinate with the State legal representative.

negotiations process, along with having responsibility for negotiation coordination, usually involves a substantial time commitment by the RPM over a long period of time.

The planning stage is based on a thorough and complete PRP search. RPMs usually will have given the PRPs early notice of their potential liability through general notice letters. Information on volumetric rankings of PRPs and the nature of substances at the site is contained in an RI/FS special notice. The RPM ensures that the PRP search has been updated, as appropriate, and that special notice for RD/RA is prepared. The RPM also is responsible for preparation of a negotiation strategy, in conjunction with the assistant Regional counsel. In view of the intense efforts required to prepare the Proposed Remedial Action Plan, responsiveness summary, and ROD, as much of this work as possible should be done before the Proposed Plan is prepared. The RPM assists in developing the Consent Decree by drafting the technical aspects of the document. The RPM also participates in developing the case referral packages for section 106 and section 107 litigation cases.

In some regions, an Enforcement Specialist assists the negotiation team by helping to prepare general and special notice letters, cost documentation packages and by participating in negotiations.

ORC Responsibilities

ORC, in partnership with the RPM, plays a central role in all phases of the RD/RA negotiations. The assistant Regional counsel's primary role is to prepare the pre-referral litigation report to DOJ and the draft Consent Decree, and to provide legal assessments during the negotiation process. ORC is responsible for coordinating with DOJ, OE, OWPE, and OGC as appropriate during the RD/RA negotiations. The assistant Regional counsel also participates in the development of the case referral package for DOJ litigation of section 106 and section 107 cases.

OWPE Responsibilities

OWPE is responsible for ensuring national consistency for negotiated settlements and consistency with Agency policy. OWPE has Regional Coordinators who are versed on the various RD/RA settlement tools (e.g., mixed funding, *de minimis*) and act as resources for the RPM and assistant Regional counsel.

OWPE participates in management review of non-delegated settlements, and the Director, OWPE must concur on these settlements. Additionally, OWPE representatives may participate on negotiation teams, if complex or nationally significant issues are anticipated. OWPE also may assist the Regions in assembling part of the cost documentation package. OWPE should be on the case correspondence list and should be supplied with relevant documents, including pre-referral litigation reports and draft Consent Decrees, relating to cases in RD/RA negotiations. OWPE's Settlement Expediter is available to assist the Regions in resolving issues related to finalizing settlements.

OE Responsibilities

OE is responsible for ensuring that negotiated settlements are consistent across the Regions with national policy for *legal* matters. OE attorneys have expertise in the legal implications of RD/RA settlements. OE attorneys may participate in any negotiations in which complex or nationally significant issues are anticipated, assist Regional counsel in pre-referral matters and review referrals sent to DOJ. OE also reviews all Consent Decrees resulting from settlements. For non-delegated settlements, the AA, OE must concur. Whether or not the settlement is delegated, OE should be on the case correspondence list and be supplied with relevant documents including pre-referral litigation reports and Consent Decrees.

OGC Responsibilities

OGC has the sole responsibility for issuing Agency legal opinions and providing advice on matters of legal and statutory interpretation to the Regions and program offices. If there is a difference of opinion between the regions or between HQ offices, OGC has the *ultimate* responsibility for providing legal advice and direction for EPA as a whole.

DOJ Responsibilities

DOJ's representative from the Environment and Natural Resources Division's Environmental Enforcement Section is EPA's attorney for litigation of Superfund cases. DOJ participates fully in negotiations, litigation, and enforcement strategy development. DOJ representatives participate on the negotiations team. The DOJ attorney represents DOJ views on the case and is responsible for providing consistency with and insight into other enforcement cases. The attorney also provides analysis of the litigation risks of going to trial. DOJ concurrence is required for all RD/RA or RA Consent Decrees and for cost recovery or *de minimis* Administrative Orders in which total site response costs exceed $500,000. The DOJ attorney and appropriate management review the initial draft of the Consent Decree before it is sent to the PRPs, as well as subsequent redrafts. DOJ case attorneys are essential legal resources for the RPM and assistant Regional counsel. Close coordination and communication with DOJ is important for successful negotiation and litigation of Superfund cases.

RPMs should remember that the information gathered in the initial stages of site cleanup, such as during the PRP Search and in preparation for RI/FS negotiations, may be used later in litigation concerning the site.

The Environment and Natural Resources Division's Litigation Support Group is available to consult with EPA regarding information management services that are available and how those services can be tailored to best serve a situation at a particular site.

For further information, call the Litigation Support Group at 202-616-3354.

Delegations

Headquarters has delegated authority to the Regional Administrators for RD/RA settlements under the following conditions:

- **With no Headquarters concurrence or consultation required if the settlement is a -**
  - Section 106 or 106/107 RD/RA settlement in which response costs do not exceed $30 million and the settlement is not in a category summarized below.
  - RI/FS settlement
  - Settlement of civil judicial penalties under section 104 or 109
- **With Headquarters consultation required -**
  - Section 106 or 106/107 RD/RA settlements in which response costs are between $30 and $60 million
  - Settlements that compromise greater than 25 percent and less than 50 percent of total past and future costs, where the total amount compromised exceeds $2 million
  - Mixed funding settlements that compromise between 25 and 50 percent of response costs in which the EPA obligation is greater than $2 million
- **Upon attainment of experience by the Region** (i.e., Headquarters concurrence retained on the first of the following types of settlements in each Region) -
  - *De minimis* settlements
  - Mixed funding settlements
- **With Headquarters concurrence retained; delegation to Region to be reviewed in the future -**
  - Section 106 and 107 settlements in which total and future response costs exceed $60 million

- Settlements that compromise greater than 50 percent of the total past and future costs, and mixed funding settlements that require 50 percent or more contribution by the U.S. where that contribution is greater than $2 million
- Multi-Regional or nationally-managed cases, including bankruptcies
- Settlements based upon extraordinary circumstances that purport to grant covenants not to sue without limitations as to future liability (section 122(f)(6)(B))
- Precedent setting cases (e.g., certain municipalities as generators, dioxin, substantial deviations from Agency policy)
- Settlements involving section 122(f)(2) special covenants not to sue
- Settlements of proofs of claim in bankruptcy actions
- Settlements presenting issues that have not been expressly delegated (e.g., settlements that include civil penalty or treble damages liability)
- Settlements of actions for access to property under section 104
- Settlements of information request actions under section 104.

For further information on Regional authority, consult OSWER Directive 9012.10-a, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13 B and 14-14 E (June 17, 1988).

References

OSWER Directive 9260.5-02A, "Clarification of Delegations of Authority 14-14-A, 14-14-B, and 14-14-C Under CERCLA" (April 4, 1990).

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1988).

OSWER Directive 9834.3, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OE, "CERCLA RD/RA Settlement Negotiations Checklist" (January 26, 1988).

OE, "Model Consent Decree Implementation" (August 1991).

Section II. Procedures and Interactions

A. Regional Decision to Pursue RD/RA Negotiations

The Regional decision to pursue RD/RA negotiations must be planned in the prior-year SCAP commitments to allow the Agency to define the resource needs for the Region. Regions should use the annual SCAP process and quarterly updates to identify those sites that are likely to progress to RD/RA negotiations in the current fiscal year and the planned fiscal year. Sites at which RODs are expected are considered the initial pool of prospects for RD/RA negotiations.

The RPM and assistant Regional counsel are the lead technical and legal negotiators, respectively, on the negotiation or case team. In addition, the RPM is usually responsible for developing a budget estimate of post-RI/FS support needs during RD/RA negotiations. The Regional CERCLA section chief and case team have responsibility for notifying Federal natural resources trustees, States, DOJ, OWPE, OE, and the relevant technical support personnel of the Region's intent to pursue RD/RA negotiations in the planned fiscal year. The decision to conduct RD/RA negotiations should be entered as a planned SCAP target.

Review PRP Search

During the RI/FS, and prior to initiation of negotiations for PRP conduct of RD/RA activities, the negotiation team should review the results of PRP search activities at the site and identify follow-up activities that may lead to identification of additional PRPs or improved evidence about the volume, substances, liability, or financial viability relating to previously identified PRPs. The potential role of newly identified PRPs should be considered in developing the negotiation plan.

B. Negotiation Planning

Negotiations for which EPA is fully prepared, especially with well established plans, schedules, and deadlines, are much more likely to result in a signed Consent Decree than negotiations for which EPA has not adequately planned. A suggested RD/RA negotiation planning schedule is presented in Exhibit VIII-3. The essential elements of negotiation planning are discussed below.

RD/RA Negotiation Plan

The RD/RA negotiation plan is one major component of the site management plan, as described in Chapter III, Comprehensive Site Planning. The object of the plan is to assist the RPM in effective management of the RD/RA negotiation process and increase the likelihood of achieving PRP settlements for RD/RA. The detailed RD/RA negotiation plan, in combination with the site overview and other existing components of the site management plan (PRP search plan, RI/FS negotiation plan) should comprise the pre-referral litigation report.

The RPM and assistant Regional counsel should prepare an RD/RA negotiation plan that outlines the negotiation objectives and strategy. The RD/RA negotiation plan is a vehicle to assist in planning specific goals and objectives for the negotiations. The plan should address, at a minimum, the following topics:

- Brief update of case status, including current status of site response activities, site enforcement activities, and their relation to overall site objectives
- PRP search assessment, including assessment of completeness (identification of all PRPs; information on volume/nature of substances from each PRP), tracking systems, strength of evidence, financial viability of PRPs, liability theories, and PRP defenses
- Cost Recovery, including plan for updating documentation and recovery of past costs to date and estimates of future oversight costs, an assessment of Statute of Limitations (SOL) issues, computation of interest claims, demand for past costs in special notice

Exhibit VIII-3

Sample RD/RA Negotiation Planning Schedule

Activity	Schedule With Respect To Planned Negotiation Start Date
PRP Search Assessment	Initiate at least 3 quarters prior to start date to allow for supplemental activities. Conclude supplemental activities no later than 5 months before start date.
Request cost-recovery documentation	Complete checklist 2 quarters prior to start date.
Decision to pursue negotiations	At least 4 months prior to start date.
Final PRP search evaluation	
Evaluate schedule in terms of STARS commitments and construction season	
Assess cost recovery case	
Develop negotiation plan	At least 3-1/2 months prior to start date.
Implement negotiation plan	Initiate at least 1 quarter prior to start date.

or demand letter, assessment of any weaknesses in past costs, relationship of past costs to overall settlement, and litigation alternatives for costs if non-settlors exist or negotiations are unsuccessful

- Remedy selection plan and review of Administrative Record, including identification of participants in RI/FS and ROD preparation, and, if the ROD is not signed, detailed timeline for ROD preparation, public participation in the remedy selection process, review of Administrative Record, and overall coordination with enforcement case development and negotiations
- Special notice letter preparation and review (with volumetric attachment)
- Consent decree preparation and review, including technical deliverables and schedules
- Plan for negotiation positions and for obtaining approval for negotiations and overall tactics to achieve these objectives. Review of volumetric shares, non-viable parties, strength of evidence, appropriateness of *de minimis* and/or mixed funding settlement, and criteria for evaluating good faith offers. Possible re-examination of positions, if there are some settlors and some viable non-settlors
- Procedural strategy for carrying out negotiations, including discussions with steering committee; timing of special notice; drop-dead dates; draft Consent Decrees; development of work plans; oversight plan; and associated response needs
- Enforcement strategy and schedule for actions should negotiations not result in a settlement within established timeframes. These may include section 106(a) UAOs or judicial actions
- Funding strategy (RD and RA may be separate) and schedule if case does not settle, including an analysis of State cost share issues
- Schedule for major milestones with specific case team assignments for managing and performing task accomplishments
- Resource needs.

The RD/RA negotiation plan also is discussed in Chapter III, Comprehensive Site Planning.

Draft Consent Decree

The terms and conditions governing the RD/RA or RA activities of PRPs are specified in a Consent Decree (CD). The case team should prepare a draft CD as part of the negotiations planning activities. A model CERCLA CD has been prepared (OSWER Directive 9835.16, "Model CERCLA RD/RA Consent Decree. Exhibit VIII-4 presents the elements outlined in the model CD. Nine of the clauses of the Model CD - site access, dispute resolution, covenants not to sue, additional response actions, indemnification, contribution protection, force majeure, certification of completion, and stipulated penalties - are considered "sacred clauses." This means that any deviation from the model language for these clauses must be concurred on by OE and OWPE at Headquarters. The concurrence of appropriate EPA and DOJ management on the draft decree should be obtained before it is sent to the State or the PRPs. See Exhibit VIII-5 for the timeframes in which this consultation/concurrence should occur.

The following is a more detailed discussion of two specific elements of CDs—covenants not to sue and reopeners. These are two frequently disputed provisions in RD/RA settlements in which the RPM may not have had prior training.

Covenants Not to Sue

Under section 122(f)(1), EPA may grant covenants not to sue (covenants) for both present and future liability to settling PRPs. In general, present liability refers to the PRPs' obligation to pay response costs already incurred by the Agency and to complete those remedial activities set forth in the ROD. Future liability refers to the PRPs' obligation to

perform any further response activities that are necessary to protect human health or the environment that arise after the ROD is signed.

Generally, PRPs do not receive broad covenants not to sue (which sometimes are referred to as releases from liability). PRPs will be released from past costs if they pay them or, depending on the provisions of the settlement, may be released if past costs are deferred to non-settlors. Under most RD/RA Consent Decrees, PRPs are liable for implementation of the ROD, O&M, and oversight, and a covenant not to sue becomes effective for these upon payment of past costs, but is contingent upon complete and satisfactory performance by settling PRPs. They remain committed to undertake any further response action required by the CERCLA section 121(c) five-year review.

Assuming CERCLA section 122 (f)(1) conditions are met, EPA must provide special covenants not to sue in two cases:

- If EPA selects a remedial action involving off-site disposal after rejecting a PRP proposal to conduct an on-site remedy that fully complies with the NCP requirements
- If the remedy involves treatment of hazardous substances and treatment of by-products that destroy, eliminate, or permanently immobilize each of the substances such that, in the judgment of EPA, neither the substances nor the byproduct of treatment present any current or future significant risk. Examples of such treatment technologies may include biodegradation and incineration.

Special covenants not to sue without reopeners also may be provided under extraordinary circumstances, which are limited. Only the Natural Resource Trustee may authorize covenants not to sue for natural resource damages.

Covenants not to sue for future liability take effect upon certification that the remedial action has been completed in accordance with the terms of the ROD and in a manner consistent with the NCP. Chapter XI, Site Completion/Deletion, contains more detailed information on certifying the completion of remedial activity at a site. For further information on covenants not to sue and model covenants, consult OSWER Directive 9834.8, "Covenants Not To Sue Under SARA" (July 10, 1987) and OSWER Directive 9835.17, "Model CERCLA RD/RA Consent Decree" (June 21, 1991).

Reopeners

Reopener provisions allow EPA to bring an administrative or judicial action against a PRP for injunctive relief or for additional response costs incurred at the site where previously unknown conditions or information indicate that the remedy is no longer protective of human health and the environment.

The operative principle is the development of new scientific information that shows that the site presents a problem not addressed satisfactorily by the remedy. This does not mean that the development of new remedial technologies is a basis for reopeners. Further information on reopeners can be found in OSWER Directive 9834.8, "Covenants Not to Sue Under SARA" (July 10, 1987).

C. Notification of States and Federal Natural Resources Trustees

Section 121(f)(1) of CERCLA provides for notice to the State of negotiations. In addition, section 122(j)(1) requires that if a release or threat of release at a site may have resulted in damages to natural resources, EPA must notify the appropriate Federal or State trustees and provide them with an opportunity to participate in the negotiations. The RPM is responsible for notifying the State and both the Federal and State trustees. Settlements that specifically provide for remediation of natural resource damages, or determine that there were no such damages and grant a covenant not to sue, must be made with the agreement of the appropriate trustee. Resolution of these issues is often important to PRPs who may decline to sign a decree without resolution. For further information on notification procedures and negotiation interactions with Federal and State trustees, refer to Chapter V, RI/FS Negotiations/Settlement.

Exhibit VIII-4(1)

Provisions in Model Consent Decree

I. Background

II. Jurisdiction

III. Parties Bound

IV. Definitions

V. General Provisions

VI. Performance of the Work by Settling Defendants

VII. Additional Response Actions/Failure to Attain Performance Standard

VIII. EPA Periodic Review to Ensure Protection of Human Health and Environment (section 121(c))

IX. Quality Assurance, Sampling, and Data Analysis

X. Access

XI. Reporting Requirements

XII. Submissions Requiring Agency Approval

XIII. Remedial Project Manager/Project Coordinators

XIV. Assurance of Ability to Complete Work

XV. Certification of Completion

XVI. Emergency Response

XVII. Reimbursement of Response Costs and Oversight Costs

XVIII. Indemnification and Insurance

XIX. Force Majeure

XX. Dispute Resolution

XXI. Stipulated Penalties

XXII. Covenants Not to Sue by Plaintiffs

Exhibit VIII-4(2)

Provisions in Model Consent Decree

XXIII. Covenants by Settling Defendants

XXIV. Effect of Settlement; Contribution Protection

XXV. Access to Information

XXVI. Retention of Records

XXVII. Notices and Submissions

XXVIII. Effective Date

XXIX. Retention of Jurisdiction

XXX. Appendices

XXXI. Community Relations

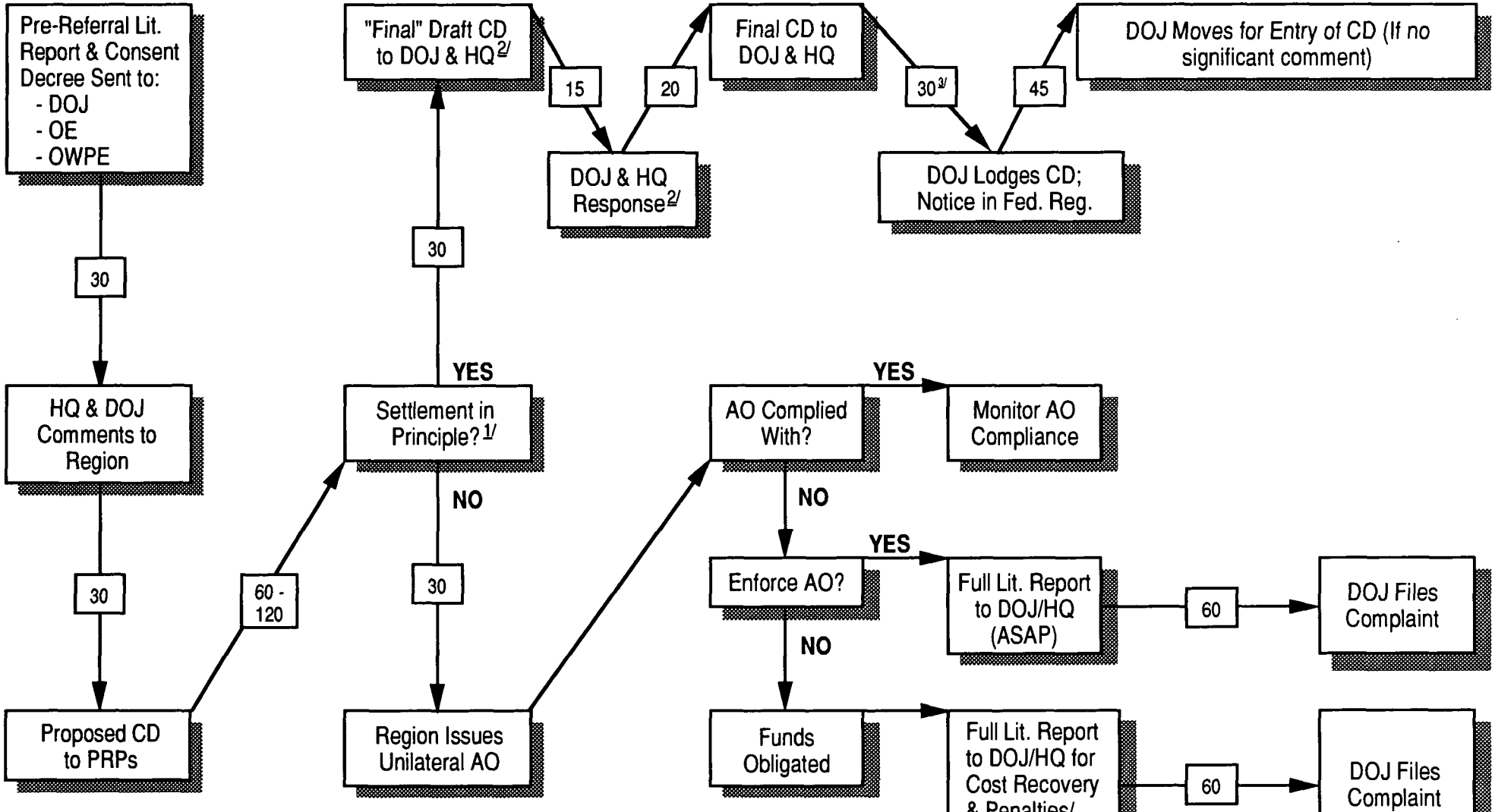
XXXII. Modification

XXXIII. Lodging and Opportunity for Public Comment

XXXIV. Signatories/Service

Exhibit VIII-5

Timeline for CERCLA Pre-Referral Negotiation Procedures (In Days)



1/ Closure reached within 120-180 days on all fundamental terms of settlement and most language of a final consent decree.
2/ HQ participates to the extent prescribed in CERCLA settlement delegations.
3/ Includes 21 days for HQ concurrence/consultation as prescribed in CERCLA settlement delegations.

D. Special Notice Letters

Section 122 of SARA authorizes EPA to issue special notice letters (SNLs) to begin a formal negotiation period with the PRPs. The primary purposes of the special notice procedures are to facilitate settlements for RD/RA through direct negotiations with PRPs and to expedite cleanups. Prior to issuance of the SNL for RD/RA, PRPs should have been provided information on all PRPs' involvement at the site, should have coalesced, and should be familiar with the remedial investigation and the remedial alternatives.

Contents

The SNL should contain the following information:

- Notice of the potential liability of the PRP
- The purpose of the SNL and the conditions of the negotiations moratorium
- Description of future response actions, if known
- Description of the elements of a good faith offer
- Statement of work to be performed
- Additional information, including information on other PRPs, fact sheets on the site, volumetric ranking of substances at the facility, and a list of the volume and nature of substances contributed by each PRP
- Demand for payment of past costs
- The date when a good faith offer is due.

The SNL should include as attachments a copy of EPA's proposed plan or the ROD, if signed, a draft Consent Decree for the RD/RA, and a draft RD/RA statement of work.

To the extent possible, the SNL should contain specific information to assist the PRPs in developing a good faith offer. This includes information stipulating the minimum elements of an acceptable good faith offer and what the Region will not accept. Minimum requirements for GFOs are discussed later in this chapter.

Headquarters has developed model special notice letters (OSWER Directive Number 9834.10A, "Model Notice Letters," February 7, 1989) which most Regions have tailored to their own use.

The ORC should notify the Chief of the Environmental Enforcement Section at DOJ and provide a pre-referral litigation report 60 days prior to issuing SNLs where settlement by Consent Decree is anticipated. A copy of the pre-referral litigation package should be sent to OE and OWPE. The memorandum should include information about when the SNL will be sent and include the draft CD for DOJ review. The draft CD also should be made available for OE and OWPE review, especially if it is anticipated that the settlement will require Headquarters consultation or concurrence.

Copies of the SNL should be sent to the appropriate State representative, the Natural Resource Trustees, the Regional Administrative Record Coordinator and OWPE (unless the Region has previously provided a copy of a general notice letter with the particular PRP as a recipient. OWPE will enter the PRP into the Superfund Enforcement Tracking System (SETS).

Cost Recovery

The negotiations should include negotiations for any past costs, such as costs of a removal or Fund-lead RI/FS. RPMs should refer to Chapter XII, Cost Recovery, for information on the different types of costs, which include indirect, direct, pre- and post-SARA, interest, and the required documentation for recovering these costs. The RPM needs to request cost documentation from the Regional Financial Office at least 90 days in advance of issuing the SNL. Once this documentation is received, the RPM should provide it to the PRPs so that they will have EPA's cost information available to them.

Timing the SNL

The SNL should be sent between the time the draft Proposed Remedial Action Plan and feasibility study are released for public comment and when the ROD is issued or shortly thereafter. The timing strategy will strike a balance between EPA's ability to conduct meaningful negotiations and minimize delay in implementing the RD/RA. It is not appropriate to delay issuance of SNL for months after the ROD. The negotiation schedule should take into account any obligation of Fund monies for RD/RA activity at the site. It should be noted that RD/RA negotiations with PRPs that occur while the ROD is being written or amended may not address matters related to the selection of the remedy.

Furthermore, negotiations must be conducted in a way that does not undermine the public participation process. Because the Proposed Plan has been released, the PRPs will be able to incorporate the possible range of remedial alternatives into the good faith offer.

Section 122(a) Letters

If EPA decides not to use the special notice procedure, the RPM must send a letter to PRPs in accordance with section 122(a) of CERCLA stating why EPA has decided to forego the formal negotiations period. Situations in which it would not be appropriate to use the special notice procedures, because it would not facilitate agreement or expedite cleanup, may include the following:

- Past dealings with the PRPs indicate that they are unlikely to negotiate a settlement
- EPA believes the PRPs have not been negotiating in good faith
- No PRPs have been identified in a PRP search reviewed by the civil investigator and assistant Regional counsel
- PRPs lack the resources to conduct response activities
- There are on-going negotiations with deadlines specified in a letter (i.e., on-going cases where negotiations would not be further expedited by the SNL process).

If additional PRPs are identified after the issuance of SNLs, the RPM may include them in on-going negotiations or, if there is a partial settlement, negotiate a separate agreement. This is a case-by-case decision. SNLs may be sent for a single operable unit or for the entire RD/RA, depending on the remedy documented in the ROD and Regional policy. Guidance on special notice letters is contained in OSWER Directives 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987) and 9834.10A, "Model Notice Letters" (February 7, 1989).

E. Good Faith Offer (GFO)

PRPs are usually given 60 days from the special notice to provide the Agency a good faith proposal for implementation of the RD/RA. The following list of minimum requirements for good faith offers should be used to help maintain national consistency:

- A statement of the PRP's willingness to conduct or finance the RD/RA that is consistent with EPA's Proposed Remedial Action Plan or the ROD, if it has been issued, or that provides a legitimate basis for further discussion. While a proposal with variations on EPA's chosen/preferred remedy does not always mean that an offer is in bad faith, it is at the very least not preferred. If, as a matter of course, EPA frequently reopens remedy discussions there will be fruitless negotiations and undue delays
- A response to EPA's draft Consent Decree that identifies and prioritizes the major concerns of the PRPs and that provides site-specific justifications for any changes proposed
- A demonstration of the PRP's technical and financial capability to perform the work, including a list of potential contractors and their qualifications
- A statement of the PRP's ability and willingness to reimburse EPA for past response (or if not, why referral to non-settlors is appropriate) and oversight costs
- A discussion of the PRP's position on release from liability and reopeners to liability.

To encourage PRPs to submit acceptable good faith offers, the RPM must take an active role in educating the PRPs. Regional minimum requirements for good faith offers should be stipulated in detail in the special notice letters. The RPM should maintain frequent contact with the PRPs or steering committee representatives regarding development of a good faith offer.

For further guidance on good faith offers, refer to OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987) and OSWER Directive 9834.10A, "Model Notice Letters" (February 7, 1989).

Negotiation Extensions

Issuance of the SNLs triggers a moratorium on EPA's conduct of certain actions. The intent of the moratorium period is to place a statutory deadline on the formal negotiation period to encourage settlement. The initial negotiation moratorium may last for a total of 120 days in RD/RA negotiations. If EPA does not receive a good faith offer within the first 60 days of the SNL, the negotiation period will terminate. If a good faith offer is received, the negotiations may continue for another 60 days. Firm schedules tend to force issues to resolution. Negotiations may be extended for 30 days with Regional Administrator approval and additional extensions may be granted with AA, OSWER approval.

For further information on extensions refer to OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987) and OSWER Directive 9835.4, "Interim Guidance on Streamlining the CERCLA Settlement Process" (February 12, 1987).

F. Settlement Incentives/ Disincentives

The settlements incentives/disincentives concept is an approach to RD/RA settlements that indicates EPA's willingness to enter into partial settlements with those willing to settle, particularly if they will conduct the cleanup, and EPA's willingness to pursue viable non-settlors for the remainder. The concept does not apply to single owner-operator sites.

The settlements incentives/disincentives concept continues EPA's goal of recovering 100 percent of site costs and preference for pressing for a close-to-100 percent settlement with some or all PRPs. Nonetheless, in some multi-party cases where most viable PRPs are willing to settle but some are not, as an incentive to those willing to settle EPA may enter into a partial settlement with the willing parties and pursue the remaining parties for the remainder of the site costs. In determining how much the settlors should pay, the interim CERCLA settlement policy should be applied. At a minimum, the settlors usually should pay more than their volumetric share to take into account non-viable, non-settlors and evidentiary deficiencies regarding viable non-settlors. Also, mixed funding and *de minimis* settlements and NBARs should be used in appropriate cases.

The settlement incentives/disincentives approach also recognizes the use of disincentives to the use of dilatory tactics in negotiation and to the refusal of all or some PRPs to settle. Section 106(a) UAOs are a powerful management tool to encourage parties that are somewhat willing to settle but are delaying resolution of negotiations. More generally, section 106(a) UAOs are also a disincentive to non-settlement because failure to comply with them may result in penalties under section 106 or treble damages under section 107. Where there is a partial settlement, it is very important to file a lawsuit against non-settlors as soon as possible. In most cases, this is a cost recovery action.

G. CERCLA Settlement Policy

EPA's interim CERCLA settlement policy sets forth general principles governing settlements with private parties under CERCLA. The policy recognizes that the objective of negotiations is to collect 100 percent of cleanup costs from PRPs. The policy also recognizes that in very limited circumstances exceptions to this goal may be appropriate, and establishes criteria for determining where such exceptions are allowed. The ten criteria are:

1. ***Volume of Wastes Contributed to Site by Each PRP.*** The volume of waste may contribute significantly and directly to the distribution of contamination on the surface and subsurface ground water. At many sites, there will be wastes for which PRPs cannot be identified. If identified, PRPs may be unable to provide funds for cleanup. The volume of wastes is not the only criterion to be considered. Therefore, it will be necessary, in many cases, to require a settlement contribution greater than the percentage of wastes contributed by each PRP to the site.
2. ***Nature of Wastes Contributed.*** If a waste contributed by one or more of the parties offering a settlement disproportionately increases the cost of cleanup at the site, it may be appropriate for parties contributing such waste to bear a larger percentage of cleanup costs than would be the case using a solely volumetric basis.
3. ***Strength of Evidence Tracing the Wastes at the Site to the Settling Parties.*** Where the quality and quantity of the Government's evidence appears to be strong for establishing the PRP's liability, the Government should rely on the strength of its evidence and not decrease the settlement value of its case. If the Government's evidence against a particular PRP is weak, that weakness should be weighed in evaluating a settlement offer from that PRP.
4. ***Ability of the Settling Parties to Pay.*** The evaluation of the settlement proposal should discuss the financial condition of the party and the practical results of pursuing a party for more than the Government can hope to actually recover.
5. ***Litigative Risks in Proceeding to Trial, including:***
   a. Admissibility of the Government's evidence
   b. Adequacy of the Government's evidence
   c. Availability of defenses.
6. ***Public Interest Considerations.*** For example, if the State cannot fund its portion of a Fund-financed cleanup, a private-party cleanup proposal may be given more favorable consideration than one received in a case where the State can fund its portion of cleanup costs. Public interest concerns may be used to justify a settlement of less than 100 percent only when there is a demonstrated need for a quick remedy to protect public health or the environment.
7. ***Precedential Value.***
8. ***Value of Obtaining a Present Sum Certain.*** The sum offered in settlement may be, in reality, higher than the amount the Government can expect to obtain at trial.
9. ***Inequities and Aggravating Factors.***
10. ***Nature of the Case that Remains After Settlement.*** All settlement evaluations should address the nature of the case that remains if the settlement is accepted. For example, if there are no financially viable, liable parties left to proceed against for the balance of the cleanup after the settlement, the settlement offer should constitute everything the Government expects to obtain at that site.

H. Settlement Tools

The negotiation team has several important settlement tools that can help achieve PRP settlements. These include:

- Mixed funding settlements
- *De minimis* settlements
- NBARs

Each of these settlement tools is discussed in detail in this section.

Mixed funding agreements are settlements whereby EPA settles with fewer than all PRPs for less than 100 percent of the response costs and there are additional measures to ensure that the response action is done. There are three types of mixed funding settlements:

- **Preauthorization** - Settling PRPs agree to conduct the response action and the Agency agrees to pay for part of the response costs by approving in advance the basic elements of a claim by settling PRPs against the Fund
- **Mixed Work** - PRPs conduct discrete parts of the response activity while EPA conducts the remainder
- **Cash Outs** - Settling PRPs pay a portion of the response costs and the Agency conducts the response action.

Mixed Funding Settlements

Once the PRPs have indicated their interest in pursuing a mixed funding settlement, the Region should evaluate the case against the ten-point settlement criteria which include, in this context, the following:

- The PRPs are in general agreement with the remedy
- A substantial part of cleanup (> 50 percent) is offered by settling PRPs
- The settlors' part of the cleanup is proportionate to or greater than a combined allocation of the settling PRPs
- Strength of liability case against and viability of the PRPs (settlors and non-settlors)
- Amount of waste contributed to the site by settlors and viable non-settlors compared to their relative settlement share
- Other options are available if settlement fails.

The best candidates for mixed funding are cases in which the following features are present:

- The potential portion or operable unit to be covered by the Fund is small, or the settling PRPs offer a substantial portion of the total cost of cleanup. In this context, substantial portion may be defined as a commitment by the PRPs to undertake or finance a predominant portion of the total remedial action
- The Government has a strong case against financially viable non-settling PRPs, from which the Fund portion may be recovered.

Cases considered poor candidates for mixed funding have the following features:

- The potential Fund portion is large (e.g., the potentially-settling parties' offer is insufficient)
- The case against settling parties is strong and the case against the non-settlors is not strong, and thus litigation is likely to be more successful.

These factors do not automatically preclude mixed funding for a case. However, for mixed funding to be seriously considered in such instances, other compensating factors must be present, such as the ability of the settlors to initiate the response action more quickly than the Government in a Fund-financed action. The following sections discuss the three types of mixed funding settlements and factors to be considered in choosing a particular type of mixed funding settlement.

After the Region completes an evaluation of the case and determines that it is a good candidate for mixed funding, the RPM notifies OERR (if Fund dollars are involved, as in preauthorization), OWPE, OE, and DOJ.

When developing cost allocations for mixed funding settlement proposals, the case team should carefully evaluate the governmental contribution to the cleanup or outstanding work and the strength of the case against non-settlors, including an analysis of liability, viability, and amount contributed to the site. The case team should be careful to avoid a

proposal with fixed division of costs between the settlors and the Government. This may result in "over-subscription," where all PRPs or more PRPs than anticipated accept EPA's proposed cost allocation. This could leave EPA with too small a settlement and too few viable or liable non-settlors left including an action where the non-settlors share would be grossly disproportionate to their contributions. To avoid "over-subscription" the case team should develop a sliding scale settlement proposal, where settlement amounts vary depending on the volumetric percentage of PRPs signing on as settlors. The work products of the Settlement Incentives/Disincentives Workgroup contain further information on developing cost allocations for mixed funding settlements.

Preauthorization

"Preauthorization" refers to the approval granted by EPA prior to cleanup actions if a PRP claim against the Fund for response costs is to be considered. Preauthorization represents EPA's commitment that, if response activities are conducted pursuant to the settlement agreement and the costs are reasonable and necessary, the PRP will be reimbursed from the Fund as set forth in the settlement.

The initial analysis is to determine whether the site is a proper candidate for a preauthorization mixed funding settlement. In addition to the points listed above that identify potential candidates for mixed funding, the nature of the proposed remedy and the PRP's ability to perform it should be considered carefully in assessing a settlement offer that involves preauthorization. The size of the PRP's portion of cleanup responsibility also should be considered. When PRPs commit to pay for a sufficiently high percentage of cleanup costs, they have a strong economic incentive to keep actual response costs within or close to estimates. Additionally, the urgency of the threat posed by the site may influence the decision to agree to preauthorization, if preauthorization would expedite response activities. Prompt initiation of remedial action would be of particular importance for sites that are not currently scheduled for full Fund financing.

Additionally, the preauthorization agreement must be approved by OERR. The OERR evaluation with regard to preauthorization is separate and distinct from the evaluation of the settlement performed by OWPE. In preauthorization agreements, the PRPs prepare a preauthorization proposal for Regional review. The RPM's early notification to OERR and OWPE of the PRP's intention to pursue preauthorization is crucial to the timeliness of Headquarters' review of the proposal and the development of the Preauthorization Decision Document (PDD). After reviewing the settlement according to the ten-point settlement criteria set forth in the Interim Settlement Policy, the RPM forwards the preauthorization proposal to OERR's Hazardous Site Control Division, State and Local Coordination Branch, State Requirements Section and the OWPE CERCLA Compliance Branch. Both Headquarters offices work jointly with the Region in reviewing and approving the PRP's submittal. The Region must also notify DOJ and ensure that the case is entered into CERCLIS/WasteLAN.

The Region should consider and plan for the amount of time necessary to process preauthorization applications and the urgency of site conditions when conducting negotiations. Although EPA has set a goal of completing review of individual preauthorization requests within a 45-day period, this time period will vary between submittals.

Preauthorization approval is documented in a Preauthorization Decision Document (PDD), prepared by EPA. PDD contents include:

- A short history of contamination at the site, and the various efforts to rectify the problem
- A summary of the analysis performed by EPA in granting prior approval
- A summary of any issues unresolved at the time of PDD issuance
- A statement of "terms and conditions" that the applicant must meet for the preauthorization to remain valid.

The PRP may not begin work until the PDD is effective. The PDD is effective only when it has been signed by the Director, OERR (by delegation from the AA, OSWER) and the consent decree has been entered. The PDD describes standards to be met if the PRP is to receive full reimbursement. In certain circumstances, a claim will be preauthorized contingent on later Agency approval of elements specified in the PDD.

Section 122(b)(4) of CERCLA states that, for cases involving preauthorization, the Fund will assume costs of remedy failure up to a proportion equal to that contributed for the original remedial action. In the event of remedy failure, the Fund portion may be met either through Fund expenditures or by recovering costs from PRPs that were not part of the original settlement. The covenant not to sue does not apply if the remedy fails due to PRP negligence.

Mixed Work

Mixed work settlements allow EPA and the PRPs to conduct discrete portions of the response activity. In mixed work settlements, EPA encourages PRPs to conduct the RA. Mixed work settlements are appropriate in cases where mixed funding is being considered and the following conditions exist:

- The Region is reasonably certain of PRP cooperation
- Coordination of activities with PRPs does not present problems
- The RPM can identify, in detail, individual activities for which each party will be responsible.

In addition, CERCLA section 104(c)(3) requires that the State pay or ensure payment of 10 percent of the RA, or 50 percent or greater if it's a State-operated facility. The PRPs may enter into an agreement with the State and EPA under State law and CERCLA where the PRPs pay 10 percent to the State and the State obligates funds for use at the site; or the State may use its own funds to pay for any portion of its share that cannot be paid for by PRPs. In either case, EPA and the State should enter into a State Superfund Contract (SSC) to ensure cost share and O&M responsibilities. Mixed work and cash outs (discussed below) should not be considered unless the State's cost share is reasonably certain.

Once mixed work is identified as a potential settlement alternative, OWPE and DOJ should be notified.

Cash Out

Cash-out settlements require the PRPs to pay for a portion of the response costs up front, while EPA conducts the response action. Cash-out settlements are not preferred. Cash-out settlements with PRPs generally involve some of the following factors:

- EPA is very confident about the expected RD/RA response costs
- The cash out will advance work at the site that might not proceed without the settlement funds
- The percentage of the total costs to be paid by settlors is substantial, unless there are major liability or financial viability concerns
- The Agency has carefully evaluated evidentiary concerns regarding liability and the value of the settlement and in light of substantial litigation risks believes that settlement is warranted
- Equitable considerations exist for both settling and non-settling parties, including the nature of any covenants not to sue in the cash-out settlement
- PRPs lack funds or the ability to secure competent technical support.

The RPM must notify OERR, OWPE and DOJ of Regional intent to pursue a cash-out settlement. Consultation requirements are the same as for preauthorization settlements. In general, cash-out settlements may occur at any stage of the remedial process. However, once Fund-lead response activities are underway, cash-out settlement with some of the

PRPs may not be advantageous, since cost recovery generally will be pursued once RA construction commences. Cash-out settlements may include a risk premium that may partially offset EPA's risk due to uncertainties, such as remedy failure or cost overruns.

Unlike preauthorization, there are no limitations to PRP liability for costs resulting from remedy failure in a cash out. Therefore, any future obligations must be specified in the cash-out agreement, including the covenant not to sue.

De Minimis

A *de minimis* settlement is a final settlement entered into with parties who meet the requirements of section 122(g)(1) of CERCLA to achieve the goals described below. It is noteworthy that a *de minimis* settlement may be incorporated into a global agreement with the major contributors and EPA. This is beneficial to major contributors because *de minimis* money goes to pay for the 2(g)(1)(B) of CERCLA): As the owner of the real property at which the facility is located, the PRP did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission, and the party had no actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance at the time of purchase. (There are similarities between this provision and the innocent purchaser defense in section 101(35).)

Criteria for Eligibility for De Minimis *Settlements*

A PRP may settle as a *de minimis* PRP if:

- Settlement (per PRP) involves only a minor portion of the response costs at the site
- Amount contributed by the individual PRP is minimal in comparison to other hazardous substances at the site
- Toxic or other hazardous effects are minimal in comparison to other hazardous substances at the site
- Settlement is practicable and in the public interest. EPA should evaluate the overall case for practicability, including the case against viable non-*de minimis* parties who may challenge the settlement. Challenges usually are based on amount of payments by *de minimis* parties and the basis of those payments.

Necessary Information for Generator De Minimis *Settlements*

In practice, *de minimis* settlements generally require:

- Reasonably accurate and complete PRP waste-in information on waste contributions, nature of substances, and financial viability to develop a volumetric ranking for generator PRPs and make adjustments for non-viable shares
- That cost estimates for the remedial activities at the site be readily available or easy to develop, and the degree of uncertainty of these estimates be known
- Development of premiums for unknown costs and cost overruns
- Identification of remaining viable parties.

Potential De Minimis *Candidates*

Characteristics of potential candidates include the following:

- Good waste-in lists with non-viable shares identified
- Past and future costs identified, premiums developed
- *De minimis* payment and remaining liability are appropriate.

Sites that do not make good candidates for *de minimis* settlements include those where:

- Poor volumetric or orphan share information is available
- Costs are highly uncertain

- Potential *de minimis* parties have not conferred with major parties and attempted to settle through them
- Potential *de minimis* parties are not organized into one group
- Potential *de minimis* parties are uncooperative in negotiations
- There are no viable non-*de minimis* parties to undertake the response action.

Timing* De Minimis *Settlements

Early *de minimis* settlements may involve very small contributors at the RI/FS stage, but most *de minimis* settlements have occurred at the ROD stage, when costs are known.

Consideration of the potential *de minimis* settlement includes:

- Refining the volumetric contribution taking into account the assignment of non-viable PRPs to all viable PRPs
- Determining a volumetric cutoff
- Refining cost estimates, including past costs, RI/FS, RD/RA, and future costs
- Developing a premium and/or reopeners to reflect the uncertainties of cost estimates
- Presenting the settlement offer, including the model CD or AO, in response to the PRP proposal or to initiate dialogue, and discussing this settlement offer with potential *de minimis* and non-*de minimis* parties.

Reopeners

The need for reopeners is determined on the basis of the certainty of costs and use of premiums. In very early settlements (RI/FS stage), the reopeners should be more expansive, and/or the premiums should be more substantial. In addition, volume cutoff levels should normally be set low, so that there can be a cash out based upon large premiums based on worst case response cost scenarios.

Finalizing Settlement

If terms are agreed upon by all parties, the final agreement can be formalized through either an AOC or CD. A record supporting the settlement must be developed. Under the June 17, 1988 delegations (14-13-B and 14-13-E), the first *de minimis* generator and the first *de minimis* landowner settlements in each Region require Headquarters concurrence. Additional cases are delegated with Headquarters consultation retained. DOJ concurrence (and, on a CD, signature) is required for *de minimis* settlements for sites where the total response costs exceed $500,000.

References

OSWER Directive 9834.7-1C, "Methodology for Early De Minimis Waste Contributor Settlements Under CERCLA Section 122(g)(1)(A)" (June 1992).

OSWER Directive 9834.7, "Interim Guidance on Settlements with *De minimis* Waste Contributors under Section 122(g) of SARA" (June 19, 1987).

OSWER Directive 9834.7-1A, "Interim Model CERCLA Section 122 (g) (4) *De minimis* Waste Contributor Consent Decree and Administrative Order on Consent" (October 29, 1987).

OSWER Directive 9835.9, "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De minimis* Settlements Under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property" (June 6, 1989).

OSWER Directive 9834.7-1B, "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) *De minimis* Waste Contributor Settlements" (December 20, 1989).

Non-Binding Allocation of Responsibility (NBAR)

An NBAR is an allocation of the total costs of response among the PRPs at a facility. section 122(e)(3) of SARA allows EPA to develop NBARs and authorizes the Agency to provide NBARs to the PRPs at its discretion. While NBARs may be useful, the PRPs at multi-party sites usually undertake the allocation themselves. An NBAR is not binding on the government or the PRPs and may not be admitted as evidence in court. The costs associated with Agency preparation of an NBAR are to be paid by the PRPs.

NBAR preparation depends primarily on the type and completeness of volumetric data available at the site. The NBAR allocation process is based primarily on the volume contributed by the PRPs, although other factors, such as toxicity and mobility of the hazardous substances and relative treatment costs may be considered. The allocation process is dependent on information collected during the PRP search.

The RPM and assistant Regional counsel have primary responsibility for developing NBARs. NBARs may be prepared, if requested by a substantial percentage of the PRPs. When prepared, NBARs are usually developed toward the end of the RI/FS, but timing may vary. NBARs may be provided to the PRPs after completion of the RI/FS. PRPs may use NBARs to reach agreement among themselves regarding negotiating positions with EPA. EPA has developed NBARs to facilitate settlements in a few cases (e.g., resolve in Region I and Hassayampa in Region IX.)

The NBAR allocation of responsibility to each PRP may differ from the volumetric ranking presented in special notice letters (SNL). Percentages previously associated with non-viable parties in SNLs are allocated to the remaining financially viable PRPs. In SNLs, the volume each PRP contributed is presented without adjustments. In NBARs, volume from non-viable parties and orphan shares is distributed among the known viable PRPs. This adjusted figure is further modified by the consideration of the following settlement criteria:

- Strength of the evidence against the PRPs
- Ability of the PRPs to pay
- Litigative risks in proceeding to trial
- Value of obtaining the present sum certain
- Inequities and aggravating factors
- Nature of the post-settlement case.

I. Finalizing Settlement

In order to finalize a settlement within established timeframes it is important to negotiate during the first 60 days rather than wait for the GFO before talking. Once the good faith offer has been received, the negotiation team and the PRPs should move quickly to finalize a settlement. Historically, the most successful method of finalizing settlement has been for the Government (EPA/DOJ) to develop iterative drafts of the Consent Decree that show changes on which PRPs comment. This process should provide for rapid identification of major substantive issues requiring review by other layers of management or more extensive discussion.

It is very important to have the drafts reviewed quickly by all parties because of the tight negotiation deadlines. It is important to establish and adhere to deadlines. Section 106(a) UAOs, especially with delayed effective dates, are an effective tool in driving PRPs who have considerable interest in doing the work but are delaying negotiations to perform the RD/RA.

The Regional Administrator, in consultation with DOJ, is expected to be the primary decision maker on CERCLA settlement issues. Headquarters and Regional authority for finalizing settlements is discussed in the first section of this chapter.

Referral Package

While the settling PRPs are in the process of signing the Consent Decree, the RPM and assistant Regional counsel must prepare a referral package for formal transmittal of the agreement to DOJ. If the settlement has not been delegated, the goal is to ensure rapid concurrence from Headquarters on the referral package. The referral package must include:

- Ten point settlement document
- Draft complaint
- Signed CD (including the technical attachments, such as the statement of work)
- Mini-litigation report (if not previously sent).

The DOJ referral package should identify the relief outstanding, including any past costs, and identify non-settlors, assess their liability, their contributions to the site individually and as compared to the settlors (with backup and including percentages), their ability to pay, and set forth a strategy for pursuing non-settlors. If costs are to be written off or not pursued, the rationale must be documented. Additionally, OE and DOJ should be notified of the referral and any non-settlors that will remain after settlement.

The RPM must also identify the resource needs for oversight of the RD/RA and begin preparations to obtain a third party RD/RA oversight contractor.

For RD/RA settlements that are delegated to the Regions, the completed referral package must be sent to DOJ, with a copy to OE and OWPE. The preparation of the final referral package should take approximately 45 days. The final referral package must be signed by the Regional Administrator. For non-delegated settlements, the settlement is sent to OE and OWPE with a copy to DOJ. OWPE provides concurrence and sends the referral package to OE. The AA, OE must formally approve the CD, which is then sent to DOJ for approval and lodging in the appropriate court. After DOJ formally receives the Consent Decree, DOJ concurs on the CD and "lodges" it in court. DOJ must also provide notice of the decree in the Federal Register for a 30-day public comment period. The negotiation team is responsible for preparing EPA's responsiveness summary to public comments. Non-settlors may object to the settlement through adverse comments. The negotiation team should endeavor to anticipate these objections to minimize complications with the court. The court will review the public comments and EPA's responses before deciding whether to approve the settlement. Upon approval, the decree is entered as a final judgment of the court.

Exhibit VIII-5 diagrams a suggested timeline for pre-referral negotiation procedures.

Where OWPE and OE have a consultation role, the draft package should be submitted for review. However, the final package is not required to go physically through the concurrence chain.

J. Inducements to Non-Settlors/ Enforcement Options

If negotiations for PRP implementation of the RD/RA do not result in settlement, the Agency has several enforcement options. The Regions may issue a section 106(a) UAO, compelling the PRPs to implement the RD/RA. The Regions also may choose to litigate the case under section 106 of CERCLA. Section 106(a) UAOs generally precede section 106 referrals. EPA may also use the Superfund to implement the RD/RA and the Government may sue PRPs for cost recovery under section 107 of CERCLA. If there is a partial settlement, depending on the nature of the outstanding relief, the government may use section 107 or section 106 authorities.

Section 106(a) UAOs

The Regional Administrator is authorized to issue section 106(a) UAOs to compel the PRPs to implement the RD/RA. PRPs have a strong incentive to comply, since sections 106 and 107 authorize a court to assess penalties as well as treble damages for non-compliance without sufficient cause. Section 106(a) UAOs require a showing of imminent and substantial endangerment.

The Region should be prepared to issue a UAO if the PRPs fail to provide a good faith settlement offer by the end of the first 60 days of the special notice moratorium, or if it is clear that no settlement will be achieved in the negotiation timeframe allowed. In addition, unless an extension of the negotiation period beyond the 120 day moratorium is justified by an agreement in principle and substantial progress in finalizing a Consent Decree, a planning goal should be to issue a UAO promptly after the 120 day moratorium expires.

If Regions are planning an RD start at a site but do not anticipate issuing a UAO, they should consult with HQ and describe their reasons for not issuing the UAO.

The issuance of unilateral orders must be considered before a Fund-financed response can proceed at a site. Unilateral orders are typically issued at the end of the special notice period if settlement is not reached at a site, an extension of negotiations is not warranted, and the case meets statutory criteria and case specific considerations set forth in this guidance.

In general, present owners and operators and viable past owner(s) and operator(s) of the site at the time of disposal should be named as respondents. At a minimum, the present owners and operators must provide access. The Agency will also generally consider naming parties who arranged for disposal or treatment of hazardous substances. When there are multiple PRPs, the Agency may consider the aggregate volume (percentage of total) and aggregate financial viability of all the PRPs to be named. When evaluating whether to name an individual PRP in an order, the PRP's contribution to the site (volume and nature of substances) and financial viability should be considered. The Agency should consider naming the largest manageable number of parties. Relevant evidentiary concerns also must be considered when deciding which PRPs to name in an order. In addition, consideration should be given to whether potential respondents will have a valid "sufficient cause" defense or a section 107(b) defense. Parties who would clearly have a valid defense to an EPA action following the parties' failure to comply should not be named in the unilateral order.

Enforcement Discretion

Under a joint and several liability scheme, the Agency has discretion when deciding whom to pursue in an enforcement action. An example of how "enforcement discretion" may be used is reflected in the Residential Homeowner's Policy. The policy states that owners or lessees of residential property located on Superfund sites will not be required to perform response actions or pay response costs except where the residential homeowner's activities lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site. However, owners of residential property who do not use the property for residential purposes or fail to comply with other CERCLA obligations are outside the scope of this policy.

Section 106 Litigation

The Regional Administrator may decide to refer the case to DOJ for section 106 litigation. The Region must prepare a referral package. The referral package is similar to that described in Chapter XII, Cost Recovery.

Section 106 litigation also requires that the Agency prove that the site constitutes an imminent and substantial endangerment to human health or the environment. This may be based on the risk assessment in the RI.

Fund

The use of the Fund to implement the RD may be limited by Regional availability of Fund monies. If the PRPs have been recalcitrant or there is a Regional decision to fund the RD if the negotiations fail, advance planning is crucial. A "planned obligation" must be targeted in the SCAP in the fiscal year negotiations where the obligation is targeted. This target is counted against the Region's total Fund budget. In some cases, the scheduled initiation of Fund-financed activity may encourage recalcitrant PRPs to settle.

Partial Settlements

The application of the settlements incentives/disincentives concept may result in a partial settlement for less than full relief. If some or all past costs are deferred to non-settlors, EPA may pursue them under section 107. Under mixed funding settlements, the recalcitrant PRPs may be held liable for the Agency's costs in implementing the RD and RA, RD/RA oversight costs, and past costs.

If the decree covers less than all the remedial work, EPA may "carve out" discrete portions of the remedy for which recalcitrants may be held liable.

K. Post-Referral Actions by DOJ

DOJ has a substantial role in cases that are referred with settlement, referred without settlement (sections 106/107), and in on-going litigation. DOJ's review of referrals with settlement involves an assessment of whether the settlement is in the government's interest and of the legal terminology of the decree. DOJ's assessment of referrals without settlement primarily involves a review of the sufficiency of the evidence regarding liability, selection/implementation of response, and desired legal remedy, costs and defenses. On-going litigation support is often resource intensive.

Section III. Planning and Reporting Requirements

A. Budget Requirements

The RPM should be involved in the development of budget estimates of post-RI/FS support needs. Post-RI/FS budget needs include RD/RA negotiations, referral development and litigation support. The standard budgets for the support activities are:

- RD/RA negotiations: (for three quarters) $24,000
- Referral development: (for three quarters) $15,000 for 106, 106/107
- Litigation support: (for ongoing quarters) $20,000 for 106, 106/107 Litigation
- RD/RA Oversight (4 quarters for RD, 6 quarters for RA) $37,500 per quarter

Please note that Headquarters and the Region have formed a workgroup which will assess pricing issues and recommend new pricing guidelines. The result of this study is expected to affect the pricing used in developing the FY 95 budget. The primary contract vehicle for RD/RA negotiations support is TES. in Fy 94, the TES contracts will expire and the Environmental Enforcement Support (EES) contracts will replace them. The primary contract vehicle for RD/RA oversight is ARCS.

The negotiation team should see if RD and/or RA funding from Superfund is available as an option to be used if negotiations fail. Since the potential demands on the Fund exceed its size, monies may not be available to initiate Fund-financed activity. For example, RA funding will first require ranking to determine eligibility and position in RA prioritization queue. If funds are available, monies will be committed for the fiscal quarter in which negotiations are scheduled to conclude. Initiation of Fund-financed activity should be planned in the fiscal year preceding the scheduled activity, due to the potentially large amount of money required for RD and RA activities. The availability of Fund money to implement the RD and RA is a valuable tool to force the PRPs to negotiate.

B. Reporting Requirements

The RPM must review and update the information in EPA's automated data systems as events happen. That is, events should be tracked in the data base on a real time basis. Depending on the Region, RPMs are responsible for entering accurate information into CERCLIS/WasteLAN or providing that information to the IMC for entry into CERCLIS/WasteLAN. The RD/RA negotiation milestones (actual start date, date of issuance of special notice) must be entered into CERCLIS/WasteLAN. A matrix of SCAP/STARS targets relevant to RD/RA negotiations is presented as exhibit VIII-6 below.

Exhibit VIII-6
SCAP/STARS Targets for RD/RA Negotiations

Activity	STARS Target	SCAP Target	Quarterly Target	Annual Target
RD/RA Negotiation Start		X	X	X
RD/RA Negotiation Completion		X	X	X

RD/RA negotiations start when:

- The first Special Notice Letter (SNL) is signed, or
- A Section 122(a) waiver of SNL is signed.

If the Region does not plan to conduct RD/RA negotiations, dates should not be entered into WasteLAN. The start of RD/RA negotiations is planned site specifically. This is a SCAP target.

RD/RA negotiations end when:

- A signed CD (section 106 or 106/107 referral with settlement) for RD/RA and 10 point analysis are referred by the Region to either DOJ or HQ
- A section 106 or 106/107 injunctive referral to compel the PRPs to perform the RD/RA is referred to DOJ or HQ. (HQ prefers that a UAO be issued prior to initiating an injunctive referral)
- A UAO for RD/RA or RA only to initiate site work is signed by the Regional Administrator
- EPA and PRPs proceed to trial under an existing case
- Funds are obligated for a Fund-lead RD, or
- If RD funds are not available and the Region decides that a UAO is not appropriate and HQ concurs with this decision in writing, the negotiation completion date is the date of the HQ memorandum concurring with the Regional decision.

The negotiation conclusion date is the date on the transmittal letter for the CD, the date on the transmittal letter with the injunctive referral, the date the UAO is signed by the Regional Administrator, the date the trial begins, the date funds are obligated, or the date on the HQ memorandum. RD/RA negotiation outcomes are SCAP targets planned site specifically in WasteLAN. Outcomes are also tracked by SCAP/STARS. A matrix of SCAP/STARS targets relevant to RD/RA negotiation outcomes is presented as Exhibit VIII-7.

Exhibit VIII-7
SCAP/STARS Targets for RD/RA Negotiation Outcomes

Activity	STARS Target	SCAP Target	Quarterly Target	Annual Target
RD/RA Settlements and Injunctive Referrals (S/E-1a & 1b)	X		X	X
RD/RA Settlements		X	X	X
RD/RA Injunctive Referral		X	X	X

Definitions for RD/RA Negotiation Outcomes:

- **RD/RA Settlements (S/E-1a)** - This measure includes all CD referrals under Section 106, 107 and 122(d) for PRPs to conduct or pay for the RD/RA. It includes mixed funding and cash out settlements for RD/RA. Credit for the CD referral is the date on the Regional Administrator's transmittal memo to HQ or to DOJ as recorded in WasteLAN. Regions also receive credit for this measure for UAOs issued under section 106 for RD/RA that are in compliance. Credit for UAOs is the date PRPs provide notice of intent to comply with the order as recorded in WasteLAN. (Should a PRP initially comply with a UAO, and later a

CD is agreed to for the same work, credit will be for the UAO only.) Also included in this measure are IAGs with Federal agencies at non-Federal Facility sites.

- **RD/RA Injunctive Referrals (S/E-1b)** - This measure includes injunctive referrals, under section 106 or 106/107, to enforce a UAO for RD/RA. Credit for the referral is the date on the Regional Administrator's transmittal memo to HQ or to DOJ as recorded in WasteLAN. (Referrals for preliminary relief or penalties do not count toward this measure.)
  - RD/RA settlements and injunctive referrals are combined targets in STARS. Credit will be withdrawn if a case is returned by OE or DOJ for additional work. Credit will be reinstated upon re-referral and will be based on the quarter of re-referral. In the event a case is referred in one year and returned to the Region in subsequent years, no credit will be provided for re-referral.

A matrix of SCAP/STARS measures relevant to RD/RA negotiation outcomes is presented as Exhibit VIII-8.

Exhibit VIII-8
SCAP/STARS Measures for RD/RA Negotiation Outcomes

Activity	STARS Reporting	SCAP Plan/Report	Quarterly	Annual
Unilateral Administrative Order (UAO)		X	X	X
Section 106, 106/107, 107 Case Resolution		X	X	X
De minimis Settlements and Number of PRPs (S/E-3a)	X	X	X	X
Mixed Funding Settlements		X	X	X
State Consent Decree (CD)		X	X	X

- **Unilateral Administrative Orders Issued for RD/RA (UAO)** - UAOs are an enforcement tool to compel the PRPs to conduct the RD and/or RA. This measure includes UAOs issued under section 106 to compel PRPs to conduct the RD/RA. Credit is based on the date the UAO is signed by the Regional Administrator, as recorded in WasteLAN. PRPs do not have to comply with the UAO in order for the Region to receive credit under this measure. UAOs are reported separately from RD/RA settlements and injunctive referrals. This is a SCAP reporting measure.
- **Section 106, 106/107, 107 Case Resolution** - Case resolution is the conclusion of a section 106, 106/107, or 107 judicial action by a full settlement, a final judgment, a case dismissal, or a case withdrawal. Credit for case resolution is given when:
  - A CD is entered in the court fully addressing the complaint with all parties
  - the case is withdrawn
  - the case is dismissed, or
  - A trial is concluded and a judgment is entered fully addressing the complaint.

The case resolution date (activity actual completion date) is the same as the milestone date and is defined as follows:

- Date the CD is entered
- Date the case is withdrawn
- Date the case is dismissed, or
- Date the judgment is entered.

This is a SCAP reporting measure.

- **Mixed Funding Settlements** - Administrative or judicial settlements under section 106 or 106/107 and section 122(b)(1) of SARA. There are three types of mixed funding settlements: 1) preauthorization; 2) mixed work; and 3) cash outs.

  This measure includes mixed funding settlements in the form of a CD or AOC between EPA and the PRPs. Credit for the CD is the date on the Regional Administrator's memo transmitting the referral to HQ or DOJ as recorded in WasteLAN. Credit for the AOC is based on the date it is signed by the Regional Administrator as recorded in WasteLAN.

- **State Consent Decree for RD/RA** - Judicial agreement between the State and the PRPs fully or partially settling a claim under CERCLA. The settlement may be for response work, or both response and cost recovery work. Credit for accomplishment is given the date the State CD is signed by the last State official or party. All WasteLAN coding requirements for CDs apply. The enforcement activity type (C1701) should be State decree (SD) and the date should be reported in C1717. In addition, the remedy field must denote that the CD was issued for RD and/or RA. This is a SCAP reporting measure, not a targeted activity.

- ***De Minimis* Settlements and Number of PRPs (S/E-3A)** - This is all administrative or judicial settlements that were reached solely under section 122(g) of SARA, with PRPs who qualified as *de minimis*. This settlement involves the established *de minimis* portions of the response costs at the site and is embodied in a CD or an AOC. If the total response costs at the site exceed $500,000 (excluding interest), the AOC can only be issued with DOJ prior written approval. If DOJ does not approve or disapprove the AO within 30 days, the AOC is considered approved and can be issued. (DOJ and the Administrator can agree to extend this 30-day period).

  Credit is given for a final settlement when an AOC is signed by the Regional Administrator or when the Regional Administrator signs the memo transmitting the CD to HQ or DOJ. The number of PRP signatories to each settlement also must be reported. The remedy qualifier for *de minimis* must be entered into WasteLAN Enforcement Remedy Qualifier data elements (C2741-C2750="DL" or "DG"). This is a STARS reporting measure.

For specific coding requirements into WasteLAN, see the Enforcement Data Quality Manual Chapter I: RD/RA Negotiations (AN), Consent Decree (CD), Unilateral Administrative Order (UA), Section 106 Litigation (SX), Section 106/107 Litigation (CL), State Decree (SD), State Order (SO), *De minimis* Consent Decree (CD).

Section IV. Potential Problems/Resolutions

This section addresses some of the common problems that arise during RD/RA negotiations. While each Region has different methods of resolving these problems, this section discusses some of the more effective Regional experiences.

A. Poor Relationships Among the PRPs

At large sites, interpersonal antagonisms can develop between the PRPs. The RPM and assistant Regional counsel should provide information to the PRPs to assist them in coalescing into a steering committee. The RPM should also recommend the use of alternative dispute resolution methods to assist the PRPs in resolving their disputes. Mixed funding may be appropriate if the great majority of parties are cooperative and a minority are recalcitrant.

B. Multiple Revisions to Draft CD

The specific language in the draft CD may cause numerous revisions to be made between the PRPs and the Agency. The Agency's policy is that the strict negotiations deadlines help force the PRPs to settle on issues in the language of the CDs. If the deadlines are approaching and it appears that settlement is near, the Regional Administrator may request a second 30-day extension from the AA, OSWER after the initial 30-day extension. To avoid this situation, the negotiation team should insist on short deadlines on revisions to the drafts. Furthermore, weekly or biweekly meetings with the PRPs are advised. These meetings should be scheduled well in advance, so that all parties are aware of the schedule for preparing revised drafts of the CD.

C. Settling with Majors Involved with *De Minimis* Settlements

In some situations, major contributors to a site may be reluctant to negotiate RD/RA settlement terms after some PRPs have settled early under *de minimis* provisions. The case team may be able to avoid conflict with major parties by soliciting settlement proposals from them prior to finalizing settlement terms with *de minimis* PRPs. Additionally, the negotiation team may find it beneficial to explain the following advantages of *de minimis* settlements to the major parties:

- In cases where there are numerous PRPs, it may not be practicable and in the public interest to sue all small parties. Early *de minimis* settlements therefore may save major parties the expense and time of litigation
- EPA will require premiums from *de minimis* settlors
- Monies from early *de minimis* settlements may provide start-up funds for major-party conduct of RD/RA activity.

It also may be helpful for the negotiation team to keep the major party steering committee advised of the status of *de minimis* settlement negotiations.

D. Use of Public Relations

Effective use of the media may increase the impact of settlements on the PRP community by providing examples of PRP participation in settlements. Publicizing PRP participation in settlements creates an incentive for future PRP participation in other settlements and enhances the public policy implications of settlements, thus providing PRPs with a policy rationale for their efforts. Additionally, press coverage of critical pre-settlement actions (e.g., issuance of special notice, commencement of negotiations) may be an effective tool in creating pressure on PRPs to settle expeditiously and cooperatively. RPMs should identify sites as candidates for the use of public relations tools as early as possible and enlist the assistance of Regional Office of Public Affairs staff.

E. Inadequate PRP Searches

Negotiating PRPs may be less willing to settle when some of the PRPs at the site have not been identified or evidence of liability against identified PRPs is not strong enough for those PRPs to decide to settle for their full share of cleanup costs. The negotiation team should work closely with the civil investigator to ensure that a thorough PRP search is conducted and all leads are investigated. The negotiation team should ensure that any new information uncovered during negotiations is considered against the information presented in the report. New information, when considered against information discovered during the initial PRP search, may lead to additional PRPs or increase the evidence of liability against already identified PRPs. The negotiation team should work with the civil investigator to follow up on any leads that may encourage settlement if new PRPs are identified during RD/RA negotiations.

F. Late Challenges to Volumetric Ranking

Many PRPs wait until EPA solicits a settlement to challenge or question EPA's volumetric ranking. EPA should encourage the steering committee to set up a process for early challenge, or the Agency should set up one itself.

Section V. References

Policy

OSWER Directive 9835.0, "Interim CERCLA Settlement Policy" (December 5, 1984).

Guidance

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1987).

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OSWER Directive 9835.12, "Releasing Information to Potentially Responsible Parties at CERCLA Sites" (March 1, 1990).

OSWER Directive 9834.10A, "Model Notice Letters" (February 7, 1989).

OSWER Directive 9833.0-1A, "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for RD/RAs" (March 7, 1990).

OSWER Directive 9833.0-2(b), "Model Unilateral Administrative Order for Remedial Design and Remedial Action Under Section 106 of CERCLA" (March 30, 1990).

OSWER Directive 9835.17, "Model CERCLA RD/RA Consent Decree" (June 21, 1991).

OSWER Directive 9839.1, "Interim Guidelines for Preparing Non-binding Preliminary Allocations of Responsibility" (May 16, 1987).

OE, "Covenants Not to Sue Under SARA" (July 10, 1987).

OSWER Directive 9834.7, "Interim Guidance on Settlements with *De minimis* Waste Contributors Under Section 122(g) of SARA" (June 19, 1987).

OSWER Directive 9834.7-1A "Interim Model CERCLA Section 122(g)(4) *De minimis* Waste Contributor CD and AOC" (October 19, 1987).

OSWER Directive 9834.7-1B, "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) *De minimis* Waste Contributor Settlements" (December 20, 1989).

OSWER Directive 9834.7-1C, "Methodology for Early *De minimis* Waste Contributor Settlements Under CERCLA Section 122(g)(1)(A)" (June 2, 1992).

OSWER Directive 9832.4, "Interim Cashout Procedures" (January 7, 1992).

OE/OSWER, "Strategy for CERCLA Section 106 Litigation Support" (January 28, 1991).

OSWER Directive 9834.6, "Policy Toward Owners of Residential Property at Superfund Sites" (July 1991).

OSWER Directive 9835.14, "Submittal of Ten Point Settlement Analyses for CERCLA Consent Decrees" (August 11, 1989).

OSWER Directive 9835.7, "Guidance on CERCLA Section 106 Judicial Actions" (February 24, 1989).

OSWER Directive 9834.13, "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (December 6, 1989).

OSWER Directive 9835.9, "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De minimis* Settlements under Section 122(g)(1)(B) of CERCLA and Settlements with Prospective Purchasers of Contaminated Property" (June 6, 1989).

OSWER Directive 9012.10-a, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13 B and 14-14 E (June 17, 1988).

OSWER Directive 9012.10-1, "Clarification of Delegations of Authority 14-14-A, 14-14-B, and 14-14-C Under CERCLA" (April 4, 1990).

OSWER Directive 9834.9A, "Interim Policy on Mixed Funding Settlements Involving the Preauthorization of States or Political Subdivisions" (May 27, 1988).

Memoranda

OE, "Draft CERCLA RD/RA Settlement Negotiations Checklist" (January 26, 1988).

OE/OSWER, "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases" (October 12, 1990).

OSWER Directive 9835.4-2B, "Accelerating Potentially Responsible Party Remedial Design Starts: Implementing the 30-Day Study" (April 2, 1992).

OWPE, "Consent Orders and the Reimbursement Provision Under Section 106(b) of CERCLA" (June 12, 1987).

OSWER Directive 9891.6, "Multi-Media Settlements of Enforcement Claims" (February 6, 1990).

OSWER Directive 9225.1-01, "Procurement Under Preauthorization and Mixed Funding" (April 19, 1989).

OSWER Directive 9225.1-03, "Regional Guidance Manual for the Response Claims Process — Preauthorization PRP RD/RA" (March 1990).

OSWER Directive 9834.9, "Evaluating Mixed Funding Settlements" (October 20, 1987).

OSWER Directive 9225.1, "Regional Guidance Manual for the Response Claims Process: Preauthorizing PRP RD/RA" (March 1990).

OSWER Directive 9834.10-10A, "Waiver of HQ Approval for Issuance of RD/RA SN at Time of ROD Sign" (September 26, 1988).

Contacts

OWPE, CERCLA Enforcement Division, Compliance Branch, 703-603-8910.

OWPE, CERCLA Enforcement Division, Guidance and Evaluation Branch, 703-603-8940.

OE, Deputy Associate Enforcement Counsel 202-260-3050.

Training

OWPE, CERCLA Enforcement Division, Contracts and Planning Branch offers periodic negotiations and enforcement training courses. For further information contact 703-603-8930.

Section VI. Activities Checklist

1)____ Determine Universe of PRPs to Extent Practicable

- a)____ Are PRPs ranked (particularly generators) by volume/ waste type?
- b)____ If infomation is missing, can gaps be filled by administrative discovery?
- c)____ Strategy developed for addressing federal and/or municipal PRPs (if applicable)
- d)____ Have General Notice Letters been sent?

2)____ Evaluate Financial Status of PRPs

- a)____ Bankruptcy issues
- b)____ Insurance coverage
- c)____ Superfund lien possible

3)____ Evaluate Liability Issues

- a)____ Strength of EPA's evidence
- b)____ Documentation in AR

4)____ Develop Strategy for Negotiating

- a)____ Assess PRPs' interest in negotiating
- b)____ Facilitate steering committee development
- c)____ Determine whether should identify and solicit a separate settlement for *de minimis* PRPs
- d)____ Should NBAR be developed?
- e)____ Decide on negotiation team's roles, (e.g., if there are liability issues and remedy issues, consider whether to divide the negotiation team into separate units)
- f)____ Determine whether Fund and State-share will be available to implement the remedy if negotiations fail or issue a UAO or initiate judicial action

5)____ Notify and Consult with Federal and State Natural Resource Trustees

6)____ Follow Special Notice (or Waiver) Procedures

- a)____ Notify DOJ 60 days before EPA issues the SNLs
- b)____ Draft CD including RD/RA SOW or ROD
- c)____ Assess GFO
- d)____ Notify Natural Resource Trustees of Special Notice issuance
- e)____ Monitor moratorium and any extension requests

7)____ Develop Cost Recovery Component of Case (including oversight costs)

8)____ Strategy for Settlement

- a)____ Is case appropriate for separate *de minimis* PRP settlement?
- b)____ Mixed funding potential
- c)____ Covenants and reopeners

9)____ Ascertain NR Trustee Strategy (e.g., is the trustee contemplating filing a natural resource claim or authorizing a convenant not to sue?)

10)____ State's Role

11)____ Citizen Participation

a)____ Any toxic waste tort pending?

b)____ TAG grant

12)____ Finalize the CD

13____ Proceed Against Non-settlors

a)____ In the event that settlement negotiations fail, are you prepared to issue a UAO or take section 106 judicial actions?

IX. RD/RA IMPLEMENTATION

Chapter IX
RD/RA Implementation

Section I. Description of Activity 1

Introduction 1

Overview 1

Responsibilities 2

PRPs 2

RD Professional 3

RA Contractor 3

QAT 3

EPA 4

RPM 4

Oversight Official 4

Section II. Procedures and Interactions 6

A. Define Remedial Design Approach 6

B. Perform Design Tasks 6

Design Investigation 6

Design Support 6

Plans and Specifications 6

Construction Schedule 7

C. EPA RD Review 7

Review RD Professional Qualifications 7

Review RD Work Plan 7

Preliminary Design Review 7

Intermediate Design Review 8

Pre-Final/Final Design Review 8

D. Community Relations Activities 9

E. Initiate Remedial Action Oversight 9

EPA Pre-RA Review 9

Review RA Work Plan 9

Review RA Contractor Qualifications 10

Review QAT Qualifications 10

Review Construction QA/QC Plans 10

F. Hold Preconstruction Conference 11

G. Implement Remedial Action 11

RPM Role/Responsibilities 11

Oversight Official Role/Responsibilities 11

Responding to Immediate Danger or an Emergency 11

H. Pre-Final/Final Inspection 12
I. Prepare Remedial Action Report 12

Section III. Planning and Reporting Requirements 13
A. SCAP/STARS 13
SIF Instructions for RD/RA Implementation 13
Remedial Design Activities 17
Remedial Action Activities 18

Section IV. Potential Problems/Resolutions 19
A. Oversight 19
B. Incentives for Successful Performance 19
C. Compliance Monitoring 19
D. Site Access 20

Section V. References 22
Policy 22
Guidance 22
Manuals 22
Memorandum 22
Contacts 22
Training 22

Chapter IX
RD/RA Implementation

Section I. Description of Activity

Introduction

EPA conducts oversight of actions taken by PRPs when the response is taken pursuant to an EPA order or Consent Decree to ensure a response is conducted consistent with the NCP (See NCP section 300.400(h)). The objectives of PRP oversight by EPA are to ensure that selected remedies being conducted by the PRP are protective of public health and the environment, and in compliance with the settlement agreement.

In the past, when PRPs conducted RD/RA activities, the RD did not start until the Consent Decree was entered as final by a Federal district court judge. As a result, the PRPs' RD/RA projects sometimes were delayed for 12-15 months after the ROD was issued.

These delays in initiating remedial design are not consistent with the Agency's efforts to expedite site clean-up. Therefore, the initiation of PRP-conducted RD activity is no longer dependent upon the court's entry of the Consent Decree. The Agency's strategy is to encourage the PRP to agree to settlements wherein engineering design work can proceed upon the lodging of the Consent Decree by EPA, or where litigation is already pending, upon execution of a stipulation obtained before the start of the RD. By implementing this strategy, RD activities may be initiated before a Consent Decree is entered. In such cases, the RPM must exercise his/her oversight authority to ensure that the PRP is conducting the RD in accordance with the terms of the settlement agreement. This strategy of encouraging the PRP to begin the RD as soon as the settlement is lodged will allow PRP-lead projects to begin at approximately the same time as a Fund-lead project for the site.

A focused approach to PRP oversight that will assist RPMs in concentrating their efforts on the most significant aspects of the projects is recommended. The successful implementation of the focused approach consists of two steps. First, the RPM must focus on certain key documents developed throughout the design and construction of the remedy such as the RD and RA Work Plans, project schedules, preliminary design, final design, Construction Quality Assurance (QA) and Quality Control (QC) Plans, and the Contingency Plan. The second step is the utilization of a Quality Assurance Team (QAT) during construction. The focused approach will allow RPMs to utilize their oversight activities in a more efficient manner, enabling them to more effectively monitor PRP activities. The ultimate goal of PRP oversight is to hold PRPs responsible and accountable for the remedial action.

EPA has developed a separate guidance for overseeing RDs and RAs conducted by PRPs, entitled "Guidance on EPA Oversight of RDs and RAs Performed by PRPs," April 1990, EPA/540/G-90/001. Also, draft guidance entitled "Model Statements of Work for RD/RAs for use with settlement agreements and for Oversight of RD/RAs" is being prepared by OERR/HSCD. Additional detail on RD/RA implementation is provided in these guidance reports. Certain methods also have been explored to expedite remedial design and remedial action so that cleanup activities can be completed more quickly. These are addressed in OSWER Directive 9355.5-02, "Guidance on Expediting Remedial Design and Remedial Action" (August 1990).

Overview

When PRPs elect to conduct RD/RA activities at a Superfund site, they must do so in accordance with the terms of the negotiated settlement agreement (either an Administrative Order on Consent or a Judicial Consent Decree) per section 122 of CERCLA. Subsequently, PRPs and their agents are responsible for the adequacy of the design and the

implementation of remedies specified. During an enforcement lead cleanup, the primary function of EPA is to ensure PRPs comply with all applicable laws, regulations, and requirements, and meet all performance standards specified in the settlement agreement.

EPA has two objectives for overseeing PRP conducted RD/RAs on enforcement lead cleanups:

- Ensure the remedies are protective of public health and the environment throughout the life of the project, and
- Ensure the RA is implemented in compliance with the terms of the settlement agreement.

The intent of the oversight program is to focus EPA efforts on the most significant aspects of the project, such as overall QA, scheduling, major changes due to changed field conditions, emergency actions, and project close out. EPA may use a high level of oversight at the onset of the RD and again when the RA is initiated. The amount of oversight effort may be increased or decreased over time, depending on the capabilities of the PRPs' design and construction teams, the implementation of a construction QA program, the nature of the technology selected, and the provisions of the settlement agreement. The oversight must always be structured so the PRPs, not EPA, remain legally responsible and accountable for the success of the response action.

This enforcement approach not only conserves Fund resources, it also frees EPA personnel to work on other sites. The focused approach will formalize the requirement for PRPs to implement a construction QA program. This is consistent with standard industry construction practice. In addition to reducing the duplication of QA activities, this will maintain the burden of QA accountability with the PRP.

Responsibilities

Because each Superfund site and RD/RA is unique, there are several acceptable variations of a PRP's organizational structure to implement the RD/RA. Regardless of the PRP organizational structure, however, it is the ultimate responsibility of the PRP to successfully implement the remedy under the terms of the settlement agreement.

Exhibit IX-1 presents a simple organizational chart illustrating the relationships in an enforcement lead project in which the PRP conducts the RD/RA. There are a number of organizations that could be used for conducting the work, and the best approach will depend on the experience and preference of the PRPs.

A "reporting relationship" as shown in Exhibit IX-1, is defined as a direct line responsibility in which one party, as an agent of the other or as a legal requirement, is compelled to report the results of their work or observations. The PRP has a "reporting relationship" with EPA as a condition of the settlement agreement, while agents and contractors hired by the PRP have a similar type of association with the PRP. Where "lines of communication" are indicated in Exhibit IX-1, it implies that an information exchange is highly desirable between parties. Such an exchange is usually necessary for a successful implementation of a remedy, however, there is no legal requirement for such communication. The QAT is used to ensure compliance and provide unbiased QA monitoring of the RA.

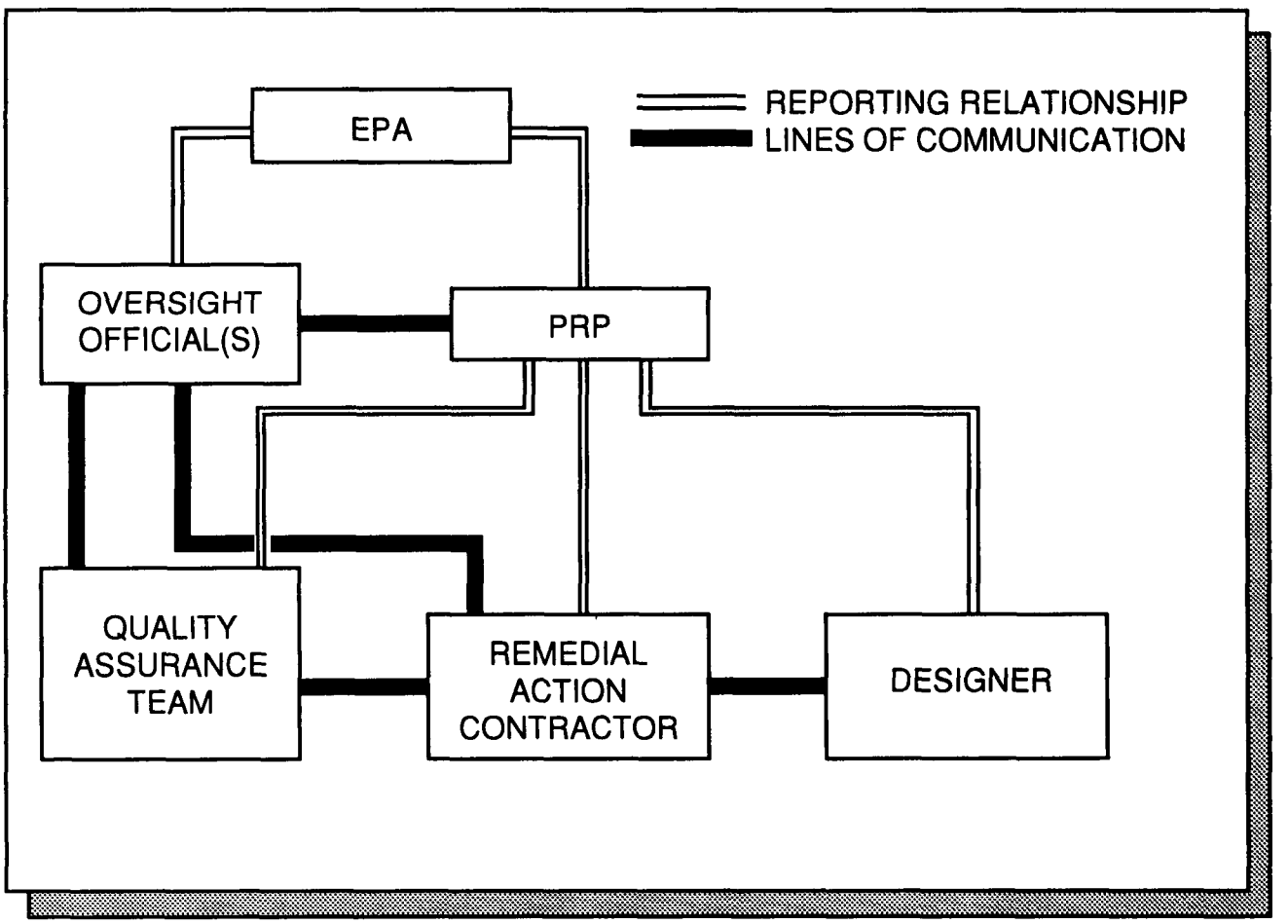
The following paragraphs discuss particular roles and responsibilities of the PRP and EPA in the implementation of an enforcement lead project in which the PRP does the RD/RA.

PRPs

The PRPs are legally responsible for complete site remediation as specified in the settlement agreement. All work is done under the PRP's control and they are responsible for the long-term performance of the remedy. PRPs provide the necessary input to effect site remediation, whether done with "in-house" resources, or through the use of hired contractors and subcontractors. PRP responsibilities are apportioned among the RD Professional, the RA Contractor, and the QAT.

Exhibit IX-1

Relationships Among Parties When RD/RA Is Performed By a PRP



RD Professional The primary function of the RD Professional, or design engineer, is to provide the PRP with a set of plans and specifications for the proposed remediation that meets the requirements and is within budget and on schedule. The RD Professional may be an employee of the PRP or may be a private consulting entity retained under a contractual relationship with the PRP. Unless the RD Professional has a large and experienced staff, many projects are sufficiently complex to require the design team to be supplemented with additional capabilities (i.e., geotechnical, electrical, mechanical, or structural engineers; field surveyors, or persons with other specialized skills.) These specialists may subcontract with the RD Professional or contract directly with the PRP.

In addition to the above responsibilities, the RD Professional usually will be required to provide a Resident Engineer to act as the PRP's agent on the site during construction. In some situations the Resident Engineer may be hired directly by the PRP. In either case, this person is one of the most critical in establishing and maintaining construction quality on the site. Typically the Resident Engineer is required to review progress and shop-drawing submittal schedules; prepare periodic progress reports; make recommendations concerning major inspections and tests; draft change orders, field orders, and work directive changes; conduct the pre-final and final inspection of completed work with PRP, RA Contractor, EPA, and other agencies; prepare a Remedial Action Report that certifies the completed project has been constructed in accordance with the settlement agreement and that all performance standards have been met; and determine that certificates, operation and maintenance (O&M) manuals, and other required data have been assembled by the RA Contractor.

RA Contractor An RA Contractor's primary responsibility in constructing the RA is to meet the quality standards specified by the design and accepted trade practices. They are responsible to the PRP for implementing and maintaining the Quality Control (QC) program. The RA Contractor will obtain all necessary permits and approvals as required by the RA activities; construct the project according to the plans and specifications by supervising and controlling the execution of work, including means, methods and sequences of construction; and maintain "Record Drawings" at the site, properly noting all changes made during construction. The RA Contractor also will implement and maintain a construction QC program, identify and report problems, provide qualified testing to demonstrate that proposed materials and equipment are acceptable, and respond constructively to QC issues.

QAT Quality is conformance to properly developed requirements. In the case of construction contracts, these requirements are established by the contract specifications and drawings. Quality Assurance is planned and systematic actions by the PRP to provide confidence that the completed remedy meets these requirements. The QAT is used to provide this level of confidence to the PRP by testing and inspecting the work of the RA Contractor. Quality Control is the system used by the RA Contractor to manage, control, and document the compliance with requirements of all RA activities. This includes activities of the parent firm and those of suppliers and subcontractors.

The QAT includes representatives from testing and inspection organizations, independent of the constructor, that are responsible for examining and testing various materials, procedures, and equipment during the construction. Since the PRP is responsible for the QA of the remedy, the QAT is retained by the PRP. The QAT are either employees of the PRP, or are working for the PRP through a contractual arrangement, and therefore have no legal means for responding to EPA direction. Any direction regarding the QAT will come from the PRP. EPA should raise issues regarding the performance of the QAT directly with the PRP.

The qualifications and expertise of the personnel should be commensurate with the scope of the project. Typical functions of the QAT include reviewing design criteria, plans, and specifications for clarity and completeness; directing and performing observations and tests for QA inspection activities; verifying that the Construction QC Plan is implemented in accordance with the site-specific Construction QA Plan; performing independent on-site inspections of the work to assess compliance with design criteria, plans and specifications; and reporting to the PRP and EPA the results of all inspections and corrective actions, including work that is not of acceptable quality or that fails to meet the specified design requirements.

EPA EPA is responsible for protecting the public health and the environment and ensuring that the PRPs comply with the terms of the settlement agreement. EPA monitors compliance of the PRP in their implementation of the remedy. The most successful way for EPA to do this is to vest responsibility for the project in a single individual within EPA, the RPM. The RPM usually hires an oversight official to assist EPA in overseeing PRP-lead RD/RAs.

RPM The RPM is the Federal official designated by EPA to coordinate, monitor, and manage remedial activities. EPA's role in RD/RAs performed by PRPs is to ensure that the remedy complies with the ROD and the settlement agreement. The RPM should manage, coordinate and monitor PRP activities with the support of the Oversight Official, and be technically competent to ascertain compliance by the PRP and the PRP's staff and consultants with the settlement agreement and the ROD.

The RPM may exercise a high level of oversight at the onset of the project. As the PRP demonstrates competence in implementing the remedy, the amount of oversight may be relaxed accordingly. The oversight program must focus the RPM's efforts on the most significant aspects of the project, such as overall quality, scheduling, major changes due to changed field conditions, site safety, emergency actions, and project close-out. This may require site visits at appropriate milestones during execution of the project.

Active participation in the design and construction of the remedy by the RPM or the Oversight Officials however, is generally inappropriate to the EPA oversight role and authority. RPMs and/or Oversight Officials should not serve as technical experts for technologies or methods required to implement the remedy. RPMs who serve in such a role, or who give direction to PRP employees or consultants, could undermine and compromise the oversight relationship between EPA and the PRP, and shift some of the responsibility for the success of the remedy to EPA. EPA should not be both a player and a referee in PRP lead projects.

At a minimum, the RPM should review and approve the PRPs' RD/RA Work Plans, design submittals, Construction QA and Construction QC Plans, Contingency Plan, and Remedial Action Report. It should be understood that the term "EPA Approval" should in no way warrant that the technology is sanctioned by EPA as technically acceptable or will work from a technical view. The term may be defined in the settlement agreement as meaning an administrative approval which simply allows the PRP to proceed to the next step. RPMs should defer to the advice of Regional Counsel and the relevant language in OSWER Directive 9835.16, "Draft Interim Model CERCLA RD/RA Consent Decree" regarding the use of the term "EPA Approval."

Oversight Official The RPM acquires technical assistance for performing oversight in monitoring PRP compliance with the settlement agreement by engaging one or more Oversight Officials capable of providing support in all technical aspects of the RD and RA. The Oversight Official is under some form of contractual or interagency agreement with EPA and reports

directly to the RPM. The recommended options available for oversight support include Alternative Remedial Contract Strategy (ARCS) contractors, the US Army Corps of Engineers (USACE), and the US Bureau of Reclamation.

The responsibilities of an Oversight Official during RD may include assisting in reviewing the professional qualifications of the RD Professional, RA Contractor, and the QAT; reviewing the RD and RA Work Plans; and reviewing the RD submittals to determine if they are protective of public health and the environment, comply with the ROD, and will attain the performance criteria specified in the settlement agreement.

During RA, the Oversight Official reviews the Contractor QA Plans and schedule for compliance with the approved plans and specifications. Construction oversight is limited to observing construction and comparing the work to a set of standards (in this case, the design plans and specifications, and the Construction QC Plan prepared by the PRP's RA Contractor). The Oversight Official also conducts spot checks of the QAT's activities and reviews QA reports. The results of all RA oversight activities are reported to the RPM.

Section II. Procedures and Interactions

A. Define Remedial Design Approach

The RD establishes the general size, scope, and character of a project. It details and addresses the technical requirements of the RA. RD begins with preliminary design and ends with the completion of a detailed set of engineering plans and specifications.

There are two approaches to RD: performance-based and definitive. In a performance-based design, basic technical specifications are developed, containing the performance requirements for the work. The RD Professional focuses on defining criteria and process limits. It is the RA Contractor's responsibility to implement a remedial plan that achieves those technical specifications.

In a definitive design, information is provided on system integration and on appropriate equipment for each unit process. The designer chooses equipment, dimensions, controls, size, shape, materials, and installation details. The contractor builds to these definitive plans and specifications.

In many situations, a mixed design approach is used. This often occurs for designs incorporating an innovative or emerging technology for which there is relatively little information available. In this instance, the designer may use a performance specification for the innovative technology and a definitive design for all other aspects.

Exhibit IX-2 presents a flow chart illustrating the RD process of the focused approach to oversight. The "diamonds" in the figure represent decision or review points that are the RPM's responsibility and are considered critical to the quality and success of the project.

B. Perform Design Tasks

Before commencing RD, it often is necessary to perform design related tasks (e.g., data gathering and treatability studies). In addition, there are other activities required to be performed during the actual design process to support the design (e.g., establishing design criteria and a delivery strategy, value engineering study, and community relations). The following tasks are commonly required in a PRP-performed RD, either as prerequisites to the design or as part of the actual design.

Design Investigation

It is unlikely that all the data required for the RD was collected during the remedial investigation and feasibility study (RI/FS) phase. Some RODs prescribe remedies contingent on the results of additional testing or treatability studies. Additional field data may need to be collected and evaluated, including geotechnical investigations, groundwater sampling, and surveys (property, utility, right-of-way, topographic).

Design Support

During the initial preliminary design phase, concepts supporting the technical aspects of the design are defined in detail. Much of the information is based on the results of field data and treatability studies that may have been completed since the RI/FS.

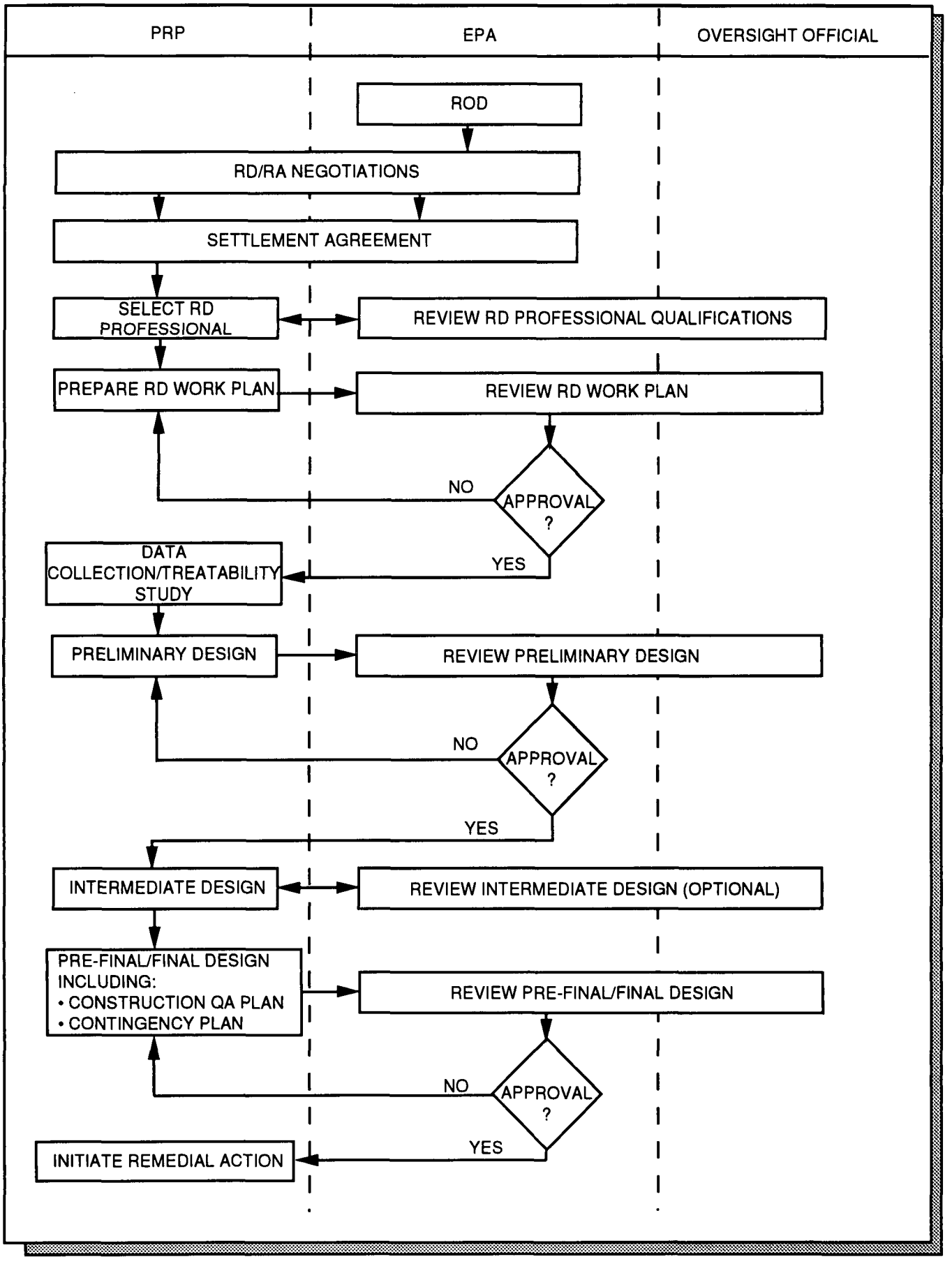
Besides the design criteria, which primarily address the project's technical issues, the designer must devise a strategy for delivering the project. This is the management approach to carry out the design and implement the RA. It normally discusses the procurement method and contracting strategy, phasing alternatives, health and safety considerations, review requirements, design schedule, contractor, labor, and equipment availability concerns, and requirements for addressing sampling and data gathering methods (Field Sampling Plan), QA considerations (Construction QA Plan), and air emissions and spill control requirements (Contingency Plan).

Plans and Specifications

The goal of RD is to produce a set of engineering plans and specifications that are consistent with the technical criteria established for the design. These documents present the design information in the detail appropriate for the requirements of the project.

Exhibit IX-2

Remedial Design Oversight Process



Construction Schedule

A construction schedule is developed to identify major tasks, determine their duration, and establish milestone dates. Key issues that may affect the schedule also should be identified.

C. EPA RD Review

During RD, EPA monitors and reviews the performance of the PRP. The Oversight Official provides technical assistance to EPA in this process. An approval of any of the RD work elements at any stage by EPA in no way guarantees the success or failure of the ultimate remedy. This is analogous to a city issuing a building permit to a developer for construction of a building. The permit does not guarantee the building will be structurally sound, it merely indicates compliance with the minimum design criteria and standards of the city for such buildings. The soundness of the building's construction is still the complete responsibility of the owner. Similarly, EPA review and approval of a PRP's work plan or design merely assesses their acceptability with regard to RA goals in accordance with the ROD and the settlement agreement. It does not warrant that the specified performance standards will be met.

Review RD Professional Qualifications

The PRP is responsible for selecting the RD Professional, subject to the approval of EPA. Selecting a qualified designer with the training, experience, staff, and capabilities consistent with the scope of work is an important step toward completing a quality constructed project.

The RPM, in conjunction with the Oversight Official, should review the qualifications of the RD Professional. The resultant analysis is used to form the basis of the level of oversight employed by EPA during the RD process. The settlement agreement may require the PRP to submit the name and qualifications of an RD "Supervising Contractor" to EPA for review and approval. If EPA disapproves this contractor submitted by the PRP, the PRP would submit a list of contractors acceptable to the PRP as "Supervising Contractor(s)" to EPA; EPA would provide a written notice of the contractors it finds approvable, from which the PRP may select. RPMs should defer to the advice of Regional Counsel and the relevant language in EPA's "Draft Model CERCLA RD/RA Consent Decree" regarding EPA review of the RD Professionals' qualifications.

Review RD Work Plan

The RD Work Plan is the first major deliverable and area of focus for the RPM and Oversight Official. It is the PRP's interpretation of the settlement agreement and the Statement of Work. A thorough review of the work plan is essential because it sets the course for the PRP's implementation of the design portion of the RA. The RD Work Plan should be reviewed for its thoroughness and approach, and to ensure that it contains at least the following items: tentative formation of the design team; a Health and Safety Plan for design activities; requirements for additional field data collection; requirements for treatability studies; a schedule for completion of the design; design criteria and assumptions; and tentative treatment schemes.

The RPM and Oversight Official should use the results of this review and the evaluation of the RD Professional qualifications to establish the level of initial RD oversight as the designer begins the preliminary design.

Preliminary Design Review

The preliminary design review is the most critical technical review performed during RD oversight. Because the preliminary design sets the pattern and direction of the entire design process, it is imperative that any deficiencies in the RA performance standards be identified. Furthermore, inconsistencies within the design itself must be identified and corrected before the PRPs proceed with the detailed design submissions. Based on the settlement agreement, EPA is required to review and approve this submission. The preliminary design submittal should include the "Basis of Design Report." This report

contains the design criteria analysis and the designer's "Remedial Action Delivery Analysis," which describes procedures for procurement of the RA, tells how the RA will be phased, etc. The submittal also should include the results of treatability studies and additional field sampling; preliminary plans, drawings, and sketches; outline of required specifications; and preliminary construction schedule.

In performing the preliminary design review, the Oversight Official and the RPM use their professional training to assess the feasibility of the design to achieve the RA goals in accordance with the ROD and settlement agreement. The Oversight Official makes a recommendation to the RPM based on the criteria listed below. The RPM is responsible for deciding whether the design is adequate and if enforcement action is necessary.

Ultimately the settlement agreement and any document incorporated into the agreement set the performance criteria for the site. The preliminary design review should evaluate the adequacy of the design with respect to all environmental and public health requirements. A review with respect to environmental criteria can be done by determining the feasibility of the design to meet the performance standards. The preliminary design should be reviewed with consideration of the following: technical requirements of the ROD, settlement agreement, and ARARs; currently accepted environmental protection measures and technologies; standard professional engineering practices; applicable statutes, EPA policies, directives, and regulations; conformance with results of field data and treatability studies; reasonableness of estimated quantities of materials specified based on known data; and examination of the construction schedule for meeting project completion goals.

The preliminary design review is limited to ensuring that the design criteria and the delivery strategy are consistent with the design requirements of the selected remedy. It should focus only on the environmental aspects of the design. Initially, the level of review should be limited to certain criteria, such as verifying that appropriate unit processes are being employed by the treatment train; confirming that the removal or treatment efficiencies assumed are reasonable for both the process and waste (concentration and volume); checking that process waste streams are adequately identified and addressed, and that flow rates are appropriate; verifying that the proposed sizing of the process is appropriate and that any site abnormalities have been addressed; and spot checking some (about 10%) of the design calculations.

The review can be expanded if any of the above areas appear to be deficient. Approval of the preliminary design only allows the PRP to proceed to the next step of the design process. It does not imply acceptance of later design submittals that have not been reviewed, or that the remedy, when constructed, will meet performance standards and be accepted.

Intermediate Design Review

The submittal of the intermediate design is optional and would normally only be performed for larger, complex designs or when required by the settlement agreement. The design is reviewed to determine that comments from the preliminary design review have been incorporated. It is a further refinement of the specifications. The results of treatability studies and any other data gathering should be incorporated. If a value engineering study has been performed by the PRP, the intermediate design would typically reflect any design modifications resulting from this study. These changes must be evaluated for consistency with the ROD.

Pre-Final/Final Design Review

The pre-final/final design submittals are reviewed for consistency with the ROD and settlement agreement. The final design submittal package from the PRP should include the following: final design plans and specifications; Operation and Maintenance (O&M) Plan; Field Sampling Plan (including a description of whether the performance standards have been achieved by the RA); Construction QA Plan; and Contingency Plan.

The pre-final/final design review is the last review of the RD and should be based upon the approved preliminary and intermediate design submittals. The Oversight Official and RPM assess the acceptability of the final design submittals on the basis of the same considerations used for the preliminary design, including conformance to the ROD. The approval of the final design is acceptance that the project may proceed to the next step; i.e., community relations activities and preparation of an RA Work Plan.

D. Community Relations Activities

At the conclusion of the RD, the RPM distributes to the community and other interested persons a fact sheet on the final engineering design. The fact sheet enables EPA to inform the public about activities related to the final design, including the schedule for implementing the RA, what the site will look like during construction, the roles of the PRP and EPA, the Contingency Plan, and any potential inconveniences such as excess traffic and noise. The RPM also should provide an opportunity for a public briefing to be held near the site prior to initiation of the RA. A public briefing may be necessary, and can serve to address issues such as construction schedules, changes in traffic patterns, location of monitoring equipment, and the methods by which the public will be informed of progress at the site.

E. Initiate Remedial Action Oversight

After completion of the RD, the RA begins, during which the actual implementation of the remedy occurs. Exhibit IX-3 presents a flow chart that illustrates the RA process of the focused approach to oversight. As in Exhibit IX-2, the "diamonds" represent critical decision or review points required of the RPM.

The RPM may use a high level of oversight at the onset of the RA as determined by requirements specified in the settlement agreement, the complexity of the remedy, past performance of the PRPs, the qualifications of the PRPs' design and construction teams (including the QAT) and any other relevant factors affecting the design and implementation of the RA. The level of this oversight then may be adjusted accordingly as implementation proceeds based upon the actual performance of the RA Contractor. The objective of the oversight program is to focus the RPM efforts on the most significant aspects of the project such as environmental protection, consideration of public health concerns, overall quality, scheduling, major changes due to changed field conditions, emergency actions, and project close-out.

EPA Pre-RA Review

During RA, EPA monitors and reviews the performance of the RA Contractor in building the project. It is the PRP's responsibility to ensure that the RA Contractor meets the quality standards specified by the design and accepted trade practices. EPA, through the Oversight Official, monitors and reviews the work of the PRP on the basis of defined applicable standards, in this case, approved design plans and specifications, and the Construction QA and QC Plans. It is inappropriate for the Oversight Official to direct or determine the means and methods of construction. Clearly defining these roles, and adhering to them, ensures that the responsibility and accountability of the construction project remains with the PRP.

Review RA Work Plan

The RA Work Plan is the basis for the PRP's approach to the implementation of the designed RA. The work plan may be a negotiated part of the settlement agreement or it may be a required submission under the agreement. As with the RD Work Plan, the RPM and Oversight Official should thoroughly review the work plan to ensure that the PRP will use a sound approach to the RA.

The RA Work Plan should be reviewed to ensure that it includes tentative formulation of the RA Team, including the key personnel, descriptions of duties, and lines of authority in the management of the construction activities; description of the roles and relationships of

the PRP, PRP Project Coordinator, Resident Engineer, QAT, RD Professional, and RA Contractor; process for selection of the RA Contractor; schedule for the RA and the process to continuously update the project schedule; method to implement the Construction QA Plan, including criteria and composition of the QAT; a Health and Safety Plan for field construction activities; strategy for implementing the Contingency Plan; procedure for data collection during the RA to validate the completion of the project; and requirements for project closeout. As with the RD Work Plan, the RPM and the Oversight Official will use this evaluation to assist in determining the initial level of oversight required for construction activities.

Review RA Contractor Qualifications

The PRP is responsible for selecting the RA Contractor, whether through a competitive bidding process or the assignment of PRP "in-house" resources. As may be required by the terms of the settlement agreement, EPA reviews and approves the selection of the PRP's preferred RA Contractor using the following criteria for guidance: an evaluation of the professional and ethical reputation as determined by inquiries with previous clients and other references; and the RA Contractor's previous experience in, and demonstrated capabilities to perform, the type of construction activities to be implemented. If EPA disapproves the contractor submitted by the PRP, the PRP would submit a list of contractors acceptable to the PRP as "Supervising Contractor(s)" to EPA; EPA would provide a written notice of the contractors it finds approvable, from which the PRP may select. RPMs should defer to the advice of Regional Counsel and the relevant language in EPA's " Draft Model CERCLA RD/RA Consent Decree" regarding EPA review of the RA Professionals' qualifications. The RPM and the Oversight Official should use this evaluation with the results of the review of the RA Work Plan to assist in determining the initial level of oversight required for construction activities.

Review QAT Qualifications

The QAT is used to provide a level of confidence to the PRP by selectively testing and inspecting the work of the RA Contractor, and ensuring the Construction QC Plan is being effectively implemented. They may be separate consultants working for the PRP under a contractual relationship or they might be "in-house" personnel assigned to the project; in either case, the QAT must be independent of the constructor. EPA reviews and approves the selection of the QAT using the following criteria for guidance: an evaluation of the professional and ethical reputation as determined by inquiries with previous clients and other references; the qualifications and expertise of the inspection personnel should be commensurate with the scope of the project; and confirmation that the QA team is truly independent and autonomous from the RA Contractor.

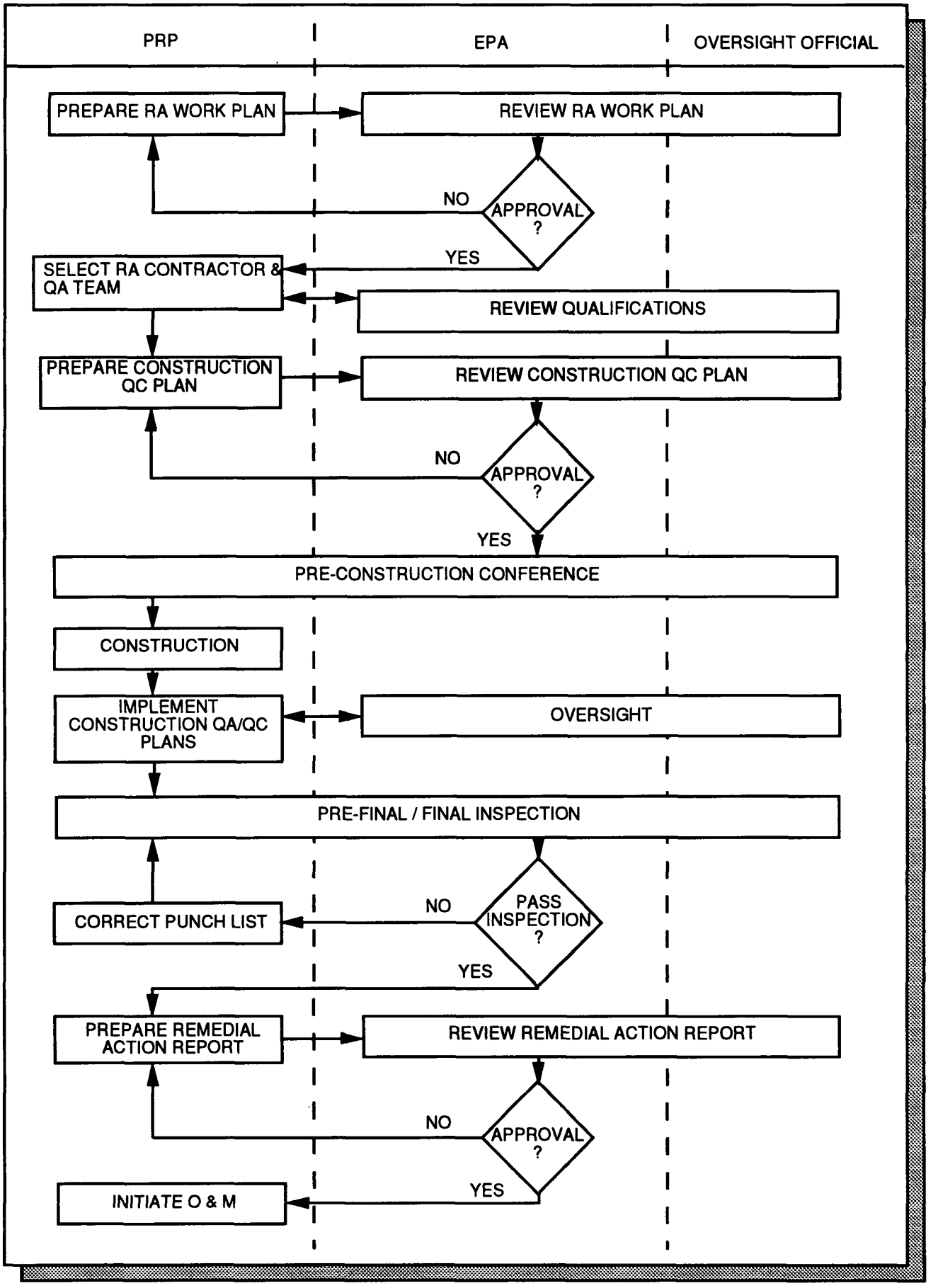
If a PRP elects to use "in-house" resources to implement the RA, it is inappropriate for PRP "in-house" personnel to also be used for QA. Because it is necessary for the QA Team to be completely independent of the contractor so the results of the QA are unbiased and objective, EPA should insist on the use of an independent firm. In a small minority of projects, the PRP may be unwilling to hire a QAT and/or is not required to do so under the terms of the settlement agreement. In these cases, EPA may decide to hire a QAT or use its Oversight Officials to ensure that the project is constructed properly.

Review Construction QA/QC Plans

Construction QA/QC should be a requirement on all construction projects. The RA Contractor is responsible for all activities necessary to manage, control, and document work so as to ensure compliance with the project requirements (i.e., plans and specifications.) The Construction QA Plan is normally prepared by the RD Professional and is submitted with the final design. It is the responsibility of the Resident Engineer to implement it through the QAT. The use of the QAT will provide for an unbiased implementation of the Construction QA Plan. More information on this construction QA/QC is provided in the "Guidance on EPA Oversight of RD/RAs Performed by PRPs."

Exhibit IX-3

Remedial Action Oversight Process



The Oversight Official should assist the RPM in reviewing each of the above plans. The review should focus on determining that the Construction QC Plan is consistent with the requirements of the plans and specifications, and that the Construction QA Plan ensures the performance standards will be met. The review should examine the appropriateness and the frequency of the tests and inspections identified in both plans. Reviewing the Construction QA and QC Plans will assist the Oversight Official in developing a strategy to spot check the PRP's QA program.

F. Hold Preconstruction Conference

The PRP will initiate a pre-construction conference prior to the start of construction on the project. The participants would include representatives of all parties involved in the RA (e.g., RPM, Oversight Official, PRP, RD Professional, QAT, and RA Contractor). The purpose of this meeting is to establish relationships among all parties involved in the RA implementation. The agenda should include items such as: introducing the members of each team; discussing EPA's expectations for the project; reviewing general project scope and requirements specified in the settlement agreement; reviewing the final Construction QA and QC Plans; reviewing the project schedule; reviewing roles and responsibilities of all parties; establishing procedures to resolve disputes or misunderstandings during construction; review of emergency actions and the Contingency Plan; and reviewing endpoint activities and procedures for project completion. The tone of this meeting will help the RPM to determine the level of oversight necessary for the project.

G. Implement Remedial Action

It is the RPM's responsibility to monitor PRP compliance with the settlement agreement and all documents and plans included therein by incorporation or reference. The RPM uses all the information and interactions to monitor PRP compliance and has the flexibility to adjust the level of oversight as determined to be necessary.

RPM Role/Responsibilities

If it is determined that the PRP is failing to comply with the terms of the settlement agreement, the problem can be approached as follows: identify the problem and devise corrective actions that are consistent with the settlement agreement; document all contacts with the PRPs concerning the inadequacies of the implementation; discuss the proposed corrective action with Regional management to ensure the RPM is maintaining a consistent Regional approach in overseeing the PRP's response activities; and contact the Office of Regional Counsel for advice on how to proceed in the event enforcement becomes necessary.

Oversight Official Role/Responsibilities

The Oversight Official reports to the RPM and supports the RPM in monitoring PRP compliance with the settlement agreement, the plans and specifications, and the Construction QA and QC Plans. Responsibilities that the RPM may assign to the Oversight Official include: attendance at the pre-construction conference, progress briefings, and any other meetings as required; making on-site observations of the work in progress to determine if the work is generally proceeding in accordance with the plans and specifications, and the Construction QA and QC Plans.

The Oversight Official is a representative of the EPA and does *not* have authority to authorize any deviation from the contract documents or assume any of the responsibilities of the contractor, subcontractor, or their superintendents. This includes advisement on or issuance of instruction concerning the constructor's techniques or performance of duties.

Responding to Immediate Danger or an Emergency

In the event any action during the performance of the remedial activities causes or threatens a release which may present an immediate danger to the on-site construction workers, the PRP shall take actions in accordance with the Health and Safety Plan. If there is a

substantial danger to the off-site public health or environment, the Contingency Plan shall be implemented. (For more information see the Guidance on EPA Oversight of RD/RAs Performed by PRPs.) This plan is written for the local affected population. In either case, the EPA must be notified.

During an emergency, the RPM and the Oversight Official should closely monitor the situation to determine that the Health and Safety Plan and Contingency Plan are being implemented. EPA does have the authority to stop work on the site if the conditions present an imminent and substantial endangerment to public health or welfare or the environment.

H. Pre-Final/Final Inspection

The PRP conducts pre-final and final inspections with the RA Contractor. These inspections ensure that contract work is complete. EPA may or may not be invited to attend these inspections. The PRP also conducts pre-final and final inspections of completed work with EPA, the Oversight Official, and other agencies with a jurisdictional interest in attendance (e.g., the State). The purpose of the inspection is to determine if all aspects of the plans and specifications have been implemented at the site. If any items have not been completed the PRP will develop a punch list which details the outstanding items still requiring completion or correction before acceptance of work. Acceptance of work may not be granted until the startup and operation of treatment systems. This also may include a demonstration that performance standards have been met.

The RPM and the Oversight Official should take careful notes of all corrective and extra work required to meet the requirements of the design plans and specifications. These notes should be carefully compared to the punch list developed by the PRP.

A final inspection should be conducted when all the items on the punch list have been completed. All items indicated as requiring correction on the punch list should be reinspected, and all tests that were originally unsatisfactory should be conducted again. A final punch list should be developed for any outstanding deficiencies still requiring correction.

I. Prepare Remedial Action Report

At the completion of the RA and correction of all punch list items, the PRP (usually the Resident Engineer) prepares a "Remedial Action Report" (Remedial Action Report) which certifies that all items contained in the settlement agreement and any incorporated documents (e.g., plans and specifications) have been completed. The report includes documentation (e.g., test results) substantiating that the performance standards have been met and also includes "Record Drawings" of the project. The RPM, with assistance from the Oversight Official, reviews the Remedial Action Report and verifies that all changes and variations from the original contract drawings have been made on "Record Drawings."

When all operable units are complete, the RPM initiates the project completion and deletion process as described in *Procedures for Completion and Deletion of National Priorities List Sites*," OSWER Directive 9320.2-3A, EPA, April 1989, as updated December 29, 1989 (OSWER Directive 9320.2-3B).

Section III. Planning and Reporting Requirements

A new "category" was added to the NPL, called the "Construction Completion" Category. The category consists of a) sites awaiting deletion; b) sites awaiting deletion but for which CERCLA section 121(c) requires reviews for the remedy no less often than five years after initiation; and c) sites undergoing long-term response actions (LTRAs). (See NCP, section 300.425(d)(6)).

A. SCAP/STARS

RPMs must ensure that current information on RD/RA activities is entered into CERCLIS/ WasteLAN for the SCAP. This section discusses the planning and reporting requirements for RD/RA activities. RPMs also are responsible for ensuring that an accurate CERCLIS/ WasteLAN site information form (SIF) is completed for RD/RA activities.

SIF Instructions for RD/RA Implementation

RD and RA activities are planned site, OU and project specifically and reported in WasteLAN. Initial schedules for RDs and RAs are established when the RI/FS for the site is initiated. These initial schedules must be updated in WasteLAN as better planning data become available. RPMs are responsible for ensuring that accurate data are reported into CERCLIS/WasteLAN. The RPMs should enter the data or provide the information to the IMC for entry. RDs and RAs are tracked by SCAP/STARS through CERCLIS. Exhibit IX-4 summarizes SCAP/STARS targets relevant to RDs.

Exhibit IX-4
SCAP/STARS Targets for RDs

Activity	STARS Target	SCAP Target	Quarterly Target	Annual Target
Remedial Design (RD) Starts (S/C-4)				
First		X	X	X
Subsequent		X	X	X
Remedial Design (RD) Completion			X	X
First		X	X	X
Subsequent		X	X	X

Definitions for:

- **RD Starts-First and Subsequent** - The obligation of funds for design assistance or technical assistance do not constitute an RD start. Under certain circumstances, an RD may be prepared by other parties (i.e., water lines where the city already prepared plans and specifications); or the plans developed for one site may be used at a similar site. Subsequent RD starts occur at NPL sites where previous RD activity has taken place. The definition of accomplishment for an RD start depends on the lead.
- **Fund-financed** - (Includes F and S lead events) A Fund RD start is counted when funds are obligated. An obligation is made when:
  - The CO signs the contract modification for the RD

- A CA is signed by the Regional Administrator or a designee: or
- An IAG is signed by the other Federal agency.

In those instances where RD activities are conducted prior to ROD signature and there is not a new obligation of funds for a subsequent RD, the start of RD is defined as the approval of the work plan to conduct these activities. If there is a new obligation of funds, the start of RD is defined as the date funds are obligated. When an RD has been prepared by other parties or plans developed for a similar site will be used, the RD start date is the same as the RA start date.

- **PRP-financed** - (Includes MR, RP, and PS lead events) For MR and RP lead, the start is credited on the date the Region approves the PRP design contractor and an enforcement document, which clearly spells out EPA's expectations with respect to the RD, exists or is planned. The appropriate dates for the RD start and the associated enforcement document must be entered in WasteLAN.

  For PS lead sites, credit will be given based on the issuance of a State order or other comparable State enforcement document for RD (or RD/RA) or, if the RD is covered by a pre-existing State order, the RD notice to proceed date. If PRPs are doing the work "in-house" pursuant to an enforcement settlement document, the start date is when EPA allows the PRPs to proceed.

  Separate first and subsequent start SCAP targets are established. Separate Fund, PRP, and Federal Facility financed RD start goals are established prior to the FY.

- **RD Completions-First and Subsequent** - An RD is complete when the plans and specifications and, in the case of a Fund-financed RD, an RA bid package for the selected remedy are developed. The definition of accomplishment for an RD completion depends on the lead

- **Fund-financed** - For F or S lead RD projects, an RD completion is the date that EPA concurs on or approves and accepts the plans, specifications and RA bid package. When the Fund performs the RD and the PRPs will do the RA under a CD, the RD completion is the date that EPA concurs on or approves and accepts the plans and specifications

- **PRP-financed** - An RD is complete on the date that EPA concurs on or approves and accepts the plans and specifications. For PS-lead RDs, the RD is complete when the State concurs on or approves and accepts the plans and specifications

- **Federal Facility** - An RD is complete on the date of EPA approval of the final RD package.

Separate SCAP targets are established for first versus subsequent and Fund/PRP versus Federal Facility RD completions.

Exhibit IX-5
SCAP/STARS Targets for RAs

Activity	STARS Target/ Measure	SCAP Target	Quarterly Target	Annual Target
Remedial Action (RA) Starts				
First RA Start		X	X	X
Subsequent RA Start		X	X	X
Fund		X	X	X
PRP		X	X	X
Federal Facility	X		X	X
Award of RA Contract (S/C-1)	X		X	X
First RA Contract Award		X	X	X
Subsequent RA Contract Award		X	X	X
RA Completion (S/C-2)	X		X	X
First RA Completion		X	X	X
Subsequent RA Completion		X	X	X
Final RA Completion		X	X	X

In addition to RDs, RAs are tracked by SCAP/STARS through CERCLIS. Exhibit IX-5 summarizes SCAP/STARS targets relevant to RAs.

Definitions for:

- **RA Start-First and Subsequent** - An RA start is the implementation of the remedy selected in the ROD at final NPL sites that is intended to ensure protection of human health and the environment. The definition of accomplishment for an RD start depends on the lead
- **Fund-financed** - (Includes F or S lead events) Credit for an RA start is given on the date a contract modification for the RA is signed by the CO or the IAG or CA is awarded, and funds are obligated. This date is entered into WasteLAN with the RA event
- **PRP-financed** - (Includes RP, MR or PS lead events) Credit for an RA start is given when one of the following occurs and has been recorded in WasteLAN:
  - If work is performed by the PRPs under the same CD or UAO as the RD, the RA start is the date EPA approves the PRP RD package (RD completion)
  - If the PRP is doing work under a State order or comparable enforcement document, and the site is covered by a State enforcement cooperative agreement or SMOA (PS-lead) with a schedule for RA work at the site, and EPA approved the ROD, the RP start is the date the State approves the PRP RD package; or

- Where the Fund performed the RD or the RD was done under a settlement/ order for RD and the PRPs are doing the RA under the terms of a CD, UAO or judgment for RA only, the RA start is the date on which the PRPs provide notice of intent to comply with the UAO (C2801="NC") or the date the CD is referred to HQ or DOJ (as recorded in WasteLAN). Where the PRP is in significant non-compliance with the UAO, credit will be withdrawn.

For Fund and PRP financed actions, the Region must enter the Remedial Technology of the RA into the RA technology Type data field (C3401=RT) and the remedial technology types data fields (C3402-C3411). Fund and PRP RA starts is a SCAP target.

- **Federal Facility** - Credit for an RA start is given on the date which substantial, continuous, physical, on-site, remedial actions begin pursuant to SARA section 120. Federal Facility RA starts is a STARS target
- **RA Contract Award (S/C-1)** - Award of RA contract is the initiation of on-site construction activities for the remedy selected in the ROD. Individual targets are negotiated in SCAP. RA contract award triggers the date for completion of Five Year Reviews. The definition of accomplishment for an RD start depends on the lead
- **Fund-financed** - (Includes F or S lead events) Sites where the EPA, a State, the USACE or BUREC has awarded a contract to initiate a Fund-financed RA. If the ARCS contractor is assigned RA responsibility, the award of RA contract is defined as the date the RA subcontract is awarded. If the Emergency Response Cleanup Services (ERCS) contractor will be performing the RA, award of the RA contract is defined as the obligation of funds to the ERCS contractor for the RA
- **PRP-financed** - (Includes RP, MR or PS lead events) Sites where the PRP has begun substantial and continuous physical action, which is equivalent to an EPA contract award, or where the PRP has taken equivalent action with its own work force

  First and subsequent, Fund and PRP RA contract awards are a single STARS target.
- **Federal Facility** - Date where the Federal agency has begun substantial and continuous physical action at a site, which is equivalent to an EPA contract award, or the date where the Federal agency has taken equivalent action with its own work force. Federal Facility award of RA contract is a SCAP measure.
- **RA Completion (S/C-2)-First and Subsequent** - A first and subsequent RA is complete when construction activities are complete, a final inspection has been conducted, the remedy is operational and functional (O&F) and an RA Report has been prepared. This report summarizes site conditions and construction activities for the OU.

  The definition of accomplishment is the date that the designated Regional official (Branch Chief or above) signs a letter accepting the RA Report for the first or subsequent RA. The contractor's construction manager submits a signed RA report to document the completion of all construction activities for that OU, and that the remedy is O&F. In lieu of a report from the contractor's construction manager, the Region must prepare a report to document the completion. The appropriate date must be recorded in WasteLAN with the RA event.

  Commitments are made on a combined Fund and PRP basis. Federal Facility RA completion commitments are made separately. First and subsequent Federal Facility RA completions are SCAP targets. First, subsequent and final Fund and PRP RA completions are a combined STARS target, separate targets are estab-

lished in SCAP. Final RA completions are also included in the STARS target S/C-3, NPL Sites That Have Been Completed.

- **Final RA Completion (S/C-2)** - A final RA is complete when:
  - Construction for all OUs is complete
  - A pre-final inspection has been conducted
  - A Preliminary Site Close-Out Report has been prepared. This report documents the completion of physical construction, summarizes site conditions and construction activities and, as appropriate, provides the schedule for the joint final inspection (required before the start of the O&F phase), approval of the O&M work plan, and establishment of institutional control. The date of the Preliminary Close-Out Report must be reported in WasteLAN with the RA Subevent, Preliminary Close-Out Report Prepared (C3101=CC)
  - A final inspection has been conducted
  - The remedy is O&F
  - A letter accepting the RA report has been signed by the designated Regional official. The date of the letter is entered into WasteLAN as the RA completion date (C2101=RA), and
  - An Interim Site Close-Out Report or Final Superfund Site Close-Out Report has been prepared. An Interim Site Close-Out Report must be prepared if the only activity remaining is Long Term Response Action.

The final RA is complete on the date the Regional Administrator signs the Interim Site Close-Out Report or Final Superfund Site Close-Out Report documenting completion of the final RA. The appropriate date must be recorded in WasteLAN with the Close-Out Report RA subevent (C3101=CL).

The date of completion of the Preliminary Close-Out Report must be entered into WasteLAN with the Preliminary Close-Out Report Prepared subevent (C3101=CC). The date of the letter accepting the RA Report must be entered into WasteLAN with the RA event (C2101=RA). The date the Regional Administrator signs the Interim or Final Superfund Site Close-Out Report must be entered into WasteLAN with the Close-Out Report subevent (C3101=CL).

First, subsequent and final, Fund and PRP RA completions are a combined STARS target; separate targets are negotiated in SCAP. Final Fund and PRP RA completions also are included in the STARS target S/C-3, NPL Sites That Have Been Completed. Final Federal Facility RA completions is a SCAP measure.

OERR/OPM is currently developing coding guidance for events (RI/FS, ROD, RD/RA).

Remedial Design Activities

RDs are planned on a site-specific basis. Initial schedules for RD are established when RI/FS activities are initiated at the site. The RPM should ensure that these initial schedules are updated in CERCLIS/WasteLAN as more accurate planning data become available.

There are four separate SCAP and STARS activities: First RD Start; Subsequent RD Start; Final RD Completion; and Subsequent RD Completion.

The CERCLIS/WasteLAN definitions of first, subsequent, and final RD starts are combined.

Remedial Action Activities

Remedial actions are planned on a site-specific basis and reported in CERCLIS/ WasteLAN. The Regions are responsible for identifying RA projects and associating planned obligations with these sites.

Seven SCAP and STARS activities are tracked:

- First RA Start
- Subsequent RA Start
- First RA Contract Award
- Subsequent RA Contract Award
- First RA Completion
- Subsequent RA Completion
- Final RA Completion.

RA starts (first, subsequent, and final) are targeted on a combined program basis. RA completions and final RA completions also are targeted on a combined basis.

Section IV. Potential Problems/Resolutions

A. Oversight

For PRP-lead RD/RAs, the oversight funding is obtained from the remedial budget. If the RPM requires technical assistance in performing his/her oversight responsibilities, the primary contract vehicle is ARCS. RPMs also should be aware that the Agency encourages use of the U.S. Army Corps of Engineers for providing technical assistance. In addition, in-house technical assistance often is available, which proves to be both cost-effective and timely. In addition to contractor support, EPA should assemble a peer review team comprised of various senior RPMs and specialty experts (i.e., wetlands expert to review wetland issues). EPA also can seek technical advice through IAGs as vehicles to access specialty experts from such organizations as the U.S. Fish and Wildlife Service, NOAA, and Marine Fisheries.

B. Incentives for Successful Performance

To enhance a cooperative problem-solving approach for the PRP-lead RD/RA, the RPM should identify areas in which the PRP has achieved significant success in remedying the problems caused by the hazardous substance release. RPMs could acknowledge these accomplishments by suggesting that Regional management either send a letter to the PRP or provide public acknowledgment in the media (newspapers, television, or radio). Performance incentives are effective and inexpensive support for the PRP to continue to achieve steady RD/RA implementation progress. Successful PRPs also serve as role models for other PRPs.

If the PRP sustains its outstanding performance resulting in steady RD/RA implementation progress, the RPM may suggest that Regional management approve a more flexible EPA oversight posture.

C. Compliance Monitoring

If the RPM determines that the PRP is failing to comply with the terms of the Consent Decree, the RPM should generally approach the problem in a constructive manner. The RPM's first course of action is to:

- Identify the problem and devise appropriate corrective action based on the terms agreed to in the consent decree for addressing late or inadequate performance by the PRPs
- Document thoroughly all contacts with the PRPs concerning the inadequacies of their implementation
- Discuss the proposed corrective action with Regional management to determine whether the RPM is maintaining a fair and consistent Regional approach in overseeing the PRP's response activities
- Contact ORC for advice on how to proceed in the event enforcement becomes necessary.

After determining whether the proposed corrective action is consistent with the Region's approach, the RPM should initiate a discussion with the PRP to identify appropriate corrective actions. For example, the RPM could take any one of the following types of corrective action:

- Send a warning letter to the PRP describing the problem and the desired response
- Hold a formal meeting with the PRP
- Provide the PRP with additional guidance to clarify EPA requirements
- Expand the level of EPA oversight by increasing the level of communications and number of site visits.

If the corrective actions do not alter the PRP's performance and significant problems continue to persist, then the RPM may advise the Regional Administrator to take one of the following corrective measures:

- Issue a Stop Work Order
- Invoke stipulated penalties
- Initiate administrative or judicial measures
- Revert to Fund-lead RD/RA.

Before requesting the Regional Administrator to impose these measures, the RPM must thoroughly document the specific problems and the corrective actions attempted.

More information on compliance monitoring can be found in the OSWER memorandum, "Follow-up on Compliance Monitoring " (June 28, 1991).

D. Site Access

The PRP is responsible for obtaining the necessary site access. Securing appropriate site access early in the RD phase will ensure that no unnecessary construction delays will be caused by either the site owner or the adjoining property owners. RPMs should check to see that the site access obtained by the PRP extends for the duration of the RA and the O&M phases of the response activities when appropriate.

Voluntary access should be obtained whenever possible. Techniques for facilitating voluntary site access include personal contacts with adjacent property owners and a good community relations campaign. If the PRP has difficulty in obtaining voluntary site access, the PRP should notify the RPM in writing. Upon receiving this written notice, the RPM should consult with the Office of Regional Counsel (ORC) and the HSCD Regional Coordinator for advice and assistance.

Section 104(e)(5)(b) of CERCLA authorizes the Agency to either seek an Administrative Order to prohibit interference with entry or to go directly to court to obtain compliance with its requirement for entry. EPA may use this authority whenever it can establish that there is a reasonable basis to believe that there may be a release or a threatened release of a hazardous substance and access is necessary to carry out response or determine need for response.

Under section 106(a) of CERCLA, the government also may petition a court to grant an injunction directing immediate compliance with the request for entry. This authority may only be invoked if EPA can show that there is an imminent and substantial endangerment to public health and welfare or the environment because of a release or threatened release from a facility. A case example of a non-settling PRP denying site access to settling PRPs is discussed below. For a more thorough discussion of site access, see OSWER Directive 9829.2 "Entry and Continued Access Under CERCLA" (June 5, 1987).

The issue of site access may cause problems when some, but not all, PRPs agree to implement RD/RA activities under EPA supervision. The case of *U.S. v. Murtha* in Region I illustrates this point.

In *Murtha*, the Agency entered into a settlement agreement with 32 corporations alleged to have generated hazardous waste. The terms of this agreement were embodied in a Consent Decree. It obligated the settling PRPs to implement the remedy chosen by EPA for the site.

Most PRPs involved at the site were parties to the Consent Decree. However, the owner of the facility failed to reach a settlement agreement with EPA. Although the owner did not oppose EPA's right to access, the owner sought to block the settling PRPs and their contractors from entering the site to conduct the response activity because of his contention that he would be liable for their negligence in carrying out the remedy. EPA brought suit against the owner seeking an injunction requiring the owner to permit the settling PRPs to enter the site.

The court decided that the owner of a facility does not have veto power over necessary remedial actions. The court relied upon a broad interpretation of section 106(a) of CERCLA to provide the authority for the settling PRPs to gain site access. The court ruled

that an owner-in-possession of a facility cannot halt the remedial process merely because he did not join in a settlement agreement with EPA. The court issued an injunction granting EPA and the settling PRPs full unrestricted access for the purpose of conducting response activities at the site.

The *Murtha* case demonstrates how the problem of site access can be addressed in situations in which section 104(e) of CERCLA is not sufficient to provide what the Agency needs. Section 106 of CERCLA grants the Agency authority to seek injunctive relief when a non-settling PRP seeks to interfere with a PRP-conducted remedial action that it is undertaking pursuant to a consent decree.

Section V. References

Policy

"National Oil and Hazardous Substance Pollution Contingency Plan," Preamble and Final Rule (40 CFR Part 300, Section 300.435) (March 8, 1990).

Guidance

OSWER Directive 9320.2-3A, "Procedures for Completion and Deletion of Sites from the NPL" (April 1989), as updated December 29, 1989 (OSWER Directive 9320.2-3B).

OSWER Directive 9355.O-4A, "Superfund Remedial Design and Remedial Action Guidance" (June 1986).

OSWER Directive 9355.1-02, "The RPM Primer: An Introductory Guide to the Role and Responsibilities of the Superfund Remedial Project Manager" (September 1987).

OSWER Directive 9355.5-01, "Guidance on EPA Oversight of Remedial Design and Remedial Actions Performed by Potentially Responsible Parties," Interim Final (April 1990).

OSWER Directive 9355.5-02, "Guidance on Expediting Remedial Designs and Remedial Actions" (August 1990).

OSWER Directive 9829.2, "Entry and Continued Access Under CERCLA" (June 5, 1987).

OSWER Directive 9835.4-2A, "Initiation of PRP-Financed Remedial Design in Advance of Consent Decree Entry" (November 1988).

American Society of Civil Engineers' publication entitled *Quality in the Constructed Project: A Guideline for Owners, Designers and Constructors.* Volume 1, Preliminary Edition for Trial Use and Comment, May 1988.

Manuals

OSWER Directive 9355.1-1, *Superfund Federal-Lead Remedial Project Management Handbook* (December 1986).

OSWER Directive 9355.2-1, *Superfund State-Lead Remedial Project Management Handbook* (December 1986).

OSWER Directive 9200.3-01B, *Superfund Comprehensive Accomplishments Plan (SCAP) Manual* (updated annually).

Memorandum

OERR/OWPE, "Follow-up on Compliance Monitoring" (June 28, 1991).

Contacts

Technical Issues and Oversight

Office of Emergency and Remedial Response (OERR), Hazardous Site Control Division (HSCD), Design and Construction Management Branch (DCMB), 703-603-8830.

Access

Office of Enforcement (OE)-Superfund, at 202-260-3050.

Training

"Introduction to Remedial Design Schedule Management," course offered periodically by OERR. For further information call 703-608-2180.

"Management of Construction in the Superfund Program," course offered periodically by OERR. For further information call 303-236-8330.

X. OPERATION AND MAINTENANCE

Chapter X
Operation and Maintenance

Section I. Description of Activity 1

Introduction 1

Section II. Procedures and Interactions 2

A. Settlement Negotiations 2

B. O&M plan 2

C. O&M Oversight 2

Section III. Planning and Reporting Requirements 3

Section IV. Potential Problems/Resolutions 4

A. State Funding 4

B. Transfer of Property 4

C. RA Restart 4

Section V. References 5

Regulation 5

Guidance 5

Contacts 5

Chapter X
Operation and Maintenance

Section I. Description of Activity

Introduction

Operation and Maintenance (O&M) can be defined as those activities required for maintaining the effectiveness of response actions. O&M will generally be required at sites where waste has been left on site. O&M activities may include periodic inspection and maintenance of waste containment measures, long-term air or water monitoring, certain institutional controls, leachate collection and treatment or disposal for source control measures, or any other periodic activity necessary to ensure the continued protection of public health and the environment. O&M activities for non-ground water remedies begin after the remedy has achieved the RA objectives and remediation goals in the ROD or Consent Decree and is determined to be operational and functional. The guidelines and types of activities required for O&M at enforcement sites are identical to those at remedial sites.

Consistent with the NCP, the Fund may be used to finance efforts to restore contaminated ground water or surface water to a level that ensures protection of public health and the environment. The operation of such activities shall be considered part of the RA only for a period of up to 10 years following construction or installation and commencement of operation. Activities required beyond the 10-year period shall be considered O&M. These concepts and limitations do not apply to enforcement-lead cleanups.

Fund resources shall not be used to perform O&M activities. At enforcement sites, O&M may be conducted by the PRP, State, or other government entity (such as a county government). EPA will not conduct or finance O&M activities at Fund-lead or non-Fund-lead sites.

Section II. Procedures and Interactions

A. Settlement Negotiations

It is essential that responsibility for O&M activities and oversight be addressed during Consent Decree negotiations. A description of required O&M activities and projected costs for the site should be available from the FS and/or the ROD. If not, it is the RPM's responsibility to clearly spell out the O&M activities and level of oversight that will be required and the corresponding costs for use in negotiations. The determination of responsibility for O&M and O&M oversight must be made prior to signing the CD and set forth in the document. Every effort should be made to have the PRP perform O&M. If the PRP will not perform the O&M, then the negotiation team should ensure that the State will assume responsibility for these activities.

B. O&M Plan

During the Remedial Design (RD), a detailed O&M plan shall be prepared that clearly defines the O&M activities required for the site and provides a detailed cost estimate. This requirement should be clearly defined in the design statement of work (SOW). The O&M plan may be amended during construction based on unexpected site conditions and the actual characteristics of the implemented remedy. These changes to the O&M plan must be made prior to the approval of the close out report. Exhibit X-1 sets forth the basic elements of an O&M plan. At sites where multiple operable units are implemented, it is possible that each operable unit will require a distinct O&M activity. In this case, the O&M activities for each operable unit will commence following completion of the RA report for that activity and EPA's acceptance of the work and will not rely on an approved close out report to signify the start of O&M.

C. O&M Oversight

Responsibility for oversight of O&M activities is set forth in the settlement document. In cases where the State is a signatory to the CD, the State may agree to assume responsibility for oversight. In situations where the State is a PRP, EPA may have O&M oversight responsibilities. The oversight agency must monitor the O&M activity for compliance with the terms of the settlement document and the O&M plan.

Exhibit X-1 (1)

Basic Elements of an Operation and Maintenance Plan

A. Description of Normal Operation and Maintenance

1. Description of tasks for operation
2. Description of tasks for maintenance
3. Description of prescribed treatment of operating conditions
4. Schedule showing frequency of each O&M task

B. Description of Potential Operation Problems

1. Description and analysis of potential operating problems
2. Sources of information regarding problems
3. Common remedies

C. Description of Routine Monitoring and Laboratory Testing

1. Description of monitoring tasks
2. Description of required laboratory tests and their interpretation
3. Required QA/QC
4. Schedule of monitoring frequency and when, if so provided, to discontinue

D. Description of Alternate O&M

1. Should systems fail, alternate procedures to prevent undue hazard
2. Analysis of vulnerability and additional resource requirements should a failure occur

E Safety Plan

1. Description of precautions, necessary equipment, etc., for site personnel
2. Safety tasks required in event of systems failure (may be linked to site safety plan developed during remedial response)

F. Description of Equipment

1. Equipment necessary for plan
2. Installation of monitoring components
3. Maintenance of site equipment
4. Replacement schedule for equipment and installed components

G. Annual Budget (to be prepared by PRP or contractor performing O&M)

1. Cost of personnel
2. Costs of preventive and corrective maintenance
3. Costs of equipment, supplies, etc.

Exhibit X-1 (2)

4. Costs of any contractual obligation (e.g., lab expenses)
5. Costs of operation (e.g., utilities, energy costs)

H. Records and Reporting Mechanisms Required

1. Daily operating logs
2. Laboratory records
3. Records for operating costs
4. Mechanism for reporting emergencies
5. Personnel and maintenance records
6. Monthly/annual reports to State agencies

Section III. Planning and Reporting Requirements

O&M means the activities required to maintain the effectiveness or the integrity of the remedy, and, in the case of measures to restore ground or surface waters, continued operation of such measures beyond a period of ten years or when the remediation levels are achieved, whichever is earlier. Except for ground or surface water actions covered under section 300.435(f)(3) of the NCP, O&M measures are initiated after the remedy has achieved the RA objectives and remediation goals in the ROD or CD, and is determined to be operational and functional. The State or PRP is totally responsible for these activities for the time period specified in the ROD or other appropriate documents.

The start of O&M is defined as the date upon which the designated Regional official signs a letter accepting the RA Report. This report documents that work has been performed within desired specifications and that the remedy is functioning properly and is performing as designed. The completion (where appropriate) of O&M is defined as the date specified in a CA, Superfund State Contract (SSC), or CD.

O&M is planned site specifically in WasteLAN and is used for resource allocation purposes only. Funds for oversight of O&M are contained in the RA Advice Of Allowance (AOA). O&M is not tracked by SCAP/STARS.

Planning and reporting requirements are governed by the terms set forth in the settlement document. Generally, cost documentation records must be maintained for up to 10 years following the final claim in cases where preauthorization is part of the settlement. Consistent with Fund-financed actions, EPA will not pay O&M costs. In some situations, "shake-down" costs for a period of one year are eligible for reimbursement in preauthorization settlements. Shake-down costs are those costs associated with ascertaining that the remedy is operational and functional (i.e., operating as designed).

Section IV. Potential Problems/Resolutions

A. State Funding

RPMs should monitor the settlement negotiations closely to ensure that, in instances where the State assumes O&M responsibility, the State can assure funding for the duration of the O&M activities. Since State funding for such activities is usually appropriated yearly, the State's assurance may require special action by the State legislature to guarantee funding. Some State statutes prohibit the use of public funds to maintain private property. In these cases, the PRP usually must assume responsibility for O&M, establish a trust fund or make other arrangements to provide the State the money for O&M. The Superfund branch of the Waste Management Division and Office of Regional Counsel in Region IV have experience handling the State funding issues discussed in this paragraph.

B. Transfer of Property

RPMs, in conjunction with Regional counsel, must ensure that the settlement contains provisions in the event that the property on which the site is located is sold. The settlement decision must contain assurances for O&M conduct and financing in the event the property is sold. Restrictions on the use of such property may be accomplished by means of institutional controls. Issues related to property transfer and O&M assurances must be addressed on a site-specific basis by the Office of Regional Counsel.

C. RA Restart

In certain instances, it may be difficult to determine when site activity falls under the scope of routine O&M and when site activity actually represents the restart of removal or remedial activity. For example, repairing a clay cap may be a routine measure required to maintain the integrity of the remedy, or it may be a removal action required to abate an immediate threat to human health, welfare, or the environment.

To prevent confusion between O&M and the restart of remedial activity, the settlement document should contain a detailed description of what constitutes a failed remedy. The settlement document also should contain very specific criteria for determining whether an activity is part of O&M or actual RA. Resolution of this issue may be accomplished through careful examination of the provisions of the settlement and site conditions by the RPM, Regional counsel, the PRPs, and State technical personnel.

Section V. References

Regulation

40 CFR part 300, "National Oil and Hazardous Substances Pollution Contingency Plan" (1990).

Guidance

OSWER Directive 9355.0-4A, "Superfund Remedial Design and Remedial Action Guidance" (June 1986).

OSWER Directive 9355.0-26, "Additional Clarification on Funding Ground or Surface Water Restoration Actions" (February 1989).

OSWER Directive 9320.2-03A-C, "Procedures for Completion and Deletion of National Priorities List Sites" (February 1992).

Contacts

Office of Emergency and Remedial Response (OERR), Hazardous Site Control Division (HSCD), Design & Construction Management Branch, 703-603-8830.

Chapter XI
Site Completion/Deletion

This chapter is reserved
until completion/deletion procedures
are revised.

Chapter XII
Cost Recovery

Section I. Description of Activity 1

Introduction 1
Cost Recovery for Conventional Removals 1
Cost Recovery for Sites in the Remedial Process 2
Cost Recovery in Context of RD/RA Negotiations 2
Case Referral 3
Recovery of Oversight Costs 3

Section II. Procedures and Interactions 5

A. PRP Liability 5
Elements of Liability 5
Standard of Liability 6
Scope of Liability — Joint and Several 6
Defenses 6
B. PRP Searches 7
C. Cost Recovery Strategy 7
Prioritization of Cases 7
Timing 8
Decision Not To Pursue Cost Recovery 9
Close-out Memorandum 9
D. Notification and Demand Requirements 10
Special Notice Letters 10
Demand Letters 10
Types of Costs and Pre-Judgment Interest 10
E. Documentation Requirements 11
Types of Expenditures 11
EPA Indirect Costs 12
Evidence 12
Cost Summaries 13
F. Documentation Procedures 14
G. Judicial Cost Recovery 15
Referral Package 15
Litigation Support 16
Litigation Management Plan 16
H. *De Minimis* Settlements 16
Necessary Information 17
Release From Liability and Reopeners 17

I. Administrative Settlements 17
J. Enforcing Settlements 18
K. Arbitration 18
L. Mixed Funding 18
M. Bankruptcy Actions 19
Statutory Background 19
Proof of Claim 19
Environmental Claims as Priorities 20

Section III. Planning and Reporting Requirements 21

A. Planning 21
B. Budgeting 21
C. Reporting Requirements 21

Section IV. References 24

Regulation 24
Policies 24
Guidance 24
Manuals 25
Training 25
Contacts 25

Appendix

Site Litigation Management Plan A1

Chapter XII
Cost Recovery

Section I. Description of Activity

Introduction

When the Agency uses Fund monies for a response action at a site where there are financially viable PRPs, it is authorized to take an enforcement action against those PRPs to recover its costs. This action, under section 107 of CERCLA, is known as a cost recovery action. Cost recovery can be pursued for the costs of a conventional removal, Remedial Investigation/Feasibility Study (RI/FS), Remedial Design (RD) and Remedial Action (RA), including EPA's costs of overseeing PRP responses. The enforcement actions taken may include issuance of demand letters, negotiations with PRPs, arbitration, alternative dispute resolution, administrative settlement, judicial settlement, and litigation.

This chapter provides RPMs/OSCs with an overview of the central components of cost recovery actions. The information is organized to follow the chronology of tasks that an RPM/OSC manages in a cost recovery action.

There are two major types of cost recovery actions:

- Cost Recovery for Removals
- Cost Recovery for Remedials.

As part of each type of cost recovery action, EPA may recover past and future response and oversight costs, indirect costs, and interest. Cost recovery cases are not limited to one type of cost, but include the direct and indirect costs related to remedial and removal actions plus interest on these costs. Indirect costs include things such as employee overhead, rent, electricity, etc. In such cases, documents relevant to all aspects of the case must be compiled. Each of these types of cost recovery actions is discussed briefly below and Exhibit XII-1 presents a graphic description of the process of each type of action.

EPA must file cost recovery actions within certain timeframes specified in the statute. These statute of limitations (SOL) dates are discussed later in this chapter.

Cost Recovery for Conventional Removals

During the course of the conventional Fund-lead removal action, the OSC is responsible for compiling the Administrative Record with assistance from Regional Counsel and Administrative Record Coordinators, obtaining information on the identities of PRPs, and documenting the removal work undertaken and the costs incurred. As the removal is completed, the OSC is responsible for completing the PRP search information. After the removal is completed and the OSC files the final report for the action, the Agency must decide whether to pursue cost recovery for its expenses. In selecting which sites to pursue, the Agency places a higher priority on sites at which more than $200,000 was spent on the removal action. If the Agency decides to proceed with cost recovery, three parallel activities are conducted: (1) ensure that the liability information collected in the PRP search meets evidentiary standards, (2) document the costs of the removal action, and (3) review the compilation of the Administrative Record.

Once the Agency's costs have been documented and the PRPs are reasonably well identified, EPA sends demand letters to the PRPs. The demand letters notify the PRPs of their liability for the Agency's cleanup costs and demand payment of the full costs of cleanup. In a limited number of situations, the PRPs will respond to the demand letters by reimbursing the Agency immediately for its costs. Follow up phone calls, after demand letters are sent, may serve as an effective means to explain both what the demand letter means and

the process, particularly to PRPs who are unfamiliar with the Superfund process. In most situations, the PRPs will seek to negotiate with the Agency over the extent of their liability or the costs incurred. If these negotiations result in a settlement, EPA and the PRPs may enter into an Administrative Order on Consent that requires the PRPs to reimburse the Agency for its costs. If the total response costs at the site exceed $500,000 (excluding interest), the Department of Justice (DOJ) must concur on the terms of the settlement.

If the PRPs refuse to reimburse EPA for these costs, the Region will decide whether to refer the case to DOJ to recover the money. When deciding whether to initiate a judicial action, the Region reviews the case's priority and all available evidence and evaluates the likely success of cost recovery efforts for that particular site. If the Region decides to initiate the suit, the case will be referred to DOJ. In general, cost recovery cases involving post-SARA removals (except those with section 104(c)(1)(C) waivers) must be filed within a statute of limitations date of three years from completion of the removal.

Cost Recovery for Sites in the Remedial Process

Cost recovery activities at sites in the remedial process are a function of past expenditures for removals, RI/FS or RD, the outcome of RD/RA negotiations, and timing concerns related to possible statute of limitations dates. When EPA incurs cleanup costs at a remedial site, there are five contexts in which it may recover its costs. First, if the Agency funds a removal or the RI/FS and the PRPs agree to perform the RD/RA, the Agency generally recovers the costs of the removal and RI/FS from the PRPs as a part of the RD/RA settlement. Second, if the Agency funds a removal or the RI/FS and one group of PRPs agrees to perform the RD/RA but there is another group of viable PRPs that does not settle for the RD/RA, the Agency may sue the non-settlors separately for all or part of its removal and/or RI/FS costs. Third, if the Agency funds the RD/RA because there was no settlement, it may seek to recover the costs of the entire response in a cost recovery action, which should be developed at the commencement of remedial construction. Fourth, where the time between the completion of a removal, RI/FS or RD and the initiation of on-site construction is likely to exceed three years, EPA will file for cost recovery of the removal and/or RI/FS and/or RD costs and later amend the suit to add the costs of the RA. Finally, where there are multiple remedial operable units, EPA will pursue a cost recovery action at the first operable unit to recover its costs and to obtain a declaratory judgment on liability for its costs at the subsequent operable units. EPA then will bring subsequent actions for its costs at the other operable units as they are incurred. The program operates on the assumption that there may be different statute of limitations dates for different operable unit activities.

Cost Recovery in Context of RD/RA Negotiations

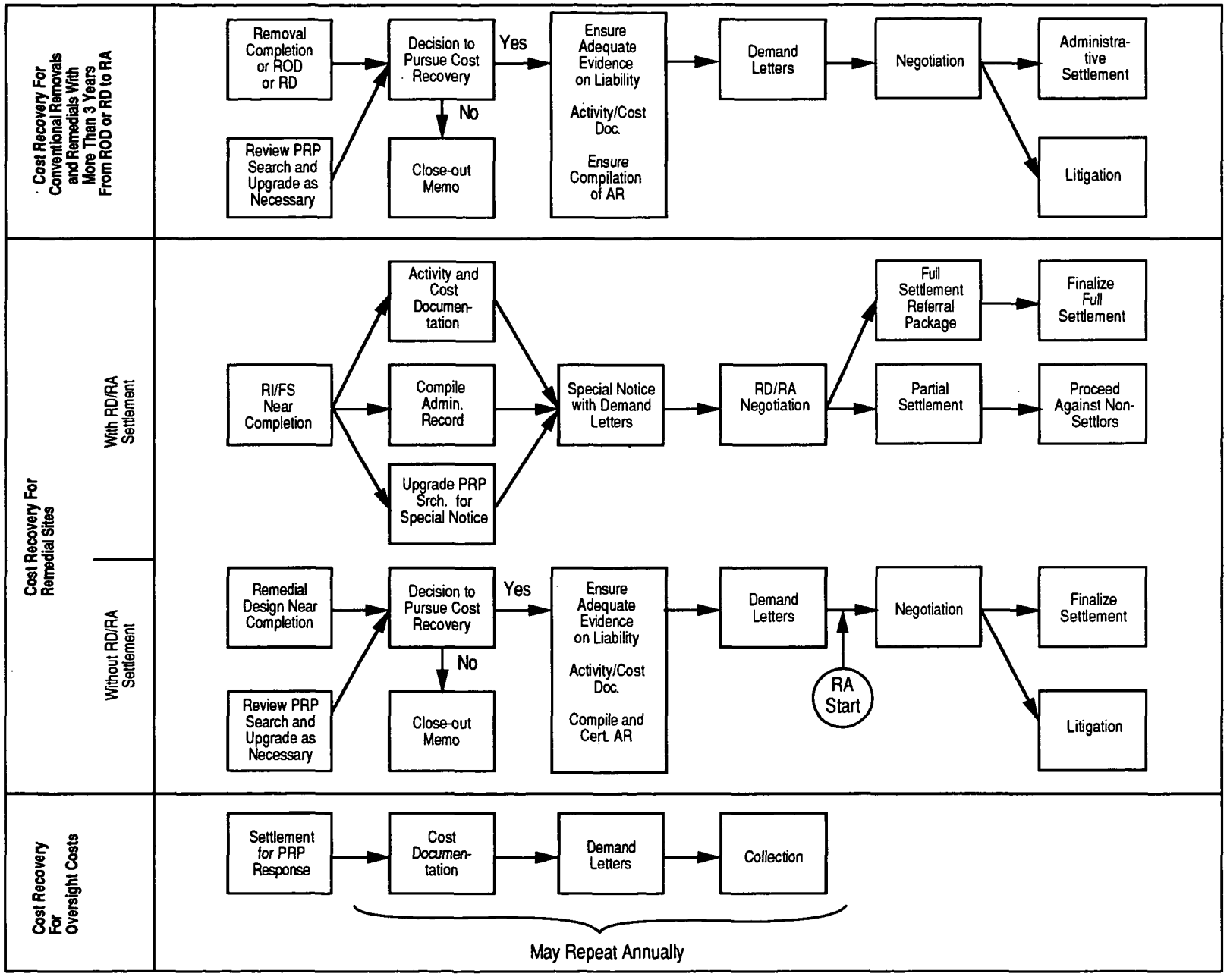
In general, the process for recovering the costs of activities during the remedial response is similar to that used to recover removal costs. However, because the Agency may be seeking either the costs of a removal or the RI/FS, the RD/RA, or several responses, the timing of these activities may vary. When the Agency negotiates with the PRPs to perform the RD/RA at the site, the RI/FS costs will be pursued as part of the overall negotiations. If, however, the Agency is pursuing remedial response costs separately from a settlement for RD/RA, separate cost documentation and demand letters will be required. Refer to Chapter VII, RD/RA Negotiations for a more-detailed discussion of the process of RD/RA negotiations.

The RPM, in conjunction with the ORC and the civil investigator, is responsible for five major pre-litigation activities involved in remedial cost recovery that can be performed concurrently and usually occur near the time that the ROD is signed. These activities are:

- Ensure that the PRP-liability information meets evidentiary standards
- Complete and certify the Administrative Record

Exhibit XII-1

Cost Recovery Process



- Document the work performed and the costs of the removal, remedial, and oversight activities undertaken
- Send demand letters to the PRPs, either as part of special notice letters or separately
- Negotiate with the PRPs about their liability and the extent of EPA's costs.

If this process is successful and the PRPs agree to reimburse the Agency for its costs, the settlement usually will result in a Consent Decree.

Case Referral

If the PRPs do not agree either to perform the RD/RA or reimburse the Agency's costs, EPA will develop a case to sue some or all of the PRPs depending on their liability and financial viability, the universe of PRPs, and their contributions. This case, developed at the time the remedial action starts, will seek to recover EPA's past and future costs, plus interest. The first step in this process is to prepare a referral package. The case team prepares the case for referral to DOJ. The team is charged with assembling all pertinent facts and documents concerning the response decision and underlying record; PRP liability, defenses and viability; and response activities and costs into a litigation referral package. Assembling cost documentation will require the case team to coordinate its efforts with Regional financial personnel, the Financial Management Division (FMD), and OWPE. Another integral part of the litigation referral package is the work performed documentation. DOJ places particular emphasis on its inclusion in the package, because it ensures that the court knows what work was performed at the site. Work performed documentation includes monthly contractor progress reports, copies of deliverables received, action memos, and RODs. The final product of the case team's work is a referral package.

The completed direct cost referral package is sent to DOJ for litigation. As DOJ develops the case, members of the case team will be called upon to perform litigation support activities. This may involve support activities ranging from consultation with the case attorneys on technical aspects of response authorization, to time consuming involvement in complex litigation, to testimony in court. The RPM/OSC also must budget and manage litigation support contractors, and can expect to be called upon to provide his/her technical expertise to help prosecute the cost recovery case.

For more information on litigation support, contact DOJ's Litigation Support Group at 202-616-3309.

Recovery of Oversight Costs

EPA may recover its costs when the PRPs perform a removal or remedial action and the Agency incurs costs in overseeing that action. If the response action is an RI/FS, section 104 of CERCLA requires that the PRPs reimburse the Agency for these costs. In other contexts, this reimbursement of oversight costs is required by EPA policy. The agreement to pay EPA's oversight costs generally will be a part of the settlement document for the PRP's response action. That document should specify what the Agency must give the PRPs to document its costs, such as a standard report from the Integrated Financial Management System, and how often the PRPs will reimburse the Agency. PRPs often reimburse the Agency on a semi-annual or annual basis. In situations in which the consent order for an RI/FS or consent decree for RD/RA specifies the cost categories and documentation to be provided by EPA as part of its billings, the documentation process should foster fewer disputes than in instances in which the settlement document is less specific. RPM/OSCs should provide a copy of the settlement document to financial management staff in order for accounts receivable to set up an account for the PRP and, later, to bill them.

References

Proposed Cost Recovery Rule, 57 Federal Register (152) (August 6, 1992).

OSWER Directive 9832.13, "The Superfund Cost Recovery Strategy" (July 1988).

OSWER Directive 9832.11, "Guidance on Documenting Decisions Not to Take Cost Recovery Actions" (June 1988).

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs for CERCLA Section 107 Actions" (January 1985).

OSWER Directive 9832.1, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980" (August 1983).

OSWER Directive 9835.11-1, "Model Litigation Report for CERCLA sections 106 and 107 and RCRA section 7003 Actions" (June 21, 1989).

Section II. Procedures and Interactions

CERCLA establishes the liability of responsible parties for the costs the government incurred when responding to a release of hazardous substances. There are three key statutory provisions:

- Section 107 of CERCLA authorizes the Agency to seek cost recovery and pre-judgment interest through judicial action
- Section 122 of CERCLA establishes conditions on settlements
- Section 122(h) of CERCLA authorizes the Agency to enter into administrative settlements with PRPs, but requires DOJ approval when the total response costs at the site exceed $500,000. The authority to settle cost recovery cases administratively was delegated to the Regional Administrators by Delegation 14-14-D (Sept. 21, 1987). Section 122(h)(3) of CERCLA provides the Agency with the necessary authority to enforce these settlements.

The Agency's cost recovery strategy emphasizes negotiating administrative settlements whenever possible and litigating only when necessary. The Regions have been delegated the authority to enter into administrative settlements.

This section of the chapter discusses the following subjects that are relevant to the cost recovery process:

A. PRP Liability
B. PRP Searches
C. Cost Recovery Strategy
D. Notification and Demand Requirements
E. Documentation Requirements
F. Documentation Procedures
G. Judicial Cost Recovery Actions
H. *De minimis* Settlements
I. Administrative Settlements
J. Enforcing Settlements
K. Arbitration
L. Mixed Funding
M. Bankruptcy

Each is presented below.

A. PRP Liability

This section discusses the nature of PRP liability for EPA's response costs. It describes the elements of a cost recovery case, the standard of liability that applies, the scope of the PRP's liability, and the categories of PRPs that are liable.

Elements of Liability

Under section 107(a) of CERCLA, the Federal government can file suit in Federal district court to obtain reimbursement for response costs. To prove its claim for cost recovery, the government must establish that:

- The site is a facility
- There was either an actual or threatened release of a hazardous substance from the facility
- EPA incurred costs as a result of this actual or threatened release

- The defendant falls within one of the four categories of PRPs. These are:
  - Current owners or operators of facilities or vessels
  - Owners or operators of a facility at the time hazardous substances were disposed of
  - Persons who arranged for treatment or disposal of hazardous substances that went to the site (e.g., generators)
  - Persons who accepted hazardous substances for transport to disposal or treatment sites of their selection.

Proof of liability may be more complex at old sites with limited documentation. For example, the PRP search includes obtaining evidence that the generators' materials were sent to the site, and contained hazardous substances. Further information on elements of liability is contained in Chapter IV, PRP Search, Notification and Information Exchange.

Standard of Liability

Section 107 of CERCLA imposes strict liability on those who are in one of the four classes of parties described in section 107(a), rather than a negligence standard. This means that PRPs are liable even if: the problems caused by the hazardous substance release were unforeseeable; the PRP acted in good faith; or state-of-the-art waste management practices were used at the time the materials were disposed. One of the most significant aspects of CERCLA is that the PRPs are liable for both their past and present waste management practices.

Scope of Liability — Joint and Several

The courts have interpreted CERCLA to impose joint and several liability on PRPs where two or more PRPs cause a harm that is indivisible, such as in the case of commingled wastes. Under joint and several liability, each PRP can be held individually liable for all of the costs of cleanup of a site, regardless of the amount of waste that the PRP sent to the site. Under this legal doctrine, the Agency may choose which PRPs to sue. The Agency does not have to sue all PRPs involved at a particular site. If EPA's suit against the named PRPs is successful, those PRPs are liable for the *entire* cost of all response activities.

When the Agency recovers the cost of the response action from the named PRPs, those PRPs may seek contribution from other PRPs. When PRPs bring a contribution action, they seek to recover a share of the judgment from other persons who were involved at the site, but were not sued by EPA. The Agency should not be involved in any contribution action brought by the named PRPs.

Defenses

Section 107(b) of CERCLA enumerates defenses that may be asserted by PRPs in any cost recovery action. If RPMs/OSCs have any knowledge of a defense that a PRP may raise, they should inform the Office of Regional Counsel (ORC).

Consistent with CERCLA's strict liability standard, three defenses are available that will keep a PRP from being held liable for the Agency's costs. The defendant has a defense if he/she establishes that the release was caused solely by:

- An act of God as defined in section 101(1) of CERCLA
- An act of war, or
- A third party other than one in a contractual relationship with the defendant, if the defendant establishes that he exercised due care and took precautions against foreseeable acts and omissions of such third party. A subset of this defense is the innocent landowner (purchaser) defense in section 101(35) of CERCLA.

The Agency's right to recover costs is limited by the requirement that the response action was not inconsistent with the national contingency plan (NCP). The PRPs bear the burden of proving that the Agency's response action was inconsistent with the NCP.

B. PRP Searches

The purposes of a PRP search include collection of evidence of the PRPs' liability and financial viability. In cases in which the PRPs fail to conduct the response activity and do not agree to reimburse the government's costs, PRP searches provide much of the evidence of a PRP's liability that will be used in future litigation.

The PRP search includes the collection and analysis of information about each PRP's connection to the site. The information collection includes title searches, a review of existing documentation such as waste manifests, responses to CERCLA section 104(e) information requests, interviews with knowledgeable parties, and analyses of waste-in information. A PRP search report is developed from this information, which describes in detail each PRP's involvement with the site and the evidence that proves that involvement.

The PRP search is a fundamental component of a response action. The exigencies of the particular site and the value of the response action dictate the scope of the initial PRP search. The search should be initiated as early as possible to develop a site-specific enforcement strategy. The PRP search generally continues during the response activity at a site. Supplemental work may be necessary for cost recovery.

PRP searches are discussed in detail in Chapter IV, PRP Search, Notification, and Information Exchange.

References

OSWER Directive 9834.6, *Potentially Responsible Party Search Manual* (August 1987).

OSWER Directive 9834.3-2a, "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 29, 1989).

C. Cost Recovery Strategy

EPA's cost recovery strategy sets forth the Agency's priorities for cost recovery and the steps that each response action must go through toward settlement, litigation, or site close-out.

Prioritization of Cases

Once a response activity has been identified as a candidate for judicial action, Regional management prioritizes the case to ensure that Regional resources are efficiently used to meet the objectives of the cost recovery program, which are:

- Maximize return of revenue to the Trust Fund
- Initiate enforcement activity within strategic time frames, but no later than the date defined by the applicable statute of limitation
- Encourage PRP settlement
- Use administrative authority and dispute resolution procedures.

OSWER has developed national case selection criteria for sites with financially viable PRPs based on the amount of money expended at the site and the cost recovery potential. Based on these criteria, the priorities for initiating cases are:

- NPL and non-NPL sites at which EPA has completed a removal action (including expanded removal actions, RI/FSs, and initial remedial measures), the response costs are $200,000 or greater, and the statute of limitations deadline is approaching
- Cases in which Fund-financed remedial design and action have been initiated. A remedial case referral to DOJ should be scheduled for every site in this category
- Sites at which there has been a partial settlement providing the Agency with less than full relief and there are viable non-settlors
- NPL or non-NPL sites at which EPA has completed a removal action and the costs of response are $200,000 or greater. Depending upon resources, referrals to DOJ on these sites should occur no later than twelve months after the completion of the removal action

- Sites at which total response costs are less than $200,000.

In addition to these five priorities, the Agency will pursue cost recovery against PRPs that are undergoing bankruptcy proceedings in limited circumstances. Bankruptcy referrals pose a difficult problem for four reasons: lack of PRP unencumbered resources, time constraints, EPA resource limitations, and lack of information. RPMs should work closely with the Regional attorneys and OE's Special Litigation Branch to resolve any bankruptcy issues.

Timing

RPMs/OSCs must be aware of statutory time limits for filing cost recovery actions. Under section 113(g) of CERCLA, cost recovery cases must be filed within three to six years, depending on the type of response. If a suit is filed after the specified time, the Agency's case could be dismissed.

CERCLA 113(g)(2) states that a cost recovery action must be initiated within:

- Three years after completion of a removal action or six years after the signature date of the removal waiver
- Six years after initiation of physical on-site construction of the remedial action.

For purposes of defining the cost recovery statute of limitations, removal actions include traditional removals, RI/FSs, and RDs. Remedial action is defined as physical on-site construction. The statute of limitations for a removal action (as defined above), is three years from the completion of the last removal action. For example, if a removal, RI/FS, and RD are conducted, the SOL would be three years from the completion date of the RD.

CERCLA 113(g)(2) indicates that if the remedial action is initiated within three years of the completion of the removal action, then removal costs may be pursued as part of the cost recovery for remedial actions. That is, the statute of limitations for the removal action is extended to six years from the initiation of physical on-site construction of the remedial action.

CERCLA 113(g)(2) further indicates that where there is a declaratory judgement on liability for response costs, the SOL for subsequent cost recovery actions is three years after the completion date of all response activity.

Based upon experience, EPA prefers to focus its energies on completing conventional removals before turning to cost recovery. At sites in the remedial pipeline, EPA prefers to have selected the remedy (i.e., the Agency knows what should be done at the site) and, if the RA is funded, to have started construction before engaging in litigation. In selecting candidates for cost recovery, a conventional removal (not including an RI/FS) may be ready for referral when it is completed. Remedial sites are ready for referral when on-site construction of the RA is initiated. Removal, RI/FS, and RD response costs may be pursued as part of RA cost recovery, unless the RA will not begin within three years of the completion of the last response action. If the RA does not begin within three years, the Removal, RI/FS, or RD costs should be sought separately.

Cost recovery actions for conventional removals should be referred to DOJ as soon as possible after the action has been completed, ideally not later than one year after the completion date. Cost recovery actions for remedial responses should be developed for filing at the time of initiation of physical on-site construction of the RA. RPMs/OSCs should anticipate that it takes at least two quarters to prepare a referral package.

The proposed cost recovery rule would change the definition of certain events that affect the SOL as follows:

(a) The term "completion of the removal action" for sites where remedial actions are taken means the date of the final remedial design prepared in connection with the final remedial action at the site

(b) The term "physical on-site construction" for remedial actions is limited to actions that occur after completion of the remedial design and issuance of the Notice to Proceed on which remedial action personnel are authorized to begin remedial construction activities

(c) The term "all response action" in section 113(g)(2)(B) of CERCLA includes, but is not limited to, all response actions that occur before the Superfund Site Close-Out Report is signed by EPA's Regional Administrator.

The Proposed Cost Recovery rule was published in the Federal Register in August 1992. As of this writing, the Agency is responding to comments received on the rule during the public comment period.

RPMs/OSCs also must be aware that special circumstances, such as bankruptcy, impending fraudulent transfer of assets, or the voluntary dissolution of the business of a PRP may require that a cost recovery case be filed on an expedited basis in order to ensure that assets of the PRPs are available to pay for the cleanup.

References

OSWER Directive 9832.3-1A, "Cost Recovery Actions/Statute of Limitations" (June 1987).

Proposed Cost Recovery Rule, 57 Federal Register (152) (August 6, 1992).

Decision Not To Pursue Cost Recovery

The Region may decide not to pursue cost recovery at a particular site after analyzing the site's cost recovery potential. Such decisions must be documented in a close-out memorandum and entered into CERCLIS. A decision not to pursue further cost recovery also can be addressed in the 10-point settlement analysis. Both of these documents provide the Agency with a means of tracking the sites that have no further potential for cost recovery and removing them from projections of future Fund revenues.

Information gathered during the PRP search, removal action, and the RI/FS forms the basis of the decision not to pursue cost recovery. The possible reasons for a Region to decide not to pursue cost recovery include:

- No PRPs were identified for the site
- PRPs identified were not financially viable
- Available evidence does not support one or more of the essential elements of a prospective case, and there is no reason to believe that such evidence can be discovered in the future
- Very small expenditures were incurred for the site and there are inadequate resources to litigate.

Close-out Memorandum

The close-out memorandum will be written by the enforcement or removal program staff person assigned to the case. The close-out memorandum must be signed by the Regional program division director. Where legal issues are involved, the memorandum should be written in consultation with an ORC attorney. The memorandum and its supporting documents are considered confidential; therefore, the close-out memorandum should not be placed in the Administrative Record. Chapter XV, Records Management, discusses how to handle confidential files.

References

OSWER Directive 9832.12, "Guidance on Cost Recovery Strategy" (July 1988).

OSWER Directive 9832.11 "Guidance on Documenting Decisions Not to Take Cost Recovery Actions" (June 1988).

D. Notification and Demand Requirements

Under CERCLA and current Agency policy, there are several different provisions for notifying PRPs of their potential liability for clean-up costs. For cost recovery purposes, the most important requirements are the issuance of letters with demands for reimbursement, either notice letters or demand letters.

Special Notice Letters

Special Notice Letters (SNLs) are issued prior to non-time-critical removals, RI/FSs and RD/RAs pursuant to section 122(e)(1) of CERCLA when it is determined that a period of formal negotiations would facilitate an agreement with the PRPs. Although a primary purpose of these letters is to facilitate negotiations for prospective work, the letters also serve as a vehicle to put past costs into the negotiations and trigger pre-judgment interest. Planning for non-time-critical removals, RI/FS, and RD/RA should include documentation of past costs. Special notice letters should include a demand for past as well as prospective costs.

References

OSWER Directive 9843.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

Demand Letters

Prior to filing a cost recovery lawsuit, as a matter of policy, EPA sends a written demand letter to the PRPs. A demand letter is a request that the PRPs reimburse the Fund for a specified amount, which is generally associated with one or more response activities. Also, the written demand letter triggers the accrual of pre-judgment interest on the response costs sought. The authority to issue demand letters has been delegated to the Regional Administrators. RPMs should consult with the Regional management to determine who has redelegated responsibility for preparing and issuing demand letters in the Region.

Demand letters should be sent to each PRP for each separate response activity, such as removals, RI/FSs, RDs, and RAs. The optimum time for issuing demand letters varies, depending on the nature of the response. For removal actions, the OSC should issue the letter soon after the removal activities are completed and all necessary documents are compiled. For each operable unit of remedial actions, a letter should be issued for the RI/FS costs, RD costs and major phases of RA costs at the following times: in connection with the ROD (in special notice); soon after the RD is completed; and soon after major phases of the RA are completed.

References

OSWER Directive 9832.18, "Written Demand for Recovery of Costs Incurred Under CERCLA" (March, 1991)

Types of Costs and Pre-Judgment Interest

In accordance with section 107 of CERCLA, the demand letter should seek to recover interest from the date that a payment of specified past costs are demanded in writing, or for future costs, the date that an expenditure is actually incurred. The demand letter should include a request for all costs, including:

- Contractor costs
- EPA direct costs, including costs such as EPA staff salaries, travel and other miscellaneous site-specific expenses
- Costs incurred under Interagency Agreements, including Corps of Engineers, DOJ, ATSDR, and Coast Guard
- Costs incurred under Cooperative Agreements, including State agreements
- Indirect costs incurred by EPA for the response actions
- Pre-judgment interest
- Future costs.

References

Comptroller Policy Announcement 87-17, "Interest Rates for Debts Recoverable Under the Superfund Amendments and Reauthorization Act of 1986" (September 1987).

Proposed Cost Recovery Rule, 57 Federal Register (152), (August 6, 1992).

E. Documentation Requirements

The Region's site files will contain several types of documents that can be used to support a cost recovery action, including enforcement information, such as data on PRP liability; the administrative record, relating to the selection of the response action; and activity and cost documentation.

This section discusses the documents relating to the third category.

When the Region begins its cost recovery action, a Regional member of the case development team may be designated as the Cost Recovery Coordinator in Regions that do not already have designated Cost Recovery Coordinators. The person preparing the referral has primary responsibility for collecting and organizing cost recovery documentation.

References

OSWER Directive 9832, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" (August 1983).

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs in CERCLA Section 107 Actions" (January 1985).

FMD, "State Superfund Financial Management and Recordkeeping Guidance" (August 1987).

OARM, "Superfund Financial Management and Recordkeeping Guidance for Federal Agencies" (January 1989).

OWPE/FMD, "Delegation of Letter Report Responsibilities and New Guidance" (June 1991).

Types of Expenditures

The government's costs of the response action can be broadly divided between direct and indirect expenditures. Direct expenditures are those that are attributable solely to the site in question. These include contractor, EPA, and other Federal and State agency staff time, travel and equipment directly associated with the site. Indirect costs are costs incurred which support more than one response action (e.g., office space, electricity, and supplies for contract and EPA personnel who work on the response actions), and so must be apportioned among all the response actions that they support. Under general accounting principles, total cost is the sum of "direct" and "indirect" costs. Both types of costs are recoverable under CERCLA.

The types of expenditures for response activities that are recoverable include:

- EPA site-specific payroll costs
- EPA site-specific travel expenditures
- Interagency Agreement expenditures
- Technical Assistance Grants (TAGs)
- Cooperative Agreement expenditures
- Costs incurred under EPA contracts with private contractors
- Other site-specific expenditures.

EPA Indirect Costs

EPA's indirect costs are included in the response action cost summaries as a separate cost item. Indirect costs for a site represent the portion of EPA's overhead and general and administrative costs which were expended in support of the response action at the site in question. The Agency uses a formula for recovering costs which has been developed by a major national accounting firm, and an indirect rate is calculated for each Region for each fiscal year. Indirect rates are calculated by determining the total direct hours charged to the site during each fiscal year by Regional program staff and multiplying this number by the indirect rate for the fiscal year. The proposed cost recovery rule would change this methodology to a full cost accounting approach in which EPA would pursue all of its direct costs.

References

Office of the Comptroller, OARM, *Superfund Indirect Cost Manual for Cost Recovery Purposes* (1986).

Proposed Cost Recovery Rule, 57 Federal Register (152), (August 6, 1992).

Evidence

The costs of response activities recoverable under section 107 of CERCLA are reflected in a variety of financial records and documents. There are two general types of information that will be available to prove the Agency's costs. Activity evidence includes documents proving that the response activities were actually undertaken (i.e., authorized and completed). Cost evidence is made up of documents proving that costs were actually incurred and paid for by the government.

RPMs/OSCs often will provide from their files:

- Authorization for the scope and performance of work by the agency or the contractor at the site, including documents such as Action Memoranda, Work Plans, Work Assignments, Technical Directive Documents (TDD)
- Authorization for change in the scope or cost of work done at the site, including documents such as Work Plan revisions and contract modifications
- Evidence of contractor performance of work at the site and documentation of completion of that work, including documents such as the Form 1955s for a removal, monthly technical and financial status reports for REM contracts, TDD or work assignment completion forms.

In managing this information from the Agency's site files, RPMs should ensure that Financial Management offices have provided the following types of documents:

- Timesheets/timecards and payroll expenses
- Travel vouchers and receipts
- Treasury schedules

- Contracts/Letters of Agreement
- Purchase orders and receipts
- Paid processed invoices and vouchers.

Properly documented costs generally lead to admissible evidence. This type of documentation lays the foundation for successful settlement negotiations and litigation. Therefore, RPMs/OSCs should work in close cooperation with Regional counsel to produce admissible evidence documenting the Agency's costs.

Cost Summaries

To prevent the courts from being burdened with unwieldy documentation, Rule 1006 of the Federal Rules of Evidence allows voluminous documentation to be condensed into summaries. These summaries must accurately characterize the underlying documents. In order to introduce a summary in court under Rule 1006, EPA must provide all of the underlying documents to the other parties at a reasonable time and may further be required to produce the documents in court. Confidential Business Information (CBI) and Privacy Act Information must be redacted (edited to delete confidential information).

The RPM and OSC should play an important role in the process of cost recovery by ensuring that documentation of the activities is provided, and that the cost summaries are complete and accurate. It is essential that the cost summary provide a complete, accurate and easily understandable summary of the work performed for each cost claimed. In addition, when multiple activities (such as an RI/FS, a removal and a remedial action) have been carried out by the same contractor or State or Federal agency, the RPM/OSC is the best EPA employee to ensure that the summaries accurately reflect these activities. The summaries also must include the dates of actual service as provided by the contractor. The RPM/OSC should ensure that the dates are accurate because they are used to calculate statute of limitations and authorization issues under contracts. The RPM and OSC should always check the cost package to ensure that all costs have been included. Much of the information in the cost package comes from the Integrated Financial Management System (IFMS), and there are a number of costs which are not reflected in that system. The RPM should be careful to see that costs of other Agencies, such as ATSDR, DOJ, FEMA, Coast Guard, and Health and Human Services are included. In addition, the summary must be checked to see that all costs that have been satisfied or paid are reflected in the cost summary, including bankruptcy proceeds, settlements with other parties, costs disallowed after audit resolution or paid by the State or a private party. The RPM also will need to ensure that calculations of the 10 percent share that the State owes for reimbursable expenses is included and accurately reflected in the summary.

In cost recovery actions, the summaries must include a description of the response activities, expenditure types, and actual costs, and must indicate which Agency performed the activity. Cost summaries, which are primarily the responsibility of the Regional financial office, should be arranged according to the following format:

- Agency site-specific payroll costs
- Agency site-specific travel expenditures
- Interagency Agreement expenditures
- Cooperative Agreement expenditures
- Site-specific contracts with contractors
- Non-site-specific contracts with contractors
- TAG expenditures
- Other Federal costs.

The above information should be summarized in a brief.

Because the cost summary is developed early in the case development process, the cost summaries will need to be updated regularly as the various response action phases are initiated and completed. RPMs/OSCs should obtain updated cost summaries at the most critical stages of the response and litigation processes, and periodically (e.g., annually) during periods of substantial expenditure. Frequent updating ensures that the most recent cost data is available for management review.

The cost summaries should be reviewed for completeness, to ensure that:

- Cost summaries do not demand payment for amounts which have been previously recovered (e.g., bankruptcy proceeds, settlements)
- Cost summaries include costs incurred by agencies with transfer allocations, whose costs are not included in the IFMS (DOJ, FEMA, ATSDR, USACE)
- State matching funds are reflected in the summary so that it is apparent what costs must be matched and so that we do not demand in excess of the 90% of such costs which the U.S. is entitled to claim.

Exhibit XII-2 outlines the type of material that should be included in a cost summary report.

F. Documentation Procedures

This section describes the procedures that are followed in assembling cost and activity documentation for a cost recovery case. This process became a Regional responsibility in January 1990 and requires joint activity by the Regional Financial Management Officer and the Regional Cost Recovery Coordinator. In Headquarters, OWPE Cost Recovery Staff and Financial Management Staff provide support and training in use of the Superfund Cost Organization and Recovery Enhancement System (SCORE$) and training in overall cost recovery procedures. Headquarters OWPE developed the Cost Recovery Rule. Headquarters FMD is rewriting guidance on cost documentation procedures. This rewrite is expected to be completed in FY 1993. Headquarters FMD also provides site-specific payroll and travel documentation.

The description provided here is a general outline of required inclusions in the cost documentation package and the procedures for assembling the package.

The Regions assemble information for the following areas of costs:

- Agency site-specific Regional payroll costs
- Agency site-specific Regional travel expenses
- Other site-specific Regional charges
- Site-specific Cooperative Agreements
- Non-site-specific Cooperative Agreements
- Site-specific indirect costs
- Site-specific Field Investigation Team (FIT) costs
- Site-specific Technical Assistance Team (TAT) costs
- Site-specific Technical Enforcement Services (TES) contract costs
- Site-specific Emergency Response Contract (ERC) costs
- Site-specific Contract Laboratory Program (CLP) costs
- Site-specific Remedial Contract (REM) costs
- Site-specific Environmental Service Assistance Team (ESAT) costs
- Site-specific Alternative Remedial Contract Strategy (ARCS) costs
- Site-specific Environmental Emergency Response Unit (EERU) costs
- Site-specific National Enforcement Investigations Center (NEIC) costs
- TAG costs

Exhibit XII-2

Cost Summary Format

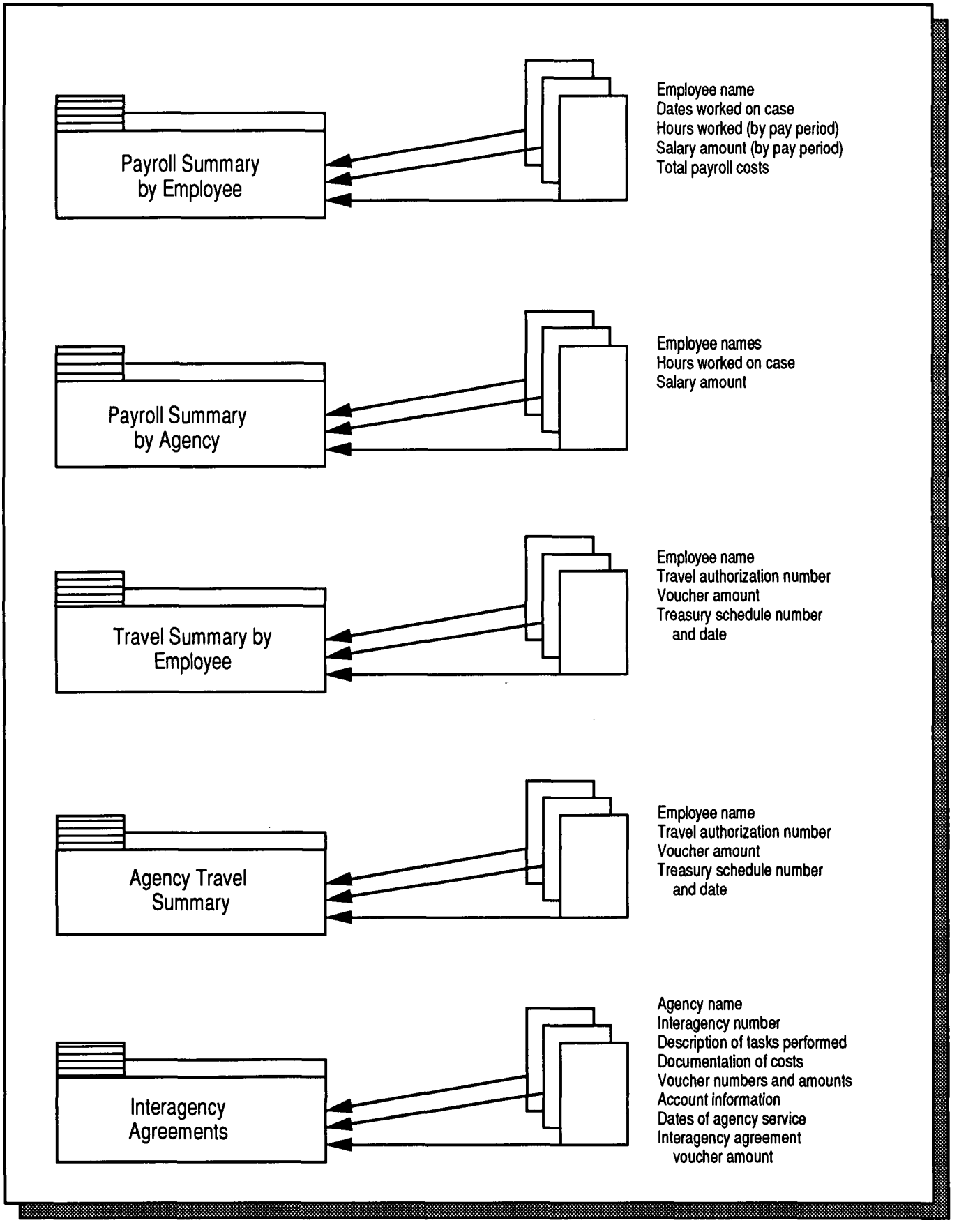
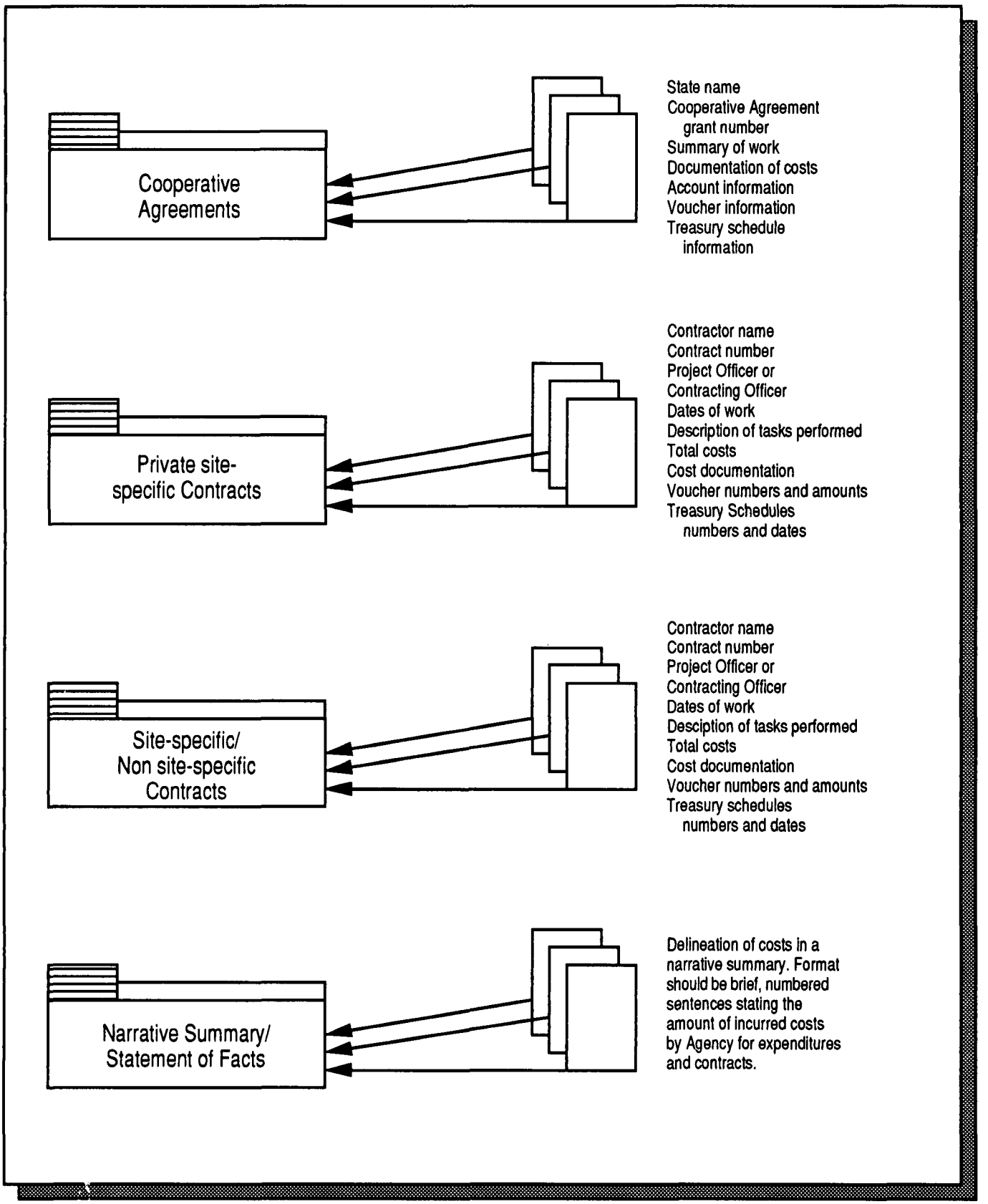


Exhibit X-2(2)

Cost Summary Format



- Interagency Agreement (IAG) costs
- Site-specific Headquarters payroll costs
- Site-specific Headquarters travel expenditures
- Miscellaneous costs related to the Agency's response activity
- Costs of overflights and aerial photography by the Environmental Photographic and Investigation Center (EPIC) and analyses of the photographs provided by the Environmental Monitoring and Systems Laboratory (EMSL).

After these costs are collected and categorized, they must be reconciled using information in SCORE$. This system is usually maintained and operated by the Financial Management Officer (FMO) in the region. The SCORE$ system downloads information on all site-specific accounts from the Integrated Financial Management System (IFMS) and produces cost summaries that can be included in the cost package for the case. Once prepared, the original cost package should be stored in the region. Another copy should be sent to the Regional Counsel, who will use it in the referral package.

Part of the costs associated with a site also may be incurred by the Department of Justice (DOJ). Although DOJ has responsibility for documenting its costs, the Cost Recovery Coordinator, the Financial Management Officer or the RPM may be required to testify in the cost recovery case. Hence, all parties should be familiar with the process by which documents are prepared.

G. Judicial Cost Recovery

When EPA and the PRPs do not reach a negotiated settlement for reimbursement of EPA's response costs, EPA usually sues the PRPs to recover those costs. This action, taken under section 107 of CERCLA, is known as a judicial cost recovery action. A judicial cost recovery action requires the involvement of the RPM/OSC, ORC staff, and attorneys from DOJ. The action is initiated when EPA prepares a referral package for DOJ. The referral package presents the evidence in the case and explains what EPA is seeking to recover.

Referral Package

To assist DOJ in preparing for cost recovery litigation, RPMs should work with the Regional attorney to prepare a section 107 referral package. At a minimum, the package should include the following information:

- Description of the response actions and their status
- Administrative Record Index and Action Memorandum/Record of Decision
- PRP liability analysis
- Anticipated defenses
- Activity and cost documentation
- Natural resource damage claims (summarizes communications with trustee)
- Enforcement history
- Relief sought
- Litigation/Settlement Strategy

Generally, the following remain in Regional files:

- Administrative Record
- PRP search backup documents (e.g., section 104(e) responses)
- Cost Summary Documentation
- Work Performed Documentation

The cost documentation package must be complete before the case is referred to DOJ, except where there are statute of limitations problems. All documents in the package

should be indexed. Proper indexing enables the case management team to access pertinent evidence from voluminous cost recovery case files.

Litigation Support

RPMs and OSCs, with ORC and Civil Investigator assistance, play an important role in supporting cost recovery litigation, including:

- Ensuring that the PRP search provides sound evidence of liability and, for generators, waste-in information
- Ensuring that the Administrative Record regarding the selection of remedy is compiled
- Ensuring that all activities and costs are documented, as needed
- Providing the technical lead for the case and acting as witnesses as necessary to prove the technical performance of the work at the site for which costs were incurred
- Assisting in case preparation and at trial in establishing discrete activities and associated costs that were related to each phase of the work at the site (e.g., RI/FS, various removals, work on separate operable units)
- Identifying potential fact witnesses who have personal knowledge of potentially relevant information, such as the PRP's liability, by providing the following information: present place of employment; home and business phone numbers; substance of testimony (brief statement); and whether the witness' statement is on file.
- Identifying and interviewing potential expert witnesses, if necessary (e.g., hydrogeologists and soil scientists)
- Identifying expert witnesses to participate in negotiations, if necessary
- Identifying potential adverse witnesses (either fact or expert) and indicating the substance of expected testimony, if known.

In addition, RPMs and OSCs may be asked to assist Regional attorneys in preparing affidavits to substantiate the Agency's response costs, or in preparing pre-trial motions, such as motions for summary judgment and motions to dismiss.

Litigation Management Plan

A litigation management plan should be developed and approved by team members. A list of the contents of the litigation management plan is included as an appendix to this chapter.

As a practical matter, most cases do not go to trial. There is strong legal precedent to support the Agency's right to make claims for reimbursement of all incurred costs plus interest. Consequently, most cost recovery cases will be settled out of court. The primary function of both the RPM and OSC in litigation support is to work closely with the attorneys from ORC and DOJ.

References

OSWER Directive 9891.1-1a, "Procedures for Transmittal of CERCLA and RCRA Civil Judicial Enforcement Case Packages to Headquarters" (June 12, 1989).

OSWER Directive 9835.11-1, "Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003" (June 21, 1989).

H. *De Minimis* Settlements

In addition to settlements during RD/RA negotiations, *de minimis* settlements are tools that may be used for eliminating the smaller contributors from the cost recovery process. Section 122(g) of CERCLA provides for settlement "...whenever practicable and in the public interest...if such a settlement...involves only a minor portion of the response costs." There are two situations in which the Agency may agree to a *de minimis* settlement:

- The amount and toxicity of the hazardous substance contributed by the PRP are minimal compared to other hazardous substances at the facility
- The PRP is an owner who did not contribute to the release or threat of release through any action or omission, did not conduct or permit the management of hazardous substances on the property, or purchase the property with knowledge of its use for generation, transportation, treatment, storage, or disposal.

Necessary Information

The PRP search process is critical to determining whether a PRP is a *de minimis* contributor. The search will provide the RPM with information regarding the identity, waste contributions, and financial viability of the PRPs. The Regional management will determine whether a PRP is a *de minimis* contributor through an analysis that includes each PRP's waste contribution, whether the settlement is "practicable and in the public interest," and whether all past costs are known. If the Agency expects to incur future costs, this will affect the scope of the settlement and covenant not to sue.

De minimis settlements may be entered as either:

- Administrative Orders on Consent
- Judicial Consent Decrees.

The Regions may issue Administrative Orders on Consent when the total response costs at the site are under $500,000. However, under section 122(g)(4) of CERCLA and the EPA delegations, when the total costs exceed $500,000 (excluding interest), the Regional Administrator must obtain the approval of the Assistant Attorney General (AAG) for the Environment and Natural Resources Division of DOJ, and consult with OSWER and OE.

All *de minimis* settlements must comply with the public comment procedures stipulated in section 122(i) of CERCLA.

Release From Liability and Reopeners

The Agency may grant *de minimis* settlors a covenant not to sue. EPA's covenant not to sue is given in exchange for the PRP's agreement to pay for part of the response costs plus a premium. This agreement means that EPA will not pursue the PRPs for future liability for costs incurred by the Agency. Such agreements normally involve liability under section 106/107 of CERCLA. The scope of the covenant will vary depending on site-specific factors. The Agency may agree to such a release only if the terms of the covenant include reopeners. Reopeners protect the Agency against cost overruns and the risk of paying for any further response action at the site. In appropriate cases, this protection may be provided by premium payments.

References

OSWER Directive 9834.9-1c, "Methodology for Early *De Minimis* Waste Contributor Settlements Under CERCLA 122(g)(1)(A)" (June 1992).

OSWER Directive 9834.7, "Interim Guidance on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA" (June 1987).

OSWER Directive 9835.9, "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De Minimis* Settlements under Section 122(g)(1), etc." (June 6, 1989).

OSWER Directive 9834.7-1b, "Methodologies for Implementation of CERCLA section 122(g)(1)(A) *De Minimis* Waste Contributor Settlements" (December 20, 1989).

I. Administrative Settlements

Section 122(h)(1) of CERCLA expressly authorizes the Agency to settle its cost recovery claims under section 107 if the case has not been referred to DOJ. However, when the total response costs at a facility exceed $500,000 (excluding interest), the Regional

Administrator must obtain the written approval of DOJ. He/She must also consult with AA, OSWER and AA, OE.

References

OSWER Directive 9012.10-A, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E" (June 17, 1988).

OE, "Draft Procedures for Administrative Settlements Under Sections 122(h)(1) and (4) of CERCLA" (October 1987).

J. Enforcing Settlements

If a settling PRP fails to comply with the terms of the settlement, the matter should be referred to DOJ for civil action. Case referrals should occur within six months of the default date. In addition to inherent governmental authority, section 122(h)(3) of CERCLA authorizes DOJ to bring a civil action to enforce the terms of the agreement. These terms are not subject to judicial review. DOJ may petition the court to impose the civil penalties authorized by section 109 of CERCLA.

K. Arbitration

Arbitration is a form of alternative dispute resolution (ADR) which provides a forum for resolution of cost recovery claims without traditional litigation. The Administrative Dispute Resolution Act (ADR Act) and section 122(h) of CERCLA specifically authorize the use of arbitration to resolve cost recovery claims.

In the cost recovery context, arbitration is a hearing conducted by a neutral third party, usually with substantive expertise, who hears facts and arguments presented by each party and renders an opinion. The scope of the neutral's decision and hearing procedures is at the sole discretion of the parties to the arbitration. Arbitrations are more streamlined in terms of procedures and evidence requirements than court litigation.

Entry into an arbitration for resolution of a cost recovery claim is voluntary and requires the consent of all involved parties. Regulations promulgated pursuant to section 122(h), 40 CFR Part 304, 54 *FR* 23174, set procedures for arbitration in cases where facility costs do not exceed $500,000 (excluding interest). In section 122(h) arbitrations, the decision of the neutral, which is filed in the Federal Register for public comment, is binding on the parties except in cases of arbitrator misconduct.

In other cases, hearing procedures and the binding nature of the neutral's decision is at the discretion of the parties. Due to constitutional restrictions, arbitrator decisions that bind the Agency without an opportunity for withdrawal are inappropriate. Chapter 5, Title 5, sections 585-591 (enacted by the ADR Act) establishes the permissible scope of arbitration decisions in cost recovery cases.

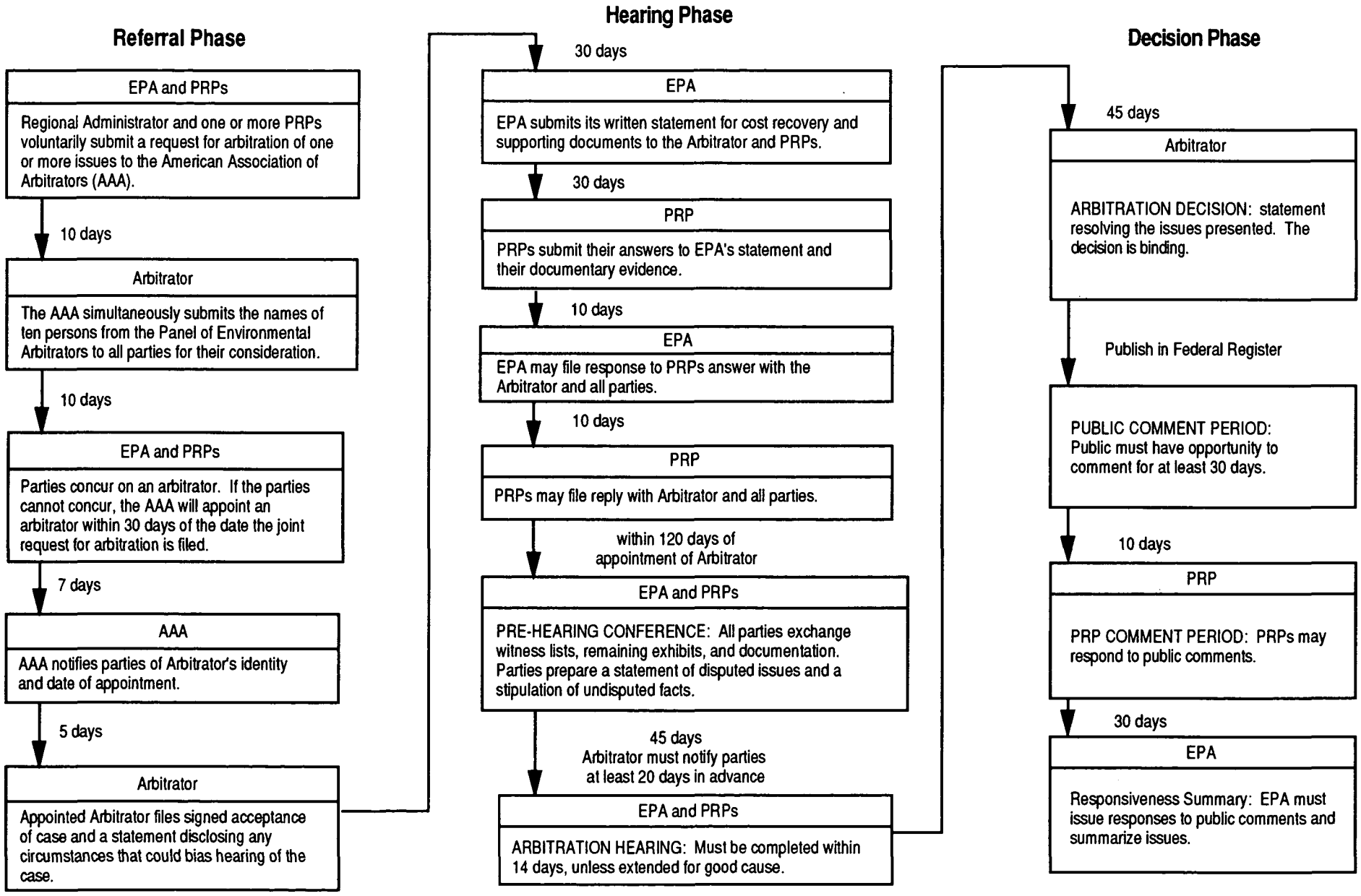
Arbitration offers the Agency an expedited method of resolving cost recovery claims without the expenditure of enforcement resources required for traditional litigation and lengthy enforcement negotiations. Exhibit XII-3 shows a flowchart of the procedures.

L. Mixed Funding

Section 122(b) of CERCLA authorizes the Agency to enter into mixed funding agreements. Under the terms of a mixed funding agreement, the Agency shares the response costs with settling PRPs. RPMs should note that when the Agency enters into a mixed funding agreement involving either a preauthorization or a cash-out with certain PRPs at a site, EPA must make a reasonable effort to recover the amount of such reimbursement from non-settling PRPs under a separate cost recovery action. A more complete discussion of mixed funding can be found in Chapter VIII, RD/RA Negotiations.

Exhibit XII-3

Arbitration Procedures for CERCLA Cost Recovery Cases Pursuant to §122(h)(2)



M. Bankruptcy Actions

Some PRPs may file for bankruptcy before reimbursing the government for its response costs. Although the Regional attorney will handle most issues related to the PRP's petition for bankruptcy, the RPM should have a working understanding of the process. The following discussion should help RPMs become familiar with pertinent concepts of bankruptcy law.

Statutory Background

A PRP may file a petition for bankruptcy under either Chapter 7 (liquidation) or Chapters 11 and 13 (reorganization) of the Bankruptcy Code. Bankruptcy proceedings under Chapter 7 involve the collection and distribution of all the debtor's non-exempt property.

By contrast, Chapters 11 and 13 allow the debtor to reorganize and rehabilitate rather than liquidate. Under Chapters 11 and 13, the creditors look to the future earnings of the debtor to satisfy claims.

There are two bankruptcy issues that the RPM should understand: proof of claim and priorities in bankruptcy.

Proof of Claim

Under the Bankruptcy Code, a debtor is discharged from his/her debts. This statutory provision releases a debtor from debts incurred *before* the debtor filed his/her petition for bankruptcy (previous debts). Creditors may object to the discharge of their claim against the debtor. The creditors must establish proof that they had a valid claim against the debtor's estate that has not been discharged as a previous debt. Creditors establish this claim by filing a proof of claim in the bankruptcy court. The deadlines for filing a proof of claim are as follows:

- Under Chapter 7 of the Bankruptcy Code: 90 days from the first meeting of creditors
- Under Chapters 11 and 13 of the Bankruptcy Code: the bar notice fixes the deadline.

The Agency has established a systematic procedure for receiving and distributing bankruptcy information. This procedure ensures that the Agency files its proof of claim within the statutorily defined deadlines, if appropriate. EPA has designated OE's Special Litigation Branch (SLB) as a central contact in Headquarters to receive all preliminary bankruptcy information. The SLB, in cooperation with the Regional bankruptcy contacts, will determine whether a particular multi-region bankruptcy matter should be handled as Headquarters-lead or Regional-lead.

The Bankruptcy Code requires a person to provide notice to all creditors. ORC takes the lead role in responding to the PRP's notice. Regional attorneys engage in the following activities:

- Notifying the SLB at 202-260-3056 and describing the status of the bankruptcy petition
  - identifying whether the bankruptcy petition was filed under Chapter 7, 11, or 13 of the Bankruptcy Code
  - determining whether a reorganization plan has been filed by the PRP
  - identifying the bar date for the proof of claim
- Sending all initial notices regarding any bankruptcy proceedings to the OE attorney at Headquarters
- Providing assistance to ORC and DOJ in the Agency's efforts to establish its proof of claim
- Providing assistance in preparing referrals to DOJ for filing proofs of claim and other necessary documents.

If the PRP has actually filed a petition for bankruptcy, DOJ and ORC will have the responsibility of obtaining the necessary bankruptcy documents to establish the Agency's

proof of claim. In most cases, the RPM will have a limited role in the bankruptcy proceedings.

Environmental Claims as Priorities

As a practical rule, a bankrupt party's estate does not have sufficient assets to satisfy all of the creditors' claims. However, if the Agency's claim is treated as a priority, the claim must be fully satisfied before the other creditors receive any money.

EPA's cost recovery actions can be treated as a priority if the Agency can establish that the costs were administrative costs, or that a Federal lien has been filed against the PRP's property. For example, administrative costs are incurred when EPA incurs costs for responding to the release on the debtor's property after the bankruptcy petition has been filed. A Federal lien for cleanup costs is created under section 107(l) of CERCLA. The lien continues to be enforced against the property until the liability is either fully satisfied, or the claim becomes unenforceable by operation of the statute of limitations.

In July 1992, a federal bankruptcy court awarded EPA $13 million from the liquidation of assets of the current owner of the Bunker Hill Superfund site. In the case, EPA asserted an "administrative expense priority claim" for $13.2 million to comply with an administrative order issued to Bunker in 1991.

References

OE, "Guidance on Federal Superfund Liens" (September 1987).

OE, "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties" (May 1987).

OE, "Revised Hazardous Waste Bankruptcy Guidance" (May 1986).

"Coordination Guidance of Agency Involvement in Bankruptcy Proceedings in RCRA and CERCLA Enforcement" (May 1988).

Section III. Planning and Reporting Requirements

A. Planning

Cost recovery planning should be consistent with the priorities identified in the cost recovery strategy and should consider sites with pending expiration of the statute of limitations. In selecting sites for cost recovery action, RPMs should consult the Cost Recovery Category Report (CRCR/ENFR-46) on the CERCLIS reports menu. This report identifies sites which are eligible for cost recovery action (e.g., remedial starts, completed removals over $200K) and sorts the sites by statute of limitations dates. It also shows any planned, on-going or completed cost recovery action at the site.

When sites have been selected, the sites should be targeted and tracked through the SCAP/STARS process. It is important to note that STARS credit is not given for sites with expenditures under $200K. Information on the expenditures at the site can be taken from the Cost Documentation system maintained by the Financial Management Officer in your region. The system maintained by the FMO (and described in the Section on Cost Documentation) will provide detailed documentation of both direct and indirect costs.

B. Budgeting

Funding for cost recovery activity is part of the Enforcement Case Budget. Data on the case budget can be found in CERCLIS/WasteLAN.

C. Reporting Requirements

Cost planning, reporting and tracking relies on the Comprehensive Environmental Response, Compensation and Liability Information System/Waste Local Area Network (CERCLIS/WasteLAN), the national data base. The data base incorporates information on response and enforcement actions at sites and is the source for Cost Recovery Category Reports (CRCR), as well as Superfund Comprehensive Accomplishments Plan (SCAP), and Strategic Targeted Activities for Results System (STARS) reports. Current and accurate data are essential for the cost recovery process to be successful.

All enforcement activities associated with cost recovery (e.g., demand letters, 107 referrals, settlements) and the amounts sought, achieved or written off in the cost recovery process must be reported in CERCLIS/WasteLAN. RPMs and OSCs must work closely with IMCs, Cost Recovery Coordinators and Headquarters cost recovery staff to ensure that data are accurately entered. Your IMC can advise you as to the existing procedure(s) in your Region.

RPMs/OSCs should ensure that target dates for demand letters, negotiations, referrals, decisions not to pursue cost recovery, and other enforcement activities are recorded in CERCLIS/WasteLAN. Pre-SARA settlements should be reviewed to determine if CERCLIS/WasteLAN should be updated with information pertaining to the reimbursement of oversight costs. If the Regions enter the data in a timely manner, CERCLIS/WasteLAN is capable of producing several classes of enforcement activity reports, as shown in Exhibit XII-4.

Cost recovery actions start with the issuance of a demand letter. This is a section 122(e) letter issued pursuant to section 107 from EPA to the PRP requesting that the PRP reimburse the Fund for a specific amount associated with one or more response activities. Demand letters are typically sent for each separate response action. Credit for this activity is given on the date the demand letter is signed by the appropriate EPA official and recorded in WasteLAN. This is a SCAP reporting measure and is recorded at the milestone level under a negotiation, settlement or litigation.

Cost recovery actions/decisions are separated into two categories: less than $200,000 and greater than $200,000. Cost recovery actions/decisions *less than $200,000* is a *STARS measure*. Cost recovery actions/decisions *greater than $200,000* is a *STARS target*.

Cost recovery actions/decisions are defined as the decision to take cost recovery action by use of any administrative cost recovery settlement, Section 106/107 or 107 judicial referral for cost recovery, initiation of Alternative Dispute Resolution (ADR) (mediation, arbitration, mini-trial), preparation of a decision document not to pursue cost recovery, settlement for past costs under a CD (with no prior referral), bankruptcy filing, cash out settlement for cost recovery or initiation of debt collection procedures. A matrix of SCAP/STARS targets and measures relevant to cost recovery actions/decisions is presented as Exhibit XII-5.

Exhibit XII-5
SCAP/STARS Targets for Cost Recovery

Activity	STARS Target	SCAP Target	Quarterly Target	Annual Target
Actions/Decisions (>$200,000)(S/E-2a)	X	X	X	X

SCAP/STARS Measures for Cost Recovery

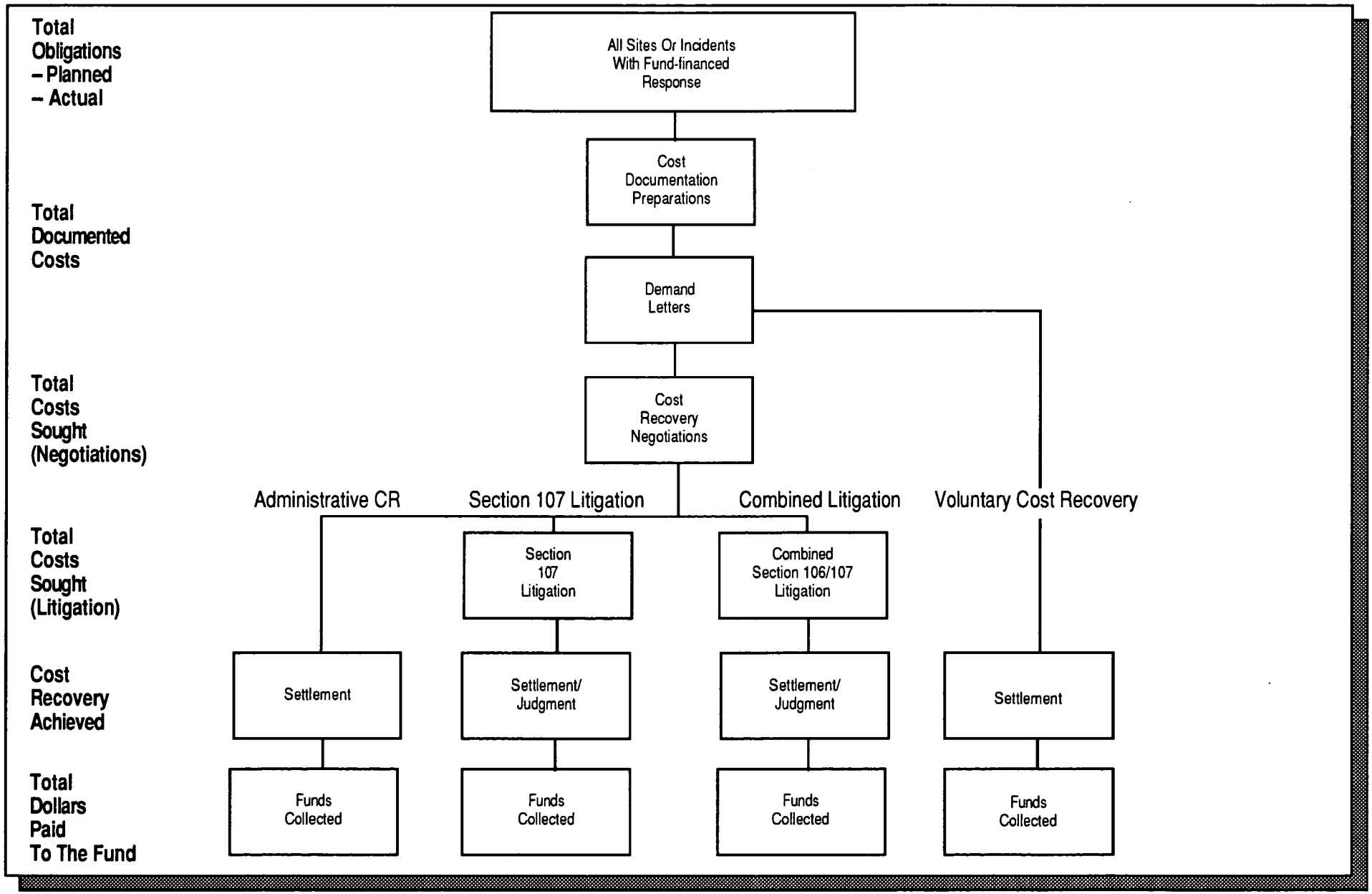
Activity	STARS Reporting	SCAP Plan/Report	Quarterly	Annual
Demand Letters Issued		X	X	X
Actions/Decisions (<$200,000)(S/E-2b)	X	X	X	X
Section 106, 106/107, 107 Case Resolution		X	X	X

Definitions for:

- **Section 107 or 106/107 referrals** - Credit is given on the date of the Regional Administrator's transmittal letter to HQ or DOJ as recorded in WasteLAN.
- **Settlement Under CD (With no prior referral)** - Credit is given on the date of the Regional Administrator's transmittal letter to HQ or DOJ as recorded in WasteLAN.
- **Cash out settlements** - Credit is given on the date of the Regional Administrator's transmittal letter to HQ or DOJ or when the Regional Administrator signs the AOC for the cash out. This date must be recorded in WasteLAN.
- **Decision Documents Prepared Not to Pursue Cost Recovery Claims** - Credit is given when the document is issued by the Regional office and recorded in WasteLAN.
- **Administrative Settlement** - Credit is given on the date that the Regional office or DOJ receives payment from the PRPs in direct response to a demand letter for voluntary cost recovery or the date the Regional Administrator signs the AOC for cost recovery. The date must be reported in WasteLAN.

Exhibit XII-4

Enforcement Activity Report Structure



- **Initiation of ADR** - Credit is given on the date that the Region refers the case to the Office of Enforcement (OE) for selection of a mediator or arbitrator as reported in WasteLAN.
- **Bankruptcy Filing** - Credit is given based on the date that the bankruptcy strategy package is prepared or on the date that the first creditor committee meeting convenes as reported in WasteLAN. New bankruptcy filing milestones have been added to WasteLAN: C2801=CP (Creditors Committee Meeting) and BS (Bankruptcy Strategy Package).
- **Initiation of Debt Collection Procedures** - Credit is given on the date the demand letter indicating use of debt collection procedures is signed by the EPA official, as reported in WasteLAN. New debt collection milestones have been added to WasteLAN: C2801=CS (Collection Services); AF (Administrative Offset); and TF (Tax Refund Offset). These milestones are valid only for activity AV (Administrative/Voluntary Cost Recovery).
- **Section 106, 106/107, 107 Case Resolution** - Case resolution is the conclusion of a section 106, 106/107, or 107 judicial action by a full settlement, a final judgment, a case dismissal, or a case withdrawal. Credit for case resolution is given when
  - A CD is entered in court fully addressing the complaint with all parties
  - The case is withdrawn
  - The case is dismissed, or
  - A trial is concluded and a judgment entered fully addressing the complaint.

  The case resolution date (activity actual completion date) is defined as follows:
  - Date the CD is entered
  - Date the case is withdrawn
  - Date the case is dismissed, or
  - Date the judgment is entered.

  This is a SCAP reporting measure.

All dates must be entered into WasteLAN. Credit for referrals is based on the referral package, not on the number of sites. Credit will be withdrawn if a case is returned to the Region by HQ or DOJ for additional work, but will be reinstated upon re-referral and will be based on the quarter of re-referral. New WasteLAN activity codes were developed for reporting debt collection procedures and bankruptcies.

For specific coding requirements into WasteLAN, see the Enforcement Data Quality Manual Chapter I: Issue Cost Recovery Decision Document (DD), Prepare Cost Documentation Package (PC), Cost Recovery Negotiations (NE), Section 107 Litigation (SV), Section 106/107 Litigation (CL), Administrative Order On Consent (AC), Administrative/Voluntary Cost Recovery (AV), Consent Decree (CD), Claim In Bankruptcy Proceeding (CB), Judgment (JG), Debt Collection Act (under development), Alternative Dispute Resolution (ADR).

Section V. References

Regulation

54 *FR* 23174 "Arbitration Procedures for Small Superfund Cost Recovery Claims" (May 30, 1989).

57 *FR* 152 "Proposed Cost Recovery Rule" (August 6, 1992).

Policies

OSWER Directive 9835.0, "Interim CERCLA Settlement Policy" (December 1984).

OSWER Directive 9832.5, "Policy on Recovering Indirect Costs in CERCLA Section 107 Cost Recovery Actions" (June 1986).

Comptroller Policy Announcement 87-17, "Interest Rates for Debts Recoverable Under the Superfund Amendments and Reauthorization Act of 1986" (September 1987).

Guidance

OSWER Directive 9891.1-1a, "Procedures for Transmittal of CERCLA and RCRA Civil Judicial Enforcement Case Packages to Headquarters (Unterberger/Diamond) (June 1989).

OSWER Directive 9835.11-1, "Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003" (June 1989).

OSWER Directive 9834.7-1b, "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) *De-Minimis* Waste Contributor Settlements" (December 1989).

OSWER Directive 9834.7-1c, "Methodology for Early *De Minimis* Waste Contributor Settlements Under CERCLA 122(g)(1)(A)" (June 1992).

OSWER Directive 9832.9, "Cost Recovery Actions/Statute of Limitations" (June 1987).

OSWER Directive 9832.1, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" (August 1983). [This guidance is also referred to as "The 1983 Cost Recovery Guidance"].

OSWER Directive 9832.0, "Cost Recovery Referrals" (August 1983).

OSWER Directive 9832.13, "Guidance on Cost Recovery Strategy" (July 1988).

OSWER Directive 9832.11, "Guidance on Drafting Decisions Not to Take Cost Recovery Actions" (June 1988).

OSWER Directive 9832.12, "Guidance on Federal Superfund Liens" (September 1987).

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

OSWER Directive 9834.1, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

OSWER Directive 9834.7, "Interim Guidance on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA" (June 1987).

OSWER Directive 9012.10-A, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E" (June 1988).

OSWER Directive 9832.6, "Small Cost Recovery Referrals" (July 1985).

FMD, "Historic Site-Specific Cost Reports in Superfund Contracts Active Prior to October 1, 1985" (June 26, 1989).

FMD, "State Superfund Financial Management and Record-Keeping Document " (August 1987).

OARM, "Superfund Financial Management and Recordkeeping: Guidance for Federal Agencies" (January 1989).

OWPE/FMD, "Delegation of Letter Report Responsibilities and New Guidance" (June 1991).

OWPE, "Draft Guidance on Reimbursement of Oversight Costs" (June 1988).

OWPE, "Draft Guidance on Written Demand for Recovery of Costs Incurred Under CERCLA" (August 28, 1990).

OSWER Directive 9834.4-A, "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas" (August 1988).

OSWER Directive 9835.9 "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA and Settlements with Perspective Purchasers of Contaminated Property" (June 6, 1989).

OE, "Draft Guidance, Procedures for Administrative Settlements under Sections 122(h)(1) and (4) of CERCLA" (October 1987).

OE, "Draft Procedural Guidance on Treatment of Insurers Under CERCLA" (November 1985).

Office of the Administrator, "Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases" (August 1987).

OE, "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties" (May 1987).

"Revised Hazardous Waste Bankruptcy Guidance" (May 1986).

OSWER Directive 9834.3-2a "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 16, 1989).

Manuals

OSWER Directive 9834.6, *Potentially Responsible Party Search Manual* (August 1987).

"OSWER Directive 9832.0-1A, *Procedures for Documenting Costs in CERCLA Section 107 Actions* (January 1985) [also referred to as "The Cost Documentation Procedures Manual"].

OARM, *Superfund Indirect Cost Manual* (March 1986).

Training

The Cost Recovery Branch of the CERCLA Enforcement Division has developed a one-day course on cost documentation. For information, call 703-308-8920.

Contacts

CERCLA Enforcement Division, Cost Recovery Branch: 703-603-8920.

OE, Waste Division, Attorney Advisors: 202-260-8865.

Appendix

Site Litigation Management Plan

This plan should be prepared in close coordination with the Department of Justice and should incorporate other guidance, as appropriate, including the Model Litigation Report, Negotiations Checklist and Pre-Referral Negotiations Procedures.)

1. Litigation Schedule and Staffing Requirements

    a. Provide a schedule for completing litigation activities (including activities, staff and contractor support)

    b. Summarize the specific team responsibilities for managing and performing litigation, along with dates for starts and completions

    c. Assess enforcement progress to date in the litigation plan.

2. Objectives of Litigation

    a. Discuss litigation objectives set by the site team and the reasons for their selection

    b. Identify the potential alternatives (e.g., return to negotiation posture or different legal options to achieve litigation objectives).

3. Litigation Strategy

    a. Identify the initial and bottom-line litigation points in the plan and reasons for the postions.

XIII. COMMUNITY RELATIONS

Chapter XIII
Community Relations

Section I. Description of Activity 1

Introduction 1

Techniques for Effective Community Relations 1

Section II. Procedures and Interactions 3

A. Community Relations Plan (CRP) 3

Coordination with Enforcement Staff 3

Consistency with Enforcement Actions 3

B. Potentially Responsible Party (PRP) Involvement 4

Notice to PRPs 4

Negotiations 4

C. Community Relations During Removal Actions 4

D. Community Relations During Remedial Actions 5

Community Relations Following an RI/FS Order 5

Proposed Plan and Public Comment 5

Public Notice and Comment on Consent Decrees for RD/RA 6

Community Relations During PRP Remediation 7

E. Other Enforcement Actions 7

Injunctive Litigation 7

Cost Recovery 7

F. Administrative Record 7

Purpose of the Administrative Record 8

Section III. Planning and Reporting Requirements 9

A. SCAP 9

Range of Activities 9

Range of Costs 9

B. Case Budget 9

Section IV. Potential Problems/Resolutions 10

A. Volatile Public Meeting 10

B. Lack of Community Interest 10

C. PRP Involvement 10

D. PRP as Principal Employer 10

Section V. References 11

Guidance 11

Manuals 11

Training 11

Contacts 11

Chapter XIII
Community Relations

Section I. Description of Activity

Introduction

A site-specific and well-planned community relations effort is an integral part of every Superfund response. The Superfund community relations program promotes two-way communication between members of the public, including PRPs, and the lead government agency responsible for the site. Activities are conducted throughout the planning and implementation of Superfund responses to encourage communication between government staff and the public. Exhibit XIII-1 illustrates the relationship of community relations activities to the Superfund technical process.

Through experience with the Superfund program, EPA has found that its decision-making ability is enhanced by actively soliciting comments and information from the public. This chapter discusses how community relations activities are affected when enforcement actions are initiated or on-going.

Techniques for Effective Community Relations

There are many techniques that can be used in a site-specific community relations program. EPA has found that there can be no set formulas in deciding which techniques to use. Each community is different. The issues of importance to the public, the level of concern, the history of public involvement, and the socio-economic background of the community vary from site to site. Community relations efforts must, therefore, be tailored to the distinctive needs of each community. They must also be tied to the technical response schedule and enforcement considerations for the site. Some general recommendations, however, for dealing with the community include:

- Involve the community early in the process
- Provide more information rather than less
- Encourage regular meetings in areas of intense community awareness.

Specific techniques for ensuring open and candid communication include small group or one-on-one meetings, and frequent telephone calls. Fact sheets, public meetings, newsletters and press releases also are appropriate to ensure citizen understanding of issues and activities associated with a site. When large public meetings are needed, they must be carefully planned to enhance productive communication. The timing, benefits and limitations of each technique are described in depth in EPA/540/R/92-009, *Community Relations in Superfund: A Handbook* (January 1992), Appendix A. (Hereafter referred to as the Community Relations Handbook).

The formal plan for EPA community relations activities at a Superfund site as required by the NCP is the Community Relations Plan (CRP). This plan provides an overview of the community relations program planned for a site; the historical, geographical, and technical details explaining why the site is on the NPL; a description of the community and its involvement with the site; details on community relations approaches to be taken; and the timing of suggested activities. There are typically two appendices to the CRP: a mailing list of interested parties and suggested locations for meetings and information repositories and administrative record files.

For enforcement sites, EPA Regional offices are responsible for developing community relations plans and associated activities. In cases in which EPA has negotiated an order with responsible parties, EPA is designated as the lead agency for community relations. If the State negotiates the order, generally the State will have the lead for community

relations, with EPA oversight. However, the conduct of community relations at State-lead sites is negotiable with EPA. The following sections of this chapter highlight these responsibilities by describing:

- Procedures and interactions of key community relations players during enforcement actions
- Planning and reporting requirements for community relations during enforcement actions
- Potential problems that may arise during community relations activities, and potential resolutions.

PAGE NOT

AVAILABLE

DIGITALLY

Section II. Procedures and Interactions

A. Community Relations Plan (CRP)

Information gathered during community interviews provides the basis for the development of site-specific Community Relations Plans (CRPs). If interviewers actively seek information about public concerns and informational needs, the communications activities will be better targeted to the community. The process for conducting these interviews involves several steps, as detailed in Chapter 3 of the Community Relations Handbook.

In addition, discussions about the site should be held with Regional technical and legal staff in advance of the interviews, so that the community relations staff can be apprised of any situations that might impact these interviews. Regardless of whether viable PRPs have been identified, the RPM should participate in the community discussions.

To incorporate the full range of views, lead agency staff may consider interviewing PRPs in the community. The EPA enforcement team for the site will determine whom to interview. This team is comprised of a Community Relations Coordinator (CRC), the On-Scene Coordinator (OSC), Regional Counsel, and the RPM, as well as equivalents at the State level when the State has the lead.

Coordination with Enforcement Staff

Coordination activities among the CRC, OSC, Regional Counsel, and RPM depend on the site-specific situation. Adequate planning is crucial to prevent the release of information that might be detrimental to the settlement and/or litigation process. Community relations plans prepared for sites with viable PRPs should receive input from all members of the enforcement team who are directly affected by scheduled activities. For example, attorneys should review the accuracy of any legal information, the RPM should review the accuracy of any technical information, and the CRC should approve the appropriateness of the community relations techniques suggested in the CRP.

The CRC is ultimately responsible for ensuring that the community relations requirements of CERCLA are implemented. Therefore, final approval of the CRP should be by the CRC, with concurrence on specific sections by members of the team.

Consistency with Enforcement Actions

Community relations activities outlined in a CRP for an enforcement site should be consistent with the settlement process and the likely schedule of enforcement actions. Community Relations staff may wish to document EPA's approach to coordinating and sharing information with PRPs within the CRP. However, any special conditions or Agency interaction with the PRPs should be spelled out in the Administrative Order or Consent Decree, not in the CRP.

The public must be told early on if PRPs are willing to participate in implementing the CRP. The Community Relations staff can do this by preparing a fact sheet or disclosing information at a public meeting. Discussions about the PRPs prior to the PRPs and EPA signing a consent agreement, however, may cause delays in the negotiations. It is preferable to delay discussing details of PRP involvement with the site until some agreement is signed or action taken. Premature disclosures may cause tension and mistrust between Agency staff and the PRP.

Assuming a site has not been referred for litigation, the CRP needs to inform the public of the possibility of litigation. Litigation generally does not occur until after the remedy is selected. EPA staff, therefore, may need to explain at public meetings or in fact sheets that pending or planned litigation may impose constraints on the release of certain information or conduct of community relations activities. Community Relations staff should describe the litigation process, and inform the community that only information that can be ascertained from court files will be available. Agency statements about the case must be

cleared with the Department of Justice before issuance. The Regional Counsel team members will be the focal point for that clearance, as well as for consulting with DOJ on statements concerning site status, such as investigations, risk assessments and response work. The plan will be amended to reflect any potential effects this could have on community relations activities.

B. Potentially Responsible Party (PRP) Involvement

EPA is the lead agency for developing and carrying out community relations activities at enforcement-lead sites. A PRP may assist in community relations activities at the discretion of the Regional office. The Regional office, however, will oversee any PRP involvement. Specifically, PRPs may be included in community relations activities at sites where they are conducting either the RI/FS, or the RD/RA, or both. If a PRP will be involved in community relations activities, the CRP should reflect that involvement. In these cases, the PRP(s) may wish to participate in public meetings, or in the preparation of fact sheets. EPA, however, will not "negotiate" with PRPs on the contents of press releases, fact sheets, or other documents distributed to the public.

Notice to PRPs

Notice letters are used to inform PRPs of their potential liability and provide an opportunity for them to enter into negotiations, to conduct or finance response activities. The negotiation process is discussed in detail in Chapter V, RI/FS Negotiations/Settlement and Chapter VIII, RD/RA Negotiations/Settlement.

Negotiations

Negotiations are generally conducted in confidential sessions between the PRPs and EPA or the state. Neither the public, nor the technical advisor (if one has been hired through a technical assistance grant by a community) may participate in negotiations between EPA, DOJ and the PRPs unless everyone agrees to allow such participation. Otherwise the ability of the parties to assert confidentiality at some later date may be affected.

Special educational efforts should be conducted prior to PRP negotiations to inform the public that little if any information regarding negotiations will be available to the public during negotiations.

The confidentiality of statements made during the course of negotiations is a well-established principle of the American legal system. Its purpose is to promote a thorough and frank discussion of the issues between the parties in an effort to resolve differences. Confidentiality not only limits what may be revealed publicly, but also ensures that offers and counter-offers made in the course of negotiations may not and will not be used by one party against the other in any ensuing litigation.

PRPs may be unwilling to negotiate without the guarantee of confidentiality. They may fear public disclosure regarding issues of liability and other sensitive issues that may damage their potential litigation position or their standing with the public. This expectation of confidentiality necessarily restricts the type and amount of information that can be made public. Community relations staff should consult with and obtain the approval of other members of the technical enforcement and Regional Counsel team before releasing any information regarding negotiations. If the site has been referred or is in litigation, DOJ approval also should be obtained.

C. Community Relations During Removal Actions

EPA encourages public participation during removal actions to the extent possible. However, removal actions may not always allow the same degree of participation as remedial actions. By their nature, the situations that require emergency removals do not allow for extensive public involvement. Adjustments to the community relations process must be made to accommodate necessary time constraints. The NCP requires that a Community Relations Plan be prepared for all removal actions lasting longer than 120 days. The NCP also requires a public comment period of at least 30 days for removals with a planning

period of six months or more before the initiation of on-site activity. For removals with a planning period of less than six months, a public comment period may be held when appropriate. The public comment period, if held, begins when the administrative record file is made available for public inspection.

The enforcement program encourages PRPs to conduct or pay for removal actions. At any time, the Agency may arrive at an agreement with the PRPs to conduct a removal, which usually is embodied in an Administrative Order on Consent (AOC). EPA also may issue a Unilateral Administrative Order (UAO) to compel PRPs to undertake a removal or other action. In addition, under limited circumstances, the Agency may refer the action to DOJ, seeking a court order to secure the removal.

A UAO or AOC is a public document and should be made available to the affected community, through the Administrative Record file. In addition, community relations staff, the RPM, and ORC should discuss the terms of the order with and describe the removal action to citizens, local officials, and the media. If the PRP subsequently fails to respond to the order, any public statements or information released regarding the status of actions at the site should first be cleared with appropriate Regional technical and enforcement personnel.

D. Community Relations During Remedial Actions

Community relations activities should be planned as early in the enforcement process as possible, generally before an RI/FS special notice letter is sent to PRPs. Meetings with small groups of citizens, local officials and other interested parties are extremely helpful for sharing general information and resolving questions. These meetings also may serve to provide information on EPA's general enforcement process.

Distribution of general Superfund public information materials, such as the fact sheet, "The Superfund Enforcement Process: How it Works," may be beneficial to community relations efforts. A discussion of how EPA encourages settlements also may be appropriate at this time.

Community Relations Following an RI/FS Order

RI/FS settlements usually are resolved as AOCs. The RI/FS workplan triggers the implementation of CR activities. When the PRPs are conducting a RI/FS, the settlement triggers a "kick-off" meeting with the public to explain the AOC and outline the next steps. Community relations, technical and legal staff should attend this meeting. Issues that should be clarified include EPA approval of the PRP's work plan, PRP's performance of the RI/FS, and agency oversight of the PRP's work. A fact sheet on the RI/FS process should be distributed at this meeting and sent to those on the site mailing list, including local officials. An announcement should be made about where the administrative record file will be located. The administrative record will include the detailed analysis of alternatives and all RI/FS information the agency considered in selecting a final remedy. It should be used as a tool to facilitate public involvement in that selection.

Proposed Plan and Public Comment

When the RI/FS is completed, the agency will issue a proposed plan and publish a notice announcing a public comment period. At a minimum, the notice is to be published in a major local newspaper of general circulation. The notice should be a "display" advertisement rather than buried in the "legal notices" section. A formal comment period of at least 30 calendar days is to be provided for the public to submit oral and written comments. This comment period can be extended to 60 days upon request by the public.

An opportunity for a public meeting is required during the public comment period. A transcript of the meeting on the proposed plan is to be available to the public in the administrative record file, and may be distributed through the information repositories or upon request. Chapter 4 of the Community Relations Handbook outlines specific public participation requirements.

After the public comment period on the proposed plan has closed, a responsiveness summary is prepared. It provides lead agency decision-makers with information about community preferences on remedial alternatives and general concerns about the site. It also demonstrates to members of the public how their comments were considered during the decision-making process. A Record of Decision (ROD) is then issued as the final plan for a particular site or operable unit at the site. Both the ROD and the responsiveness summary will be placed in the administrative record file and other information repositories. In addition, the responsiveness summary may be distributed to commentors and those on the site mailing list. Chapter 4 of the *Community Relations Handbook* provides further information on requirements for public notice and availability of the ROD and responsiveness summary.

Public Notice and Comment on Consent Decrees for RD/RA

If a negotiated settlement under CERCLA Section 106 is reached, the proposed consent decree will be submitted to the U.S. District Court for approval, as required under CERCLA section 122(d)(1). It is a legally binding agreement between the agency and the PRPs. In some cases, the State signs as a third party to the agreement. At the time DOJ lodges the consent decree with the court, a notice of the proposed agreement must be published in the Federal Register. There must also be a notice of a public comment period on the proposed consent decree before its entry by the court as a final judgment.

Responsible parties who are non-settlors to the agreement usually take this opportunity to raise their own concerns. They may go so far as to file a court case to block entry of the consent decree. States may do likewise if they believe a consent decree does not protect their interests.

The public comment period must be at least 30 calendar days in length and may be extended upon request. The proposed consent decree may be withdrawn or modified if comments demonstrate that it is inappropriate, improper, or inadequate.

To ensure that public comment opportunities are extended to interested parties, agency staff generally issue a press release after the consent decree has been lodged as a proposed judgment with the court. For PRP-lead sites, DOJ should notify the Regional Counsel for the particular site and provide a copy of the *Federal Register* notice of the decree. Regional Counsel should ensure that technical and community relations staff are informed of this.

Community relations staff can then mail copies of the press release or copies of the *Federal Register* notice to persons on the site mailing list. The press release should indicate how copies of the consent decree document may be obtained, including its location and that of other relevant documents. The procedures for public comment on the consent decree and a contact name for obtaining further information also should be announced. The public notice and press release for the consent decree may be combined.

Communications with the public should focus on the remedial provisions of the settlement agreement. Details of the negotiations, such as the behavior, attitudes, or legal positions of PRPs, any compromises incorporated in the settlement agreement, evidence, or attorney work-products, must remain confidential.

If a negotiated settlement for RD/RA results in actions fundamentally different from those selected in the ROD, the ROD will have to be amended. An amendment to a ROD also requires a public comment period, which should coincide, if possible, with the comment period for the consent decree. Comments must be addressed in the Responsiveness Summary for the ROD Amendment, not the consent decree. During the formal comment period, a public meeting may be held. Agency staff must offer the opportunity for a public meeting when there are significant community issues or concerns or the site team thinks a meeting is prudent. If held during the public comment period, these meetings should be documented and significant oral comments received during the meeting addressed in a response to comments documented on the consent decree.

Once the public comment period on the proposed consent decree has closed, DOJ staff (in cooperation with EPA and State staff) will consider each significant comment and write a response. DOJ will then file a "Motion to Enter" the consent decree. Response to comments are released to the public at the same time. The agency should use information repositories to make these documents available to the public. A third press release may be issued at this time announcing entry of the consent decree.

Community Relations During PRP Remediation

The lead agency retains responsibility for community relations during a PRP-lead remediation that conforms with a consent decree or any enforcement order. The scope and nature of community relations activities will be the same as for fund-lead response actions. When PRPs participate in community relations activities at the site, EPA, State, and PRP roles need to be explicitly defined. A PRP may not have been involved in the initial stages of the CRP, but later may show sufficient interest, commitment, and capability to warrant some level of participation. The lead agency should then re-evaluate the PRP's role in conducting community relations and a new CRP may be developed. PRP involvement in community relations activities also may be addressed in the consent decree or other enforcement orders.

E. Other Enforcement Actions

Section 122(i) of CERCLA requires the lead Agency to publish a notice of proposed settlements for administrative orders on consent under section 122(g)(4) (*de minimis* settlements) and under section 122(h) (cost recovery settlements/arbitration). The notice published in the *Federal Register* must identify the site and the parties to the proposed settlement. A public comment period of at least 30 days is required for these agreements. Regional staff should provide notice (e.g., a press release, a notice to persons on the site mailing list, or an advertisement in the newspaper of local circulation) to supplement the FR notice. For further information on response to comments see Chapter 6 of the Community Relations Handbook.

Injunctive Litigation

An injunctive case may be referred to DOJ for litigation at any point in the enforcement process, which may change the scope of community relations activities. Community relations activities at the site should be re-evaluated by the site team, and changes to accommodate confidentiality should be agreed upon by the site team, including DOJ. While consideration should be given to implementing the Community Relations Plan as previously approved, litigation may require changes in public disclosures. For example, the court may impose a gag order or place restrictions on information released during negotiations or at public meetings that address potential site remedy. Under these circumstances, the DOJ attorney will advise the site team on how to proceed.

Cost Recovery

If a Fund-financed cleanup is conducted, EPA may sue PRPs to recover costs. Cost recovery generally follows removal actions or the start of remedial action. Community interest in the site may have lessened, unless other operable units remain to be addressed.

A spokesperson chosen by the site team, in coordination with DOJ, should take the lead in responding to inquiries regarding current site conditions. All inquiries regarding litigation should be forwarded to the lead-agency cost-recovery team, which will prepare a response, subject to the concurrence of DOJ.

F. Administrative Record

Section 113(k)(1) of CERCLA requires the establishment of an Administrative Record file upon which the selection of a response action is based. It also requires that a copy of the Administrative Record file be located at or near the site. Section 113(k)(2) of CERCLA requires that the Agency promulgate regulations outlining procedures for interested persons to participate in developing the Administrative Record file. Subpart I of the NCP

details how the administrative record file (the incomplete record as it is being compiled) is assembled, maintained, and made available to the public. After the ROD is signed, referring to the "file" is no longer necessary.

From the remedial investigation through the selection of remedy, the Administrative Record file will be available for public inspection at a central Regional location and at or near the site. The information in the record file is crucial to the public in that it contains the information upon which the lead agency bases its decisions when selecting a final remedy. The site team should use the Administrative Record file as a tool for facilitating public involvement.

Publicly-available documents concerning response selection must be made available to all interested parties at the same time. If EPA requests PRPs to review a plan, other members of the public should review that plan as well. When a kick-off meeting is scheduled, the public, including residents and PRPs, should be invited.

The record file and CRP for a remedial action should be made available to the public no later than the time the remedial investigation phase begins, which is usually when the final RI/FS work plan is approved. The timing for establishing the record file for a removal action will depend on the nature of the removal. As outlined in the NCP, for removals with a planning period of at least six months before on-site activities will be initiated, the record file must be made available to the public when the engineering evaluation/cost analysis (EE/CA) or its equivalent is available for public comment. For removals with a planning period of less than six months, the record file must be available to the public no later than 60 days after the initiation of on-site cleanup activity.

Purpose of the Administrative Record

The Administrative Record has two purposes. First, the record provides an opportunity for the public to be involved in the process of selecting a response action. During the selection of a response action, information is reviewed and made available in the publicly accessible Administrative Record file. Second, the Administrative Record represents the information that was available to and considered by the Agency at the time of its decision. If the Agency is challenged concerning the adequacy of a response action, judicial review of that selection will be limited to the Administrative Record. A complete Administrative Record will allow the Agency to avoid costly and time-consuming litigation. The public should be advised that comments must be submitted in a timely manner in order to be considered.

The CRC's duties concerning the relationship of the Administrative Record file to the information repositories, public notices, and public comments are described in Chapter 6 of the Community Relations Handbook. Additional information on the roles of the CRC, OSC, RPM, and Regional Counsel in the development and maintenance of the Administrative Record can be found in Chapter XV, Records Management and in OSWER Directive 9833.3A-1 "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

Section III. Planning and Reporting Requirements

A. SCAP

SCAP planning activities take place at the beginning of each fiscal year. The site team, including the RPM, CRC, and Regional attorney decide the course of community relations activities for each site by quarter. For PRP-lead sites, the enforcement case budget (described below) provides funding for community relations.

Site-specific characteristics affect the costs of community relations at Superfund sites. The unique features of each Region and the specific characteristics of each site necessitate individualized community relations programs. Such differing programs in turn require changes in the level of involvement from site to site.

Range of Activities

The range of activities conducted for Superfund community relations may include developing brochures, writing CRPs, interviewing members of the community, preparing fact sheets, organizing information repositories, organizing public meetings, issuing public notices, developing ROD responsiveness summaries, holding small group meetings, translating information for communities and conducting workshops. The Community Relations staff in the Waste Management Division or the Office of Public Affairs usually works with the RPM to conduct these activities.

Range of Costs

As stated above, the range of costs varies from site to site. Higher costs can be expected at sites that are more complex, and, thus, more time consuming.

A variety of conditions and circumstances may influence the costs of performing community relations activities at Superfund sites, *such as*:

- Different Regional preferences and expectations
- Political, social, and economic differences among sites
- Level of technical complexity
- Stage of the remedial response action
- Level of public involvement
- Size of geographic area
- Extent of travel requirements

B. Case Budget

The enforcement case budget provides funds for community relations for RI/FS and RD/RA activities when a PRP-lead is expected. The CRP should be funded concurrently with the RI/FS negotiations. Community relations implementation (CRI) should be funded concurrently with the RI/FS oversight work assignment. A revised CRP should be funded concurrently with the RD/RA negotiations and CRI for the RD/RA oversight. The enforcement case budget does not fund community relations at Federal, State or Federal-Enforcement lead sites. The community relations lead should be designated as RP for activities funded by the enforcement case budget.

Section IV. Potential Problems/Resolutions

This section discusses specific problems that may occur during community relations activities at enforcement sites, and suggests methods for resolving these issues.

A. Volatile Public Meeting

Keeping citizens informed from the beginning of the process will help to avoid volatile situations. However, perceived health and safety concerns posed by a hazardous waste site can sometimes lead community members to react emotionally during public meetings and informational briefings. Meeting participants can become confrontational and defensive when discussing proposed solutions to a site, particularly if technical information is not completely understood. To alleviate this situation, EPA technical and legal staff may use a neutral, third-party moderator to facilitate a useful exchange of information during a meeting. A moderator can help set the tone for a meeting by setting forth guidelines at the outset. When a moderator serves as the intermediary between citizens and the lead agency, the meeting may run more efficiently.

B. Lack of Community Interest

Through initial contacts with a site community, EPA may discover that citizens have little knowledge of or interest in site activities. In this situation, it may be necessary to contact a broader group of community members to ensure that undetected concerns do not get overlooked. Additional groups that may be contacted include: clergy, League of Women Voters, civic groups, garden clubs, neighborhood associations and professional organizations. Information on these groups is usually available from the local Chamber of Commerce. If, after contacting a broad range of potential interest groups, no significant interest or concerns are identified, community relations staff should devote time to developing and implementing extensive outreach efforts.

C. PRP Involvement

As outlined in Chapter 6 of the Community Relations Handbook, PRPs may participate in community relations activities. This may include developing fact sheets and brochures on cleanup actions. In this situation, the RPMs should make it clear to the community which materials have been produced by EPA and which have been prepared by the PRP with review by EPA. Further, RPMs should work closely with PRPs who wish to develop community relations materials to ensure that those materials receive adequate EPA review before distribution. EPA – and not the PRPs – retains all decision-making authority and directs all community relations activities. When EPA produces a fact sheet or other outreach document, those materials also should be distributed to the PRP.

D. PRP as Principal Employer

The nature of the environmental threat and how directly a community feels affected generally determine the reaction of the community toward outreach activities at a site. In some situations, economic considerations of the residents can outweigh their environmental concerns. Nevertheless, the community must be informed that PRPs will be made accountable to the public for their site. RPMs should address these fears as much as possible by emphasizing EPA's desire to present the facts about the site. For example, when a PRP is the principal employer in a town, citizens may fear losing their jobs if they attend meetings about the site. It is important to organize meetings and interviews in such a way that citizens can comfortably express their concerns. It may be more appropriate to conduct telephone interviews to ensure privacy. RPMs also may want to institute a site hotline or include information request forms in the newspaper to provide anonymity. These techniques may help secure the involvement of hesitant community members.

Section V. References

Guidance

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 1991).

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

OSWER Directive 9836.2, "CERCLA Community Relations Mailing List" (February 6, 1989).

OSWER Directive 9230.0-08, "Planning for Sufficient Community Relations" (March 7, 1990).

Manuals

EPA/540/R-92/009, *Community Relations in Superfund: A Handbook* (January 1992).

OSWER Directive 9200.3-01, *Superfund Comprehensive Accomplishments Plan (SCAP) Manual* (Annual).

Training

"Community Relations in Superfund: Concepts and Skills for Response Staff." For additional information, call 703-603-8751.

"Risk Communication in Superfund," 703-603-8822.

Contacts

Office of Emergency and Remedial Response, Hazardous Site Control Branch, State and Local Coordination Branch, 703-603-8751

Regional Community Relations Coordinator.

XIV. STATE ENFORCEMENT

Chapter XIV
State Enforcement

Section I. Description of Activity 1

Introduction 1

Background Information 1

Enforcement Authorities 1

Section II. Procedures and Interactions 3

A. The Role of the State and EPA in PRP Oversight 3

B. Cooperative Agreements and Core Program Funding 4

C. Development of the Lead Agency Enforcement CA 5

D. Sections in a CA Application 5

E. Development of the SMOA 6

F. Articles in a SMOA 6

G. EPA Approval of State Remedies 7

Section III. Planning and Reporting Requirements 9

A. SCAP 9

Site Classification 9

B. CERCLIS/WasteLAN 9

Activity Leads 9

Event Leads 10

C. Case Budget 10

Section IV. Potential Problems/Resolutions 12

A. Forum Shopping by PRPs 12

B. Overseeing State Oversight of PRPs 12

C. SCAP Targets 12

D. Standard Planning Time Line 12

E. SMOA Development 12

F. State Challenges to RD/RA Consent Decrees 12

Section V. References 13

Policy 13

Regulation 13

Guidance 13

Manual 13

Contacts 13

Chapter XIV
State Enforcement

Section I. Description of Activity

Introduction

This chapter focuses on state involvement in the Superfund enforcement process. This chapter primarily addresses potential agreements and funding mechanisms between EPA and states involved in the Superfund process. This information should be used in conjunction with the National Oil and Hazardous Substances Pollution Contingency Plan, specifically Subpart F - State Involvement in Hazardous Substance Response (40 CFR 300) and Subpart O - Cooperative Agreements and Superfund State Contracts for Superfund Response Actions (40 CFR Part 35 Subpart O), and other available EPA guidances that are cited throughout the chapter.

Background Information

CERCLA provides for state involvement in selection of remedies and negotiations. EPA and a state may agree to designate a site as state-lead enforcement. If so, the state may receive funding for various enforcement activities, including; (1) PRP searches, (2) issuance of notice letters to PRPs, (3) negotiations with PRPs to secure their commitment for site cleanup, (4) administrative or judicial enforcement actions to compel PRP cleanup, and (5) oversight of PRP response activities.

Before reauthorization, CERCLA did not contain a framework for EPA to involve states. CERCLA now provides for state involvement in selection of remedies and the enforcement process. EPA's intent is to obtain more cleanups by PRPs through state enforcement.

This section focuses on the state enforcement process by describing these two major components of the program:

- Authorities available for Federal and state enforcement, and
- CERCLA state enforcement strategy.

These areas are discussed in the following sections.

Enforcement Authorities

Section 121(f) of CERCLA, as amended by SARA, requires EPA to provide substantial and meaningful involvement by states in the selection, development, and initiation of remedial actions undertaken within their boundaries. Subpart F of the NCP implements section 121(f)(1) of CERCLA. It specifies among other things, state and EPA responsibilities for identifying state and federal ARARs, an annual process for establishing priorities and identifying the lead for enforcement response, and a notification process for state participation in PRP negotiations. Section 121(f)(2)(C) of CERCLA authorizes EPA to conclude settlement negotiations with PRPs without state concurrence.

Many state statutes authorized their programs to remediate releases of hazardous substances. This authority can take many forms, from state responsibility over non-NPL sites, to authority for actions at all hazardous sites in the state. CERCLA does not preclude states from pursuing enforcement actions under state law in the absence of formal agreement with or lead designation by EPA. In turn, EPA has the authority under CERCLA to proceed with its own enforcement action or attempt to intervene prior to a state settlement with or litigation against PRPs. However, as specified in section 122(e)(6) of CERCLA, after RI/FS work has been initiated by EPA or the PRPs (pursuant to an Administrative

Order or Consent Decree), no PRP may undertake any remedial action at the facility unless the action is authorized by EPA.

The enforcement strategy for state involvement emphasizes maximizing the number of sites that can be cleaned up by enhancing and fully utilizing state capability and minimizing duplication of effort between EPA and the states. There are two types of state-lead enforcement sites depending on whether EPA provides money to the state for work or oversight at the site. Sites where EPA does not provide site-specific money and the state has the enforcement-lead are referred to as non-Fund financed state-lead enforcement sites. Sites where EPA provides money and the state has the enforcement-lead are referred to as state-lead enforcement sites. Section 300.515(e)(2)(ii) provides "state concurrence on a ROD is not a prerequisite to EPA's selecting a remedy, i.e., signing of ROD, nor is EPA's concurrence a prerequisite to a state's selecting a remedy at a non-Fund-financed state-lead enforcement site under state law." See OSWER Directive 9831.9, "Questions and Answers About the State Role in Remedy Selection at Non-Fund Financed State-Lead Enforcement Sites" (April 18, 1991). However, remedies must be consistent with the NCP, EPA policies and guidances to ensure successful cost recovery efforts and to reduce difficulties in deleting sites from the NPL when remedies are implemented.

Section 104(d)(1) of CERCLA authorizes EPA to enter into a contract or cooperative agreement with capable states to take actions to respond. Section 300.505 of the NCP describes the requirements for EPA/State Superfund Memorandum of Agreement (SMOA). Subpart O of 40 CFR Part 35 details requirements and procedures for Core Program Cooperative Agreements, Site-specific Cooperative Agreements, and Superfund State Contracts.

Section II. Procedures and Interactions

To assist EPA and individual states operating together in the Superfund program, it is preferable to have clearly defined processes and procedures for coordination and interaction. Although either EPA or states may conduct enforcement actions against PRPs without the other's involvement, it is in both the state's and EPA's best interests to coordinate such actions.

There is an opportunity under CERCLA for coordination and the sharing of responsibilities between EPA and the states. EPA and states may interact in one of the following arrangements:

- States participate, in a support role, in EPA-lead enforcement actions pursuant to section 121(f) of CERCLA (EPA-lead enforcement sites)
- States assume lead responsibility relying on CERCLA authority through Cooperative Agreements (CAs) (state-lead Fund sites)
- States assume oversight responsibility for PRPs at EPA-lead sites (EPA-lead enforcement site with state as lead technical agency)
- States act under their own authority as lead agency with assistance from EPA through CAs which specify EPA concurrence on the ROD and other major deliverables (state-lead enforcement sites)
- States act under their own authority as lead agency, absent a SMOA or CA, through participation in "Annual Consultation" (see 40 CFR section 300.515(h)(i)). (Non-Fund-financed state-lead enforcement sites).

Another potential relationship between EPA and the states can be established through the Core Program. EPA provides funding for states to develop state enforcement capability under this program.

A. The Role of the State and EPA in PRP Oversight

An effective enforcement program requires a balanced approach that relies on a mix of Fund-financed cleanup, Consent Orders/Decrees reached through formal negotiations, and where necessary, litigation. The general nature of EPA and state interaction in pursuing PRP site cleanup commitments can best be illustrated through a discussion of required oversight roles for states and EPA as well as available funding schemes. Where EPA provides money to a state for site-specific remedial work or PRP oversight, EPA will require EPA concurrence on the remedy and consistency with the NCP.

Oversight roles are as (1) lead agency and (2) support agency. The lead agency has primary responsibility for planning and implementing a response under CERCLA. The support agency furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance to the lead agency. A variation on the strict distinction between lead and support roles is where states or EPA can have primary responsibilities for specific tasks (e.g., RI/FS) while the other agency has the overall lead for the clean up process at the site. Lead agency designation is determined by EPA in consultation with the states based on consideration of numerous factors. It is generally preferable that enforcement lead designation remain the same throughout the remedial process, instead of lead being designated separately for each major event, such as RI/FS, RD/RA.

States should attempt to obtain a commitment from PRPs to pay for oversight costs whenever negotiating with PRPs prior to requesting funds from EPA. Later, EPA should seek recovery for CA oversight costs from PRPs. When oversight costs are reimbursed by PRPs at the end of the year or at completion of the response action, EPA funds can be used to the extent available as described on OSWER Directive 9831.6a-6d, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 7, 1988). Because CA funds are 90% Federal, the money that is reimbursed to EPA must

go into the Trust Fund to be reappropriated later. EPA cannot collect the States' 10% share. In applying for an enforcement cooperative agreement, the state applicant must demonstrate that "it has taken all necessary action to compel PRPs to fund the oversight" of negotiated cleanup activities. (See Subpart O of 40 CFR Part 35, section 35.6155(c)(2)(iii)).

During annual consultations or when developing agreements, EPA and the states should consider the extent to which each party will be involved in the other's negotiations with PRPs. The extent of involvement should be based on various factors. These include the state's staff resources, level of confidence in past experience with the state, and site-specific factors such as complexity or national significance of the response action. See OSWER Directive 9831.6a-6d, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 7, 1988) for detailed information.

Where EPA has the lead for oversight, EPA encourages the state to conduct oversight tasks only if it has the in-house capability to do the work. Generally, EPA will not fund the state to hire contractors for oversight tasks (with the exception of procuring another state agency) unless the state provides adequate justification for their use. Furthermore, EPA will not fund states to conduct oversight tasks that duplicate EPA's efforts. Guidance for determining whether to fund a state for oversight of a PRP response can be found in OSWER Directive 9831.6b, "CERCLA Funding of PRP Oversight by States at NPL Sites" (April 7, 1988).

States also may be involved in three-party agreements (EPA/State/PRP). Generally, the Agency does not encourage three-party agreements for every site as resource duplication may occur. Yet, this is a viable option where EPA and a state work together.

B. Cooperative Agreements and Core Program Funding

EPA funding of states is related to encouraging or compelling PRPs to undertake response activities to cleanup a site (such as negotiations for RI/FS and RD/RAs) and to conduct necessary technical, administrative and enforcement activities during their oversight of PRPs' response (such as compiling the administrative record, preparing remedy decision documents and enforcing the provisions of settlement agreements).

Two types of Superfund response agreements are essential to state participation in CERCLA implementation. The first, Superfund Cooperative Agreements, is the vehicle through which EPA can provide funds to states to assume responsibility as lead or support agencies for response. CAs are usually site-specific but there are options for multi-site enforcement CAs. Core Program Cooperative Agreements may be used for non-site-specific activities that support states. See Subpart O of 40 CFR 35 information.

The second, Superfund State Contracts (SSCs), is necessary to ensure state involvement as mandated under section 121 of CERCLA and to obtain state assurances required under section 104 of CERCLA prior to remedial action. SSCs are only applicable to Fund sites. SSCs are not applicable to enforcement sites activities because state assurances are not required for enforcement sites.

Funding through enforcement cooperative agreements may be for state-lead or state-support enforcement activities. State-support activities include a review role for the state.

Core Program CAs expand the range of activities eligible for funding. Core Program funding provides funds to a state to conduct CERCLA implementation support activities that are not assignable to specific sites, but are intended to develop and maintain a state's ability to participate in the CERCLA response program.

The amount of funding provided to states is negotiated between the state and the Region based on the availability of funds and the recipient's program needs in the following areas:

- Procedures for removal actions and longer-term remediation of environmental and health risks at hazardous waste sites

- Provisions for satisfying all requirements and assurances
- Legal authorities and enforcement support associated with proper administration of the recipient's program and with efforts to compel PRPs to conduct or pay for studies and/or remediation
- Efforts necessary to hire and train staff to manage publicly-funded cleanups, oversee RP-lead cleanups, and provide clerical support
- Efforts necessary to build infrastructure procedures for administrative record compilation and cost documentation
- Other activities deemed necessary by EPA to support sustained EPA/recipient interaction in CERCLA implementation.

States can use Core Program CAs to develop safety plans, quality assurance project plans, and community relations plans. Core Program CAs can provide funding for document review, development, and refinement of the enforcement program. States can also use Core Program CAs to hire and train staff to oversee cleanup matters and to cover clerical or administrative support, which cannot be charged to site specific CAs.

C. Development of the Lead Agency Enforcement CA

In developing lead state-enforcement CAs, EPA requires that states document their ability to perform the response action and enforcement. Specifically, a state must demonstrate that it has the authority, jurisdiction, and the necessary administrative capabilities to take an enforcement action(s) to compel PRP cleanup of the site, or recovery of the cleanup costs. When the state submits a CA application, EPA and the state have already designated the site as a state-lead enforcement site. The Region evaluates the state's ability to conduct the response action and the ability to be lead enforcement agency. When EPA funds state response or oversight activities, under a cooperative agreement, the state has assured that their response actions and oversight of PRPs will be consistent with CERCLA, the NCP and applicable EPA guidance.

The discussion of Case Budget in Section III of this chapter describes state activities that can and cannot be funded under state enforcement CAs. Detailed information on the following provisions can be found in Subparts F of the NCP, Subpart O of 40 CFR Part 35 and in "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites."

D. Sections in a CA Application

Some of the significant sections included in a CA application are listed below; detail is provided on those related to state enforcement. Depending on the task to be funded by the CA (e.g., PRP search, issuance of notice letters and negotiations, RI/FS), other additional provisions may be added.

- **Legal Authority** - Documents that adequate enforcement authorities are available
- **Consistency with CERCLA Section 122** - Provides that state settlements will be consistent with certain CERCLA section 122 provisions and related EPA Superfund Policy when negotiating and settling with PRPs under a CA. (Although states can avail themselves of equivalent procedures, they are not authorized by CERCLA to use section 122 when pursuing enforcement actions under their own authorities)
- **Negotiation Time Frames** - Ensures that the state will notify EPA if a settlement is not reached within 90 days of issuance of special notice for RI/FS negotiations and 120 days for RD/RA negotiations; and requires that the state recommend whether negotiations should continue with the PRPs
- **Formalizing Successful Actions** - Ensures that the state will culminate successful actions by entering into an enforceable order or decree, or issuing some other enforceable document requiring the PRP to conduct the response action in accordance with the NCP and relevant EPA policy and guidance

Other requirements that are included in a CA application address the Administrative Record, Community Relations, and Scope of Work. The planning and reporting requirements of these state enforcement actions are presented in section III of this chapter.

E. Development of the SMOA

A Superfund Memorandum of Agreement (SMOA) is a non-site specific document that facilitates and documents the processes and procedures that the Region and state use when conducting site-specific response actions. A SMOA, if negotiated properly, should remain applicable to the EPA-State Superfund interaction for several years with only relatively minor modifications as changes to the relationship occur.

The SMOA concept provides a written document that is mutually approved by the Agency and state and that covers aspects of EPA-State interaction on Superfund activities. The articles covered in the SMOA parallel the major points of State-EPA interaction set forth in the NCP. EPA and the State should tailor the SMOA to their particular needs. SMOAs are used to describe the terms for the states and EPA when the state wants to become the lead agency for enforcement action at an NPL site or seek EPA concurrence on the remedy at an NPL site. A SMOA shall be supplemented by site-specific enforcement agreements between EPA and states which specify schedules and EPA involvement. The SMOA may identify the extent to which EPA and the state will participate in each other's response actions and how ARARs will be identified. In the absence of a SMOA, EPA and the states shall comply with the requirements and review times in section 300.515(h) of Subpart F of the NCP. SMOAs, unlike CAs, are not legally binding. SMOAs and the state's responsibilities for involvement are available in Subpart F of the NCP and OSWER Directive 9375.0-01 "Interim Final Guidance on Preparation of a Superfund Memoranda of Agreement (SMOA)" (May 8, 1989). The guidance presents a model SMOA suggesting language and content for later adaptation by EPA Regions and States.

F. Articles in a SMOA

The following paragraphs summarize material that may be included in the SMOA regarding State enforcement; following this information is a listing of other important articles for inclusion in the SMOA.

- **Principles** - This article summarizes the status of the state's hazardous waste problem, the status of the state's Superfund program, the roles of the lead and support agencies, as well as agreements concerning the aggressiveness of enforcement activity.
- **Enforcement** - This article describes expectations for enforcement and the general nature of EPA and state interaction in pursuing PRP site cleanup commitments. The parties to the SMOA may agree in principle that:

  1. Negotiated response actions with qualified PRPs are essential to an effective program for the cleanup of NPL sites
  2. Two-party (i.e., EPA or State and PRP) settlement negotiation and execution is generally more efficient than three-party (i.e., EPA and State and PRP) negotiation and execution
  3. The state has demonstrated adequate authority to carry out enforcement

In addition, the parties to the SMOA may agree in practice to do the following:

4. Designate the lead and support agencies for enforcement actions at NPL sites during the annual planning process
5. Indicate those sites where the support agency will be requested to concur on the Lead Agency's Record of Decision (ROD) or other decision document. EPA retains final approval authority on RODs where it has provided monies to states for oversight/enforcement activities
6. Develop site-specific enforcement strategy outlines with timeframes during the annual planning process

7. Set forth response action commitments and settlements with PRPs in enforceable documents indicating the lead agency responsible for all Superfund communication with PRPs
8. Organize a meeting between the lead agency and the support agency prior to the start of negotiations with PRPs to discuss goals, starting points and bottom-line positions for negotiations
9. Provide draft and final enforcement documents to the support agency prior to issuance to the PRPs
10. Allow for assistance requests by lead agency to support agency at any time during the enforcement and negotiation process
11. Have the lead agency notify PRPs of a planned RI/FS and determine their willingness and ability to conduct the RI/FS
12. Provide the state an opportunity to be a party to any enforcement document in which it chooses to participate
13. Recognize that the agreement does not limit the ultimate enforcement authority of EPA or the United States government.

EPA and the State also may include the following articles in the SMOA as suggested in OSWER Directive 9375.0-01, "Interim Final Guidance on Preparation of Superfund Memoranda of Agreement (SMOA)" (May 8, 1989):

- Federal facilities
- Introduction and Statement of Purpose
- Agreement Concerning Roles and Responsibilities
- Lead State Agency Designation
- Site-Specific Designation of Lead/Support Agency
- Remedial Project Manager/Support Agency Coordinator Designations
- Support Agency Concurrence
- Points of Contact
- Planning/Coordination Processes
- Removal Actions
- Processes to be Defined
- Consultation, Agreement and Concurrent Processes
- Support Agency Site-Specific Review/Oversight
- Resolution of Disputes
- Exclusion of Third Party Benefits
- Negation of Agency Relationship.

Subpart K of the NCP will address roles of the state, Federal facilities, and EPA in SMOAs, Interagency Agreements, and other processes.

G. EPA Approval of State Remedies

EPA retains remedy selection authority when the lead agency is acting under CERCLA authority. States retain remedy selection when they are acting under state authority without a cooperative agreement with EPA. However, EPA may not be bound by a state-selected remedy unless the Regional Administrator has expressly adopted, in writing, a remedy that complies with section 121. At non-Fund-financed state-lead enforcement sites where the state does not have a cooperative agreement with EPA, a state may proceed without EPA concurrence and adoption of the ROD for the site.

The Agency's potential for achieving cleanup goals can be optimized by including appropriate state-lead enforcement sites. This is advantageous where states have developed a willingness and ability to manage state-lead enforcement sites within reasonable timeframes.

References

OSWER Directive 9831.6, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 7, 1988).

OSWER Memorandum 9375.0-01 attachment, "Interim Final Guidance on Preparation of Superfund Memoranda Of Agreement" (May 8, 1989).

OSWER Directive 9375.2-01, "State Core Program Funding Cooperative Agreements" (December 12, 1987).

Section III. Planning and Reporting Requirements

EPA defines state-lead enforcement as those National Priorities List (NPL) sites where the state has primary responsibility for the site.

In order to increase the contribution of state-lead enforcement sites toward CERCLA cleanup goals and to encourage state enforcement activity, it is important that funding is placed where the most evident environmental results can be achieved. Moreover, the necessary coordination between the Federal government and states can only work when funds are planned and reported for, as this section illustrates.

The following planning and reporting issues are presented in this portion of the chapter:

- SCAP process related to state enforcement
- State-lead enforcement and related mandates
- Classification of site leads
- CERCLIS/WasteLAN and related Agency and state responsibilities
- Different types of state leads, and
- Case budget and cooperative agreement information.

Each of these topics is discussed in detail in this section of the chapter.

A. SCAP

Regions are required to report progress on State Enforcement-lead sites as they would any other site. This includes State Enforcement (SE) leads where there is Federally financed work performed by the state with a state enforcement component; and work financed by the PRP under a state order through which no EPA oversight support or money is provided (SR). (See additional detail on activity and event lead codes under section B of this chapter.)

Site Classification

After a hazardous waste site is identified, EPA or a State initiates an investigation to identify PRPs associated with the site. On the basis of this preliminary PRP search, EPA (perhaps in coordination with the state) may make an initial determination of how cleanup of the release will be managed and who will initiate enforcement actions under CERCLA. The decision to classify a site as a state enforcement-lead response is based on the site history, strength of legal evidence and the national significance of the site.

B. CERCLIS/ WasteLAN

The relationship of states to the budgetary planning process is graphically presented in Exhibit XIV-1. The relationship begins when the Regional office together with the state determines activity and event targets for the SCAP and STARS. These targets are reviewed by EPA Headquarters through CERCLIS/WasteLAN and used to revise SCAP and STARS, and to determine the case budget.

The CERCLIS/WasteLAN system uses a series of activity and event codes to designate the lead agency. A discussion of these codes follows.

Activity Leads

A lead code must be placed in CERCLIS/WasteLAN for all events and activities. For RI/FS, RD, RA, O&M, and enforcement activities, the lead codes identify the entity performing the work. There are several possible enforcement activity leads the state may assume at a site.

The SCAP defines the following codes to designate enforcement activity leads:

- **SE** - SE stands for State Enforcement. This code is used to designate enforcement activities initiated by a state using its own enforcement authorities to clean up sites. Trust Fund dollars are used to pay or partially pay for the enforcement and response activities at state enforcement lead sites through Cooperative Agreements. SE could therefore be used for RI/FS and RD/RA negotiations
- **FE** - FE stands for Federal Enforcement site where Fund money is being used to pay for the enforcement activities.

Event Leads

Event types are codes for a specific response, non-response, or a support event within the Pre-Remedial, Remedial, Removal, and Community Relations components of the Superfund program.

States have a role in the following event codes:

- **S** - S stands for state-lead site where events are paid with Trust Fund dollars
- **SN** - SN is used to designate state-funded events where no Trust Fund expenditures are involved. Site events are undertaken solely by the state and paid for by state authorities. SN applies to response events (RI/FS, RD, RA, removal)
- **SR** - SR stands for State Enforcement/Responsible Party Financed and is used to designate events where the state has an administrative or judicial order requiring the PRPs to do the response work. There is no Federal concurrence on the remedy, and no State/EPA agreements, or cooperative agreements covering the site
- **PS** - PS is used for a PRP response under a state order, when Fund money is supporting Cooperative Agreements with states conducting state-lead oversight; or for sites not receiving Fund money that receive EPA oversight through SMOAs, State/EPA agreements or Cooperative Agreements. Money will be approved through the case budget described in the following section.

C. Case Budget

The Case Budget (CB) allocation is the approved extramural funding for enforcement activities and events identified in CERCLIS/WasteLAN. Funds are available to the Regions on a quarterly basis through the Advice of Allowance (AOA) process. Regions may use enforcement funds in their TES contracts or Non-TES vehicles, including Cooperative Agreements. See Exhibit XIV-2 for a diagram illustrating Cooperative Agreement funding through the case budget and refer to Chapter XVI, Contracts and Case Budget, for specific case budget information.

The FY 91 case budget includes approximately $3.6 million to support enforcement Cooperative Agreements with states. This money is intended to fund state support activities during Federal-lead enforcement actions and conduct of State-lead enforcement actions (SE-lead) or oversight (PS-lead). These resources will be distributed to each Region through the OWPE AOA. Specifically, state enforcement CAs should be used to fund the following state activities:

- PRP search
- Negotiations
- Administrative or judicial enforcement
- Oversight of PRP response (RI/FS)
- Participation in site-specific activities in cases in which EPA has reached a settlement agreement with the PRPs.

Funds for state enforcement CAs are not intended to provide states with resources to:

- Conduct state-lead RI/FSs, RDs, or RAs. Dollars for these events are allocated by OERR

Exhibit XIV-1

Relationship of States to Budgetary Planning Process

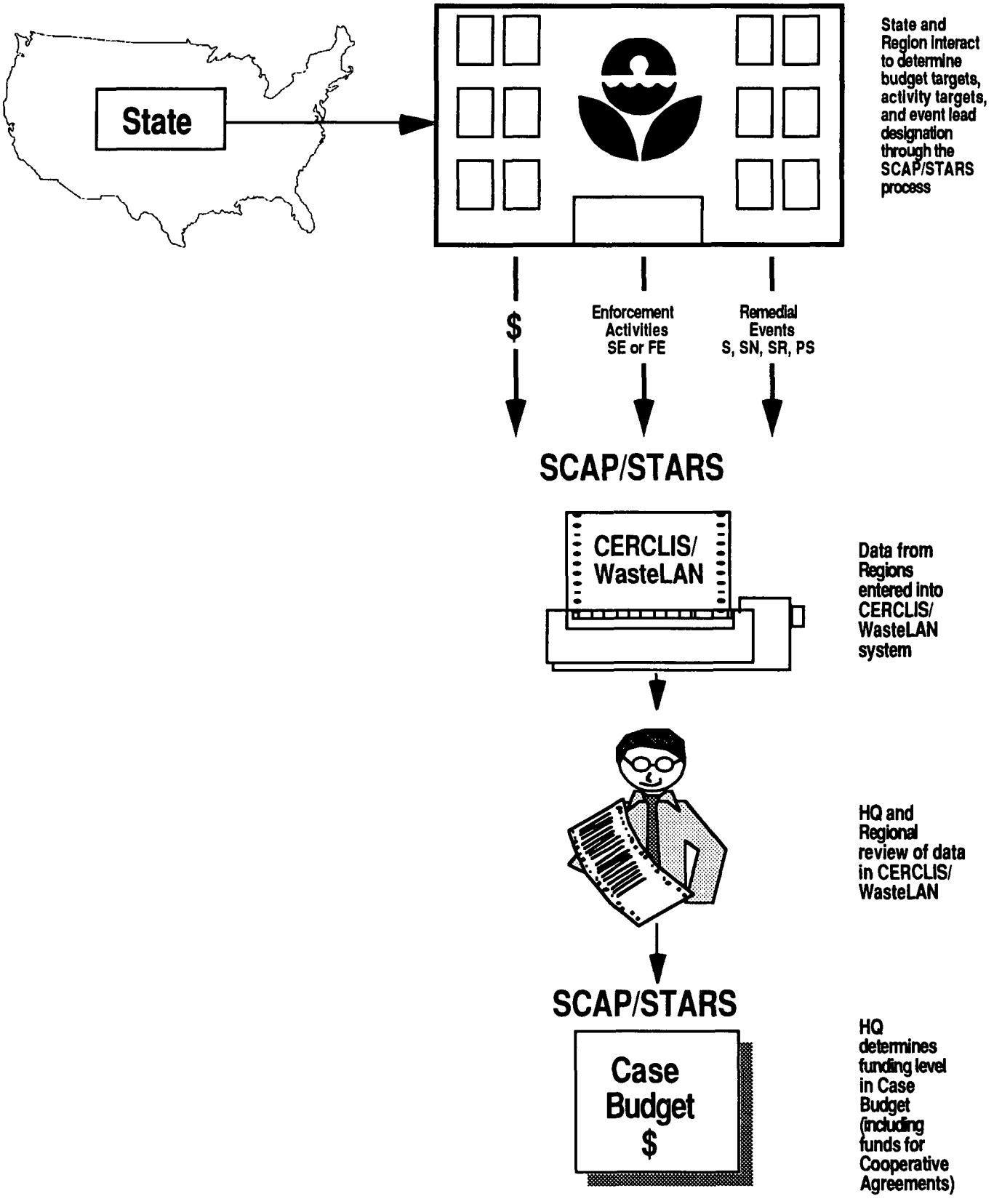
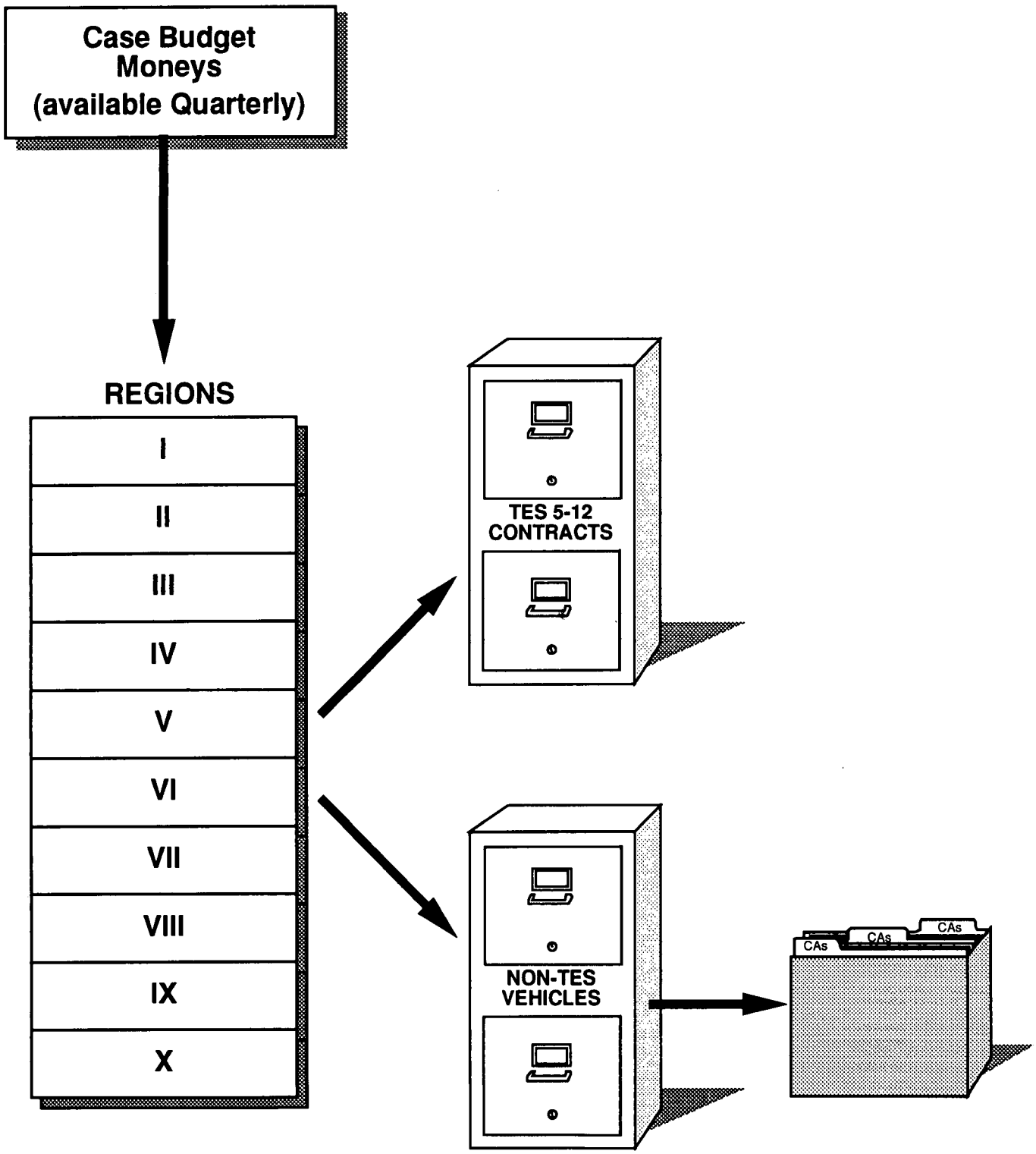


Exhibit XIV-2

CA Funding Through Case Budget



- Oversee PRPs at Federal-lead sites. Dollars for oversight of RP response at Fund-lead or Federal enforcement-lead sites are generally allocated from the TES or ARCs contracts
- Award community relations technical assistance grants. Allocations from these come OERR.

Three priorities have been established to help guide the Regions in planning enforcement CA resource needs. The priorities are consistent with EPA's goal to achieve 650 construction completions by 2000 and with the Agency's policy of encouraging state involvement in CERCLA enforcement activities. The Regions should, when possible, use CAs to fund state support activities and state-lead enforcement activities at sites in each of the following categories:

- Sites counting toward the 650 construction completion goal
- Sites in which states have shown strong enforcement interest (primarily state-lead sites). More in-depth information on these priorities can be found in the OSWER fiscal year SCAP Manual. Also refer to Chapter XVI, Contracts and Case Budget, for additional background on the development of the case budget and related Agency responsibilities.

Section IV. Potential Problems/Resolutions

This section discusses specific issues RPMs may confront during state enforcement activities and suggests methods for resolving these issues.

A. Forum Shopping by PRPs

This situation occurs when PRPs negotiate separately with state and Federal authorities to identify their best deal. There are advantages and disadvantages to this strategy for the PRPs: the PRP is unable to get liability releases from Federal and state authority unless a joint decree is signed (however, a joint decree doesn't *guarantee* releases—releases must be negotiated as part of the settlement). Moreover, PRPs should be interested in the process of deletion from the NPL. EPA can delete a site from the NPL only if the site meets standards set forth in the NCP, not if it meets only a state's requirements. Therefore, RPMs need to make it clear to PRPs that it is in their best interests to work both with EPA and the state in developing a settlement.

B. Overseeing State Oversight of PRPs

To avoid delays in the project because of poor quality work, a vigorous oversight effort is necessary. The RPM must make sure the state is aggressive in its oversight efforts and should work closely with state officials to make sure the work conducted is of acceptable quality. For example, the RI/FS must be of sufficient quality to support the ROD.

C. SCAP Targets

When states delay discussions with the Regions concerning their SCAP targets, it is difficult to monitor progress. It is imperative that states be viewed as partners with the Region. With a state-lead project, EPA should work closely with the state to identify start and close dates for activities listed on the SCAP so that target figures will be accurate.

D. Standard Planning Time Line

If Regions do not complete their schedule through the RA phase, their budget could be short-changed. For planning SCAP budget projections, the RPMs should use the Standard Planning Time Line or Regional Time Line, until better planning information becomes available for projecting start and completion dates for events. These dates are critical for budget projections and influence budget estimates for upcoming years.

E. SMOA Development

SMOAs are not required unless the state wishes to recommend the remedy for concurrence or to be the lead agency for non-Fund financed activities at an NPL site or if the Region and the State wish to modify the review times set forth in the NCP. When the state wishes to negotiate a SMOA, EPA must do so; however, EPA may not require that the state draft a SMOA. In general, Regions and states should work to encourage development of SMOAs.

F. State Challenges to RD/RA Consent Decrees

Pursuant to section 121 (f)(2)(B), states can challenge ARARs in Consent Decrees. These challenges can be a major source of delay. RPMs should establish and maintain contact with the state throughout the process to avoid delays.

Section V. References

Policy

National Oil and Hazardous Substances Pollution Contingency Plan: Final Rule (March 8, 1990) to FR 8666, Subpart F - State Involvement in Hazardous Substance Response and Subpart K - Federal Facilities.

Regulation

40 CFR Part 35, Subpart O, "Cooperative Agreements and Superfund State Contracts for Superfund Response Actions" (June 5, 1990) 40 FR 22994.

Guidance

OSWER Directive 9831.2, "Reporting and Exchange of Information on State Enforcement Actions at National Priorities Sites" (March 14, 1986).

OSWER Directive 9375.0-01 attachment, "Interim Final Guidance on Preparation of Superfund Memoranda Of Agreement (SMOA)" (May 8, 1989).

OSWER Directive 9831.8, "Counting State-lead Enforcement NPL Sites Toward the CERCLA Section 116 (e) RA Start Mandate" (October 21, 1988).

OSWER Directive 9831.7, "Supporting State Attorneys General CERCLA Remedial and Enforcement Response Activities at NPL Sites" (June 21, 1988).

OSWER Directive 9831.6, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 7, 1988).

OSWER Directive 9831.3, "EPA-State Relationship in Enforcement Actions for Sites on the NPL" (October 2, 1984).

OSWER Directive 9831.9, "Questions and Answers About the State Role in Remedy Selection at Non-Fund Financed State-Lead Enforcement Sites" (April 18, 1991).

FMD, "State Superfund Financial Management and Recordkeeping Document" (August, 1987).

Manual

OSWER Directive 9355.2-1, *Superfund State-lead Remedial Project Management Handbook* (December 1986).

OSWER Directive 9200.3-01B, *SCAP Manual* (updated annually).

Contacts

Office of Waste Programs Enforcement, CERCLA Enforcement Division, Guidance and Evaluation Branch, FTS 703-603-8940.

Office of Emergency and Remedial Response, Hazardous Site Control Division, State and Local Coordination Branch, FTS 703-603-8840.

XV. RECORDS MANAGEMENT

Chapter XV
Records Management

Section I. Description of Activity 1

Introduction 1

Section II. Procedures and Interactions 2

A. Site Files 2

Remedial Site Files 2

File Content and Structure 2

Collection of Field Data 2

File Management Process 2

Removal Site Files 2

File Content and Structure 3

Site File Kit 3

Collection of Field Data 3

File Management Process 3

B. Administrative Record Files 3

File Content and Structure 3

EPA Roles 4

Involvement of Other Parties 5

Public Participation 5

Remedial Actions 6

Removal Actions 6

Excluded and Privileged Information 7

Post-Decision Information 7

Compendium 8

Models 8

Certification 8

C. Cost Documentation File 8

File Content and Structure 8

File Management Process 9

D. Storage and Maintenance of the Records 9

File Maintenance 9

Disposition of Inactive Records 9

Vital Records 9

Section III. Planning and Reporting Requirements 10
A. Setting Priorities 10
B. Planning 10
C. Budget 10

Section IV. Potential Problems/Resolutions 11
A. Space 11
B. Transporting the Record to the Site 11
C. ORC and RPM Involvement 11

Section V. References 12
Policy 12
Guidance 12
Manuals 12
Contacts 12
Training 13

Chapter XV
Records Management

Section I. Description of Activity

Introduction

Records Management is critical to the success of the Superfund enforcement program. Due to the involvement of numerous Federal and State agencies, contractors, RPMs, OSCs, and PRPs at a site over a potentially extended time period, good file organization is necessary to document the site activities. Within Superfund, there are three primary areas of file management: the site file; the Administrative Record file for selection of each response action; the cost documentation file.

The site file contains all acquired site-specific information.

The Administrative Record file is a subset of the site file. As mandated by section 113(k) of CERCLA, the Administrative Record for selection of the response action contains all the documents that form the basis for the decision to select a CERCLA response action and acts as a vehicle for public participation in the selection of the response action. Proper compilation and maintenance of the Administrative Record file is crucial because under section 113(j) of CERCLA, judicial review of issues concerning the adequacy of any response action is limited to the information contained in the Administrative Record. In-depth information on compiling the Administrative Record for selection of response actions is contained in OSWER Directive 9833.3A-1 "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990). Note that there may be other Administrative Records to support other decisions taken by the Agency, e.g., a Deletion Administrative Record.

The cost documentation file consists of Headquarters and Regional documentation of expenditures and is required to recover Fund expenditures under section 107 of CERCLA.

Section II. Procedures and Interactions

A. Site Files

The site file consists of all information generated or received for a site. There are two kinds of site files:

- **Remedial site files** - which consist of all acquired information for a remedial action
- **Removal site files** - which consist of all acquired information for a removal action.

This section discusses aspects of both kinds of site files, including their content and structure, the collection of field data, and file management responsibilities.

There is no one way to organize files; this chapter gives recommendations and refers to model file structures that are available. Regions may want to add their own file structure to this handbook.

Remedial Site Files

The RPM is responsible for developing and maintaining accurate and complete files of the activities pertaining to the site.

File Content and Structure

The remedial site file should contain all documents acquired during the remedial response. The document inventory and filing system may be based on serial identification numbered documents or other coding systems. These systems may be manual or automated. A suggested file structure with sample contents is illustrated in Exhibit XV-1.

Collection of Field Data

Site-specific data quality objectives will govern the data management methods used, and the site's Quality Assurance Project Plan/Field Sampling Plan (QAPP/FSP) will identify both field and analytic data to be acquired and the standard operation procedures to be used. A data security system must be implemented to safeguard the chain of custody records and document control for field data. Refer to OSWER Directive 9355.07A, "Data Quality Objectives for Remedial Response Activities" (March 1987) for more specific guidance.

File Management Process

The RPM must complete the appropriate forms and reports and file them according to the Regional file structure. Files must be distributed to the Regional office from the site on a regular basis and as soon as possible to assess their applicability to response selection, to determine if the documents should be copied and/or stored in the Region, and to submit financial documents for processing. Documents that are selected to be part of the Administrative Record should be copied from the site file and maintained in a separate Administrative Record file. CERCLA requires that the Administrative Record file be available to the public at or near the facility at issue. The site file, however, is generally not available for public review because it contains draft documentation and privileged materials.

Removal Site Files

Removal site file management has typically been the responsibility of the OSC, with assistance from other EPA Regional staff, Technical Assistance Team (TAT) contractors, and the U.S. Coast Guard Strike Team. Each Region must clearly assign responsibility for each of the file management functions.

Exhibit XV-1(1)

Remedial Model File Structure

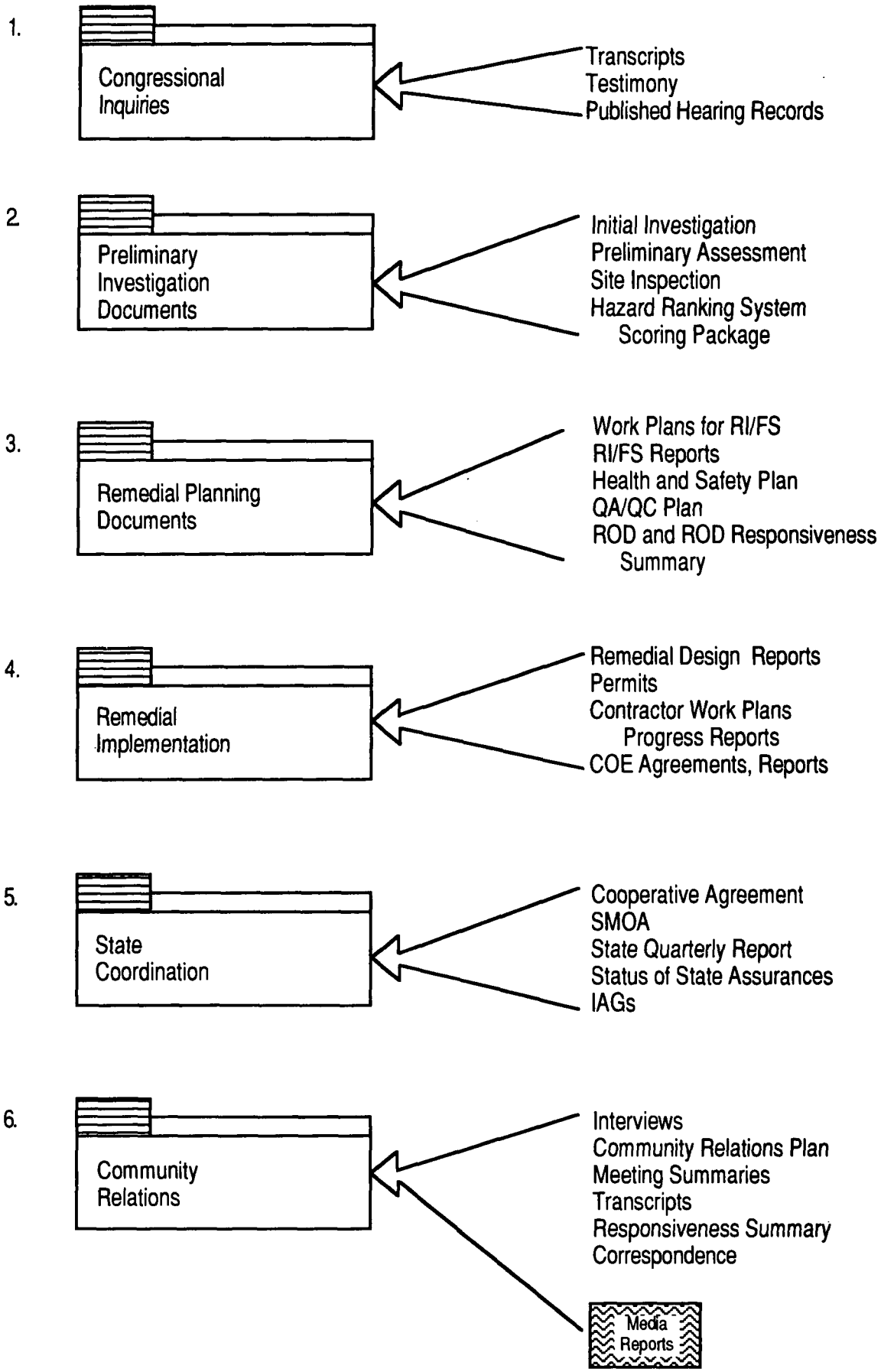
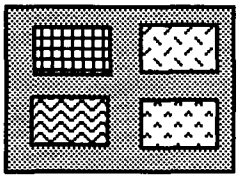
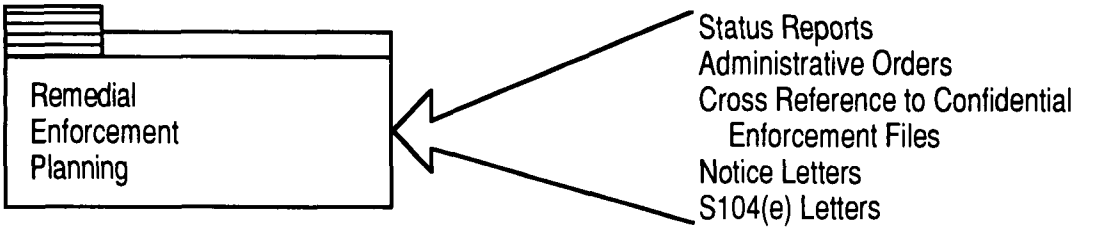
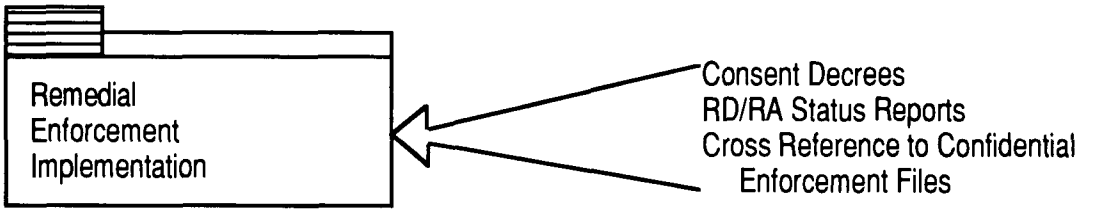
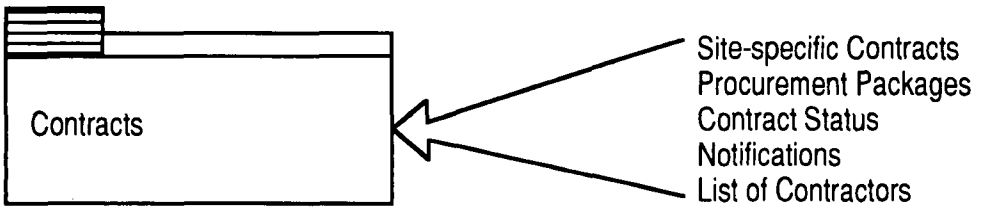


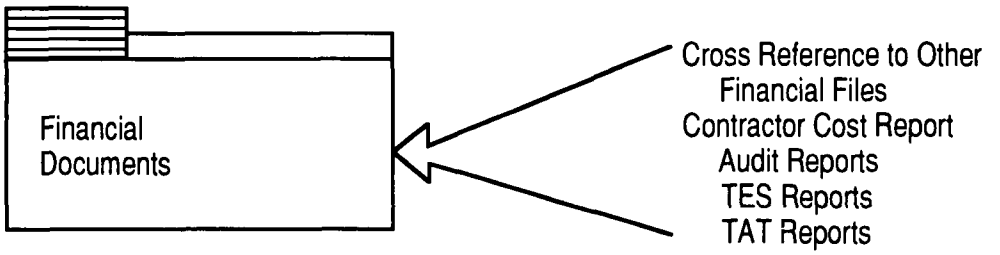
Exhibit XV-1(2)

7.  Imagery (Maps, Photographs, etc.)

8. 

9. 

10. 

11. 

File Content and Structure

Removal site files include documentation of all aspects of the removal: operational, legal, financial, community relations, and technical. Each Region should have a site file structure that can be used consistently at each site. All file structures used by the Regions should include the same minimum set of information. See Exhibit XV-2 for an example of a model file structure and component documents.

Site File Kit

The site file kit contains the items necessary to support the structured collection and storage of information at the site. Kit materials include file boxes, file folders, blank forms, time sheets, office supplies, and, if available, a personal computer. The Regional office distributes kits to OSCs, who may delegate acquisition of additional supplies to Regional administrative support personnel or the TAT. The site file kit should be transferred to the site upon project initiation. For short-term actions, the site file should be kept with the OSC. For long-term actions, the site file should remain in the command post.

Collection of Field Data

Data-gathering activities, based on site work plans or field sampling plans, are documented daily in the field logs. Guidance for quality assurance of field samples may be contained in the QA/QC Project Plans for the removal site. A data security system must be implemented to safeguard chain of custody records and document control procedures for field data.

File Management Process

Similar to RPM responsibilities for the remedial site file, the OSC must complete the appropriate forms and reports (such as Action Memoranda, work reports, and time sheets) in a timely fashion and file them according to the Regional file structure. Files must be distributed to the Regional office from the site on a regular basis and as quickly as possible to assess their applicability to the response selection, to determine if the documents should be copied and/or stored in the Region, and to submit financial documents for processing. Documents that are part of the Administrative Record should be copied from the site file and maintained in a separate Administrative Record file. The site file, unlike the Administrative Record file, need not be available for public review. The following section offers guidance on documents to be included in the Administrative Record.

B. Administrative Record Files

The Administrative Record contains the documents that form the basis for the selection of CERCLA response actions. Section 113(k)(1) of CERCLA requires that the Agency establish Administrative Records for the selection of CERCLA response actions. Section 113(k)(2) of CERCLA requires that the public have the opportunity to participate in the development of the Administrative Record. This section discusses the major requirements for the Administrative Record with regard to content and non-EPA involvement and some specific requirements for different types of Superfund actions. Although the terms "administrative record file" and "administrative record" often are used interchangeably, the "administrative record file" refers to the collection of documents before a decision document is signed. After the decision document is signed, the file becomes the "administrative record."

File Content and Structure

The record should consist of the documents considered or relied upon in the selection of a CERCLA response action, whether the documents support or oppose the Agency's selected action. Voluminous documents may be referenced in the Administrative Record file and made available to the public upon request. Documents in the Administrative

Record file should include relevant writings, graphs, charts, photographs, and data compilations, but the file does not include physical samples. Documents should be compiled as they are generated or received and made available at or near the site when the Remedial Investigation is begun. See Exhibit XV-3 for a sample file structure and list of documents that, if considered or relied upon for the selection of response at a site, must be included in the Administrative Record file. The list is not exhaustive. The record file should contain any information on which the response action was based. Documents generated or received for a site, but not relevant to the response selection process, should not be included in the Administrative Record file.

EPA Roles

The OSC, RPM, enforcement staff, ORC, Community Relations Coordinator, and the Administrative Record Coordinator are all involved in establishing Administrative Record files. The Administrative Record Coordinator has the duty of ensuring the adequate compilation and maintenance of the record files but is not responsible for deciding which documents to include in the record files. Those decisions should be made by the OSC or RPM in consultation with the ORC. The following chart identifies recommended roles for Administrative Record development.

Recommended Roles for Administrative Record Development

Tasks	RPM/ OSC	RC	ARC	CRC	Contractor
Develop compilation schedule & procedures			•		
Develop maintenance & update procedures			•		
Coordinate efforts to obtain necessary documents	•	•	•	•	•
Technical/legal review of documents & index	•	•			
Screen privileged documents	•	•			
Check adequacy & completeness of AR	•	•			
Organize & photocopy documents					•
Site repository arrangements	•		•	•	
Issue public notices			•	•	

When there is a question about including certain documents in the Administrative Record file, such documents can be segregated and reviewed by the RPM and the ORC at 3- or 4-month intervals (this should be done more often for removals). At critical times, such as prior to the public comment period, the issues regarding these documents should be resolved and, if appropriate, the documents included in the record file.

Each separate response action at a site (operable unit, interim action, or removal action) should be supported by an Administrative Record file. Guidance does allow information relevant to one response decision to be referenced in AR files for other/subsequent response decisions. The record file must be available to the public at or near the facility at

Exhibit XV-2
Removals Model File Structure

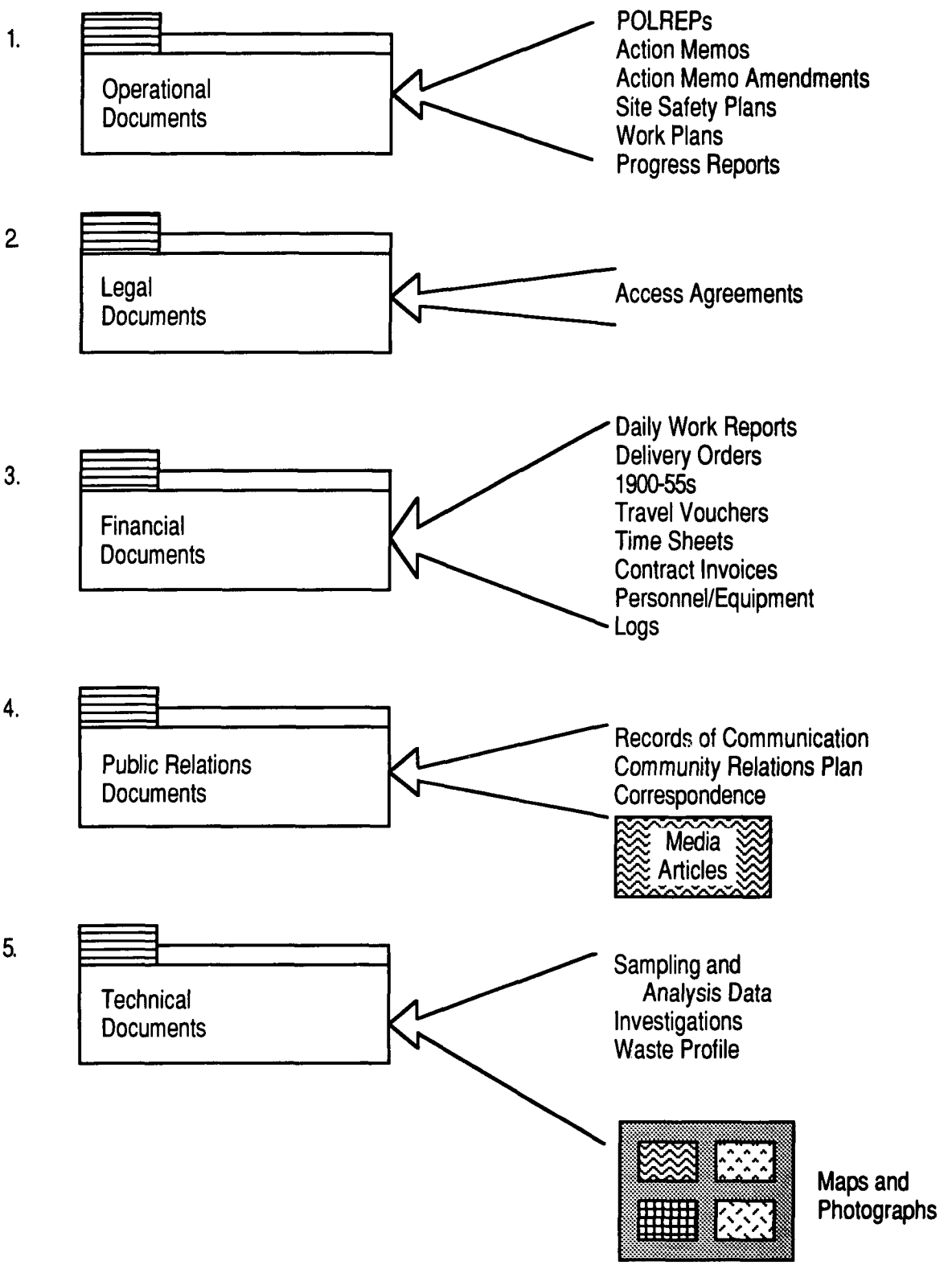


Exhibit XV-3(1)

Administrative Record Model File Structure

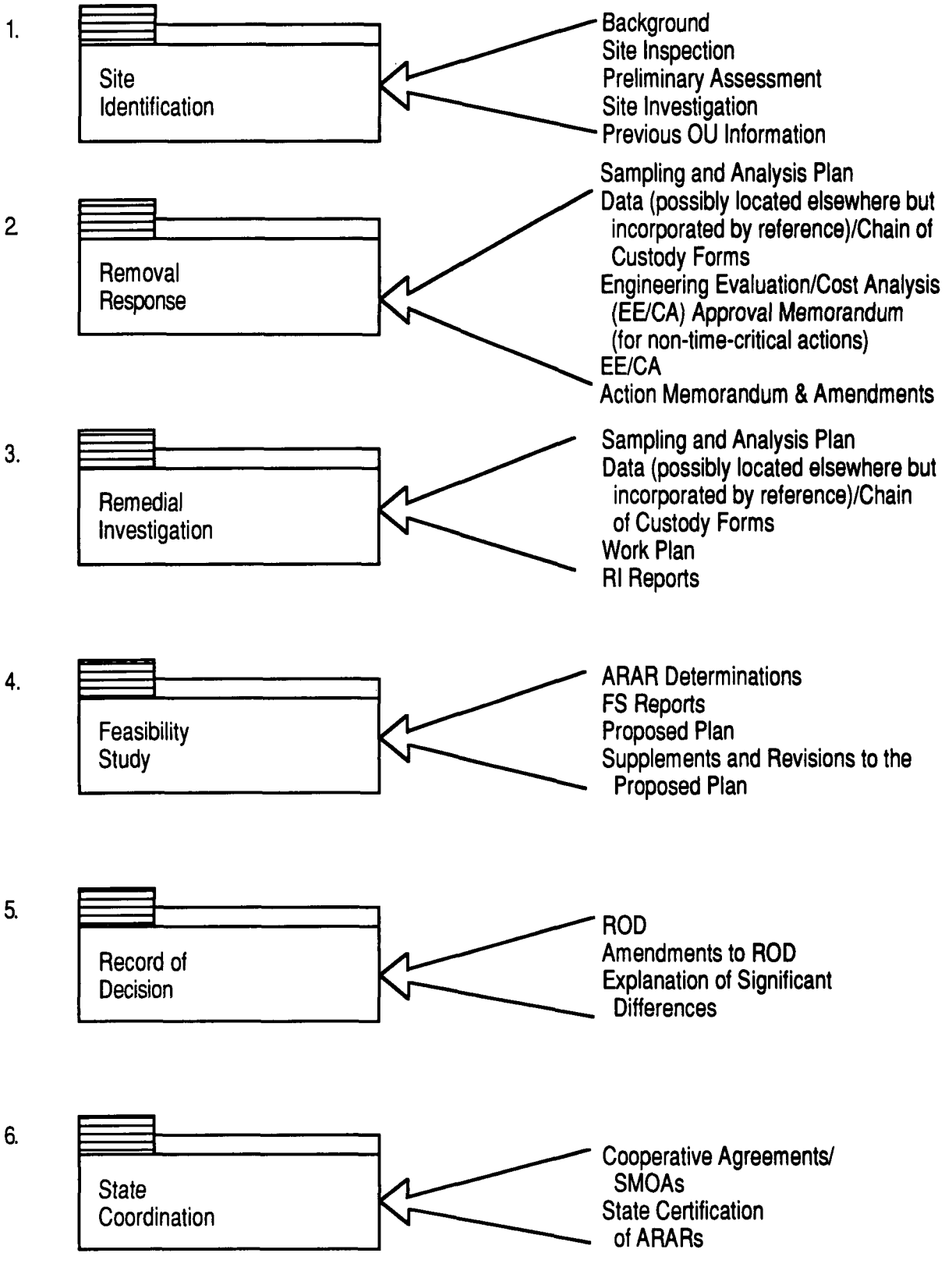
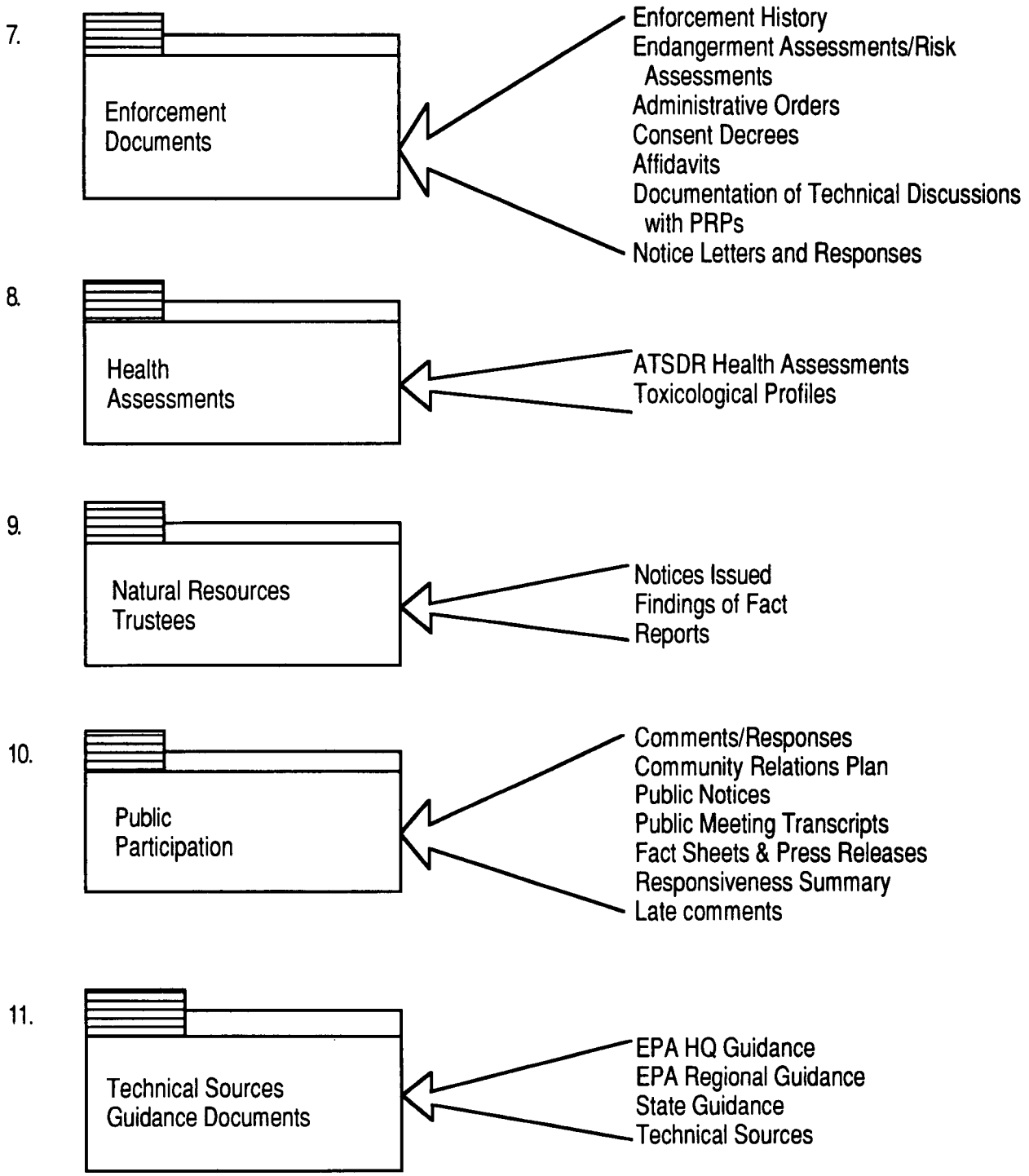


Exhibit XV-3(2)



issue. Public participation in the process is discussed later in this chapter and in more detail in Chapter XIII, Community Relations.

Involvement of Other Parties

The Administrative Record file for a Federal-lead site should reflect any state involvement in the selection of a response action. For guidance on documentation of state involvement in the response selection, see OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

Where a state has been officially designated as the "lead agency," the state must compile and maintain the Administrative Record file in accordance with section 113(k) of CERCLA. The state must transmit copies of key documents to the EPA Regional office. At a minimum, the state as lead agency must transmit a copy of the index, the RI/FS work plan, the RI/FS released for public comment, the proposed plan, and any public comments received on the RI/FS and the proposed plan. For purposes of oversight, the state should also send a copy of any risk assessment, final draft RI and final draft FS to the appropriate EPA Regional office. Agreements pertaining to the state's role and responsibilities regarding the Administrative Record should be incorporated into the Superfund Memorandum of Agreement (SMOA) or Cooperative Agreement (CA). The record file compiled by the state should reflect EPA's participation, comments, concurrence, and any disagreements at the same stages as are required for state involvement in a Federal-lead site.

For Federal facilities, the lead agency has responsibility for compiling an Administrative Record file in accordance with section 113(k). At NPL sites and any other site where EPA is involved in selecting a response action at a Federal facility, the Federal agency must transmit key documents to the EPA Regional office. At a minimum, the Federal agency must transmit a copy of the index, the RI/FS work plan, the RI/FS released for public comment, the proposed plan, and any public comments received on the RI/FS and proposed plan. For purposes of oversight, the Federal agency also should send a copy of any risk assessment, final draft RI and final draft FS to EPA. Inter-Agency Agreements (IAG) should spell out procedures for compiling and maintaining the record file.

Public Participation

Section 113(k) of CERCLA specifies that the Administrative Record "shall be made available to the public." In satisfying this provision, the Agency must comply with all relevant public participation procedures outlined in sections 113(k) and 117 of CERCLA. The NCP contains additional guidance. See also EPA/540/R-92/009, *Community Relations in Superfund: A Handbook* (January 1992) and OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities," (November 1991).

In general, the Administrative Record should document any opportunity for public involvement in the selection of a response action. All documents related to the opportunity for public involvement (e.g., notices and fact sheets) and relevant written comments received from the public should be included in the record file to establish a complete record for purposes of judicial review.

The record file also should contain information brought to the Agency's attention by the public. Reports, data and other information generated by outside parties and submitted to the Agency should be included in the record file.

The Agency should request that substantive oral comments (either in person or over the phone) be put in writing by the commentor for inclusion in the record file. The commentor should be advised that the obligation to supply the comment in writing rests with the commentor. The Agency may choose to record oral comments that it will want to rely on.

The Agency may respond to comments received *prior* to a public comment period in various ways, depending on the nature and relevance of a particular comment. The Agency's consideration of such a comment may be in the form of a written response, or reflected by documented actions taken after receiving the comment, or even by changes in

subsequent versions of documents. If the Agency responds to a comment, the response should be included in the record file.

The Agency may notify commentors that comments submitted prior to a formal public comment period must be resubmitted or specifically identified during the public comment period in order to receive formal response by the Agency. Alternatively, the Agency may notify a commentor that the Agency will respond to the comment in a responsiveness summary prepared at a later date.

Significant comments received *during* a formal public comment period must be addressed in a responsiveness summary (included with the ROD in remedial response actions). The responses may be combined by subject or other category in the record file. It should be noted that one response can be prepared to multiple comments of the same nature in order to be most efficient. Comments should be included in the record file in their original form whenever feasible. For further information, consult OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan and the Record of Decision, Explanation of Significant Differences, and the ROD Amendment" (June 1989).

In all cases, the Agency should publish a notice of availability of the record file when the record file is first made available for public inspection in the vicinity of the site at issue. The notice should explain the purpose of the record file, its location and availability, and how the public may participate in its development. The notice should be published in a major local newspaper of general circulation in the area of the site at issue and distributed to persons on the community relations mailing list. This notice should also be sent to all known PRPs if they are not already included on the community relations mailing list.

The availability of the record file will vary depending upon the nature of the response action. Different procedures are outlined below for remedial and removal response actions.

Remedial Actions

Section 113(k)(2)(B) of CERCLA outlines the requirements and procedures for public participation in the Administrative Record file for remedial actions. The Agency's policy, as outlined in the NCP, is that the Administrative Record file for a remedial action must be established at the Regional office and made available for public inspection at a location at or near the site when the remedial investigation begins.

Removal Actions

Section 113(k)(2)(A) of CERCLA requires that EPA develop appropriate procedures for participation of interested parties in the development of an Administrative Record for a removal action. These requirements also are discussed in Chapter II, Removals.

Emergency removal actions initiated within hours and lasting less than 30 days

The Administrative Record file must be made available to the public no later than 60 days after initiation of removal activity at the site. The record file must be maintained in the Regional office, but need not be made available at or near the site. Public comment on the Administrative Record file should be held when appropriate.

Other time-critical removals, including emergency removals lasting more than 30 days

The Administrative Record file must be made available to the public no later than 60 days after the initiation of removal activity at the site. The record file must be established at the Regional office and made available for public inspection at or near the site at issue. Public comment on the Administrative Record file should be held when appropriate. In general, a public comment period will be considered appropriate if cleanup activity has not been

completed at the time the record file is made available to the public and if public comments might have an impact on future action at the site. A responsiveness summary on the significant comments received must be prepared and included in the record file following the public comment period.

Non-time-critical removals

The Administrative Record file must be available for public inspection when the engineering evaluation/cost analysis (EE/CA) is made available for public comment. The Administrative Record file must be available at a central Regional location and at or near the site. A public comment period of at least 30 days must be initiated. The notice of public comment period may be combined with the notice of availability of the record file if they occur at the same time. The Agency must respond to all significant comments received during the public comment period and place the comments and the responses to them in the record file.

Excluded and Privileged Information

Documents should be excluded from the Administrative Record if they contain information that is not considered or relied upon during the Agency's selection of a response action. Examples of such documents may include contractor work assignments, cost documentation information, and PRP liability. Information relevant to the selection of the response action that is generated or received after a decision document is signed should be kept in a post-decision file and may be added to the record file in certain limited situations.

Some documents in the Administrative Record file may be protected from public disclosure on the basis of an applicable privilege. The RPM/OSC and ORC share responsibility for deciding which documents are privileged. Types of privilege include: deliberative process, confidential business information, attorney work product, attorney-client communication, personal privacy, and state secrets. Any privileged information that was considered or relied on to make the response action decision must be placed in a confidential portion of the record file. A short description of the information in the privileged document should be inserted in the portion of the record file available to the public and included in the index. In situations involving attorney-client privilege and deliberative process privilege, ORC should be consulted for proper procedure.

Post-Decision Information

After a decision document is signed, information generated or received by the Agency should be placed in a post-decision document file, which is separate from the Administrative Record file. Post-decision documents may be added to the record file in limited situations:

- If the decision document does not address or if it reserves a significant aspect of the response action decision to be made at a later date. In such cases, the Agency should continue to add documents to the record file that form the basis for the unaddressed portion of the decision.
- If there is a significant change in the remedy selected in the decision document. These changes may be addressed in an explanation of significant differences
- If the submitted documents contain changes that fundamentally alter the basis of the overall response action. Such changes will require an amended decision document
- If the submitted documents contain significant information, not contained elsewhere in the file, that could not have been submitted during the public comment period and substantially support the need to significantly alter the response action.

Post-decision information may also be added to the record file if the Agency holds public comment periods after the selection of the response action. The Agency may hold additional public comment periods or extend the time for submission of public comment on

any issue concerning response selection. All significant comments submitted during such comment periods, along with any public notices of the comment period, transcripts of public meetings, and Agency responses to the comments, should be placed in the record file.

Compendium OSWER Directive 9833.4, "Compendium of CERCLA Response Selection Guidance Documents" (May 1989) is a collection of guidance documents that are frequently used in the selection of a CERCLA response action. Not all of the documents listed will be used for the selection of remedy process at every site. The index of the record file must indicate which documents were used for that particular site as well as identify where those guidance documents may be obtained.

Models Models of the Administrative Record file structure, index, certification, and notice of public availability are available as guidance for their preparation. See the documents listed at the end of this chapter.

Certification When a selected remedy becomes the subject of litigation, and the record is filed in court, the Agency must certify that the Administrative Record is complete. Such certification should be signed by the Regional Administrator's designee after consultation with ORC. Any certification of the record should be made by program staff and not legal staff.

In addition, the Region may choose to have the Administrative Record Coordinator certify that the record was compiled and maintained in accordance with applicable Agency regulations and guidance, although this second certification is not required.

C. Cost Documentation File

Cost documentation is a cooperative effort among the RPM, OSC, other case team members, the Regional Financial Management Office (FMO), Headquarters' Financial Management Office (HQ-FMO), OWPE, and DOJ.

For the Agency to litigate cost recovery actions successfully under section 107 of CERCLA, proper documentation is essential. The Agency bears the burden of proving three elements for cost recovery:

- Proof of release or threat of release of a hazardous substance that caused the Agency to incur response costs
- Proof of liability of the responsible party
- Proof of expenditures (work performance).

To meet this burden, the Agency must meet the usual civil standard of proving all elements by preponderance of the evidence.

Regions should consider cost documentation an on-going process. Documents should be compiled and organized as soon as the pertinent information becomes available.

File Content and Structure The cost documentation file should contain the following documents:

- Case Resolution Document
- Cost Recovery Documentation Checklist
- Software Package for Unique Reports (SPURs)
- General Correspondence
- Cost Summary Report
- Payroll (HQ and Region)
- Agency Indirect Costs

- Travel (HQ and Regions)
- Contracts by Contractor
- Interagency Agreements by Agency (IAGs)
- State Cooperative Agreement or State Contract
- National Enforcement Investigation Center Documents
- Environmental Photographic Interpretation Center Documents
- Miscellaneous Procurement Expenses.

File Management Process

The Cost Recovery Coordinator, in coordination with the Regional Financial Management Office, coordinates the collection, assembly, and summarization of Regional cost documents. It is the RPM/OSC's responsibility to ensure that the Cost Recovery Coordinator gets all documents related to contractor work on-site.

For more information on documenting costs and activities, see Chapter XII, Cost Recovery.

D. Storage and Maintenance of the Records

The Superfund Records Management Officer in the Region has the responsibility for maintaining and storing the site files and the Administrative Record files. In most Regions, there is an Administrative Records Coordinator who takes responsibility for those files. The responsibilities and those who handle them differ from Region to Region. There is currently an initiative through OWPE and the OSWER-Information Management (IM) staff to establish records management systems for site files in all Regions. Evaluation of current Regional file management format for potential integration with Administrative Record needs should be considered.

File Maintenance

File maintenance includes a file maintenance plan, development of charge-out procedures, and documentation of file use. For guidance on file maintenance procedures and efficient filing procedures, refer to EPA/IMSD 91-020, *Draft Model Regional Records Management Operating Procedures Manual* (November 1991) and OSWER-IM, "Procedures for the Transfer of Contract Laboratory Program (CLP) Files for Storage in the Federal Records Center (FRC)," (August 1992). In addition, many regions have developed regional records management manuals.

Disposition of Inactive Records

Most Superfund Records are designated as permanent records and are not subject to destruction. Inactive Records may be transferred to a Federal Records Center in accordance with EPA records control schedules. For general guidance on record disposition, refer to EPA/IMSD 91-020, Draft Model Regional Records Management Operating Procedures Manual (November 1991). Guidance on disposition of Agency records is being developed by OSWER-IM and OIRM.

Vital Records

Vital records are those records deemed crucial to EPA's operation. The vital records program is designed to protect EPA's vital records in case of disaster or emergency. OSWER Information Management staff in Headquarters has established a Superfund Document Management Workgroup to address, as one of its tasks, the issue of which Superfund documents fall into this category of vital records. For general guidance on policies and procedures, refer to Chapter 4 of OIRM 2160, Records Management Manual (1986).

Section III. Planning and Reporting Requirements

A. Setting Priorities

Regions must set priorities for the order in which they plan to organize site files and compile Administrative Records and cost documentation files. Regions should make a concentrated effort to implement the requirements of the proposed regulations with regard to removal and remedial Administrative Records and cost documentation files compilation.

B. Planning

Records management plans for site files, cost documentation files, and Administrative Record files are Region-specific and depend on the state of the Region's record system and the methodology employed.

C. Budget

Funding for organizing site files is provided from a lump-sum records management budget managed by the Superfund enforcement support section. A standard budget for NPL site file organization ranges from $5,000 for a small site to $20,000 for a large, complex site. Most Regions will have sites which range in size and complexity and will have to balance their budgets accordingly.

Funding for Administrative Record compilation can be obtained through REM, TES, TAT, or 8(a) contracts. The standard budget for RI/FS (REM), removals (TAT), or PRP oversight (TES) is from $5,000 for a small site to $20,000 for a large and complex site.

Section IV. Potential Problems/Resolutions

A. Space

Lack of space for Administrative Record compilation, public access, and records storage are common records management problems in the Regions. Also, the large volume of site files can make it difficult to select and obtain documents for the Administrative Record due to lack of file organization. By organizing site files into a central data bank, Regions are able to establish an adequate base for compilation of the Administrative Record.

Due to lack of space, increased record retrieval requirements, tracking needs, and storage limitations, some Regions are moving toward electronic imaging technology and microfiche/microfilm. OSWER-IM is currently developing a Superfund Document Management System (SDMS) to assist regions in imaging, organizing, and retrieving site file documents.

B. Transporting the Record to the Site

Some Regions have experienced difficulty in identifying locations for the record at or near the site, contacting the facilities, and transmitting the records to the site. Regions have found that working closely with their community relations coordinators can be helpful in identifying facilities, and, in some cases, transporting the records.

C. ORC and RPM Involvement

Regions have experienced difficulty in obtaining adequate and timely participation by the ORC and RPM/OSC in the Administrative Record due to their heavy workloads. Furthermore, the ORC and RPM/OSC perceptions may vary as to what they believe should be included in the Administrative Record file. Several Regions have found training to be helpful and that early joint involvement by the RPM/OSC and ORC in record compilation can facilitate the process.

Section V. References

Policy

40 CFR Part 300 National Oil and Hazardous Substances Contingency Plan, (March 8, 1990).

Guidance

OSWER Directive 9360.2-01, "Model Program for Removal Site File Management" (July 1988).

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 3, 1988).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (July 1989).

OSWER Directive 9832.1, "Cost Recovery Actions Under CERCLA" (August 1983).

OSWER Directive 9355.0-7A, "Data Quality Objectives for Remedial Response Activities" (March 1987).

OSWER-IM, "Procedures for the Transfer of Contract Laboratory Program (CLP) Files for Storage in the Federal Records Center (FRC)" (August 1992).

Manuals

OSWER Directive 9355.0-14, *The Compendium of Superfund Field Operations Methods* (December 1987).

OSWER Directive 9833.4, *Compendium of CERCLA Response Selection Guidance Documents* (May 1989).

OSWER Directive 9230.0-3B, *Community Relations in Superfund: A Handbook* (March 1988).

OSWER Directive 9240.0-01, *The User's Guide to the Contract Laboratory Program* (1986).

OSWER Directive 9832.0-1A, "*Procedures for Documenting Costs in CERCLA section 107 Actions*" (January 30, 1985).

EPA/IMSD-91-020, *Draft Model Regional Records Management Operating Procedures Manual* (November 1991).

Office of Information Management 2160, *Records Management Manual* (January 1986).

The National Enforcement Investigation Center Policies and Procedures Manual (1981).

Region 1 Guidance, "Region 1 Records Center Operations Manual."

Region 9 Site File Guidance, "Reference Manual for Superfund Staff."

Contacts

OWPE, CERCLA Enforcement Division, Guidance and Evaluation Branch, 703-603-8940.

OWPE, CERCLA Enforcement Division, Cost Recovery Branch, 703-603-8920.

OSWER, Information Management Staff, 202-260-7951.

OIRM, Information Management and Services Division, National Records Management Program, 202-260-5911.

Training

OSWER Information Management staff are developing programs for CERCLA Records Management:

- Superfund Document Management System (SDMS) is an initiative to develop and pilot a network-compatible electronic imaging system to help store, manage, and retrieve Superfund site file documents.
- Revision of the records retirement/disposition schedules for Superfund site files, ARs, cost recovery documentation, enforcement, and compliance documentation, etc.
- Coordination with OWPE/CED/Contracts and OERR/HSCD to develop guidance for what to do with contractor-held records at delivery order/work assignment close-out.

For additional information, contact OSWER-IM staff, 202-260-7951.

Administrative Record

OWPE periodically provides training workshops on the Administrative Record. For more information, contact CERCLA Enforcement Division, Guidance and Evaluation Branch, 703-603-8940.

CERCLA Cost Documentation

OWPE and the Office of the Comptroller are available to provide training in overall cost recovery procedures and use of the Superfund Cost Organization and Recovery Enhancement System (SCORE$). Contact CERCLA Enforcement Division, Cost Recovery Branch, 703-603-8920.

Chapter XVI
Case Budget/Contracts

Section I. Description of Activity 1

Introduction 1

Section II. Procedures and Interactions 3

A. Case Budget Process 3

Budget Development 3

Resource Allocation 3

Pricing Factors 3

Negotiating Changes 4

B. Delegations of Responsibility 4

C. Purpose and Scope of Contracts 4

D. Work Assignment Manager Responsibilities 4

Pre-Issuance Period 4

Post-Issuance Period 5

Administrative Responsibilities 5

Technical Responsibilities 5

Work Assignment Close-out 6

Restrictions on the WAM 6

Section III. Planning and Reporting Requirements 7

A. Relationship to SCAP 7

B. Obligating Documents 7

C. Effective Dates 7

D. Non-Site-Specific Funds 8

E. Contractual Issues 8

Section IV. Potential Problems/Resolutions 9

A. Estimating Costs 9

B. Scope of Work (SOW) 9

C. Conflicts of Interest 9

D. Inherently Governmental Functions 10

E. Poor Quality Contractor Work 10

Section V. References 11

Regulations 11
Policies 11
Guidance 11
Manuals 11
Memoranda 11
Training 11
Contacts 11

Chapter XVI
Case Budget/Contracts

Section I. Description of Activity

Introduction

This chapter discusses the procedures and mechanisms by which RPMs plan and use EPA's extramural resources for Superfund enforcement program support. These resources are referred to as the enforcement Case Budget. The Case Budget includes the funds for most work performed by contractors, other Federal agencies under Inter-Agency Agreements (IAGs), and States under State Cooperative Agreements (CAs). This chapter describes how Case Budget funds are planned, allocated, and distributed, as well as the requirements an RPM must follow in obtaining and managing these resources. It is important for RPMs to understand the contract management process because the Superfund program relies on contractors for technical input and support. RPMs must be familiar with contract management procedures to ensure that the contractor and other extramural resources are used effectively. RPMs also must be familiar with the Case Budget planning process so that they can ensure the necessary funds are available when needed.

Extramural Case Budget resources support a wide variety of Regional and Headquarters enforcement activities. The five general categories that the Case Budget funds are: identification of PRP(s); negotiations; PRP oversight through the RI/FS; litigation; and program implementation. The process used for planning Case Budget funds is integrated with the SCAP, budget distribution, and Advice of Allowance (AOA) processes. Information on Regional Case Budget requests is stored in the CERCLA Information System (CERCLIS/WasteLAN), which is used to allocate available extramural funds among the Regions and to track approved Case Budget Technical Enforcement Support (TES) work assignment tasking and non-TES obligations. In addition, OWPE has developed the Technical Enforcement Support Work Assignment Tracking System (TESWATS), which provides a method for tracking the status of each work assignment issued under the Technical Enforcement Support (TES) contracts.

The Case Budget and the response program planning process are closely linked to the SCAP target-setting process. The largest share of Case Budget funds is tied directly to the Regions' SCAP targets, based on estimates of the average level of resources required to support each activity. For some activities, such as RI/FS oversight, resources are allocated on a quarterly basis, from the time the activity starts until it is completed. Therefore, resources may be available to support these activities in fiscal years when no SCAP-targeted activity will occur. In these cases funding is limited to a finite length of time for budget purposes. For example, RI/FS activities are normally limited to 10 quarters worth of funding and cost recovery litigation to 12 quarters. Extramural funds are provided for on-going quarters during the fiscal year. Requests for these activities should, therefore, be limited to the amount needed during the FY that is being planned.

Identification of the budget source when planning enables each program to develop an annual extramural budget and facilitates the AOA process. The six budget sources for extramural resources that correspond to the program elements are: Enforcement, Remedial, Removal, Headquarters Remedial, Headquarters Removal, and Federal Facilities. Use of these budget sources for support of any specific activity is dictated by one or more of the following: Congressional appropriations authority; Office of Management and Budget (OMB) directives; EPA Office of Comptroller guidance; and Office of Solid Waste and Emergency Response (OSWER) administrative policy and guidance. Thus, oversight of PRP-conducted RD/RA activities is funded through the Regional Remedial

extramural budget by OSWER administrative policy. Refer to Chapter XVII, SCAP/ STARS Cycle, for a more detailed description of the SCAP process.

Exhibit XVI-1 shows the iterative process that takes place between Headquarters and the Regions, whereby the Case Budget is determined according to Regional needs, national priorities, and funding needs. Exhibit XVI-1 reflects both Regional and Headquarters responsibilities with respect to Case Budget planning and obligations.

CERCLIS/WasteLAN is the system used by the Regions and Headquarters to communicate during the Case Budget process. The Regions are responsible for entering data on planned activity dates, funding requirements, and contract vehicles into CERCLIS/ WasteLAN during the SCAP target-setting negotiations. Headquarters uses planning data and negotiated targets to allocate the Region's Case Budget funds.

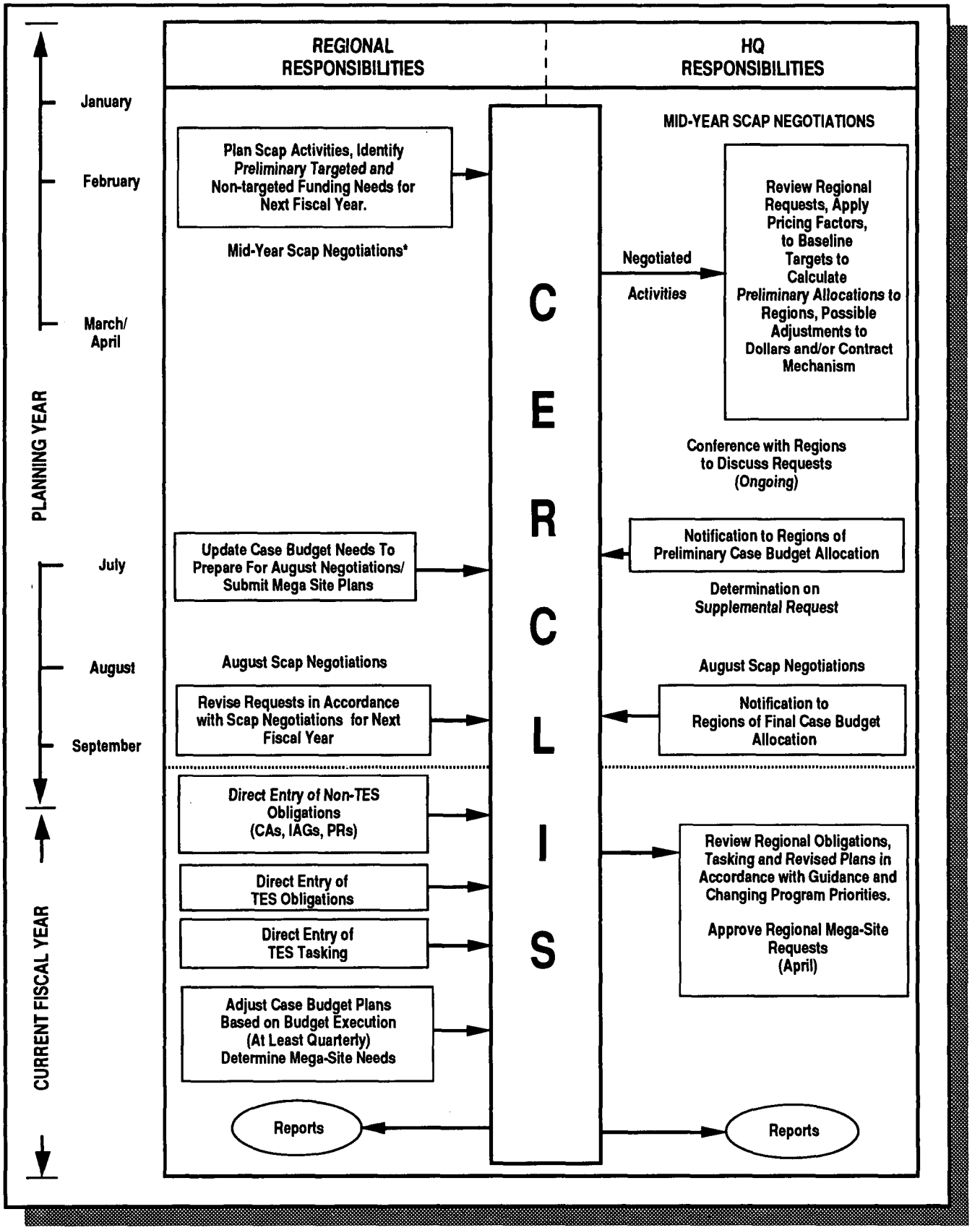
The primary contract vehicles for enforcement support are the TES contracts. The purpose of these contracts is to assist EPA in PRP oversight, community relations, case support, negotiations with responsible parties, and referrals to DOJ. The TES V through XII contracts are available for Regional use. The TES XIII contract supports Headquarters program activities.

A Long Term Contracting Strategy (LTCS) has been developed to replace the current TES V+ contracts with Enforcement Support Services Contracts in FY 1994. Enforcement Support Services Contracts are small, regionally based contracts designed to provide specialized services such as PRP searches and litigation and negotiation support.

Additional contracts available for enforcement support include the Alternative Remedial Contracts Strategy (ARCS) contracts and 8(a) firms. Regardless of the contract vehicle that is used, RPMs generally act as Work Assignment Managers (WAMs) for specific projects that affect their sites. This role includes both administrative and technical responsibilities. WAMs must develop the scope of work and independent cost estimate for the project, review the work plan, track project progress, and close out the assignment upon its completion. They also must provide technical guidance to the contractor, ensure that the contractor's work meets the Agency's standards for quality, review monthly costs, and evaluate performance.

Exhibit XVI-1

Case Budget Data Flow



* For FY93, Preliminary SCAP negotiations (Scheduled for February) were canceled.

Section II. Procedures and Interactions

This section discusses the specific procedures that the Regions and Headquarters follow in implementing the Case Budget process and managing enforcement work assignments. It begins with a brief discussion of the budget development and allocation processes and focuses on the RPM's role in contract management.

A. Case Budget Process

The EPA budget process has two major components that are closely linked. The first, which is used to determine the total level of resources available to the Agency for the Superfund program, is the budget development process. The second component focuses on allocating the total available resources among the Regions.

Budget Development

The amount of extramural funds that are available nationally is determined by the Federal government's budget development process. This process involves a planning cycle in which each agency, including EPA, submits its estimated resource needs to Congress at the beginning of each calendar year. The estimated resource need is based on Regional planning data in CERCLIS/WasteLAN. Congress reviews the Agency's requests and, shortly before the beginning of the fiscal year, determines the appropriate funding level. The budget becomes effective once the President signs the appropriations bill.

Resource Allocation

Once the total level of available extramural resources has been determined, those funds are allocated to the regions based on need and program priorities. Resources are allocated from Headquarters to the Regional offices for the removal, remedial, and enforcement programs, each of which has a separate Advice of Allowance (AOA). Case Budget funds are formally distributed to the Regions through the quarterly AOA process. AOA distributions are based primarily on average pricing factors and the targets and measures for SCAP activities, as listed in CERCLIS/WasteLAN. Funding is provided for enforcement activities that are not themselves SCAP targets or measures. These activities include Administrative Records compilation and program management needs. A change in allocating resources was implemented in FY 92 and is based on each Region's performance in obligating/tasking its current year approved enforcement funds. A case budget review is conducted at mid-year at which time each Region is expected to have a 60% utilization rate in obligating/tasking of its first and second quarter AOA. Any Region not achieving the 60% utilization rate may risk losing its third and fourth quarter AOA. These funds may then be redistributed to another Region that has demonstrated a need for additional funds.

Pricing Factors

Headquarters and Regional program managers have developed pricing factors for the major enforcement activities. These pricing factors are national average estimates for the extramural cost of each major enforcement activity. They are intended to guide the Regions in estimating their resource needs for the current and upcoming fiscal years. Adjustments to these factors, as applied to individual sites, may be made within the Region. Enforcement Mega-sites exhibit one or both of the following characteristics: 1) sites which are extremely large in spacial extent and with unusually large numbers of responsible parties (sometimes in the thousands) and; 2) sites that cost significantly more than the average pricing factor. Regions receive Mega-site resources by submitting annual Enforcement Mega-site plans that detail current site status and outline enforcement resources that are needed in the upcoming year. Mega-sites are principally in Regions I, VII, VIII and IX. Currently, pricing factors do not exist for Mega-site activities. All activities must be paid for out of the region's approved budget. In FY 94, OSWER plans to revise and update the workload budget model; this will impact pricing factors.

Negotiating Changes

If a Region identifies a significant change in the resources that will be required to support its enforcement activities, it can negotiate to change its Case Budget allocation. While there are rarely any additional funds available on a nationwide basis, shifts between Regions are negotiated among the Regions and Headquarters at the mid-year and prior to the fourth quarter. Each Region has an opportunity to present its needs and Headquarters decides which AOAs to change based upon national priorities, performance, and any unanticipated site problems or activities.

B. Delegations of Responsibility

In FY89, the Regions began playing a significant role in both the financial and contractual management of the enforcement program. In the area of financial management, the Regions are responsible for obligating all funds. This includes mechanisms such as TES V+, State Cooperative Agreements (CAs), ARCS, 8(a) contracts, small purchases, and site-specific contracts. The Regions are also responsible for ensuring that the total funds obligated do not exceed the Region's AOA for non-TES and TES V+ funds. Additional information on financial management is available in the OSWER SCAP Manual.

Contractually, the Regions are responsible for reviewing and recommending payment of each invoice and voucher submitted under contracts and other vehicles for which they have financial management responsibilities. For all TES contracts, Project Officer approval authority for work assignments and invoices has been delegated to the Regional Project Officers. Under this delegation, the Regions are responsible for WA initiation and tracking, performance evaluation, and WA closeout where necessary. In addition, the Regions must ensure that the necessary SCAP information is complete and available to track each transaction in TESWATS and CERCLIS/WasteLAN.

C. Purpose and Scope of Contracts

EPA has contracts with TES contractors to assist the Agency in carrying out its enforcement activities. The TES contracts are multi-year level-of-effort (LOE) contracts and, as such, allow specific tasks to be assigned to the contractors on an as-needed basis, within the restrictions of the overall contract statement of work. Hours are assigned to a project based upon EPA's estimate of the level of effort required to complete the project. In addition, the Regions have access to other contract vehicles that may be used to support enforcement activities. These include: ARCS, 8(a) contracts, small purchases, and site-specific contracts. Each of these is discussed in Exhibit XVI-2. IAGs also may be used to support Regional enforcement activities. OWPE currently has an IAG with DOJ for legal representation to EPA for the Superfund Enforcement Program. Regions may initiate IAGs with the U.S. Army Corps of Engineers, the U.S. Geological Survey, and the U.S. Fish and Wildlife Service. A detailed discussion of the use of State Cooperative Agreements can be found in Chapter XIV, State Enforcement.

D. WAM Responsibilities

In many instances, the RPM will act as the Work Assignment Manager (WAM) on work assignments at sites that are his/her responsibility. This section describes the administrative and technical responsibilities of the EPA WAM prior to issuance of a work assignment under an EPA contract and throughout the period of performance of the project.

Pre-Issuance Period

Before the work assignment is issued, the WAM is responsible for defining and preparing the Scope of Work (SOW), and ensuring that the approach to accomplishing the project is within the contract's statement of work. This includes a review of the potential contractor's staffing to see that the level of personnel is sufficient to perform the work and a determination of the adequacy and reasonableness of the level and allocation of resources for various tasks under the WA.

Additionally, the WAM is responsible for identifying the applicable appropriation for the WA, the period of performance, project schedule and milestones, travel requirements, and

any government property or equipment needed to successfully complete the assignment. Once the WAM has assembled this information, the WA should be discussed with the Section Chief for a determination of the project's priority.

Prior to the issuance of a WA estimated to exceed $25,000, an Independent Government Estimate (IGE) must be developed by the WAM. It must be developed independently without input from the contractor receiving the work assignment. The IGE is used as a tool in negotiating the work plan budget with the contractor and for documenting the resulting agreements in the contract file. The IGE demonstrates that the government is prepared to negotiate realistic costs for work to be performed.

Post-Issuance Period

The WAM's post-issuance responsibilities can be divided into two broad categories: administrative and technical. Both are critical to the effective use of EPA's contractor resources.

Administrative Responsibilities

The WAM's administrative responsibilities include developing a Statement of Work (SOW), schedule, independent government estimate, and work assignment form, and reviewing and approving both the cost and technical aspects of the contractor's work plan. In addition, the WAM has monthly responsibilities that include reviewing and approving or disapproving contractor vouchers, and reviewing progress reports to identify any potential problems. If problems are identified, the WAM should contact the Regional Project Officer (RPO) and discuss possible solutions. Additional post-issuance responsibilities include: providing any information on WA status required by contract managers; preparing technical direction memoranda and changes to level of effort; and assisting in the closeout of the work assignment once all work is completed. In addition, an important administrative responsibility of the WAM is to provide periodic information on the contractor's performance to be used in the performance evaluation process that determines the contractor's award fee. The WAM is required to prepare a Performance Evaluation Report (PER) on a periodic basis (usually a trimester) defined by the Performance Evaluation Board for the TES contract being used. The WAM may be asked to assist in developing performance evaluation summary reports for the RPO.

Technical Responsibilities

In addition to the WAM's administrative responsibilities, he/she acts as the principal technical contact between the Agency and the contractor. In this role the WAM must ensure that the contractor has all necessary guidance and policy materials to ensure proper completion of the project, monitor and oversee all contractor work to verify that required quality standards are met, provide technical direction where necessary, and review and approve or reject all project deliverables. The WAM is ultimately responsible for the quality of the contractor's work.

The WAM's technical management of the WA is critical to the success of the project. The WAM should meet regularly with the contractor to monitor progress on the work assignment. These meetings may be weekly, monthly, or bi-monthly, depending on the level of activity on the assignment. At these meetings, the WAM should review the monthly status report that describes the progress made since the previous meeting, any problems that have been encountered, any changes in approach that are anticipated by the contractor, and the next activity that the contractor expects to perform. In addition to regular meetings, the WAM should review drafts of major deliverables to ensure that the product meets contract and Agency standards. Where on-site work is involved, the WAM should go with the contractor to the site on a periodic basis to monitor the work that is performed.

In addition to these general management responsibilities, the following are examples of the types of WAM involvement that may be required for two different types of enforcement assignments.

PRP Search:

- Identify existing materials that may contain relevant information on PRP identities
- Arrange access to information in EPA and State files
- Provide the contractor with information about the technical conditions at the site
- Review the draft PRP Search Report to identify any additional data that may be missing
- Ensure proper management review of the PRP Search Report
- Work with the contractor to identify additional tasks that will be needed to fill gaps in the data
- Review drafts of the interim final report to ensure completeness and accuracy.

RI/FS Oversight:

- Provide the contractor with complete records of the technical conditions at the site
- Provide the contractor with all settlement agreements and PRP work schedules
- Use a compliance monitoring system to identify key points to check if PRPs are in compliance with administrative or judicial orders
- Work with the contractor to determine the necessary level of on-site presence during sampling events
- Review the contractor's analysis of the PRP's technical performance.

Work Assignment Close-out

Upon completion of the work assignment, the contractor will submit a final report summarizing the total costs for the project and the nature of the work that was done. The WAM is responsible for verifying that the WA has been completed fully and satisfactorily and for preparing the necessary close out WA and performance evaluation report. If budgeted, a meeting may be held between the WAM and the contractor to review the project's performance and completion.

Restrictions on the WAM

During the course of directing a work assignment, the EPA WAM shall <u>not</u>:

- Make changes or issue orders that will affect the terms and conditions of the contract (only the Contract Officer has such authority)
- Give technical direction that will increase costs and level of effort or change the technical approach of the project
- Authorize services or work to begin before issuance of the work assignment
- Direct or request the contractor to perform services that create an employee/employer conflict of interest (COI)
- Direct the contractor to perform work outside the scope of the work assignment
- Direct the placement of a subcontract.

The WAM *may*:

- Oversee the progress of the contract
- Issue technical direction which is consistent with the statement of work and does not require an increase in estimated cost or fee or a time extension
- Amend the work assignment if there is an increase or decrease in the level of effort, a significant change in the budget, or modifications to the scope of work. Work assignment amendments must be approved by the Project Officer and the Contract Officer before the changes take effect.

In summary, the WAM should not direct the contractor to do anything that might bind the government to pay for additional goods or services not anticipated in the current work plan for the WA.

Section III. Planning and Reporting Requirements

The CERCLIS/WasteLAN database has been designed to accommodate data describing site-specific and non-site-specific planned and actual obligations and TES tasked amounts. It is the primary mechanism for tracking the planning and utilization of Case Budget funds. Although the Integrated Financial Management System (IFMS) is the official Agency system for tracking obligations, commitment, and expenditures of Agency funds, these data are periodically down-loaded into CERCLIS/WasteLAN from IFMS. Within CERCLIS/WasteLAN, the site-specific planned obligations will be entered directly into the appropriate Event or Enforcement Activity record for the site. Non-site-specific planned obligations are entered by the Regions into CERHELP, the non-site-specific portion of CERCLIS/WasteLAN.

TESWATS is intended to facilitate management of the large volume of work assignments under the TES contracts. This system, maintained by both Headquarters and Regional staff, contains information about the financial status of each active TES WA. Regional staff are responsible for entering the WA information into TESWATS. Headquarters staff enters data concerning when a work assignment is approved by the contracting officer. The RPM should be aware that the information on the work assignment forms, used to initiate and amend TES work assignments, is also entered into TESWATS and WasteLAN.

A. Relationship to SCAP

As discussed previously, the Case Budget planning process is directly related to the SCAP target-setting negotiations that take place in February and August of each fiscal year. (In FY 93 preliminary negotiations scheduled for February were cancelled.) RPMs must actively participate in that process to ensure that sufficient funds are available to support each planned and on-going enforcement action. The SCAP process is described in detail in Chapter XVII, SCAP/STARS Cycle.

In addition to participating in the SCAP process, the Regions are responsible for entering key data on extramural obligations and tasking into CERCLIS/WasteLAN. These data should be entered by the 5th working day of each month. The Regions are responsible for verifying that the information in IFMS, TESWATS, and CERCLIS/WasteLAN is consistent.

B. Obligating Documents

To assist in the allocation and tracking process, the following information must appear on all Regionally-prepared obligating documents: EPA ID number, site spill ID number, operable unit number, CERCLIS/WasteLAN Event or Activity code, work assignment number, and dollars obligated or tasked. For TES work assignments, TESWATS captures this information, and the contracting officer will be unable to approve requests that do not include this information. The proper account information also must appear on each transaction in order for the commitment or obligation to be official.

C. Effective Dates

A Cooperative Agreement is considered obligated when it is signed by the Regional Administrator; an IAG is considered obligated when it is signed by the other agency; contracts are considered obligated when the Contract Officer signs the obligating document (e.g., for TES, the obligating document is the work assignment, for 8(a) firms, the obligating document is the contract).

D. Non-Site-Specific Funds

Non-site-specific plans should indicate total dollars requested for an activity that the Region is unable or does not wish to indicate site-specifically. Non-site-specific records should also indicate the number of sites at which an activity is expected to occur, as well as the contract mechanism. Headquarters requires this information for the Regional Case Budget allocation.

E. Contractual Issues

Preparation of a funding document is the primary step in the process of committing and obligating funds made available through the Superfund program's AOA. The funding document specifies the commitment date, the amount, and the funding vehicles, including contracts, Cooperative Agreements, and IAGs. The Integrated Financial Management System establishes the official obligation date and other pertinent data when the transaction is entered into IFMS. These documents must be used whenever Superfund AOA funds will be used.

The SCAP Manual is the definitive statement of policy and procedures on the handling of SCAP-related information. Therefore, RPMs should refer to the most recent version of that manual for current information on financial reporting requirements.

Section IV. Potential Problems/Resolutions

This section presents some of the problems that may be encountered by an RPM participating in the Case Budget process or managing enforcement contracts.

A. Estimating Costs

Due to environmental differences throughout the Regions, costs and LOE estimates for similar projects, such as RI/FS oversight, may vary dramatically. Therefore, it is important to make estimates based on the activities to be completed in the particular Region, and not on national averages. RPMs should consult with others who have done similar work under similar conditions to more accurately estimate the likely costs of any given project. However, because resources are allocated based on average pricing factors, if one project in a Region will cost more than the average, the Region should be prepared to identify another project that will require fewer resources than allocated in the average pricing factor.

From a national planning perspective, the issue of keeping pricing factors comparable with "real world" costs has always been an area of concern for the Federal government. Therefore, it is imperative that those who contribute to the pricing factor development process be kept abreast of the latest estimates of site clean-up activity costs.

B. Scope of Work (SOW)

When the RPM develops a SOW for a work assignment, it is important to clearly define the process and products that are required. The SOW will act as the contractor's guide to performing the assignment, and the more direction that is provided, the better the final product will be. Where unusual site conditions or the unavailability of critical data will affect the project approach, the RPM should clearly identify these circumstances in the SOW and allow for alternative approaches.

To the extent possible, the SOW should set forth a detailed approach to the project and should include an outline of the deliverables that are expected. In addition, a time schedule for the deliverables should be presented that includes periods for RPM review of draft deliverables and that reasonably reflects the time constraints on the RPM. The SOW also should identify any applicable guidance, such as the *PRP Search Manual*, that may assist the contractor in performing the assignment.

C. Conflicts of Interest

There are two areas in which conflicts of interest may be raised as an issue of concern to the WAM. The first is the WAM's personal conduct. The second area of concern is the contractor's organizational or personnel conflicts that could pose problems with performance of the work assignment.

In regard to personal conduct, the WAM must be familiar with the *U.S. EPA Guidance on Ethics and Conflicts of Interest* document of February 1984, Executive Order 12674 of April 12, 1989, "Principles of Ethical Conduct for Government Officers and Employees," as well as similar provisions outlined in Chapter 5 of the *U.S. EPA Project Officers' Handbook*, Second Edition, dated April 1984. Based on this information, the WAM must avoid any actual, apparent, or potential conflict in the work assignment and the contract. The WAM will not participate knowingly in the contract where a conflict of interest could arise and will immediately report to the Project Officer any circumstance that could raise this issue. Basically, a conflict of interest arises when the WAM has financial or personal interest in the regulated community.

Organizational COI refers to work that the contractors or their subcontractors have performed at private and public sector sites that may impair their objectivity in doing work assigned through the contract. To alleviate organizational COI, the contractor must submit

a statement within 5 days of receiving each WA certifying that a potential organizational COI does not exist, or if it does, it has been reported to the CO.

Personnel COI is defined as a relationship of an individual with an entity (either through a current financial relationship, prior or current work relationship, etc.) that may impair the individual's objectivity in performing contract work.

For every work assignment that the contractor accepts, a statement must be made by the contractor verifying that all potential COIs, whether organizational or personnel, have been reported to the Contracting Officer. If the contractor determines that work on an assignment would create an actual COI, the contractor immediately notifies the contractor of the conflict to enable the CO to determine if work should stop. The contractor should not automatically stop work, because certain situations allow for work to continue.

D. Inherently Governmental Functions

WAMs should ensure that the contractor is performing only appropriate tasks. The contractor should never perform work which is inherently governmental. OMB Circular A-76 describes inherently governmental activities as those "being so intimately related to the public interest as to mandate performance only by Federal employees." Examples of such activities include reviewing vouchers and invoices for the purposes of determining whether cost, hours, and work performed are reasonable; a contractor representing him/herself as an EPA employee; and preparing responses to Freedom of Information Act requests (other than routine non-judgmental responses). For further information on inherently governmental activities, see EPA Order 1900.2, "Contracting at EPA" (October 1990) and the memorandum from the administrator, "Contracting at EPA" (April 1990).

E. Poor Quality Contractor Work

WAMs are responsible for ensuring that contractors maintain a high standard of quality on their work. To assist in this, the WAM needs to outline specifically in the SOW what services are to be provided, the time frames involved, and the reporting requirements. Also, strict Quality Assurance/Quality Control (QA/QC) procedures should be applied to each phase of a work assignment, rather than at the end of the assignment only. However, if poor-quality work is consistently delivered by a particular contractor to the Agency after these measures have been taken, the most effective way to eliminate this problem is to issue a stop-work-order, after consultation with the Project Officer and Regional management. Stop-work-orders can only be issued by the Contract Officer. Poor contractor performance can be addressed by scheduling meetings with the contractor to state the Agency's concerns in this respect, and if necessary, elevating the issue to the contractor's and Agency's upper management. Another avenue available to improve contractor performance is to note poor performance in a performance evaluation report which is then reviewed by the Performance Evaluation Board. Poor performance can thus be reflected in the award fee provided to the contractor during this periodic review.

Extensions of a period of performance and expansions of a work assignment budget should be accomplished only through an approved work assignment amendment. Verbal instructions to the contractor, in this regard, by the RPO or WAM are never acceptable. By providing verbal instructions, a WAM could so mislead a contractor that the government would be bound to pay the contractor's costs for services rendered on a theory of quasi-contract. A quasi-contract is not a contract, but a theory that the government should pay for rendered services. Case law indicates that the government could hold an employee liable for costs in such a situation. This position has never been tested in relation to an EPA employee.

Section V. References

Regulations

EPA Order 1900.2, "Contracting at EPA" (October 1990).

5 C.F.R. section 2635, "The Standards of Ethical Conduct of Employees of the Executive Branch" 57 Federal Register 11886-11891, (August 1992).

Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees" (April 1989).

Policies

Office of Administration, Grants Administration Division, "The Interagency Agreements Policy and Procedures Compendium" (1988).

Guidance

"U.S. EPA Guidance on Ethics and Conflicts of Interest" (February 1984).

Manuals

OSWER Directive 9871.0, "Roles and Responsibilities of Regional Project Officers and Work Assignment Managers Under the Technical Enforcement Support (TES) Contracts" (May 3, 1989).

OSWER Directive 9200.3-01, *SCAP Manual* (updated annually).

U.S. EPA Project Officer's Handbook, Second Edition (April 1984).

Memoranda

From the Administrator, "Contracting at EPA" (April 1990).

Training

Required training course for all POs, WAMs, and/or DOOs, "Contract Administration Training for Project Officers, Work Assignment Managers, and Delivery Order Officers," is offered in all Regions by the EPA Institute.

TESWATS Training is also available from OWPE, CERCLA Enforcement Division, Contracts and Planning Branch. This office, as well as Regional Project Officers, can provide guidance on preparing work assignments, performance evaluation reviews, cost verification forms, etc.

Case Budget Training is offered on an as needed basis from the Contracts and Planning Branch within OWPE's CED.

Contacts

Office of Waste Programs Enforcement, CERCLA Enforcement Division, Contracts and Planning Branch. FTS 703-603-8930.

Chapter XVII
SCAP/STARS Cycle

Section I. Description of Activity 1

Introduction 1
SCAP 1
Budget 2
FTEs 2
STARS 2
SCAP/STARS Relationship 2
CERCLIS/WasteLAN 3
CERCLIS/WasteLAN Database 3
CERHELP Database 3

Section II. Procedures and Interactions 4

A. The SCAP Process 4
B. The IMC 4
C. Targets/Measures 4
D. Development of Reporting Measures 4
E. Target Setting 5

Section III. Planning and Reporting Requirements 6

A. SCAP Planning 6
B. Quarterly Planning Process 6
C. SCAP/STARS Adjustment/Amendments 6
D. STARS Target Adjustments 7
E. Planning Requirements and Procedures 7
F. Accomplishment Reporting 7
G. STARS 8
H. SCAP 8
I. Financial Planning and Management 8
J. Case Budget 8
K. Advice of Allowance 9
AOA Process 9
AOA Change Request Procedures 9

Section IV. Potential Problems/Resolutions 10

A. Data Quality and Planning in CERCLIS/WasteLAN 10
B. Headquarters/Regional Negotiations 10
C. Interpretation of Definitions 10
D. Impact of Schedule Changes on SCAP 10

Section V. References 11

Manual 11

Contacts 11

Training 11

Chapter XVII
SCAP/STARS Cycle

Section I. Description of Activity

Introduction

This chapter provides an overview of the Superfund Comprehensive Accomplishments Plan (SCAP) process and its relationship to the Agency-wide Strategic Targeted Activities for Results (STARS). More specific information on the process can be obtained from the Superfund Program Implementation Manual or SCAP Manual which is updated annually. RPMs, OSCs and Information Management Coordinators (IMCs) play important roles in providing timely and accurate site information for entry into the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS/ WasteLAN)—the database from which SCAP reports are generated. SCAP and STARS reports help plan, budget, track and evaluate Superfund program progress. The schedules and time frames presented in this chapter are for fiscal year 1993 and are subject to change. IMCs will be informed of any changes that occur.

The SCAP process is used by the Superfund program to plan, budget, track and evaluate progress toward Superfund site cleanups. The SCAP process generates data that fulfills the following functions:

- Establishing program priorities for the subject fiscal year
- Tracking of accomplishments against those priorities
- Providing information used in allocating resources (intramural and extramural) to the Regions
- Updating planning (schedules and funds) for the current fiscal year
- Providing planning data for outyear (e.g., the year after the planned fiscal year) budget purposes
- Responding to information requests from various sources including Congress and the Office of Management and Budget (OMB).

The SCAP planning process is a dynamic effort that has a significant impact on Superfund resource allocations and program evaluation. Planned obligations for the response budget, case budget, and STARS targets and measures are generated through SCAP. CERCLIS/ WasteLAN data are the main source of information for the Superfund budget and evaluation process. The SCAP process is managed at Headquarters by the Office of Waste Programs Enforcement (OWPE), the Office of Emergency and Remedial Response (OERR), and the Office of Federal Facilities Enforcement (OFFE). STARS is managed by the Office of Policy, Planning and Evaluation (OPPE).

SCAP

The SCAP process is crucial to Superfund program planning, tracking, and evaluation. SCAP tracks progress at each site and allows Regions and Headquarters to forecast site and program directions. SCAP targets encompass a wider spectrum of activities than STARS. This is because SCAP is intended to reflect general program direction as opposed to STARS, which is intended to reflect fiscal year specific priorities. In some cases, new SCAP categories are developed; in other cases, the projections for SCAP activities are adjusted to match the Agency's goals. This is particularly important in a program as dynamic as Superfund, given that the number of sites in various stages of the process varies from year to year.

SCAP information is a subset of the site data collected through the CERCLIS/WasteLAN system. The CERCLIS/WasteLAN system consists of two databases, CERCLIS/WasteLAN and CERHELP, which are discussed on the following pages.

Budget

Budget formulation and distribution is a three year process. Two years prior to the fiscal year being planned the budget formulation process begins. This process is called the outyear budget development. During the outyear, project plans and schedules are reviewed to determine the resources needed to support the Superfund Enforcement Program in the subject budget year. Resource requirements are based on CERCLIS/WasteLAN data when available, in association with other assumptions regarding the direction of the program. For example, the projects planned in CERCLIS/WasteLAN at the start of the third quarter of FY93 will be used to formulate the initial National FY95 budget.

During the planning year, which is one year prior to the FY being planned, Regional project planning data are reviewed for changes. Based on these revised CERCLIS/WasteLAN data, Regional distributions are determined using the OWPE Distribution Model.

Once the FY begins, Regions receive quarterly allocations to support projects planned in CERCLIS during the annual SCAP negotiations which occur the August prior to the start of the FY. The FY is referred to as the operating year.

FTEs

SCAP forms the basis of the Superfund workload models that distribute FTEs for each program and Region. There are two Superfund program models, the Site and Spill Response Model, which distributes resources for the site assessment, remedial, and removal programs, and the Technical Enforcement Model, which distributes enforcement FTEs. The preliminary and final distributions of Regional and program resources for the upcoming fiscal year are based on the planning information contained in CERCLIS/WasteLAN in the second quarter and the end of August, respectively.

Although these resource models have been frozen for the past several years, they are still run to determine Regional FTE needs, as compared to frozen FTE levels. Where appropriate, targets are adjusted to narrow the gap between actual resource needs and frozen FTE levels.

STARS

STARS is the Agency-wide system used by the Administrator to set targets for and monitor the key environmental objectives and strategic planning goals identified in the Agency's Operating Guidance for each fiscal year. National and Regional STARS goals for Superfund are established and tracked through SCAP. STARS targets and measures are reported quarterly by the Regions to Headquarters and OPPE through the STARS data system. This data is checked and verified against CERCLIS/WasteLAN data by Headquarters. In some Regions, RPMs/OSCs are responsible for entry of this data into CERCLIS/WasteLAN. OPPE tracks Regional progress toward STARS goals on a quarterly basis as part of the overall Agency performance evaluation process.

SCAP/STARS Relationship

STARS targets and measures are a subset of those contained in SCAP, and STARS accomplishments are generated through SCAP in CERCLIS/WasteLAN. SCAP and STARS planning and reporting cycles are set independently of each other. The STARS reporting cycle is a quarterly cycle, whereas the SCAP reporting cycle is monthly. Negotiation of SCAP and STARS targets and measures occur in a two-stage process. Preliminary project targets are set in March; final targets and measures are set in August. The latter set represent the Region's commitments for the upcoming FY. These negotiations are the basis for Regional FTE and Case Budget Allocations. At Headquarters, OWPE, OERR, and OPPE coordinate SCAP and STARS.

CERCLIS/WasteLAN

The CERCLIS/WasteLAN system consists of two databases: one site-specific database, CERCLIS/WasteLAN, and a second, CERHELP, which contains both site-specific information (targets) and non-site-specific information.

SCAP information is a subset of the site data collected through the CERCLIS/WasteLAN system, thus CERCLIS/WasteLAN tracks the SCAP. Data entry responsibilities and report retrieval abilities are at the Regional level so that Regional managers and users play a central role in maintaining and using the database. Headquarters relies on the CERCLIS/WasteLAN system as the sole repository of information on Superfund plans and accomplishments.

CERCLIS/WasteLAN Database

CERCLIS/WasteLAN is a database that is used by Headquarters and Regional personnel for Superfund site, program, and project management. CERCLIS/WasteLAN contains the official inventory of Superfund sites and supports site planning and tracking functions. Planning encompasses estimating project schedules as well as projecting financial requirements, which are part of the SCAP. In CERCLIS/WasteLAN, financial data are integrated with data from the site assessment, remedial, removal, and enforcement programs. Through CERCLIS/WasteLAN, Regions and Headquarters can see integrated financial and scheduling data for the site assessment, removal, remedial, and enforcement programs. The CERCLIS/WasteLAN database contains site, operable unit (OU), event, enforcement activity, technical, and financial information. Regions are responsible for manually transferring data from the Agency-wide Integrated Financial Management System (IFMS) into CERCLIS/WasteLAN. Types of data can include commitments, decommitments, obligations, deobligations, transaction dates, obligating document numbers, and funding vehicles budget source. Currently, TES contract work assignment amounts are entered manually into CERCLIS/WasteLAN on a periodic basis. The source for this information is the TES Work Assignment Tracking System (TESWATS). OWPE is in the process of integrating these two systems, which will eliminate duplication of data entry. The TESWATS/WasteLAN integration is planned for early FY94.

CERHELP Database

CERHELP contains site-specific and non-site-specific information such as SCAP and STARS targets, accomplishments, Advice of Allowance (AOA), Annual Operating Plans, budget, and other information on non-site-specific activities. The CERHELP database consists of the following separate files:

- The Targets and Accomplishments data file is used for setting and tracking SCAP and STARS targets and measures. Preliminary and final Regional SCAP/STARS commitments are entered into the system by Headquarters. Target and non-site-specific accomplishment data are updated to reflect SCAP adjustments or approved amendments as they occur. Regional reporting of non-site-specific accomplishments is also performed through this system. Data from this system are used in all "official" SCAP targets and accomplishment reports and are the baseline for Regional evaluation.
- The Budget/AOA file is used by Headquarters for Regional SCAP budget development and control and for tracking and reporting the AOA process.
- Planning and tracking of non-site incident activities and financial data are accomplished through the Non-Site/Incident Activity system. Regions are responsible for entering and maintaining SCAP non-site-specific information.

CERHELP gives Regions access to non-site-specific budget information. Regions also will be able to track planning data and reconcile the site-specific planning in the CERCLIS/WasteLAN database with the AOA and SCAP/STARS targets in CERHELP. It serves as an important management tool for Regions and Headquarters.

Section II. Procedures and Interactions

A. The SCAP Process

The negotiation cycle is the mechanism by which quarterly and annual targets are established. The SCAP formal negotiating cycle occurs on a semi-annual basis. The negotiation cycle is discussed later in this chapter under Section III, Planning and Reporting Requirements.

B. The IMC

The Regional Information Management Coordinator (IMC) typically is a senior position that coordinates all Regional CERCLIS/WasteLAN users and serves as the liaison between the Waste Management Division, ORC, and the Environmental Services Division. The IMC also serves as the liaison between Headquarters and the Regions in the planning and financial areas and with information management issues. The IMC holds ultimate responsibility for the data in CERCLIS/WasteLAN and CERHELP. RPMs/OSCs must coordinate fully with the IMC to ensure that accurate and timely information is entered into CERCLIS/WasteLAN and that the most recent information is included in the SCAP target-setting and budgeting process.

C. Targets/ Measures

SCAP and STARS targets are the key devices by which program goals are translated into quantifiable program achievements. They identify performance expectations for the Regions. Specific targets are negotiated with the Regions, and Regions commit themselves to achieving these goals. SCAP and STARS targets therefore play a central role in ensuring that program goals are not seen only as a method for allocating resources.

A SCAP or STARS *targeted measure* (either quarterly or annual) is a pre-determined numerical goal that is established prior to the fiscal year the designated activities will take place. Targeted measures are designed to reflect major steps in the cleanup or enforcement processes. Examples of SCAP and STARS targeted activities are PRP first RI/FS starts and section 107 cost recovery referrals/decisions > $200K. Targeted measures quantify program achievement goals on a Region-specific, and in some cases, site-specific basis. Regions are evaluated according to their completion of targeted activities.

A SCAP or STARS *reporting measure*, on the other hand, is not used for program accounting purposes. It is used to track an activity that is important in monitoring overall program progress. Reporting measures have no associated quantitative goals; only actual accomplishments are tracked. The SCAP process also uses *projection measures*. Projection measures generally result in numerical goals being established prior to the fiscal year. Projection measures represent each Region's estimate of what the Region will accomplish during a certain reporting period and are designed to give Headquarters a general idea of expected program performance. Projection measures play a key role in setting annual budgets and FTE allocations.

Exhibits XVII-1 and XVII-2 set forth the SCAP and STARS targets and measures for Fiscal Year 1993.

D. Development of Reporting Measures

Headquarters program offices take the lead in developing SCAP and STARS targeting and reporting measures in conjunction with the development of the annual SCAP Manual and Agency Operating Guidance. Headquarters proposes reporting measures for OSWER in approximately December, prior to the beginning of the operating year. Regional responses to the proposed measures are returned to Headquarters in February and March, as part of the annual Agency Operating Guidance development process. Preliminary negotiations are based on the draft operating guidance and final negotiations are based on the final operating guidance. Measures normally are finalized in June, prior to the beginning of the fiscal year. Development of the draft and final SCAP Manual occurs concurrently with the development of draft and final Operating Guidance.

E. Target Setting

The process for the development of a fiscal year's SCAP and STARS targets and measures begins during the second quarter of the previous fiscal year. Preliminary targets and measures for the upcoming fiscal year are set by mid-March and are used to derive the preliminary FTE allocations for the coming year. All SCAP targets and measures are negotiated, and numbers are established only after discussions have been held among OERR, OWPE, OFFE, and the Regions. Final SCAP and STARS targets are set in the fourth quarter SCAP, which is finalized in August. Final targets and measures also involve Headquarters/Regional negotiations. The SCAP Manual contains detailed procedures for target setting.

SCAP and STARS Targets and Projection Measures are negotiated as SCAP targets. Therefore, STARS targets are also SCAP targets.

Several CERCLIS/WasteLAN reports are used by Headquarters and the Regions in the development and negotiation of Regional outputs. RPMs should check with their IMC to obtain these reports.

Section III. Planning and Reporting Requirements

A. SCAP Planning

Regions are required to keep the SCAP data in CERCLIS/WasteLAN and CERHELP up-to-date and accurate. Changes in planning information (i.e., schedules and funds) should be entered into CERCLIS/WasteLAN or CERHELP *within five days of the RPM becoming aware of the need for the change. Accomplishments also are to be reported within five days.* RPMs should contact the IMC through their Section Chief as soon as possible regarding changes in site information that affect the SCAP planning process.

B. Quarterly Planning Process

Quarterly, Regions should generate SCAP reports for internal review of the planning data in CERCLIS/WasteLAN and CERHELP. These planning data should reflect any adjustments or approved amendments made to the annual plan. Regions should note that changes made in CERCLIS/WasteLAN to site schedules and other planning data will not automatically result in changes to SCAP and STARS targets. Although Regions have the flexibility to alter plans, they are still accountable for meeting the targets negotiated at the beginning of the fiscal year.

On the fifth working day of each month, Headquarters extracts the proposed Regional SCAP update. The Regional reports are circulated to Headquarters program offices for review, and serve as the basis of Headquarters/Regional negotiations. To ensure consistency in the negotiation phase, a copy of the CERCLIS/WasteLAN and CERHELP databases are frozen prior to generating the Regional reports. Regions should pull copies of appropriate reports off the frozen database to verify/reconcile planning and accomplishment data with Headquarters. As a result, all parties (Headquarters and the Regions) should have identical data for use during the negotiation process. Exhibit XVII-3 summarizes the major activities of the February and August negotiating sessions.

CERCLIS/WasteLAN data quality problems that affect the SCAP update should be resolved prior to negotiations. The problems should be resolved on a Region-specific basis through conference telephone calls between Headquarters and the IMC. The IMC will communicate with the appropriate RPM or Section Chief, as necessary, to resolve data integrity problems.

C. SCAP/STARS Adjustment/ Amendments

After targets have been finalized and planned funding levels developed, the SCAP process provides the flexibility to modify plans during the year. Modifications to planned targets are termed either adjustments or amendments. Amendments are SCAP changes that:

- Decrease an annual SCAP target
- Increase the Region's annual operating budget
- Change the Advice of Allowance
- Change a quarterly or annual STARS target.

Changes to SCAP targets require a formal request from the Regional Branch Chief to Headquarters, specifically, Chief, Program Development and Budget staff. The SCAP/STARS target amendment process necessitates a formal request from the Regional Administrator. In addition, any increases in annual operating plans or quarterly advices of allowance must be submitted through IFMS, as well as the appropriate program office for Headquarters approval. Any SCAP changes that do not necessitate a target change are termed adjustments and do not require Headquarters' approval. An example of a SCAP adjustment is substituting one site for another that was originally planned for a specific SCAP or STARS target. Adjustments are incorporated in CERCLIS/WasteLAN by updating the database and the CERHELP Targets and Accomplishments data file on an ongoing basis. Exhibit XVII-4 sets forth the SCAP amendment process.

All amendments should be recorded in the CERCLIS/WasteLAN site-specific database after OPPE approves the Region's request. Regions should not initiate any obligation against change requests until confirmation is received from the Office of the Comptroller. Regions cannot revise the site back-up in the Targets and Accomplishments data file until the amendment is approved by Headquarters.

D. STARS Target Adjustments

Regions may request an adjustment to a STARS target if the change is necessitated by extenuating circumstances. Changes in STARS targets may be necessary and approved under the following conditions:

- Major, unforeseen contingencies arise that alter established priorities (i.e., Congressional action)
- Major contingencies arise to alter established Regional commitments (i.e., State legislative action)
- Measure or definition in system is creating an unanticipated negative impact.

STARS target adjustments must be submitted in writing to the Assistant Administrator, OSWER (AA, OSWER). The AA, OSWER evaluates the request and makes a recommendation to OPPE whether to concur with the request.

E. Planning Requirements and Procedures

The SCAP Manual (OSWER Directive 9-200.3-01D) contains detailed information on planning requirements and procedures for the various Superfund response and enforcement program activities. RPMs should refer to the manual for specific requirements and procedures of the SCAP planning process. The SCAP manual sets forth specific planning requirements and procedures for:

- Preliminary Assessments/Screening Site Inspections
- Listing Site Inspections
- First and Subsequent Starts and Completions
- To Be Determined (TBD) Sites
- Setting Activity Time Frames
- Project Takeovers
- Remedial Financial Management
- Case Budget Planning
- Removals
- Determining Impact on Funding Status of RP Takeover
- State Enforcement
- Technical Assistance Grants.

RPMs play an integral role in communicating site status information to the IMC. This information must be timely to ensure accurate planning for future activities. RPMs should make themselves thoroughly familiar with the planning requirements and procedures set forth in the SCAP manual.

F. Accomplishment Reporting

CERCLIS/WasteLAN is the Regional reporting vehicle for SCAP and STARS. If an activity or event is not properly entered into CERCLIS/WasteLAN, the event will not have occurred for budget or accountability purposes. It is therefore crucial that information be entered into CERCLIS/WasteLAN promptly and accurately based on the requirements and schedules outlined in the SCAP Manual. Accomplishments data are recorded on various Regional data entry forms and are entered into CERCLIS/WasteLAN and CERHELP by

the IMC, RPM, or designee. A tool to facilitate data entry in decentralized regions, the Remedial Pipeline Project Management (RP2M), has been developed. It is currently being piloted in Regions II, III, IV and V. Data on accomplishments should be entered into CERCLIS/WasteLAN within five days of the event. Therefore, it is important that RPMs promptly relay relevant site information to the IMC through their Section Chief.

G. STARS

Regions enter accomplishments data into CERCLIS/WasteLAN. Quarterly, Headquarters extracts accomplishments data from CERCLIS/WasteLAN and manually enters the information into the PR1ME-based STARS system. The data are then reviewed by the Regions for discrepancies. The Regions then correct the data in CERCLIS/WasteLAN (if necessary) and enter comments regarding discrepancies. Headquarters and the Regions then reconcile the discrepancies and Headquarters enters final information into the STARS system.

H. SCAP

Regions should generate SCAP reports routinely (or more frequently) for internal review. Regions perform data quality checks and make adjustments to the CERCLIS/WasteLAN or CERHELP database if the databases do not reflect actual accomplishments. The RPM must verify that CERCLIS/WasteLAN and CERHELP data are consistent with actual accomplishments.

On the fifth working day of each month, Headquarters extracts SCAP reports from CERCLIS/WasteLAN and CERHELP. These reports are reviewed by Headquarters to evaluate Regional progress toward SCAP targets and accomplishments. Data are submitted to OPPE for reporting STARS accomplishments on a quarterly basis.

I. Financial Planning and Management

The SCAP process is the planning mechanism used by the Superfund program to identify site assessment, remedial, removal, and enforcement funding needs for the current and planned fiscal years. The planned obligations included in the fourth quarter SCAP update in CERCLIS/WasteLAN (July) form the basis of the final Regional budgets for the next fiscal year. The annual Regional operating plan and the associated budget are a result of the Headquarters and Regional negotiations on the proposed program budgets. Regions are required to operate within their final negotiated annual operating budget.

Prior to the fiscal year, each Region is allocated an annual budget for site assessment, remedial, removal, and enforcement activities. The criteria used to develop the major portion of the Regional budget are discussed in the SCAP manual.

J. Case Budget

Case budget funds are apportioned to the Regions based on the annual targets and measures and the Region's planning information reflected in the CERCLIS/WasteLAN and CERHELP site and non-site databases. Each activity has a pricing factor that is used during the allocation process. These factors are itemized in Exhibit XVII-5. Activities with a duration of less than one year are fully funded (e.g., negotiations, removal oversight, long-term response, section 107 Administrative Orders). Activities with a duration exceeding one year are funded quarterly (e.g., RI/FS, oversight, section 106 and 107 litigation). Other priority activities (Administrative Record and State management assistance) are added to this calculation. Allocations are reviewed and adjusted quarterly based on changing targets, the number of quarters remaining in the current fiscal year, and Regional performance in obligating and tasking monies allocated to date. The case budget is discussed in detail in Chapter XVI, Case Budget/Contracts.

K. Advice of Allowance

The Advice of Allowance (AOA) represents the funds allocated to each Region by the Office of the Comptroller for each quarter of the fiscal year. The AOA comprises five accounts:

- Remedial Action (site-specific)
- Remedial Design (non-site-specific)
- Removal (non-site-specific)
- Other Remedial (regular or "O" Allowance)
- Enforcement (case budget).

The Enforcement, or case budget, account is managed by OWPE. The other accounts are managed by OERR.

AOA Process

Normally, the Office of the Comptroller issues the quarterly AOA on the first working day of each quarter. The AOA is based on the Phase III Operating Plan that identifies projected obligations for each quarter of the fiscal year. The Phase III Operating Plan for FY 93 is based on the final SCAP plans developed in the fourth quarter of FY 92. Funds available for obligations, however, are limited to projected needs for the upcoming quarter. OWPE has a specific process for the Enforcement AOA, which is discussed in Chapter XVI, Case Budget/Contracts.

AOA Change Request Procedures

Regions are required to manage the funds issued in the AOA. Headquarters approval is not required to shift funds between projects within the other remedial, RD, removal or enforcement portions of the AOA. Any shifts of funds between allowances or any addition or deletion of funds from any of the allowances requires Headquarters approval through the SCAP amendment and change request procedures. These procedures are discussed in detail in the SCAP Manual.

Section IV. Potential Problems/Resolutions

A. Data Quality and Planning in CERCLIS/ WasteLAN

RPMs play a central role in ensuring CERCLIS/WasteLAN data accuracy. Inaccurate or missing data may lead to insufficient funding and incorrect accomplishments reporting. RPMs must communicate all relevant site information through their Section Chief to the IMC in a timely manner to ensure CERCLIS/WasteLAN data integrity. RPMs also should review relevant CERCLIS/WasteLAN data regularly for consistency with actual activity.

B. Headquarters/ Regional Negotiations

The SCAP negotiation process involves extensive and detailed communication between Headquarters and the Regions. During this process, it is important that RPMs coordinate closely with the IMC and other appropriate personnel so that the most current and accurate information is considered during the negotiation.

C. Interpretation of Definitions

It is essential that Headquarters and Regional personnel clearly understand the SCAP and STARS targets and measures definitions. Incorrect interpretations of target and measure definitions may prevent actual accomplishments from being reported or recognized. RPMs must communicate with their Section Chief or the IMC regarding the nature of reported activity to ensure that the appropriate targets and measures are updated. If RPMs or other staff have questions or are confused by the definitions, it is important to ask the Regional IMC or Headquarters for clarification.

D. Impact of Schedule Changes on SCAP

Site schedule changes must be analyzed for their impact on SCAP, and the changes entered into the system as soon as possible. SCAP will continue to be a viable planning tool only if accurate planning information is entered into the system. RPMs must inform the IMC promptly of site schedule changes to ensure the effectiveness of the SCAP planning functions.

Section V. References

Manual

OSWER Directive 9200.3-01B, *Superfund Comprehensive Accomplishments Plan (SCAP) Manual* (updated annually).

Contacts

Office of Waste Programs Enforcement, CERCLA Enforcement Division, Contracts and Planning Branch, Regional Planning Section. 703-603-8930.

Office of Waste Programs Enforcement, Program Management and Support Office, Budget Formulation Section, Information Management Section. 202-260-8250.

Office of Emergency and Remedial Response, Office of Program Management, Resources Management Section, Program Development and Budget Staff. 703-603-8912.

Training

"Case Budget Overview," a 1-day course and "Customized CERCLIS/WasteLAN Reporting," a 2-day course are periodically available. For additional information, call 703-603-8930.

Enforcement Glossary

Site examples are given as references for selected terms. The regions in which the sites are located are listed in parentheses.

Administrative Order on Consent (AOC): A legal agreement signed by EPA and an individual, business, or other entity through which the entity agrees to take an action, refrain from an activity, or pay for certain costs. It describes the actions to be taken, may be subject to a public comment period, applies to civil actions, and can be enforced in court. AOCs are most commonly used for removal actions and RI/FSs, however, they may be used for *de minimis* and cost recovery settlements.

Administrative Record (AR): The body of documents that "forms the basis" for the selection of a particular response at a site. For example, the AR for remedy selection includes all documents that were "considered or relied upon" to select the response action. An AR must be available at or near every site to permit interested individuals to review the documents and to allow meaningful public participation in the remedy selection process. This requirement does not apply to other ARs, such as those for deletion.

Administrative Subpoena: A command issued by EPA requiring testimony and, if necessary, the production of documents deemed necessary to the administrative investigation of a site. CERCLA section 122(e)(3)(B) authorizes the issuance of administrative subpoenas as is "necessary and appropriate" to gather information to perform a Non-binding Preliminary Allocation of Responsibility or "for otherwise implementing CERCLA section 122." No legal mandate prohibits the use of an administrative subpoena as an initial information gathering tool, however, the Agency prefers using section 104(e) requests before issuing administrative subpoenas. [Nyanza, Davis Liquid (1), Peak Oil, Bay Drum, Zellwood Groundwater Contamination (4)]

Alternative Dispute Resolution (ADR): A process that allows parties to resolve their disputes without litigating the matter in court. ADR involves the use of neutral third parties to aid in the resolution of disputes through methods which include arbitration, mediation, mini-trials, and fact finding. [Spectra Chem, Republic Hose, Greiners Lagoon, Schilling Landfill, Onalaska Landfill (5)]

Arbitrary and Capricious: Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle. Under CERCLA section 113(j)(2), a court ruling on a challenge to a response action decision will apply the arbitrary and capricious standard of review.

Arbitration: An alternative dispute resolution technique that involves the use of a neutral third party to hear stipulated issues pursuant to procedures specified by the parties. Depending upon the agreement of the parties and any legal constraints against entering into binding arbitration, the decision of the arbitrator may or may not be binding.

Cash-Out: A settlement that requires PRPs to provide up-front financing for a portion of the response action, rather than performing the work themselves. There are several types of cash-out settlements. A mixed-funding cash-out settlement requires the settling PRP to provide a substantial portion of the total response costs whereas a *de minimis* cash-out settlement requires a minor portion of the response costs to be paid by the settling PRPs. [Mixed Funding Cashout: Prices Landfill (2)]

CERCLA 106(b) Reimbursement Petition: Petition by an entity, who has complied with a Unilateral Administrative Order, requesting reimbursement from EPA for reasonable costs plus interest of conducting a response action. A person may be entitled to reimbursement if the person can establish that he/she is not liable for response costs under CERCLA section 107(a), or if the person can demonstrate that the Agency's selection of the response action was arbitrary and capricious or was otherwise not in accordance with law.

CERCLIS: The abbreviation for the CERCLA Information System; a national information management system for the CERCLA program. CERCLIS inventories and tracks releases, accomplishments, expenditures, and planned actions at potential and actual Superfund sites.

Cleanup Activities: Actions taken to deal with a release or threatened release of a hazardous substance that could affect humans and/or the environment. The term "cleanup" is sometimes used interchangeably with the terms remedial action, removal action, response, or corrective action.

Comment Period: Formal time period provided for the public to review and comment on a proposed EPA action, rulemaking, or settlement.

Community Relations: EPA's program to inform and encourage public participation in the Superfund process and to respond to community concerns and incorporate them into the Agency decision making process.

Community Relations Coordinator (CRC): Lead Agency staff who works to inform the public about and involve the public in the Superfund process and cleanup actions.

Community Relations Plan (CRP): A document that identifies techniques used by EPA to communicate effectively with the public during the Superfund cleanup process at a specific site. This plan describes the site history, the nature and history of community involvement, and concerns expressed during community interviews. Additionally, the plan outlines methodologies and timing for continued interaction between the Agency and the public at the site.

Consent Decree (CD): A legal document, approved by a judge, that formalizes an agreement reached between EPA and one or more potentially responsible parties (PRPs) outlining the terms by which the PRP(s) will conduct all or part of a response action; pay for all or part of a response action; pay past costs; cease or correct actions or processes that are polluting the environment; or otherwise comply with regulations where the PRPs' failure to comply caused EPA to initiate regulatory enforcement actions. The CD describes the actions PRPs will take, is subject to a public comment period prior to its approval by a judge, and is enforceable as a final judgment by a court.

Contribution: A legal principle by which an entity can seek to recover some of the response costs for which the entity has already resolved liability with the United States. For example, when several PRPs are liable for a hazardous substance release, EPA is not required to pursue all of the PRPs. If EPA settles with or wins its case against a subset of PRPs, then the right of contribution enables the PRPs (i.e., the settling PRPs or those against whom a judgment is rendered) to seek recovery of a proportional share from other PRPs who were not named as defendants in EPA's suit or settlement, but who nonetheless contributed to the release.

Contribution Protection: A statutory provision which provides that any PRP who resolved its liability to the U.S. in an administrative or judicially approved settlement is not liable to other PRPs for claims of contribution regarding matters addressed in the settlement.

Cooperative Agreement (CA): Mechanism used by EPA to provide Fund money to states, political subdivisions, or Indian tribes to conduct or support the conduct of response activities. Subpart O of the NCP, 40 CFR Part 35, outlines specific response actions that may be conducted using CA funds.

Cost Recovery: A process by which the U.S. Government seeks to recover money previously expended in performing any response action from parties liable under CERCLA 107(a). Recoverable response costs include both direct and indirect costs.

Covenants Not to Sue: A contractual agreement, such as those authorized by CERCLA section 122(f) and embodied in the Consent Decree or Administrative Order on Consent, in which the Agency agrees not to sue settling PRPs for matters addressed in the settlement. EPA's covenant not to sue is given in exchange for the PRP's agreement to perform the response action or to pay for the cleanup by the Agency, and does not take effect until PRPs have completed all actions required by the Consent Decree and Administrative Order on Consent.

Covenants not to sue are generally given in either Consent Decrees or Administrative Orders. Under CERCLA, the use of covenants not to sue is discretionary. In effect, the Agency is authorized to agree to such a release for future liability only if the terms of the covenant include "reopeners."

Declaratory Judgment: A binding adjudication of rights and status of litigants. Within the context of CERCLA, the U.S. may file a claim seeking declaratory judgment on liability for past and future response costs at the site. If declaratory judgment on liability is granted, the U.S. does not have to prove liability in any future action with the defendant.

Demand Letter: A written demand for recovery of costs incurred under CERCLA. The primary purposes of written demands are to formalize the demand for payment of incurred costs plus future expenditures, inform potential defendants of the dollar amount of those costs, and establish that interest begins to accrue on expenditures. A demand letter may be incorporated into the special notice letter.

***De Minimis* Contributor**: A PRP who is deemed by the settlement agreement to be responsible for only a minor portion of the response costs at a particular facility. A determination of a PRP's responsibility is made based on the volume, toxicity, or other hazardous effects in comparison to other wastes at the facility. CERCLA section 122(g)(1)(A) explicitly defines *de minimis* contributor.

***De Minimis* Landowner**: A PRP who is deemed by the settlement agreement to be a past or present owner of the real property at which the facility is located who did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission, and had no actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance at the time of purchase. CERCLA section 122(g)(1)(B) explicitly defines *de minimis* landowner.

***De Minimis* Settlement**: An agreement, either administrative or judicial, authorized by CERCLA section 122(g), between EPA and PRPs for a minor portion of response costs.

De Novo: Generally, a new hearing or a hearing for the second time. At a de novo hearing, the court hears the case as the court of original and not appellate jurisdiction. Under CERCLA, for example, a judge may hear a case de novo if the Administrative Record is found to be incomplete or inaccurate. Such a de novo hearing would allow judicial review that is not limited to the Administrative Record. A potential result of a de novo trial could be the court selecting the remedy. [Hardage Criner (6)]

Discovery: A pre-trial procedure that enables parties to learn the relevant facts about the case. The Federal Rules of Evidence provide for extremely broad discovery. The basic tools of discovery are depositions, interrogatories, and requests for production of documents. One of the few limitations on the scope of discovery is that the material sought must be relevant to the subject matter of the pending suit, or likely to lead to the production of relevant material.

Easement: A right afforded to an entity to make limited use of another's real property. An easement is one form of institutional control that may be required at a Superfund site if all the hazardous substances cannot be removed from the site. Easements may include limiting access or control of surface activities.

Eminent Domain: The power to take private property for public use. Under the U.S. Constitution, there must be just compensation paid to the owners of this property. EPA exercises its power of eminent domain through the process of condemnation.

Enforcement Actions: EPA, state, or local legal actions to obtain compliance with environmental laws, rules, regulations, or agreements and/or obtain penalties or criminal sanctions for violations. Enforcement procedures may vary, depending on the specific requirement of different environmental laws and related regulatory requirements.

Explanation of Significant Difference (ESD): A document regarding a significant change to the Record of Decision when new information is discovered about a site or difficulties are encountered during the remedial design/remedial action phase of cleanup. An ESD is submitted into the Administrative Record to inform the public of any significant changes that are being made to the selected remedy.

Extraordinary Circumstances: A situation that justifies the deletion of a standard reopener in a Consent Decree. This release is granted infrequently and is given in response to unusual conditions related to liability, viability, or a physical circumstance of the site or the remedial action. [Re-Solve (1), Smuggler Mountain, California Gulch (8)]

Federal Lien: A lien in favor of the U.S. authorized by CERCLA section 107(1) that may be imposed upon a PRP's property subject to a response action. The lien arises when the PRP receives written notice of its potential liability for response costs under CERCLA, or the Agency actually incurs response costs at a particular site. The lien continues until the PRP's liability is fully satisfied or the claim becomes unenforceable by operation of the statute of limitations.

Federal Register: A federal government publication that includes proposed regulations, responses to public comments received regarding proposed regulations, and final regulations.

The Federal Register is published every working day by the Office of Federal Register, National Archives and Records Administration, Washington, DC 20408. The Federal Register publishes regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents required by Congress to be published, and other Federal agency documents of public interest. The Federal Register is available to the public through public libraries that are Federal Depositories, law libraries and large university libraries.

Force Majeure: A clause common to construction contracts which protects the parties in the event that a portion of the contract cannot be performed due to causes that are outside of the parties' control (i.e., problems that could not be avoided by the exercise of due care, such as an act of God). These causes are known as "force majeure" events. Force majeure provisions are included in Administrative Orders on Consent and Consent Decrees. These provisions stipulate that the PRPs shall notify EPA of any event that occurs that may delay or prevent work and that is due to force majeure.

Two examples of force majeure may be raised as defenses to liability. CERCLA section 107(b) releases from liability any person who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance was caused solely by an act of God or an act of war (i.e., force majeure.) There has never been a finding by the courts that upheld a claim of no liability based upon the force majeure defense.

Full Release: An agreement by EPA to relinquish (release) a PRP from any further liability for response costs. Under CERCLA section 122(j)(2), Natural Resource Trustees may grant full releases to liability for damages to natural resources.

Fund (Hazardous Substance Response Trust Fund): A fund set up under CERCLA to help pay for cleanup of hazardous waste sites and for legal action to force cleanup actions on those responsible for the sites. The fund is financed primarily with a tax on crude oil and specified commercially used chemicals.

General Notice Letter (GNL): A notice to inform PRPs of their potential liability for past and future response costs and the possible future use of CERCLA section 122(e) special notice procedures and the subsequent moratorium and formal negotiation period.

Generator: Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

Good Faith Offer (GFO): A written proposal submitted by a PRP to the EPA to perform or pay for a response action. PRPs are given 60 days from the special notice to provide EPA a written GFO. The GFO must be specific, consistent with the ROD or proposed plan, and indicate the PRPs' technical, financial, and management ability to implement the remedy.

Hazard Ranking System (HRS): The principle screening tool used by EPA to evaluate risks to public health and the environment associated with abandoned or uncontrolled hazardous waste sites. The HRS calculates a score based on the potential of hazardous substances spreading from the site through the air, surface water, or ground water and on other factors such as nearby population. This score is the primary factor in deciding if the site should be on the NPL and, if so, what ranking it should have compared to other sites on the list. A site must score 28.5 or higher to be placed on the NPL.

Indian Tribe: As defined by CERCLA section 101(36), any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Information Repository: Where the administrative record, current information, technical reports, and reference materials regarding a Superfund site are stored. The EPA or the State establishes the repository in the community as soon as a site is discovered. It provides the public with easily-accessible information. Repositories are established for all sites where cleanup activities are expected to last for more than 45 days. Typical community repository locations include public libraries or municipal offices.

Information Request Letter: Formal written requests for information, authorized by CERCLA sections 104(e)(2)(A) through (C), issued during an administrative investigation. EPA is authorized to request information from any person who has or may have information relevant to any of the following:

- The kind and quantity of materials that have been or are being generated, treated, disposed of, stored at, or transported to a vessel or facility

- The nature or extent of a release or threatened release of a hazardous substance, pollutant, or contaminant at or from a vessel or facility
- The ability of a person to pay for or perform a cleanup.

Failure to respond or an incomplete response to an informational request are subject to statutory penalties.

Innocent Landowner: A person who purchased or acquired real property without actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances. PRPs may assert this claim as part of their defense, however, only the court may make this determination based on CERCLA sections 107(b) and 101(35).

Joint and Several Liability: A legal doctrine defining the scope of a defendant's liability. When more than one PRP is involved at a site and the harm is indivisible, the court may impose joint and several liability upon all parties involved at the site. In this instance, each PRP involved at the site may be held individually liable for the cost of the entire response action.

Judicial Review: The court's review of a decision rendered by a Federal agency or department or a court's review of an appeal challenging either a finding of fact or finding of law. Under CERCLA, for example, the court provides judicial review prior to entry of the Consent Decree. Additionally, the court would provide judicial review of an EPA decision if a PRP submitted a "petition to review" to a Federal court of appeals. The jurisdiction of the court and the scope of its review is defined by CERCLA section 113(h) and the Judicial Review Act, 28 U.S.C. sections2341-2351.

Lead Agency: The agency that primarily plans and implements cleanup actions. These could include EPA, state or political subdivisions, other Federal agencies, or Indian tribes. Other agencies may be extensively involved in the process, but the lead agency directs and facilitates activities related to a site, often including enforcement actions.

Mixed Funding: Settlements whereby EPA settles with fewer than all PRPs for less than 100% of the response costs. The settlement must provide a substantial portion, greater than 50%, of the total response costs and there must be viable non-settlors from which remaining response costs may be pursued. The three types of mixed funding settlements are preauthorization, cash-out, and mixed work.

Mixed Work: A type of mixed funding settlement whereby EPA and the PRPs agree to conduct discrete portions of the response action. Often EPA's portion of the work is paid for or performed by other PRPs as a result of subsequent settlements or unilateral administrative orders. [Ottati and Goss (1), Love Canal (2), Syntex (7)]

Moratorium: The period of time after Special Notice Letters are issued during which the Fund will not be used to begin work at the site for the RI/FS or RA. EPA also will not seek to compel PRP action at the site during the moratorium.

National Oil and Hazardous Substances Pollution Contingency Plan (NCP): The NCP is the major framework regulation for the federal hazardous substances response program. The NCP includes procedures and standards for how EPA, other federal agencies, states and private parties respond under CERCLA to releases or threats of releases of hazardous substances and under the Clean Water Act section 311, as amended by the Oil Pollution Act of 1990, to discharges of oil.

Natural Resources: Land, fish, wildlife, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, or controlled by the United States, any State or local government, any foreign government, any Indian tribe, or any member of an Indian tribe.

Natural Resources Damages: Damages for injury or loss of natural resources as set forth in CERCLA sections 107(a) and 111(b) and 300.615 of the NCP.

Non-binding Preliminary Allocation of Responsibility (NBAR): An allocation of the total cost of response among PRPs at a facility. CERCLA section 122(e)(3) allows EPA to provide NBARs to PRPs to facilitate settlement. An NBAR is not binding on the United States or the PRPs and cannot be admitted as evidence in court. [Re-Solve (1), Hassayampa (9)]

Orphan Share: A portion of cleanup costs that cannot be assessed to a PRP as a result of either the PRP's insolvency or EPA's inability to identify PRP(s).

Owner or Operator: Any person owning or operating a vessel or facility, or in the case of a hazardous substance being accepted for transportation, the common or contract carrier. It does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, or abandonment.

Performance Bond: A guarantee given by a contractor that the work assignment will be completed according to its terms and within the agreed upon time frame.

Performance Standards: Provisions in Consent Decrees and Administrative Orders specifying specific levels of performance that site activities must achieve; often incorporated by reference to the record of decision. The inclusion of such performance standards enables the Agency to assure measurable levels of cleanup which provide the protectiveness desired.

Person: An individual, firm, corporation, association, partnership, joint venture, commercial entity, United States Government, State, municipality, or any interstate body.

Plaintiff: A party who brings a legal action; the party who complains or sues in a civil action and is so named on the record.

Potentially Responsible Party (PRP): Any individual or entity including owners, operators, transporters, or generators who may be liable under CERCLA section 107(a).

Preauthorization: A type of mixed funding settlement whereby EPA preauthorizes a claim against the Trust Fund by the PRPs for a portion of their costs of conducting a response action. Once the preauthorization agreement is finalized, the PRPs conduct the response action, as outlined in the settlement agreement, petition non-settling PRPs for reimbursement, and, if necessary, seek reimbursement from the Fund for the preauthorized amount not received from non-settling PRPs. [Re-Solve (1), York Oil (2), Army Creek (3), Peak Oil (4), Motco (6), Colbert (10)]

Premium: A sum paid or agreed to be paid by a PRP to cover risks associated with the settlement. This sum represents an amount in addition to the cost of the response action. For example, a premium may be part of an early *de minimis* settlement due to potential inaccuracy of total response costs estimates or remedy failure.

Record of Decision: The official Agency document that explains which remedial cleanup alternatives have been considered, the selected remedy, technical background relative to the decision, and how the decision complies with the law.

Recalcitrant: A PRP may be considered recalcitrant for continued disinterest or refusal in reaching settlement or failure to comply with a settlement or order. This entity may also be considered a non-settlor.

Recusal: The voluntary or involuntary removal of a government official from any involvement in a specific matter. Recusals are used to preserve the ethical standards of public service. A recusal generally occurs when there is an appearance of a conflict between governmental responsibilities and private interest. Once a person is removed through a recusal, he/she cannot participate in any activity relating to the matter;

specifically, he/she cannot see any correspondence or participate in any meeting or negotiations related to the issue.

Remand: A legal term used when a court sends back a case to either a lower court or an administrative agency for further action. For example, under CERCLA, if an administrative record is found to be incomplete or inaccurate, one option of the reviewing court would be to remand the case back to EPA with instructions to compile an accurate and complete administrative record.

Reopeners: Contractual provisions that preserve the Agency's right to compel the PRPs to undertake additional response actions or to pay costs for Agency response actions in addition to those agreed to in the settlement. Reopeners to liability are triggered when previously unknown conditions at the site are discovered, or information previously unknown to EPA is received, that indicates the remedial action is not sufficiently protective. Reopener provisions restrict the covenant not to sue provisions by defining the conditions under which the settlement may be re-examined.

Settlement: The resolution of a claim. Settlement occurs when the federal and/or state agency have a written agreement regarding the payment and conduct of specified response actions. Settlements may be resolved administratively through an Administrative Order on Consent or judicially through a Consent Decree.

Special Account: A sub-account of the Trustfund where cashout settlement funds may be deposited to segregate the funds and ensure that they are readily accessible for work at the site covered by the settlement. [New Bedford (1), Sharon Steel (8)]

Special Master: A court appointed individual who oversees the progress of a complex case before it goes to trial. The scope of the special master's authority is set forth in an Order of Reference. Special masters are appointed only under exceptional conditions. For example, special masters may be appointed in cases requiring the interpretation of complicated technical data or voluminous amounts of information.

Special Notice Letter: A written notice to a PRP providing information on potential liability, conditions of the negotiation moratorium, future response actions, and demand for past costs. The SNL is authorized under CERCLA section 122(e)(1) and triggers the start of the negotiation moratorium.

Statute of Limitations (SOL): The statutory defined period of time within which the United States, on behalf of EPA, must file a claim for cost recovery. If the U.S. does not file a case within the SOL, it might not be able to recover its costs from the PRPs.

Statutory Penalties: Penalties authorized by a statute. For example, under CERCLA, if PRPs do not comply with an Administrative Order, they may be sued for statutory penalties of up to $25,000 per day under section 106(b)(1).

Stipulated Penalties: Fixed sums of money that a defendant agrees to pay for violating the terms of a settlement. Procedures for invoking and appealing stipulated penalties and penalty amounts are agreed to in the Administrative Order on Consent or the Consent Decree.

Strict Liability: Legal responsibility for damages without regard to fault or diligence. The strict liability concept in CERCLA means that the Federal Government can hold PRPs liable without regard to a PRP's fault, diligence, negligence, or motive.

Summary Judgment: Finding in a civil case that there is no genuine issue of material fact and a party thus prevails on the issue.

Takings: The physical occupancy or regulatory intrusion into the uses of property that essentially precludes all uses of the property. The occupancy or regulatory action need not

be permanent to be considered a taking. The fifth and fourteenth Amendments to the Constitution of the United States bar federal and state governments from "taking" private property without compensation. Under CERCLA, takings issues have been raised in regard to limitations on property or water use and occupancy of the property by EPA to conduct response actions. [See Hendler v. United States, 952 F. 2d 1364, Federal Circuit 1991.]

Technical Assistance Grant (TAG): A program that provides grants of up to $50,000 per Superfund site so citizens can hire independent technical advisors to help them understand information related to cleaning up a site.

Tolling Agreement: An agreement between EPA and the PRP(s) delaying the statute of limitations for cost recovery actions. [Schafer Manufacturing, Eau Claire Municipal Well Field (5), Fairchild Semi-conductor Corp. (9)]

Transporter: Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance.

Treble Damages: Sum at least equal to, and not more than three times, the amount of the response costs. Under CERCLA section 107(c)(3), if EPA conducts the cleanup as a result of the PRPs' non-compliance with an Administrative Order, treble damages may be assessed for a maximum of three times the amount of the response costs at the site. Damages may be assessed in addition to recovery of response costs at the site. [Parsons (4)]

Unilateral Administrative Order (UAO): An order issued by EPA, authorized by CERCLA section 106, requiring the PRP(s) to undertake a response action. There must be imminent and substantial endangerment to the public health or the environment before such an order can be issued.

INDEX

Index

Access: II-10; IX-20.

Administrative Order (AO): II-3, 6, 8, 11, 12, 15-7; V-1, 10, Ex. V-4, 15, 17; VI-1, 3, 8, 17; XII-20.

Administrative Order on Consent (AOC)/Consent Order: I-2, 5, 6; Ex. II-1, Ex. II-4, II-8, 9-11, 15, 17; V-9, 10, 12, 13, 16,-18; VI-2, 3, 4, 15, Ex. VI-2, Ex. VI-3; VIII-1; XIII-5, 7.

Administrative Record (For Selection of Remedy): Ex. II-1, Ex. II-2, Ex. II-4, II-3, 10; V-11; VI-5, 23, 24-26; VII-2, 6-8, Ex. VII-2; VIII-1; XII-2, 11; XIII-7, 8: XV-1, 3, 5-9, 10.
(For Deletion - Deletion Docket): Ex. XI-1; XV-4.

Administrative Subpoena: IV-16

Advice of Allowance (AOA): X-3; XVI-1, 3; XVII-3, 6, 9.

Alternative Dispute Resolution (ADR) Act: I-3, 4; IV-20; XII-8, 22.

ARARs: I-3; II-13; V-7; VI-3, 5, 13, 21, 11, 25; Ex. VI-1; VII-1, 2, 4, 6, 7; XIV-6.

Arbitration: I-3; XII-1, 18, Ex. XII-3.

ATSDR: Vi-4, 6, 10, 20, 24, 25.

Case Budget: V-15; XIV-9, Ex. XIV-1, 10, Ex. XIV-2, **Ch. XVI;** XVII-7, 8.

Cash Out: VIII-15, 16; XII-18

CERCLA Settlement Policy: VIII-11.

CERCLIS: II-14; IV-21; V-15; VI-14; VII-19; IX-13; XII-9, 20; XIV-9, Ex. XIV-1; Ex. XVI-1, XVI-7; XVII-1, 3, 10.

Civil Investigator (CI): II-5, 19; IV-5, 6, 7, 14, 21.

Close-Out Report: II-16; IX-17; XII-9.

Community Relations: II-12, 13; IV-1; VI-5; VIII-8, 18; IX-9; **Ch XIII.**

Community Relations Coordinator: V-11; VI-5, 8; **Ch. XIII.**

Community Relations Plan: Ex. II-2, II-13; VII-12; IX-9; XIII-1, 5.

Consent Decree (CD): I-5, 6; II-15, 16; V-13, 16, 17, 18; VI-2, 3; VIII-7, 22; IX-4, 10, 20, 21; X-2; XII-17; XIII-6; XIV-2, 12; Ex. XV-3.

Reopeners: VII-7, 8, 17; XII-17, Ex. XVII-5.

Covenants not to Sue: VIII-7, 8.

Contracts (TES, ARCS, ERCS, etc.): V-15; VI-15; IX-19, XII-14; XV-2, Ex. XV-1; XVI-1, 2.

Contractors: II-5: IV-6, 7, 8, 21; VI-7; VII-12; IX-2, Ex. IX-1, 3, 5, 10, 11; XII-11; XV-2; XVI-1, 10.

Contribution Protection: II-8, 11.

Cooperative Agreement: VII-2; XIV-1, 2-5, 10, Ex. XIV-2; XV-5; XVI-1, 4, 7.

Cost Recovery: I-1, 2, 6; II-8; IV-1; VIII-6, 9; **Ch. XII;** XIII-7; XV-9.

Case Referral: XII-3, 8, 15, 18.

Documentation: XII-11, 13, 14, Ex. XII-4.

Covenants Not to Sue: VIII-7, 8.

Delegations: III-4; IV-10; XII-5.

***De Minimis* Settlements:** I-1, 2; VIII-1, 3, 4, 16-17; XII-16; XIII-7.

Department of Interior (DOI): VI-4, 6.

Department of Justice (DOJ): I-2, 3, 6, 7; II-12; III-4; IV-13; V-2, 3, 12, 16; VI-15; VII-12; VIII-1, 2,-4; XII-3, 7, 11, 13, 15, 17, 19; XIII-4, 7; XVI-2.

Emergency Response Notification System (ERNS): II-17, Ex. II-7

Enforcement Discretion: VIII-8, 20.

Endangerment Assessment: VI-10, 24; IX-12, 20.

Risk Assessment: II-1, 2; VI-2, 10, 11, 24; VII-2, 16; VIII-20; Ex. XV-3.

Five-Year Review: IX-3.

General Notice Letter (GNL): IV-1, 16, Ex. IV-1; 17-18; V-1.

Good Faith Offer (GFO): V-1, Ex. V-1, 11, 13; VI-8, Ex. VI-2.

Hazard Ranking System (HRS): III-5.

Information Request Letter (104(e) Letters): II-10, 11, Ex. IV-1, 19.

Inherently Governmental Function: XVI-10.

Innocent Landowner Defense: IV-3, 6; XII-6.

Inter-Agency Agreement (IAG): VI-15, 16; IX-14, 19; XII-13; XV-5; XVI-7.

Liability: I-2; Ex. II-4, II-19; IV-1, 2, 3, 6; XII-1, 5, 6, 7, 11, 15, 16, 20, A!; XIV-12.

Long Term Response Action (LTRA): IX-13.

Mediation: I-3, 4.

Model Removal AOC: II-9.

Model Removal UAO: II-9.

Mixed Funding: I-2; IV-1; VIII-1, 3, 4; XII-18, 19.

Cash Out: VIII-15-16; XII-18.

Mixed Work:VIII-13, 15.

Preauthorization: VIII-14.

Natural Resource Damages: V-7; VIII-8, 9.

Natural Resource Trustees: I-8; V-7; VIII-8, 9.

NBAR: I-2; VIII-1, 18.

NCP: I-1, 2; II-1, 2-4, 13; III-1, 4; V-13; VI-3, 13; VII-1, 6; VIII-8; IX-1; XIII-4, 7-8; XIV-1, 5, 12.

Negotiation Moratorium: V-5, 11, 12; VIII-2.

NPL: I-6; II-15-17; III-4; IV-21, 22, Ex. IV-4; VII-13; IX-13; XII-7; XIV-6, 9, 12: XV-5; Ex. XVII-1.

Office of Emergency and Remedial Response (OERR) Roles and Responsibilities: I-7; V-15; VI-16; VIII-13-15; IX-1; XIII-1, 5; XIV-10, 11; XV-13.

Office of Enforcement (OE) Roles and Responsibilities: I-3; V-2, 3; VI-16; VIII-2, 3, Ex. VIII-5, 13, 19, 24; XII-8.

Office of General Counsel (OGC) Roles and Responsibilities: VIII-3.

Office of Regional Counsel (ORC) Roles and Responsibilities: I-5, 7; II-12; IV-6; V-10, Ex. V-2, Ex. V-4; VIII-1, 3; IX-17, 20; X-4; XII-6, 9, 14, 16, 19; XIII-3, 6; XV-4, 7, 8.

Office of Waste Programs Enforcement (OWPE) Roles and Responsibilities: V-2, 6, 12; VI-7; VIII-2, 3, Ex. VIII-5, 9, 13, 15, 19; XII-3, 14; XV-8, 9; XV-13; XVI-1, 4; XVII-1, 5.

On-Scene Coordinator (OSC) Roles and Responsibilities: Preface-1, II-1, Ex. II-1, 3-7, 10, 14, 15, 22; XII-1, 3, 8, 13, 16, 21; XIII-3; XV-3, 7, 9, 11.

Operation and Maintenance (O&M): VIII-15; IX-3, 8; **Ch. X**; XIV-9.

O&M Plan: X-2.

Oversight: I-1, 6; Ex. II-1, II-12, 22; VI-4-6; VIII-21; IX-1, 4, 8, 11, 19; XII-3; XIV-3, 4, 10, 12; XVI-2; (see RI/FS Oversight and RD/RA Oversight).

Oversight Assistant: VI-5, 6, 10.

Premium: VIII-16, 17, 26.

Proposed Plan: VI-6, 17; VII-1, 4, 5, 6-8, 12; VIII-2, 3, 10; XIII-6.

PRP Search: I-4, 5, 6; II-2, Ex. II-1, 4, Ex. II-3, 6, 7, 14, 19, 22; III-5; **Ch. IV**; V-1, Ex. V-1, 4-8; Ex. VIII-1, 4, 6, 27; XII-7; XIV-1, 10; XVI-6; Ex. XVII-5.

PRP Search Plan: III-3; IV-3, Ex. IV-1, 8, 27; Ex. V-1.

Baseline Report: IV-14, 14, Ex. IV-1, Ex IV-2, 27, 28.

Interim Final Report: II-23; Ex. IV-1, Ex. IV-2, 16, 21, 27, 29.

QAPP/FSP: XV-2, Ex. XV-1.

RD/RA Negotiations: I-5; II-2; Ex. III-1, IV-23; VII-8, 12, 18; **Ch. VIII**; XII-2, 16; XIII-9, Ex. XVII-1.

RD/RA Oversight: VIII-21; Ex. IX-2, Ex. IX-3, 8, 9, 19; XIII-9.

Records Management: Ch. XV.

Record of Decision (ROD): I-5, 6; II-16; Ex. III-1, Ex. III-2; V-1, 2, 9; VI-5, 6, 8, 15, 16; VII-2, 4, Ex. VII-1, 8-13, 15, 18, 19; VII-8; VIII-7; IX-1, 4, 6, Ex. IX-2; XIII-6; XIV-6; Ex. XV-3; Ex. XVII-1, Ex. XVII-2.

Regional Project Officer (RPO): XVI-4, 5, 9, 10.

Removals: Ch. II.

Reopeners: VIII-7, 8, 17; XII-17; Ex. XVII-5.

Risk Assessment: II-1, 2; VI-2, 10, 11, 24; VII-2, 16; VIII-20; Ex. XV-3.

Ecological Assessment: II-2; IV-10, 24.

Endangerment Assessment: VI-10, 24; IX-12, 20.

Human Health: II-1, 2; VI-10, 11, 24; VII-2, 16; VIII-20; IX-12, 20.

RI/FS Negotiations: I-5; II-2; III-3, Ex. III-1; **Ch. V**; VI-2, 7; VII-5; XIII-9; Ex. XVII-2, Ex. XVII-5.

RI/FS Negotiation Plan: III-3; V-5, Ex. V-1; VII-5.

RI/FS Oversight: I-6; Ex. V-3; VI-3-5, 9, Ex. VI-2, Ex. VI-3, 20; XVI-6, 9.

Superfund Accelerated Cleanup Model (SACM): I-1; III-1, 3-6; V-1; Ex. XVII-5.

Selection of Remedy: I-3, **Ch. VII.**

Site Completion: Ch. XI.

Site Management Plan: III-1, 3, 4.

Site Planning: Ch. III.

Special Notice Letter (SNL): V-1, 11; VI-1, Ex. VI-2; VIII-9-11, Ex. VIII-2, 18, 23; XII-10; Ex. XV-1.

Statement of Work (SOW): V-2, 8, Ex. V-1, Ex. V-3, 12, 15; VI-2, 3, 8; X-2; XIII-4, 5.

State Enforcement: I-7; VII-2, 3, 6, 10, 13, 23; **Ch. XIV**; XV-5; XVII-7, Ex. XVII-5.

Statute of Limitations: II-1; VIII-6; XII-1, 8, 20, 21.

Steering Committee: IV-2, Ex. V-1, V-6, 7.

Superfund Comprehensive Accomplishments Plan (SCAP): I-6; II-14, 16, Ex. II-6; III-3, Ex. III-1, 7; IV-21, Ex. IV-4; V-4, 13, 15, Ex. V-5, Ex. V-6; VI-14, Ex. VI-4, 15, 20; VIII-6, 20, 22, Ex. VIII-6, Ex. VIII-7, Ex. VIII-8; IX-13, 14, Ex. IX-4, Ex. IX-5, 15, 16; X-3; XII-21, Ex. XII-5; XIII-9; XIV-9, Ex. XIV-1; XVI-1, 2, Ex. XVI-1, 3, 4, 7, 8; **Ch. XVII.**

Superfund Enforcement Tracking System (SETS): IV-4; VIII-9.

Superfund Memorandum of Agreement (SMOA): VI-15, VII-2, 10; XIV-1, 2, 6, 7, 10, 12; XV-5, Ex. XV-1, Ex. XV-3.

Technical Assistance Grant (TAG): XII-12; Ex. XIII-1; XVII-7.

Technical Assistance Committee: VI-7.

Technical Assistance Team (TAT): II-4, 5, 12, 14, 16; XV-1, 3.

Technical Enforcement Support (TES): II-4, 5, 12, 14; VIII-26; XV-1; XVI-1, 7.

Unilateral Administrative Order (UAO)/Unilateral Order: Ex. II-1; Ex. II-4, 6, 8, 9, 10, 11, 12, 15, 22; V-16, 17; VII-1; VIII-11, Ex. VIII-5, 18, 19, 23, 24.

Work Assignment Manager: XVI-2, 4-6, 9, 10.