United States
Environmental Protection
Agency

Office of Site Remediation
Enforcement

January 1999

EPA

CERCLA Enforcement Project Management Handbook:

An Overview of Principles, Policies, and Practices for Effecting and Managing PRP Involvement in Superfund Site Cleanup

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

FEB 22 1999

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of the FY 1999 Update of the CERCLA Enforcement Project Management Handbook

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Distribution

This memorandum transmits the FY 1999 update of the CERCLA *Enforcement Project Management Handbook* to Headquarters and Regional offices. This updated version of the handbook supersedes the one published in May 1993, and all earlier editions.

The Handbook is intended to be a basic reference and training manual to assist Superfund 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 the specific roles and responsibilities of enforcement personnel. Although primarily intended for RPMs and OSCs, the Handbook will be a useful tool for all those involved with the enforcement process.

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

The Handbook, and future updates of Handbook chapters, will be available electronically on the EPA Intranet. For additional information on the Handbook, contact Sally Martiny at 202/564-6067 (martiny.sally@epa.gov).

Attachment

Acknowledgments

This document was prepared by the Office of Site Remediation Enforcement in EPA's Office of Enforcement and Compliance Assurance. Sally Martiny and Monica Gardner served as EPA's Project Coordinators.

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Enforcement Project Management Handbook

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Acronyms

Acronyms

A

AA	Assistant Administrator
ADR	Alternative Dispute Resolution
AO	Administrative Order
AOA	Advice of Allowance
AOC	Administrative Order on Consent
AR	Administrative Record
ARAR	Applicable or Relevant and Appropriate Requirement
ARCS	Alternative Remedial Contracting Strategy
ATP	Ability to Pay
ATSDR	Agency for Toxic Substances and Disease Registry

B

BODR	Basis of Design Report
BUREC	Bureau of Reclamation

C

CA	Cooperative Agreement
CAG	Community Advisory Group
CB	Case Budget
CBI	Confidential Business Information
CD	Consent Decree
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
CERCLIS 3/ WasteLAN	Comprehensive Environmental Response, Compensation, and Liability Information System/Waste Local Area Network
CFR	Code of Federal Regulations
CI	Civil Investigator
CIC	Community Involvement Coordinator
CIP	Community Involvement Plan
COR	Close Out Report
CRC	Cost Recovery Coordinator
CRI	Community Relations Implementation
CWA	Clean Water Act

D

DD	Decision Document
DNAPL	Dense Non-Aqueous Phase Liquid
DOI	Department of the Interior
DOJ	Department of Justice
DQO	Data Quality Objective

E

EA	Endangerment Assessment
EAB	Environmental Appeals Board

EE/CA	Engineering Evaluation/Cost Analysis
EPCRA	Emergency Planning and Community Right-to-Know Act of 1986
EPM	Enforcement Project Manager
ERCS	Emergency Response Cleanup Services
ERNS	Emergency Response Notification System
ESI	Expanded Site Inspection

F

FCOR	Final Close Out Report
FE	Federal Enforcement
FEMA	Federal Emergency Management Agency
FMD	Financial Management Division
FMO	Financial Management Office
FOIA	Freedom of Information Act
FR	*Federal Register*
FS	Feasibility Study
FSP	Field Sampling Plan
FY	Fiscal Year
FWS	Fish and Wildlife Service

G

GFO	Good Faith Offer
GNL	General Notice Letter

H

HASP	Health and Safety Plan
HRS	Hazard Ranking System

I

IAG	Interagency Agreement
IEUBK	Integrated Exposure Uptake Bio-Kinetic
IFMS	Integrated Financial Management System
IMC	Information Management Coordinator

L

LDRs	Land Disposal Restrictions
LOE	Level of Effort
LTRA	Long-Term Response Action

M

MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
MPE	Multi-Phase Extraction
MSW	Municipal Solid Waste

N

NBAR	Non-Binding Preliminary Allocation of Responsibility
NCP	National Contingency Plan (National Oil and Hazardous Substances Pollution Contingency Plan) (Abbreviated as National Contingency Plan in this handbook)

NEIC	National Enforcement Investigation Center
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NOD	Notice of Deletion
NOID	Notice of Intent to Delete
NOIPD	Notice of Intent for Partial Deletion
NOPD	Notice of Partial Deletion
NPL	National Priorities List
NRC	National Response Center
NRRB	National Remedy Review Board
NTC	Non-Time-Critical

O

O&F	Operational and Functional
O&M	Operation and Maintenance
OC	Office of Compliance
OC	Office of the Comptroller
OE	Office of Enforcement
OECA	Office of Enforcement and Compliance Assurance
OERR	Office of Emergency and Remedial Response
OGC	Office of General Counsel
OIRM	Office of Information Resources Management
OLS	Office of Litigation Support
OMB	Office of Management and Budget
OPA	Oil Pollution Act
OSC	On-Scene Coordinator
OSHA	Occupational Safety and Health Administration
OSRE	Office of Site Remediation Enforcement
OSWER	Office of Solid Waste and Emergency Response
OU	Operable Unit
OWPE	Office of Waste Programs Enforcement

P

P&C	Participate and Cooperate
PCOR	Preliminary Close Out Report
PDD	Pre-Authorization Decision Document
PNRS	Preliminary Natural Resource Survey
POLREP	Pollution Report
PPA	Prospective Purchaser Agreement
PPED	Policy and Program Evaluation Division
PRN	Pre-Referral Negotiation
PRP	Potentially Responsible Party

Q

QA	Quality Assurance
QA/QC	Quality Assurance/Quality Control
QAO	Quality Assurance Office
QAPP	Quality Assurance Project Plan

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

R

RA	Remedial Action
RA	Regional Administrator
RAC	Response Action Contract
RAGS	Risk Assessment Guidance for Superfund
RAR	Remedial Action Report
RCRA	Resource Conservation and Recovery Act
RD	Remedial Design
RD/RA	Remedial Design/Remedial Action
RSD	Regional Support Division
REM	Remedial Engineering Management
RI/FS	Remedial Investigation/Feasibility Study
RO	Regional Ombudsman
ROD	Record of Decision
RPM	Remedial Project Manager
RRT	Regional Response Team

S

SAIC	Special-Agent-In-Charge
SAP	Sampling and Analysis Plan
SARA	Superfund Amendments and Reauthorization Act of 1986
SCAP	Superfund Comprehensive Accomplishments Plan
SCORE$	Superfund Cost Organization and Recovery Enhancement System
SDMS	Superfund Document Management System
SE	State Enforcement
SEP	Supplemental Environmental Project
SMOA	Superfund Memorandum of Agreement
SMP	Site Management Plan
SNAP	Superfund National Assessment Program
SNL	Special Notice Letter
SOL	Statute of Limitations
SOW	Statement of Work
SPIM	Superfund/Oil Program Implementation Manual
SSC	Superfund State Contract
START	Superfund Technical Assistance and Response Team

T

TAG	Technical Assistance Grant
TBC	To Be Considered
TESWATS	Technical Enforcement Support Work Assignment Tracking System
TRT	Technical Review Team
TSCA	Toxic Substances Control Act
TST	Technical Support Team

U

UAO	Unilateral Administrative Order
USACE	United States Army Corps of Engineers
USC	United States Code
USCG	United States Coast Guard
USGS	United States Geological Survey

V

VCP	Voluntary Cleanup Program
VE	Value Engineering
VOC	Volatile Organic Compound

W

WAM	Work Assignment Manager
WasteLAN	Waste Local Area Network

Preface

Preface

Purpose

This handbook was prepared primarily to assist EPA Superfund Remedial Project Managers (RPMs) in planning, negotiating, and managing Potentially Responsible Party-(PRP-) lead response actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Other field personnel, such as On-Scene Coordinators (OSCs), also may find the handbook useful for their purposes. It provides an overview of the roles and responsibilities of the RPM/OSC in identifying and communicating with PRPs; coordinating with communities, states, tribes, and natural resource trustees; negotiating agreements for site cleanup; initiating administrative and judicial enforcement actions; selecting site remedies; recovering EPA's response 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 complements 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 at each step of the removal and remedial processes.

Scope

Procedures and information contained in this document are based on EPA policy and guidance. The handbook is not intended either to replace Agency guidance or to stand alone. The following chapters summarize specific policies, guidance, and other information about EPA's national enforcement program and the role of RPMs/OSCs in that program. The reader should bear in mind that some oversimplification was necessary to keep the handbook to a moderate length. Throughout the chapters, the reader is referred to specific, detailed guidance, policies, and procedures. The reader should use these resources to supplement the information presented in the handbook.

Role of Remedial Project Managers

The emphasis of this handbook is on the role of the RPM/OSC in the enforcement process. It is recognized, however, that regional differences exist in defining that role. 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 responsibility for those activities may rest on regional personnel other than the RPM. RPMs should consult with regional management on the scope of their specific responsibilities.

Organization

This handbook addresses the removal enforcement process and the phases of the remedial planning and implementation process from the baseline PRP search (generally conducted when the site is listed on the National Priorities List (NPL) or when the region determines that a response action may be warranted) through completion of remedial activity and deletion of the site 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 chapters presenting enforcement topics that either are not a direct part of the remedial process or are relevant to many steps in the process. These chapters cover enforcement activities associated with establishing liability; PRP searches; cost recovery; community involvement; state enforcement; records management; site completion and deletion; and targeting accomplishments and measuring program progress.

Chapter Format

Chapters are organized to provide a description of a phase of site cleanup or specific enforcement activity, a chronology of procedures for which the RPM is responsible, associated planning and reporting requirements, and a discussion of potential problems and possible solutions. Chapter subsections contain many useful references to specific policies, guidance, and procedures relating to the topic under discussion. The On-Line Information Sources section at the back of the handbook provides a list of additional sources of information, including resources providing access to many of the references cited in the handbook.

Applicability

Although the handbook is designed both for new RPMs/OSCs and for those who have experience with the enforcement program, it is hoped that the handbook also will help other EPA personnel understand the technical, enforcement, and management tasks required to complete response actions at PRP-lead sites. 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.

1. Introduction

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Chapter 1 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 sections presents background information critical to understanding the role of enforcement in the success of the Superfund program. Together they provide the context required for understanding the role of the Remedial Project Manager (RPM) in executing the enforcement program.

1.1 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. The enforcement program plays a major role in achieving this goal, and the RPM plays a crucial role in every phase of the enforcement program. The RPM ensures that cleanup activities pursuant to agreements with Potentially Responsible Parties (PRPs) are appropriate and effective and that PRPs implement them thoroughly and efficiently. Each chapter of this manual covers a distinct phase of the RPM's role in the enforcement process. In addition to performing duties that directly affect response actions, the RPM is also responsible for keeping data on enforcement projects up to date. The RPM's role in work planning, budgeting, and accomplishments reporting, and its interface with the Government Performance and Results Act of 1993, is discussed in Chapter 16, Targeting Accomplishments and Measuring Performance.

1.1.A Obtaining PRP Response Action

A primary goal of the enforcement program is to obtain consensual settlement or, if necessary, compel PRPs to implement site cleanups. The primary tools used to achieve this goal are the Administrative Order (AO), judicial enforcement authority set forth in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 106, and the settlement provisions of section 122. These authorities are discussed in more detail in Chapter 5, RI/FS Negotiations/Settlement, and Chapter 8, RD/RA Negotiations/Settlement.

1.1.B Cost Recovery

When EPA takes response or enforcement action at a site, the enforcement program's goal is to recover the costs of those actions from the responsible parties. 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. Authority for cost recovery is found in CERCLA section 107. Cost recovery is discussed further in Chapter 12, Cost Recovery.

1.1.C PRP Response Action Oversight

Once the PRP has agreed to take response action 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 AO or judicial Consent Decree (CD), CERCLA, the National Contingency Plan, and relevant guidance. In addition to their oversight, RPMs may use the authority in CERCLA section 104 for third-party oversight of PRP-conducted Remedial Investigation and Feasibility Study (RI/FS) activities to ensure that this goal is met. Oversight responsibilities are discussed in Chapter 2, Removals; Chapter 6, RI/FS Implementation; and Chapter 9, RD/RA Implementation.

1.1.D Expediting the Process through Administrative Reforms

The reforms to Superfund are intended to improve the efficiency, pace, cost, and fairness of the program. For the enforcement program, these efforts have included, in particular, a number of initiatives and pilots to encourage and accelerate PRP-lead cleanup actions. The enforcement reforms range from compensating settling parties for a portion of costs attributable to insolvent parties ("orphan shares") to committing to conduct cost effective oversight while ensuring protective clean-ups. These reforms are important for achieving prompt site cleanups and maximum responsible party participation in performing and paying for them, while promoting fairness and equity in the enforcement process.

1.2 Programmatic Background

CERCLA has stringent, far-reaching liability provisions that provide EPA with a wide array of enforcement tools for achieving hazardous waste site cleanup. These include AO authority, judicial enforcement authority, and the authority and funding for direct cleanup action.

1.2.A Liability

CERCLA section 107 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 may be held liable for the entire cost of site cleanup unless it can be shown that the harm or threat is divisible. This rule, known as "joint and several liability," is a powerful tool that EPA can use to encourage PRPs to agree to perform cleanups. This is discussed in more detail in Chapter 3, Establishing CERCLA Liability, Chapter 4, PRP Search, Notification, and Information Exchange, and Chapter 12, Cost Recovery.

1.2.B Settlement and Enforcement Provisions

CERCLA provides EPA with the authority to order PRPs to investigate and clean up sites, negotiate settlements with PRPs to fund and/or perform site cleanups, and commence legal action if the PRPs do not perform and/or pay for cleanup. Settlements for removals are usually finalized by Administrative Orders on Consent (AOCs). Remedial Action (RA) settlements are more complex and, by law, must be set forth in CDs and approved by the Department of Justice (DOJ) and a federal court. Remedial Design (RD) settlements may take the form of AOCs or CDs, but combined RD/RA settlements must be set forth as CDs.

Under CERCLA, EPA may use a variety of special settlement tools. In mixed funding settlements, settling PRPs and EPA contribute to the RA, and EPA generally pursues viable non-settlors for the costs it has 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. In addition, 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 and other settlement tools are discussed fully in Chapter 5, RI/FS Negotiations/Settlement, and Chapter 8, RD/RA Negotiations/Settlement.

1.2.C Enforcement Authority

If the PRPs do not settle with EPA, CERCLA section 106 gives the Agency the authority to unilaterally order them to conduct the response. In addition, with the assistance of DOJ, EPA may obtain a court order under section 106 compelling the PRPs to perform the cleanup. Under section 107, EPA may sue PRPs for cost recovery. These authorities are discussed further in Chapter 8, RD/RA Negotiations/Settlement and Chapter 12, Cost Recovery.

1.2.D Other Statutory Authorities

In some instances, EPA may use authorities provided by environmental statutes other than CERCLA, although the applicability of these laws is subject to specific legal requirements that are beyond the scope of this handbook. For example, under the Resource Conservation and Recovery Act, the Agency can order owners and operators of hazardous waste treatment, storage, and disposal facilities to investigate any potential releases and to clean up the facility if necessary. The Toxic Substances Control Act and its regulations can be used by the Agency to impose conditions on the handling of particularly hazardous substances such as asbestos and polychlorinated biphenyls. In cases where releases affect surface waters, provisions of the Clean Water Act (CWA) can be used to impose fines and to require cleanup. These other statutes also provide the basis for many of the Applicable or Relevant and Appropriate Requirements (ARARs) on which cleanup levels are based in site Records of Decision (RODs). ARARs are discussed in Chapter 5, RI/FS Negotiations/Settlement, Chapter 6, RI/FS Implementation, and Chapter 7, Selection of Remedy.

1.2.E Administrative Dispute Resolution Act

The Administrative Dispute Resolution Act of 1990 expressly authorizes and encourages all federal agencies to use Alternative Dispute Resolution (ADR) techniques to assist in the resolution of disputes involving a federal agency.

Types of ADR potentially useful in EPA matters include the following, all of which are non-binding except for arbitration, which can be either binding or advisory:

- **Mediation** - Use of a neutral party with no decision-making authority to aid the parties in their negotiations. Types of mediation include:
  - **Facilitation** - Use of a neutral party to enhance information exchange or promote effective decision-making.
  - **Allocation** - Primarily used by members of PRP groups to privately assess responsibility and allocate the costs among PRPs. EPA does not usually participate in these groups, but may encourage the PRPs to use this process.
- **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 party to assist a negotiation team in evaluating the potential for settlement and/or use of ADR professionals.

- **Fact-Finding** - Use of a neutral party with subject matter expertise to resolve technical or factual issues. Fact-finding can be performed in either an investigation or arbitration format, and can be binding or advisory.
- **Arbitration** - Use of a quasi-judicial setting in which a neutral third party, chosen by the parties to the dispute, is asked to decide how the conflict will be settled. Arbitration may be either binding or non-binding. Procedure and evidentiary requirements are more streamlined in arbitration than in court proceedings.
- **Minitrial** - Use of a structured presentation of each party's case to a panel of decision-makers from each party and a neutral "judicial officer." Procedural and evidentiary standards are negotiable by the participants. After case presentation, parties meet to attempt a negotiated settlement, but may request a non-binding recommendation.

The most commonly used ADR mechanism in regional enforcement actions is mediation. Mediation has proven extremely helpful in reducing the regional resources required to obtain Superfund cost recovery and Remedial Design/Remedial Action (RD/RA) settlements. To ensure that mediation is used whenever it would be beneficial, several regional offices have established procedures to ensure that each Superfund enforcement action is reviewed for potential ADR assistance. ADR methods, primarily mediation and allocation, have been used by EPA to assist the resolution of more than 200 civil actions and have been included as a dispute resolution option in more than 40 settlement agreements. ADR has been, or is being, used to facilitate many difficult settlements, including cost recovery and remedial actions in excess of $200 million with more than 1,600 parties, and for actions with both state 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 under way to provide equal status to the initiation of mediation or arbitration relative to that given for the initiation of legal action.

The Office of Site Remediation and Enforcement (OSRE) has dedicated staff to assist regional offices, DOJ, and members of the regulated community in the evaluation of the appropriateness of ADR techniques in enforcement cases. In addition, ADR specialists are on staff in each of EPA's regional offices. OSRE offers training to Agency and DOJ staff and publishes a quarterly report on Agency ADR activities. OSRE and the regional ADR specialist offer assistance in reviewing case files for appropriate ADR actions, locating appropriate ADR professionals and preparing required procurement documents, and seeking funding for ADR use. Finally, EPA has funded a national ADR contract to provide neutral services for a variety of matters including Superfund enforcement.

1.2.F Program Goals

The Superfund enforcement program seeks to maximize the involvement of PRPs in the cleanup of Superfund sites. The Agency's enforcement goals are to:

- Maintain high levels of PRP participation in conducting and financing cleanup through use of EPA's enforcement authorities and/or tools.
- Ensure fairness and equity in the enforcement process.
- Recover Fund monies expended by EPA.

If properly planned, negotiated settlements do not take longer to implement than Fund-lead activity. The key elements are good planning and effective deadline management.

The enforcement authority provided by CERCLA offers PRPs a powerful incentive to settle with EPA. Settlement is usually faster and less costly than litigation, and it reduces the risk that PRPs will be assessed treble damages under CERCLA section 107.

1.3 Overview of Superfund Process

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

1.3.A Site Assessment and Response Planning

Current Superfund site assessment practice seeks to integrate previously separate removal and remedial assessments into a single, concurrent process. Whenever possible, assessment activities are conducted concurrently with response and enforcement actions. For example, because an Administrative Record file must be made available for public inspection when RI/FS work begins, regions should start compiling the record file as soon as any work pertinent to remedy selection commences, regardless of whether or not a decision has been made to perform an RI/FS. Likewise, CERCLA section 122 special notice procedures should be used where they may facilitate RI/FS or RD/RA settlement, even if the region anticipates conducting those response actions in combination with other actions. It is important to emphasize that these practices do not supersede the legal distinction between removal and remedial authorities or the procedural requirements for exercising those authorities.

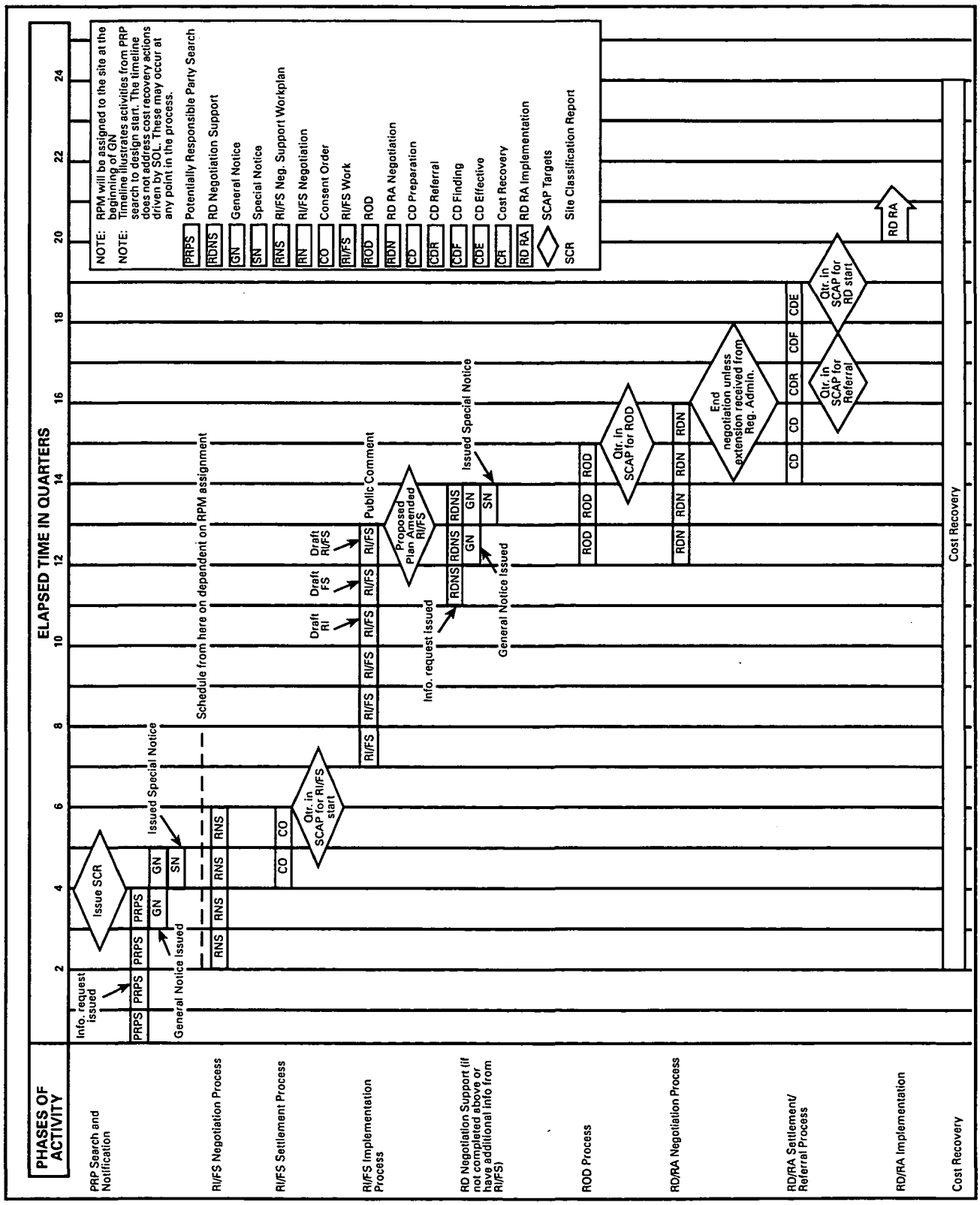
1.3.B Site Management Planning

It is important to develop and maintain a general road map of site activities as early in the response process as possible to ensure a coherent context for planning and conducting specific site activities. The SMP serves this purpose and evolves over time, becoming more precise as the site passes through different phases.

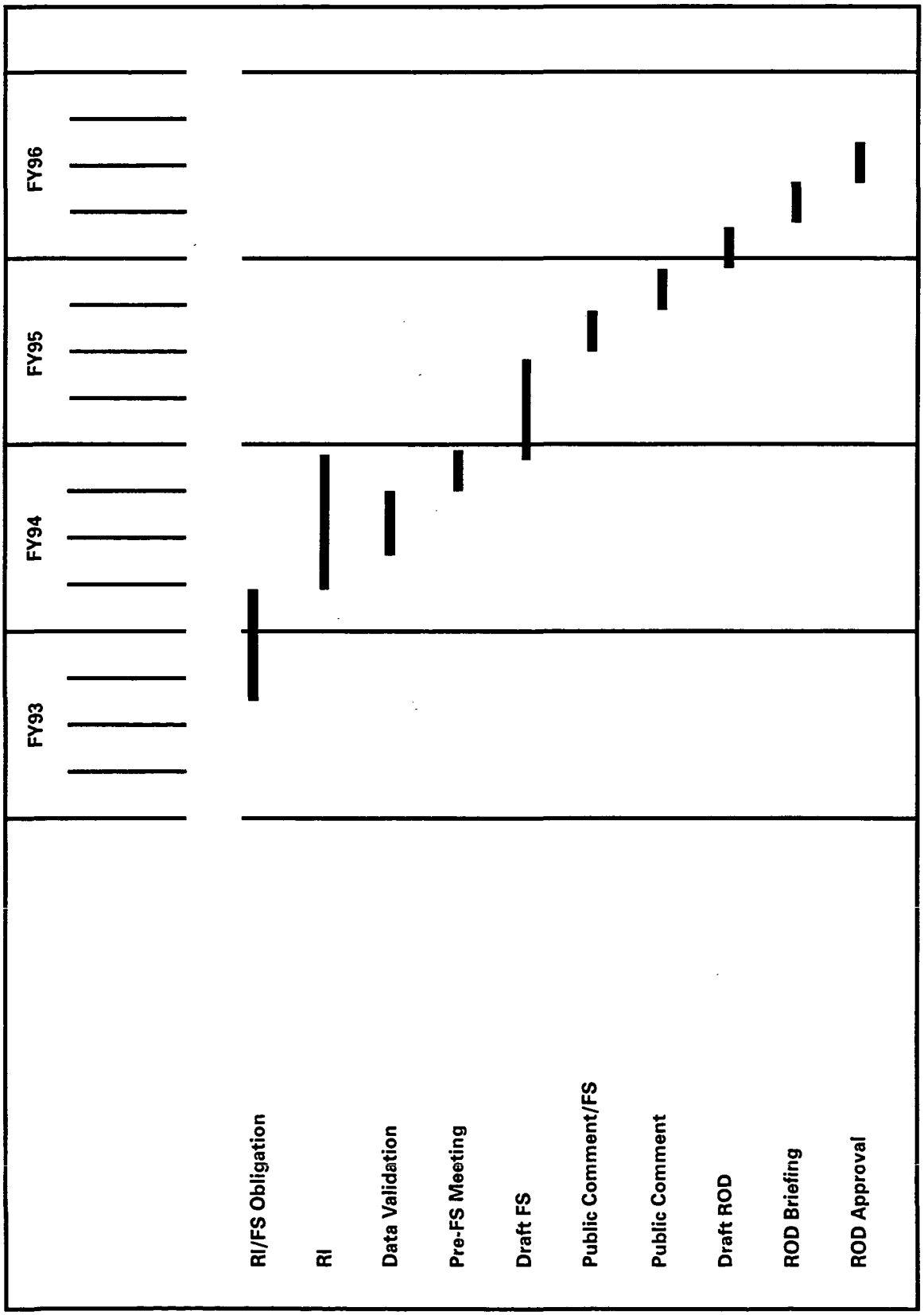
Exhibit 1-1 presents the Agency's view of the key steps and optimum duration of phases in moving sites from identification to remediation.

Exhibit 1-2 shows the level of specificity appropriate for the general timeline of an SMP. Critical points where the timeliness of enforcement actions could affect response activity should be indicated on the timeline. Regional Decision Teams develop response strategies for sites following receipt of initial site information and as the assessment process advances. Day-to-day project management responsibility is exercised by the site management team. The SMP should document the decisions made by both teams in coordination with each other.

1-1 Schematic Overview of CERCLA Enforcement and the Remedial Process



1-2 Sample Portion of Site SMP Timeline*



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

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 road map - 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 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.

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. Whenever a major change or addition is made to the overview or 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 management team and major PRP representatives with a response and enforcement history of the site, the response and enforcement objectives, and a schedule of major activities.

Each Region must develop both an SMP and management review and concurrence process that is appropriate for its own 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.

Regions are required to develop site-specific plans for removal work one quarter in advance. Extensive site-specific detail is not required in each quarterly plan, as the exact nature of removal work cannot always be anticipated. The planning process begins by identifying sites in the Comprehensive Environmental Response, Compensation, and Liability Information System 3, EPA's national information management system for the Superfund program, that are potential candidates for removal work in the next quarter. Due to the sometimes unexpected and time-critical nature of removal actions, this process may only include a portion of the sites that actually undergo removal actions during the specified quarter.

The main elements necessary for removal planning include designation of the expected lead, identification of the funding that each action will require, and determination of the category of each removal. As discussed in Chapter 2, Removals, removal actions are classified as follows:

- **Emergency** - the Agency determines that cleanup activities are required within hours of the determination that removal action is necessary.

- **Time-Critical** - the Agency determines that a period of less than six months is available before removal activities must begin.
- **Non-Time-Critical** - the Agency determines that a period of more than six months is available before removal activities must begin; the lead agency must perform an Engineering Evaluation/Cost Analysis or its equivalent.

If a removal action is expected to take more than 120 days, preparation of a Community Involvement Plan (CIP) is required. The lead agency develops the CIP with the participation of the responsible party under the oversight of EPA regional staff. The elements of the CIP in the context of removals are further described in Chapter 2, Removals.

1.3.C PRP Searches

As soon as the Agency decides that a response action is likely to be required at a site or when the site is proposed for listing on the National Priorities List (NPL), 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 should involve regional attorneys and civil investigators. The search involves detailed review of state, EPA, and site records; interviews with site owners, operators, and transporters; and requests for information from those who may have been involved with the site. The PRPs identified by this process are notified of their potential liability and informed that they will have the opportunity to negotiate with EPA to conduct site cleanup.

Regions are encouraged to adopt, where appropriate, 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 searches, regions should coordinate with other parts of the program and with the states. Chapter 4, PRP Search, Identification, and Information Exchange, contains a detailed description of the PRP search process.

1.3.D Negotiations

Formal negotiations with PRPs usually begin at two stages in the cleanup process, before the RI/FS and after EPA releases the Proposed Plan for public comment, or generally no later than when EPA signs the ROD. The purpose of these negotiations is to reach agreement that the PRPs will perform the RI/FS or RD/RA and pay any past costs incurred by EPA. During the course of negotiations, EPA and the PRPs exchange information on site conditions, the PRPs' liability, past costs, and the nature of the required work. Based on this information, EPA and the PRPs try to reach an agreement that the PRPs will both finance and conduct the work. If an agreement is not reached, EPA may (1) issue an order compelling the PRPs to do the work, and pay past and future costs; (2) sue the PRPs to require them to perform the work if they fail to comply with the order; and/or (3) use Superfund funds to perform the work and seek to recover the costs later. The negotiation process is described in detail in Chapter 5, RI/FS Negotiations/Settlement, and Chapter 8, RD/RA Negotiations/ Settlement.

1.3.E Settlements

If negotiations are successful, EPA and the PRPs must sign a legal document that sets forth the cleanup agreement. If the work required is an RI/FS, RD, or removal action, EPA and the PRPs usually use an AOC. An AOC is a legally binding administrative document, authorized by CERCLA, that EPA and the PRPs both sign. Although a judicial CD may be used instead, CDs are not the preferred mechanism for RI/FSs or removal actions because administrative settlements can be processed more quickly. A CD is similar to an AOC, but it is a judicial action that must be approved by DOJ, filed in federal court, and entered or approved by a judge before it becomes final. If the settlement between EPA and the PRPs includes an RA, CERCLA section 122 requires that the settlement be in the form of a CD. These settlement methods are discussed in more detail in Chapter 5, RI/FS Negotiations/Settlement, and Chapter 8, RD/RA Negotiations/Settlement.

1.3.F Oversight

Once the AOC or CD takes effect, PRPs can begin work. EPA closely monitors all work at the site. 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 6, RI/FS Implementation, describes the oversight process for RI/FSs and Chapter 9, RD/RA Implementation, discusses the process as it relates to RD/RAs.

1.3.G Cost Recovery

If negotiations with the PRPs are unsuccessful, EPA can choose to perform the work first and seek to recover its costs later. To recover costs, EPA usually issues a demand letter and if the PRPs do not comply, EPA refers the matter to DOJ to sue the PRPs. If the United States incurs response costs of $500,000 or less at a facility, EPA can compromise the claim and settle with the PRPs directly using an AOC. If more than $500,000 in United States response costs are involved, the Attorney General's written approval of any compromise and settlement is required. The cost recovery process is described further in Chapter 12, Cost Recovery.

1.3.H Timeline

Although it is difficult to describe a typical Superfund site, the timeline in Exhibit 1-1 fairly depicts the general flow of enforcement and response activities. More detailed information about the Agency's expectations regarding how long each activity should take is available in OSWER's Superfund/Oil Program Implementation Manual for the current fiscal year. The periods set forth in the manual represent overall planning goals for the entire Agency as set forth in the Superfund Comprehensive Accomplishments Plan (SCAP). Individual site conditions may lead to longer or shorter durations for each activity. RPMs should consider both the SCAP planning durations and site-specific conditions in developing an overall site management plan.

1.4 Key Players

The Superfund enforcement program requires close coordination among many different players in EPA, other federal agencies, states, and tribes. 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, states, and tribes, EPA regional staff (i.e., RPMs managing Fund-lead sites, community involvement staff, and regional counsel) may play active planning and coordination 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.

Regional attorneys act as the region's primary legal advisors whenever enforcement action is taken at a site. 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 DOJ when EPA sues the PRPs for either site cleanup or cost recovery.

At Headquarters, two major offices participate in the program. Within the Office of Solid Waste and Emergency Response, the Office of Emergency and Remedial Response is responsible for NPL listing and Fund-financed removal and remedial actions. Within the Office of Enforcement and Compliance Assurance, OSRE takes the lead in managing the overall Superfund 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. OSRE also provides legal advice and coordination in all formal enforcement actions, especially judicial cases. In major cases, OSRE reviews case referral packages before they are sent to DOJ. It also comments on precedent-setting settlements. OSRE consists of the Policy and Program Evaluation Division (PPED) and the Regional Support Division (RSD). PPED generally takes the lead in evaluating enforcement program activities and developing policy and guidance, while RSD takes the lead in supporting the regions in enforcement actions and reviewing settlements.

1.4.A Other Federal Agencies

DOJ has a major role 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 CD. DOJ develops and presents legal positions that explain the Agency's goals to PRPs and the courts and provides the only communication between EPA and the courts regarding site-specific litigation. In addition, DOJ is EPA's official representative in negotiations that take place while a case is pending before a court.

As noted earlier, DOJ also must approve any claim that is settled, whether by CD or by AOC, where total response costs at the site exceed $500,000.

Other federal agencies, such as the U.S. Coast Guard and the United States Army Corps of Engineers (USACE), may become involved in the program when their technical expertise is required. For example, USACE has extensive expertise in the management of large-scale construction projects and therefore can be helpful in the management of RAs.

1.4.B States and Tribes

The role of the states and tribes in the Superfund program is substantial and increasing. Today states and tribes are involved in Superfund as early as the site assessment phase, usually participate in the development of the ROD, and may participate in settlement negotiations with PRPs. In addition, states and tribes may take a lead role at a site by negotiating directly with the PRPs and by issuing orders under state/tribal legal authority.

1.4.C 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 department or agency, such as the Department of the Interior, the National Oceanic and Atmospheric Administration, or the Department of Agriculture, a state agency designated by the governor, or a combination of 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.

1.5 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.

1.5.A Emergency Planning and Community Right-to-Know Act

A detailed discussion of enforcement of CERCLA section 103 and Emergency Planning and Community Right-to-Know Act (EPCRA) sections 302 to 312, which concern emergency planning, notification, and right-to-know, can be found in the *Enforcement Reference Manual for EPCRA* Sections 302, 303, 304, 311, and 312, and CERCLA section 103 finalized by the former Office of Waste Programs Enforcement 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 On-Scene Coordinators who are aware of potential violations should contact their regional EPCRA enforcement coordinator for further assistance and information.

1.5.B Oil Pollution Act

The Superfund Docket retains copies of a periodic publication, Update on Implementation of the Oil Pollution Act of 1990. A particularly helpful overview of the statute and its implementation by the Agency can be found in EPA Publication No. 9360.8-OIFS, OPA Q's & A's: Overview of the Oil Pollution Act of 1990 (December 1991), 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 and hazardous substances. Judicial actions proposing millions of dollars in penalties have been initiated for more serious violations of CWA section 311.

1.5.C Federal Facilities

The Federal Facilities Enforcement Office 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 OSWER Directive 9992.4, Federal Facilities Hazardous Waste Compliance Manual (January 9, 1990).

2. Removals

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Chapter 2 Removals

2.1 Description of Activity

2.1.A Introduction

This chapter discusses enforcement activities associated with removal actions. Generally, removal activity, including activity to secure and oversee Potentially Responsible Party (PRP) 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 Remedial Project Manager (RPM) may play a key role in securing and overseeing PRP removal response. In recent years, there has been an increase in RPM oversight of removal activities, particularly at National Priorities List (NPL) sites and at PRP-lead non-NPL sites. For convenience, only the term "OSC" is used throughout this chapter, although the information is the same for RPMs when appropriate. **Exhibit 2-1** provides a broad overview of the removal enforcement process.

References

Office of Solid Waste and Emergency Response (OSWER) Directive 9360.3-06, "Removal Enforcement Guidance for On-Scene Coordinators" *Superfund Removal Procedures* (April 6, 1992).

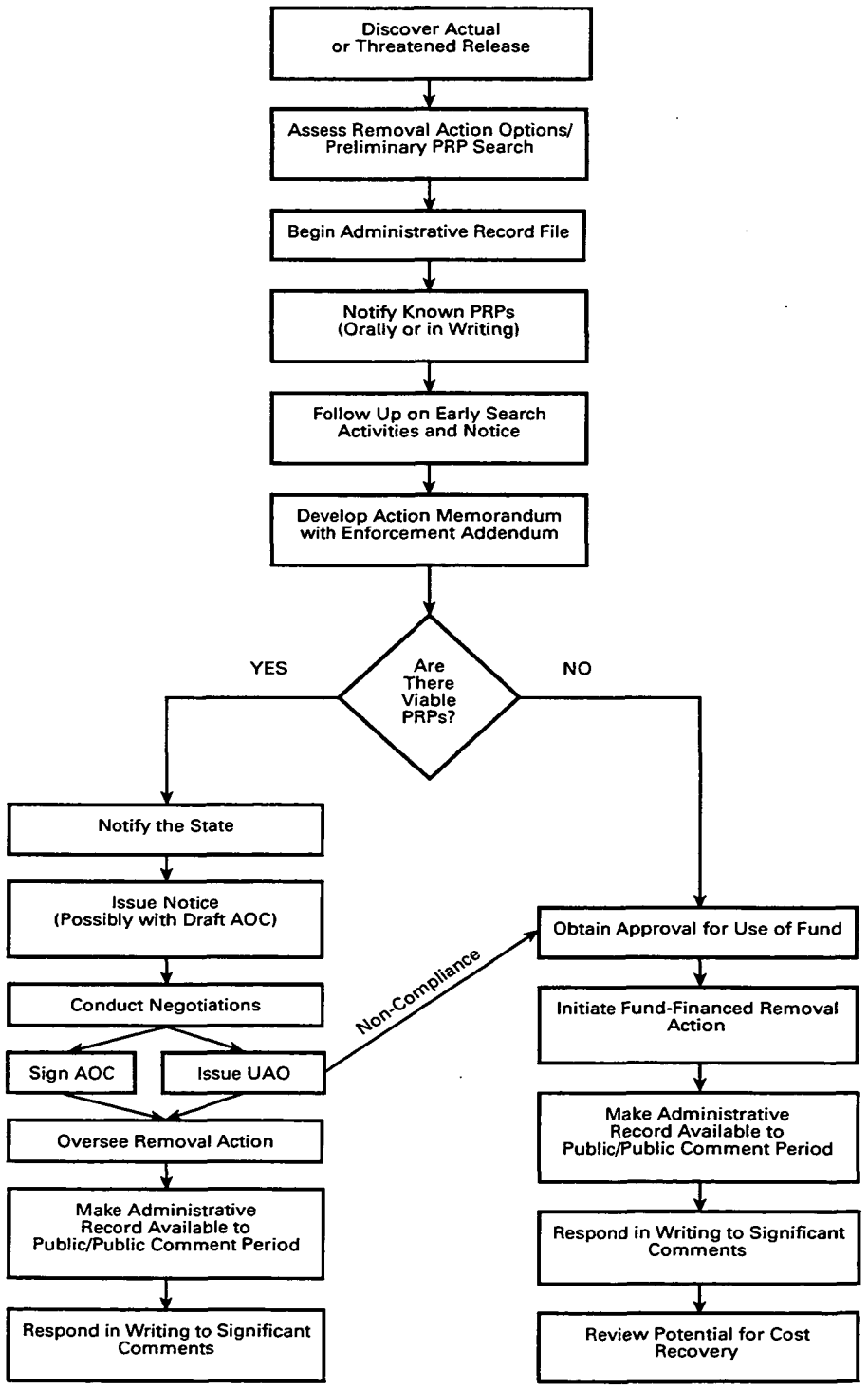
Note: This document is one of a series of stand-alone volumes relating to the removal program. The following six of 10 volumes have been completed as of this publication of the Enforcement Project Management Handbook: 1) Action Memorandum Guidance; 2) Removal Enforcement Guidance for On-Scene Coordinators; 3) Public Participation Guidance for On-Scene Coordinators: Community Relations and the Administrative Record; 4) Removal Response Reporting: Pollution Reports (POLREPS) and OSC Reports; 5) Guidance on the Consideration of ARARs during Removal Actions; and 6) Guidance on Conducting Non-Time-Critical Removal Actions under CERCLA.

2.1.B Definition

Removal actions are defined in section 101(23) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to include "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 accomplish the following:

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

2-1 Overview of Removal Enforcement Activities' Relationship to Response Actions*



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

Sections 104(a) and (b) also authorize responses and studies regarding releases and threatened releases of pollutants or contaminants which present an imminent and substantial danger to human health or welfare.

2.1.C Authority

Section 104(a) of CERCLA authorizes the President to act, consistent with the National Contingency Plan (NCP), to remove or to arrange for the removal of any hazardous substance, pollutant, or contaminant if the President deems it necessary to protect the public health, 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 public health, 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/refuses to comply with a section 106 order. Specific standards and procedures for implementing CERCLA and for conforming to other statutes are set forth in the NCP.

2.1.D 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 threatened 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 (NTC)** - 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 NTC removals.

The urgency determination influences 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.

2.1.E 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. To the greatest extent possible, all removal activities should be designed to reduce risk to human health and the environment. This list is intended neither to limit response officials from taking other actions deemed necessary under the circumstances, nor to preclude the lead agency from referring response actions to other appropriate federal or state enforcement authorities.

- Installation of fences, warning signs, or other security or site control precautions where humans or animals have access to the release.
- Construction of 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.
- Stabilization of berms, dikes, or impoundments where needed to maintain the integrity of the structures.
- Installation of caps over contaminated soil or sludge, where needed to reduce migration of hazardous substances, pollutants, or contaminants into soil, ground water, or air.
- Use of 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, or direct contact with, 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, of leakage, of exposure to humans, animals or the food chain, or of 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 an alternative water supply where it will reduce the likelihood of exposure of humans or animals to contaminated water.

2.1.F 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 exceptions to these statutory limits (which do not apply to PRP-lead removal actions) include the following:

- 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 (commonly called an emergency exemption).
- A continued response action is otherwise appropriate and consistent with the remedial action to be taken (commonly called a consistency exemption).

OSCs who request an exception to the statutory limits on cost or duration for a Fund-lead removal action should first ensure that all potential avenues for securing PRP cleanup or funding for cleanup have been pursued. Regions should carefully review all cost exception requests for Fund-lead removal actions for evidence of activity to secure PRP participation in the

cleanup. Headquarters reviews emergency cost exceptions over six million dollars. 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 Administrative Order (AO) has been issued to the PRPs or previous demands for reimbursement have been made.
- The Administrative Record (AR) index.
- Enforcement history of the site.
- Enforcement options, discussion, and recommendations.
- Any enforcement sensitive information should be included in the enforcement strategy addendum to the Action Memorandum.

References

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

National Oil and Hazardous Substance Pollution Contingency Plan (NCP), 40 Code of Federal Regulations (CFR) section 300.415 ("Removal Actions") (1990).

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

2.1.G Administrative Record and Public Participation

Section 113(k) of CERCLA requires that the Agency establish an Administrative Record (AR) for selection of CERCLA response actions. The AR 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 AR for a removal action. The AR should consist of documents that the Agency considered or relied on to select the response action and, when appropriate, should include documents demonstrating the public's opportunity to participate in the selection of the response action (more information on the AR is contained in Chapter 15, Records Management).

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

Section 300.800 of the NCP and its associated preamble discuss AR and public participation requirements. **Exhibit 2-2** depicts the various activities EPA considers as requirements when establishing an AR for each of the removal categories defined earlier in this chapter. The requirements for each

2-2 Administrative Record Requirements for Removals and Community Involvement

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 Involvement 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.

removal category differ to ensure that the AR does not unduly create delays in emergency and time-critical removal actions.

The compilation of a complete and accurate record of the documents used by the Agency in making its removal decision is crucial to the enforcement process. Any review of EPA's removal decision will be limited to those records contained in the AR.

References

NCP, 40 CFR section 300.800 ("Establishment of an Administrative Record") (1990).

Office of Solid Waste and Emergency Response (OSWER) Directive 9833.3A-1, "A Final Guidance on Administrative Records for Selecting CERCLA Response Actions" (December 3, 1990).

2.1.H Written Response

A written response to significant comments received during a public comment period should be included in the AR file along with the comments. The RPM or OSC should consult regional counsel when determining which comments are significant and which are extraneous or intentionally inflammatory. The AR serves to document how public comments have been considered during the decision-making process and to provide answers to significant questions raised.

Reference

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

2.2 Procedures and Interactions

2.2.A PRP Search

PRP searches are discussed in detail in Chapter 4, 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 relating to removal actions.

Reference

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

2.2.A.1 PRP Response Policy

Where PRPs are known and able to perform the removal, EPA prefers that they undertake the response action pursuant to a consent 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 cleanup and disposal and for cost recovery if the removal is conducted with use of the Fund.

2.2.A.2 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 4, PRP Search, Notification, and Information Exchange. The Level of Effort (LOE) and amount of time expended on the PRP search 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 2-3** shows how the LOE tends to vary with urgency. Information gathered during the PRP search, such as that indicated by the activities in Exhibit 2-3, 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 maximize the advantage of having much of the PRP research conducted in the field, and as a matter of standard procedure, the Enforcement Project Manager (EPM), if different from the OSC, should consult with the OSC on the PRP search as well as on 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.

2.2.A.3 Emergency Situation

In emergency situations where the PRPs are not immediately known, the OSC usually conducts the PRP search in two phases. Initially, streamlined procedures consisting of verbal inquiries of municipal officials and reasonably available on-site sources, as well as reviews of readily available site records, are implemented. Verbal inquiries should be documented and obvious visual information linking possible PRPs to the site should be recorded as soon as practicable. An expedited work assignment may be used

2-3 PRP Search Activities

Urgency of the Situation

Level of Effort

Emergency	Time-Critical	Non-Time-Critical
Preliminary search* • Review readily available site records • Consult municipal officials • Conduct on-site interviews • Gather visual evidence from site *Follow up search conducted later	• Review readily available site records • Consult municipal officials • Conduct on-site interviews • Gather visual evidence from site • Review relevant site records • Conduct off-site interviews • Conduct a title search (coordinate with civil investigator) • Document additional evidence linking PRP to site (e.g., photos) • Issue 104(e) information requests • Use START for preliminary activities	• Review readily available site records • Consult municipal officials • Conduct on-site interviews • Gather visual evidence from site • Review relevant site records • Conduct off-site interviews • Conduct a title search (coordinate with civil investigator) • Document additional evidence linking PRP to site (e.g., photos) • Prepare baseline PRP search report • Issue 104(e) information requests regarding generators and transporters • Prepare interim final PRP search report

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

through the Superfund Technical Assistance and Response Team (START) or Enforcement Support Services (ESS) contract vehicles. The OSC should prioritize and expedite certain search activities to support the notice, negotiation, and AO process before the removal begins. The AO process results in issuance of either an Administrative Order on Consent (AOC) or a Unilateral Administrative Order (UAO). Once the site is stabilized, a second, more extensive phase of PRP identification should be conducted. 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 (CI) and contractor (e.g., ESS) may provide assistance on the follow-up search.

2.2.A.4 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 CIs to determine 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.

2.2.A.5 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 PRP search to identify generators and transporters. A baseline report, as described in Chapter 4, PRP Search, Notification, and Information Exchange, should be prepared, and decisions should be made on specialized tasks. Where PRPs do not conduct the removal, an interim final PRP search report will be necessary.

ESS contracts, START contract support, or CIs may be used to support PRP searches in NTC 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.

2.2.A.6 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 and any other items found or removed from the site, such as drums, in order to verify site conditions or the source of material, and obtaining evidence of PRP links to the site, such as site records identifying owners/operators and generators. OSCs may utilize START contractors in gathering information that helps 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.

2.2.A.7 PRP Search Completion

As noted in Chapter 4, PRP Search, Notification, and Information Exchange, 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 2-3 shows the information that the PRP search effort should include or yield to meet the target of a completed PRP search.

2.2.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.

2.2.B.1 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 the following:

- 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 issuing a UAO).
- Availability of the Fund.
- Cost of the removal.

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

A takeover or lead change may occur after an action has started and credit has been given. Typically, this occurs when a settlement with a PRP is reached after the action has started. When circumstances warrant passing the lead to a PRP during a phase of cleanup, steps should be taken to minimize potential causes for delay. A policy has been established that limits lead changes from EPA to PRPs in the middle of a phase of the Superfund process, except in situations where the change will not cause undue delays.

Reference

OSWER Directive 9800.1-01, "Limiting Lead Transfers to Private Parties During Discrete Phases of the Remedial Process" (November 14, 1991).

2.2.B.2 Enforcement Strategy Addendum to Action Memorandum

Except in 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. 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.
- Indicate if notices have been sent, to whom, and with what response. Also, describe planned notice activities and their implementation schedule.
- Review problems posed by site.
- Develop clear Statement of Work (SOW) consistent with draft Action Memorandum.
- Prepare draft 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 PRPs, which can be jeopardized by inadequate preparation and unclear cleanup goals. A well-written and well-defined SOW will help to clearly present cleanup goals to the PRPs and provide the foundation for EPA to obtain goods and services on time and within budget. The SOW should be attached to the notice letter that advises PRPs of their potential liability and possibly initiates negotiations with EPA for conducting the removal.

References

OSC Warrant Training Course: Participant's Manual (Winter 1996).

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

2.2.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: notice of

potential liability, and notice of an opportunity to negotiate to conduct the removal. 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 varies depending on whether the following are true:

- The notice will be used simply to notify PRPs of their potential liability; it may further advise the PRPs 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 actions by the PRPs. Except in limited emergency situations, it is inappropriate to provide initial notice by a UAO. **Exhibit 2-4** identifies the steps involved in securing PRP action.

References

Office of Site Remediation Enforcement (OSRE) Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)" (July 26, 1996).

OSRE Memorandum, "Transmittal of Sample Documents for Compliance and Monitoring" (July 1, 1996).

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

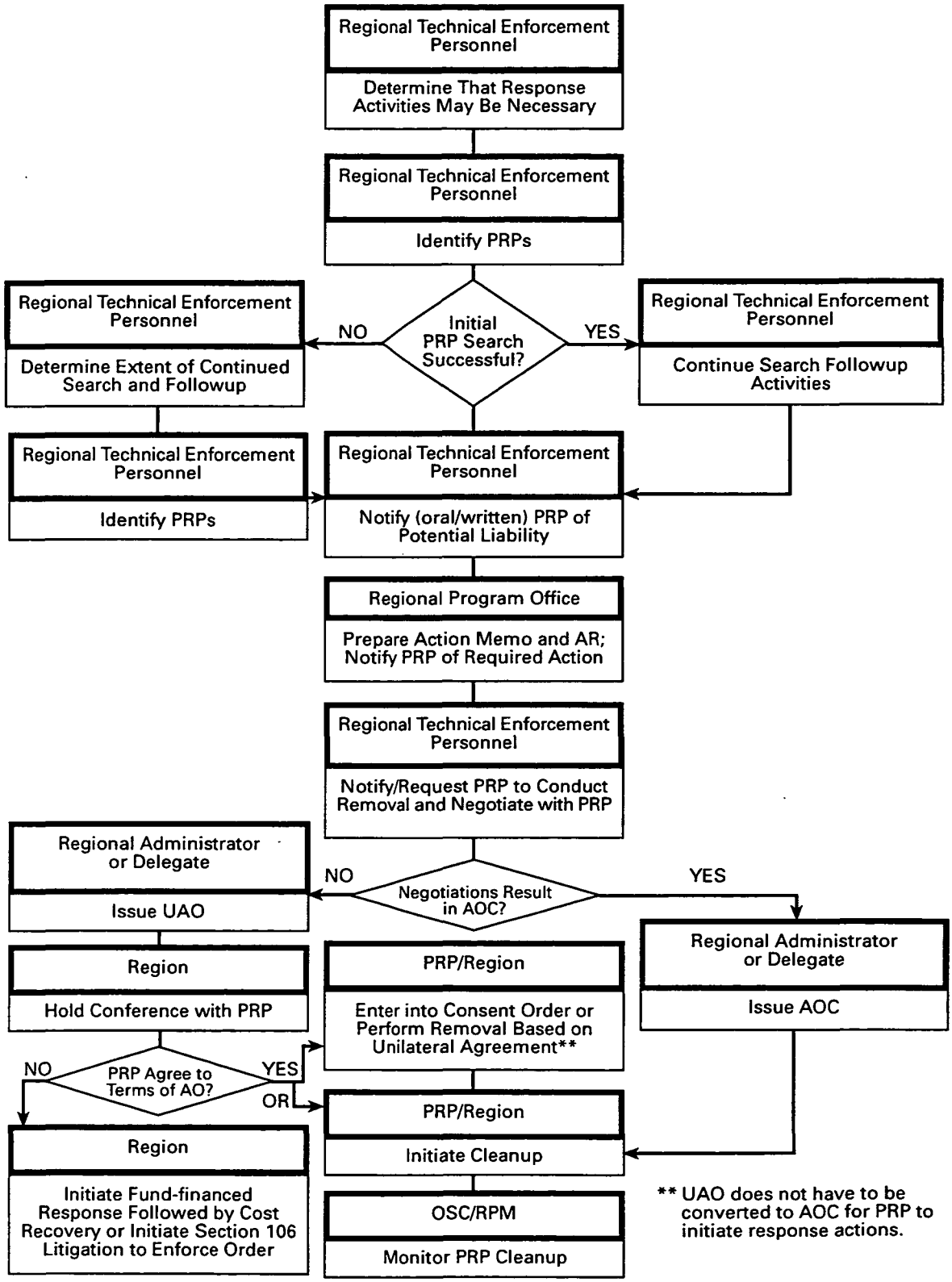
OSWER Directive 9834.10-1a, "Model Notice Letters" (February 7, 1989).

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

2.2.C.1 Notification in Emergency Situations

In emergencies, the OSC may notify known PRPs verbally. The regional program office then should prepare and send a General Notice Letter (GNL) to the PRPs confirming the verbal notification of liability and any request for response. The regional program office should send the notice letter as soon as possible following the verbal notification. Although a written notice letter typically precedes the initiation of an AO, this is not necessary in emergencies, given the limited time available.

2-4 Securing PRP Action for Removals



2.2.C.2 Notification in Time-Critical Situations

In time-critical situations, the OSC may initially notify PRPs verbally 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.

2.2.C.3 Notification in Non-Time-Critical Situations

In NTC 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. 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 NTC 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.

2.2.D AOC Negotiations and UAO Issuance

The site lead determination and enforcement strategy will determine the general approach to negotiating activity at the site. Where negotiations are part of the strategy and when time allows, the preferred approach to negotiations is to send the PRPs a notice letter specifying the work to be done and establishing a time frame for negotiation of an 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 UAO if they do not consent to an AOC. For leverage in negotiating an AOC, it is often helpful to have a signed Action Memorandum; however, regions should ensure adequate funding is available for the removal action before signing the memorandum. A draft Action Memorandum may also be a helpful AOC negotiation tool. 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 NTC 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 SOW in negotiations and/or as an attachment to the order. It has been EPA policy to use Alternative Dispute Resolution (ADR) in the PRP negotiation process when necessary and appropriate.

Steps enforcement staff may take when conducting negotiations with PRPs include the following:

- Meet with PRPs.
- Negotiate language in the AO.
- Consider use of ADR in negotiations.
- Negotiate technical points and schedules in the work plan.
- 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 actions, 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 AO 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 SOW 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 only a portion of the removal action. The PRPs may be financially or technically unable to completely address some of the contamination at the site. It may be appropriate to have the PRPs undertake simple tasks (e.g., security) as well as others that they can accomplish. Where the PRPs appear to be incompetent or lack substantial resources, it is often preferable to initiate a Fund-lead response. At some 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. Orders issued in these situations are known as "carve out" orders. 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).

References

OSWER Memorandum, "Use of Alternative Dispute Resolution in Enforcement Actions" (May 1995).

OSWER Directive 9833.1, "Issuance of Administrative Orders for Immediate Removal Actions" (February 21, 1984).

2.2.D.1 Administrative Orders on Consent

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

2.2.D.2 Unilateral Administrative Orders

In emergency and some time-critical situations, regional staff may find it necessary to bypass negotiations and immediately issue a UAO. In addition, if viable PRPs fail to respond appropriately to the verbal/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).

In some situations, there may be reasons for not issuing a UAO to certain PRPs. For example, issuing a UAO to all identified PRPs may constitute more than the largest manageable number a region can handle within the constraints of its limited resources. A region should also take into account PRPs who have already performed response work, especially in cases where work performed may be equivalent to a PRP's "fair share."

UAOs are an effective way to achieve PRP response in situations where there is insufficient time to pursue thorough negotiations, or if the PRPs are 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.

References

OSRE Memorandum, "Documentation of Reason(s) for Not Issuing CERCLA Section 106 UAOs to All Identified PRPs" (August 2, 1996).

OSWER Directive No. 9833.0-1A, "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions" (March 7, 1990) (Although not specific to removals, this guidance contains useful, generally applicable guidance).

2.2.D.3 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. 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 model orders provide enough flexibility for site-specific factors.

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

The following sections are found in both the model UAO and AOC:

- **Jurisdiction and General Provisions** - The sections describe the legal authority for issuing the order.
- **Parties Bound** - This section lists those parties related to the respondents who are subject to the terms of the order.
- **Definitions** - Terms which are ambiguous or may become a source of future confusion or challenge by the PRPs should be defined. Both orders contain this section as optional.
- **Findings of Fact** - The order contains 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** - The legal determinations necessary to issue an order under section 106 are described in this section.
- **Order** - This section contains many sub-sections specifying the work objectives and the general parameters for performing the cleanup. These include the following:
  - 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 OSC** - This section indicates that the OSC is responsible for overseeing the implementation of the order.
- **Reservation of Rights** - This section contains 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 PRPs 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 permits the OSC to make verbal and written modifications. The OSC can modify any plan, schedule, or SOW 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. Modifications should not be so extensive as to generate a new order.
- **Notice of Completion** - This section states that EPA will notify the respondent(s) in writing when the work specified by the order is completed, with the exception of any continuing obligations required by the order. If EPA determines that any removal actions have not been completed in accordance with the order, it will notify the respondent(s), provide a list of the deficiencies, and require that the respondent(s) modify the work plan to correct such deficiencies.
- **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 order was issued and the effective date of the order.
- **Reimbursement of Costs** - The UAO requires reimbursement of all response costs. The AOC requires reimbursement of past costs as well as oversight costs.
- **Post-Removal Site Control** - The respondent is responsible for implementing post-removal site control activities.

The following sections are found specifically 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 certain types of events outside respondents' control occur.

- **Covenant Not to Sue** - Upon issuance of a Notice of Completion, EPA may provide the following covenants in the AOC: 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 CERCLA. Contribution protection protects a settling party against lawsuits from non-settlors. The AOC will specify the breadth of the contribution protection it provides.
- **Indemnification** - This section states that the respondent will not hold the United States responsible for damages, costs, or claims arising from an act or omission of respondent in carrying out an AOC.
- **Financial Assurance** - The respondent is required to provide periodic financial assurances. This section is optional.
- **Public Comment** - Section 122(i)(2) requires that, at least 30 days before any settlement regarding past costs, 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.

The following sections are found only in the UAO:

- **Access to AR** - This section, found in the UAO, informs the PRP that the AR file is available for review at the region.
- **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 violations of the order and penalties.

References

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).

2.2.D.4 Issuance of UAOs

Regional enforcement staff should issue a UAO before Fund activation but after preparation of an enforcement action memo, whenever a PRP has been identified (unless the PRP is non-viable), provided the criteria for site lead

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, provided that the PRP does not comply.

Reference

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

2.2.D.5 Activation of Fund During AO Issuance

If site conditions warrant, the OSC should immediately initiate on-site response activities while the AO process continues. 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 reflect that EPA has performed a specified portion of the work and that the PRP is ordered to take over the remaining work.

2.2.D.6 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 UAO and replace it with an AOC if significant enforcement advantages are achieved. EPA generally does not devote a significant amount of time to a second round of negotiations.

2.2.D.7 Enforcement of AO

Non-compliance with AOs is determined through the oversight process. There are two kinds of non-compliance: 1) no major response to the order; and 2) 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 and penalties under CERCLA section 107. This includes treble damages (three times the amount EPA spends on the removal) 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 for violations occurring before January 30, 1997, and not more than $27,500 per day for those occurring after January 30, 1997 (pursuant to EPA's Civil Monetary Penalty Inflation Adjustment Rule, implementing the Debt Collection Improvement Act of 1996).

In certain situations EPA, with assistance from the Department of Justice (DOJ), 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.

Reference

Office of Enforcement and Compliance Assurance (OECA) Memorandum, "Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders" (September 30, 1997).

2.2.E PRP Oversight

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 START or ESS. Contractors and other federal agencies 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 enforce the AO by assessing stipulated penalties, by taking a CERCLA section 106 judicial action, or by taking over the response and pursuing cost recovery.

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 nonparticipating PRPs, OSCs and RPMs should comply with the cost documentation procedures described in Chapter 12, 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 12, Cost Recovery.

References

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).

2.2.F Criminal Investigation

If at any time before or during removal actions criminal activity is suspected, the Regional Criminal Investigation Office should be notified immediately to begin criminal investigative activities. In situations where a criminal investigation has been initiated, the OSC or RPM should consult with regional counsel regarding permissible communications and activities in furtherance of the criminal investigation.

Reference

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

2.2.G Community Involvement

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

- 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 necessary information about the response action and about the effects of the release on the community's health and safety.

References

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

OSWER Directive 9360.3-05, "Public Participation Guidance for OSCs: Community Relations and the Administrative Record" (July 1992).

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

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

2.2.G.1 Community Involvement Plan

NCP section 300.415(n)(3)(ii) states that a Community Involvement Plan (CIP) 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(n)(2)(i) for requirements applicable to actions expected to take less than 120 days). Before preparing a CIP, program and community involvement staff must meet with local officials and interested citizens to obtain information about the site and to identify public concerns. The plan should provide the following:

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

Responsible parties may participate in implementing elements of the CIP at the direction of, and with oversight by, regional staff. The lead agency develops the CIP.

Reference

NCP, 40 CFR section 300.415 ("Removal Actions") (1990).

2.2.G.2 Community Involvement Activities

Specific types of community involvement actions 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. Other aspects of community involvement, through Technical Assistance Grants, Community Action Groups, and environmental justice initiatives, are discussed in Chapter 13, Community Involvement.

2.2.H Applicable or Relevant and Appropriate Requirements

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 greatest 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.

Reference

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

2.3 Planning and Reporting Requirements

2.3.A Contractor Support

Resources available to regional personnel to conduct PRP searches include OSCs, the START contract, the ESS contract, CIs, EPMs, 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.

2.3.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 CERCLIS 3/WasteLAN data system.

Removals are tracked by the Superfund Comprehensive Accomplishment Plan (SCAP) through CERCLIS 3/WasteLAN. OSCs should coordinate with their information managers to ensure that they are entering information into CERCLIS 3/WasteLAN correctly. All SCAP targets are established on an annual basis. Targets are planned site specifically prior to the quarter the removal is projected to begin. **Exhibit 2-5** summarizes SCAP Targets relevant to removals.

Planning and reporting requirements are defined in the Superfund Program Implementation Manual (SPIM). Definitions in the SPIM are subject to change on an annual basis and thus, should be revisited yearly.

2-5 SCAP Targets/Measures for Removals

Activity	SCAP Reporting	Quarterly	Annual
NPL Removal Starts	Measure (part of ACT-5)	X	X
Fund	Planning	X	X
PRP	Planning	X	X
Non-NPL Removal Starts	Measure (part of ACT-5)	X	X
Fund	Planning	X	X
PRP	Planning	X	X
Removal Completions	Measure (part of ACT-6 and ACT-7)	X	X
Fund	Planning	X	X
PRP	Planning	X	X
Federal Facility Removals	Measure (part of FF-17)	X	X

The following are definitions for Removal Starts:

- **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 danger posed by a pollutant or contaminant. 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 by EPA as documented in a POLREP. The date the on-site work begins is the start date for the removal action.
- **PRP-financed actions under the terms of an AOC, UAO, CD, or judgment** - The PRPs or their contractors have begun work on site for construction of the removal (emergency, time critical, or non-time critical) as documented in a POLREP and the PRPs have provided written notice of intent to comply with a UAO, or an enforcement instrument has been signed by EPA and the PRPs, or a judgment has been signed by a federal judge. The date of on-site construction is reported in CERCLIS 3/WasteLAN as the removal (Action Name = PRP Removal) actual start date (Actual Start). One of the following must be entered into CERCLIS 3/WasteLAN for the enforcement instrument:

- The date the AOC (Action Name = Admin Order on Consent) was signed by the PRPs and the designated Regional official (Actual Complete), and the Response Actions Achieved of "PRP Removal."
- The date (Actual Complete) the PRPs provide notice of intent to comply (Action Name = PRP Notify EPA of Intent to Comply) with a UAO signed (Actual Complete) by the designated Regional official (Action Name = Unilateral Admin Order), and the Response Actions Achieved of "PRP Removal."
- The date the CD (Action Name = Consent Decree) was signed by the PRPs, the designated Regional official, and the Federal judge (Actual Complete), and the Response Actions Achieved of "PRP Removal."
- The date a judgment (Action Name = Judicial/Civil Judgment) was signed by the federal judge (Actual Complete), and the Response Actions Achieved of "PRP Removal."

- **PRP-financed under terms of a state order or decree** - The PRPs or their contractors have begun work on site for construction of the removal (emergency, time critical, or non-time critical) as documented in a POLREP and the state enforcement instrument has been signed by the appropriate state official.
- **PRP-financed (RP-lead actions) emergency actions where no enforcement instrument exists** - The PRP or their contractors have begun construction work on site in response to an emergency incident, and EPA provides on-site technical oversight and/or is part of an incident command/unified command. The date of construction is reported in WasteLAN as the removal (Action Name = PRP Emergency Removal) actual start date (Actual Start).

The following definitions are for Removal Completions:

- **Fund-financed** - A Fund-financed removal is considered complete when the actions specified in the Action Memorandum are met, or when a ROD is signed which encompasses the actions specified in the Action Memorandum, (the ROD actual complete date should be the same as the Removal actual complete date), or when the contractor has demobilized and left the site (as documented in the POLREP) and recorded as the removal (Action Name = Removal Action) actual completion date (Actual Complete) in CERCLIS 3/ WasteLAN.
- **PRP-financed removal performed by the PRP under the terms of a Federal enforcement instrument** - This PRP-financed removal is considered complete when the region has certified that the PRPs have fully met the terms of an AOC, UAO, CD, or judgment and either have completed the actions specified in the Action Memorandum (as documented in a POLREP) and recorded as the removal (Action Name = PRP Removal) actual completion date (Actual Complete) in

CERCLIS 3/WasteLAN or a ROD (Action Name = Record of Decision) is signed which encompasses the actions specified in the Action Memorandum (the ROD actual complete date should be the same as the PRP Removal actual complete date).

- **PRP-financed removal performed by the PRPs under the terms of a state enforcement document** - This PRP-financed removal is considered complete when the state has certified the PRPs have fully met the terms of the instrument and either have completed the actions specified in the Action Memorandum (as documented in a POLREP) and recorded as the removal (Action Name = PRP Removal) actual completion date (Actual Complete) in CERCLIS 3/ WasteLAN, or a ROD (Action Name = Record of Decision) is signed which encompasses the actions specified in the Action Memorandum (the ROD actual complete date should be the same as the PRP Removal actual complete date).

- **PRP-financed emergency action where no enforcement instrument exists** - This PRP-financed removal is considered complete when the OSC, in consultation with the unified command/incident command system (if applicable), has determined that the emergency is stabilized (as documented in a POLREP) and recorded as the removal (Action Name = PRP Emergency Removal) actual completion date (Actual Complete) in WasteLAN.

In order to receive credit for a removal completion, an endangerment assessment must be performed. This endangerment assessment may be documented in an Action Memo, Removal Action Decision Document, or enforcement instrument. Regions must enter at least one of these documents into WasteLAN, or identify in WasteLAN which of these actions contain the endangerment assessment and their actual completion date (Actual Complete).

For either Fund- or PRP-financed removals, an action qualifier (Qualifier) must be recorded to identify whether the action resulted in the site being "Total Site Cleanup Cleaned Up," a "Partial Site Cleanup Partially Cleaned Up," or "Site Stabilization Stabilized."

Action qualifiers are defined as follows:

- **Total Site Cleanup Cleaned Up** - All threats have been addressed as defined in the Action Memo and the region determines that it has addressed all threats posed by the site and will not be returning for subsequent response activity. Also, all removal obligations and related work have been completed.

- **Partial Site Cleanup Partially Cleaned Up** - Removal action(s) have been completed that have taken specified waste(s) off site, or permanent treatment technologies have been applied such that specified waste(s) will not have to be handled again. Example: Contaminated drums are removed but soil contamination remains. Site is partially cleaned up.

- **Site Stabilization Stabilized** - All threats identified in the Action Memo have been addressed and the region may take additional removal actions as new threats are identified/investigatory information is available. Example: Site is fenced to preclude entry/exit and drums are segregated and overpacked to prevent a release/contamination. Site is stabilized.

Exceptions:

Temporary demobilization and temporary storage on-site are not considered completions, unless temporary storage is the only action specified in the Action Memorandum to mitigate threats to public health, welfare, and the environment. Likewise, temporary off-site storage of hazardous substances at a Treatment, Storage, and Disposal (TSD) facility other than the facility of ultimate disposal is a continuation of the action, not a completion, unless temporary off-site storage at a TSD is the only action specified in the Action Memorandum. In addition, a removal would not be considered complete if either of the following is true:

- The Action Memorandum requires the EPA contractor to monitor the hazardous substances stored on-site or additional contractor expenditures are anticipated.
- Hazardous substances are being stored at an off-site facility, other than the ultimate TSD facility required in the Action Memorandum.

A removal would be considered complete if either of the following is true:

- The SOW for the action does not specify final off-site disposal of hazardous substances; the substances have been stabilized and are stored on-site due to circumstances such as the unavailability of a final treatment/disposal remedy; and no additional CERCLA removal authority funds are anticipated to be expended on this action. In this instance, no CERCLA removal authority funds will be expended for long-term site Operation and Maintenance (O&M). Any long-term site O&M should be performed by the PRP or another agency (e.g., the State).
- Hazardous substances are being stored off-site at the location of final disposal, and no additional contractor expenditures are anticipated for this action.

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 reportable quantity levels), not

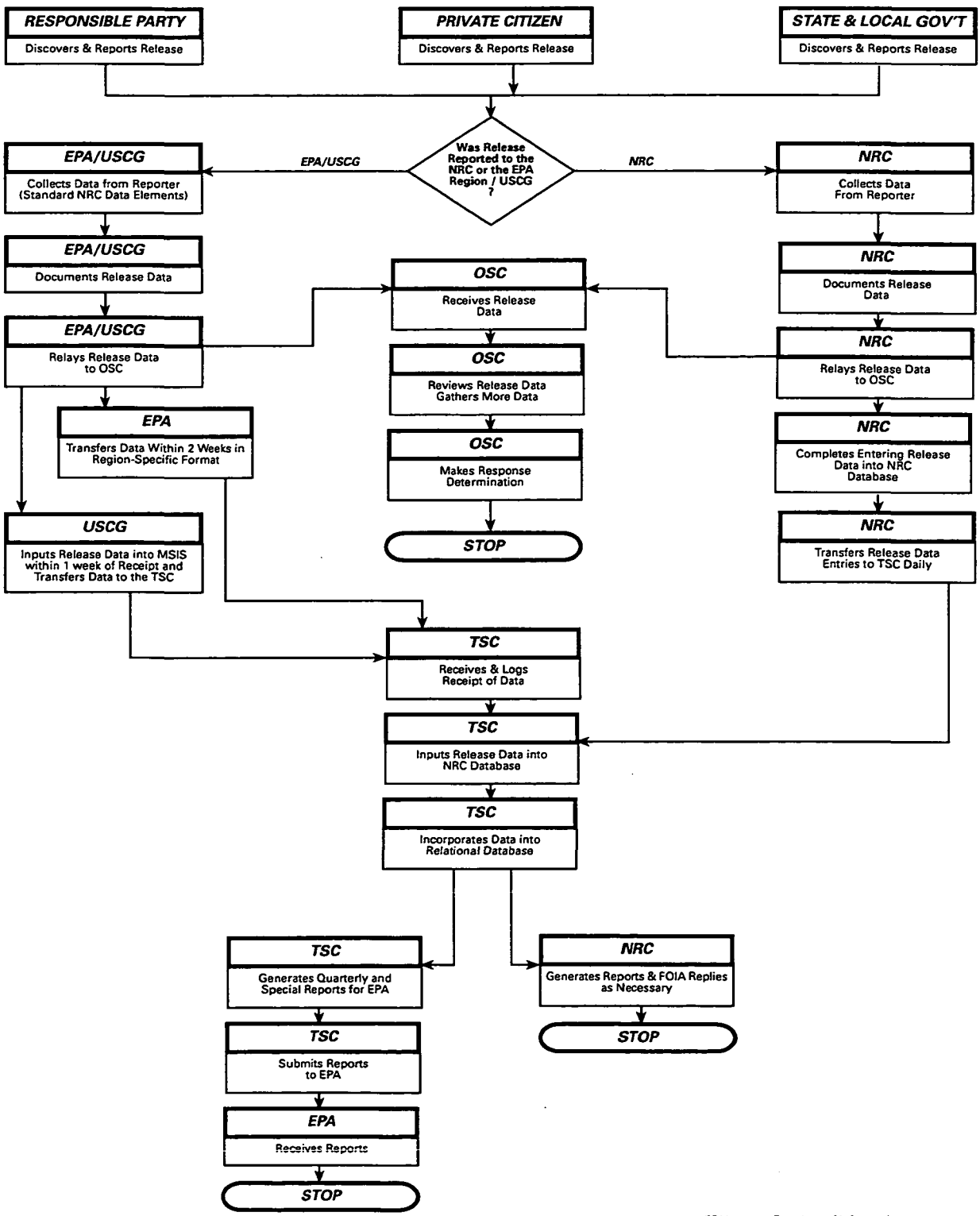
only those that result in removal action. ERNS also provides assistance to regional enforcement personnel in supporting day-to-day response operations and enforcing release reporting requirements. **Exhibit 2-6** provides a diagrammatic representation of the ERNS release notification process.

Reference

OSWER Directive 9200.3-14-1D. *Superfund Oil Program Implementation Manual* (updated biennially).

SCAP/OIL Quick Reference Coding Guide.

2-6 ERNS Notification Process



FOIA: Freedom of Information Act
USCG: U.S. Coast Guard field offices
EPA: Environmental Protection Agency
NRC: National Response Center
TSC: DOT's Transportation Systems Center

2.4 Potential Problems/Resolutions

2.4.A Civil Investigator Support

Many regions have identified CIs as useful resources for gathering PRP liability and financial information for removal cases. CIs may render effective quality assurance when used to oversee research being conducted by EPMs.

Some regions have established a removal-dedicated CI position. This position allows the investigator to become familiar with the types of investigative situations that removals present and to prevent conflicts in situations where priority is required by remedial cases. Additionally, assigning a CI exclusively to removal cases ensures the investigator's availability to conduct PRP research when required immediately for a time-critical removal.

2.4.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 AO option. To ensure PRP searches yield the necessary financial information, regions may want to include a financial disclosure form with information request letters issued under section 104(e) of CERCLA when there is reasonable certainty as to the recipient's status as a PRP. If PRP status is in question, a request for financial information should be delayed until issuance of a GNL. Standard PRP search procedures in many regions include a Dun and Bradstreet financial report and a review of records for bankruptcy, property ownership, and financial status information.

2.4.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 AO. Therefore, enforcement personnel should be involved in removal cases at the outset to facilitate gathering as much information as possible before issuance of an AO. 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 to identify additional PRPs.

2.5 Activities Checklist

The following checklist has been developed to assist OSCs in conducting and coordinating enforcement procedures among 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 verbal inquiries with PRPs and other observers (e.g., public officials, reporters) at the site.

___ Notify NEIC or Regional Criminal Office 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 verbally of potential CERCLA liability (with written confirmation).

___ Notify PRPs in writing of liability.*

___ Issue Special Notice Letters.*

Preparation for Negotiation

___ Establish the AR.

___ Notify state prior to negotiations or issuance of an AO.

___ Prepare negotiation strategy.*

___ Draft Action Memo with enforcement addendum.

___ Prepare draft AOC.

___ Negotiate AOC or issue UAO.

*This activity should be conducted if time permits.

Removal Action

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

___ Make the AR publicly available within 60 days after the initiation of on-site activities (emergencies and time-critical actions) or when the EE/CA is made available for public comment (NTC actions).

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

___ Oversee PRP compliance with the orders.

Cost Recovery

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

Use Cost Recovery Decision Document to document decision not to pursue cost recovery.

___ Refer cost recovery cases to DOJ within 12 months of completing the removal action.

___ Complete Interim Final PRP Search Report.

Chapter 3 Establishing CERCLA Liability

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Chapter 3 Establishing CERCLA Liability

3.1 Description of Activity

3.1.A Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes liability for the costs of actions taken to respond to the release or threatened release of hazardous substances. Liability under CERCLA, set forth in section 107, is triggered if both of the following conditions exist:

- There is a release or threatened release of a hazardous substance from a facility.
- The release or threatened release causes response costs to be incurred.

Potentially Responsible Parties (PRPs) may be held liable for acts that occurred prior to CERCLA's enactment in 1980.

Liability under CERCLA is ordinarily joint and several. However, the PRPs can establish the divisibility of harm at the site. Determination of divisibility requires a reasonable basis for determining the specific contribution of each PRP to the release of hazardous substances that resulted in contamination. Divisibility has been recognized by courts only where contamination was caused by a single hazardous substance. Divisibility has not been extended to address a multiple-pollutant situation. The fact that the remedy can be divided and allocated among PRPs does not render the harm divisible.

CERCLA imposes a strict liability standard. Under a strict liability standard, no showing of fault is required to establish liability. Claims by a defendant that it was not negligent or that it was acting in accordance with industry standards do not provide a defense to liability.

3.1.B Liable Parties

Section 107 designates four classes of liable parties:

- **Current owners and operators** - parties who own or operate a vessel or facility.
- **Past owners and operators** - parties who owned or operated the vessel or facility at the time of disposal.
- **Arrangers** - generators and other parties who arranged for the disposal or transport of hazardous substances.
- **Transporters** - parties who accepted hazardous substances for transport and who selected the site.

Any person who fits within the definition of one of these four classes may be directly liable under CERCLA. In addition, a person may be held liable for acts of others if common law principles of secondary liability are met (e.g., by "piercing the corporate veil" to establish the liability of a corporation's shareholders, or establishing certain agency relationships).

Owner/operator liability may include more than one operator. Some courts have broadly interpreted operator liability to impose liability under

CERCLA on any entity which exercises substantial control over the facility. Parties who may be directly liable as operators can include:

- **Corporate officers** - In addition to holding a corporate entity liable, the government has brought CERCLA actions against individual officers or shareholders in a corporation. Under state law principles, corporate officers and shareholders generally are not liable individually for unlawful acts of the corporation. Most courts have concluded, however, that an officer or director may be liable directly under CERCLA given any of the following fact patterns:
  - The corporate officer participated personally in the activity leading to the release.
  - The corporate officer exercised control over waste handling or disposal operations.
  - The corporate officer exercised control over facility operations and could have prevented or significantly abated the hazardous waste release.

  The government sometimes proceeds directly against corporate officers if the corporation is bankrupt, out of business, or without sufficient assets to pay for the cleanup.

- **Parent corporations** - On June 8, 1998, the Supreme Court in *United States v. Bestfoods,* 118 S. Ct. 1876 (1998), established a standard of Superfund liability under CERCLA section 107(a)(2) for parent corporations as operators of facilities operated or owned by subsidiary corporations. In *Bestfoods,* the Court held that a parent corporation that actively participates in, and exercises control over, the operations of its subsidiary's facility may be held directly liable as an operator of the facility under CERCLA section 107(a)(2). The Court also stated in *Bestfoods* that the question is not whether the parent operated the subsidiary, but whether the parent directly operated the subsidiary's facility, which may be proven by showing that the parent corporation managed, directed, or conducted operations specifically related to the leakage or disposal of hazardous waste, or made decisions about compliance with environmental regulations at the facility. The Court also stated that a parent's control of a subsidiary, if extensive enough, may establish indirect liability. However, establishing indirect liability requires the application of veil piercing principles.

  The Court in *Bestfoods* also held that direct liability of a parent corporation cannot be established merely because directors and officers hold positions in both parent and subsidiary corporations. To impose direct liability because of dual officers or directors, it must be proven that the officers and directors were acting in a manner beneficial to the parent but contrary to the interests of the subsidiary.

- **Successor corporations** - If a corporation is determined to be a successor corporation to an entity that was subject to CERCLA liability, the successor corporation inherits that CERCLA liability. When a corporation that incurred CERCLA liability is merged into or is purchased by another corporation, successor liability is determined by courts on the specific facts of each case using traditional corporate law principles. It is essential that the specific facts of each case be reviewed when the issue of successor liability is being considered. An analysis of as many independent factors (listed below) as possible should be made before ruling out the possibility that CERCLA successor liability exists when corporations are considered as PRPs.

  Successor liability is generally established where: (1) the purchasing corporation expressly or implicitly agrees to assume the liabilities of the other corporation or (2) where a transaction between two corporations amounts to a consolidation or merger. Successor liability may also apply in *de facto* mergers, which may occur when there is no formal merger but the purchased corporation's shareholders, officers, and directors continue to perform similar duties in the purchasing corporation. In general, when two corporations merge pursuant to statutory provisions, liabilities become the responsibility of the surviving corporation.

  Sales of assets by corporations normally do not convey CERCLA liability. However, some courts have ruled that successor liability may exist when a corporation that purchases the assets of another corporation is a "mere continuation" of the corporation that sold the assets. In considering if asset sales result in "mere continuation" (also referred to as a "continuity of business enterprise"), courts have considered the following factors:

  - Use of the same employees.
  - Use of the same supervisory personnel.
  - Use of the same production facilities in the same location.
  - Production of the same product.
  - Use of the same name.
  - Continuity of assets.
  - Continuity of general business operations.
  - Whether the successor holds itself out as a continuation of the previous enterprise.

Section 101(20)(D) provides an exemption from owner/operator liability for a state or local government that acquires ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other means because of its function as a sovereign. CERCLA sections 101(20)(A) and (E) also provide a "secured creditor exemption" for a person who holds indicia of ownership primarily to protect a security interest (e.g., a lender) if the person does not participate in the management of the facility. Section

107(n) limits the CERCLA liability of fiduciaries to the assets held in the fiduciary capacity and provides that a fiduciary shall not be liable in its personal capacity for certain actions. Exemptions and limitations to liability are discussed more fully later in this chapter.

Parties who owned or operated a facility while disposal occurred may also be liable. An intermediate owner who owned the site after disposal had stopped, and who sold the property before any response costs had been incurred, may not be liable under section 107(a). However, the definition of disposal includes leaking of hazardous substances, so a person who acquired a site after active disposal had ended, but while leaking (e.g., of drums) was occurring, could be liable.

Under CERCLA section 107(a)(3), parties that may be liable as arrangers include "any person who by contract, agreement, or otherwise arranged for disposal or treatment ... of hazardous substances owned or possessed by such person...." Most courts have held that whether a defendant can show that it arranged to have its waste disposed of elsewhere is irrelevant so long as the government can prove that the waste was disposed of at the site from which the release (or threat of release) occurred.

Courts have used concepts such as "constructive possession" in assessing liability for generators. Lack of ownership or physical possession of a hazardous substance that was subject to an arrangement for disposal may not release a party from liability if the party controlled the handling or disposal of the substance.

Under CERCLA section 107(a)(4), transporter liability is extended to a party "who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person from which there is a release or threatened release." The important distinction between arranger and transporter liability is that a transporter is liable only if it selected the treatment or disposal site.

Reference

Office of Solid Waste and Emergency Response (OSWER) Directive 9829.0, "Policy for Enforcement Actions Against Transporters Under CERCLA" (December 23, 1985).

3.1.C Extent of Liability

Under section 107, each category of PRP is liable for the following:

- The costs of removal or remedial actions taken by the United States or a state that are not inconsistent with the National Contingency Plan (NCP).
- The costs of removal or remedial actions taken by other parties that are consistent with the NCP.
- Any damages to natural resources, recoverable in an action brought by federal, state, or tribal natural resource trustees.
- The costs of health assessments under section 104(i).

Under section 106, parties also are liable for injunctive relief where the site may present an "imminent and substantial endangerment," which courts generally have defined broadly. Injunctive relief may take the form of an order to compel the party to take action to abate the endangerment or institute a cleanup. Under section 106(b), failure to comply with a section 106 order may result in daily penalties of up to $27,500 ($25,000 for non-compliance occurring prior to January 30, 1997).

Under section 106(b), PRPs may comply with a section 106 order and seek reimbursement from the Fund for the reasonable costs plus interest of a response action. A person is entitled to reimbursement if the person can establish that it is not liable for response costs under section 107(a) or that the Agency's selection of the response action was arbitrary and capricious or was otherwise not in accordance with law. Section 106(b) reimbursement petitions are discussed in greater detail in a later section of this chapter.

3.1.D Defenses to Liability

Defenses to liability are limited by section 107(b) to cases in which the release or threat of release was solely caused by:

- Acts of God.
- Acts of war.
- Acts or omissions of a third party with whom the PRP has or had no direct or indirect contractual relationship, provided the PRP exercised due care with respect to the hazardous substances and took precautions against foreseeable acts or omissions of the third party and the consequences of those acts or omissions.

For purposes of the "third party" defense contained in CERCLA section 107(b)(3), CERCLA section 101(35)(A) defines "contractual relationship" to include those conveying interests in land and sets forth types of land-holding parties that may assert a third party defense. The first is any landowner who did not know and had no reason to know that hazardous substances had been disposed at the facility. Such a landowner, who is sometimes referred to as an "innocent landowner," must prove that, prior to acquiring the property, he/she made all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice at the time of the acquisition. A party may also assert the third party defense where a midnight dumper trespassed on the party's property and disposed of hazardous substances.

The second type of land-holding party that may assert a third party defense to CERCLA liability is any government entity (federal, state, or local) that acquired the property through an involuntary acquisition. EPA's interpretation of the involuntary acquisition defense is discussed in the "State and Local Governments" section of this chapter.

The third type of land-holding party that may avail itself of a third party defense is a party who acquired the facility by inheritance or bequest.

Pursuant to CERCLA section 101(35)(D), a third party defense is not available to any party who caused or contributed to the contamination.

References

Office of Site Remediation Enforcement (OSRE) Memorandum, "Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities" (June 30, 1997).

"Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18344 (April 29, 1992) (section addressing involuntary governmental acquisitions codified at 40 Code of Federal Regulations (CFR) section 300.1105).

3.1.E Exceptions to CERCLA Response Authority

Certain types of releases or threatened releases do not trigger CERCLA response authorities. Under CERCLA section 101(14), Congress excluded petroleum not specifically listed, natural gas, and synthetic gas from the definitions of "hazardous substance" and "pollutant or contaminant." As a result, releases solely of petroleum not specifically listed, natural gas, and synthetic gas into the environment do not trigger CERCLA response authorities, although they may be addressed using other environmental statutes such as the Oil Pollution Act. Under CERCLA section 101(22), several types of activities are excluded from the definition of "release" and are not subject to CERCLA response actions. These include:

- Releases that result in exposure to persons solely within a workplace and for which the persons could assert a non-CERCLA claim against their employer.
- Vehicular engine exhausts.
- Certain radioactive contamination covered by other laws.
- The normal application of fertilizer.

Under CERCLA sections 104(a)(3) and (4), Congress prohibits use of the Trust Fund, except in emergencies, to finance federal response to releases of:

- Naturally occurring substances (such as radon) from locations where they are normally found.
- Products (such as asbestos) that are part of the structure of, and result in exposure within, residential, business, or community structures.
- Substances (such as lead) in public or private drinking water supplies due to deteriorating pipes.

Section 107(j) excludes from CERCLA liability response costs resulting from a "federally permitted release." Although EPA has full authority under CERCLA to respond to federally permitted releases, the permittee is not liable for cleanup costs resulting from such releases. CERCLA section 101(10) defines releases that qualify as federally permitted releases (e.g., the discharge of pollutants in compliance with a National Pollutant Discharge Elimination System permit under the Clean Water Act). This exclusion does not apply, however, to releases in violation of permits. Section 107(i) states that CERCLA liability provisions do not apply to response costs or damages resulting from the application of pesticide products.

Reference

OSWER Directive 9838.1, "Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)" (July 31, 1987).

3.2 Procedures and Interactions

3.2.A Establishing the Elements of Liability in the PRP Search

The identification of PRPs that may be liable under CERCLA is the primary purpose of the PRP search. The PRP search should be designed to bring to light information establishing, as to each PRP, the elements of liability discussed in section 1 of this chapter. Remedial Project Managers (RPMs) should consistently consult and coordinate with regional counsel to ensure that information adequate to support enforcement actions is gathered. The PRP search process is discussed in detail in Chapter 4, PRP Search, Notification, and Information Exchange.

3.2.B Exemptions and Limitations to Liability

This subsection discusses exemptions and limitations to CERCLA liability that arise directly from the CERCLA statute. Subsection C will discuss EPA discretionary policies that may influence EPA's decision not to take action against certain PRPs.

3.2.B.1 Secured Creditors

CERCLA sections 101(20)(A) and (E) exempt from owner/operator liability any person who, without participating in the management of a facility, holds indicia of ownership primarily to protect that person's security interest in the facility. Holding a security interest means having a legal claim of ownership in order to secure a loan, equipment, or other debt. This exemption protects from section 107 owner/operator liability those persons, such as private and governmental lending institutions (e.g., banks), who maintain a right of ownership in or guarantee loans for facilities that become contaminated with hazardous substances.

Under section 101(20)(F), which was added to CERCLA by amendment in 1996, a lender "participates in management" and will not be protected by the secured creditor exemption if it does either of the following:

- Exercises decision-making control over environmental compliance related to the facility, such that the lender has undertaken responsibility for hazardous substance handling or disposal practices.
- Exercises control at a level comparable to that of a manager of the facility, such that the lender has assumed or manifested responsibility with respect to (1) day-to-day decision-making regarding environmental compliance, or (2) all, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

The term "participate in management" does not include certain activities (provided those activities do not rise to the level of participating in management as defined in subsection 101(20)(F)), such as:

- Inspecting the facility.
- Requiring a response action or other lawful means to address a release or threatened release.
- Conducting a response action under section 107(d)(1) or under the direction of an On-Scene Coordinator (OSC).

- Providing financial or advisory support toward an effort to prevent or cure default.
- Restructuring or renegotiating the terms of the security interest.

With respect to post-foreclosure activities, a lender that did not participate in management prior to foreclosure and that seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, is not an "owner or operator" if it:

- Sells, re-leases (in the case of a lease-finance transaction), or liquidates the facility.
- Maintains business activities or winds up operations.
- Undertakes a response action under section 107(d)(1) or under the direction of an OSC.
- Takes any other measure to preserve, protect, or prepare the facility for sale or disposition.

In light of the substantial similarities between the amended secured creditor exemption and EPA's 1992 "Final Rule on Lender Liability Under CERCLA" (the rule and its preamble provide additional clarification of the same or similar terms used in the secured creditor exemption), EPA treats the rule and preamble as guidance in interpreting the exemption.

References

OSRE Memorandum, "Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities" (June 30, 1997).

"Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18344 (April 29, 1992).

3.2.B.2 Fiduciaries

CERCLA section 107(n) limits CERCLA liability of fiduciaries. Under section 107(n), fiduciary liability under any provision of CERCLA shall not exceed the assets held in the fiduciary capacity. Additionally, a fiduciary will not be liable in its personal capacity for certain actions, such as:

- Undertaking or requiring another person to undertake any lawful means of addressing a hazardous substance.
- Enforcing environmental compliance terms of the fiduciary agreement.
- Administering a facility that was contaminated before the fiduciary relationship began.

The liability limitation and "safe harbor" described above do not limit the liability of a fiduciary whose negligence causes or contributes to a release or threatened release.

The term "fiduciary" means a person acting for the benefit of another party as a bona fide trustee, executor, or administrator, among other things. It does not include a person who does either of the following:

- Acts as a fiduciary with respect to a for-profit trust or other for-profit fiduciary estate, unless the trust or estate was created because of the incapacity of a natural person, or as part of, or to facilitate, an estate plan.
- Acquires ownership or control of a facility for the objective purpose of avoiding liability of that person or another person.

Nothing in the fiduciary subsection applies to a person who does either of the following:

- Acting in a beneficiary or non-fiduciary capacity, directly or indirectly benefits from the trust or fiduciary relationship.
- Is a beneficiary and fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits exceeding customary or reasonable compensation.

Furthermore, nothing in the fiduciary subsection precludes a claim against the assets of the trust or estate administered by the fiduciary.

3.2.B.3 Service Station Dealers

Under CERCLA section 114(c), service station dealers managing recycled oil are exempt from certain liability provisions if the dealer meets specific requirements. The exemption applies to generator and transporter liability under sections 107(a)(3) and (4), and covers claims under section 107. The service station dealer still may be held liable under sections 107(a)(1) and (2) as an owner and operator.

3.2.B.4 State and Local Governments

CERCLA section 107(d)(2) provides that, except for gross negligence or intentional misconduct, state and local governments are not liable for costs or damages resulting from an emergency response to a hazardous substance release or threatened release. Under CERCLA section 107(d)(1), a person rendering care or assistance in accordance with the NCP cannot be held liable under CERCLA for costs or damages resulting from such care. Such a person can be liable for costs or damages as the result of his or her negligence.

CERCLA section 101(20)(A) exempts from owner/operator liability units of state and local government that "involuntarily" acquire CERCLA facilities, provided they did not cause or contribute to the contamination. Governmental entities may also be protected from liability resulting from involuntary acquisitions by the third party defense of section 107(b)(3), as discussed in the "Defenses to Liability" portion of section 1 of this chapter. EPA included examples of involuntary acquisitions by government entities in its Lender Liability Rule, issued in 1992. The Lender Liability Rule was vacated by the D.C. Court of Appeals in 1994. However, Congress enacted provisions very similar to the rule and validated the portion of the rule that addresses involuntary acquisitions by government entities in the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. As stated in the rule, examples of involuntary acquisitions include those made by a government entity that is:

- Acting in its capacity as a sovereign (such as acquisition following abandonment or tax delinquency).
- Acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisition of the security interests or properties of failed private lending or depository institutions).
- Undertaking foreclosure or its equivalent while administering a governmental loan, loan guarantee, or loan insurance program.
- Acting pursuant to seizure or forfeiture authority.

References

OSRE Memorandum, "Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities" (June 30, 1997).

OSRE/Office of General Counsel (OGC) Memorandum, "Municipal Immunity from CERCLA Liability for Property Acquired Through Involuntary State Action" (October 20, 1995).

"Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18344 (April 29, 1992) (section addressing involuntary governmental acquisitions codified at 40 CFR section 300.1105).

3.2.B.5 Contractors

Under CERCLA section 119, Response Action Contract (RAC) contractors and state or local government employees are protected from liability, except in cases of negligence, gross negligence, or intentional misconduct. EPA may provide indemnification for liability arising from RAC contractor negligence (but not gross negligence or intentional misconduct) under certain circumstances, as defined in EPA's 1993 RAC contractor indemnification guidance. Indemnification payments made by EPA to RAC contractors, including payments for expenses associated with contribution litigation between PRPs and RAC contractors, are recoverable from PRPs as a government response cost under CERCLA section 107.

References

OSRE Memorandum, "Guidance Concerning Liability and Indemnification of CERCLA Response Action Contractors" (April 17, 1996).

OSWER Memorandum, "Superfund Response Action Contractor Indemnification" (January 25, 1993).

3.2.C EPA's Discretionary Policies on Liability

The Agency exercises its discretion in deciding whether to pursue certain parties who may fall within a category of liable parties under section 107(a). The Agency has issued several policies concerning the treatment of such parties. These policies are described below. Note that these are discretionary policies and therefore do not bind anyone, including EPA.

3.2.C.1 Residential Homeowners

In July 1991, EPA released its "Policy Toward Owners of Residential Property at CERCLA Sites," which states that enforcement actions generally will not be taken against owners of residential property located on Super-

fund sites. The policy applies to properties that are owned and used exclusively for single family residences of one to four units. Furthermore, the owner's knowledge of the presence of contamination on the property at the time of purchase or sale shall not affect EPA's enforcement discretion. A potential exception to this policy would be if a homeowner's activities resulted in a release of a hazardous substance.

Reference

OSWER Directive 9834.6, "Policy Toward Owners of Residential Property at Superfund Sites" (July 3, 1991).

3.2.C.2 Owners of Property Above Contaminated Aquifers

Where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs. This policy is subject to the following conditions:

- The landowner did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substances through any act or omission. The failure to take affirmative steps to mitigate or address ground water contamination, such as conducting ground water investigations or installing ground water remediation systems, will not, in the absence of exceptional circumstances, constitute an omission by the landowner within the meaning of this condition.
- The person who caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner. Cases where the landowner acquired the property, directly or indirectly, from a person who caused the original release will require an analysis of whether, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances that gave rise to the contamination in the aquifer.
- There is no alternative basis for the landowner's liability for the contaminated aquifer, such as liability as a generator or transporter under CERCLA section 107(a)(3) or (4), or liability as an owner by reason of the existence of a source of contamination on the landowner's property other than the contamination that migrated in an aquifer from a source outside the property.

References

OSRE Fact Sheet, "Policy Toward Owners of Property Containing Contaminated Aquifers" (November 1995).

OSRE Memorandum, "Policy Towards Owners of Property Containing Contaminated Aquifers" (May 24, 1995).

3.2.C.3 Municipalities

EPA's 1998 "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at National Priorities List (NPL) Co-Disposal Sites" (Municipal Solid Waste (MSW) Policy) supplements the 1989 "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes," stating that EPA will continue its policy of generally not identifying generators and transporters of MSW or municipal sewage sludge (collectively referred to as MSW) as PRPs at NPL sites. However, in recognition of the strong public interest in reducing contribution litigation, EPA will make settlements available to MSW generators and transporters and municipal owners and operators of co-disposal landfills who elect to resolve their potential CERCLA liability and obtain contribution protection. The MSW Policy's methodology for settlements includes the following basic components:

- Settlement amounts for MSW generators and transporters are calculated by multiplying the known or estimated quantity of MSW contributed by such settling parties by a unit cost of $5.30/ton. The unit cost represents an estimate of the cost of remediating MSW at a representative Resource Conservation and Recovery Act subtitle D landfill. Such a unit cost reflects EPA's belief that, absent co-disposal with other wastes (such as industrial hazardous waste), MSW alone does not generally present the type of risks that the Superfund program was designed to address, nor the costs typically associated with Superfund remediation.
- The policy establishes 20 percent of total estimated response costs for the site as a presumptive baseline settlement amount of an individual municipality to resolve its owner/operator liability at a co-disposal site. Regions may offer settlements varying from this presumption, generally not to exceed 35 percent (to be determined by site-specific factors set forth in the policy). The 20 percent baseline amount is based on EPA's consideration of historic CERCLA settlements with such parties, their unique governmental responsibility to provide basic sanitation services, and the unique financial planning considerations that municipalities face. Municipal owner/operators who do not settle with EPA pursuant to the policy remain subject to site claims by EPA consistent with the principles of joint and several liability.

References

OSRE Memorandum, "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (February 5, 1998).

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

3.2.C.4 Prospective Purchasers

It is EPA's policy not to become involved in private real estate transactions. However, an agreement with a covenant not to sue a prospective purchaser may be considered if it will have substantial benefits for the government and if the prospective purchaser satisfies other criteria. The Agency recognizes

that entering into an agreement containing a covenant not to sue with a prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a payment for cleanup or a commitment to perform a response action. EPA's experience has shown that Prospective Purchaser Agreements (PPAs) have also benefited the community where the site is located by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier. EPA has issued guidance that explains the circumstances under which PPAs may be considered. A model PPA is attached to the PPA guidance.

EPA may reject any offer if it determines that entering into an agreement with a prospective purchaser is not sufficiently in the public interest to warrant expending the resources necessary to reach such an agreement. The following criteria should be considered when evaluating potential PPAs:

- EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the Agency.
- EPA will receive a substantial benefit either in the form of a direct benefit for cleanup or as an indirect public benefit in combination with a reduced direct benefit to EPA. Public benefits to be considered include the creation or retention of jobs, productive use of abandoned property, and revitalization of blighted areas.
- Continued operation or new development of the property, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA's response action.
- Continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site.
- The prospective purchaser is financially viable.

Reference

Office of Enforcement and Compliance Assurance (OECA) Memorandum, "Guidance on Agreements with Prospective Purchasers of Contaminated Property" (May 24, 1995)(a model PPA is attached to this guidance).

3.2.C.5 Comfort/ Status Letters

Comfort/status letters are another tool used by EPA to encourage the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier. EPA often receives requests from parties for some level of comfort that, if they purchase, develop, or operate on brownfields (abandoned, idled, or under-used industrial and commercial properties where expansion or redevelopment is complicated by real or perceived environmental contamination), EPA will not pursue them for the costs of cleaning up any contamination resulting from previous uses of the property. A comfort/status letter can provide a measure of comfort to an interested party by providing information about the potential for EPA involvement or the level of actual EPA involvement at a brownfield property. Comfort/status letters are provided solely for informational purposes and relate only

to EPA's intent to exercise its response and enforcement authorities under CERCLA at a property based upon the information presently known to EPA. The letters are not intended to limit or affect EPA's authority under CERCLA or any other law or to provide a release from CERCLA liability.

Upon receiving a request from an interested party for information about the party's circumstances, regional offices may issue comfort/status letters, at their discretion, when there is a realistic perception or probability of incurring CERCLA liability and such comfort will facilitate the cleanup and redevelopment of a brownfield property, and there is no other mechanism available to adequately address the party's concerns. With the information provided by EPA, the party inquiring about the property can decide whether the risk of EPA action is great enough to forego involvement, whether to proceed as planned, whether additional investigation into site conditions is required, or whether further information from EPA or other agencies is needed.

EPA has issued guidance that explains the circumstances under which comfort/status letters may be appropriate (four sample comfort/status letters that address the most common inquiries received regarding brownfield properties are attached to the guidance).

Reference

OSRE Memorandum, "Policy on the Issuance of Comfort/Status Letters" (November 12, 1996).

3.2.C.6 *De Minimis* Parties

At multiparty sites, some PRPs may have disposed of relatively small quantities of hazardous substances, or a landowner may not have been aware of, or involved with, hazardous substance activities at the facility. In the interest of reaching a final settlement with such parties as promptly as possible, CERCLA authorizes special settlements with these *de minimis* parties "whenever practicable and in the public interest" if the settlement involves only a minor portion of the response costs at the facility concerned. Under CERCLA section 122(g), a *de minimis* settlement may be appropriate in two situations:

- Where the amount and toxicity of hazardous substances contributed by a party is minimal compared with the total amount and toxicity of hazardous substances at the site.
- Where a party is a property owner who did not conduct or permit the generation, handling, or disposal of hazardous substances at the facility; did not contribute to the release or threatened release at the facility; and acquired the facility without knowledge that the property had been used to store, handle, or dispose of hazardous substances.

De minimis settlements offer the advantages of being both early and final, as EPA issues *de minimis* parties a covenant not to sue with only limited reopeners and the settling parties receive contribution protection. In return for a covenant with fewer reopeners than most CERCLA settlements (e.g.,

there is no reopener for unknown conditions), *de minimis* settlors pay a premium above the base payment of their share of cleanup costs. EPA has issued guidance encouraging early *de minimis* settlements (preferably before the Record of Decision is signed). Completion of such early settlements depends on early compilation of information on PRP waste contributions and response costs.

References

OSRE Memorandum, "Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree and Administrative Order on Consent" (September 29, 1995).

OSRE Memorandum, "Standardizing the *De Minimis* Premium" (July 7, 1995).

Office of Waste Programs Enforcement (OWPE)/Office of Enforcement (OE) Memorandum, "Communications Strategy for Settlements with Small Volume Waste Contributors" (September 30, 1993).

OSWER Directive 9834.7-1D, "Streamlined Approach for Settlements with *De Minimis* Waste Contributors under CERCLA Section 122(g)(1)(A)" (July 30, 1993).

OSWER Directive 9634.7-1C, "Methodology for Early *De Minimis* Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)" (June 2, 1992).

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 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, "Interim Guidance on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA" (June 19, 1987).

3.2.C.7 "De Micromis" Parties

CERCLA provides the Agency with the authority to enter into settlements at any time with persons who may have contributed minuscule amounts of hazardous substances to a Superfund site. "De micromis" settlements are simply a subset of *de minimis* settlements and are entered into under the *de minimis* contributor settlement authority of section 122(g)(1)(A). EPA's policy states that "de micromis" parties, who have contributed only a minuscule amount of waste to the site, should not participate in financing the cleanup. "De micromis" settlements, therefore, may be effected without any exchange of money. "De micromis" settlements are not available to owners or operators of Superfund sites.

EPA's policy is to offer a "de micromis" settlement to qualifying parties only if one of the following is true:

- The parties have been sued by other PRPs at the site.
- The parties face the concrete threat of litigation by other PRPs at the site.
- The parties have approached EPA seeking settlement and the region has determined that such parties have a reasonable expectation of facing contribution litigation.

"De micromis" settlements may be available to parties who generated or transported a minuscule amount of waste to a Superfund site (even less than the minimal amount normally contributed by *de minimis* waste contributors). EPA's policy endorses presumptive eligibility cut-off levels of 0.002 percent for hazardous substance contributors and 0.2 percent for MSW contributors. Where the region determines that site-specific factors warrant the use of an absolute volume cut-off for hazardous substance contributors, EPA endorses the use of a presumptive eligibility cut-off at 110 gallons or 200 pounds. Regions may vary these eligibility cutoffs based on site-specific factors.

References

OSRE Fact Sheet, "Revised De Micromis Guidance" (June 4, 1996).

OSRE/Department of Justice (DOJ) Memorandum, "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors" (June 3, 1996).

3.2.C.8 Orphan Shares

In order to provide greater fairness, reduce litigation, and promote faster cleanup of Superfund sites, EPA has adopted the policy of compensating for a portion of the "orphan share" at sites where PRPs enter into settlements to perform cleanup. The term "orphan share" refers to that share of responsibility which is specifically attributable to parties EPA has determined have each of the following characteristics:

- Potentially liable.
- Insolvent or defunct.
- Unaffiliated with any party potentially liable for response costs at the site.

The orphan share does not include shares of responsibility arising from unallocable waste, the difference between a party's share and its Ability to Pay (ATP), or parties EPA does not ordinarily pursue, such as "de micromis" contributors, MSW contributors, and residential homeowners. EPA will compensate parties that agree to perform a remedial action or Non-Time-Critical removal for the orphan share in an amount that does not exceed any of the following: (1) the orphan share; (2) 25 percent of the projected remedy or removal costs; or (3) the total past and future oversight costs.

EPA has enforcement discretion to compensate for a portion of the orphan share in certain cost recovery settlements. Where there is a significant orphan share in a cost recovery case, the orphan share may be considered as

an "inequity" or "aggravating factor" within the meaning of the "Interim CERCLA Settlement Policy." This may justify EPA's recovery of less than 100 percent of response costs. However, it is the intent of EPA not to enter into settlements that provide incentives for parties to refuse to enter into agreements for performance of work, believing they may get a better settlement at the time EPA pursues a cost recovery claim. Therefore, except in extraordinary cases, EPA should not offer an orphan share compromise in a cost recovery settlement to a party that refused a previous settlement offer that included a compromise based on orphan share considerations. Moreover, a party that was not offered a settlement for cleanup work including an orphan share compromise should not, except in extraordinary circumstances, receive a greater compromise of response costs in a cost recovery settlement than it would have received if the party had signed a consent agreement and the orphan share policy had been applied.

References

OECA Memorandum, "Addendum to the 'Interim CERCLA Settlement Policy' Issued on December 5, 1984" (September 30, 1997).

OSRE, *The Orphan Share Implementation Notebook* (August 26, 1996).

OSRE Fact Sheet, "Orphan Share Reform" (June 4, 1996).

OSRE Memorandum, "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996).

3.3 Planning and Reporting Requirements

3.3.A Planning

Planning for liability issues begins with the PRP search, which develops information sufficient to establish the liability of PRPs. That information is later used in settlement negotiations, in support of decisions to issue administrative orders under section 106, and in cost recovery proceedings. This process is described more fully in Chapter 4, PRP Search, Notification, and Information Exchange.

3.3.B Reporting Requirements

Reporting requirements relating to the process of establishing liability, negotiating with PRPs to conduct investigations and perform cleanup work, and recovering response costs are discussed in the chapters describing those tasks. Chapters with particular relevance to liability issues include Chapter 4, PRP Search, Notification, and Information Exchange; Chapter 8, RD/RA Negotiations/Settlement; and Chapter 12, Cost Recovery.

3.4 Potential Problems/Resolutions

3.4.A CERCLA Section 106(b) Reimbursement Petitions

Under CERCLA section 106(b)(2), PRPs that have complied with a section 106 order may seek reimbursement from the Hazardous Substance Superfund for the reasonable costs plus interest of a response action. A person is entitled to reimbursement if the person can establish that (a) he/she is not liable under section 107(a) for response costs, or (b) the Agency's selection of the response action was arbitrary and capricious or otherwise not in accordance with law.

The party must file the petition for reimbursement within 60 days of completion of the response action. A party claiming that it is not liable under section 107(a) must also show that the costs for which it seeks reimbursement are reasonable. Where a party seeks reimbursement on the grounds that EPA's selection of the response action was arbitrary or capricious, reimbursement is limited to expenses incurred pursuant to the part of the order found to be "arbitrary and capricious or otherwise not in accordance with law."

Petitions for reimbursement are filed with EPA's Environmental Appeals Board (EAB). After a petition is received, EAB sends a letter to the appropriate regional office soliciting a response to the petition.

When a region receives notice of a section 106(b) petition for reimbursement, a regional case attorney is assigned to the case. The regional case attorney should then contact the team coordinator of the Regional Support Division's (RSD) Administrative and Judicial Procedures Team and the Office of General Counsel (OGC) contact for 106(b) petitions. RSD and OGC then assign staff to the petition, who provide support and work with the regions to ensure national consistency in positions taken in response to petitions.

The team may then either (a) file a response within 30 days of EAB's letter contending that the petitioner has not met one of the threshold requirements for reimbursement (e.g., the petitioner has failed to comply with the section 106 order, or the required action has not been completed) or (b) file a response within 60 days of EAB's letter addressing the merits of the petitioner's claims in support of reimbursement. If EAB denies a petition in full or in part, the PRP may file an action for reimbursement in federal district court.

References

EPA's Environmental Appeals Board Memorandum, "Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions" (October 9, 1996).

OSRE/OGC Memorandum, "Procedures for Coordinating Responses to Section 106(b) Petitions Before the Environmental Appeals Board" (June 6, 1996).

OSWER Directive 9833.2, "Consent Orders and the Reimbursement Provision Under Section 106(b) of CERCLA" (June 12, 1987).

3.4.B Ability to Pay

A PRP's ability to pay the amount sought by the government is one of 10 criteria EPA considers in determining when it may be appropriate to accept less than that amount in settlement, as described in EPA's CERCLA settlement policy. EPA has adopted an "undue financial hardship" standard for settlements with PRPs with limited financial resources and has created a process of analysis to determine a settlement amount that is not likely to create an undue financial hardship. The role of ATP in the Superfund enforcement process is discussed in Chapter 12, Cost Recovery.

References

OSRE Memorandum, "General Policy on Superfund Ability to Pay Determinations" (September 30, 1997).

OSRE Memorandum, "Existing Ability to Pay Guidance and Models" (May 1995).

3.4.C Bankruptcy

When a PRP files for bankruptcy, the Agency must decide how to respond. It is not always appropriate for the Agency to file a claim for recovery of response costs or penalties or to otherwise participate in a bankruptcy case. Therefore, EPA has issued guidance that identifies factors to be considered when determining whether to participate in a bankruptcy case, including whether to pursue collection of costs or penalties against debtors with CERCLA liabilities. Bankruptcy also creates other issues in CERCLA cases, including issues related to abandonment of contaminated property, access to property owned by the bankrupt party, and the impact of the automatic stay provided by the Bankruptcy Code on administrative and judicial proceedings. The role of bankruptcy in the Superfund enforcement process is discussed in Chapter 12, Cost Recovery.

References

OECA Memorandum, "Guidance on EPA Participation in Bankruptcy Cases" (September 30, 1997).

EPA, National Bankruptcy Lead Region Work Group, "A Bankruptcy Primer for the Regional Attorney" (February 1994).

4. PRP Search, Notification, and Information Exchange

Chapter 4 PRP Search, Notification, and Information Exchange

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Chapter 4 PRP Search, Notification, and Information Exchange

4.1 Description of Activity

4.1.A 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 or threat of release of hazardous substances. Effective PRP searches are fundamental to the Agency's enforcement strategies of obtaining maximum PRP involvement in conducting response activities and cost recovery. For remedial sites, a PRP search should be initiated concurrently with the listing Site Inspection (SI), or at the latest, by the initiation of the National Priorities List (NPL) listing process. PRP search activities are generally a continuous process, not a discrete phase, especially at the more complex sites.

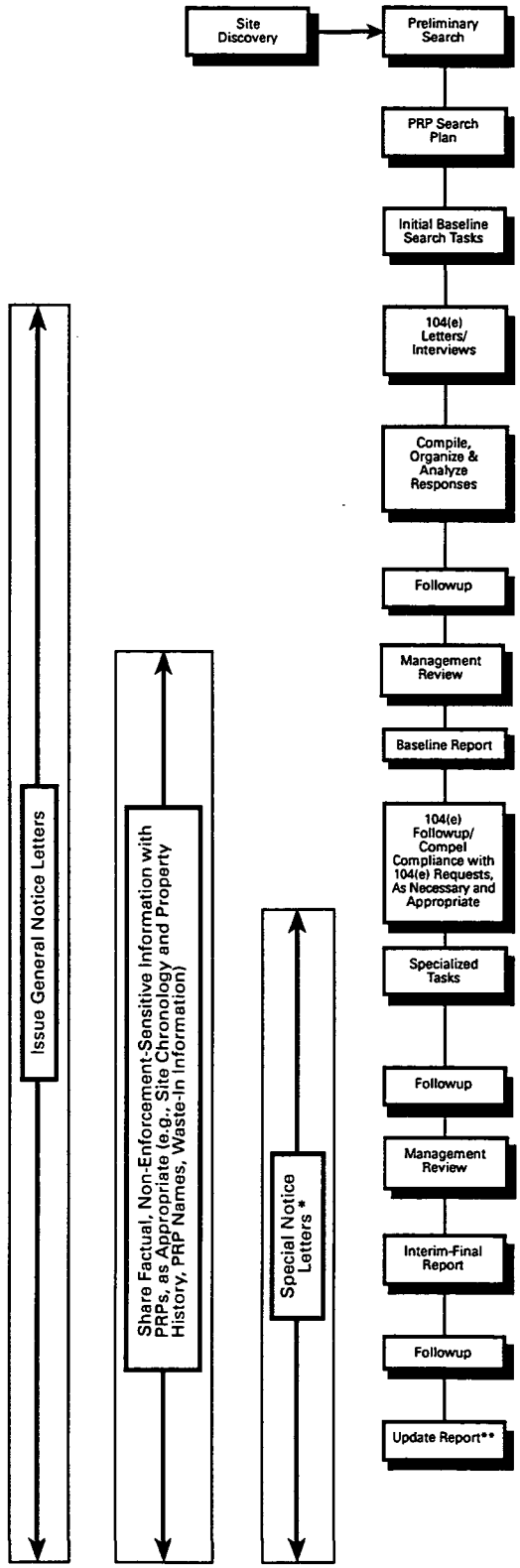
Exhibit 4-1 presents an overview of the flow of activity during the PRP search.

4.1.B Objectives of PRP Searches

PRP searches accomplish several objectives:

- Identify PRPs who may be liable under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and provide the information needed to issue General Notice Letters (GNLs) (liability standards are discussed in Chapter 3, Establishing CERCLA Liability).
- Provide information for Special Notice Letters (SNLs) 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 for a waste-in list in order to do a volumetric ranking.
- Provide information to assess: possible full settlements for litigation risks in light of the PRPs' liability, allocation of their "fair share," and ability to pay response costs; possible partial settlements for the appropriateness of the settlement in light of the 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 Resource Conservation and Recovery Act (RCRA) hazardous wastes for assessing potential Applicable or Relevant and Appropriate Requirements (ARARs).

4-1 Overview of the PRP Search Process



NOTE:

This exhibit presents an overview of a typical PRP search. It is not intended as a prescribed process for every PRP search. A PRP search team should exercise professional discretion when deciding what process is appropriate for a particular site.

* Timing of special notice is generally dictated by response planning. The baseline phase of the PRP search should be essentially complete for the purpose of RI/FS Special Notice at least 90 days before the planned RI/FS start date. Improved evidence on liability and ability to pay will be collected during the RI/FS and follow-up phase, if necessary. The collection of such improved evidence will be completed, reviewed, and updated, if necessary, prior to issuance of RD/RA SNLs.

**Completed at least 90 days prior to issuance of RD/RA Special Notice Letters.

- Document evidence that may be used in cost recovery actions (CERCLA section 107), CERCLA section 106 actions, access actions, and for liens.
- Promote PRP involvement in the response action.

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. At removal sites, evidence of liability must be obtained for section 106 Unilateral Administrative Orders (UAOs) and for cost recovery. While the elements of a search at a removal site are often similar to a search in connection with the remedial process, time constraints and the level of expenditures may warrant modification of the approach. PRP searches at removal sites are discussed in Chapter 2, Removals.

Early identification of PRPs enables the Agency to promptly issue GNLs. The early issuance of GNLs facilitates the formation of PRP steering committees. Also, provision of waste-in information facilitates the PRPs' agreement on allocations of costs. These negotiation techniques are discussed in detail in Chapter 5, RI/FS Negotiations/Settlement, and Chapter 8, RD/RA Negotiations/Settlement.

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 cleanup is generally in the interest of both EPA, which can thereby conserve Fund monies, and the PRPs, who avoid the transactional costs of litigation.

All regional personnel assigned to a site should function as a team to perform the PRP search. Remedial Project Managers (RPMs) should utilize the expertise of regional attorneys, Civil Investigators (CIs), 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.

4.1.C General Approach to PRP Searches

Because the RPM is responsible for managing response actions at the site, it is vital for the RPM and other members of the PRP search team 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 10 baseline tasks, and is followed by development

of a baseline report, which summarizes the findings of the PRP search to that point. Depending on the complexity of the site and other factors, one or more additional specialized tasks and/or repetition of one or more of the baseline tasks also may be required. Once these are complete, an interim-final report is issued.

4.1.C.1 Baseline Search Tasks

For reasons of budget, timing, and standardization of 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. These tasks are set forth below:

- File review.
- Records compilation.
- Interviews.
- Title search.
- Site Summary.
- Categorization of PRPs.
- Development of waste-in information.
- Collection of corporate and financial information.
- CERCLA section 104(e)/RCRA section 3007 information request letters.
- Report preparation.

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

4.1.C.2 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 for including those tasks. Site-specific data gathering problems are addressed by using "specialized" search tasks in conjunction with the 10 basic tasks. The specialized tasks provide further avenues of investigation that assist the PRP search team in uncovering additional information about the PRPs and 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. The PRP search team should exercise professional discretion in determining which of the specialized tasks are most applicable to a particular site.

Specialized search tasks are divided into three general categories:

- Sources of information.
  - PRP file review (obtain through a section 104(e) request).
  - Private citizen/PRP interview.
  - Field survey.
  - Site sampling.
  - Enforcement tracking system (e.g., Comprehensive Environmental Response, Compensation, and Liability Information System 3/ Waste Local Area Network (CERCLIS 3/WasteLAN)).
  - Deeds.
  - Aerial photographs.
  - EPA files (e.g., RCRA, EPCRA, TSCA, CWA).
  - State enforcement files (e.g., CERCLA, RCRA, CWA).
  - CERCLA administrative subpoena authority.
  - Secretary of State corporate information.
  - Follow-up 104(e) information request letters.
  - Former employee/neighbors to site interviews.
- Waste stream analysis.
  - Industrial surveys.
  - Process chemistry analysis.
  - Waste stream inventory.
- Additional miscellaneous tasks.
  - Compliance history.
  - Financial assessment.
  - Property appraisal.

4.1.C.3 Managing the Search Process

The PRP search team must ensure that all appropriate investigative tasks are conducted at the site. Prior to initiating these tasks, the team 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 specialized tasks. The PRP search plan should be tailored to the circumstances of each case instead of attempting to pigeon-hole the circumstances of each site into a fixed search format.

The PRP search tasks should be managed as an iterative process; task interaction and repetition produces broader and deeper information than if the tasks were treated as discrete, insular units to be 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 followup on leads and to fill any data gaps. The PRP search process is described in greater detail in section 2 of this chapter.

4.1.D 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, the baseline report and the interim-final report (except in simple owner/operator situations where the baseline report usually will suffice). Usually, the baseline report is issued after the basic investigative tasks have revealed information identifying:

- A chronological summary of site history.
- A summary of PRP liability at the site.
- Additional follow-up search needs.

Additional search tasks are conducted and the interim-final report is issued after:

- All PRPs have been thoroughly identified.
- An opportunity for PRP input into the PRP search has been provided.
- Liability inquiries have been resolved.
- Waste contribution to the site, financial viability, and PRP involvement at the site have been established.

Both reports should be divided into two deliverables. The "Site Chronology and Property History" consists of a chronological presentation of known facts without any interpretation or inferences regarding liability. No privilege is claimed for this deliverable. Non-privileged material is not protected from disclosure to PRPs or others in litigation. The "PRP Synopsis," which is privileged work product, includes an evaluation of the evidence supporting liability. Documents prepared in anticipation of possible litigation are generally protected from disclosure by the work product privilege. The regional case attorney should be involved in the evaluation of the evidence supporting liability and should also be consulted if there are questions about what materials are privileged. A more detailed description of this two-part report format is shown in **Exhibit 4-2**.

References

Office of Solid Waste and Emergency Response (OSWER) Directive 9834.3-2a, "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 29, 1989).

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

4.1.E Key Players in the PRP Search Process

The PRP search team typically includes the RPM, the regional case attorney, and the CI or other PRP search staff, such as an enforcement specialist or cost recovery specialist. Any of these personnel, depending on the region and the circumstances in which the PRP search takes place, may take the lead in managing the PRP search process. This chapter describes a PRP search in which the RPM is responsible for managing the PRP search. Where a different team member takes the lead, the roles described in this

4-2 PRP Search Report Format

Deliverable 1: Site Chronology and Property History

The Site Chronology and Property History section of the report should be a chronological presentation of known facts, which are properly referenced to supporting documentation. This section contains no conclusions, interpretations, or inferences regarding liability. No privilege is claimed on any portion of this section. Suggested subsections include:

- Introduction
  - Project Background
  - Project Approach
  - List of Contacts (listing public agencies that were contacted to collect information)
  - Overview of Report

- Discussion of the Site
  - Site History (including factual background information about the site as well as a history of the facility):
    - Site location and size
    - Adjoining properties
    - Brief description of site history to include:
      - Site owner/operator(s)
      - When operations began
      - Type of operations at the site
      - Types of substances manufactured, treated, stored, or disposed
    - Permits applied for or granted
    - Warnings/violations issued by regulatory agencies
  - Property History. This subsection summarizes the review of all title documents and presents a chain-of-title (including corporate name changes of property owners, as well as conveyances, quitclaims, deeds, and liens), with corresponding references to the relevant documentation

Deliverable 2: PRP Synopsis

The PRP Synopsis section of the PRP search report should be stamped "Privileged Work Product – Enforcement Confidential, Prepared in Anticipation of Litigation." Suggested subsections include:

- Introduction

- Discussion of the site. This subsection should refer the reader to the first section of the report

4-2 (cont.) PRP Search Report Format

- ◆ PRPs
  - Statutory provisions & relevant policy/guidance
  - PRPs – Owner/operators. Information obtained from the baseline tasks can be summarized, referenced, and placed in this subsection:
    - PRP name
    - Status (current owner, successor, etc.)
    - Current address
    - Headquarters address
    - Registered agent
    - President
    - Current status
    - Corporate information
    - Narrative description of basis for inclusion
    - References
    - Nature and volume of hazardous substance(s) associated with PRP
    - Reference to appendices or attachments for additional information, rankings, or groupings
    - Financial information, ATP issues
  - PRPs – generators (same information as for owner/operators)
  - PRPs – transporters (same information as for owner/operators)
  - Special PRP information
- ◆ Special site information
- ◆ Other parties associated with the site
- ◆ Conclusions and recommendations
- ◆ Appendix: PRP evidences sheets

chapter may vary. Regardless of which team member takes the lead, however, PRP searches are collaborative efforts in which members of the PRP search team must effectively coordinate their efforts to achieve successful PRP searches. In addition, where PRP search functions are performed by a contractor, the contractor's work must be coordinated with that of the team.

4.1.E.1 Remedial Project Managers

An RPM responsible for managing a PRP search generally performs the following functions:

- Establish the PRP search priorities and strategy, in consultation with the regional case attorney and Superfund program management.
- Manage contractor-conducted search tasks.

- Define the scope of the search, in consultation with the regional case attorney.
- Develop PRP search work assignments, budgets, and schedules.
- Coordinate contractor efforts and review baseline, interim, and final contractor deliverables, in consultation with the regional case attorney.
- 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 (QA/QC) procedures to ensure the accuracy of data gathered during the search.
- Ensure that adequate information is gathered for SNLs (including the universe of PRPs and waste-in information).
- Ensure that adequate evidence of a PRP's liability and Ability to Pay (ATP), where appropriate, is gathered.
- Ensure that the universe of PRPs, viewed broadly, is included in community involvement mailing lists.

RPMs must coordinate with the regional case attorney to determine whether the collected information is sufficient to establish the PRPs' liability.

4.1.E.2 Regional Attorneys

Regional case attorneys are responsible for directing case development for each site. Paralegals may also assist in the PRP search. 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. A regional attorney also should be consulted on the scope of the PRP search.

In general, regional 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, attorneys can provide advice about complex liability issues such as corporate successors and possible legal defenses, such as the innocent landowner defense.

4.1.E.3 Civil Investigators or PRP Search Staff

There is at least one CI in each region. CIs may assume responsibilities for developing a regional PRP search strategy that is consistent with EPA policy and for overseeing the implementation of that strategy. CIs can provide the PRP search team with investigative skills and authorities that are often not available in the contractor community.

The CI's role in enforcement activities 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, OSCs, and the PRP search Work Assignment Manager (WAM).

CIs usually conduct crucial interviews or follow up investigation leads. For example, CIs can be valuable resources when information is needed about additional parcels of land and there is insufficient time to assign a contractor to the task, or when a lack of records requires numerous interviews, phone calls, and database searches.

In some regions, CIs play active roles 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.

4.1.E.4 Contractors

The Agency secures the assistance of contractors to conduct some PRP search activities, such as most baseline search tasks. By actively managing and overseeing the processes involved in the PRP search, the RPM 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.

Regions have access to contractor support under the Enforcement Support Services (ESS) contracts, which provide for a variety of PRP search support activities.

For any work assignment costing more than $25,000, an Independent Government Cost Estimate must be developed by the WAM.

Tasks assigned to the contractor should be well defined. The RPM 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.

4.2 Procedures and Interactions

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

Exhibit 4-3 provides a flowchart of the specific activities discussed in this section. A PRP search activities checklist is included in section 5 of this chapter.

4.2.A Initiate Preliminary PRP Search

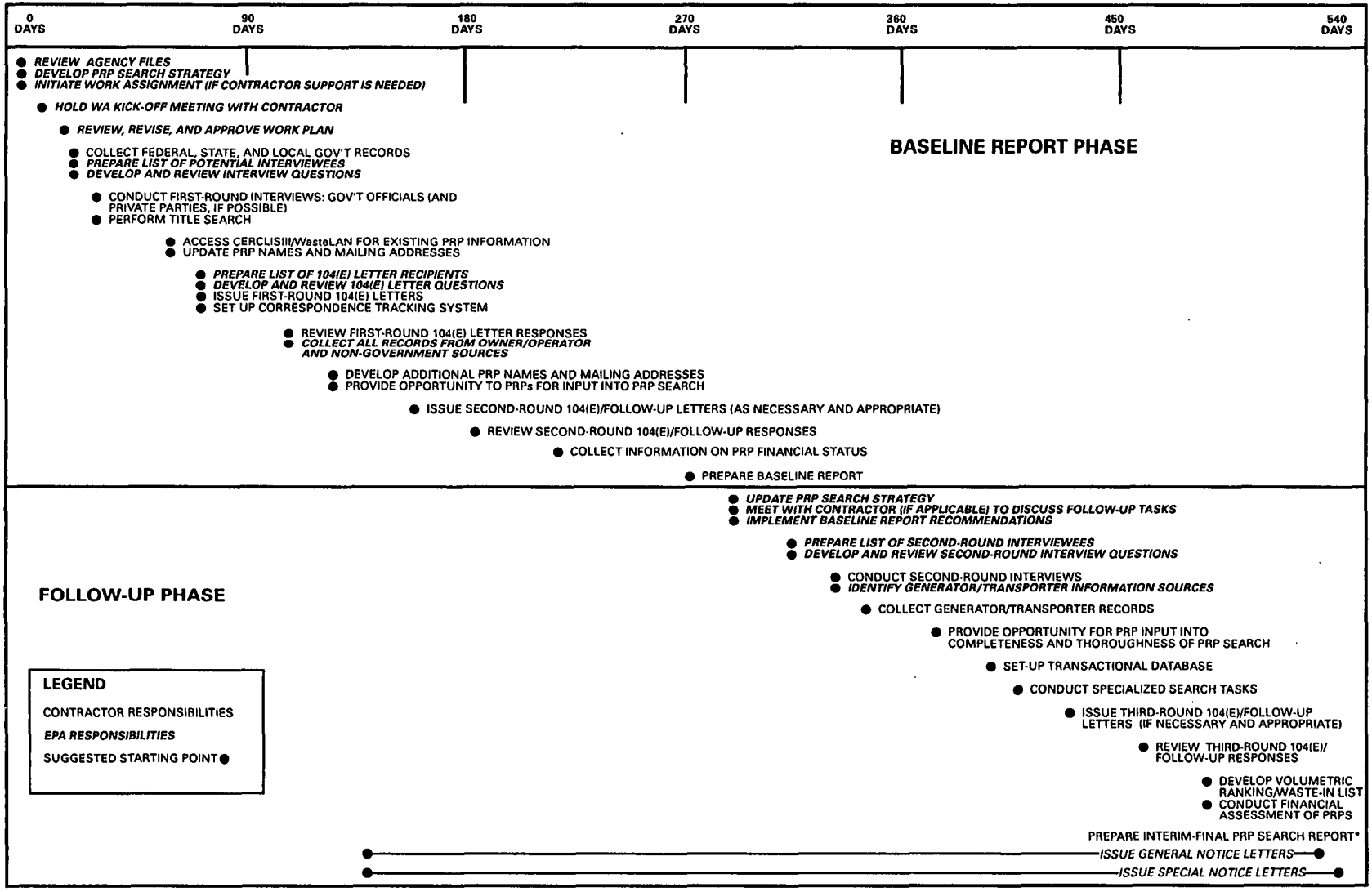
A preliminary PRP search is initiated when a site is discovered. The object of a preliminary search is to determine obvious PRPs who may be available to conduct appropriate response activity at the site. Once the site has undergone a listing SI, the RPM must conduct a more extensive PRP search to locate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

4.2.B Develop PRP Search Plan

An effective enforcement strategy requires early and continuous involvement of all key players, including RPMs, regional attorneys, and CIs. The development of a search plan consists of six activities:

- Development of 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 5 of this chapter for an outline of possible considerations). In developing the plan, the RPM should:
  - Avoid the use of generic work plans that do not consider 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 site-specific information needs.
- Identification of 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.
- Development of roles and responsibilities for all members of the PRP search team.
- Identification of review points to assess the thoroughness and completeness of the PRP search.

4-3 PRP Search Process Flow Chart



* At sites where no volumetric ranking/waste-in list or financial assessment of PRPs is done the interim-final PRP search report should be prepared 60 days after review of third-round 104(e)/follow-up responses. At sites where a volumetric ranking/waste-in list or financial assessment of PRPs is done the interim-final PRP search report should be prepared 120 days after these tasks.

- Development of 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.
- Development of a plan to provide opportunities for PRP input into the PRP search.

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 included as an appendix to this chapter.

4.2.C Baseline Search

The preparation of a PRP search baseline report may, in a typical case, require six to nine months (refer to the flowchart presented in Exhibit 4-3). The initial steps include developing a PRP search plan, formulating the work assignment, and reviewing and accepting the contractor's work plan.

By structuring the execution of the 10 baseline tasks into interrelated 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 certain situations.

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

- Conduct preliminary records review.
  - 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 to develop information on site operations that may not be recorded in documents.
  - Update and verify names and addresses.
- Issue information request letters to owners and operators as authorized by section 104(e) of CERCLA and section 3007(a) of RCRA.
- 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, including financial status.
  - Develop a list of other possible PRPs, identifying generators and transporters, and, if possible, their waste contributions.
  - 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 their association with other PRPs and involvement at the site.
  - For corporations, this information should include the date of incorporation, whether the corporation currently exists, and names of parent or successor corporations. The regional case attorney should review the evidence for 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, generator, and transporter. If sufficient evidence for some generators and transporters cannot be collected in time for inclusion in the baseline report, this work should be completed in the follow-up phase of the PRP search.

- Prepare the baseline report (refer to the format in Exhibit 4-2).

4.2.D Issue Section 104(e) Letters 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, operators, and generators (or 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.

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 GNL.

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, 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 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. If information on generator and transporter PRPs is not available in time for inclusion in the baseline report, it may be developed later for inclusion in the interim-final report.

The facts collected from the response to an information request letter will help the RPM determine whether the respondent should receive a GNL. For this reason, the Agency has articulated a preference for using information request letters to gather the initial facts about PRPs. Interviews can be used in conjunction with information request letters to supplement and/or accelerate information gathering.

4.2.D.1 Statutory Authority

Section 104(e) of CERCLA and section 3007(a) of RCRA authorize the Agency to issue information request letters. RCRA section 3007 information gathering authority applies to any site with hazardous wastes as defined in section 1004(5), and is not limited to sites regulated under Subtitle C. The authority to conduct information gathering activities has been delegated to the Assistant Administrator (AA), OSWER and the AA, Office of Enforcement and Compliance Assurance (OECA) by Delegation 14-6 (revised May 11, 1994). Some of this authority, including the authority to issue section 104(e) and section 3007(a) information request letters, has been further delegated to the regional administrators.

Delegation 14-6 requires regional administrators and the AA, OSWER to consult with the AA, OECA (or his/her designee) before issuing compliance orders or subpoenas. On September 30, 1994, the Director of the Regional Support Division (RSD) of OECA's Office of Site Remediation Enforcement (OSRE) waived this consultation requirement for administrative subpoenas and UAOs to compel compliance, so long as those subpoenas or UAOs do not deviate significantly from the Agency's model subpoena or model Administrative Order (AO) for CERCLA information requests.

Reference

OSRE Memorandum, "Consultation with OECA under CERCLA Delegation 14-6" (September 30, 1994).

4.2.D.2 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 the 1988 "Final Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas." This includes the following categories of information:

- Owners.
  - Names and addresses, including updated information.
  - Periods and type of ownership.
  - Corporate successorship.
  - Site history during ownership including conditions, operations, and waste disposal. In addition, information about waste disposal and the substances disposed of during periods of past owners and operators of the facility. Waste disposal information should include the amount, nature, and location of the wastes.
  - Information on whether wastes were RCRA hazardous wastes (for use in evaluating potential ARARs).

  - Lessors/lessees and the above information about them.
  - Information related to defenses.
  - *De minimis* status.
  - For small businesses, individuals with control (including shareholder information).
- Operators.
  - Similar to above.
  - Names and addresses of individuals in charge of operation and waste disposal practices.
- Financial information (should not be requested in a first-round information request unless the liability of the recipient is well established).
  - Information about the PRP's ability to pay for response actions.
  - Insurance information (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, and 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, or stored, treated, or disposed of at the site.
  - Dates of shipment or disposal.
  - Quantity and nature of the materials.
  - Hazardous substances (as defined in 40 Code of Federal Regulations (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., whether the land ban applies).
  - Updated names and addresses of parties involved in these transactions.
- 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, and 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.

Sample initial information request letters tailored to large businesses and small businesses/individuals and sample instructions for responding to those letters were made available as attachments to the 1995 memorandum "Transmittal of Sample Documents for More Effective Communication in CERCLA Section 104(e)(2) Information Requests." Similarly, sets of questions addressing specific issues that commonly arise at NPL sites (e.g., successor liability, ability to pay, lead battery facilities, polychlorinated biphenyl sites) were made available on the "Disk Repository of Current CERCLA Section 104(e) Questions." Section 104(e) letters also may encourage PRP input in the PRP search process and the larger Superfund process leading to settlement, providing PRPs with the opportunity to supply information they feel is relevant to the process, including the identity of other parties that should be PRPs.

The response to a section 104(e) letter must be in writing. The letter should indicate that the PRP is responsible for informing the Agency if any information contained in the PRP's response is confidential and subject to protection under section 104(e) of CERCLA. Any such information should be clearly marked and submitted separately from information for which no claim of confidentiality is made.

The Agency's statutory information-gathering authority is not limited to collecting facts directly related 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, the RPM or regional attorney should include a request that the person (or corporation) submit an affidavit, signed by a corporate officer, describing the scope of his/her investigation if the search does not disclose all of the information sought. The information request letter should also inform the recipient about opportunities for consultation with EPA.

References

OSRE Memorandum, "Disk Repository of Current CERCLA Section 104(e) Questions" (February 29, 1996).

OSRE Memorandum, "Transmittal of Sample Documents for More Effective Communication in CERCLA Section 104(e)(2) Information Requests" (June 30, 1995).

OSWER Directive 9834.4A, "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 25, 1988).

4.2.D.3 Municipal Sites

As provided in the 1989 "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes," 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 (MSW) and sewage sludge were deposited. The identities of transporters and persons who arranged for disposal should be sought. Records should be collected and reviewed.

References

OSRE Memorandum, "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (February 5, 1998).

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

4.2.D.4 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 to perform a response action. In effect, the Agency has the authority to ascertain whether a PRP's insurance policy may cover and is sufficient to pay for the costs of site remediation. RPMs, in consultation with regional attorneys, should inquire about the PRP's comprehensive general liability and environmental impairment insurance. Two approaches should be used to obtain information about the PRP's insurance coverage:

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

Requests for information about the PRP's insurance policies should be as neutral as possible. Avoid using terms such as "pollution exclusion," "sudden," "non-sudden," or "accidental," as these terms have special meaning in environmental insurance law. The PRP should be asked 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 its insurance policy. This is an effective way to obtain necessary insurance information without having the PRP risk compromising its coverage. If the PRP does send a copy of the insurance policy, the regional case attorney should be consulted to determine the extent of the PRP's coverage.

4.2.D.5 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 civil penalties that may be imposed for failing to respond to an information request letter. Under section 104(e)(5)(B)(ii) of CERCLA, the Agency may request that a court impose penalties of up to $27,500 per day for unreasonable non-compliance with

the information request ($25,000 for non-compliance taking place prior January 30, 1997).

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.

4.2.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 4-2 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 a regional attorney.

Responses to information requests should be organized alphabetically by PRP and placed in an appendix to the baseline report. Documents for which PRPs have asserted claims of confidentiality should be clearly marked. Requests for disclosure of such documents should be discussed with a regional attorney. 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.

4.2.E.1 Responding to Freedom of Information Act Requests

PRPs may request information under the FOIA. RPMs should agree to provide only the information and documents that are within the scope of a proper request. Under FOIA exemption 7, EPA 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. RPMs are encouraged to send PRPs the non-enforcement sensitive, factual portion of the baseline or interim-final report (Deliverable 1 of the PRP Search Report Format in Exhibit 4-2). If RPMs have any questions as to the appropriateness of complying with the FOIA request they should contact a regional attorney.

RPMs may choose to create a publicly available repository of site information. This technique reduces the number of FOIA requests received by EPA because interested parties have direct access to the data they would otherwise seek using FOIA requests. In addition, the creation of a public repository for site information is consistent with EPA's policy of expediting the CERCLA settlement process by releasing information on PRP waste contribution as soon as practicable in order to facilitate PRP organization and coalescence.

Reference

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

4.2.E.2 Enforcement Strategy for Non-Compliance with Information Requests

If recipients of section 104(e) letters ignore EPA's request for responses within the specified time (usually 30 days) or provide incomplete answers, the region is encouraged to use alternative methods to follow up and then consider the appropriateness of using one or more of the following enforcement strategies:

- Send a follow-up 104(e) letter stating that, if the party fails to comply with the information request, EPA may elect to issue an AO or initiate a judicial action to compel compliance, including possible assessment of penalties. A sample 104(e) follow-up letter is cited below.
- Issue an AO 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 a regional attorney to decide which enforcement strategy to implement at a particular site.

Reference

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)" (July 26, 1996).

4.2.E.3 Administrative Order to Compel Compliance

Under section 104(e)(5)(A), the Agency can issue an AO to compel compliance with an information request. AOs are issued by EPA and involve a notice and an opportunity for consultation. Consequently, EPA can respond promptly to a recipient's non-compliance. The regions no longer need to consult with RSD personnel before using AOs to compel compliance with a 104(e) information request, as long as the order does not deviate significantly from EPA's model order. However, if the recipient continues to ignore the request for information, the Agency will have to refer a petition to DOJ to enforce EPA's AO. This process may be time-consuming.

References

OSRE Memorandum, "Consultation with OECA under CERCLA Delegation 14-6" (September 30, 1994).

OSRE Memorandum, "Model Administrative Order for CERCLA Information Requests" (September 30, 1994).

4.2.E.4 Judicial Action to Compel Compliance

Section 104(e)(5)(B) of CERCLA authorizes the Attorney General to initiate a civil lawsuit to compel a person to respond to the Agency's information request. In addition to ordering compliance, the court is authorized to assess substantial monetary penalties against a PRP who has failed 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 the January 1988 "Expansion of Direct Referral of Cases to the Department of Justice." In time-critical situations, the RPM should refer to "Procedures for Processing Oral and Other Expedited Referrals" and the April 1988 "Expansion of Direct Referral of Cases to the Department of Justice."

Section 4 of this chapter discusses specific case examples of the Agency using judicial action to enforce its information requests.

References

OSWER Directive 9891.5A, "Expansion of Direct Referral of Cases to the Department of Justice" (January 14, 1988).

Office of Enforcement (OE) Memorandum, "Procedures for Processing Oral and Other Expedited Referrals" (December 1987).

4.2.F Conduct Witness Interviews

Interviews are generally performed under three scenarios:

- Documents do not exist and EPA must rely solely or heavily upon interviews.
- Documents do exist, but EPA needs to clarify the content of the documents, and the interviewee has knowledge of, or is in possession of, the documents.
- EPA wants to develop leads on additional PRPs or evidence for liability determinations.

The PRP search team should identify witnesses to be interviewed as early as possible in the PRP search. It may be advantageous to interview parties prior to issuance of 104(e) letters. The PRP search team should evaluate a number of potential considerations to determine the appropriate timing of interviews with respect to other search tasks. The team should consider, but not be limited to, the following factors when deciding to conduct interviews:

- Nature and volume of information already gathered.
- Nature and volume of information potentially to be gained from interviews.
- Time required to plan, coordinate, and conduct interviews.
- Timing considerations.

- Capabilities and availability of the interviewer(s).
- Location and availability of the interviewees.
- Sources of interviewees.
- Documentation or admissibility requirements.

Early interviews often can expedite the PRP search and conserve resources. RPMs should continue to evaluate the need for witness interviews as the PRP search progresses. Interviews should be performed by personnel who have experience and/or specialized training in how to conduct interviews, evidentiary collection processes, and due process requirements. Interviews are usually performed by CIs, but in some cases regional attorneys and RPMs have performed or participated in interviews.

Former employees or adjacent landowners are often the best sources of information about a facility's operating, waste generation, and waste disposal practices. They may also be valuable sources of information about the involvement of management in waste disposal and the names of other material witnesses. RPMs should work together with regional attorneys to ensure that state law regarding the interviewing of witnesses is followed. For example, in some states, interviews of current employees must be conducted in the presence of corporate counsel.

Written statements signed by witnesses should be obtained as soon as possible after interviews. The statement should be prepared in the first person, dated, and signed (with any accompanying appendices attached) to allow use as a court exhibit later, if needed. Witnesses should always be given the opportunity to review statements before being asked to sign them.

4.2.G Review Baseline Search Progress

The RPM is responsible for managing the search in accordance with the strategy, for updating the strategy as necessary, and for meeting schedules. Exhibit 4-3 shows these responsibilities in detail.

RPMs must ensure that sufficient follow-up is being done 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 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 when 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 interviewees and records sources should be

documented. This ensures that if it became necessary to reconstruct the investigation, sufficient documentation would exist to determine what leads had been followed up and whether all reasonably available sources of information had been exhausted even if personnel had changed since the original PRP search. This written record will attest to the thoroughness and completeness of a particular PRP search.

4.2.H Prepare Baseline Report

The baseline report presents a concise summary of the information obtained from the baseline search activities. The baseline report consists of two separate deliverables. The known facts about the site and its PRPs are summarized without interpretation in the first section of the report, the "Site Chronology and Property History." Back-up information is set forth in supplemental appendices. The second section of the report, the "PRP Synopsis," includes interpretation and analysis of evidence of liability and financial viability. In effect, the baseline report is an interim report that contains available information in the areas specified in Exhibit 4-2. It provides information on the owner/operators and provides leads on generators and transporters, thereby enabling the RPM and regional management to assess the extent and nature of gaps in the PRP data.

RPMs, with the input of the regional case attorney and the CI, should carefully review both sections of the report to determine the likelihood that all possible PRPs have been listed, the completeness of waste-in information, and the sufficiency of the information documenting each PRP's liability and financial viability. All information in the report should be attributed to a specific source. The "PRP Synopsis" is enforcement confidential, while the "Site Chronology and Property History" generally is not. RPMs should ensure that the cover of the "PRP Synopsis" clearly states that it is "Privileged Work Product - Enforcement Confidential, Prepared in Anticipation of Litigation." This enables the Agency to protect from disclosure the information contained in that section of the baseline report. Any copies of the "PRP Synopsis" should be numbered for tracking purposes.

4.2.I Management Review

Regional supervisors, with regional case attorney, 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, the RPM 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.

4.2.J Issue 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 to 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 CFR section 261.30. Each listed waste has an EPA hazardous waste number that precedes the name of the substance. Under 40 CFR 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 Toxicity Characteristic Leaching Procedure toxicity. To determine whether the substances present at a particular site meet this criteria, the RPM should consider asking questions such as the following:

> "For all waste sent to the facility or site, identify any known RCRA listing designation as defined by 40 CFR 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."

Reference

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

4.2.J.1 Municipal Sites

A key feature of EPA's 1989 "Municipal Settlement Policy" is the notification policy for municipalities and private parties who generate or transport MSW, sewage sludge, and trash from commercial, institutional, or industrial entities. The "Municipal Settlement Policy" is supplemented by the 1998 "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites," which established methods for calculating settlement amounts for both MSW generators/transporters and municipal owner/operators. It is necessary to understand the notification and settlement policies in order to ensure that the information needed in applying them is obtained.

Municipal and private party owner/operators generally will be notified as PRPs if they were owners or operators of facilities at the time of disposal of hazardous substances, or if 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 both of the following are true:

- The region obtains site-specific information that the MSW or sewage sludge contains a hazardous substance.
- The region has reason to believe that the hazardous substance is derived from 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 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 wastes from commercial or industrial processes or activities, and 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 both of the following to the region:

- None of the hazardous substances contained in the trash is derived from a commercial, institutional, or industrial process or activity.
- 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.

In order to protect MSW generators/transporters from contribution claims made by PRPs, EPA will settle with generators/transporters that it would not otherwise pursue as PRPs. The settlement amount for generators/transporters is calculated using an estimated cleanup cost of $5.30/ton. The more complete the waste contribution records are for a site, the easier it is to estimate the contribution of generators/transporters and to complete early settlements. Municipal owner/operator settlements are based on a presumptive baseline settlement amount of 20 percent of total estimated response costs for the site. These settlements are also dependent on data generated by the PRP search.

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

References

OSRE Memorandum, "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (February 5, 1998).

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

4.2.J.2 *De Minimis* and "De Micromis" Settlements

Recognizing that early settlements reduce transaction costs for all parties, EPA attempts to reach *de minimis* and "de micromis" settlements as early as possible. A good PRP search that provides complete information about PRPs and the type and quantity of waste they contributed is one of the keys to efficiently reaching such early settlements. Using this information and methods described in several guidances, EPA can reach pre-Record of Decision (ROD) settlements with *de minimis* contributors and be prepared to enter into settlements quickly with "de micromis" contributors that face contribution litigation brought by other PRPs. *De minimis* and "de micromis" settlements are discussed in greater detail in Chapter 8, RD/RA Negotiations/Settlement.

References

OSRE/Department of Justice (DOJ) Memorandum, "Revised Guidance on CERCLA Settlements with 'De Micromis' Waste Contributors" (June 3, 1996).

OSRE Memorandum, "Issuance of Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree and Administrative Order on Consent" (September 29, 1995).

OSRE Memorandum, "Standardizing the *De Minimis* Premium" (July 7, 1995).

Office of Waste Programs Enforcement (OWPE)/OE Memorandum, "Communications Strategy for Settlements with Small Volume Waste Contributors" (September 30, 1993).

OSWER Directive 9834.7-1d, "Streamlined Approach for Settlements with *De Minimis* Waste Contributors under CERCLA 122(g)(1)(A)" (July 30, 1993).

OSWER Directive 9634.7-1C, "Methodology for Early *De Minimis* Waste Contributor Settlements under CERCLA section 122(g)(1)(A)" (June 2, 1992).

4.2.K Specialized Investigative Tasks

As part of the revised search strategy, RPMs should consider which specialized tasks are needed to conduct a thorough search. Refer to "Managing the Search Process" in part 1 of this chapter for a discussion of when to use these specialized tasks. RPMs should exercise 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.

An administrative subpoena, authorized under section 122(e)(3)(B) of CERCLA, compels an individual to answer questions under oath and, when requested, to produce documents. The regions no longer need to consult with RSD personnel before using administrative subpoenas, as long as the order does not deviate significantly from EPA's model subpoena. Regional counsel will secure issuance of the subpoena and select the location for the

proceeding. If the witness ignores the subpoena, 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 people who work 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 interviews and information request letters to obtain initial information about a person's involvement at the site.

References

OSRE Memorandum, "Consultation with OECA under CERCLA Delegation 14-6" (September 30, 1994).

OE Memorandum, "Recommendations Concerning the Use and Issuance of Administrative Subpoenas under CERCLA Section 122" (August 30, 1991) (revised model subpoena attached).

4.2.L Interim-Final Report

As indicated by its name, the interim-final report is not viewed as an end in itself. Rather, the interim report is one of many steps in the overall investigation. The investigation at a site should continue until all necessary, reasonably obtainable information pertaining to a PRP's 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 (i.e., the waste-in list). If possible, this takes place approximately six months before the RI/FS SNLs are issued. In some cases, particularly for multi-party sites, it may be necessary to prepare preliminary information in order to issue GNLs, to issue SNLs, and to release information to the PRPs. Updated versions of the report can then be prepared for the Remedial Design/Remedial Action (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 4-2.

The regional case attorney should review instances in which a generator or transporter is designated as a PRP based on a parent/subsidiary or corporate successor theory.

The RPM should focus on the facts contained in the report and not lengthy historical or other narratives. The RPM 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 transferable to a tracking system or inventory database.

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.

4.2.M Interim Report Followup

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 and 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 all parties have been identified, 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) and EPA has made determinations on all defenses to liability claimed by PRPs. It should be noted that in many situations, circumstances may require that the search continue throughout the course of the Remedial Investigation/Feasibility Study (RI/FS) and, possibly, into the RD/RA.

The PRP search is an on-going investigation; 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.

4.2.N General Notice Letters

GNLs 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. In addition to designating a person as a PRP, GNLs are used to encourage PRPs to coalesce, that is, to form a group that will act as a steering committee, 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.
  - Section 106 authorizes the Agency to issue AOs 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.
  - 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.

- 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.
  - 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 an EPA contact for PRPs (or their attorneys) to call.
- Information about the development of the Administrative Record (AR) pursuant to section 113(k) of CERCLA.

RPMs, in consultation with the regional case attorney, should use their judgment to tailor the contents of GNLs to accommodate the circumstances at a specific site. For example, it may be appropriate to use the sample GNL tailored to small businesses or individuals (included in the 1996 "Transmittal of Sample Notice Letters") when sending GNLs to parties not familiar with the Superfund process. GNLs sent to debtors or bankruptcy trustees should not include a demand for payment, as such a demand might be regarded as an act to collect payment of a pre-bankruptcy petition debt. Such acts are prohibited by the automatic stay provision of Bankruptcy Code section 362(a).

GNLs should be sent by certified mail, return receipt requested, and 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. Communications from PRP attorneys should be referred to the regional case attorney as soon as practicable.

In general, the standard governing who receives a GNL is based upon a reasonable belief that an intended recipient may be a PRP. Certainty is not required. GNL recipients must be approved by both regional management and the regional case attorney. RPMs should carefully consider the question of who receives a GNL. Once a party has been designated as a PRP and issued a GNL, its 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

summarized above in section 2.D.3 of this chapter. In addition, it should be noted that notwithstanding the above general policy, there may be 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 SNLs for RI/FS are scheduled and GNLs have not been issued, GNLs need not be sent if they would not advance the process. Copies of GNLs should be sent to:

- Regional AR coordinator.
- Regional Community Involvement Coordinator (CIC) for inclusion of the noticed parties on the community involvement mailing list.
- Appropriate state representative(s).
- Federal and state natural resource trustees.

References

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; 4) Follow-Up 104(e)" (July 26, 1996).

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

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

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

4.2.0 Develop 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 can be 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' shipments to a site.

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 steering committee organization, which can streamline and expedite the settlement process.

Reference

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

4.2.P On-Going Information Exchange

At any point, 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. Following a PRP's response to an information request, EPA will generally provide the PRP with a copy of any information the Agency has gathered regarding that PRP. More broadly, as soon as reasonably possible, the RPM should provide the PRPs with the names, addresses, and volumes and nature of substances contributed for 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. The 1993 revised policy on information release includes a more forceful statement on the value to the Agency of releasing information, particularly waste-in information, to PRPs in order to facilitate PRP organization and coalescence. In addition, this policy clarifies that waste-in information, to the extent it is available, should normally be released well before special

notice is issued. RPMs may choose to make information available to PRPs by creating a publicly available repository of site information. Information for which PRPs have asserted a claim of confidentiality, however, should be disclosed to the public only after consultation with a regional attorney.

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 techniques to resolve issues the RPM has with the PRPs or that PRPs have among themselves.

References

OSWER Directive 9835.12-01a, "Revised Policy on Discretionary Information Release Under CERCLA" (March 31, 1993).

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

4.3 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 regional attorneys and other key players early in the search process to achieve timely, high-quality PRP searches.

4.3.A Planning

In general, RPMs should initiate PRP searches before the site is proposed for inclusion on the NPL. Ideally, the PRP search should be initiated when EPA decides that a response action may be warranted during the site assessment and completed shortly after the NPL proposed listing. The baseline phase of the PRP search report should be completed at least 90 days before the funds are obligated for a projected RI/FS start. The PRP search, including all follow-up phase activities (if necessary), should be completed and the PRP search reviewed and updated (if necessary) 90 days prior to issuance of RD/RA SNLs.

4.3.B Budget

The quality of a PRP search is a function of planning, proper and focused utilization of contractors, oversight, and follow up. Sufficient money, within the region's limitations, must be budgeted to efficiently reach the search objective, i.e., to uncover all reasonably available evidence of the PRPs' liability. The RPM should ensure that the investigative process is planned and conducted to achieve the desired results 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.

The RPM should take into account the nature of the site when planning a PRP search by weighing the costs of the search against the value of PRP resources that might be gained. At sites where remedies of relatively small dollar value are anticipated, only limited search activities should be performed. At sites where more costly remedies are anticipated, more extensive search activities are appropriate. Under-committing resources is as inefficient as over-committing resources. Therefore, RPMs should work closely with regional management to determine how to effectively commit resources for a particular site.

4.3.C Reporting Requirements

PRP search completions is one of the program measures monitored by the Agency to track overall program progress. For reporting purposes, a PRP search is deemed to be complete when the region documents in the site file that all reasonably achievable criteria for complete and thorough PRP searches have been met. These criteria include:

- Providing an opportunity to PRPs for input into the PRP search.
- Collecting necessary and appropriate financial and contribution data to apportion responsibility.

- Completing follow-up activities on all parties.
- Making *de minimis* and "de micromis" determinations, as necessary.
- Categorizing all PRPs.
- Making financial viability determinations on all PRPs asserting an ability to pay problem.

4.4 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.

4.4.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 early actions, RI/FS activity, 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.

4.4.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 the contractor's Statement of Work 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 can 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.

4.4.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.

4.4.C.1 The Cannons Sites

The Agency sought to enforce its request for information about a PRP's involvement at the Cannons sites in Massachusetts and New Hampshire. 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 the Superfund Amendments and Reauthorization Act, a number of notice letters were issued pursuant to RCRA section 3007). On November 14, 1986, the Agency sent Crown the following:

- AO compelling a response.
- Administrative complaint.
- Proposed consent agreement.

The AO 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 response, 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.

4.4.C.2 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 (since raised to $27,500 per day) for the 499 days of non-compliance with the order.

4.5 Activities Checklist

The following list of tasks that are commonly part of a PRP search is intended as an aid for RPMs overseeing the PRP search process. The checklist is not intended to present an exhaustive set of procedures, nor is it meant to be a chronological list of tasks. RPMs should exercise 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, title search.

- a)_____ Conduct initial baseline tasks.
- b)_____ Conduct additional (i.e., specialized) tasks concurrently with the baseline tasks (if appropriate).

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

- a)_____ 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.
  - Establish the tracking system.
  - Determine identities of non-responders and incomplete responders.
- b)_____ Follow up on recipients who fail to fully comply with the request for information.
  - Send follow-up letters to recipients who provided incomplete or inadequate information.

- Determine whether an administrative order assessing penalties should be issued if recipient fails to respond to warning letter.
- 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 a parent corporation.

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 confidential section of the report should clearly state that the document is "ENFORCEMENT CONFIDENTIAL." Attribute all information in the report to specific sources. Document all work done. Manage information in a manner consistent with the 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 specialized tasks to perform.

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

a)_____ Link generators to the site.

b)_____ Determine which 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 is a listed or characteristic hazardous waste as defined by RCRA [see 40 CFR 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(e) 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 pay.

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 party'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 parties 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.

b)_____ Assemble back-up documents.

c)_____ Develop name and address list. Provide to community involvement coordinator and AR 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.

c)_____ Provide an opportunity for PRP input into the PRP search.

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 ranking and Non-Binding Preliminary Allocation of Responsibility.

c)_____ Complete information collection (including use of subpoenas), distribution of information (including AR coordinator and CIC), documentation of evidence, and notification (including special notice).

5. RI/FS Negotiations/
Settlement

Chapter 5 RI/FS Negotiations/Settlement

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Chapter 5 RI/FS Negotiations/Settlement

5.1 Description of Activity

5.1.A Introduction

This chapter discusses the process of negotiating an agreement for Potentially Responsible Party (PRP) conduct of the Remedial Investigation (RI) and Feasibility Study (FS), and focuses on the Remedial Project Manager's (RPM's) role in the process. EPA's policy is to encourage PRPs to perform RI/FSs under EPA oversight when EPA determines that the PRPs are qualified to do the work and will perform it in accordance with Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requirements and EPA guidance.

EPA prepares for RI/FS negotiations from the time the listing site inspection is undertaken or the Regional Decision Team decides to begin the PRP search. EPA performs a PRP search, issues General Notice Letters (GNLs), and may meet with PRPs prior to beginning RI/FS negotiations. EPA "scopes" the RI/FS in accordance with National Contingency Plan (NCP) section 300.430(b) prior to initiating settlement discussions to ensure that investigative and analytical studies are tailored to site circumstances and that the analysis is appropriate for the complexity of the site problems being addressed. 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 on Consent (AOC) or Consent Decree (CD), or referral for litigation or obligation of Fund monies.

5.1.B Statutory Authority

Although CERCLA section 106 Administrative Orders (UAOs) may be issued, EPA usually relies on sections 104 and 122 to enter into agreements with PRPs to allow them to conduct all or part of the RI/FS. The settlement procedures in CERCLA section 122 are used 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.

5.1.C 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 GNLs to advise them of their potential liability.

Following general notice, EPA continues to develop the PRP search. After EPA has received responses to information requests and assembled information regarding waste types and volumes, it may provide certain information to PRPs and encourage 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 AO.

EPA can issue an SNL pursuant to section 122 regarding the RI/FS. Issuance of 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, and triggers a 90-day moratorium on commencement of an RI/FS by EPA. Receipt of special notice triggers a 60-day period during which the PRPs can make a proposal to EPA for undertaking or financing the RI/FS. The SNL is usually accompanied by a draft AOC and RI/FS Statement of Work (SOW). RI/FS negotiations that result in settlement are concluded with the signing of an AOC (or entry of a CD, if the case has been filed in court) that incorporates a SOW.

5.1.D Early *De Minimis*

Agency guidance describes the methodology for providing PRPs who are minor contributors of hazardous substances to a CERCLA site (commonly referred to as *de minimis* parties) an opportunity to resolve their liability as completely as possible early in the response process, i.e., prior to signature of the Record of Decision (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 assess the feasibility of 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. Current Agency guidance does away with the requirement of preparing a waste-in list or volumetric ranking for determining *de minimis* eligibility. For more information on waste contribution, see Chapter 4, PRP Search, Notification, and Information Exchange.

Agency guidance sets forth a "Model First Point of Contact Letter" for use with *de minimis* parties. The model letter is intended to be the Agency's initial contact with *de minimis* PRPs, and should be issued prior to a notice of offer letter.

A typical RI/FS negotiation process is summarized in **Exhibit 5-1**.

References

Office of Waste Programs Enforcement/ Office of Enforcement Memorandum, "Communications Strategy for Settlements with Small Volume Waste Contributors" (September 30, 1993).

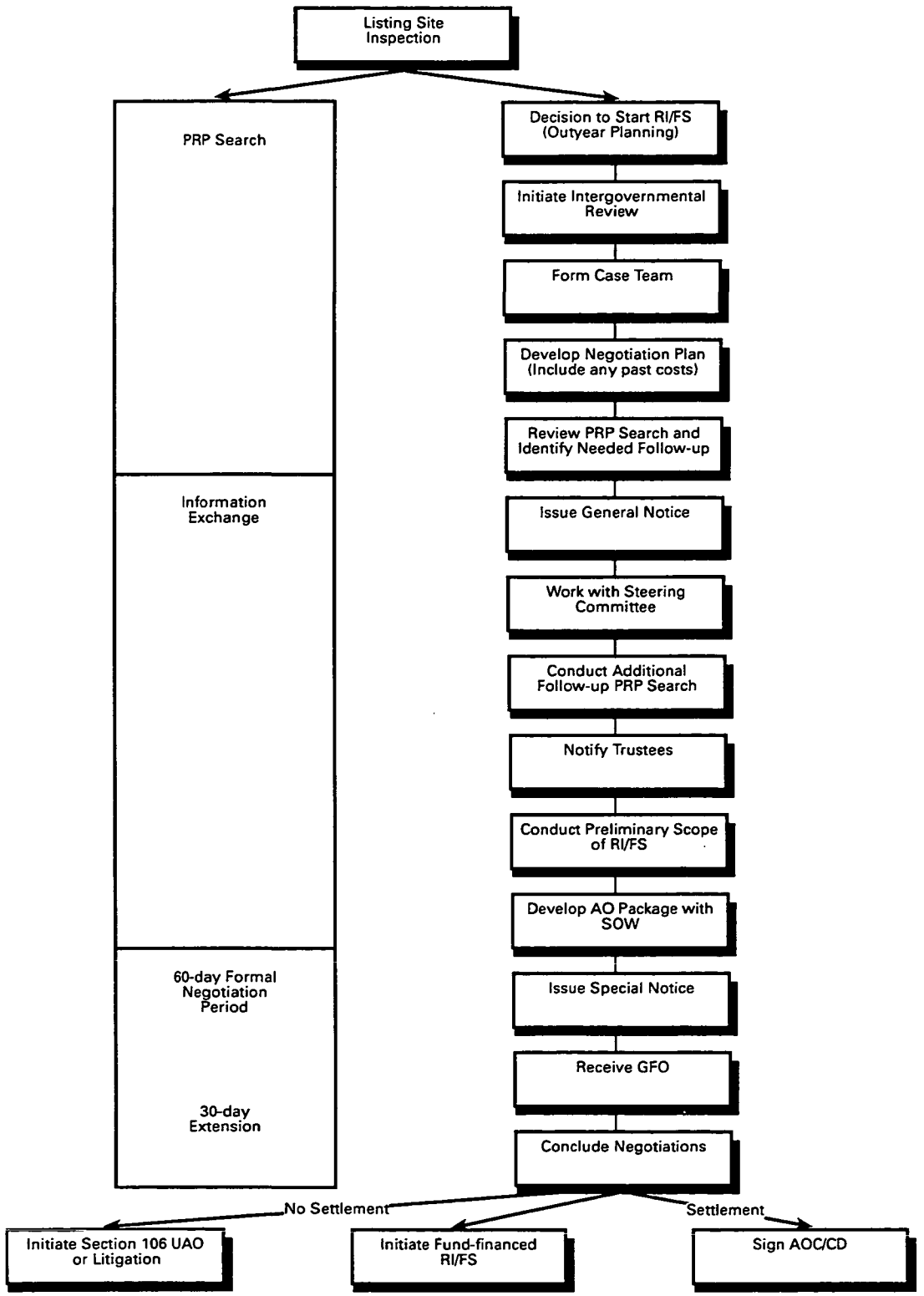
Office of Solid Waste and Emergency Response (OSWER) Directive 9834.7-1D, "Streamlined Approach for Settlements With *De minimis* Waste Contributors under CERCLA Section 122(g)(1)(A)" (July 30, 1993).

OSWER Directive 9634.7-1C, "Methodology for Early *De minimis* Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)" (June 2, 1992).

5.1.E Roles and Responsibilities

This section describes the roles and responsibilities of RPMs, regional counsel, and representatives of the Office of Site Remediation Enforcement (OSRE) and the Department of Justice (DOJ). Their primary activities in each phase of the negotiation process are summarized below. Regions vary in the way they distribute tasks between RPMs and regional counsel. In some regions, Enforcement Specialists assist negotiation teams by helping to prepare GNLs, SNLs, and cost packages and documentation, performing

5-1 RI/FS Negotiation Process*



*This general overview of the RI/FS negotiation process may not apply in all situations

PRP search-related tasks, and participating in negotiations. The primary responsibilities of RPMs and regional counsel are detailed in **Exhibit 5-2**. The Office of Enforcement and Compliance Assurance (OECA) updates its "Roles Memo" periodically; regional personnel should refer to it to find out when they need to consult with Headquarters.

5-2 RI/FS Negotiation and Settlement Roles and Responsibilities

RPM

NEGOTIATIONS PLANNING

- Coordinate information exchange with the PRPs, including section 104(e) letters, and provide the PRPs with information regarding other PRPs (in conjunction with regional counsel)
- Assemble documentation for past removal, preliminary assessment/site inspection, or other costs
- Ensure PRP search review and follow-up by Civil Investigator (CI) and regional counsel
- Send GNLs
- 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, if necessary
- Request obligation of funds from the Hazardous Substance Superfund, if appropriate

Regional Counsel

NEGOTIATIONS PLANNING

- Review strength of evidence of PRP liability
- Coordinate with CI regarding PRP search activities
- Draft initial AO
- Notify DOJ of the negotiations if past costs are involved.

INFORMAL AND FORMAL NEGOTIATIONS

- Review the SNLs
- Conduct negotiations as the lead legal representative
- Redraft the AO or CD as the result of negotiations
- Coordinate with the state legal representative

References

OECA Memorandum, "Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas" (September 30, 1998).

OECA Memorandum, "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (May 19, 1995).

5.1.E.1 Remedial Project Manager

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

The RPM shares with regional counsel the role of educating the PRPs about EPA's negotiating position and providing pertinent PRP and site information. The RPM also may help the PRPs organize into a steering committee, and should encourage the formation of a PRP steering committee in nearly all cases. The RPM, in conjunction with 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 (AR) for selection of response. The RPM's role in the timing of SNLs and the ensuing formal negotiation period is discussed in detail later in this chapter.

In the circumstance where a decision has been made to perform an RI/FS, the RPM also participates in developing the case referral packages for section 106 and 107 litigation cases. The RPM works jointly with regional counsel to develop the technical information in support of a referral package for section 106 and 107 litigation cases. The RPM and regional counsel work together 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.

5.1.E.2 Regional Attorney

Regional counsel, in partnership with the RPM, plays a central role in all phases of the RI/FS negotiations. Regional counsel's primary responsibility is to provide legal advice during the negotiation process to ensure that the process complies with CERCLA and to negotiate non-technical aspects of the legal agreement.

5.1.E.3 Office of Site Remediation Enforcement

OSRE is responsible for ensuring that settlements negotiated by EPA regions are consistent with national policy. OSRE attorneys are usually not involved in RI/FS negotiations, but may participate in them when the negotiations present complex or nationally significant issues and assist regional counsel in pre-referral matters.

5.1.E.4 Department of Justice

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 through AOs rather than CDs. DOJ approves compromises of certain past costs in RI/FS orders in accordance with CERCLA section 122(h)(1).

5.2 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 Remedial Design (RD) and Remedial Action (RA) negotiation process, which is discussed in Chapter 8, RD/RA Negotiations/Settlement.

5.2.A Decision to Start the RI/FS

The decision to initiate RI/FS activities is made in the course of preparing the annual Superfund Comprehensive Accomplishments Plan (SCAP). The SCAP process is discussed in Chapter 16, Targeting Accomplishments and Measuring Performance. The RI/FS start, as planned in 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 may be necessary. Negotiation planning usually is initiated six to nine months prior to the planned RI/FS start date in the SCAP. When planning an RI/FS start, RPMs should keep in mind that, in cases where the SNL procedure is implemented and a GFO 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 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 SCAP as a National Priorities List (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? What is the likelihood of finding viable PRPs?
- **PRP Capabilities** - Are PRPs qualified and prepared to undertake the RI/FS?
- **Willingness of the PRPs to Cooperate** - What is the likelihood of settlement? What is the basis for this conclusion?

The decision to start an RI/FS involves the SCAP coordinator (or IMC), section chiefs or team leaders, and branch chiefs. The Superfund Program Manager grants final approval on RI/FS start decisions.

5.2.B Intergovernmental Review

The Code of Federal Regulations sets forth the intergovernmental review process for the Superfund program. The process applies to all Fund- or state-designated agency-lead remedial projects, including Fund-lead RI/FSs. RPMs should initiate the intergovernmental review process during settle-

ment negotiations so that it will already be under way if Fund monies are used for site response activities. The regulation does not apply to responsible parties, however, and their activities are not subject to its notification and review procedures.

References

40 Code of Federal Regulations Part 29 ("Intergovernmental Review of the Environmental Protection Agency Programs and Activities").

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).

5.2.C Formation of the Case Team

Primary responsibility for developing settlements rests with the case or negotiation team. The team usually consists of the RPM and regional counsel. Additionally, a Civil Investigator may work closely with the Case Team to manage or support the PRP search. The primary responsibilities of the Case Team follow.

PRP Search

- Ensure that the PRP search is as complete as possible, 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, AOs, or CDs, in advance of negotiations.
- Conduct negotiations and maintain deadlines.

The Case Team also assumes a coordinating role in facilitating a site's progress through the enforcement process. As part of this role, 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 than others to result in signed AOCs. The RI/FS negotiation plan is also discussed in Chapter 3, Establishing CERCLA Liability, and is included as an appendix to this chapter.

5.2.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 SNLs. 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, especially about current ownership of the site, must be reviewed and updated regularly.

Information requests (104(e) letters) 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 GNL. Issuance of the information request letter prior to the GNL is especially encouraged in situations where information from PRPs is necessary to determine whether the issuance of a GNL is appropriate. Issuance of the GNL marks the point at which EPA has sufficient evidence to make a preliminary determination that a party is a PRP. Information request letters are discussed at length in Chapter 4, PRP Search, Notification, and Information Exchange.

5.2.E Issue General Notice

The GNL informs PRPs of their potential liability, may begin or continue the process of information exchange, and initiates the process of "informal negotiations." Informal negotiations are any discussions that are not conducted as part of the negotiation moratorium triggered by issuance of special notice under CERCLA section 122(e). GNLs should be issued at the vast majority of all sites that are proposed for or listed on the NPL.

The GNL identifies a party as a PRP and informs the recipient of its potential liability for all response activities and costs incurred by the government. GNLs should be sent to all parties for whom there is sufficient evidence to make a preliminary determination of potential liability under CERCLA section 107. The RPM, in consultation with regional counsel, should issue the general notice to PRPs as soon as possible. Agency guidance sets forth a model GNL. It is advisable to omit the demand for payment in any notice letter sent to a debtor or bankruptcy trustee as such a demand may be regarded as an act to collect payment of a pre-bankruptcy petition debt. Such acts are prohibited by the automatic stay provision of Bankruptcy Code section 362(a). The procedure for issuing GNLs and their contents are discussed in detail in Chapter 4, PRP Search, Notification and Information Exchange.

References

OSRE Memorandum, "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (February 5, 1998).

OECA Memorandum, "Guidance on EPA Participation in Bankruptcy Cases" (September 30, 1997).

OSWER Directive 9835.12-01a, "Revised Policy on Discretionary Information Release Under CERCLA" (March 31, 1993).

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

OSWER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988).

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

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

5.2.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 GNL, 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 make that information known to the steering committee.

Establishment of PRP steering committees provides several logistical and tactical advantages to the negotiation process, including:

- A central point for dissemination of information and government decisions.
- A single point of issuance of PRP proposals and decisions.
- A forum in which PRPs may negotiate among themselves to determine allocations among their own members.
- The opportunity for experienced PRPs to educate less-experienced PRPs.

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 leadership 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.

Reference

OSWER Directive 9835.12-01a, "Revised Policy on Discretionary Information Release Under CERCLA" (March 31, 1993).

5.2.G Followup 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. Such leads should be pursued only where they appear fruitful, 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.

5.2.H Natural Resource Trustees

Natural resource trustees and their responsibilities are identified and described in NCP Subpart G and Executive Order 13016, August 28, 1996, which delegated authority to issue CERCLA section 106(a) UAOs to natural resource trustees. EPA is not a trustee for natural resources under CERCLA. The trustees most frequently involved with CERCLA activities are the Department of the Interior, the Department of Agriculture, and the Department of Commerce, which has delegated its responsibilities to the National Oceanic and Atmospheric Administration (NOAA). CERCLA section 104(b)(2) requires that the trustees be notified of releases of hazardous substances that have the potential for 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 PRPs. CERCLA does not give EPA the authority to negotiate on behalf of the trustees. The RPM and regional counsel should ensure that coordination with the trustees is maintained throughout the remedial process. The coordination process established in EPA's Memorandum of Understanding (MOU) with NOAA should be followed when interacting with that Agency. Additional MOUs may be negotiated with other federal trustees. Until these MOUs are completed, however, the coordination sequence contained in the EPA-NOAA MOU should be used as the model for coordination with other natural resource trustees.

Reference

OSWER Directive 9295.0-02, "Memorandum of Understanding (MOU) between EPA and NOAA" (April 1992).

5.2.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. Once 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, 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 Applicable or Relevant and Appropriate Requirements (ARARs), when available, and risk-related factors.

Development of site objectives and the site management strategy should be conducted in light of the numerous guidance documents the Agency has produced to assist, and realize cost and time savings, in performing RI/FSs.

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 management 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. The site management strategy should also set forth how the RI may contribute to the PRP search, i.e., producing evidence of PRP liability or identifying additional PRPs. This would be particularly appropriate at sites at which all of the sources of contamination are not yet well defined.

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 in 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

"Multi-Phase Extraction (MPE) Technology Selection for the VOCs in Soil and Ground Water Presumptive Remedy," Draft Final (January 1997).

"Landfill Presumptive Remedy Saves Time and Cost," EPA 540-F-96-017.

"Application of the CERCLA Municipal Landfill Presumptive Remedy to Military Landfills," EPA 540-F-96-020.

"Presumptive Response Strategy and Ex-Situ Treatment Technologies for Contaminated Ground Water at CERCLA Sites," EPA 540-R-96-023.

"User's Guide to the VOCs in Soils Presumptive Remedies," EPA 540-F-96-008.

OSWER Directive 9355.4-14FSA, "Quick Reference Fact Sheet" (July 1996).

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)" (July 26, 1996).

OSWER Directive 9355.4-23, "User's Guide" (April 1996).

"Soil Screening Guidance: Technical Background Document," EPA 540-R-95-128.

"Presumptive Remedies for Soils, Sediments, and Sludges at Wood Treater Sites," EPA 540-R-95-128.

"CERCLA Landfill Caps RI/FS Data Collection Guide," EPA 540-F-95-009.

"Presumptive Remedy for CERCLA Municipal Landfill Sites," EPA 540-F-93-035.

"Site Characterization and Technology Selection for CERCLA Sites With Volatile Organic Compounds in Soils," EPA 540-F-93-048.

"Policy and Procedures," EPA 540-F-93-047.

"Technology Selection Guide for Wood Treater Sites," EPA 540-F-93-020.

OSWER Directive 9234.2-25, "Guidance for Evaluating the Technical Impracticability of Ground Water Restoration" (September 1993).

"Presumptive Remedies for Municipal Landfill Sites," *Superfund Accelerated Cleanup Bulletin:* Volume 2, Number 1 (February 1993).

"Presumptive Remedies," *Superfund Accelerated Cleanup Bulletin* (August 1992).

"Presumptive Remedies for Wood Treatment Facilities," *Superfund Accelerated Cleanup Bulletin* (May 1992).

"Presumptive Remedies for Municipal Landfill Sites," *Superfund Accelerated Cleanup Bulletin:* Volume 1, Number 1 (April 1992).

"Conducting RI/FS for CERCLA Municipal Landfills," EPA 540-P-91-001.

OSWER Directive 9355.3-01FS1, "Getting Ready - Scoping the RI/FS" (November 1989).

OSWER Directive 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988).

5.2.J RI/FS Statement of Work

The RI/FS SOW describes the broad objectives, general activities to be undertaken, and deliverables to be submitted by PRPs as part of the RI/FS. The SOW should be prepared before issuance of special notice and included in the notice letter when issued to the PRPs. Agency guidance sets forth a model SOW, the major components of which are set forth in **Exhibit 5-3**.

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 RPM 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 9835.8, "Model Statement of Work for a Remedial Investigation and Feasibility Study Conducted by Potentially Responsible Parties" (June 2, 1989).

OSWER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies" Interim Final (October 1988).

5-3 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 INVOLVEMENT

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 Report

TASK 4: BASELINE RISK ASSESSMENT

ACTIVITIES:

- Contaminant Identification and Documentation
- Exposure Assessment and Documentation
- Toxicity Assessment and Documentation
- Human Health Risk Characterization
- Environmental Evaluation

5-3 (cont.) 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 Evaluation Criteria and Document Analysis
- Compare Alternatives Against Each Other and Document Comparison of Alternatives

DELIVERABLES:

- Draft Feasibility Study Report

TASK 8: OVERSIGHT ACTIVITIES

5.2.K Risk Assessments

Current Agency policy allows PRPs to conduct risk assessments at most sites where they are performing the RI/FS, and no longer requires regions to consult the Office of Emergency and Remedial Response (OERR) before authorizing PRPs to do so. The decision whether to allow a PRP to conduct the risk assessment is site-specific and must ensure compliance with section 104(a)(1) of CERCLA, which states that "no remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS." Agency guidance sets forth six criteria that regions should consider when deciding whether to allow a PRP to perform a risk assessment:

- EPA's prior experience with the requesting PRP at this or other sites and in particular whether excessive oversight and revisions were necessary when that PRP previously conducted a risk assessment.
- PRP or PRP contractor's experience in conducting acceptable human health and ecological risk assessments at Superfund sites.
- PRP or PRP contractor's willingness to follow current Superfund risk assessment processes and guidances.
- PRP or PRP contractor's demonstrated ability to submit data to EPA in the proper format.
- Available EPA resources and schedule for RI/FS completion.
- Level of public concern at the site.

The Risk Assessment Guidance for Superfund (RAGS) Human Health Evaluation Manual Part D: Standardized Planning, Reporting, and Review of Superfund Risk Assessments establishes a process for using spreadsheet software to develop analytical schemes for risk assessments at Fund-lead, PRP-lead, Federal Facilities, and RCRA Corrective Action sites. It enables RPMs and risk assessors to scope and plan risk assessments, formulate problems, and develop conceptual site models as part of a continuing relationship that also expands stakeholder involvement. Tables generated by the software applications serve as the basis for interim deliverables for risk assessment contractors and form part of the Comprehensive Environmental Response, Compensation, and Liability Information System 3/Waste Local Area Network (CERCLIS 3/WasteLAN) data base.

The Agency is currently drafting supplements to RAGS covering involvement of community stakeholders, consideration of land use, establishment of background for risk assessment, use of uncertainty/probabilistic analysis, and standardization of approaches for lead-contaminated sites. The supplement on community involvement should be finalized during the second quarter of FY1999 and the others by the end of calendar 1999. The Agency is also drafting a concise, user-friendly reference document on practices that can help to increase public participation in risk assessments. This document should be finalized during the second quarter of FY1999. Once available, these resources should guide development of the SOW.

References

Federal Facilities Restoration and Reuse Office Memorandum, "Use of Risk-Based Methodologies in Setting Priorities for Cleanup Actions at Federal Facilities" (May 21, 1998).

OSWER Directive 9285.7-01D, Risk Assessment Guidance for Superfund (RAGS) Human Health Evaluation Manual Part D: Standardized Planning, Reporting, and Review of Superfund Risk Assessments (January 1998).

OSWER Directive 9340.1-02, "Revised Policy on Performance of Risk Assessments During Remedial Investigation/Feasibility Studies (RI/FS) Conducted by Potentially Responsible Parties" (January 26, 1996).

5.2.L Draft Administrative Orders

The terms and conditions governing the RI/FS activities of PRPs should be specified in an AOC. AOCs are the preferred settlement document for RI/FS activities because EPA may enter into AOCs under its own authority. In limited circumstances, EPA may issue a UAO to compel a PRP to perform an RI/FS.

The Case Team should prepare a draft AOC before special notice is sent. Agency guidance sets forth a model AOC, and most regions also 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 for inclusion in the special notice to the PRPs. RPMs must coordinate closely with regional counsel in preparing the draft AOC.

In addition to the SOW, which outlines the activities to be performed, the AOC usually 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** - identifies the site and parties involved, and describes the response action.
- **Jurisdiction** - describes EPA's authority to issue the order.
- **Parties Bound** - describes to whom the agreement applies and whom it binds.
- **Statement of Purpose** - describes the purpose of the order in terms of mutual objectives in preparing an RI/FS.
- **Findings of Fact** - provides an outline of facts upon which the order is based.
- **Conclusions of Law and Determinations** - specifies that the site is a "facility," wastes are "hazardous substances" 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** - provides that EPA may require PRPs to perform response actions in addition to those required by the initially approved work plan if EPA determines that such actions are necessary for a complete RI/FS.
- **Quality Assurance (QA)** - 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 AR Requirements** - specifies that EPA release the RI/FS and prepare 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 AR requirements of CERCLA section 113.
- **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 settlement 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. The settlement should also provide for access to the site by EPA contractors and specify actions EPA might take to gain access. In developing these provisions, the Case Team should consider access needs and the cooperation of the parties owning property to which access might be required. This section also stipulates that the PRPs shall submit to EPA in the subsequent monthly progress report all results of sampling, modeling, tests, or other data; that the PRPs waive any objections to data that are verified according to the QA/quality control procedures required by the AOC or any EPA-approved work plans or sampling and analysis plans; and that EPA may take split or duplicate samples.
- **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 10 years after commencement of the RA, 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*** - defines what constitutes an acceptable delay not subject to penalties; stipulates that the PRPs shall notify EPA of any event that occurs that might 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 of past response costs incurred by the government.
- **Reimbursement of Response and Oversight Costs** - provides for reimbursement of government costs in connection with the RI/FS, including review and oversight. Cost categories and documentation to be provided by EPA should be included. The Agency's policy is to bill PRPs on an annual basis and offer to discuss oversight expectations for the upcoming year.
- **Reimbursement Petition** - stipulates that PRP/respondent agrees not to file a reimbursement petition under CERCLA section 106(b).
- **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 AOC is not considered an admission of liability.
- **Other Claims** - states that the AOC does not release any party from liability except a signatory of the order.
- **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 AOC 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 AOC shall terminate when the PRP demonstrates in writing that all work has been performed and EPA approves.

References

OSWER Directive 9340.1-02, "Revised Policy on Performance of Risk Assessments During Remedial Investigation/Feasibility Studies (RI/FS) Conducted by Potentially Responsible Parties" (January 26, 1996).

OSWER Directive 9835.3-1A, "Model Administrative Order on Consent for Remedial Investigation/Feasibility Study" (January 30, 1990).

Office of Enforcement and Compliance Monitoring Memorandum, "Use of Stipulated Penalties in EPA Settlement Agreements" (January 24, 1990).

OSWER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988).

5.2.M Issue Special Notice

The SNL procedure authorized by CERCLA section 122(e) 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. Certain investigatory and planning activities might occur during the negotiation moratorium, including any "additional studies" as set forth in CERCLA section 104(b). 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 used whenever it would facilitate agreement. Regions may choose to negotiate agreements on RI/FS and RD performance at the same time. If EPA does not issue a special notice, the region must notify PRPs accordingly.

The RI/FS negotiation moratorium may last 90 days if EPA receives a 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 SNL should specify the calendar date through which the moratorium runs. If there are multiple PRPs and they are likely to receive the special notice on different days, the region may consider beginning the moratorium 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.

RPMs and regional counsel should manage negotiations from the outset so that PRPs understand the negotiation ground rules and the Agency's expectations. Schedules should be established and adhered to so that active negotiations are not delayed until the end of the moratorium. RPMs and regional counsel should strongly emphasize to PRPs that GFOs will not be rubber-stamped, extensions of the negotiation moratorium will not be granted as a matter of course, and negotiations will cease when the moratorium expires.

In cases where EPA decides it is inappropriate to issue the special notice, the Region must notify PRPs in writing of the decision. CERCLA section 122(a) provides that the notice indicate the reasons why the region determined that issuing the special notice and entering into formal negotiations was not appropriate. Agency guidance sets forth 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 AR coordinator for placement in the AR.

In general, EPA policy is to issue SNLs 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 enactment of SARA and ongoing negotiations would not benefit by issuance of special notice.

The RPM also must notify the state of the negotiations and provide the state with the opportunity to participate.

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.

References

OECA Memorandum, "Guidance on EPA Participation in Bankruptcy Cases" (September 30, 1997).

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

5.2.N 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 PRPs qualifications and willingness to undertake the RI/FS. A GFO for the RI/FS normally should contain the following elements, which EPA should request in the SNL:

- A statement of the PRPs' 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 PRPs' technical capability to undertake the RI/FS, including identification of the firm(s) that might actually conduct the work or a description of the process they will use to select the firm(s).

- A demonstration of the PRPs' capability to finance the RI/FS.
- A statement of willingness by the PRPs to reimburse EPA for costs incurred in connection with the PRPs' conduct of the RI/FS, including oversight.
- The name, address, and phone number of the party or steering committee that will represent the PRPs in negotiations.

If EPA determines (1) that the offer constitutes a GFO based on the above elements, and (2) that continuing negotiations will be beneficial, the region may approve a 30-day extension of 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 (RA) may approve extending negotiations for an additional 30 days beyond the 90-day moratorium. Extensions are granted only in very rare circumstances and for short duration where final agreement is imminent; in no case should negotiations exceed 120 days. PRPs should be advised that the moratorium on unilateral EPA commencement of an RI/FS expires at the end of the 90-day moratorium notwithstanding the second 30-day extension. Requests for extensions to the formal negotiation period should be made in writing by the Case Team to the RA. 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 RA will approve or deny the extension based on the information presented in the request. Headquarters concurrence is no longer required before issuing a second 30-day extension of the negotiation moratorium for RI/FS negotiations.

In cases where a GFO is rejected based on the criteria outlined in Agency guidance on PRP participation in conducting RI/FSs, the Case Team must determine whether the PRPs are indeed negotiating in good faith and whether to continue negotiation efforts.

Under CERCLA section 122(h)(1), the Agency may compromise and settle a claim under CERCLA section 107 for past and future response costs if the case has not been referred to DOJ for further action. In cases where total response costs of the United States exceed $500,000 (excluding interest), claims may be compromised (i.e., settled for less than 100 percent of total costs) only after approval by DOJ. DOJ is not required to review an AO for PRP conduct of an RI/FS.

References

OSRE Memorandum, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (September 30, 1998).

OSWER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" Interim Final (October 1988).

5.2.O 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 promptly and properly. RPMs should consider whether the following conditions for PRP conduct of the RI/FS are met.

5.2.O.1 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 of the SOW that are not consistent with CERCLA, the NCP, and requirements set forth in Agency guidance.

5.2.O.2 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. In addition, 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 PRPs' demonstration of their technical, managerial, and financial capabilities might be the first deliverable under the settlement.

In addition to the PRPs' technical and managerial capabilities, the Agency will have considered their ability to objectively address certain issues in drafting the order. Tasks that the Agency should pay special attention to and consider reserving for itself include determination of ARARs and the effectiveness of institutional controls.

5.2.O.3 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.

5.2.P Negotiations Outcome: PRP-Lead RI/FS

Negotiations that result in settlement are concluded by signature of an AOC or entry of a CD committing the PRPs to conduct the work and reimburse the government's costs.

Once PRPs have signed the settlement document, the agreement must go through the regional concurrence chain and ultimately be signed by the RA, unless his/her authority has been re-delegated. If the settlement document is a CD, it will be finalized in coordination with DOJ's Environmental Enforcement Section.

Although it is preferable not to have uncooperative PRPs conducting the investigatory work of the RI/FS, in limited circumstances section 106 UAOs may be issued to achieve PRP conduct of RI/FS activities.

Current Agency policy requires documentation of decisions to exclude any PRPs from a UAO or not to issue a UAO to late-identified PRPs after other PRPs have assumed responsibility for conducting the response action.

Reference

OSRE Memorandum, "Documentation of Reason(s) for Not Issuing CERCLA 106 UAOs to All Identified PRPs" (August 2, 1996).

5.2.Q Negotiations Outcome: Fund-Lead RI/FS

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 or continue a period of informal negotiations, if appropriate. Initiation of Fund-financed activity is possible only if provisions have been made for the activity in SCAP. A 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.

5.3 Planning and Reporting Requirements

This section discusses the planning and reporting requirements associated with the RI/FS negotiation process.

5.3.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 16, Targeting Accomplishments and Measuring Performance. 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 of 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 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 might 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. Proper planning entails achieving a balance between Fund- and PRP-lead targeted RI/FSs.

RPMs should anticipate the extent of contractor involvement in the issuance of GNLs and SNLs, development of the SOW, and evaluation of PRP engineering qualifications. In addition, RPMs should note that separate work assignments must be initiated for RI/FS negotiation and oversight of PRP RI/FSs. The initiation of separate work assignments is necessary for tracking and recovery of oversight costs.

If needed, contractor support generally is available through Enforcement Support Services contractors, other federal agencies (e.g., United States Army Corps of Engineers) under Interagency Agreements (IAGs), or states under Cooperative Agreements. 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 6, RI/FS Implementation. PRPs are required by the statute to pay for EPA's costs in connection with the RI/FS, including oversight.

5.3.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 the Comprehensive Environmental Response, Compensation and Liability Information System 3/Waste Local Area Network (CERCLIS 3/WasteLAN). **Exhibit 5-4** summarizes SCAP measures relevant to RI/FS negotiations. RPMs are responsible for ensuring that accurate data are reported into CERCLIS 3/WasteLAN. The RPMs should enter 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 CERCLIS 3/ WasteLAN. The start of RI/FS negotiations should be planned site-specifically. This is a SCAP reporting measure.

5-4 SCAP Measures for RI/FS Negotiations

Activity	SCAP Final/Report	Quarterly	Annual
RI/FS Negotiation Start	X	X	X
RI/FS Negotiation Completion	X	X	X

RI/FS Negotiation Start and RI/FS Negotiation Completion are defined as follows:

- **RI/FS Negotiation Start** - RI/FS negotiations start when the first SNL is signed, or a waiver of SNL is signed.
- **RI/FS Negotiation Completion** - The RI/FS negotiation ends when the following have been accomplished.
  - A UAO for RI/FS is signed by the RA (a UAO is not the preferred enforcement tool for RI/FS and should be used only under unique circumstances).
  - An AOC for RI/FS is signed by the RA or other delegated official.
  - A signed CD for RI/FS is referred by the region to OSRE 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 RA signs the order, the date on the transmittal letter referring the CD, or the date on which funds for RI/FS are obligated.

The RI/FS negotiation outcomes are also tracked by SCAP. A matrix of SCAP measures relevant to RI/FS negotiation outcomes is presented as **Exhibit 5-5**.

5-5 SCAP Measures for RI/FS Negotiation Outcomes

Activity	SCAP Final/Report	Quarterly	Annual
Total Response Settlements (CD, AOC, UAO)	X	X	X
State Orders for Expanded Site Inspection/RI/FS	X	X	X

RI/FS negotiation outcomes are defined as follows:

- **AOC and UAO** - Enforcement tools used to compel PRPs to assume responsibility for removal actions and RI/FS projects. Report CERCLA section 104/106/122 AOs (AOCs and UAOs) issued by EPA for PRPs to conduct removal actions and/or RI/FSs. Credit for an order is based on the date it is signed by the RA as recorded in CERCLIS 3/WasteLAN. Projections for AOs for RI/FS are made site specifically.
- **CD** - Judicial agreement between EPA and PRPs requiring PRPs to conduct the RI/FS. Credit is based on the CD start date as recorded in CERCLIS 3/WasteLAN (i.e., the date the RA signs the transmittal memo to Headquarters or DOJ).
- **State Orders for Expanded Site Inspection (ESI)/RI/FS** - Agreements between a state and PRPs requiring the PRPs to conduct the ESI or RI/FS. Credit is given as of the completion date recorded in CERCLIS 3/WasteLAN (i.e., when the last state official signs the agreement).

For specific coding requirements into CERCLIS 3/WasteLAN, see the SCAP/OIL Quick Reference Coding Guide or your IMC.

Reference

OSWER Directive 9200.3-14-1D, *Superfund/Oil Program Implementation Manual* (updated biennially).

SCAP/OIL Quick Reference Coding Guide.

5.4 Potential Problems/Resolutions

This section discusses specific issues the Case Team might confront during the course of RI/FS negotiations and suggests methods for resolving these issues.

5.4.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 (e.g., reporting requirements, implementation of construction requirements) as well as the amounts per violation per day should be specified as stipulated penalties in the agreement. CERCLA section 122 also allows EPA to seek or impose civil penalties for violations of AOs.

5.4.B Past Costs

In many cases, EPA has incurred significant costs at a site prior to settling with PRPs for performance or financing of the RI/FS. Such costs might include the conduct of one or more removal actions or actions taken under section 7003 of the Resource Conservation and Recovery Act. 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 issuance of the SNL, and include them in the letter as a demand. In negotiations, the Case Team should consider the numbers of settlors and non-settlors, the likely statute of limitations for the removal action, the possible implications of cost recovery litigation on remedial activities, and possibilities of reallocation in RD/RA negotiations; in particular, the Case Team must remember that a removal action does not attract the six-year, RA limitation period unless the RA commences within three years after completion of the removal action.

5.4.C RI/FS Oversight Costs

The cost of EPA or state oversight is often a major issue during RI/FS negotiations. Although PRPs typically seek to cap their responsibility for oversight costs, section 104(a)(1) of CERCLA expressly provides that PRPs may perform an RI/FS only if they agree to reimburse "any cost incurred" in connection with RI/FS oversight.

The projected amount of EPA/state oversight and procedures for oversight billing should be discussed thoroughly during RI/FS negotiations. In all cases, the nature and degree of oversight should be appropriate for the work being performed; regions should strive to use oversight resources in a cost-effective manner. Oversight costs include amounts spent on Agency contractors.

5.4.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 might 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.

5.4.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 might include determinations and evaluations of conditions that are unknown at the time of execution of the agreement. Modifications of 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 of 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 that the PRPs agree to undertake.

The order may not provide that there will not be an investigation of potential problem areas.

5.5 Activities Checklist

RPMs should use this activities checklist as a guide when involved in RI/FS negotiations. It is not intended to provide an exhaustive list of procedures, nor is it meant to be a chronological list of tasks. Reportable data should be entered into CERCLIS 3/WasteLAN throughout the negotiation process.

1)_____ Decision to start the RI/FS.

- a)_____ Is the RI/FS start planned in 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 GNLs.
- 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 SNLs.
- b)_____ Evaluate GFO.
- c)_____ Request negotiation extension, if appropriate.

7)_____ Conclude negotiations.

- a)_____ Prepare AO for signature.
- b)_____ Initiate Fund-financed activity, if appropriate.

Appendix: RI/FS 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-lead RI/FS relative to site and PRP history to date.
- c)_____ Identify potential for alternative settlements, including mixed funding, de minimis, "de micromis," 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 SOL, etc.

4)_____ Remedy Selection Process.

- a)_____ Discuss the methodology used in selecting a site remedy (identifying participants in RI/FS review; ROD preparation; PRP and public participation in the process; and compilation, review, updating, and certification of the AR).
- b)_____ Indicate how remedy selection affects the RD/RA negotiation process.

5)_____ Criteria For GFO. Include PRPs' willingness to conduct or finance site cleanup activities and reimburse EPA for oversight activities, response to EPA's SOW, demonstration of PRP capabilities, etc.

6)_____ Enforcement Prerequisites.

a)_____ Discuss the progress made in identifying PRPs and their 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 SOW or work plan.

b)_____ Describe key items required to conduct PRP oversight.

c)_____ Assess the site access situation.

8)_____ Draft AO or CD as appropriate.

6. RI/FS Implementation

Chapter 6 RI/FS Implementation

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Chapter 6 RI/FS Implementation

6.1 Description of Activity

6.1.A Introduction

This chapter focuses on the Remedial Project Manager's (RPM's) role in overseeing the implementation of a Potentially Responsible Party (PRP)-conducted Remedial Investigation and Feasibility Study (RI/FS). To put the oversight responsibilities in context, a summary of the RI/FS process is also provided.

A PRP-conducted RI/FS may be ordered unilaterally under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), but is usually authorized and governed by an Administrative Order on Consent (AOC) under sections 104 and 122. The terms and conditions governing RI/FS activities may be specified in a Consent Decree (CD), but an AOC is the preferred settlement document.

The purpose of oversight is to ensure that an RI/FS prepared by a PRP is functionally equivalent to the RI/FS that EPA would have prepared if the site were Fund-lead. The RI/FS must comply with CERCLA, the National Contingency Plan (NCP), Agency guidance, and all settlement agreements or orders.

RPM management of the RI/FS begins in preliminary scoping before a Special Notice Letter (SNL) or General Notice Letter (GNL) has been sent to the PRP. Actual PRP implementation of the RI/FS begins after the AOC 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).

RPMs have a wide range of discretion in the type and amount of oversight they conduct at PRP-lead sites. The appropriate level of oversight will depend on numerous considerations including, but not limited to, PRP performance, site complexity, degree of risk, community involvement, and technologies used. RPMs are responsible for managing oversight in a cost-effective manner that ensures that selected remedies will be effective and protective of human health and the environment. The Superfund Administrative Reform on PRP oversight affirms RPMs' responsibility to strive to work cooperatively with settling PRPs to maximize the efficiency of site work and minimize the cost of oversight.

References

Office of Site Remediation Enforcement (OSRE), "Superfund Reforms Annual Report FY1997."

Office of Solid Waste and Emergency Response (OSWER) Directive 9835.1(c), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 1 (July 7, 1991).

OSWER Directive 9835.1(d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 2 (July 7, 1991).

OSWER Directive 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988).

6.1.B RI/FS Overview

In general, the RI/FS is an investigation designed to characterize a site, assess the nature and extent of the contamination, evaluate the potential risk to human health and the environment, and develop and evaluate potential remedial alternatives. An RI/FS generally serves two primary purposes:

- Provides information to assess the risks posed to public health and the environment by the site.
- Presents and evaluates a range of remedial alternatives (treatment, engineering controls, institutional controls, or a combination of these, plus a no-action alternative) based on specified site criteria (for source control actions, see section 300.430(e)(3) of the National Contingency Plan (NCP)).

The process is composed of the RI, which is the actual field data collection and 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 may in turn affect 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 from site to site, and are phased in accordance with a site's complexity and the amount of available information. A phased RI/FS process 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 to evaluate and compare remedial alternatives.

The RI/FS is an enforcement document as well as a technical one; it defines the universe of PRPs and develops evidence of each PRP's liability by documenting the presence and sources of contaminants at the site. Information gathered during the RI can advance the PRP search, especially at sites where contaminants or sources are not yet well defined. Accordingly, the RPM should coordinate RI/FS and PRP search activities.

6.1.C Phases of RI/FS Activity

Generally, there are seven major phases of RI/FS activity. Each phase is briefly summarized below and graphically depicted in **Exhibit 6-1**. The oversight guidance referred to above has a chapter on each phase.

6.1.C.1 Pre-RI/FS Negotiation Scoping

Pre-RI/FS scoping should begin several months before an SNL or GNL for an RI/FS has been sent out to the PRP, and is generally completed when the RPM does the following:

- Obtains a general understanding of the site using the existing information and determines, generally, the data needed to make a remedy selection decision.
- In some Regions, 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 Statement of Work (SOW) and draft AOC.

Pre-RI/FS negotiation scoping is often the initial task performed internally by the RPM, frequently with the help of the support contractor. Generally, 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 scoping effort 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 an SOW, and resource needs can be determined.

6.1.C.2 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 an SOW, has been signed by EPA and the PRP. During this phase, the RPM (with the help, as appropriate, of an oversight assistant), members of the TST, and the PRP refine 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 in developing project plans that are subject to EPA's review, comment, and approval. Many of the activities begun during the scoping process (i.e., preliminary risk assessment, determination of need for treatability studies, identification of Applicable or Relevant and Appropriate Requirements (ARARs)) are continued and refined as site work progresses and new information is obtained.

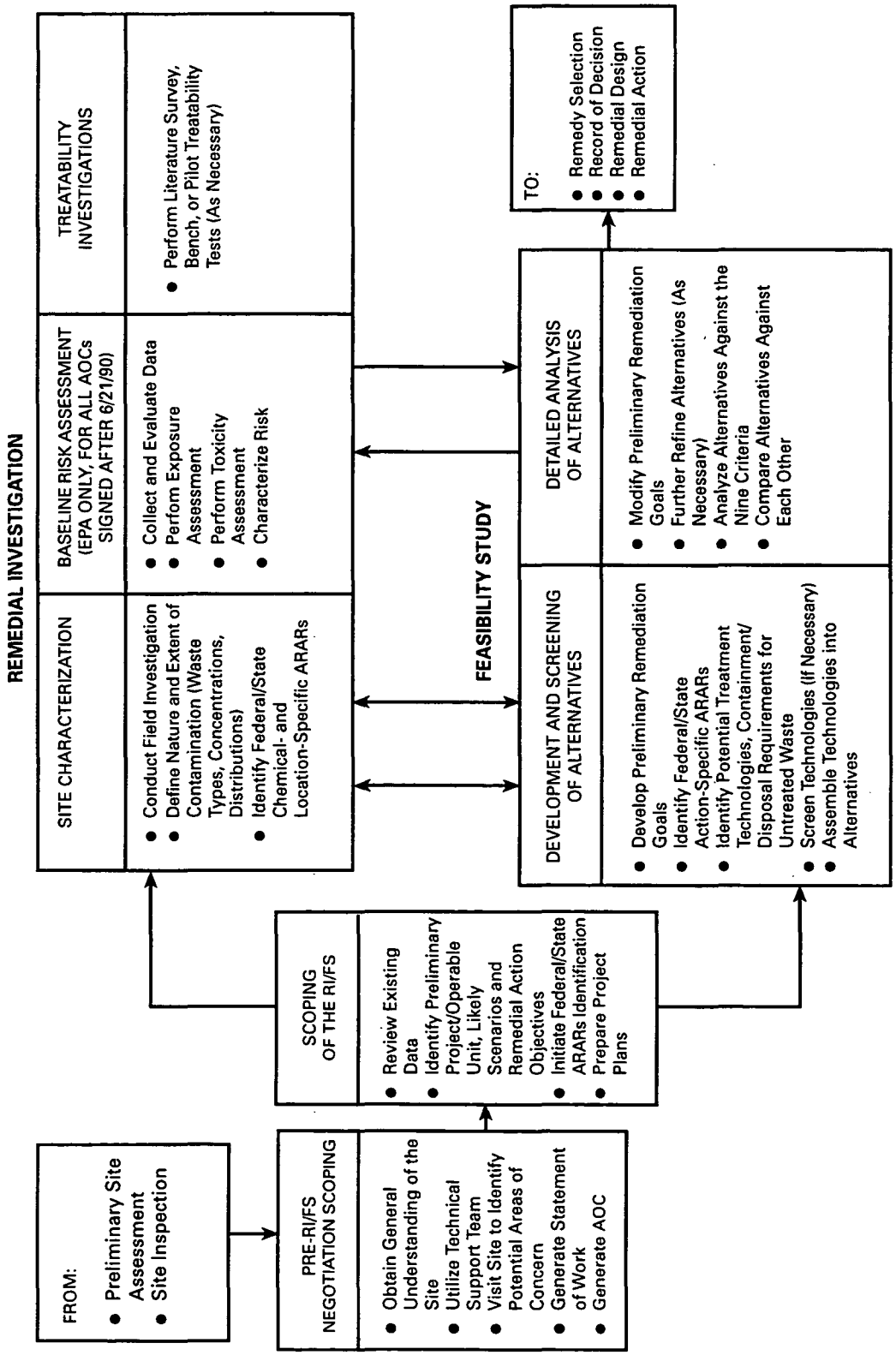
6.1.C.3 Site Characterization

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 collected during site characterization also contributes to other analyses, including EPA's baseline risk assessment, treatability investigations, and the natural resource trustee survey. Thorough and accurate site characterization assures that the FS can be completed and conducted without gathering additional information.

6.1.C.4 Baseline Risk Assessment

The purpose of the baseline risk assessment is to characterize the current and future 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. (The NCP, section 300.430(e)(2)(i)(A)(2) defines the acceptable exposure levels for known and suspected carcinogens

6-1 Phased RI/FS Process



as those representing a maximum lifetime cancer risk to an individual of between 10^{-4} and 10^{-6}.) If the baseline risk assessment indicates that action is necessary, remediation goals for each contaminant are established as criteria in evaluating how each viable alternative will address the risk(s). PRPs may conduct risk assessments at most sites where they are performing the RI/FS, and regions are no longer required to consult Headquarters before permitting them to do so. See Chapter 5, RI/FS Negotiations/ Settlement ("Risk Assessments") and "Risk Assessment" below.

6.1.C.5 Treatability Investigations

Treatability studies, if needed, are conducted during the RI and should provide the data needed to evaluate one or more treatment technologies during the development, screening, and detailed analysis in the FS. RPMs should encourage PRPs to evaluate the need for treatability studies as early in the RI/FS process as possible. If Remedial Actions (RAs) 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.

6.1.C.6 Development and Screening of Alternatives

Remedial alternatives are developed and evaluated so that relevant information concerning RA options can be presented to a decision-maker for final selection. Initial development and screening based on effectiveness, implementability, and cost should produce a range of alternatives which address the preliminary RA goals. These alternatives must then undergo a "detailed analysis of alternatives" for final screening (see below). If site-specific conditions warrant adoption of a presumptive remedy, e.g., in the case of a municipal landfill, developing a complete range of alternatives may not be necessary. RPMs should thoroughly document the grounds for deciding to adopt the presumptive remedy at a particular site.

6.1.C.7 Detailed Analysis of Alternatives

During the detailed analysis, each alternative that survives the initial screening is assessed against the nine evaluation criteria set forth in NCP section 300.430(e)(9)(iii). The PRPs should present the results of this assessment in a form 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 7, Selection of Remedy, for the list of the nine evaluation criteria.

References

National Oil and Hazardous Substance Pollution Contingency Plan (NCP), 40 Code of Federal Regulations (CFR) section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

OSWER Directive 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988). (Appendix F contains sample formats for arranging detailed analyses of alternatives.)

6.1.D Oversight Objectives

Under section 104(a)(1) of CERCLA, the Agency is responsible for providing oversight of PRP-conducted RI/FSs. The RPM has primary responsibility for managing RI/FS oversight. Others may also play an oversight role. For example, the regional attorney may have the lead role in reviewing any PRP claim of a *force majeure* event or an inability to obtain access to the site property. Other regional personnel may have primary responsibility for reviewing a PRP's documentation of financial assurance.

In FY1999, the Agency announced an initiative to ensure compliance by PRPs with orders and settlement agreements for RI/FSs, response work, and cost recovery. The oversight by RPMs and other regional personnel is critical to ensuring that PRPs meet their commitments. Each region was asked to conduct an assessment of PRP compliance with CERCLA orders and consent decrees and prepare an action plan for responding to every recent instance of substantial non-compliance.

The nature of EPA's oversight activity at a particular site varies, depending on the technical complexity of the site and feasible remedies, the nature of the work being done, the Agency's level of confidence in the PRP's technical competence, and the PRP's demonstration of work quality in the course of the project. 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 CD), 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 are being collected and analyzed to enable EPA to characterize the site, identify site risks, develop a range of alternatives, select a preferred remedial alternative, write the Proposed Plan and ROD, and make a finding of "imminent and substantial endangerment" under section 106 of CERCLA and/or section 7003 of the Resource Conservation and Recovery Act (RCRA).

Achievement of these objectives depends, in part, upon the terms of the order (or consent decree), guidance and direction provided to the PRP, and effective project review. The instrument covering the RI/FS (i.e., AOC, CD, or Unilateral Administrative Order (UAO)) will not be discussed in this chapter because it is covered in Chapter 5, 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.

Fostering a good working relationship with the PRPs can have a significant impact on the quality, timing, and costs of projects. 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. The RPM should clearly communicate guidance and expectations concerning format, technical content, mechanisms for incorporating Agency comments, and schedule of deliverables. The RPM should also explicitly offer, at least annually, to discuss with settling PRPs EPA's oversight expectations for the upcoming year and provide them the opportunity to suggest ways to improve the efficiency of the oversight process. Frequent meetings with the PRPs during the course of the RI/FS, especially when changes in work, scope, and/or oversight occur, will facilitate PRP implementation that will satisfy Agency criteria.

In addition to conducting oversight to ensure that PRP work and deliverables are acceptable and in compliance, the RPM must manage oversight in a cost-effective manner. Although this manual identifies certain tasks and deliverables as part of an overall oversight process, the RPM should use discretion and flexibility in determining to what extent, or in what format, specific tasks or deliverables should be performed in order to ensure that oversight is most effective and efficient. The RPM should also effectively manage the project to meet the RI/FS objectives within the time constraints of the AOC. Adhering to project schedule, helps keep overall project oversight costs down, and expedites the ultimate cleanup of the site.

The following are examples of opportunities to minimize oversight costs, as appropriate to the site:

- Eliminating duplicative state/federal reviews of documents.
- Eliminating interim deliverable milestones while maintaining accountability of the PRP to produce an acceptable product.
- Reducing production of documents by increasing the use of meetings, briefings, and other communication methods to identify issues early.
- Reducing the number of scheduled field visits to observe routine field activities and using occasional unannounced visits instead.
- Taking fewer split samples (using Contract Laboratory buy-ins, where available) and relying on audits instead.

References

OSWER Directive 9200.4-15, "Reducing Federal Oversight at Superfund Sites with Cooperative and Capable Parties" (July 31, 1996).

OSWER Directive 9835.1(c), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 1 (July 7, 1991).

OSWER Directive 9835.1(d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 2 (July 7, 1991).

6.1.E Roles and Responsibilities

Following is a summary of the primary roles and responsibilities of the RPM, risk assessor, oversight assistant, natural resource trustees, Agency for Toxic Substances and Disease Registry (ATSDR), and local communities during an RI/FS. **Exhibits 6-2** through **6-6**, which appear at the end of section 1, summarize these roles and responsibilities through the seven RI/FS phases. The Office of Enforcement and Compliance Assurance (OECA) updates its "Roles Memo" periodically; regional personnel should refer to it to find out when they need to consult with Headquarters.

References

Office of Enforcement and Compliance Assurance (OECA) Memorandum, "Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas" (September 30, 1998).

OECA Memorandum, "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (May 19, 1995).

6.1.E.1 Remedial Project Manager

The RPM has primary responsibility for overseeing all response activities. Prior to the signing of the agreement between EPA and the PRP, the RPM should have completed the following tasks:

- Identify the preliminary scope of RI/FS activity.
- Coordinate with the state and, as appropriate, other agencies (e.g., Department of the Interior, National Oceanic and Atmospheric Administration (NOAA), ATSDR) on scoping.
- Identify the site-specific activities and deliverables required from the PRP.
- Prepare a project schedule for the AO.
- 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.
- In consultation with regional counsel, 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 tasks during the RI/FS:

- Conduct scheduled and unscheduled site inspections in conjunction with the oversight assistant.
- Monitor PRP adherence to the agreement; consult with regional 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., risk assessment, ground water, contaminants, bedrock).
- Meet with PRPs periodically to communicate the Agency's requirements and discuss progress, including good work, deficiencies, needed work, and changes in the scope of work and corresponding oversight. Where PRPs are not in compliance with the agreement, issue a letter warning PRPs to take immediate action to ensure compliance or be subject to assessment of stipulated or statutory penalties.
- Maintain Agency schedule for reviewing deliverables or meeting any other deadlines.
- Ensure that information is updated in the Agency's tracking system, the Comprehensive Environmental Response, Compensation, and Liability Information System 3/Waste Local Area Network (CERCLIS 3/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 involvement.
- Coordinate intergovernmental involvement interactions.
- Ensure EPA management review at major stages (e.g., work plan, draft RI, Proposed Plan, ROD).
- Conduct community involvement activities with the assistance of the Community Involvement Coordinator (CIC).
- Maintain the site file, including cost recovery documentation.
- Establish and update periodically the Administrative Record (AR) in conjunction with regional counsel and the Administrative Record Coordinator.
- Finalize any supplements to the RI/FS and write the Proposed Plan and ROD.
- Ensure that bills to PRPs include appropriate documentation of oversight costs.

References

OSRE Memorandum, "Ensuring Potentially Responsible Party Compliance with CERCLA Obligations" (November 3, 1998).

Office of Enforcement and Compliance Assurance (OECA) Memorandum, "Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders" (September 30, 1997).

OECA Memorandum, "Operating Principles for an Integrated Enforcement and Compliance Assurance Program" (November 27, 1996).

OSRE Memorandum, "Transmittal of Sample Documents for Compliance Monitoring" (July 1, 1996), (See Attachment 5, "Sample Letter for Late and/or Unacceptable Deliverables.").

6.1.E.2 Oversight Assistant

The RPM may arrange for an oversight assistant to facilitate the RPM's oversight of PRP-conducted RI/FS activities. The RPM should use discretion in determining the roles and responsibilities of the oversight assistant to avoid duplicating effort or incurring unnecessary costs.

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 (QA) tasks. (Review and approval of Quality Assurance Project Plans (QAPPs) are usually performed by the region's QA Office.)
- 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 AR 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 Information Management Coordinator (IMC) for input into CERCLIS 3/ WasteLAN.

Procurement of the oversight assistant's service is typically obtained through the Superfund Technical Assistance and Response Team, Response Action Contracts, and Remedial Oversight Contracts.

The RPM also may seek assistance in executing his/her oversight responsibilities from the U.S. Fish and Wildlife Service (FWS), U.S. Geological Survey, Bureau of Land Management, and U.S. Army Corps of Engineers (USACE), among other agencies.

State agencies also often will enter into a support agency Cooperative Agreement (CA) with EPA to participate in the oversight of PRP activities. The RPM should work to coordinate with the recipient agency to minimize duplication of effort wherever possible. In some cases, it may be expeditious and cost-effective for EPA to enter into a CA for the State agency to conduct oversight instead of EPA.

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.

6.1.E.3 Regional Attorney

ARAR identification may continue throughout the RI/FS as a better understanding is gained of site conditions, contaminants, receptors, exposure pathways, and remedial action alternatives. Likewise, as hypotheses are tested and either confirmed or rejected, adjustments or choices as to the appropriate course for further investigations and analyses may be required. In coordination with the RPM and/or the support agency, the regional attorney is responsible for:

- Reviewing information gathered in the course of the RI/FS to ensure that previously identified ARARs remain applicable or relevant and appropriate with reference to the eight factors set forth in NCP section 300.400(g)(2).
- Identifying non-federal ARARs and confirming their applicability or relevance and appropriateness.
- Ensuring that the RI/FS is gathering the types of information required to evaluate potential ARARs.
- Determining whether ARARs are eligible for waivers under section 121(d)(4) of CERCLA.

The regional attorney is also responsible for determining, in coordination with the RPM, whether the PRPs are in compliance with the RI/FS AOC, and, if not, to ensure vigorous enforcement of the stipulated penalties provisions of the AOC. The regional attorney also may have the lead role in reviewing PRP claims of *force majeure* or inability to obtain access to site property.

Reference

OSRE Memorandum, "Transmittal of Sample Documents for Compliance Monitoring" (July 1, 1996).

6.1.E.4 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 (PNRSs), which are typically initiated at the beginning of the RI/FS process. These surveys, conducted by the natural resource trustees, are designed to assist the Agency in reaching comprehensive settlements of all federal natural resource claims under CERCLA.

Trustees include the federal and state governments and Indian tribes. NOAA's National Marine Fisheries Service has jurisdiction over marine and coastal fisheries, and a shared jurisdiction over anadromous fish (e.g., salmon, striped bass) and catadromous 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 FWS has jurisdiction over all migratory species and endangered and threatened species. The respective states, territorial governments, and Indian tribes should be contacted regarding other, generally non-migratory species. RPMs should confirm with regional management procedures for notifying the trustees.

6.1.E.5 Agency for Toxic Substances and Disease Registry

Under section 104(j)(6) of CERCLA, ATSDR must perform a health assessment for all National Priorities List (NPL) sites. This assessment must be performed within one year after the site is proposed for 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 ATSDR and maintain information exchange with them. RPMs must ensure that draft and enforcement-sensitive documents and materials released to ATSDR are clearly marked as such. RPMs are responsible for reviewing and commenting on the draft health assessment provided by ATSDR. Data collected during RI activities and reports generated as a result of that data collection also should be forwarded to ATSDR.

Reference

OSWER Directive 9285.4-00, "Guidelines for Conducting ATSDR Health Assessment Activities with the Superfund Remedial Process" (April 1987).

6.1.F Community Involvement

Communities may participate in the RI/FS process through Technical Assistant Grants (TAGs) and Community Advisory Groups (CAGs). TAGs provide resources to eligible communities affected by Superfund sites to acquire independent technical assistance to help them understand and comment on site-related information. More than 185 TAGs have been awarded since the program's inception in 1988. CAGs are made up of representatives with diverse community interests and provide a public forum for community members to present and discuss their needs and concerns about the decision-making process at sites affecting them. Both have proven to be effective mechanisms for facilitating participation of community members, and both have shown how community involvement

in the decision-making process can enhance, rather than impede, the site cleanup. The RPM is one of the main points of contact between the Agency and the community, and should exploit opportunities to involve them in the RI/FS process wherever possible (e.g., by reviewing and discussing SOWs).

TAGs are authorized by CERCLA section 117(e), while CAGs are a result of Round 2 of the Superfund Administrative Reforms. In FY1997, the Agency issued a revised rule that simplified the TAG application and administrative procedures, eliminating the three-year budget period, removing a 20 percent cap on TAG administrative expenses, and interpreting the Superfund Amendments and Reauthorization Act's (SARA's) "one TAG per site" language to allow multiple, non-current grant applications.

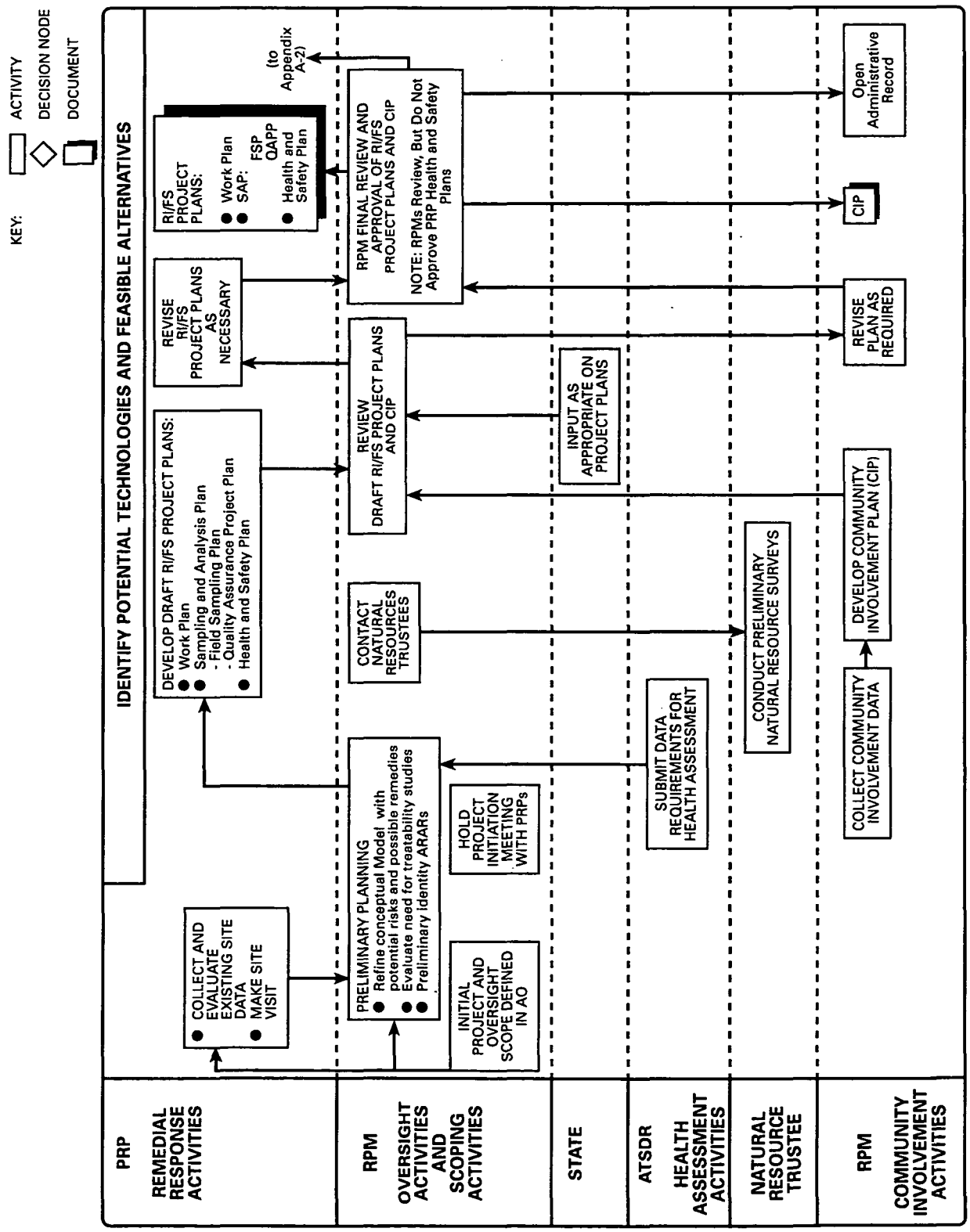
References

OSWER Directive 9230.0-28, "Guidance for Community Advisory Groups at Superfund Sites" (December 1995).

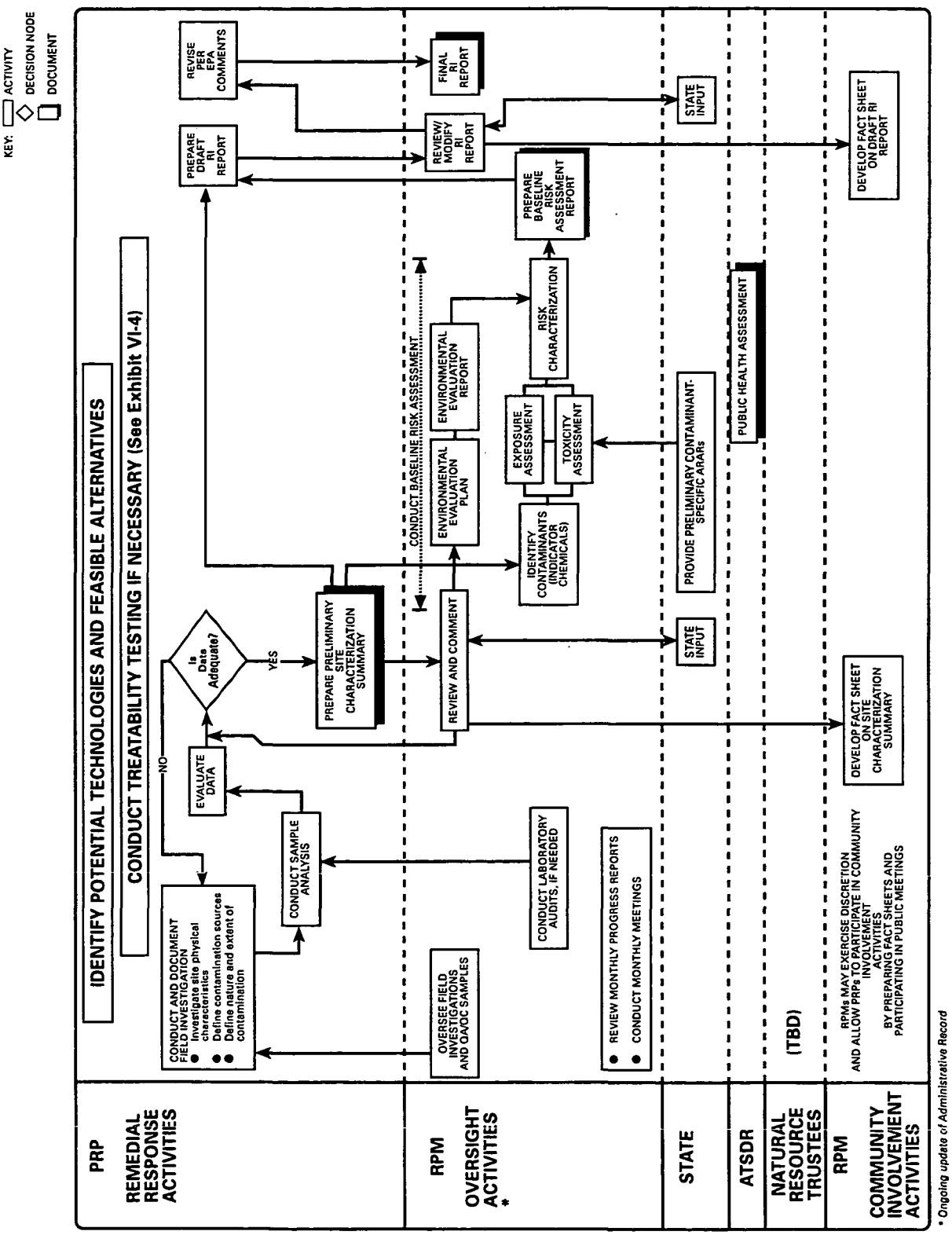
Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 3, 1988).

6-2 RI/FS Scoping Following AO

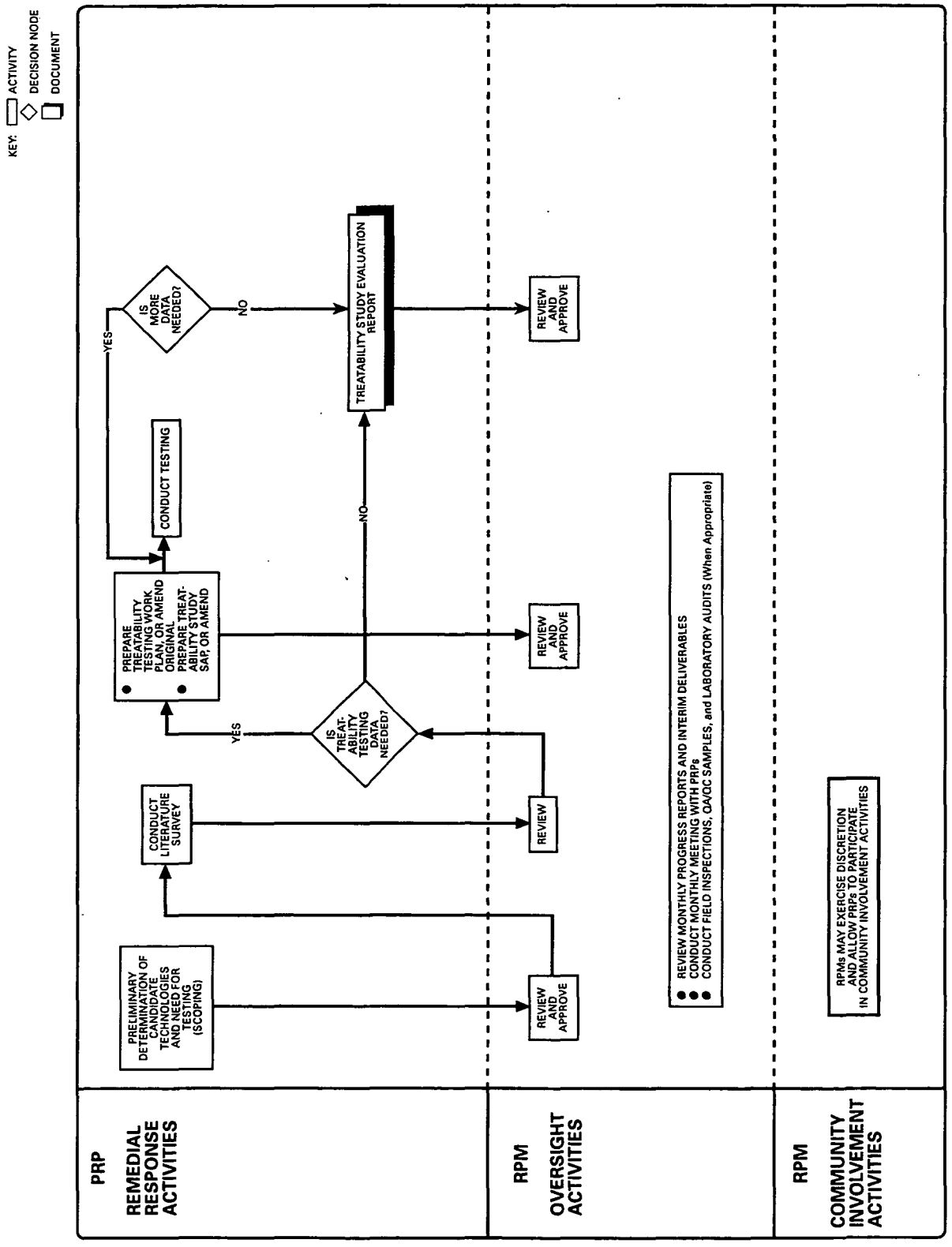


6-3 Site Characterization, Baseline Risk Assessment, and RI Report

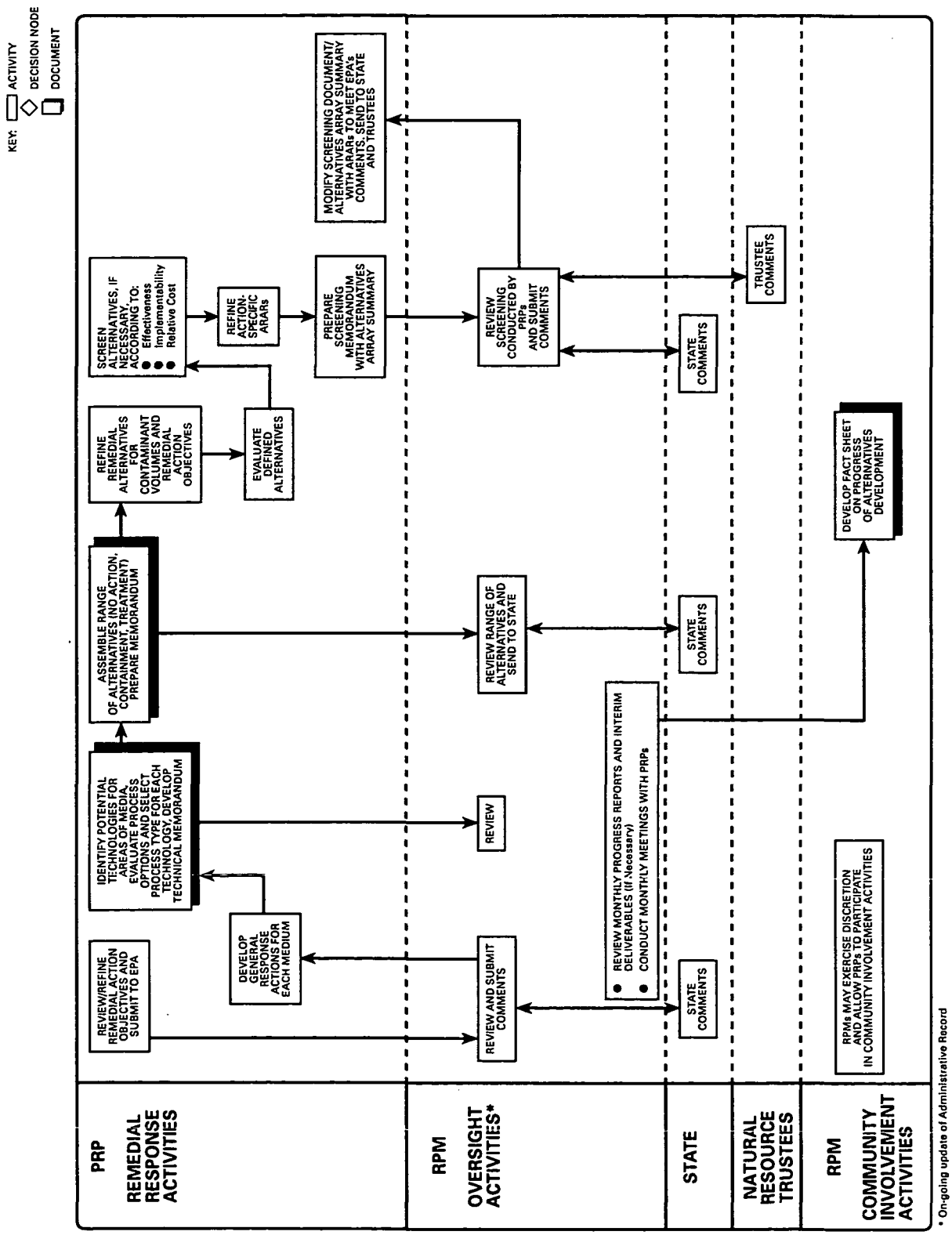


* Ongoing update of Administrative Record

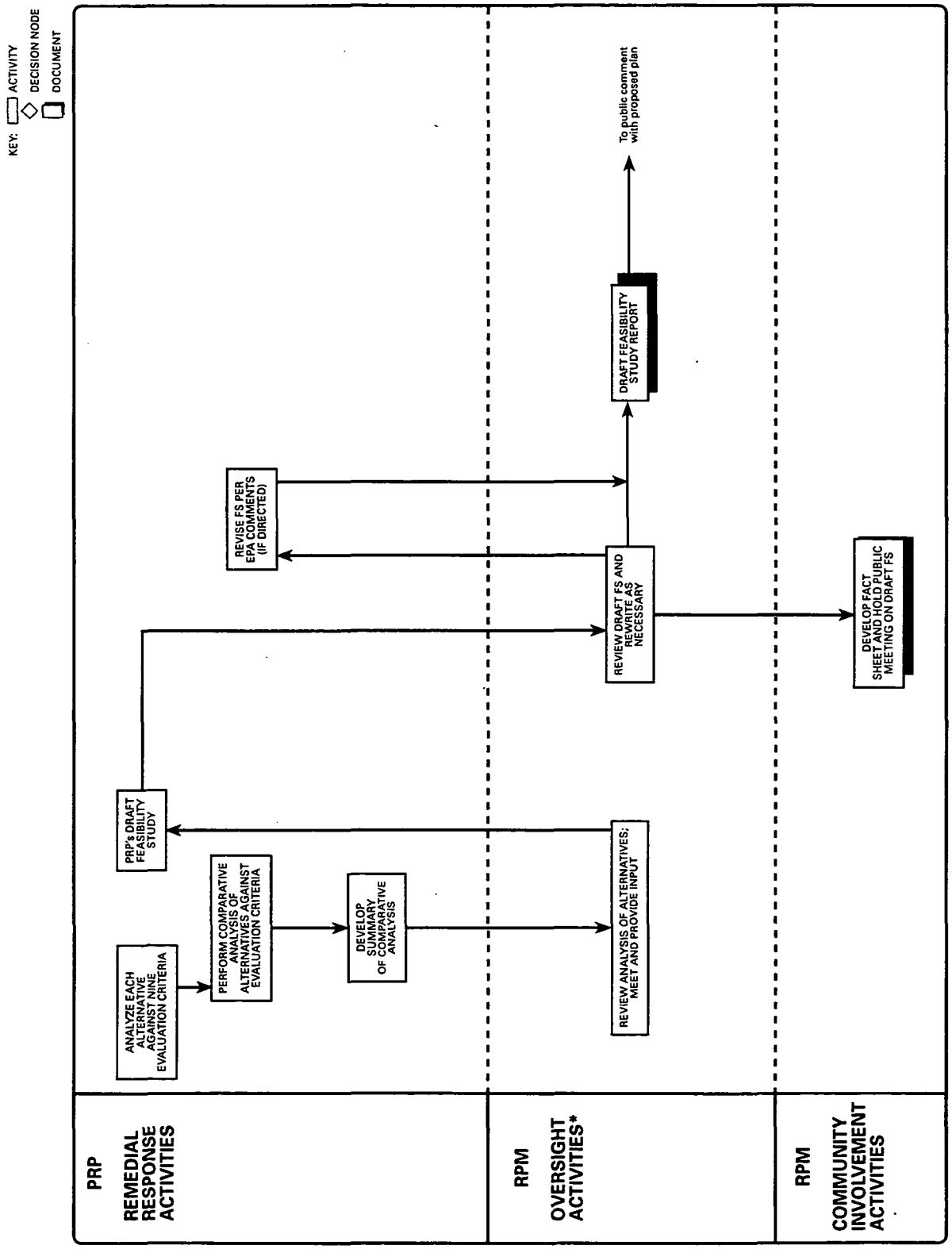
6-4 Treatability Investigations



6-5 Feasibility Study: Development and Screening of Alternatives



6-6 Feasibility Study: Detailed Analysis of Alternatives and FS Report



6.2 Procedures and Interactions

This section summarizes the process and deliverables associated with each phase of RI/FS activity. The phases of this process are not necessarily discrete or sequential. Work from different phases may be conducted concurrently, and the RPM may change the schedule for and format of deliverables based on site needs.

6.2.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: 1) before and during RI/FS negotiations, and 2) after the PRP has signed an agreement with EPA. RPM responsibilities during both phases also are discussed in section 1 of this chapter.

6.2.A.1 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 (exposure pathways).
- Possible risks.
- Possible acceptable contaminant ranges.
- Possible remedies.

See Chapter 5, RI/FS Negotiations/Settlement for information on forthcoming risk assessment guidance.

The RPM should decide what information is required for the site conceptual model. Specific data needs should then be defined and the model SOW modified to ensure that necessary data are gathered. In particular, the site-specific objectives and general management strategy should be added to the model SOW.

It is particularly important that the SOW be as specific as possible about what is needed in the work plan, but it should not be so specific that it limits generally required work. The RPM should keep in mind that Technical Assistance Committees, which are internal EPA resources, or 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, if needed, before the order is finalized to prevent unnecessary delays.

At this point, the RPM should begin identifying oversight and review functions and schedules, coordinating with the state to determine the extent of its oversight participation, and assessing the PRP's ability to conduct portions of the RI/FS as demonstrated in the Good Faith Offer. This oversight activity is discussed in Chapter 5, RI/FS Negotiations/Settlement. Regular meetings with the PRPs should be scheduled to begin after an agreement has been reached.

6.2.A.2 Scoping After Agreement

Once the AOC 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, USACE, 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 Involvement Plan in conjunction with the CIC. Any PRP participation in community relations activities is controlled by EPA.

The required deliverables for the scoping process include a work plan, SAP, and Health and Safety Plan (HASP).

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 guidance and that they understand what EPA expects of them in the RI/FS. The RPM also should clarify EPA's expectations for conducting oversight and provide the PRPs with opportunities to suggest alternative oversight approaches to maximize the efficiency of oversight while ensuring that work is of high quality.

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 plans for initial phases of the RI/FS so that work on them can begin before the entire plan is approved. Conditions to the approval must be specific. Conditional approvals should be reviewed by the section/unit chief. The RPM also has discretion to merge several documents, such as the work plan, SAP, and the HASP, into one deliverable, if appropriate, to improve the efficiency of labor, facilitate the schedule, or control the costs. The RPM will make this decision on a case-specific basis, but should be

alert to opportunities to streamline the work and oversight process without sacrificing quality.

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 should review and approve any modifications in writing.

References

OSWER Directive 9355.3-01FS1, "Getting Ready: Scoping the RI/FS" (November 1989). (Fund-lead)

OSWER Directive 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988).

6.2.A.3 Work Plan

The PRPs' work plan expands the tasks of the SOW by detailing the work to be done in conducting the RI/FS.

The draft work plan is generally submitted by PRPs after the AOC is signed. It must direct, in detail, the activities and deliverables specified in the SOW, including a schedule for all activities. Together with the 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 also may 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 5, RI/FS Negotiations/Settlement, and also in this chapter. Once a work plan has been incorporated by reference in the AOC, the RPM must ensure that the plan is available for public review as part of the AR.

6.2.A.3.1 Sampling and Analysis Plan

The SAP details the procedures that the PRPs plan 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 (QA) and Quality Control (QC) protocols necessary to achieve required Data Quality Objectives (DQOs). DQOs define the type and quality of sampling and analytical data required to make the various RI/FS decisions. For example, DQOs are established to ensure that the analyses are performed with sufficient detection limits to identify relatively low but significant concentrations of contaminants. 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 assistance of regional QAO personnel to determine whether the PRP plans can achieve the DQOs.

The Agency anticipates that it will finalize EPA Requirements for Quality Assurance Project Plans for Environmental Data Operations (EPA QA/R-5) and Data Quality Objectives for Hazardous Waste Site Investigations

(G-4HW) in FY1999. Consult your regional or Superfund QA manager for supplemental regional guidance on DQOs and QAPPs.

References

"EPA Guidance for Quality Assurance Project Plans (EPA QA/G-5)," EPA 600-R-98-018.

"Guidance for the Data Quality Objectives Process (EPA QA/G-4)," EPA 600-R-96-055.

OSWER Directive 9355.07B, "Data Quality Objectives for Remedial Response Activities" (March 1987).

6.2.A.3.2 Health and Safety Plan

The HASP 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 HASP. PRPs must comply with Occupational Safety and Health Administration requirements.

Exhibits 6-7 and **6-8** portray RI/FS oversight activities during the scoping phase and the other RI/FS phases.

Reference

29 CFR 1910.120 ("Hazardous Waste Operations and Emergency Response") (Occupational Safety and Health Administration Regulations).

6.2.B Site Characterization

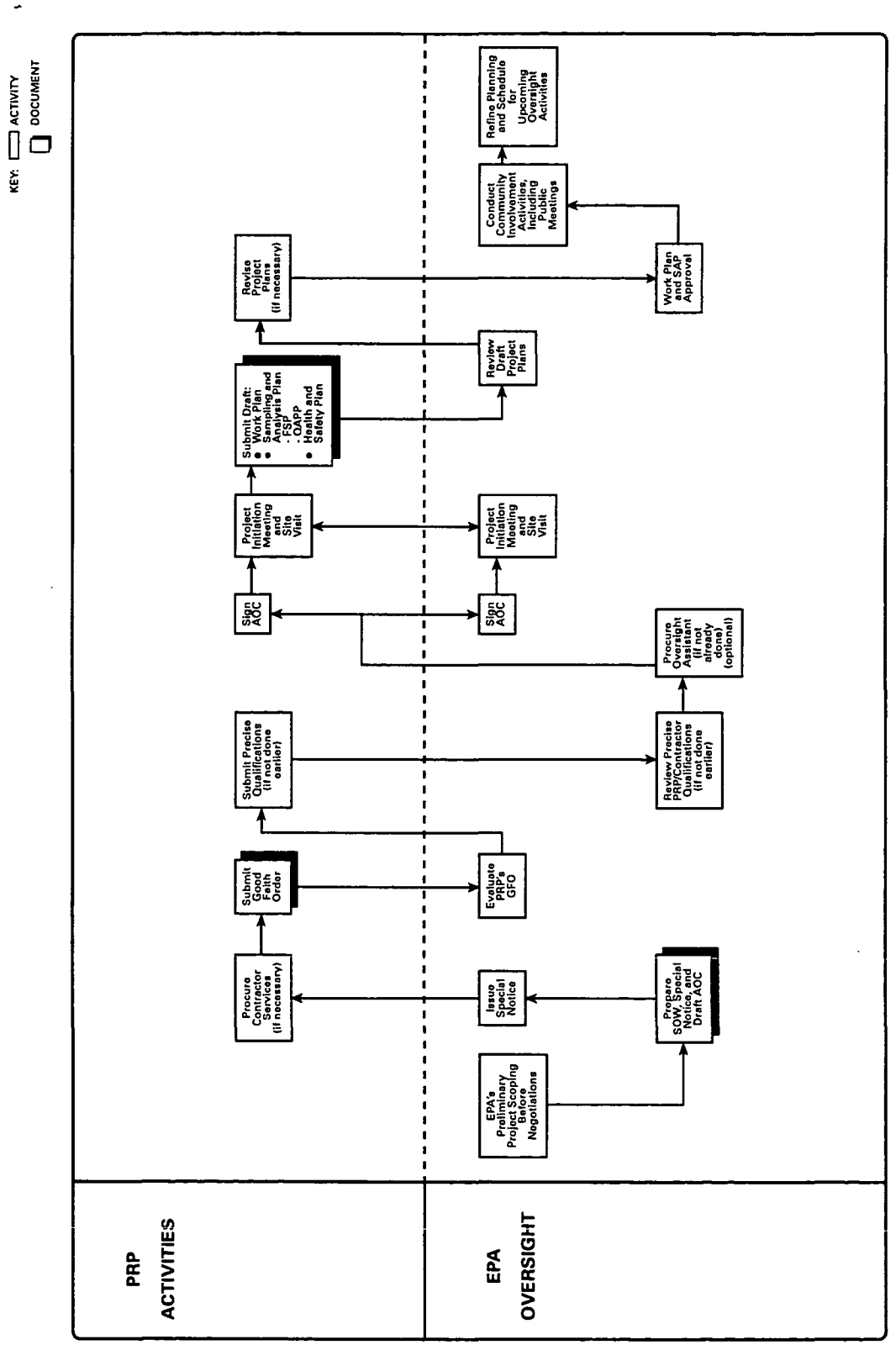
The objectives of this phase are to define the site characteristics, the source(s) of contamination, and the nature and extent of contamination, and to determine possible fate and transport of contaminants as preparation for determining site risks. The major components are collection of field data, analyses of data, and preparation of reports.

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.

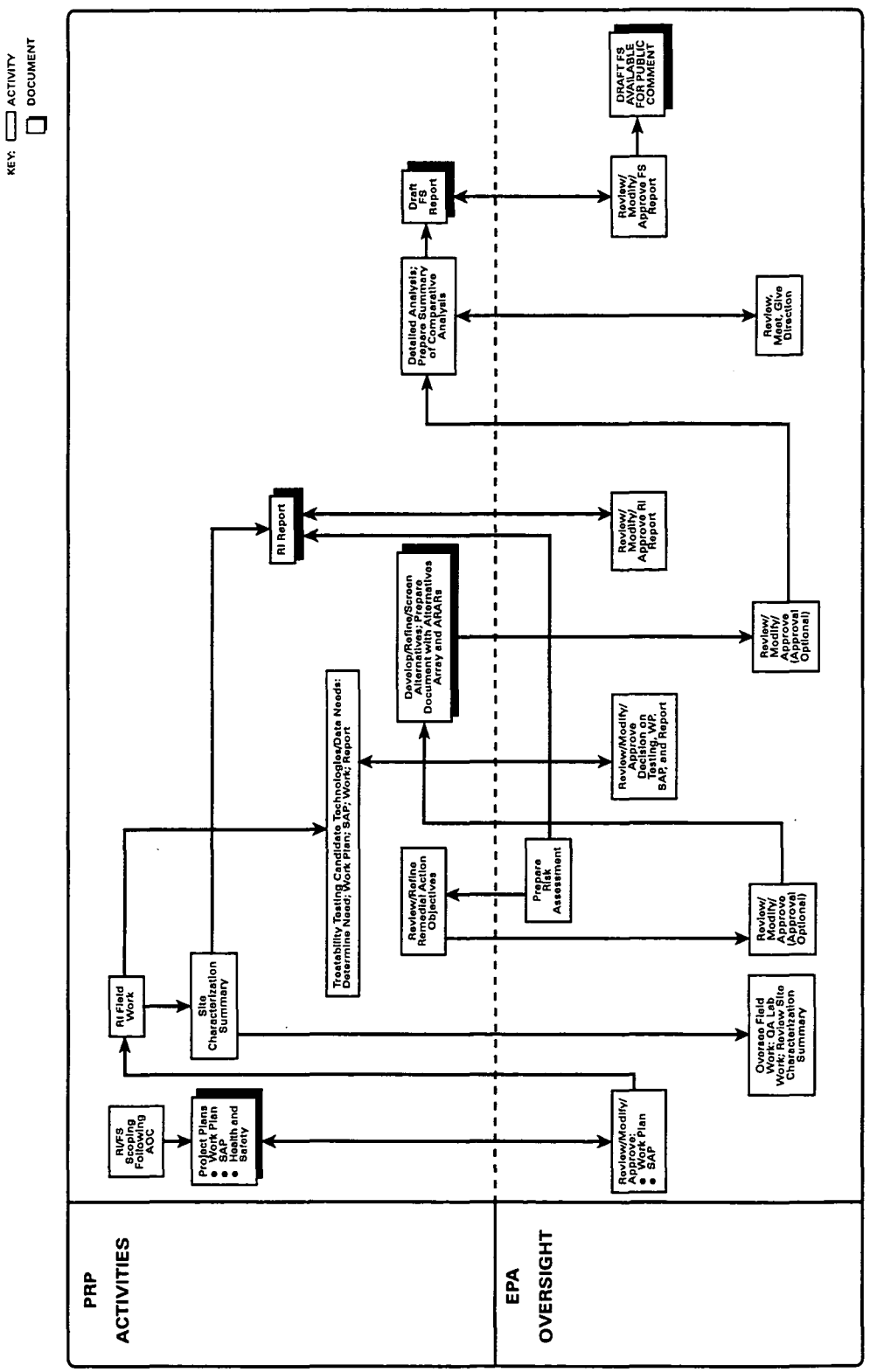
RPMs must have the PRPs establish the quality of old data through reliable means. DQOs apply to all data, old and new. The required technical memorandum documenting the need for additional data should include the analysis and meaning of old data as the basis for establishing what additional data are needed. It is imperative that the site characteristics, including physiography, geology, hydrogeology, and hydrology, be defined. This foundation is critical to subsequent definition of potential transport pathways. In addition, data gathered during site characterization are used in treatability analyses and analyses 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 site, data must be gathered at various depths and lateral locations so that volumes and concentration gradients of

6-7 Overview of RI/FS Oversight Activities During Scoping



6-8 Overview of Major RI/FS Oversight Activities



contaminants may be plotted on a three-dimensional grid. In addition to producing a baseline picture showing principal threat areas and volumes, this methodology will contribute important information about contaminant mobility pathways and velocity and about treatability testing requirements.

The RPM should ensure that the PRP provides notice of the planned dates for field activities at least two weeks in advance. The QAPP/FSP must be approved before gathering of environmental data begins. During the PRP conduct of field activities, the RPM should ensure that the PRPs collect sufficient information at the proper locations and follow QA/QC procedures. The RPM may rely on the oversight assistant to keep accurate records of site activities, if appropriate. 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 of documenting field activities. Field activity reports should be used in conjunction with the SAP. By combining these two reporting tools, the oversight assistant will have a valuable means of keeping track 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 activity log books or field log books. A log book 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, a record of any field activities not included in the field activity reports, and a description of daily activities and contacts with the public or press.

A photographic or video record of field activities also may be a useful tool for documenting field work for PRPs as well as the oversight assistant. If one of these tools is used, the oversight assistant should keep detailed information about the location, date, time, and subject matter of each photograph or tape in the field log.

If sampling data is not received within a month of analysis by the PRPs' laboratories, the RPM 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 RI report.

The preliminary summary is prepared after the results from sampling 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 data collection and analysis, and supports the FS.

References

OSWER Directive 9835.1(c), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 1 (July 7, 1991).

OSWER Directive 9835.1(d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 2 (July 7, 1991). (Appendix provides examples of field activity reports.)

OSWER Directive 9335.0-14, "A Compendium of Superfund Field Operation Methods" (September 1987).

6.2.C Risk Assessment

A baseline risk assessment, which may be referred to as an Endangerment Assessment (EA), is conducted during the RI. The region will use the baseline risk assessment to determine whether, in the absence of an RA, a particular site poses a substantial danger to public health and welfare, and the environment. The baseline risk assessment process is cumulative in nature; the components of the assessment build on one another. There are two separate inquiries: human health and the environment. The human health evaluation should address all exposure pathways for each medium of concern, toxicity values for carcinogenic and non-carcinogenic effects, and the cancer risk and/or hazard index for each chemical of concern. The environmental evaluation addresses any critical habitats or endangered species affected by site contamination.

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, regional management finds that the intermediate deliverable from the PRP remains unacceptable, the region may decide at that point to prepare its own risk assessment or to pursue stipulated penalties if allowed by the AOC or CD. 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 AR file. Such an explicit certification by EPA of

a PRP risk assessment should help assure the public that EPA is providing necessary oversight. 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 or pursue stipulated penalties if allowed by the AOC or CD. If EPA undertakes the risk assessment because the PRP's is unacceptable, the Agency may use any part of the PRP's work deemed to be of high quality.

The Risk Assessment Guidance for Superfund (RAGS) Human Health Evaluation Manual Part D: Standardized Planning, Reporting, and Review of Superfund Risk Assessments establishes a process for using spreadsheet software to develop analytical schemes for risk assessments at Fund-lead, PRP-lead, Federal Facilities, and RCRA Corrective Action sites. It enables RPMs and risk assessors to scope and plan risk assessments, formulate problems, and develop conceptual site models as part of a continuing relationship that also expands stakeholder involvement. Tables generated by the software applications serve as the basis for interim deliverables for risk assessment contractors and form part of the Comprehensive Environmental Response, Compensation, and Liability Information System 3/Waste Local Area Network (CERCLIS 3/WasteLAN) data base.

The Agency is currently drafting supplements to RAGS covering involvement of community stakeholders, land use considerations, establishing background for risk assessment, using uncertainty/probabilistic analysis, and standardizing approaches for lead-contaminated sites. The supplement on community involvement should be finalized during the second quarter of FY1999 and the others by the end of calendar 1999. The Agency is also drafting a concise, user-friendly reference document on practices that can help to increase public participation in risk assessments. This document should be finalized during the second quarter of FY1999. Once available, these resources should guide implementation of the RI/FS.

References

Federal Facilities Restoration and Reuse Office Memorandum, "Use of Risk-Based Methodologies in Setting Priorities for Cleanup Actions at Federal Facilities" (May 21, 1998).

OSWER Directive 9285.7-01D, Risk Assessment Guidance for Superfund (RAGS) Human Health Evaluation Manual Part D: Standardized Planning, Reporting, and Review of Superfund Risk Assessments (January 1998).

OSWER Directive 9355.0-69, "Rules of Thumb for Superfund Remedy Selection" (August 1997).

OSWER Directive 9355.0-30, "Role of the Baseline Risk Assessment in Superfund Remedy Selection" (April 22, 1991).

OSWER Directive 9285.7-01A, "Risk Assessment Guidance for Superfund: Volume 1- Human Health Evaluation Manual, Part A" (December 1991).

OSWER Directive 9285.7-01B, "Risk Assessment Guidance for Superfund: Volume 1- Human Health Evaluation Manual, Part B" (December 1989).

OSWER Directive 9285.5-1A, *Superfund Exposure Assessment Manual* (April 1989).

OSWER Directive 9285.7-01, "Risk Assessment Guidance for Superfund - Environmental Evaluation Manual: Volume 2" (March 1989).

Integrated Risk Information System.

Public Health Risk Evaluation Database.

6.2.D Treatability Investigations

Treatability studies are designed to provide information for EPA to use in conducting detailed analyses of alternatives. If treatability studies are deemed appropriate, they should be conducted during the scoping phase as they may take over six months to complete (e.g., biotreatability studies). The decision whether to conduct treatability studies is based on a number of factors, including: 1) whether a treatment alternative is properly considered for the site; 2) the nature and size of the site; 3) the nature of the contaminants and contaminated media; 4) the potential for migration and possible site risks; 5) information available in technical literature; and 6) the uncertainties associated with selecting an appropriate site remedy. The final decision on the type and extent of treatability study to conduct (literature survey, bench, or pilot) depends on uncertainties of treatment and the amount of work that should be deferred to the RD process. A literature survey may suffice when the performance of a technology under consideration has been sufficiently documented on similar wastes. In that case, site-specific information collected during the site characterization may be adequate to evaluate and cost the technology without treatability testing. Where controversial technologies are under consideration, e.g. incineration, community involvement can be an important factor in facilitating treatability studies.

In addition to progress meetings and reports, the required deliverables for treatability investigations may include:

- An identification of candidate technologies.
- A literature survey and determination of whether testing is necessary.
- A treatability testing work plan or revisions of the original work plan.
- A treatability study SAP or revisions of the original SAP.
- A treatability study HASP or revisions of 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, and the results set forth 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.

6.2.E Development and Screening of Alternatives

During the process of developing alternatives, RPMs should ensure that the PRPs undertake the following activities:

- Develop specific RA 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 RA alternatives, if necessary, on the basis of effectiveness, implementability, and cost.
- Prepare an alternatives array document.

The information produced by the development and screening of alternatives is used in assembling remedial technologies into alternatives for either the site as a whole or for a specific Operable Unit.

Development of RA alternatives should be conducted in light of the numerous guidance documents the Agency has produced to assist and realize cost and time savings in performing RI/FSs. These include general policy and procedures for conducting RI/FSs at municipal landfills; presumptive remedies for sites with volatile organic compounds in soil and ground water, municipal landfills, and wood treater sites; guidance on soil screening, characterizing dense non-aqueous phase liquid sites, estimating risk at lead-contaminated soil sites, technical impracticability waivers at sites where complete restoration is infeasible, and land use considerations in the risk assessment and remedy selection processes. These and other resources are referenced below.

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 useful for two reasons. First, it streamlines the FS process; second, it ensures that only the most promising alternatives are being considered by EPA.

RPMs should either closely scrutinize PRP conduct of the screening process or conduct it themselves. The alternatives development screening document, including the alternatives array, must be scrutinized. At this stage, ARARs should be given specific attention as compliance with ARARs is a threshold criterion that each alternative must meet in order to be eligible for selection. RPMs should be wary of PRP proposals that are ineffective because they treat too little or do not treat to appropriate levels. RPMs should ensure that regional management has 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 compare 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 the best or most promising, while retaining a range of alternatives broad enough to satisfy the 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.

References

OSWER Directive 9355.0-69, "Rules of Thumb for Superfund Remedy Selection," (August 1997).

"Multi-Phase Extraction (MPE) Technology Selection for the VOCs in Soil and Groundwater Presumptive Remedy," Draft Final (January 1997).

"Landfill Presumptive Remedy Saves Time and Cost," EPA 540-F-96-017.

"Application of the CERCLA Municipal Landfill Presumptive Remedy to Military Landfills," EPA 540-F-96-020.

"Presumptive Response Strategy and Ex-Situ Treatment Technologies for Contaminated Ground Water at CERCLA Sites," EPA 540-R-96-023.

"User's Guide to the VOCs in Soils Presumptive Remedies," EPA 540-F-96-008.

OSWER Directive 9355.4-14FSA, "Quick Reference Fact Sheet" (July 1996).

OSWER Directive 9355.4-23, "User's Guide" (April 1996).

"Soil Screening Guidance: Technical Background Document," EPA 540-R-95-128.

"Presumptive Remedies for Soils, Sediments, and Sludges at Wood Treater Sites," EPA 540-R-95-128.

"CERCLA Landfill Caps RI/FS Data Collection Guide," EPA 540-F-95-009.

"Presumptive Remedy for CERCLA Municipal Landfill Sites," EPA 540-F-93-035.

"Policy and Procedures," EPA 540-F-93-047.

"Site Characterization and Technology Selection for CERCLA Sites With Volatile Organic Compounds in Soils," EPA 540-F-93-048.

"Technology Selection Guide for Wood Treater Sites," EPA 540-F-93-020.

OSWER Directive 9234.2-25, "Guidance for Evaluating the Technical Impracticability of Ground Water Restoration" (September 1993).

"Presumptive Remedies for Municipal Landfill Sites," Superfund Accelerated Cleanup Bulletin: Volume 2, Number 1 (February 1993).

"Presumptive Remedies," *Superfund Accelerated Cleanup Bulletin* (August 1992).

"Presumptive Remedies for Wood Treatment Facilities," *Superfund Accelerated Cleanup Bulletin* (May 1992).

"Presumptive Remedies for Municipal Landfill Sites," *Superfund Accelerated Cleanup Bulletin:* Volume 1, Number 1 (April 1992).

"Conducting RI/FS for CERCLA Municipal Landfills," EPA 540-P-91-001.

OSWER Directive 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988).

6.2.F Detailed Analysis of Alternatives

The detailed analysis of alternatives consists of the analysis and presentation of the relevant information needed to allow decision makers to select a site remedy. Nine evaluation criteria set forth at NCP section 300.400(e)(9)(iii) 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.

A detailed analysis of alternatives consists of the following components: 1) further definition of each alternative relative to the more limited information presented in the screening analysis; 2) an individual assessment and summary profile of each alternative against the nine evaluation criteria; and 3) a comparative analysis among the alternatives to assess their relative performance with respect to each evaluation criterion.

The PRPs should submit a technical memorandum summarizing the results of the detailed analysis. In addition, the PRPs should 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 7, Selection of Remedy.

References

OSWER Directive 9355.0-69, "Rules of Thumb for Superfund Remedy Selection," (August 1997).

OSWER Directive 9835.1(c), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 1 (July 7, 1991).

OSWER Directive 9835.1(d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 2 (July 7, 1991).

OSWER Directive 9355.3.01FS3, "Feasibility Study - Development and Screening of Remedial Action Alternatives" (November 1989).

OSWER Directive 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Interim Final (October 1988).

6.3 Planning and Reporting Requirements

The RPM should review and update the information in EPA's automated data systems as events happen. That is, events should be tracked in the database on a real-time basis. Depending on the region, RPMs are responsible for entering accurate information into CERCLIS 3/WasteLAN or providing that information to the IMC for entry into CERCLIS 3/WasteLAN. For example, activities such as RI/FS starts, field work starts, and draft RI/FS completions must be entered into CERCLIS 3/WasteLAN. RI/FS events are tracked in the Superfund Comprehensive Accomplishments Plan (SCAP). A matrix of SCAP targets relevant to RI/FS implementation is presented as **Exhibit 6-9**.

6-9 SCAP Targets for RI/FS Scoping

Activity	SCAP Target/Measure	Quarterly Target	Annual Target
Remedial Investigation/Feasibility Study			
RI/FS Start (Fund)	X	X	X
RI/FS Start (PRP)	X	X	X
Start of Public Comment (RI/FS to Public)	X		
RI/FS Comp. ROD			
RI/FS Comp. (ROD) (Fund)	X		
RI/FS Comp. (ROD) (PRP)	X		

The following are definitions of the Exhibit 6-9 SCAP activities.

RI/FS Start - 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 following have occurred:

- The contract modification for the RI/FS has been signed by the Contracting Officer.
- An Interagency Agreement (IAG) has been signed by the other federal agency (USACE or Bureau of Reclamation).
- 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 (RA). The RI/FS start date is the AOC completion date (RA signature date).
- A CD is referred by the region to the Department of Justice (DOJ) or Headquarters. The RI/FS start date is the last signature date by the appropriate official or party (RA, DOJ, or Headquarters).

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 one of the following:

- 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, 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 start date should coincide with the IAG effective date. For sites where RI/FS work starts prior to the IAG effective date, however, the earliest date reportable is the IAG completion date. For sites where RI/FS work is initiated under a RCRA order or permit, the RI/FS start date should equal the date when the RCRA order or permit becomes effective.

In rare cases, with Headquarters 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 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 work plans following the initial scoping meeting.

Separate Fund-financed, RP-lead and Federal Facilities RI/FS start targets will be established in SCAP prior to the fiscal year. Targets are established site-specifically. For RI/FS starts, "To-Be-Determined" 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 release to the public is accomplished the date the proposed plan is made available to the public. This date should be recorded

in WasteLAN with the RI/FS event under the SubAction Start of Public Comment. 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) - 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 OSWER) or the RA/Deputy RA.

For F, FE, and SE Lead ROD - credit is given on the date the ROD is signed by the RA/Deputy RA or the AA OSWER.

Upon completion of a Federal Facilities RI/FS, the federal agency selects a remedy for the site that is presented in a cleanup Decision Document (DD) (i.e., ROD, Corrective Action DD). EPA or the state may either approve or concur on the remedy selection or, in the case of a dispute, they may select the remedy. For EPA, this authority has been delegated to the RA or his/her designee.

For Federal Facilities - credit is given on the date of EPA approval/concurrence in the cleanup DD pursuant to an IAG or other enforceable DD, or the date of EPA's letter of concurrence.

The RI/FS completion date and the ROD completion date are the same. This date should be entered in WasteLAN as both the RI/FS and ROD completions. For specific coding requirements into CERCLIS 3/WasteLAN, see the SCAP/OIL Quick Reference Coding Guide or your IMC.

Reference

OSWER Directive 9200.3-14-1D, *Superfund/Oil Program Implementation Manual* (updated biennially).

SCAP/Oil Quick Reference Coding Guide.

6.4 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.

6.4.A Dispute Resolution

When disputes arise between the RPM and the PRPs' project manager, the RPM should attempt to resolve the matter informally. If informal efforts fail, the RPM should implement formal dispute resolution mechanisms in accordance with the AOC after coordination with regional counsel.

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 Superfund program manager, who is the final arbitrator of the dispute. If the PRP fails to comply with the decision, the Agency may take one or more of the following actions:

- 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 counsel to coordinate dispute resolution efforts.

6.4.B Corrective Measures

If oversight investigations reveal 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 PRPs' 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 take the following steps:

- 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 a deficiency notice can lead to penalties or EPA takeover of the RI/FS. The AOC normally will stipulate penalties for noncompliance, but penalties may also be imposed under CERCLA section 122(l) in accordance with section 109. Where the Agency requires perfor-

mance of the RI/FS pursuant to a section 106 UAO, penalties may be imposed under section 106(b)(1).

Reference

OECA Memorandum, "Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders" (September 30, 1997).

6.5 Activities Checklist

This checklist is not intended to present an exhaustive set of procedures, nor is it intended to be a chronological list of tasks. 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. Ensure appropriate regional Superfund 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 CIP 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 PRPs' development of a work plan, SAP, and site HASP, meet with PRPs and, as appropriate, regional Superfund management 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 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.

- Federal and state ARARs (approach, primarily to contaminant-specific and location-specific).
- Human health.
- Approach to contaminant identification; exposure assessment, use of the *Superfund Exposure Assessment Manual*, use of current and maximum reasonable use scenario assuming growth; exposure points with pathways, media, exposure route, persons exposed and amount exposed to, fate and transport models; use of the Integrated Risk Information System 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 RA 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 SAP.

a)___ FSP.

- Site background (including an evaluation of existing data).
- Sampling objectives.
- DQOs.
- 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.
- Preventive maintenance procedures and schedules.
- Data assessment procedures.
- Corrective action procedures.
- QA reporting procedures.

13)_____ Receive the HASP.

14)_____ Draft comments; changes to PRPs' plans.

15)_____ Coordinate with state trustees as necessary.

16)_____ Management review of project plans.

17)_____ Approve/modify plans.

18)_____ Refine oversight plan..

a)___ Address what is to be done, when, by whom.

b)___ Assure oversight persons are informed of their duties and of schedules.

c)___ Budget resources.

d)___ Ensure other communications; (e.g., state, ATSDR, trustee).

e)___ Anticipate common problems.

19)_____ Open AR at region and near site; add approved plans.

20)_____ Begin community involvement activities upon approval of plans.

OVERSEE RI FIELDWORK AND DATA ANALYSES

21)_____ Meet with 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 PRPs' field support preparation and resources.

24)_____ Develop field check lists.

25)_____ Develop site characterization, source definition, description of nature and extent of contamination. On an ongoing basis:

a)___ Assure compliance with work plan and SAP.

b)___ Oversee schedule, ensure advance notice by PRP of field work, schedule site inspections, have oversight assistant review data as developed by PRPs for sufficiency, review QA/QC trends.

c)___ Assure adequate locations, types, depths, numbers, etc. of samples.

d)___ For ongoing fieldwork, check quality of sampling and testing.

- Ensure sample splits, spikes, blanks, etc.
- Review QA/QC of loss/analyses.
- Ensure use of proper lab protocols; audit lab, compare splits, etc.
- Ground water monitoring well construction/ installation.

e)___ Check quality of ground water elevations and pump tests in various strata.

f)___ Check quality of soil sampling (surface/at depths).

g)___ Check quality of ground water sampling.

h)___ Check quality of surface water sampling.

i)___ Check quality of sediment sampling.

j)___ Review well and other receptor surveys.

k)___ Review field books, activity logs, etc.

l)___ Review progress reports.

m)___ Review data management.

n)___ Hold progress status meetings.

o)___ 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 ground water remediation).

p)___ 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 AR.

29)_____ Ensure adequate oversight activity documentation (cost documentation).

30)_____ Identify interim actions as necessary.

PERFORM RISK ASSESSMENT

31)_____ Secure qualified contractor.

32)_____ Identify any highly controversial substances that warrant Headquarters assistance.

33)_____ Identify federal and state contaminant-specific ARARs.

34)_____ Perform human health risk assessment/EA.

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)_____ Perform 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; 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)_____ Produce final comments.

43)_____ Review and modify/approve interim RI report (possible additional work may be identified in FS).

44)_____ Update AR.

45)_____ Release fact sheets and hold 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 RA objectives, alternative development and screening, detailed analysis, SARA-compliant remedies.

48)_____ Review, modify, and possibly approve RA 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 that appropriate alternatives passed the screen, and proper identification and attorney review of ARARs, particularly action-specific ARARs. If PRPs continue to lean improperly toward no-action, ineffective, 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 AR.

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 AR.

FEASIBILITY STUDY

62)_____ Facilitate attorney review of ARARs.

63)_____ Circulate PRP draft FS to state, trustees, intra-EPA groups.

64)_____ Develop preliminary comments.

65)_____ Ensure internal EPA and management review, discuss proposed plan.

66)_____ Finalize comments.

67)_____ Ensure development of an FS that supports proposed plan.

68)_____ Update AR.

69)_____ Prepare oversight/response cost billing.

70)_____ Prepare for RD/RA negotiations.

7. Selection of Remedy

Chapter 7 Selection of Remedy

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Chapter 7 Selection of Remedy

7.1 Description of Activity

7.1.A Introduction

This chapter provides a general discussion of the process used by federal agencies to select a final Remedial Action (RA) from among the options that undergo detailed analysis in the Remedial Investigation/Feasibility Study (RI/FS). See **Exhibit 7-1** for a representation of the elements that make up the remedy selection process. For more detailed information on the remedy selection process, consult the National Contingency Plan (NCP), "Guidance on Preparing Superfund Decision Documents," and other documents referenced at the end of each section.

Reference

National Oil and Hazardous Substance Pollution Contingency Plan (NCP), 40 Code of Federal Regulations (CFR) section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

7.1.B Overview

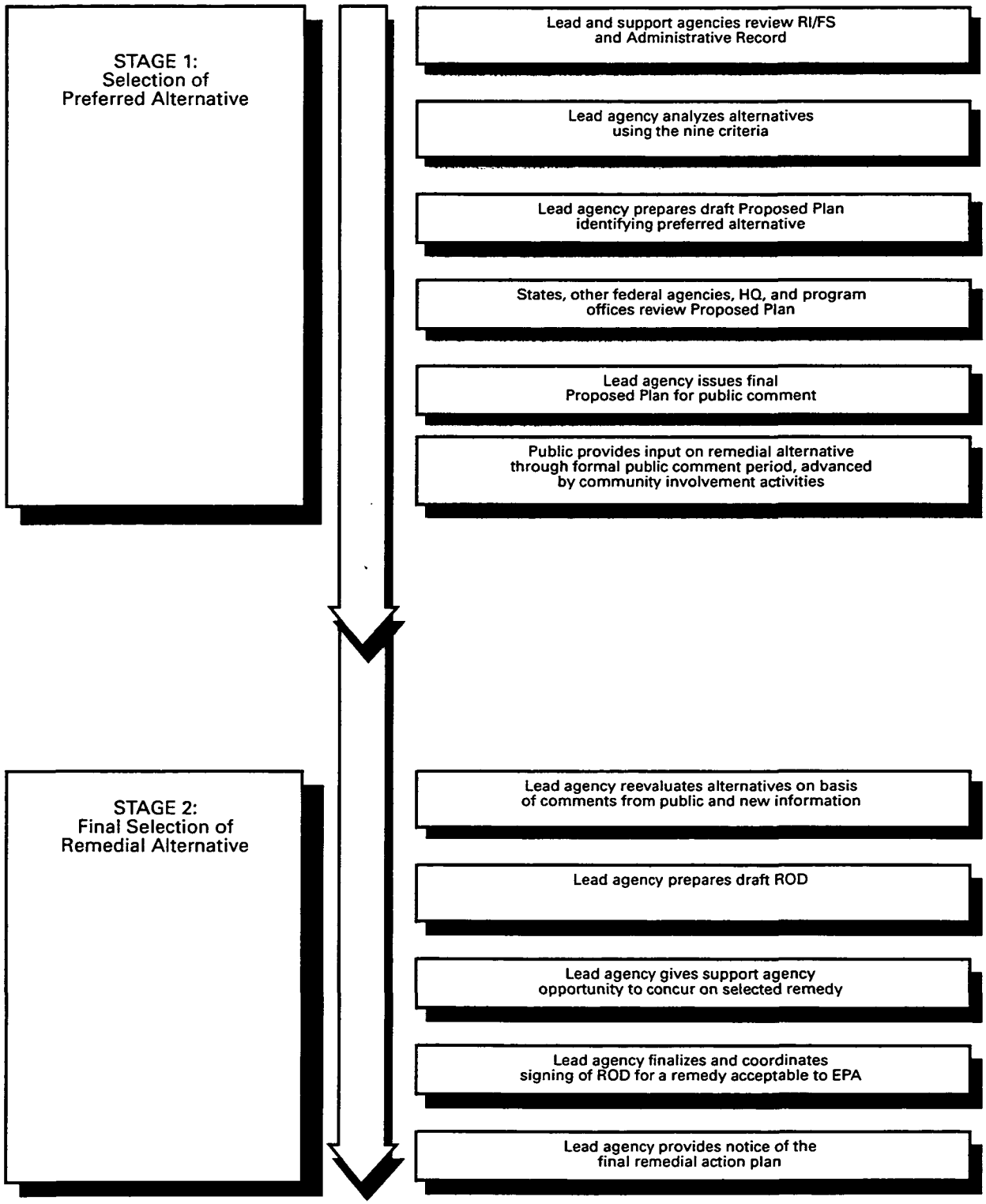
EPA has established the remedy selection process to fulfill the mandates of section 121 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Substantively, the remedy selection process involves an objective assessment of alternative approaches for remediating problems at sites against nine evaluation criteria that encompass statutory requirements and a risk management decision as to which option provides the most appropriate solution for a site. Procedurally, the selection of a CERCLA RA 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 the Administrative Record (AR) to identify a preferred alternative. This preferred alternative is presented to the public in a Proposed Plan, which includes the supporting information and analysis, for review and comment. Second, the lead agency reviews the public comments, consults with the support agency to evaluate whether the preferred alternative is still the most appropriate RA for the site or site problem, and makes a decision.

7.1.C Statutory Authority

Section 121 of CERCLA and the NCP require that the chosen remedy meet certain standards. The lead agency must select a remedy that:

- Is protective of human health and the environment.
- Attains 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 treatments that permanently and significantly reduce the volume, toxicity, or mobility of the hazardous substances, pollutants, or contaminants as a principal element.

7-1 Selection of Remedy Overview of Decision-Making Process



Remedies must be consistent with the requirements of the NCP. The NCP (40 CFR 300.430 (i)) specifies nine evaluation criteria to be used in comparing remedial alternatives. See Chapter 6, RI/FS Implementation for a discussion of the nine evaluation criteria.

The NCP establishes additional procedures for the remedy selection process. The process must include an opportunity for substantial and meaningful involvement of state and tribal officials. The lead agency must comply with public involvement requirements by allowing the public to comment and submit information on the remedy for inclusion in the AR (see section 300.800 of the NCP), and must document its decision in an AR that is accessible to the public. EPA must notify Potentially Responsible Parties (PRPs), state personnel, and natural resource trustees about negotiations for implementation of the remedy.

References

"Rules of Thumb for Superfund Remedy Selection," EPA 540-R-97-013.

NCP, 40 CFR section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

NCP, 40 CFR section 300.800 ("Establishment of an Administrative Record") (1990).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October 1989) (comprehensive update anticipated in FY99).

7.1.D Responsibilities

Federal and state agencies conduct remedy selection activities as cooperative efforts. Section 121(a) of CERCLA states that the President (EPA) shall select appropriate RAs. 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 14, State Involvement in CERCLA 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 lead agency, EPA retains final remedy selection authority for all Fund-lead actions and the authority to concur in all enforcement actions taken under CERCLA sections 106 and 122 and all Federal Facilities RAs at NPL sites under CERCLA section 120.

In general, the remedy selection process is the responsibility of the government agencies involved at the site. Contractors and PRPs, however, may participate in particular aspects of the process.

States, tribes, and community stakeholders have had an increasing role in the remedy selection process. A Superfund Administrative Reforms pilot program allows selected states or tribes to conduct the remedy selection process, consistent with applicable law and regulations, with minimal EPA

oversight or involvement. The NCP (section 300.515 (e)(2)(ii)) requires that EPA still concur with the final ROD. Communities can also become more involved in the remedy selection process by participating in a Superfund Administrative Reforms pilot program that uses consensus-based approaches to empower local citizens in achieving remedies that satisfy the community while still meeting statutory and regulatory requirements.

References

"Rules of Thumb for Superfund Remedy Selection," EPA 540-R-97-013.

OSWER Directive 9355.7-04, "Land Use in the CERCLA Remedy Selection Process" (May 1995).

NCP, 40 CFR section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

NCP, 40 CFR section 300.515 ("Requirements for State Involvement in Remedial and Enforcement Response") (1990).

OSWER Directive 9355.0-27FS, "A Guide to Selecting Superfund Remedial Actions" (April 1990).

OSWER Directive 9234.2-05FS, "CERCLA Compliance with Other Laws Manual-CERCLA Compliance with State Requirements" (December 1989).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan and Record of Decision." (July 1989) (comprehensive update anticipated in FY99).

7.1.E 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. The remedy is selected by applying the criteria to identify the most protective solution which meets, or with appropriate justification, waives ARARs for a given site. The nine evaluation criteria are used to develop the RI/FS detailed analysis, which forms the basis for the remedy decision. The evaluation criteria are categorized into three groups: threshold, primary balancing, and modifying criteria. The definition and application of each type of criteria is presented below.

7.1.E.1 Threshold Criteria

The two threshold criteria that must be satisfied in order for an alternative to be eligible for selection are the following:

- **Overall protection of human health and the environment** - Protectiveness is the primary requirement that CERCLA RAs must meet. A remedy is protective if it adequately eliminates, reduces, or controls unacceptable risks posed by hazardous substances, pollutants, or contaminants in both the short and long terms. A site at which, after the remedy is implemented, hazardous substances remain without engineering or institutional controls must allow for unrestricted use and unlimited exposure for human and environmen-

tal receptors. For those sites where hazardous substances remain such that unrestricted use and unlimited exposure is not allowable, engineering controls, institutional controls, or a combination of the two must be implemented to control exposure and thereby ensure reliable protection over time. In addition, implementation of a remedy must not result in unacceptable short-term risks to or cross-media impacts on human health and the environment.

- **Compliance with ARARs** - On-site remedies must attain or justify waiver of ARARs. Alternatives are developed and refined throughout the selection process to ensure that they will meet all of their respective ARARs, or the lead agency must be able to provide grounds for invoking statutorily established waivers. During the detailed analysis, information on federal and state action-specific ARARs is assembled along with previously identified chemical-specific and location-specific ARARs. The state should be asked to provide a list of statutory and regulatory alternatives that should be ARARs for the remedial alternatives. Alternatives will be refined to ensure compliance with these requirements, or waivers that might be invoked will be identified by the lead agency.

References

OSWER Directive 9347.3-08FS, "Superfund LDR Guide #8: Compliance with Third Third Requirements Under the LDRs" (October 1990).

OSWER Directive 9347.3-11FS, "Superfund LDR Guide #11: CERCLA Compliance with the RCRA Toxicity Characteristics (TC) Rule: Part II" (October 1990).

OSWER Directive 9347.3-09FS, "A Guide to Delisting of RCRA Wastes for Superfund Remedial Responses" (September 1990).

OSWER Directive 9347.3-06FS, "Superfund LDR Guide #6A: Obtaining a Soil and Debris Treatability Variance for Remedial Actions" (second edition) (September 1990).

OSWER Directive 9347.3-06BFS, "Superfund LDR Guide #6B: Obtaining a Soil and Debris Treatability Variance for Removal Actions" (September 1990).

OSWER Directive 9234.2-08FS, "ARARs Q's and A's. Compliance with the Toxicity Characteristics Rule: Part I" (May 1990).

OSWER Directive 9234.2-07FS, "CERCLA Compliance with Other Laws Manual - Summary and Part II: CAA, TSCA, and Other Statutes" (April 1990).

OSWER Directive 9234.3-001, "ARARs Short Guidance Quarterly Report" (December 1989).

OSWER Directive 9234.2-03FS, "Overview of ARARs: Focus on ARAR Waivers" (December 1989)

OSWER Directive 9347.3-07FS, "Superfund LDR Guide #7: Determining When Land Disposal Restrictions (LDRs) Are Relevant and Appropriate to CERCLA Response Actions" (December 1989).

OSWER Directive 9234.2-04FS, "RCRA ARARs: Focus on Closure Requirements" (October 1989).

OSWER Directive 9347.3-01FS, "Superfund LDR Guide #1: Overview of RCRA Land Disposal Restrictions (LDRs)" (July 1989).

OSWER Directive 9347.3-02FS, "Superfund LDR Guide #2: Complying With the California List Restrictions Under Land Disposal Restrictions (LDRs)" (July 1989).

OSWER Directive 9347.3-03FS, "Superfund LDR Guide #3: Treatment Standards and Minimum Technology Requirements Under Land Disposal Restrictions (LDRs)" (July 1989).

OSWER Directive 9347.3-05FS, "Superfund LDR Guide #5: Determining When Land Disposal Restrictions (LDRs) Are Applicable to CERCLA Response Actions" (July 1989).

OSWER Directive 9234.1-01, "CERCLA Compliance with Other Laws Manual" (August 1988).

OSWER Directive 9347.3-10FS, "Superfund LDR Guide #10: Guide to Obtaining No Migration Variances for CERCLA Remedial Actions" (undated).

7.1.E.2 Primary Balancing Criteria

Once it has been determined that the alternatives meet the threshold criteria, five primary balancing criteria are used to weigh major trade-offs among the different hazardous waste management strategies. The five balancing criteria 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 in 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 completion of the RA. This analysis should include consideration of the following: the degree of risk posed by the hazardous substances remaining at the site, the adequacy and reliability of any controls (e.g., engineering and institutional controls) used to manage the hazardous substances remaining at the site, and the potential impacts on human health and the environment (based on assumptions included in the reasonable maximum exposure scenario) should the remedy fail. This evaluation criterion takes into account the following: the uncertainties associated with land disposal; the goals, objectives, and requirements of the Resource Conservation and Recovery Act (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; and threats to the environment associated with redisposal or containment of the hazardous substances.

- **Short-term effectiveness** - This criterion includes the short-term impacts of the alternatives (e.g., impacts during implementation) on the neighboring community, 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 during implementation and the time needed to achieve protection of human health and the environment should be analyzed as well.
- **Reduction of toxicity, mobility, or volume through treatment**- This criterion ensures that the relative performance of the different alternatives in reducing toxicity, mobility, or volume through treatment will be assessed, addressing the statutory performance requirements for remedies that employ treatment as a principal element. The reduction of the inherent hazards posed by the principal threats at the site should also be considered. Specifically, the analysis should examine the magnitude, significance, and irreversibility of reductions.
- **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 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** - Costs assessed include direct and indirect capital costs, annual Operation and Maintenance (O&M) costs, and the net present value of capital and O&M costs.

References

"The Role of Cost in the Superfund Remedy Selection Process," EPA 540-F-96-018.

OSWER Directive 9355.7-04, "Land Use in the CERCLA Remedy Selection Process" (May 1995).

7.1.E.3 Modifying Criteria

Modifying criteria are considered throughout the remedy selection process, but are fully considered after public comment. The following are the two modifying criteria:

- **State acceptance** - This criterion, which is a concern throughout the remedial process, reflects the statutory requirement to provide 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 are not received until after the state has reviewed the draft RI/FS and 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 (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 Involvement Plan (CIP) is implemented. In most cases, 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.

7.1.F Promotion of Appropriate National Consistency

To promote appropriate national consistency, a series of administrative reforms have been enacted. The creation of the National Remedy Review Board (NRRB) brings together expertise to review and make recommendations on remedies that exceed specific cost criteria. The NRRB's goals are to promote national consistency in remedy selection and cost-effectiveness. In addition, EPA developed guidance describing the key principles and expectations, interspersed with "best practices" based on program experience that should be consulted during the Superfund remedy selection process. The purpose of the "Rules of Thumb for Superfund Remedy Selection" guidance is to assist Regional Project Managers (RPMs) and other program implementers in applying remedy selection principles in an appropriately consistent manner.

References

OSWER Directive 9200.0.21, "National Consistency in Superfund Remedy Selection."

OSWER Directive 9220.0-26, "National Remedy Review Board, Progress Report: Fiscal Year 1997" (February 1998).

"Rules of Thumb for Superfund Remedy Selection," EPA 540-R-97-013.

OSWER Directive 9200.1-18FS, "Consolidated Guide to Consultation Procedures for Superfund Response Decisions" (May 14, 1997).

OSWER Directive 9220.0-24, "National Remedy Review Board, Progress Report: Fiscal Year 1996" (January 1997).

7.1.G Innovative Technologies

New and innovative technologies may be implemented at a site when there is potential for the developing technology to produce comparable or superior results or implementability, fewer or less adverse impacts than other approaches, or lower costs for the same level of performance. To encourage these technologies, EPA has expanded indemnification coverage to include both the prime contractor and the innovative technology contractor. The cost of a failed response action will be shared in an amount equal to 50 percent of the estimated cost of the failed innovative response action, 50 percent of the actually incurred cost of the failed innovative response action, or $10 million, whichever is less.

References

"Guidance on Innovative Technology Risk Sharing," EPA 542-B-98-005.

NCP, 40 CFR section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

7.1.H ROD Delegation, Consultations, and Briefings

In general, Headquarters has delegated the authority to sign RODs to the Regional Administrator (RA). In some circumstances, consultation with Headquarters or cross-regional review groups is required, and extra time should be built into the decision-making process to allow for review and comment resolution. A comprehensive fact sheet has been developed to summarize these consultation requirements.

Reference

OSWER Directive 9200.1-18FS, "Consolidated Guide to Consultation Procedures for Superfund Response Decisions" (May 14, 1997).

7.2 Procedures and Interactions

This section discusses the steps in the decision-making process required to fulfill the mandates of the NCP.

7.2.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 or of an Operable Unit (OU) of the site, an assessment of current and potential risks posed by the site or OU to human health and the environment, a description of alternative remedies, and a 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. While PRPs may be involved in the RI/FS process, they are not the decision makers in selecting a remedy under CERCLA. The lead agency must select the preferred alternative and the ultimate remedy (see the discussion in section 4 of this chapter, "Potential Problems/Resolutions").

EPA's RPM should ensure that proper Remedial Action Objectives are chosen and that the proper alternatives pass the screening. Because EPA is required to sign off on any Fund-financed remedy, the RPM should take an active role even at state-lead sites.

For sites where lead is present, the Technical Review Workgroup (TRW), consisting of experts in lead toxicity and exposure assessment, is available for information and advice on a wide range of lead-related issues. The TRW must also be consulted when the Integrated Exposure Uptake Bio-Kinetic model or other models are employed.

Before completing the RI/FS report, the RPM should consult with the state in examining the findings of the comparative analysis. EPA then makes a preliminary determination of the preferred alternative.

References

Administrative Reforms, Round 3, Reform 6C, "Utilize Expert Workgroup on Lead."

"Rules of Thumb for Superfund Remedy Selection," EPA 540-R-97-013.

OSWER Directive 9200.1-18FS, "Consolidated Guide to Consultation Procedures for Superfund Response Decisions" (May 14, 1997).

OSWER Directive 9355.4-23, "Soil-Screening Guidance: User's Guide" (April 1996).

OSWER Directive 9835.1(c), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 1 (July 7, 1991).

OSWER Directive 9835.1(d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 2 (July 7, 1991).

OSWER Directive 9355.3-11FS, "Streamlining the RI/FS for CERCLA Municipal Landfill Sites" (September 1990).

OSWER Directive 9285.7-05FS, "Guidance for Data Usability in Risk Assessment" (September 1990).

OSWER Directive 9355.0-27FS, "A Guide to Selecting Superfund Remedial Actions" (April 1990).

OSWER Directive 9255.3-01FS4, "Feasibility Study - Detailed Analysis of Remedial Action Alternatives" (March 1990).

OSWER Directive 9380.3-02FS, "Treatability Studies Under CERCLA: An Overview" (December 1989).

OSWER Directive 9285.7-01A, "Risk Assessment Guidance for Superfund: Volume 1 - Human Health Evaluation Manual (Part A)" (December 1989).

OSWER Directive 9285.7-01B, "Risk Assessment Guidance for Superfund: Volume 1 - Human Health Evaluation Manual (Part B)" (December 1989).

OSWER Directive 9285.7-01C, "Risk Assessment Guidance for Superfund: Volume 1 - Human Health Evaluation Manual (Part C)" (December 1989).

OSWER Directive 9355.3-01FS1, "Getting Ready: Scoping the RI/FS" (November 1989).

OSWER Directive 9355.3-01FS2, "Remedial Investigation - Site Characterization and Treatability Studies" (November 1989).

OSWER Directive 9355.3-01FS3, "Feasibility Study - Development and Screening of Remedial Action Alternatives" (November 1989).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (July 1989) (comprehensive update anticipated in FY99).

OSWER Directive 9355.3-06, "RI/FS Improvements: Phase II Streamlining Recommendations" (January 1989).

OSWER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies" Interim Final (October 1988).

OSWER Directive 9835.1A, "Interim Guidance on PRP Participation in the RI/FS Process" (May 16, 1988).

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

7.2.B Preparation of Proposed Plan

Section 300.430 (f)(2) of the NCP 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 opportunities for public input and requests comments from the community on each of the remedial options.

References

OSWER Directive 9335.3-02FS-2, "A Guide to Developing Superfund Proposed Plans" (November 1989).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October 1989) (comprehensive update anticipated in FY99).

7.2.B.1 Format of Proposed Plan

The lead agency may issue the Proposed Plan in a fact sheet format. If, however, the Proposed 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 Involvement 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 solving it are clearly identified.

7.2.B.2 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 OU or response action.
- Summary of site risks.
  - Identifies chemicals of concern.
  - Identifies exposure scenarios.
  - Summarizes current and potential site risks.
- Summary of alternatives.
  - 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 of comment periods and public meetings.
- Identifies location(s) of AR.
- Lists names and numbers of government contacts.
- States whether special notice was issued.

References

OSWER Directive 9335.3-02FS-2, "A Guide to Developing Superfund Proposed Plans" (November 1989).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October 1989) (comprehensive update anticipated in FY99).

7.2.C State/Federal and Public Input on Preferred Alternative

The following is a general discussion of the process for coordinating federal, state, public, and 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 and other federal agencies prior to the release of the Proposed Plan for public comment. If the preferred alternative costs more than $30 million, or if the action costs more than $10 million and this cost is 50 percent greater than that of the least costly, protective cleanup alternative, then the NRRB will review the proposed cleanup decision. The RPM should also seek substantial input from the state and state agencies. Early state involvement improves the Superfund program's ability to facilitate concurrence on the selected remedy.

State-lead sites fall into two categories: sites where EPA has provided funding and retains the right to select the remedy, and sites where EPA is not involved. At sites in the first category, if the state is the lead and EPA does not concur with the state's preferred alternative, EPA can assume the lead for the ROD and proceed through the design stage. Such instances do not occur often. In the second category, the state should be reminded that EPA is not bound by the remedy selection unless EPA signs the ROD or concurs on it. The state should send copies of the RI/FS report and draft Proposed Plan to appropriate state and federal program offices. The RPM should ensure consistency with CERCLA and the NCP, sufficiency of the AR, and technical backup for the RI/FS, including Quality Assurance/ Quality Control (QA/QC) and treatability testing.

References

OSWER Directive 9200.1-18FS, "Consolidated Guide to Consultation Procedures for Superfund Response Decisions" (May 1997).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October1989) (comprehensive update anticipated in FY99).

7.2.D Public Input on Remedial Alternatives

The lead agency must make the Proposed Plan available to the public and announce its availability. A notice must be placed in a local newspaper of general circulation. In addition, the lead agency should notify the public of opportunities and resources for community input in order to prepare concerned citizens for an upcoming public comment period.

7.2.D.1 Public Notice

The lead 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 involvement 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.

References

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October1989) (comprehensive update anticipated in FY99).

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

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

7.2.D.2 Public Meeting

Another source of public input is public meetings. Section 300.430 (f)(3)(I)(D) of the NCP 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. No single meeting format is appropriate for all Superfund sites; however, the agency is required to keep transcripts of public meetings concerning the RI/FS and Proposed Plan.

7.2.D.3 Public Comment Period

The lead agency solicits public participation in the remedy selection process by holding a public comment period on the Proposed Plan, and frequently on the RI/FS. During the comment period, the public, including PRPs, may submit written statements or verbal comments containing information for the lead agency to consider when selecting a remedial alternative. Statements and comments may be presented at a public meeting orally or in writing, and written statements may be submitted directly to the lead agency.

Section 300.825(c) of the NCP addresses the issue of comments received after the public comment period has ended. A detailed consideration of the comment is required if the comments contain significant information, the information is not contained elsewhere in the AR file, the information could not have been submitted during the public comment period, or the information substantially supports the need to significantly alter the

response action. Other comments not meeting these criteria should still be addressed in order to demonstrate that EPA has properly reviewed each comment and to provide feedback to stakeholders. These comments need only be presented in a simple response document outlining the NCP criteria and the basis for not considering the comments. For a detailed discussion of community involvement requirements, consult Chapter 13, Community Involvement.

Many piloted activities provide opportunities for more public input. EPA is currently evaluating the impacts that enhanced involvement has on the settlement negotiation process, remediation planning studies, and cleanups themselves.

References

Administrative Reforms, Round 2, Reform 6 ("Community Involvement in the Enforcement Process Pilots").

Community Relations in Superfund: A Handbook, EPA/540/R-92/009.

NCP, 40 CFR section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

7.2.D.4 Administrative Record

At various times during the RI/FS and ROD process, public notices are issued that refer interested persons to the AR file for information. The AR includes all documents that the agency considered or relied on to select the RA. The record file will be located at the regional office and at an information repository at or near the site to facilitate review.

The lead agency compiles and maintains the AR file. Complete documentation in the AR file is essential to demonstrate that the agency considered all relevant information and provided a contemporaneous explanation of its decision making, as this is the record that will used in any judicial review of the decision (see Chapter 15, Records Management, for more information on the AR). **Exhibit 7-2** identifies the documents that the agencies should place in the AR file during the remedy selection process.

Reference

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

7.2.D.5 PRP Participation

The lead agency, and not a PRP, must compile the AR. In some circumstances, however, PRPs may assist in maintaining the AR and in conducting community involvement activities. PRPs may house the AR file at or near the site, provided that it is maintained in a location open to the public and kept in a manner that would not discourage public participation. It is the lead agency's responsibility, however, to maintain the record index and to decide which documents to include in the record and which documents to transmit to the PRPs for inclusion in the record. PRP activities, with respect to community involvement activities, may include assisting at public meetings and providing fact sheets, subject to the lead agency's approval and oversight. The CIP should reflect the fact that PRPs are helping conduct public information activities.

7.2.E Preparation for RD/RA Negotiations

It is important to prepare for negotiations before the ROD is signed. Once the ROD is signed at a federal-lead site, EPA may negotiate with the PRPs over implementation of the Remedial Design/Remedial Action (RD/RA), as appropriate. At a state-lead site, EPA is not required to conduct the negotiations. If Fund monies will be requested by the state, however, 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 Letter (SNL) to the PRPs. The notice letter triggers a 60-day moratorium on EPA-conducted RA 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 (see Chapter 8, RD/RA Negotiations/Settlement, for a detailed description of the appropriate circumstances and procedures for conducting RD/RA negotiations).

In addition to notifying the PRPs that the moratorium has been invoked, the negotiation team must notify other parties as well. The RPM must notify state representatives and state or federal natural resource trustees. This notification should include a copy of the SNL and a list of the parties receiving it. The RPM should submit at this time the notice letter and the list to the AR coordinator for inclusion in the AR.

Reference

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

7.2.F Final Selection of Preferred Alternative

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 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.

If the lead agency modifies its original preferred alternative, it must examine the extent of the change. Some changes must be discussed in the ROD; more significant changes may require additional opportunity for public comment.

Reference

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October 1989) (comprehensive update anticipated in FY99).

7-2 Contents of the Administration 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 removal response actions are indicated in brackets.

Factual Information/Data

- Preliminary Assessment report
- Site Investigation report
- Approved Remedial Investigation/Feasibility Study (RI/FS) work plan
- Amendments to final RI/FS work plan
- Sampling and Analysis Plan consisting of a Quality Assurance Project Plan and a Field Sampling Plan
- 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)
- RI/FS
- 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 Involvement Plan
- Newspaper articles
- Proposed Plan
- Public notices
- Community involvement mailing list and document sent to persons on this list
- Documentation of public meetings
- Public comments
- Transcript of public meeting on RI/FS and Proposed Plan
- Responses to state and other federal agency comments

Other Party Information

- Documentation of state involvement
- ATSDR health assessment
- Natural resource trustees, findings of fact and final reports

7-2 (cont.) Contents of the Administration Record

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
- Amended ROD
- Explanation of Significant Differences
- Action Memorandum [Removal]
- Amended Action Memorandum [Removal]
- EE/CA Approval Memorandum [Removal]

7.2.G Preparation of Draft ROD

After the Agency re-evaluates the chosen alternative, a draft ROD is prepared. The ROD serves as the official Agency Decision Document (DD) on the selection of a remedy that makes all determinations and findings required by statute and regulation.

7.2.G.1 Components of ROD

RODs consist of three basic components:

- **Declaration** - functions as an abstract for the key information contained in the ROD and is the authorizing section of the ROD signed by the EPA RA, Assistant Administrator (AA) of OSWER, or other delegated official when all sections have been completed.
- **Decision Summary** - provides an overview of the site characteristics, alternatives evaluated, and analysis of each option, and explains how the selected remedy meets the statutory and regulatory requirements.
- **Responsiveness Summary** - provides an overview and analysis of information and comments received on the Proposed Plan, RI/FS report, and other information in the AR. It demonstrates how comments were integrated into decision making and provides a formal response to comments.

The following discussion highlights the process for compiling a ROD and the elements of each section.

References

OSWER Directive 9355.3-02FS-3, "A Guide to Developing Superfund No Action, Interim Action, and Contingency Remedy RODs" (April 1991).

OSWER Directive 9335.3-02FS-1, "A Guide to Developing Superfund Records of Decision" (November 1989).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October1989) (comprehensive update anticipated in FY99).

7.2.G.1.A Declaration

The Declaration section of the ROD is signed by the EPA RA, the AA of OSWER, or other delegated official. The support agency must also be given the opportunity to concur with the remedy selected and, if appropriate, to co-sign the ROD. 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 explain why it does not. The Declaration should contain a statement regarding any ARAR waivers. The determination of imminent and substantial endangerment also should be included in the Declaration, unless the ROD is for a no-action decision.

7.2.G.1.B Decision Summary

The Decision Summary should provide an overview of the site-specific factors and analysis that led to selection of the remedy. Generally, this section should include the following:

- Site name, location, and description.
- Site history and enforcement activities.
- Highlights of community participation.
- Scope and role of the OU or response action.
- Site characteristics.
- Current and potential future site and resource uses.
- Summary of site risks.
- Remediation objectives.
- Description of alternatives.
- Summary of the comparative analysis of alternatives.
- Selected remedy.
- Statutory determinations.
- Documentation of significant changes.

For no-action RODs, this DD outline is abbreviated.

7.2.G.1.C Responsiveness Summary

The final component of the ROD is the Responsiveness Summary, which serves two purposes. First, 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, and is written after the Agency has chosen a remedy in response to public comments. The Responsiveness Summary should be both concise and complete.

It is important that each significant comment received by EPA during the public comment period be provided 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.

7.2.G.2 Changes from the Proposed Plan to the ROD

Significant changes from the preferred alternative that could have been reasonably anticipated by the public, such as substantially modifying or selecting a different RI/FS alternative, must be documented and explained in the documentation of significant changes section of the ROD. Non-significant changes should be documented in the description of alternatives section of the ROD. Significant changes may relate to the scope, performance, or cost of the remedy as follows:

- **Scope** - changes that substantially alter the type of treatment or containment technology, address a greater volume or type of waste, a new environmental pathway or medium, or 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. Feasibility study cost estimates are expected to provide an accuracy between plus 50 percent to minus 30 percent.

If a change could not reasonably have been anticipated by the public, EPA must seek additional public comment on a revised Proposed Plan. An example of a change that could not reasonably have been anticipated is selection of a new alternative not previously analyzed.

References

OSWER Directive 9355.3-02FS-4, "A Guide to Addressing Pre-ROD and Post-ROD Changes" (April 1991).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October 1989) (comprehensive update anticipated in FY99).

7.2.H 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 section 300.515 (e)(2)(iii) of the NCP, the lead agency will submit the ROD to the support agency, which should be allowed at least 10 working days to examine the ROD, unless the CA or SMOA specifies a different period. Both agencies

will submit the ROD for review by the support program offices. Each agency determines its own period for interagency review.

In particular, lead and support agencies should get the input of regional and state counsel. An area of potential dispute with the state is the determination of which 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 should review the consultation guide to determine when consultation with Headquarters is necessary.

References

OSWER Directive 9200.1-18FS, "Consolidated Guide to Consultation Procedures for Superfund Response Decisions" (May 14, 1997).

NCP, 40 CFR section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

NCP, 40 CFR section 300.515 ("Requirements for State Involvement in Remedial and Enforcement Response") (1990).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October1989) (comprehensive update anticipated in FY99).

7.2.1 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 RAs 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 to which the state will not agree, or on which it has yet to comment officially, EPA should anticipate the consequences. First, for a Fund-lead action, it is unlikely that a state will pay for part of the RA and Operations 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 (CD) 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 off-site activities (e.g., Publicly Owned Treatment Works disposal, transportation of wastes, and off-site 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).

7.2.J Briefing and Signature

When the state completes a ROD, preferably the state director and the EPA RA or other delegated official 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. All RODs conducted under federal authority will be signed by the EPA RA or the AA of OSWER, if necessary, as specified in the delegation report.

7.2.K Notice

Pursuant to section 300.430 (f)(6)(i) of the NCP, the lead agency will publish notice of the final RA 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 RA begins. The final version of the ROD, including the Responsiveness Summary, must be included in the AR.

7.2.L Post-ROD Changes

EPA may receive new information that leads to an alteration of the remedy specified in the ROD. Such new information may include characterization or volume of contamination present at the site, new expectations regarding the performance of selected technologies under site-specific conditions, or a change in clean up requirements (ARARs). A ROD Amendment, Explanation of Significant Differences (ESD), or memorandum to the file may be required depending on the nature of the post-ROD change.

A reform to update remedies was undertaken specifically to encourage appropriate changes in RAs in response to advances in remediation science and technology. Appropriate changes should reduce the cost or time involved. If a remedy update is to occur, 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.

References

OSWER Directive 9355.3-02FS, "A Guide to Addressing Pre-ROD and Post-ROD Changes" (April 1991).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October1989) (comprehensive update anticipated in FY99).

7.3 Planning and Reporting Requirements

7.3.A Reporting Requirements

This section discusses RPM planning and reporting requirements for the selection-of-remedy phase of the Superfund program.

7.3.A.1 Submission of Documents

In addition to referring documents to EPA program offices for review, the lead agency must submit them to EPA Headquarters in order to receive credit for its 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.

7.3.A.2 Information Databases

The lead agency has responsibility for enabling EPA to track accomplishments at the site, such as submission of the draft FS to the public. The lead agency discharges 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 the Comprehensive Environmental Response, Compensation, and Liability Information System 3/Waste Local Area Network (CERCLIS 3/WasteLAN).

7.3.A.3 Implications of Submissions

The information supplied by the lead agency about RI/FS completion/ROD submission 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 data and to achieve ROD completion by that time.

7.3.B Planning Requirements

The enforcement budget should include an estimate of the dollars needed to negotiate and obtain commitments from PRPs to perform or pay for the response action. The RPM must also work closely with regional counsel and the Department of Justice to determine any budgeting needs to carry out case management strategy. This may include budgeting for a CERCLA section 106/107 action or specialized RD/RA negotiation tasks, such as Alternative Dispute Resolution (ADR), efforts to allocate responsibility, orphan share determination, and peripheral settlements such as *de minimis,* "de micromis," and findings on Ability to Pay. Response budgeting requirements might involve implementation of a CIP and/or oversight or implementation of a PRP-lead RD or a Fund-financed RD/RA.

7.3.C Contractor Participation

As discussed in Chapter 6, 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 involvement activities, with the approval of the lead agency. Contractors may assist further by drafting straightforward portions of the ROD package (e.g., site history, description of contamination), by providing technical assistance in preparation of the Responsiveness Summary, although the accuracy of these documents

remains the responsibility of the lead agency, and by conducting ADR where there are issues between the lead agency, PRPs, and/or the community regarding the preferred remedy. Finally, contractors may assist the lead agency in providing meetings and briefings for agency management.

7.4 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.

7.4.A PRPs' RI/FS Suggests Preferred Remedy

The FS should not recommend a remedy; it provides information impartially on all viable alternatives considered. The Proposed Plan should contain this recommendation. If one is favored and not ultimately selected, an FS amendment would be required. More importantly, pre-selection of a remedy is implied, which arguably causes due process concerns 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, and may have to supplement the RI/FS to avoid bias. The selected remedy must be well-founded on data that exist in the AR.

References

OSWER Directive 9835.1(c), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 1 (July 1991).

OSWER Directive 9835.1(d), "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies," Volume 2 (July 1991).

OSWER Directive 9835.1a, "Interim Guidance on PRP Participation in the RI/FS Process" (May 16, 1988).

7.4.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 involvement activities to receive input from many citizens at an early date, thus getting conflicts out in the open quickly and resolving the issues. Otherwise, the public may provide a sizeable number of comments during the formal public comment period, forcing the lead agency to use 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.

7.4.C Disputes over ROD

If the support agency does not concur on the remedy, the lead agency may choose to proceed without 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 RA was performed in accordance with the NCP in order to remove the site from the NPL, the state may 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 RA at ROD signature generally precludes these difficult situations. There may be instances, however, where proceeding with the ROD, despite non-concurrence, is appropriate.

7.5 Activities Checklist

The following checklist is not intended to present an exhaustive set of procedures, nor is it meant to be a chronological list of tasks. 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)_____ Consult NRRB if the preferred alternative meets the specified criteria.

4)_____ Produce draft version of Proposed Plan that identifies the preferred remedial alternative.

5)_____ Review and comment on all alternatives proposed by states and other federal agencies for PRP-lead sites.

6)_____ Review operative Remedy Delegation Report to assess whether Headquarters review/comment or consultation is needed.

7)_____ Send draft RI/FS report and draft Proposed Plan to appropriate program offices.

8)_____ Review state comments, summarize them in Proposed Plan, and draft Agency response.

9)_____ Finalize Proposed Plan by addressing support agency and other program office comments as appropriate.

10)_____ Submit RI/FS, Proposed Plan, comments, and responses to AR, along with any other information used in reaching decision.

11)_____ Publish newspaper notices announcing the availability of resources for public information, the completion of the Proposed Plan and RI/FS, and opportunities for community input.

12)_____ Notify persons on mailing list that Proposed Plan and RI/FS are complete.

13)_____ Conduct public meeting.

14)_____ Conduct community involvement activities.

15)_____ Hold 30-day public comment period (this may be extended by an additional 30 days upon timely request).

Final Selection of Remedial Alternative

16)_____ Re-evaluate preferred alternative on basis of comments and new information received from the public, including PRPs and other sources.

17)_____ Prepare draft version of ROD Declaration and Summary.

18)_____ Prepare Summary and Response to Comments for Responsiveness Summary.

19)_____ Conduct public comment period on any significant changes which were not logical outgrowths of the earlier remedial alternatives.

20)_____ Finalize ROD Summary.

21)_____ Complete Responsiveness Summary

22)_____ Brief lead agency management on ROD.

23)_____ Submit ROD to appropriate offices and support agency, each of which will brief its management on the ROD.

24)_____ Seek input from regional counsel.

25)_____ Seek concurrence or non-concurrence from support agency on the selected remedy.

26)_____ Brief agency management and present ROD for signatures.

27)_____ Publish notice and make ROD available to public through AR.

28)_____ Provide information on ROD start and completion for entering into CERCLIS 3/WasteLAN.

29)_____ Send copy of ROD (hard copy and disk) to Headquarters.

Chapter 8 RD/RA Negotiations/Settlement

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Chapter 8 RD/RA Negotiations/Settlement

8.1 Description of Activity

8.1.A Introduction

This chapter discusses the process of negotiating for Potentially Responsible Party (PRP) conduct of the Remedial Design/Remedial Action (RD/RA) and focuses on the Remedial Project Manager's (RPM's) role in that process. In addition to discussing the RD/RA negotiation process, this chapter discusses the settlement tools available to EPA and PRPs, including mixed funding, Non-Binding Preliminary Allocations of Responsibility (NBARs), and *de minimis* and "de micromis" settlements. "De micromis" parties are a subset of *de minimis* parties; therefore, unless otherwise noted, all RD/RA negotiation/settlement procedures applicable to *de minimis* parties will also apply to "de micromis" parties.

8.1.B Statutory Authority

Section 122 of CERCLA requires that all RD/RA settlements with PRPs be finalized as judicial Consent Decrees (CDs). CDs 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.

8.1.C Overview of the Negotiation Process

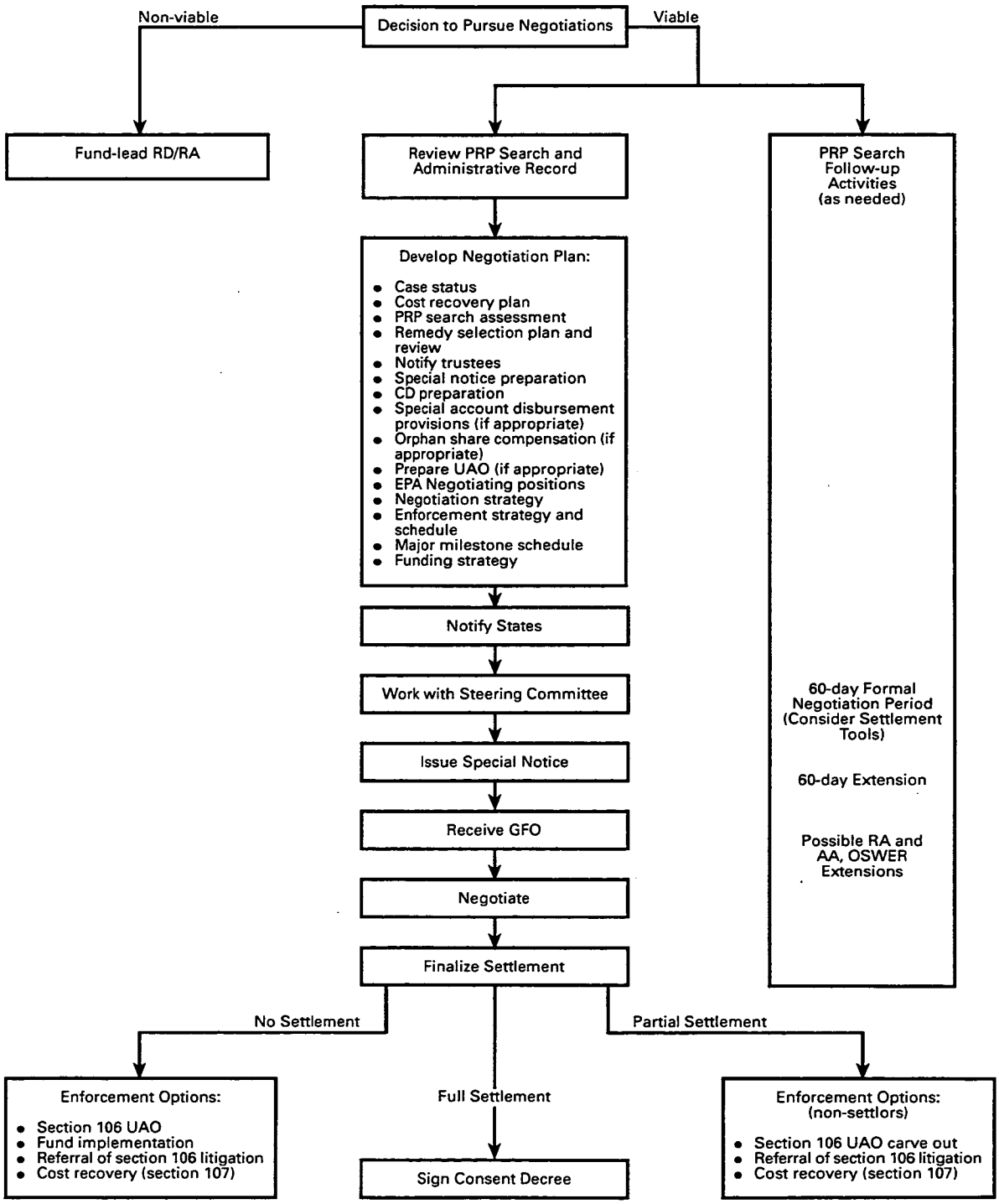
The RD/RA negotiation process requires cooperation and close coordination of the regional program office, regional counsel, the Department of Justice (DOJ), and the Office of Site Remediation Enforcement (OSRE). **Exhibit 8-1** summarizes the RD/RA negotiation process.

The negotiation planning process begins with a regional decision that there are 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 and other evidence when making this decision. The PRP search should be completed as early as possible, ideally well in advance of RD/RA negotiations. Regions should attempt to begin RD/RA negotiations concurrently with the RD to prevent lag-time between negotiations and the commencement of the RD.

8.1.C.1 RD/RA Negotiation Plan

The first step in the RD/RA negotiation process is for the RPM and regional counsel 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 steps in 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 (AR) 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

8-1 RD/RA Negotiation Process



NOTE: This general overview of removal enforcement may not apply in all situations, especially emergencies.

appropriateness. *De minimis* parties should be removed from the liability system as early as possible (pre-Record of Decision (ROD), if appropriate).

By the time the RD/RA negotiation and settlement process begins, most or all PRPs have been notified of their status as PRPs with a General Notice Letter (GNL). Following general notice, EPA continues to look for more PRPs and for hard evidence of liability. If additional PRPs are identified, EPA issues GNLs to them, as allowed under section 122(a), unless special notice has been provided or waived. Language can be inserted into GNLs to solicit information about nomination of additional parties. The RPM and regional attorney 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 resource 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 the state's concerns are understood and to determine the availability of state funding should negotiations fail to produce a settlement.

8.1.C.2 Pre-Referral Package

A pre-referral package should be submitted to DOJ (with copies to OSRE) before the commencement of the formal settlement process to ensure timely involvement of 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 (SNLs).

As a practical matter, it is advisable to commence dialogue with OSRE and DOJ as early as possible, prior to providing the pre-referral for the 60-day review, by conducting a phone conference to obtain 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 and result in a more efficient settlement process.

8.1.C.3 Formal Settlement Process

The formal settlement process begins with the issuance of SNLs to the PRPs. SNLs 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 (FS) 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 CD (approved by appropriate EPA and DOJ management) and Proposed Remedial Action Plan, or proposed or final ROD should be attached to the SNL.

With certain exceptions, the issuance of SNLs begins a 60-day moratorium on action under sections 104 and 106 of CERCLA. PRPs have 60 days from the date SNLs are issued to submit a Good Faith Offer (GFO) to EPA. If such an offer is received, the moratorium is extended an additional

60 days. If additional time is necessary, the Regional Administrator (RA) or his/her delegate may extend the moratorium period for an additional 120-180 days. Moratorium extensions beyond 120 days should only occur in exceptional cases. Negotiation schedules should be established quickly and adhered to as strictly as possible. To aid in keeping a set negotiation schedule, RPMs should ensure that their expectations are clearly understood by all the parties involved, including PRP attorneys, regional counsel, and DOJ.

Once agreement has been reached, the PRPs and the RA must sign a CD. The CD is then forwarded to DOJ with a referral package developed by regional counsel. If the settlement falls under any of the categories of non-delegated settlements, OSRE must concur on the signed CD before it is forwarded to DOJ. It should be noted that RD-only settlements may be in the form of an AOC 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 conduct the remedial action.

Should EPA fail to reach an agreement with the PRPs, the region may issue a Unilateral Administrative Order (UAO). 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.

References

Office of Enforcement (OE), "Model CD Implementation" (August 1991).

OE, "Draft CERCLA RD/RA Settlement Negotiations Checklist" (January 26, 1988).

Office of Solid Waste and Emergency Response (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).

8.1.D Roles and Responsibilities

This section describes the roles and responsibilities of the RPM, regional counsel, and representatives from OSRE, the Office of General Counsel (OGC), and DOJ. The primary activities for each group are summarized for each phase of the negotiation process below and in **Exhibit 8-2.**

8-2 Roles and Responsibilities

RPM

NEGOTIATIONS PLANNING

- Ensure PRP search review and follow up by civil investigator and ORC
- Send GNL, if necessary
- Coordinate update information exchange with the PRPs, including section 104(e) letters and provide the PRPs with information regarding other PRPs (in conjunction with regional counsel)
- Assemble cost documentation
- Assist in preparation of negotiation plan and pre-referral litigation report
- Review administrative record
- Comment upon 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 (SNLs)
- Conduct negotiations as lead technical representative on the case team
- Maintain coordination among appropriate Headquarters and state and natural resource trustee offices
- Request extensions for negotiations from Regional Administrator/ Headquarters, if necessary
- 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

8.1.D.1 Remedial Project Manager

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 regional counsel and OSRE during each phase of the negotiations. Planning, preparing for, and participating in the negotiations process, along with negotiation coordination, usually involves a substantial time commitment by the RPM over a long period.

The RPM works together with the On-Scene Coordinator (OSC) and regional counsel to develop the negotiation plan early in the process, before GNLs are issued. The planning stage is based on a thorough and complete PRP search. RPMs should always give the PRPs early notice of their potential liability through GNLs. Information on volumetric rankings of PRPs and the nature of substances at the site should be included 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 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 CD by commenting on 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 GNLs, SNLs, and cost documentation packages, and by participating in negotiations.

8.1.D.2 Regional Counsel

The regional counsel, in partnership with the RPM, plays a central role in all phases of the RD/RA negotiations. The regional counsel's primary role is to prepare the pre-referral litigation report to DOJ and the draft CD, and to provide legal counsel during the negotiation process. The regional counsel is responsible for coordinating with DOJ, OSRE, and OGC as appropriate during the RD/RA negotiations. The regional counsel also participates in the development of the case referral package for DOJ litigation of section 106 and section 107 cases.

8.1.D.3 Office of Site Remediation Enforcement

OSRE is responsible for ensuring national consistency for negotiated settlements and consistency with Agency policy. OSRE (specifically the Regional Support Division (RSD) of OSRE) has regional liaisons, and OSRE has designated subject matter experts who are versed in the various RD/RA settlement tools (e.g., mixed funding, *de minimis*) and who act as resources for the RPM and regional counsel.

OSRE participates in management review of non-delegated settlements. The Assistant Administrator (AA) of the Office of Enforcement and Compliance Assurance (OECA) or, in some cases, the Director of OSRE, must concur on these settlements. Additionally, OSRE representatives may participate on negotiation teams if complex or nationally significant issues are anticipated. OSRE also may assist the regions in assembling part of the

cost documentation package. OSRE should be on the case correspondence list and should be supplied with relevant documents, including pre-referral litigation reports and draft CDs, relating to cases in RD/RA negotiations.

OSRE is also responsible for ensuring that negotiated settlements are consistent across the regions with national policy for legal matters. OSRE attorneys have expertise in the legal implications of RD/RA settlements, and they 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. OSRE also reviews all CDs resulting from settlements.

8.1.D.4 Office of General Counsel

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 Headquarters offices, OGC has the ultimate responsibility for providing legal advice and direction for EPA as a whole.

8.1.D.5 Department of Justice

DOJ's representative from the Environment and Natural Resources Division's Environmental Enforcement Section is EPA's attorney for the 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 CDs. At facilities where total Fund response costs exceed $500,000, DOJ concurrence is also required for CERCLA section 122(h) cost recovery settlements and section 122(g) *de minimis* Administrative Orders (AOs). The DOJ attorney and appropriate management review the initial and subsequent drafts of the CD before it is sent to the PRPs. DOJ case attorneys are essential legal resources for the RPM and regional counsel. Close coordination and communication with DOJ is important for successful negotiation and litigation of Superfund cases.

The RPM should remember that the information gathered in the initial stages of site cleanup, such as information gathered 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 Office of Litigation Support (OLS) 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.

8.1.E Delegations

The OSRE Memorandum "Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas" (September 30, 1998) defines the requirements for concurrence, prior written or oral approval, and consultation that regions must comply with during the RD/RA negotiations and settlement process. For example, the memorandum

specifies that the Regional Administrator may approve RD/RA negotiation moratorium extensions from 120 to 180 days, after which the prior written approval of the Director/RSD is required for extensions from 181 to 240 days, and the prior written approval of the Director/OSRE is required for extensions from 241 to 300 days. The memorandum also contains the concurrence and consultation requirements for various categories of settlements. Because revisions to concurrence and consultation requirements are made frequently, the required concurrence or consultation for a particular negotiation and settlement action should be confirmed in advance. A chart listing designated OSRE staff for specific CERCLA consultations is available from OSRE.

References

OECA Memorandum, "Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas" (September 30, 1998).

OECA Memorandum, "Supplemental Environmental Projects Policy" (April 10, 1998).

OSRE Memorandum, "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (February 5, 1998).

OECA Memorandum, "Interim Policy on Settlement of CERCLA Section 106(B)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders" (September 30, 1997).

OSRE Memorandum, "General Policy on Superfund Ability to Pay Determinations" (September 30, 1997).

OECA Memorandum, "Coordinated Settlement of Parallel Proceedings Interim Policy and Procedures" (June 9, 1997).

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e) Request" (July 26, 1996).

OECA Memorandum, "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (May 19, 1995).

OSRE Memorandum, "Model Administrative Order for CERCLA Information Requests" (September 30, 1994).

OSWER Directive 9833.06, "Model Administrative Order on Consent for Removal Response Actions" (March 16, 1993).

OSWER Directive 9835.3-2A, "Administrative Order on Consent for Remedial Investigation/Feasibility Study" (July 2, 1991).

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

OSWER Directive 9834.4A, "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 25, 1988).

OSWER Directive 9012.10-a, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13 B and 14-14 E (June 17, 1988).

8.2 Procedures and Interactions

8.2.A Regional Decision to Pursue RD/RA Negotiations

The regional decision to pursue RD/RA negotiations must be included in the prior-year Superfund Comprehensive Accomplishments Plan (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 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 resource trustees, states, DOJ, OSRE, 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.

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 of previously identified PRPs. The potential role of newly identified PRPs should be considered when developing the negotiation plan.

8.2.B Negotiation Planning

Negotiations for which EPA is fully prepared, especially those with well established plans, schedules, and deadlines, are much more likely to result in a signed CD than negotiations for which EPA has not adequately planned. A suggested RD/RA negotiation planning schedule is presented in **Exhibit 8-3**. The essential elements of negotiation planning are discussed below.

8.2.B.1 RD/RA Negotiation Plan

The RD/RA negotiation plan is one major component of the site management plan. The object of the plan is to assist the RPM in effective management of the RD/RA negotiation process and to 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 (e.g., the PRP search plan, RI/FS negotiation plan), should comprise the pre-referral litigation report.

The RPM and 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, and establishing a schedule for the negotiations. The plan should also serve as a checklist of steps to be taken in EPA's negotiation process. The plan should address, at a minimum, the following topics:

8-3 Sample RD/RA Negotiation Planning Schedule

Activity	Schedule With Respect To Planned Negotiation Start Date
Assess PRP search	Initiate at least 3 quarters prior to start date to allow for supplemantal activities. Conclude supplemental activities no later than 5 months before start date.
Request cost recovery documentation	Complete checklist (negotiation plan) 2 quarters prior to start date.
Decide to pursue negotiations	At least 4 months prior to start date.
Make final PRP search evaluation	
Assess cost recovery case	
Develop negotiation plan	At least 3-1/2 months prior to start date.
Implement negotiation plan	At least 1 quarter prior to start date.

- 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 plans for updating documentation, recovery of past costs to date, estimates of future oversight costs, assessment of Statute of Limitations (SOL) issues, computation of interest claims, demand for past costs in general or special notice or demand letters, assessment of any weaknesses in past costs, relationship of past costs to overall settlement, and litigation alternatives for recovering costs if non-settlors exist or negotiations are unsuccessful.
- The remedy selection plan and review of the AR, including identification of participants in RI/FS and ROD preparation, a detailed timeline for ROD preparation (if the ROD has not been signed), public participation in the remedy selection process, review of the AR, and overall coordination with enforcement case development and negotiations.
- SNL preparation and review (with volumetric ranking attachment).
- CD preparation and review, including technical deliverables and schedules. (If an orphan share exists at the site, compensation should

be included in the elements of the CD. Terms for disbursement of funds from a special account should also be defined in the CD.)

- Planning for negotiation positions, 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 GFOs. Possible re-examination of positions, if there are some settlors and some viable non-settlors.
- Procedural strategy for carrying out negotiations, including discussions with the steering committee, timing of special notice, drop-dead dates, draft CDs, the development of work plans, an oversight plan, and associated response needs.
- Enforcement strategy and a schedule for actions should negotiations not result in a settlement within established timeframes. These actions 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.

8.2.B.2 Draft Consent Decree

The terms and conditions governing the RD/RA or RA activities of PRPs are specified in a CD. The Case Team should prepare a draft CD as part of the negotiations planning activities. A model CERCLA CD has been prepared for this purpose. **Exhibit 8-4** presents the elements outlined in the model CD.

Nine of the clauses in the Model CD–site access, dispute resolution, covenants not to sue, additional response actions (which falls under heading XXI in Exhibit 8-4), indemnification, contribution protection, *force majeure*, certification of completion, and stipulated penalties–are considered very important. This means that any significant deviation from the model language for these clauses must be concurred with by OSRE. 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. In addition, the region is required to send a mini-litigation report to DOJ 60 days before sending the draft RD/RA CD to the PRPs at the beginning of negotiations. A mini-litigation report is required for all RD/RA negotiations. See **Exhibit 8-5** for the time frames in which this consultation/concurrence should occur.

Reference

"Revised Model CERCLA RD/RA Consent Decree," 63 *Federal Register* 9541 (February 25, 1998).

8-4 Provisions in Model Consent Decree

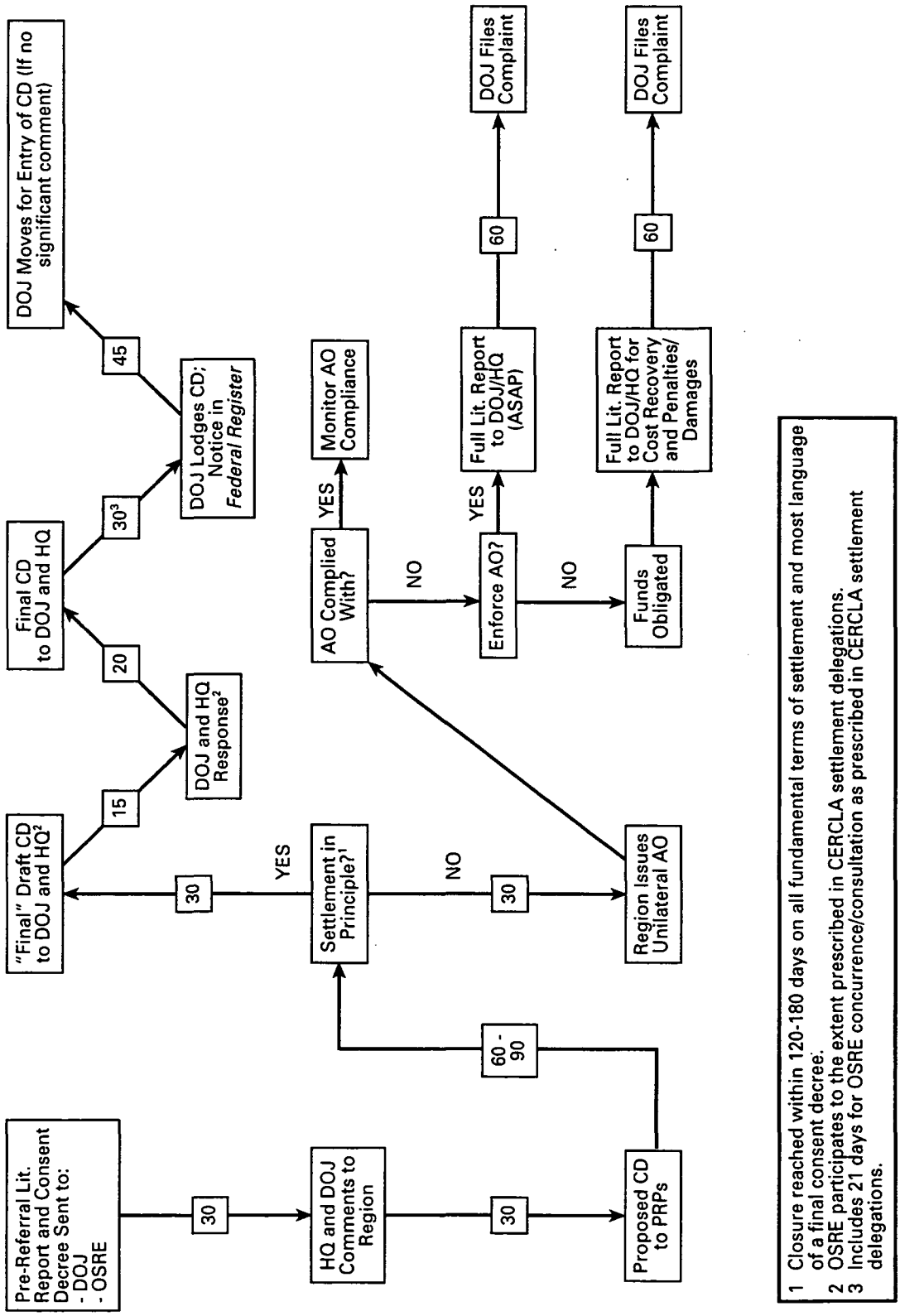
I.	Background
II.	Jurisdiction
III.	Parties Bound
IV.	Definitions
V.	General Provisions
VI.	Performance of the Work by Settling Defendants
VII.	Remedy Review
VIII.	Quality Assurance, Sampling, and Data Analysis
IX.	Access and Institutional Controls
X.	Reporting Requirements
XI.	EPA Approval of Plans and Other Submissions
XII.	Project Coordinators
XIII.	Assurance of Ability to Complete Work
XIV.	Certification of Completion
XV.	Emergency Response
XVI.	Reimbursement of Response Costs
XVII.	Indemnification and Insurance
XVIII.	*Force Majeure*
XIX.	Dispute Resolution
XX.	Stipulated Penalties
XXI.	Covenants Not to Sue by Plaintiff[s]
XXII.	Covenants by Settling Defendants
XXIII.	Effect of Settlement; Contribution Protection
XXIV.	Access to Information
XXV.	Retention of Records
XXVI.	Notices and Submissions
XXVII.	Effective Date
XXVIII.	Retention of Jurisdiction
XXIX.	Appendices
XXX.	Community Relations
XXXI.	Modification
XXXII.	Lodging and Opportunity for Public Comment
XXXIII.	Signatories/Service
XXXIV.	Final Judgment

8.2.B.3 Covenants Not to Sue

Under section 122(f)(1), EPA may grant covenants not to sue 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 may be released from

8-5 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 OSRE participates to the extent prescribed in CERCLA settlement delegations.
3 Includes 21 days for OSRE concurrence/consultation as prescribed in CERCLA settlement delegations.

liability for past costs if they reimburse the Fund for all or part of its response costs at the site, depending on the provisions of the settlement. Under most RD/RA CDs, PRPs are liable for implementation of the ROD, Operation and Maintenance (O&M), and payment of government oversight costs. A covenant not to sue becomes effective for these liabilities upon payment of past costs. However, the covenant 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, as described in CERCLA section 122(f)(2), in the following 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 National Contingency Plan (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.

Covenants not to sue without reopeners also may be provided under extraordinary circumstances, as described in CERCLA section 122(f)(6)(B). Only the natural resource trustees 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 and performance standards have been achieved in accordance with the terms of the ROD and in a manner consistent with the NCP. Chapter 11, Site Completion/Deletion, contains more detailed information on certifying the completion of remedial activity at a site.

References

OSWER Directive 9834.8, "Covenants Not to Sue Under SARA" (July 10, 1987)

"Revised Model CERCLA RD/RA Consent Decree," 63 *Federal Register* 9541 (February 25, 1998).

8.2.B.4 Matters Addressed

In the past, settlements generally have not included a definition of "matters addressed," but instead have contained a statement that the "Settling Defendants are entitled to such protection from contribution actions or claims as is provided in CERCLA section 113(f)(2)" or the equivalent. This approach caused uncertainty regarding the effect of the settlement on the contribution rights of persons not party to the settlement, and in turn caused subsequent litigation and delays in entry of decrees. Defining "matters addressed" in settlements will reduce uncertainty and litigation

regarding the scope of contribution protection associated with such settlements. Therefore, a definition of "matters addressed" should typically be included in the contribution protection section of future settlements. The general principles for defining "matters addressed" are as follows:

- "Matters addressed" should be site-specific, and should identify response actions and costs for which the parties intend contribution protection to be provided. At a minimum, these will be the response actions the settling parties agreed to pay for or perform, but can be broader in range in some circumstances, such as for *de minimis* and ATP settlements.
- The "matters addressed" must satisfy the legal standard for entry, i.e., that the settlement is "fair, reasonable, and consistent with the goals of CERCLA." The required demonstration can ordinarily be accomplished by showing that the response actions or costs within the definition of "matters addressed" were considered in determining the amount of the settlement and that the settlors' contribution represents a reasonable contribution based on a defensible criterion such as volumetric share and toxicity of hazardous substances contributed to the site.
- The scope of the covenant not to sue is relevant to, but not dispositive of, the scope of "matters addressed." In some cases, "matters addressed" are defined less broadly than the covenant not to sue. An item that is not within the scope of the covenant not to sue, however, is not ordinarily considered to be a matter addressed in a settlement.

For *de minimis* settlements and other settlements where the PRPs pay a share of the specified costs, an item is addressed if it is included in the cost total to which the parties' shares are applied. Other items whose costs cannot be estimated at the time of settlement may be included in "matters addressed" if the settlors pay a premium that reflects the risk that such costs will ultimately be incurred.

Settlors in final RD/RA CDs usually bear the bulk of the site costs. In the interest of fairness, it is likely that they should receive contribution protection for all site costs, including those that may have been incurred by other PRPs. So long as the costs borne by other PRPs are known or can be reasonably estimated and were considered in determining how much the final RD/RA settlors should be required to do and pay, those earlier PRP costs should be included in "matters addressed" along with all of the United States' costs. The definition of "matters addressed" in such a settlement should include all anticipated costs and work.

In cases where it is not possible to conclude that settlors are paying an appropriate portion of all costs, public and private, it may be appropriate to limit "matters addressed" to costs reimbursed or work performed under the decree or to list specifically the matters for which the settlor is to receive contribution protection, including costs incurred by PRPs to the extent they have been considered.

In RD/RA settlements for only one of several Operable Units (OUs), "matters addressed" are likely to be limited to the portion of the cleanup which the settlors are performing or funding. However, if the settlor conducts the entire remedy for a site through a series of OU decrees, the final OU decree should use a definition of "matters addressed" equivalent to what the settlor would have received if it had performed the entire remedy under one, final RD/RA decree.

In "past cost-only" settlements, the covenant not to sue covers past response costs only. To prevent disputes regarding the parties' intentions as to the scope of contribution protection, "matters addressed" should be narrowly limited to the United States' past response costs. In some cases, such as where prior settlors have already reimbursed part of the United States' past costs, it may be appropriate to narrow "matters addressed" even further. In these instances, "matters addressed" may be limited to past costs the settling defendant has agreed to pay or to the United States' past costs that were not reimbursed prior to any payments to be made under the decree.

In cashout settlements, "matters addressed" should reflect the scope of the settlement. If the settlor's payment represents a reasonable contribution toward all anticipated past and estimated future site costs, "matters addressed" should include all such response activities and costs. However, if the settlor's payment was determined based on only a subset of site response costs, only that subset is a matter actually addressed.

ATP settlements often represent a judgment of what is an appropriate amount for a PRP with limited financial resources to pay. So long as cost or work items are considered in the analysis of total anticipated costs used to develop the judgement, they should be included in "matters addressed." However, ATP settlements do not always address all site costs. In such cases, a more limited definition of "matters addressed" will be appropriate.

In order to avoid any uncertainty arising from the overlap between the definition of "matters addressed" and the standard reservations and reopeners, which are not typically "addressed" by the settlement, language indicating that "matters addressed" in the settlement does not include these reserved rights should be included. This language should be drafted to require that the United States invoke the reservation or reopener before a contribution plaintiff can avoid the bar to contribution suits on the basis of such reservation or reopener. Where CDs are not intended to provide broad contribution protection, "matters addressed" should not overlap with standard reservations and reopeners, and other special language should not be needed.

Reference

DOJ/OSRE Memorandum, "Defining 'Matters Addressed' in CERCLA Settlements" (March 14, 1997).

8.2.B.5 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 when 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.

Reference

OSWER Directive 9834.8, "Covenants Not to Sue Under SARA" (July 10, 1987).

8.2.C Notification of States and Federal Natural Resource 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 under the trusteeship of the United States, EPA must notify the appropriate federal 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 for natural resource damages, 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, see Chapter 5, RI/FS Negotiations/Settlement.

8.2.D Special Notice Letters

Section 122 of the Superfund Amendments and Reauthorization Act (SARA) authorizes EPA to issue SNLs to begin a formal negotiation period with the PRPs. It is EPA's policy to use CERCLA section 122(e) special notice procedures whenever possible. 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 and should be familiar with the RI and remedial alternatives.

8.2.D.1 Contents

The SNL should contain the following information:

- Notice of the potential liability of the PRP.
- Purpose of the SNL and the conditions of the negotiation moratorium.
- Description of future response actions, if known.
- Description of the elements of a GFO.

- Statement of Work (SOW) to be performed.
- Additional information, including other PRPs' names and addresses, 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.
- Date when a GFO is due.

The SNL should include as attachments a copy of EPA's Proposed Plan (or the ROD, if signed), a draft CD for the RD/RA, and a draft RD/RA SOW.

To the extent possible, the SNL should contain specific information to assist the PRPs in developing a GFO. This includes information stipulating the minimum elements of an acceptable GFO and what the region will not accept. Minimum requirements for GFOs are discussed later in this chapter. Headquarters has developed model SNLs as samples for regions to use at their discretion.

Regional counsel 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 CD is anticipated. A copy of the pre-referral litigation package should be sent to OSRE. 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 OSRE review, especially if it is anticipated that the settlement will require OSRE consultation or concurrence.

Copies of the SNL should be sent to the appropriate state representative, the natural resource trustees, the regional AR coordinator, and OSRE (unless the region has previously provided a copy of a GNL with the particular PRP as a recipient). Regions will enter the PRP into CERCLIS 3/WasteLAN.

Reference

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)" (July 26, 1996).

8.2.D.2 Cost Recovery

The negotiation process should include negotiations for any past costs, such as costs of a removal or Fund-lead RI/FS. RPMs should refer to Chapter 12, Cost Recovery, for information on the different types of costs, which include indirect, direct, pre- and post-SARA, and 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.

8.2.D.3 Timing the Special Notice Letter

The SNL should be sent between the time the draft Proposed Remedial Action Plan and FS are released for public comment and when the ROD is issued, or shortly thereafter (within 45 days). The timing strategy will strike a balance between EPA's ability to conduct meaningful negotiations and minimizing delay in implementing the RD/RA. It is not appropriate to delay issuance of SNLs 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 GFO.

8.2.D.4 Section 122(a) Letters

If EPA decides not to use the special notice procedure, the region must notify the PRPs in accordance with section 122(a) of CERCLA, stating why EPA has decided to forego the formal negotiation 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 (CI) and regional counsel.
- The PRPs lack the resources to conduct response activities.
- There are ongoing negotiations with deadlines specified in a letter (i.e., ongoing 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 ongoing 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 OU or for the entire RD/RA, depending on the remedy documented in the ROD and regional policy.

References

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

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

8.2.E Good Faith Offer

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 GFOs 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 CD that identifies and prioritizes the major concerns of the PRP 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 and oversight costs (or if not, a statement of why referral to non-settlors is appropriate).
- A discussion of the PRP's position on release from liability and reopeners to liability.

To encourage PRPs to submit acceptable GFOs, the RPM and regional attorney must take an active role in educating the PRPs. Regional minimum requirements for GFOs should be stipulated in detail in the SNLs. The regional attorney should maintain frequent contact with the PRPs or steering committee representatives regarding development of a GFO.

References

OECA Memorandum, "Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas" (September 30, 1998).

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; 4) Follow-Up 104(e)" (July 26, 1996).

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

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

8.2.F 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 GFO within 60 days of the issuance of SNLs, the negotiation period will terminate. If a GFO is received, the negotiations may continue for another 60 days. Firm negotiation schedules should be developed quickly and adhered to in order to force issues to resolution. If in exceptional cases negotiations must be extended beyond 120 days, prior written or oral approval of the RA or his/her delegate must be obtained. Moratorium extensions from 181-240 days require Director/

RSD approval and 241-300 day extensions require Director/OSRE approval. Requests for extensions from OSRE (including RSD) should be made at least 14 days in advance of the expiration date of the negotiation period.

References

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

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

8.2.G Settlement Incentives/ Disincentives

The settlement 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 settlement 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 parties, non-settlors, the orphan share greater than 25 percent of the projected remedial costs, and evidentiary deficiencies regarding viable non-settlors. Also, mixed funding, *de minimis* settlements, and NBARs should be used in appropriate cases.

The settlement incentives/disincentives approach also recognizes the use of disincentives in response 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 will be a cost recovery action.

8.2.H CERCLA Settlement Policy

EPA's interim CERCLA settlement policy sets forth general principles governing settlements with private parties. 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 policy states 10 criteria to be considered when negotiating settlements:

- **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 in 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 settlement contributions greater than the apportioned percentage of wastes contributed by each PRP to the site.
- **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.
- **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.
- **Ability of the Settling Parties to Pay.** 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. Ability to Pay (ATP) settlement is reserved for business PRPs who demonstrate that the amount sought by the government is likely to put them out of business or otherwise jeopardize their viability, and for both business and individual PRPs who demonstrate that payment of such an amount is likely to create an undue financial hardship. See Chapter 12, Cost Recovery ("Ability to Pay").
- **Litigative Risks in Proceeding to Trial.** Such risks include:
  - Admissibility of the government's evidence.
  - Adequacy of the government's evidence.
  - Availability of defenses.
- **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.
- **Precedential Value.** Where the factual situation is conducive to establishing a favorable precedent for future government actions, settlement should be on terms most favorable to the government.

Where PRPs will not settle on such terms, and the quantity and quality of evidence is strong, it may be in the government's best interest to try the case.

- **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.
- **Inequities and Aggravating Factors.** Analyses of settlement proposals should flag for the decision makers any apparent inequities to the settling parties inherent in the government's case, any apparent inequities to others if the proposal is accepted, and any aggravating factors.
- **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.

References

OECA Memorandum, "General Policy on Superfund ATP Determinations" (September 30, 1997).

OSRE Fact Sheet, "Existing Ability to Pay (ATP) Guidance and Models" (May 1995).

OSWER Directive 9835.14, "Submittal of Ten Point Settlement Analyses for CERCLA Consent Decrees" (August 11, 1989).

8.2.1 Settlement Tools

The negotiation team has several important settlement tools that can help achieve PRP settlements. These include the following:

- Mixed funding agreements.
- *De minimis* settlements.
- "De micromis" settlements.
- NBARs.
- Orphan share compensation.

Each of these settlement tools is discussed in detail in this section.

In certain instances, Supplemental Environmental Projects (SEPs) may be included in settlements with PRPs and may lower the settlors' final settlement penalty.

8.2.1.1 Mixed Funding Settlements

Mixed funding agreements are generally 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 will be 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.
- **Cashouts** - Settling PRPs pay a portion of the response costs and the Agency conducts the response action.

Once the PRPs have indicated their interest in pursuing a mixed funding settlement, the region should evaluate the case against the 10-point settlement criteria, which include, in this context, the following:

- The level of PRP agreement with the remedy.
- Whether a substantial part of cleanup (> 50 percent) is offered by settling PRPs.
- Whether the settlors' part of the cleanup is proportionate to or greater than their combined allocation.
- The strength of the liability case against and viability of the PRPs (settlors and non-settlors).
- The amount of waste contributed to the site by settlors and viable non-settlors compared to their relative settlement share.
- Other available options if settlement fails.

The best candidates for mixed funding are cases in which the following features are present:

- The potential portion or OU 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 whom the Fund portion may be recovered through litigation.

Cases considered poor candidates for mixed funding have the following features:

- The potential Fund portion is large (e.g., the potential settlors' offer is insufficient).
- The case against the potential settlors is strong and the case against the non-settlors is not strong, and thus litigation against the potential settlors is likely to be more successful than a mixed funding settlement.

These factors do not automatically preclude mixed funding for a case. For mixed funding to be seriously considered in such instances, however, 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.

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), OSRE, 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 a 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 an unrecovered amount grossly disproportionate to the share of contamination contributed by the pool of viable, liable non-settlors available for future cost recovery actions. 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.

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.

Reference

OSWER Directive 9834.9, "Evaluating Mixed Funding Settlements" (October 20, 1987).

8.2.1.1.1 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, absent any shortfall in the Fund, 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 themselves 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.

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 OSRE. In preauthorization agreements, the PRPs prepare a preauthorization proposal for regional review. The RPM's early notification to OERR and OSRE 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 10-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 OSRE's Regional Support Division. 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 3/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, the review time for submittals will vary.

Preauthorization approval is documented in a PDD, which is prepared by EPA. PDD contents include the following:

- 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 becomes effective when it has been signed by the Director, OERR (by delegation from the AA OSWER), and the CD 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 in a proportion equal to that contributed by the Fund 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.

References

OSWER Directive 9225.1-03, "Regional Guidance Manual for the Response Claims Process - Preauthorization PRP RD/RA" (March 1990).

OSWER Directive 9225.1-01, "Procurement Under Preauthorization and Mixed Funding" (April 19, 1989).

OSWER Directive 9834.9A, "Interim Policy on Mixed Funding Settlements Involving the Preauthorization of States or Political Subdivisions" (May 27, 1988).

8.2.I.1.2 Mixed Work Settlements

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 Fund contribution to the RA, or 50 percent or greater if it is 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 cashouts (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, OSRE and DOJ should be notified.

8.2.I.1.3 Cashout Settlements

Cashout settlements require the PRPs to pay for a portion of the response costs up front, while EPA or other PRPs conduct the response action. Cashout settlements with PRPs generally involve some of the following factors:

- EPA is very confident about the expected RD/RA response costs.
- A Special Account will be created.
- The cashout 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 cashout settlement.
- PRPs lack funds or the ability to secure competent technical support.

The RPM must notify OERR, OSRE, and DOJ of regional intent to pursue a cashout settlement. Cashout settlements require concurrence of the AA/OECA if total past and projected site costs exceed $100 million and greater than $10 million is being recovered. They require consultation with the Director/RSD at Fund-lead sites where the amount recovered is greater than $10 million. In general, cashout settlements may occur at any stage of the remedial process. Once Fund-lead response activities are underway, however, cashout settlement with some of the PRPs may not be advantageous, since cost recovery generally will be pursued once RA construction commences. Cashout 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 settlements, cashout settlements do not include limitations to PRP liability for costs resulting from remedy failure. Therefore, any future obligations must be specified in the cashout agreement, including covenants not to sue.

References

OSWER Directive 9832.4, "Interim Cashout Procedures" (January 7, 1992).

8.2.1.2 *De Minimis* Settlements

A *de minimis* settlement is a final settlement between EPA and parties who meet the requirements of section 122(g)(1) of CERCLA. It is noteworthy that a *de minimis* settlement may be incorporated into a global agreement between the major contributors and EPA. This is beneficial to major contributors because *de minimis* money goes to pay for the response costs.

8.2.1.2.1 Eligibility Criteria

A PRP may settle as a *de minimis* party if all of the following are true:

- The settlement involves only a minor portion of the response costs at the site.
- The amount of hazardous substances contributed by the individual PRP is minimal in comparison to other hazardous substances at the site.
- The toxic or other hazardous effects of those substances 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.

A property owner also may settle as a *de minimis* party. Section 122(g)(1)(B) of CERCLA provides for *de minimis* settlements where the owner of the real property at which the facility is located 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.

8.2.1.2.2 Necessary Information for Contributor *De Minimis* Settlements

In practice, *de minimis* settlements generally require all of the following:

- An assessment of the individual PRP's waste contribution relative to the volume of waste at the site.
- Cost estimates for remedial activities at the site with a known degree of uncertainty.
- Development of presumptive premiums for unknown costs and cost overruns, generally 50 percent for settlements with a remedy cost reopener and 100 percent for settlements without a remedy cost reopener.
- Identification of remaining viable parties.

8.2.1.2.3 Potential *De Minimis* Sites

Characteristics of potential *de minimis* sites include the following:

- Past and future costs have been identified and premiums have been developed.
- *De minimis* payment and remaining liability are appropriate.

Sites that do not make good candidates for *de minimis* settlements include those where some of the following are true:

- 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 uncooperative in negotiations.
- There are no viable non-*de minimis* parties to undertake the response action.

8.2.1.2.4 Communication Strategies

Certain communication strategies are recommended to aid in informing and assisting *de minimis* parties who may be unfamiliar with the Superfund process. The following strategies should be used to ensure successful communications with both *de minimis* and non-*de minimis* parties prior to, during, and following *de minimis* settlement negotiations:

- A "First Point of Contact" letter describing various elements of the settlement process should be sent to potential *de minimis* parties.

- Formation of a *de minimis* group should be encouraged.
- Non-*de minimis* settlors should be actively involved in the settlement.
- Use of Alternative Dispute Resolution (ADR) methods should be considered.
- The "Superfund and Small Waste Contributors" brochure should be included in the first mailings to *de minimis* PRPs, along with subsequent development and distribution of site-specific fact sheets.
- Public meetings may be held to inform parties about EPA's efforts to settle with small-volume waste contributors.
- The regional Office of Congressional and Legislative Affairs and elected officials should be informed of impending *de minimis* settlements.
- A press release may be issued to announce a successful *de minimis* settlement and/or a hotline may be established to handle requests for information about a particular site or settlement.

8.2.1.2.5 Timing *De Minimis* Settlements

Early *de minimis* settlements may be reached at the RI/FS stage, but most *de minimis* settlements have occurred at the ROD stage, when costs are known.

Consideration of a potential *de minimis* settlement includes the following:

- Refining the volumetric contribution taking into account the proportion contributed by non-viable PRPs to all viable PRPs.
- Determining a volumetric cutoff.
- Refining cost estimates, including past costs, RI/FS, RD/RA, oversight, and operation and maintenance costs.
- Developing a presumptive premium and/or reopeners to reflect the uncertainties of cost estimates.
- Presenting the settlement offer, including the model CD or AOC, in response to a PRP proposal or to initiate dialogue, and discussing this settlement offer with potential *de minimis* and non-*de minimis* parties.
- Using the revised model *de minimis* contributor CD or AO to implement early *de minimis* expedited settlements in accordance with the Superfund Administrative Reforms initiative.

8.2.1.2.6 Cost Reopeners

The need for cost 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. Where a cost reopener may be appropriate, offering the potential settlors an option of either paying less and receiving a settlement that contains a cost reopener, or paying the higher premium for a settlement with no cost reopener should be considered. Cost reopeners should be distinguished from the standard reopeners (pre- and post-certification) found in most CDs.

8.2.1.2.7 Finalizing Settlement

If terms are agreed upon by all parties, the final *de minimis* agreement can be formalized through either an AOC or CD. A record supporting the settlement must be developed. Consultation at the RSD Director level is required for *de minimis* landowner settlements and for the first settlement in each region involving "de micromis" parties. 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 Fund response costs exceed $500,000.

8.2.1.3 "De Micromis" Settlements

"De micromis" settlements are a subset of *de minimis* settlements entered under the *de minimis* settlement authority of section 122(g)(1)(A) of CERCLA and, therefore, follow the *de minimis* settlement procedures closely in matters such as necessary information for generator settlements, potential settlor characteristics, and timing. "De micromis" settlements may be available to parties who generated or transported a minuscule amount of waste to a Superfund site, an amount less than the minimal amount normally contributed by *de minimis* waste contributors. "De micromis" settlements should only be considered when it is found that a party who has contributed minuscule amounts of waste is likely to be pursued by other PRPs at the site. "De micromis" settlements are not available to owners or operators of Superfund sites.

A PRP may settle as a "de micromis" party if all the following criteria are met:

- The settlor meets the criteria listed for *de minimis* parties.
- The settlor is being threatened with litigation by private parties.
- The settlor meets the presumptive "de micromis" eligibility cut-off levels:
  - 0.002 percent of total site waste for hazardous substance contributors.
  - 0.2 percent of total site waste for MSW contributors.
  - 110 gallons or 200 pounds when site-specific conditions warrant an absolute volume cut-off.

References

OSRE/DOJ Memorandum, "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors" (June 3, 1996).

OSRE Memorandum, "Model CERCLA Section 122(g)(4) De Minimis Contributor Consent Decree and Administrative Order on Consent" (September 29, 1995).

OSRE Memorandum, "Standardizing the De Minimis Premium" (July 7, 1995).

OSRE Memorandum, "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Case" (May 19, 1995).

OSWER Directive 9834.7-1D, "Streamlined Approach for Settlements with De Minimis Waste Contributors Under CERCLA Section 122(g)(1)(A)" (July 30, 1993).

OSWER Directive 9834.7-1C, "Methodology for Early De Minimis Waste Contributor Settlements Under CERCLA Section 122(g)(1)(A)" (June 1992).

OSWER Directive 9834.7-1B, "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements" (December 20, 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 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 9834.7, "Interim Guidance on Settlements with De Minimis Waste Contributors Under Section 122(g) of SARA" (June 19, 1987).

8.2.1.4 Non-Binding Allocation of Responsibility

A Non-Binding Allocation of Responsibility (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. NBARs are 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 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 1 and Hassayampa in Region 9).

The NBAR allocation to each PRP may differ from the volumetric ranking presented in SNLs. In SNL volumetric rankings, 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 in light 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.

Reference

OSWER Directive 9839.1, "Interim Guidelines for Preparing Non-Binding Preliminary Allocations of Responsibility" (May 16, 1987).

8.2.I.5 Orphan Share Compensation Policy

At sites where there is an orphan share component, compensation should be made to those PRPs who are willing to perform the cleanup of the site. Orphan share compensation is generally made through settlements such as RD/RA CDs or Non-Time-Critical (NTC) removal AOCs/CDs, but can be made on a discretionary basis through cost recovery settlements. This compensation is necessarily subject to the adequacy of funding of the clean-up program. Therefore, the Agency has limited orphan share compensation to 25 percent of the projected cost of the remedial action at the site.

The orphan share is that share of responsibility which is specifically attributable to identified parties EPA has determined to have each of the following characteristics:

- The party is potentially liable.
- The party is insolvent or defunct.
- The party is unaffiliated with any party potentially liable for response costs at the site.

This definition of orphan share does not include the following:

- Unallocable waste.
- The difference between a party's share and its ability to pay.
- Shares attributable to "de micromis" contributors, MSW contributors, or certain lenders or residential homeowners that EPA would not ordinarily pursue for cleanup costs.

Compensation for the orphan share component of the federal compromise should be maximized as long as it does not exceed any of the following:

- The orphan share.
- The sum of all unreimbursed past costs and EPA's projected future costs of overseeing the design and implementation of the ROD remedy or NTC removal costs.

- Twenty-five percent of the projected ROD remedy or NTC removal costs at the site.

Regions may, at their discretion, decide that compensation less than the maximum amount is appropriate after consideration of equitable factors, including the following:

- Fairness to other PRPs, including small businesses, MSW parties, small volume waste contributors, and certain lenders and homeowners.
- PRP cooperation.
- The size of the orphan share.

References

OECA Memorandum, "Addendum to the 'Interim CERCLA Settlement Policy' Issued on December 5, 1984" (September 30, 1997).

OSRE Memorandum, "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996).

8.2.1.6 Special Accounts

Special accounts are site-specific, interest bearing subaccounts created within the Superfund Trust Fund. EPA is authorized by CERCLA section 122(b)(3) to retain and use monies received from PRPs to carry out response actions determined in settlement agreements through the creation of special accounts. This enables EPA to use special account funds and interest earned for Fund-financed cleanup at a site, or for disbursement to PRPs agreeing to perform response actions through a settlement agreement. special accounts provide EPA with more flexibility in settling the response costs that performing PRPs are required to pay, and promote fairness by providing a way for small and/or non-performing parties to contribute to response costs without long-term involvement. Regions are required to separately identify payments for past and future response costs because only funds paid for future costs can be placed in special accounts. Special accounts provide the following advantages: accounts can be established and accessed quickly; interest earned can be credited towards response costs or disbursement; account funds retain site-specific designations; and funds can be used by EPA without an annual congressional appropriation. Special account funds may be designated for response actions such as the following:

- Actual cleanup activities.
- EPA oversight costs.
- A work takeover by EPA if the PRP fails to perform response efforts.
- Cleanup at additional OUs at the site.
- Pursuit of non-settlors.
- Cost overruns or remedy failure.

To receive a special account disbursement, PRPs must agree to perform response actions pursuant to a settlement agreement such as an AOC or a

CD. EPA will not provide special account funds to PRPs performing response actions pursuant to a UAO. Disbursements should follow written certification by EPA of PRP completion of work at a site. If cleanup work is performed in phases, disbursements following completion of phases of response work are an acceptable alternative to disbursement after completion of all work. Phased disbursements should be made in conjunction with major PRP performance milestones such as RD completion.

A settlement agreement that includes disbursement of special account funds should contain certain minimum terms to ensure consistency and proper administration of disbursements. These provisions include the following:

- Identification of the special account.
- Documentation and certification that must be submitted to EPA by the settling party to receive a disbursement.
- Timing and amount of special account disbursements.
- Termination of disbursements.
- Recapture of disbursements.
- Transfer to the Fund of funds remaining in the special account after completion of the response action.
- Covenant not to sue the United States.

Further description of these elements can be found in the "Interim Final Guidance on Disbursement of Funds from EPA Special Accounts to CERCLA Potentially Responsible Parties" (November 3, 1998).

With the exception of disbursements agreed upon in settlements, it is Agency policy to transfer all special account balances to the Fund when a balance remains in a special account due to overestimation of future response costs, or when funds held in reserve are not used. This transfer should take place once PRPs have completed response actions and EPA has liquidated all other obligations. Termination of disbursement may occur for various reasons such as the trigger of a settlement provision for EPA work takeover or work stoppage, or Agency determination of false, inaccurate, or incomplete PRP submission of response information. In all instances, once termination occurs, no further disbursements will be made under the original agreement.

References

OSRE Memorandum, "Interim Final Guidance on Disbursement of Funds from EPA Special Accounts to CERCLA Potentially Responsible Parties" (November 3, 1998)

OSRE/Office of the Comptroller, "Update and Implementation of the Superfund Reform on Special Accounts" (February 7, 1997)

OSRE Memorandum, "Transmittal of Special Account Short Sheet" (March 27, 1996).

8.2.J Processing Final Settlements

In order to finalize a settlement within established timeframes, it is important to negotiate during the first 60 days after SNLs are issued rather than wait for the GFO before negotiating. Once the GFO has been received, the negotiation team and the PRPs should move quickly to finalize a settlement. Historically, the most successful method of finalizing a settlement has been for the government (EPA/DOJ) to develop iterative drafts of the CD that show changes on which PRPs comment. This process provides 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 RA, 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.

8.2.K Referral Package

While the settling PRPs are in the process of signing the CD, the RPM and 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 OSRE on the referral package. The referral package must include the following:

- 10-point settlement document.
- Draft complaint.
- Signed CD (including the technical attachments, such as the SOW).

The DOJ referral package should identify the relief outstanding, including any past costs, and set forth a strategy for pursuing non-settlors. It should also identify non-settlors and assess their liability, their contributions to the site, both individually and as compared to the settlors (with backup and including percentages), and their ability to pay. If costs are to be written off or not pursued, the rationale must be documented. Additionally, OSRE 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 OSRE. The preparation of the final referral package should take approximately 45 days. The final referral package must be signed by the RA. For non-delegated settlements, the settlement is sent to OSRE with a copy to DOJ. OSRE must formally approve the CD, which is then sent to DOJ. After DOJ formally receives the CD, 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 and other members of the public may object to the settlement through adverse comments. The negotiation team should try to anticipate these objections in order 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 8-5 diagrams a suggested timeline for pre-referral negotiation procedures.

Where OSRE has a consultation role, the draft package should be submitted to OSRE for review. The final package, however, is not required to physically pass through the concurrence chain.

8.2.L 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 region may issue a section 106(a) UAO, compelling the PRPs to implement the RD/RA. The region also may choose to litigate the case under section 106 of CERCLA. Section 106(a) UAOs generally precede section 106 referrals. EPA also may use the Fund to implement the RD/RA, then DOJ 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 106 or section 107 authorities. Sample language for UAOs to be issued to parties expected to comply and parties not expected to comply can be found in the attachments of the memorandum, "Transmittal of Sample Documents for Compliance Monitoring" (July 1, 1996).

8.2.L.1 Section 106(a) Unilateral Administrative Orders

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 CD, a planning goal should be to issue a UAO promptly after the 120 day moratorium expires.

If regions are planning to use Fund monies to finance an RD or an RA start at a site, they should consult with OSRE and describe their reasons for not issuing a UAO to the PRPs.

The issuance of unilateral orders must be considered before a Fund-financed response proceeds at a site. Typically, UAOs should be 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. If negotiations are extended, then issuance of a unilateral order with a delayed effective date, commencing at the end of the extension period, should be considered.

When determining who should be included in a UAO, the region should start with the presumption that all PRPs should receive the UAO. It can then exclude specific PRPs if an appropriate reason for exclusion exists. Agency policy specifies only a few reasons that regions may properly cite to justify the exclusion of a PRP from a UAO:

- Weakness in the evidence of the party's liability.
- A financial inability of the party to contribute to the cleanup.
- A relatively minor contribution by the PRP to the site conditions.
- Prior agreement of the PRP to bear its "fair share" of the cleanup.
- Manageability concerns raised when a region decides it cannot readily handle all of the remaining PRPs given its limited resources.

Regions face three separate documentation requirements relating to equitable issuance of UAOs. The first requirement calls for regional staff to document their reason(s) for proposing that certain PRPs be excluded from a UAO to be issued. In justifying an exclusion, staff may, for example, discuss the *de minimis* amount of waste sent by a particular PRP, concerns about the strength of EPA's evidence against a certain party, or the party's weak financial status. This documentation should be set forth in the UAO package submitted to the regional decision maker so that senior management is aware of, and concurs in, the exclusion of these PRPs. The second requirement calls for regions to confirm in writing that they have not identified any other PRPs in cases where they report that no PRPs were excluded from the order. For example, if a region determines that there is only one PRP for a site, it must document this determination when it prepares a UAO for that PRP. Finally, the third requirement applies to decisions not to issue UAOs to late-identified PRPs, i.e., PRPs who are identified after other PRPs assume the obligation to conduct the cleanup. When a region identifies a PRP at such a stage, it should consider issuing a UAO requiring the respondent to Participate and Cooperate (P&C) with the other PRPs. Sample language for a P&C order can be found in the attachment to the July 1, 1996 "Transmittal of Sample Documents for Compliance Monitoring." In seeking regional management's approval not to issue a P&C order to a late-identified PRP, the regional staff should document its rationale for non-issuance. For all three requirements, a copy of the required documentation should be submitted to OSRE no later than two weeks after issuance of the UAO (or the decision not to issue a UAO).

References

OSRE Memorandum, "Transmittal of Sample Documents for Compliance Monitoring" (July 1, 1996).

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 9833.0-1a, "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions" (March 7, 1990).

8.2.L.2 Enforcement Discretion

Under a joint and several liability scheme, the Agency has discretion when deciding whom to pursue in an enforcement action. Examples of the use of "enforcement discretion" include the following:

- The July 1991 "Policy Toward Owners of Residential Property at CERCLA Sites" states that enforcement actions generally will not be taken against owners of residential property located on Superfund sites. A potential exception to this policy would be if a homeowner's activities resulted in a release of a hazardous substance.
- Where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA generally will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs.
- EPA's policy addressing municipalities and municipal wastes contains two primary themes:
  - EPA generally will not pursue generators and transporters of primarily MSW and sewage sludge, but will make settlements with such parties available at co-disposal landfills, if requested. Such settlements generally will be based on the unit cost of $5.30 per ton.
  - Municipalities named as PRPs will be treated in the same way as private parties in the settlement process, unless a municipality is an owner or operator of a co-disposal landfill. At co-disposal landfills, EPA generally will seek 20 percent of site response costs from the municipal owner/operator. In some cases, EPA may offer settlements varying from the 20 percent presumption, but generally will not seek more than 35 percent of site costs. In all cases, municipal owners/operators who are unwilling to settle with EPA are subject to joint and several liability at the site.
- An agreement with a covenant not to sue a prospective purchaser may be considered if it will have substantial benefits for the government and if the prospective purchaser satisfies other criteria. EPA may reject any offer if it determines that entering into an agreement with a prospective purchaser is not sufficiently in the public interest to warrant expending the resources necessary to reach an agreement.
- EPA policy states that "de micromis" parties, who have contributed only a minuscule amount of waste to a site, should not participate in financing the cleanup. Therefore, "de micromis" settlements may be effected without any exchange of money.

References

OSRE Memorandum, "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (February 5, 1998).

OSRE/DOJ Memorandum, "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors" (June 3, 1996).

OECA Memorandum, "Guidance on Agreements with Prospective Purchasers of Contaminated Property" (May 24, 1995).

OSRE Memorandum, "Policy Towards Owners of Property Containing Contaminated Aquifers" (May 24, 1995).

OSWER Directive 9834.6, "Policy Toward Owners of Residential Property at Superfund Sites" (July 3, 1991)

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

8.2.L.3 Section 106 Litigation

The Regional Administrator may decide to refer a case to DOJ for section 106 litigation. The region must prepare a referral package for such cases. The referral package is similar to that described in Chapter 12, 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 standard may be met using data from the risk assessment created as part of the RI.

Reference

OE/OSWER Memorandum, "Strategy for CERCLA Section 106 Litigation Support" (January 28, 1991).

8.2.L.4 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 the region has decided to fund the RD if the negotiations fail, advance planning is crucial. A "planned obligation" must be targeted in the Superfund Comprehensive Accomplishments Plan (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.

8.2.L.5 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 CD covers less than all the remedial work, EPA may "carve out" discrete portions of the remedy for which recalcitrants may be held liable.

8.2.M Post-Referral Actions by the Department of Justice

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 settlements involves an assessment of whether the settlement is in the government's interest and of the legal terminology contained in the decree. DOJ's assessment of referrals without settlements primarily involves a review of the sufficiency of the evidence regarding liability, and the selection and implementation of the response. The assessment also includes an evaluation of the desired legal remedy, costs, and defenses. Ongoing litigation support is often resource intensive.

References

"Revised Model CERCLA RD/RA Consent Decree" 63 Federal Register 9541 (February 25, 1998).

OECA Memorandum, "Revisions to the Access and Institutional Control Provisions of the Model CERCLA RD/RA Consent Decree" (February 18, 1998).

OSRE Memorandum, "General Policy on Superfund Ability to Pay Determinations" (September 30, 1997).

OECA Memorandum, "Addendum to the 'Interim CERCLA Settlement Policy' Issued on December 5, 1984," (September 30, 1997).

"CERCLA Black Letter Law Outline" Superfund Attorney Orientation Program (May 1997).

OSRE Memorandum, *The Orphan Share Implementation Notebook* (August 26, 1996).

OSRE Memorandum, "Documentation of Reason(s) for Not Issuing CERCLA Section 106 UAOs to All Identified PRPs" (August 2, 1996).

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)" (July 26, 1996).

OSRE Memorandum, "Transmittal of Sample Documents for Compliance Monitoring" (July 1,1996).

OSRE Fact Sheet, "Orphan Share Reform" (June 4, 1996).

OSRE Fact Sheet, "Revised De Micromis Guidance" (June 4, 1996).

OECA Memorandum, "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996).

OSRE/DOJ Memorandum, "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors" (June 3, 1996).

OSRE Memorandum, "Issuance of Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree and Administrative Order on Consent" (September 29, 1995).

OSRE Memorandum, "Drafting Guidance for Revised Interim Supplemental Environmental Projects Policy" (August 1995).

OSRE Memorandum, "Standardizing the *De Minimis* Premium" (July 7, 1995).

OSRE Fact Sheet, "Existing Ability to Pay Guidance and Models" (May 1995).

OSRE Memorandum, "Interim Revised EPA Supplemental Environmental Projects Policy" (May 8, 1995).

OWPE/OE Memorandum, "Communications Strategy for Settlements with Small Volume Waste Contributors" (September 30, 1993).

OSWER Directive 9834.7-1D, "Streamlined Approach for Settlements with *De Minimis* Waste Contributors under CERCLA Section 122(g)(1)(A)" (July 30, 1993).

8.3 Planning and Reporting Requirements

8.3.A Budget Requirements

The RPM should be involved in the development of budget estimates for 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 the following:

- 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 (four quarters for RD, six quarters for RA) $37,500 per quarter

Headquarters and the regions have formed a workgroup which will assess pricing issues and recommend new pricing guidelines. The primary contract vehicle for RD/RA negotiations support is Enforcement Support Services (ESS) contracts. The primary contract vehicle for RD/RA oversight is Remedial Action Contracting Strategy (RACS).

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 the 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.

8.3.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 3/WasteLAN or providing that information to the Information Management Coordinator (IMC) for entry into CERCLIS 3/WasteLAN. The RD/RA negotiation milestones (actual start date, date of issuance of special notice) must be entered into CERCLIS 3/WasteLAN. A matrix of SCAP targets relevant to RD/RA negotiations is presented as **Exhibit 8-6**.

8-6 SCAP Targets for RD/RA Negotiations

Activity	SCAP Target/Measure	Quarterly Target	Annual Target
RD/RA Negotiation Start	X	X	X
RD/RA Negotiation Completion	X	X	X

RD/RA negotiations start when one of the following occurs:

- The first SNL is signed.
- 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. Planning for the start of RD/RA negotiations is site-specific. This is a SCAP target.

RD/RA negotiations end when one of the following occurs:

- 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 OSRE.
- A section 106 or 106/107 injunctive referral to compel the PRPs to perform the RD/RA is referred to DOJ or OSRE. (OSRE 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 (RA).
- EPA and PRPs proceed to trial under an existing case.
- An AOC for RD only is signed by the RA.
- Funds are obligated for a Fund-lead RD.
- If RD funds are not available, and the region decides that a UAO is not appropriate, and OSRE concurs with this decision in writing, the negotiation completion date is the date of the OSRE memorandum concurring with the regional decision.

The negotiation completion 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 RA, the date the trial begins, the date funds are obligated, or the date on the OSRE memorandum. RD/RA negotiation outcomes are SCAP targets planned site specifically in WasteLAN.

A matrix of SCAP measures relevant to RD/RA negotiation outcomes is presented as **Exhibit 8-7**

8-7 SCAP Measures for RD/RA Negotiation Outcomes

Activity	SCAP Plan/Report	Quarterly	Annual
Section 106, 106/107 Case Resolution	X	X	X
De minimis Settlements and Number of PRPs (S/E-3a)	X	X	X
Mixed Funding Settlements	X	X	X
State Consent Decree (CD)	X	X	X

The following are definitions for RD/RA negotiations outcomes:

- **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 one of the following occurs:

  - A CD is entered in the court fully addressing the complaint with all parties.
  - The case is withdrawn or dismissed.
  - 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 one of the following:

  - The date the CD is entered.
  - The date the case is withdrawn.
  - The date the case is dismissed.
  - The 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: preauthorization, mixed work, and cashout.

  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 RA's memo transmitting the referral to OSRE or DOJ as recorded in WasteLAN. Credit for the AOC is based on the date it is signed by the RA as recorded in WasteLAN.

- **State CD 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 this 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 should be State Decree and the date should be reported in the actual completion date field. 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** - This addresses administrative or judicial settlements that were reached solely under section 122(g) of CERCLA, with PRPs who qualified as *de minimis* parties. 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 Fund response costs at the site exceed $500,000 (excluding interest), the AOC can only be issued with prior written DOJ approval. If DOJ neither approves nor disapproves the AOC within 30 days, the AOC is considered approved and can be issued. (DOJ and the RA can agree to extend this 30-day period).

  Credit is given for a final settlement when an AOC is signed by the RA or when the RA signs the memo transmitting the CD to OSRE or DOJ. The number of PRP signatories to each settlement also must be reported. The settlement category for *de minimis* must be entered into WasteLAN.

Reference

OSWER Directive 9200.3-14-1D, *Superfund/Oil Program Implementation Manual* (updated biennially).

SCAP/OIL Quick Reference Coding Guide.

8.4 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.

8.4.A Poor Relations Among the PRPs

The RPM and regional counsel should help the PRPs to coalesce into a steering committee. A steering committee, in addition to other advantages, is a useful organization for resolving antagonisms that can arise between PRPs, especially at large sites, during the remedial process. The RPM and regional attorney should also recommend the use of Alternative Dispute Resolution (ADR) methods to assist the PRPs in resolving their disputes. Use of ADR can have the following benefits:

- ADR typically reduces transaction costs for dispute resolution.
- ADR tends to focus mediated negotiations on resolving real issues, rather than posturing, and is less likely to get derailed by personality conflicts.
- In ADR mediation, parties are more likely to identify settlement options that are tailored to their particular needs.
- ADR alleviates time-consuming burdens placed on EPA for organizing negotiations, particularly in multi-party cases, because a neutral third party is available to handle these responsibilities.

A fact sheet is available that contains a detailed description of the ADR process. Information discussed in the fact sheet includes an ADR nomination memoranda and information on ADR specialist consultation and ADR funding.

Should efforts to achieve cooperative consensus prove unsuccessful, mixed funding may be appropriate if the great majority of parties are cooperative and only a minority are recalcitrant.

Reference

OSRE Memorandum, "Use of Alternative Dispute Resolution in Enforcement Actions" (May 1995).

8.4.B Multiple Revisions to Draft Consent Decree

Disagreements over specific language may cause numerous revisions in the draft CD and delays in the negotiations. The Agency's policy is that strict negotiations deadlines help force the PRPs to settle on language to be included in the CD. Regional and DOJ insistence that settlements adhere strictly to model language, unless a strong justification can be presented for not doing so, also aids in bringing negotiations to a close. To avoid delays, the negotiation team should insist on short deadlines on revisions to CD 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.

8.4.C Settling with Major Contributors at *De Minimis* Settlement Sites

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.

8.4.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.

8.4.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 PRP search team to ensure 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 PRP search 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 previously identified PRPs. The negotiation team should work with the PRP search team to follow up on any leads that may encourage settlement if new PRPs are identified during RD/RA negotiations.

8.4.F Late Challenges to Volumetric Ranking

Many PRPs wait until EPA solicits a settlement to challenge or question EPA's volumetric ranking. This practice can delay the negotiation and settlement process. EPA should encourage the steering committee to set up a process for early challenge, or the Agency should set up one itself.

8.5 Activities Checklist

The following checklist is not intended to present an exhaustive set of procedures, nor is it meant to be a chronological list of tasks. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

1)____ Determine universe of PRPs to extent practicable.

- a)____ Are PRPs ranked (particularly generators) by volume/waste type?
- b)____ If information is missing, can gaps be filled by administrative discovery?
- c)____ Has a strategy been developed for addressing federal and/or municipal PRPs (if applicable)?
- d)____ Have GNLs been sent?

2)____ Evaluate financial status of PRPs.

- a)____ Bankruptcy issues.
- b)____ Insurance coverage.
- c)____ Possible Superfund lien.

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 EPA should identify and solicit a separate settlement for de minimis PRPs.
- d)____ Decide whether an NBAR should 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)____ Develop strategy for settlement.

a)____ Evaluate whether case is appropriate for separate *de minimis* PRP settlement.

b)____ Assess mixed funding potential.

c)____ Develop appropriate covenants and reopeners.

9)____ Ascertain natural resource trustee strategy (e.g., is the trustee contemplating filing a natural resource claim or authorizing a covenant not to sue?).

10)____ Determine state's role.

11)____ Facilitate citizen participation.

a)____ Determine whether any toxic waste tort suit is pending.

b)____ Consider use of TAG grant.

12)____ Finalize the CD.

13)____ Proceed against non-settlors.

a)____ In the event that settlement negotiations fail, is the region prepared to issue a UAO or take section 106 judicial actions?

9. RD/RA Implementation

Chapter 9 RD/RA Implementation

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Chapter 9 RD/RA Implementation

9.1 Description of Activity

9.1.A Introduction

EPA exercises oversight of response actions taken by Potentially Responsible Parties (PRPs) pursuant to an EPA order or Consent Decree (CD) to ensure the response is conducted consistent with the National Contingency Plan (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 are in compliance with the settlement agreement.

In the past, when PRPs conducted Remedial Design/Remedial Action (RD/RA) activities, the RD did not start until the CD 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 Record of Decision (ROD) was issued.

These delays in initiating RDs are not consistent with the Agency's efforts to expedite site cleanup; therefore, the initiation of PRP-conducted RD activity is no longer dependent upon the court's entry of the CD. The Agency's strategy is to encourage the PRP to agree to settlements wherein engineering design work can proceed upon the lodging of the CD 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 CD is entered. In such cases, the Remedial Project Manager (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 allows PRP-lead projects to begin at approximately the same time as a Fund-lead project would have begun.

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, Design Criteria Report (DCR), Basis of Design Report (BODR), 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 more efficiently, enabling them to monitor PRP activities more effectively. The ultimate goal of PRP oversight is to hold PRPs responsible and accountable for implementing the RA in accordance with the ROD and CD statement of work.

EPA has developed separate guidances for overseeing RDs and RAs, as well as model statements of work for RD/RAs conducted by PRPs.

References

Remedial Design/Remedial Action Handbook, EPA 540-R-95-059

"Guidance for Scoping the Remedial Design," EPA 540-R-95-025.

Office of Solid Waste and Emergency Response (OSWER) Directive 9355.5-02, "Guidance for Expediting Remedial Designs and Remedial Actions" (1990).

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 9835.4-2A, "Initiation of PRP-Financed Remedial Design in Advance of Consent Decree Entry" (November 18, 1988).

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 9355.0-4A, "Superfund Remedial Design and Remedial Action Guidance" (June 1986).

9.1.B 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 (AOC) or a CD for RDs, but only under a CD for RAs) per section 122 of Comprehensive Environmental Response, Compensation, and Liability Act (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 PRP compliance with all applicable laws, regulations, and requirements, and to 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.
- 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 PRP's 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 help to ensure that PRPs meet the requirement of implementing a construction QA program, which is standard industry construction practice. In addition to reducing the duplication of QA activities, this will maintain the burden of QA accountability on the PRP.

9.1.C Responsibilities

Because each Superfund site and RD/RA is unique, there are several acceptable variations of PRP 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 9-1 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.

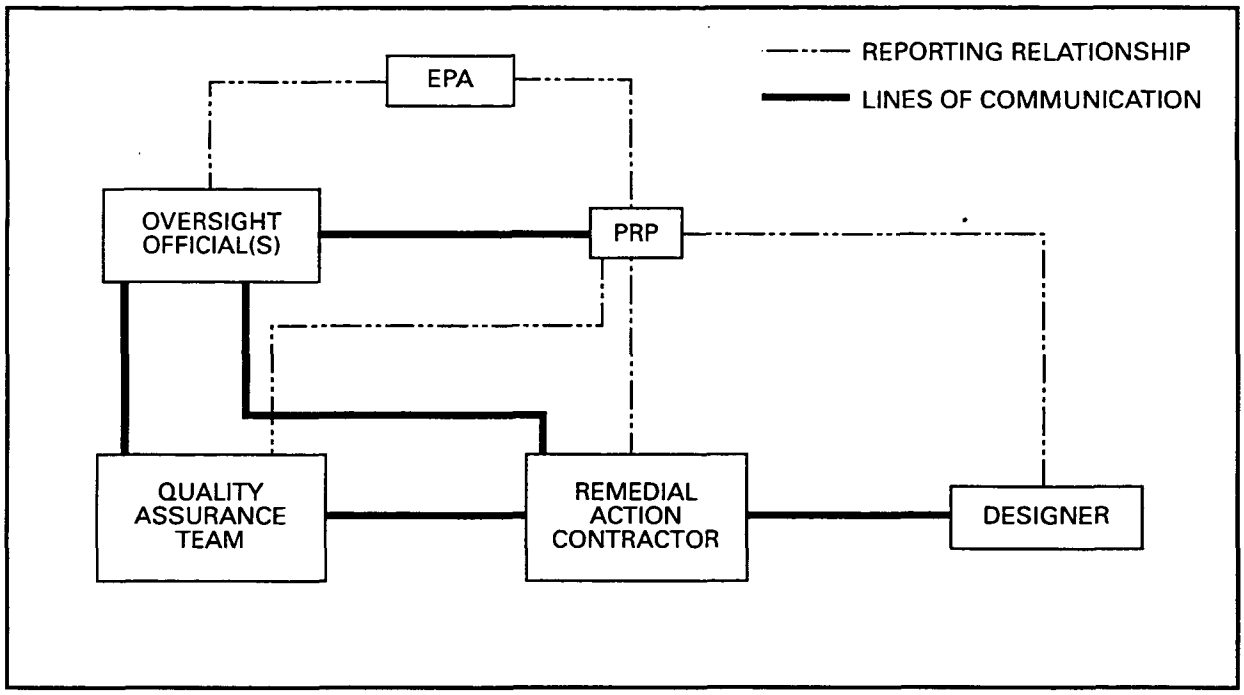
A "reporting relationship" as shown in Exhibit 9-1 is defined as a direct line responsibility in which one party, as an agent of the other or under a legal requirement, is compelled to perform work in accordance with the terms of the relationship and to report the results of its work or observations. 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 9-1, 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 the 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.

9.1.D PRP Responsibilities

The PRPs are legally responsible for the site remediation 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 affect 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.

9-1 Relationships Among Parties When RD/RA is Performed By a PRP



9.1.D.1 Remedial Design 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 is within budget and meets the requirements 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 (e.g., 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; interpret plans and specifications; resolve disputes; 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 (RAR) which certifies that 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.

9.1.D.2 Remedial Action 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 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. In addition, the RA contractor 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.

9.1.D.3 Quality Assurance Team

Quality is conformance to properly developed requirements. In the case of construction contracts, these requirements are established by the contract specifications and drawings. The QA process identifies planned and systematic actions that provide confidence that the completed remedy meets the stated requirements. The QAT is used to provide this level of confidence to the PRP by testing and inspecting the work of the RA contractor. QC is the system used by the RA contractor to manage, control, and document the compliance with requirements of all RA activities of the parent firm and those of suppliers and subcontractors.

The QAT includes representatives from testing and inspection organizations, independent of the constructor, who 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 members are either employees of the PRP, or are working for the PRP through a contractual arrangement, and, therefore, have no legal obligation to respond 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 construction QC 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.

9.1.E EPA Responsibilities

EPA is responsible for protecting public health and the environment and for ensuring that PRPs comply with the terms of the settlement agreement. EPA monitors compliance of the PRPs 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 may arrange for or hire an oversight official and assemble a Technical Review Team (TRT) of professionals with the technical knowledge necessary to assist EPA in overseeing PRP-lead RD/RAs. The RPM should take care in assigning roles and responsibilities to these individuals to maximize efficiency and avoid duplication of effort. If appropriate, the RPM may also choose to personally conduct the responsibilities of the oversight official.

9.1.E.1 Remedial Project Manager

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 TRT, and should be technically competent to ascertain compliance by the PRP, PRP staff, and consultants with the settlement agreement and the ROD.

The RPM should 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 closeout. This may require site inspections at appropriate milestones during execution of the project.

As described in Chapter VI, RI/FS Implementation, the RPM has ultimate discretion in determining the appropriate level of oversight to apply at a site. The Superfund administrative reform on PRP oversight reemphasizes that the RPM should be alert, especially with respect to the role of the oversight official, to manage oversight of RD/RA in a cost-effective manner, while ensuring that the remedy is protective.

Active participation in the design and construction of the remedy by the RPM, oversight officials, or TRT, however, is generally inappropriate. 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 PRP's RD/RA Work Plans, design submittals, Construction QA and Construction QC Plans, Contingency Plan, and RAR. The term "EPA Approval" should not warrant that the technology is sanctioned by EPA as technically acceptable

or competent. The term may be defined in the settlement agreement as meaning an administrative approval that simply allows the PRP to proceed to the next step. RPMs should defer to the advice of regional counsel and EPA guidance regarding the use of the term "EPA Approval."

References

Remedial Design/Remedial Action Handbook, EPA 540-R-95-059.

"Guidance for Scoping the Remedial Design," EPA 540-R-95-025.

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 9355.1-02, "The RPM Primer: An Introductory Guide to the Role and Responsibilities of the Superfund Remedial Project Manager" (September 1987).

9.1.E.2 Oversight Official and Technical Review Team

RD/RA oversight requires knowledge in a variety of engineering, geological, and environmental disciplines. Since RPMs rarely possess the requisite knowledge and experience, it is often necessary to assemble a TRT comprised of individuals with such expertise. **Exhibit 9-2** provides a list of possible TRT members, who may be assembled from in-house EPA staff and/or, from other offices and organizations under some form of contractual or interagency agreement with EPA. The recommended options available for oversight support include Response Action Contracts (RACs) contractors, the U.S. Army Corps of Engineers (USACE), and the U.S. Bureau of Reclamation (BUREC).

The responsibilities of an oversight official and the TRT 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 and TRT review 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).

9-2 Potential Technical Review Team Members

EPA Regional Personnel	Experience Added to Project Team
Technical Support Team	• Specialized technical services
Ground water Technical Support Unit	• Specialized technical services
Other experienced RPMs	• RD/RA management experience
ORD personnel	• Technology experts
Office of Water	• Media experts
Office of Solid Waste	• Media experts
Office of Air	• Media experts
RCRA representative	• Applicable or Relevant and Appropriate Requirements (ARARs), regulatory specialists
Health and Safety Officer	• Health and safety specialists
Community Relations Coordinator	• Experience in communicating with the public
Environmental Services Division	• Quality assurance/sampling experts
Regional IGCE Coordinator	• Costing specialist
Contracting Officer/Project Officer	• Contract/WA administration
Staff attorney	• Legal expertise
Quality Assurance Manager/Coordinator	• Quality assurance/quality control experts
State Personnel	
State Environmental Departments	• State ARARs, procedures, concerns
State natural resource trustees	• Environmental impact/management
Federal Agencies	
U.S. Army Corps of Engineers	• Design, construction, and management experience
U.S. Bureau of Reclamation	• Management and oversight experience
U.S. Department of Interior	• Management and oversight experience
U.S. Geological Survey	• Management and oversight experience
Occupational Safety and Health Administration	• Safety and health expertise
National Oceanic and Atmospheric Administration	• Media and weather expertise
EPA Contractors	
ARCS/RACs	• Engineering and scientific expertise; RD and construction management
Local Government Agencies	
Building Inspectors	• Design review plan-checks for compliance with building codes
Community Members	
Community Group (TAG recipient)	• Technical expertise

The oversight official and TRT also conduct spot checks of the QAT's activities, and review QA reports. The results of all RA oversight activities are reported to the RPM. More detailed guidance on assembling and utilizing TRTs is provided in the *Remedial Design/Remedial Action Handbook*.

References

Remedial Design/Remedial Action Handbook, EPA 540-R-95-059.

"Guidance for Scoping the Remedial Design," EPA 540-R-5-025.

OSWER Directive 9355.5-01, "Guidance on EPA Oversight of Remedial Design and Remedial Actions Performed by Potentially Responsible Parties" Interim Final (April 1990).

9.2 Procedures and Interactions

9.2.A 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. The RD begins with a 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 detailed design. 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 detailed 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 detailed design for all other aspects.

Exhibit 9-3 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.

9.2.B Design Tasks

It often is necessary to perform design-related tasks (e.g., data gathering and treatability studies) before starting an RD. In addition, there are other activities required to be performed during the actual design process to support the design (e.g., establishment of design criteria and a delivery strategy, completion of a value engineering study, and implementation of community involvement activities). Information typically collected during the predesign phase is shown in **Exhibit 9-4**, followed by tasks that are commonly required in a PRP-performed RD, either as prerequisites to the design or as part of the actual design. Information regarding design tasks can be found in the "Guidance for Scoping the Remedial Design" document.

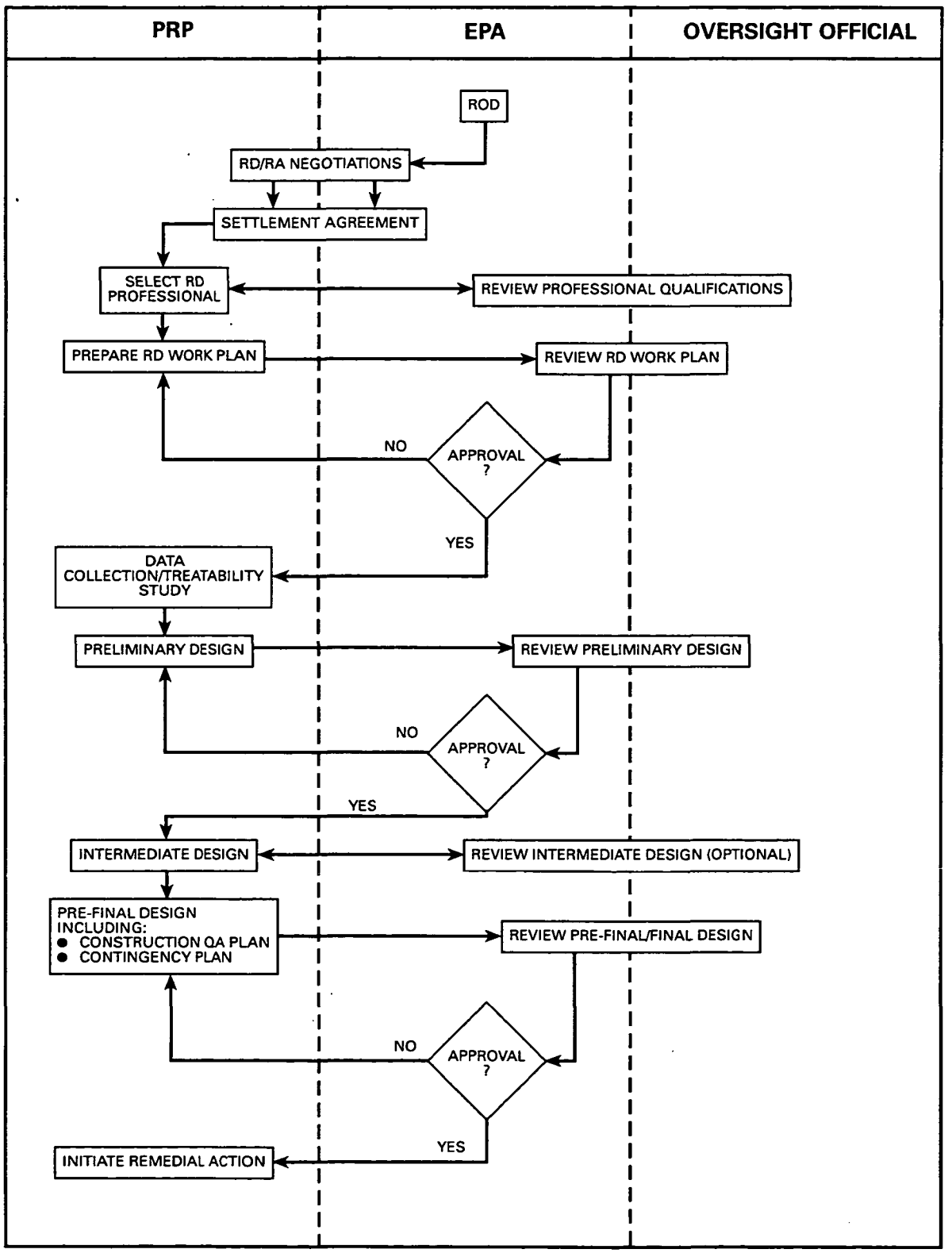
Reference

"Guidance for Scoping the Remedial Design," EPA 540-R-95-025.

9.2.B.1 Design Investigation

There may be instances when all the data required for the RD was not 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, ground water sampling, and surveys (property, utility, right-of-way, topography).

9-3 Remedial Design Oversight Process



9-4 Typical Collection of Predesign Information

- Initial site conditions (e.g. characteristics, availability of utilities, restrictions on road use)
- Availability of site access (any known restrictions or issues)
- Technology/design approach
- Performance standards, ARARs, permits
- Summary of all available technical information (listing of the source and description of the data)
- Volume of materials to be treated and the accuracy of the data
- Unresolved issues (including undecided or unknown performance standards)
- Health and safety concerns
- Operation and maintenance (O&M) issues
- Historical property boundary ownership information

9.2.B.2 Design Support

During the initial preliminary design phase, the designer details the concepts which will support the technical aspects of the ultimate design. 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 establishing the design criteria, which primarily address the project's technical issues, the designer must devise a strategy for delivering the project. This strategy becomes the management approach to carry out the actual RA. The management approach normally discusses the procurement method and contracting strategy, phasing alternatives, health and safety considerations, review requirements, design schedule, contractor, labor, equipment availability concerns, and requirements for addressing sampling and data gathering methods under the Field Sampling Plan (FSP), QA considerations (Construction QA Plan), and air emissions and spill control requirements (Contingency Plan).

9.2.B.3 Plans and Specifications

The RD should produce a set of engineering plans and specifications that are consistent with the technical criteria established for the design. These documents should present the design information at a level of detail appropriate to the requirements of the project.

9.2.B.4 Construction Schedule

A construction schedule should identify major tasks, determine their duration, and establish milestone dates. It also should identify key issues which may affect the schedule.

9.2.C EPA Remedial Design Review

During RD, EPA, with technical assistance from the oversight official and TRT, monitors and reviews the PRP's performance. EPA approval at any stage of the RD work elements in no way guarantees the success or failure of the ultimate remedy. Such EPA approval 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's review and approval of a PRP's work plan or design merely indicates the plan's acceptability with regard to RA goals in accordance with the ROD and the settlement agreement and does not warrant that specified performance standards will be met.

The remainder of this subsection presents a standardized approach for the development of an acceptable design for a remedial construction project. Depending on the site-specific conditions, including, but not limited to, site complexity, technologies being used, PRP capacity and cooperation, public involvement concerns, and the requirements of the CD, the RPM may abbreviate this process. If appropriate, the RPM may choose to merge deliverable documents, substitute deliverables with briefings, or conduct tasks concurrently rather than consecutively in order to improve the speed and efficiency of the project and reduce oversight costs as well as the overall cost of the project. The RPM, however, must be careful not to modify oversight tasks to the detriment of the quality of the work performed.

9.2.C.1 Remedial Design Professional Qualifications Review

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 high-quality project.

The RPM, in conjunction with the oversight official and TRT, 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 should require the PRP to submit the name and qualifications of an RD "Supervising Contractor" to EPA for review and approval. If EPA disapproves of the contractor submitted by the PRP, the PRP submits a list of contractors acceptable to the PRP as "Supervising Contractor(s)" to EPA. EPA then would provide written notice of the contractors it finds acceptable, from which the PRP may select its choice. RPMs should defer to the advice of regional counsel and relevant language in EPA's guidance.

9.2.C.2 Remedial Design Work Plan Review

The RD Work Plan is the first major deliverable and area of focus for the RPM, oversight official, and TRT. It is the PRP's interpretation of the settlement agreement and the SOW. 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 (HASP) for design activities; requirements for additional field data collection; requirements for treatability studies; a schedule for completion of the design; design criteria and assumptions; sampling and analyzing plan; contingency plan; and tentative treatment schemes.

The RPM, oversight official, and TRT 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.

9.2.C.3 Preliminary Design Review

The preliminary design review is completed when approximately 30% of the design work has been completed. Major inconsistencies within the design itself should be identified and corrected before the PRPs proceed with the detailed design submissions. Based on the settlement agreement, EPA may be required to review and approve this submission. The preliminary design submittal should include the BODR, if this report has not been previously provided. 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, drawing lists, drawings, and sketches; an outline of required specifications; and a preliminary construction schedule. Preliminary design submittal components are noted in **Exhibit 9-5**.

In performing the preliminary design review, the oversight official, TRT, 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 and TRT make a recommendation to the RPM based on the criteria listed below. The RPM is responsible for deciding whether the design is adequate and if an enforcement action is necessary.

9-5 Preliminary Design Phase Submittal Components

- ◆ Design criteria report
  - Project description
  - Design requirements and provisions
  - Preliminary PFDs
  - O&M provisions
- ◆ Basis of design report
  - Design assumptions
  - RA contracting strategy
  - Permits plan
  - Preliminary easement/access requirements
  - Preliminary P&IDs
- ◆ Preliminary drawings and specifications
  - Outline of general specifications
  - Drawings and schematics, including final P&IDs
  - O&M requirements
  - Chemical and geotechnical data
- ◆ Results of VE screen
- ◆ Preliminary RA schedule

Ultimately, the settlement agreement and any document incorporated therein 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 conformance of the construction schedule with project completion goals.

The function of 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 tasks, 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 percent) of the design calculations.

The review can be expanded if deficiencies are found in any of these areas. 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.

For complex or high-cost projects, the designer may call for a Value Engineering (VE) screening and, if warranted, a VE study. The object of VE is to achieve the lowest life cycle cost consistent with the requirements of the project. VE efforts, conducted by independent teams trained in VE methods, focus on the function of the various components of the project seeking to reduce cost without a loss of quality. Projects which are candidates for VE are screened early in the design phase.

Screening results, which identify potentially high cost design elements, are submitted with or before the preliminary design documents. If a VE screening is submitted, the RPM should utilize the oversight official and TRT to evaluate the results and potential impacts to project requirements and schedule. If screening results lead to a full VE study, the PRP should provide the RPM with the results of the study and its determination as to whether the project schedule or ROD will require any alteration. The RPM should utilize the oversight official and TRT to evaluate any changes recommended by the study to ensure that the requirements of the ROD or other remedial documents are not adversely impacted.

9.2.C.4 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 intermediate design phase is considered complete at the 60 percent stage of design. 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 VE study has been performed by the PRP, the intermediate design would typically reflect any design modifications resulting from this study. The intermediate design should also include an intermediate O&M Plan. These changes, plans, and refinements must be evaluated for consistency with the ROD.

Reference

Remedial Design/Remedial Action Handbook, EPA 540-R-95-059.

9.2.C.5 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; O&M Plan; FSP (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, TRT, 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 involvement activities and preparation of an RA Work Plan.

9.2.D Community Involvement Activities

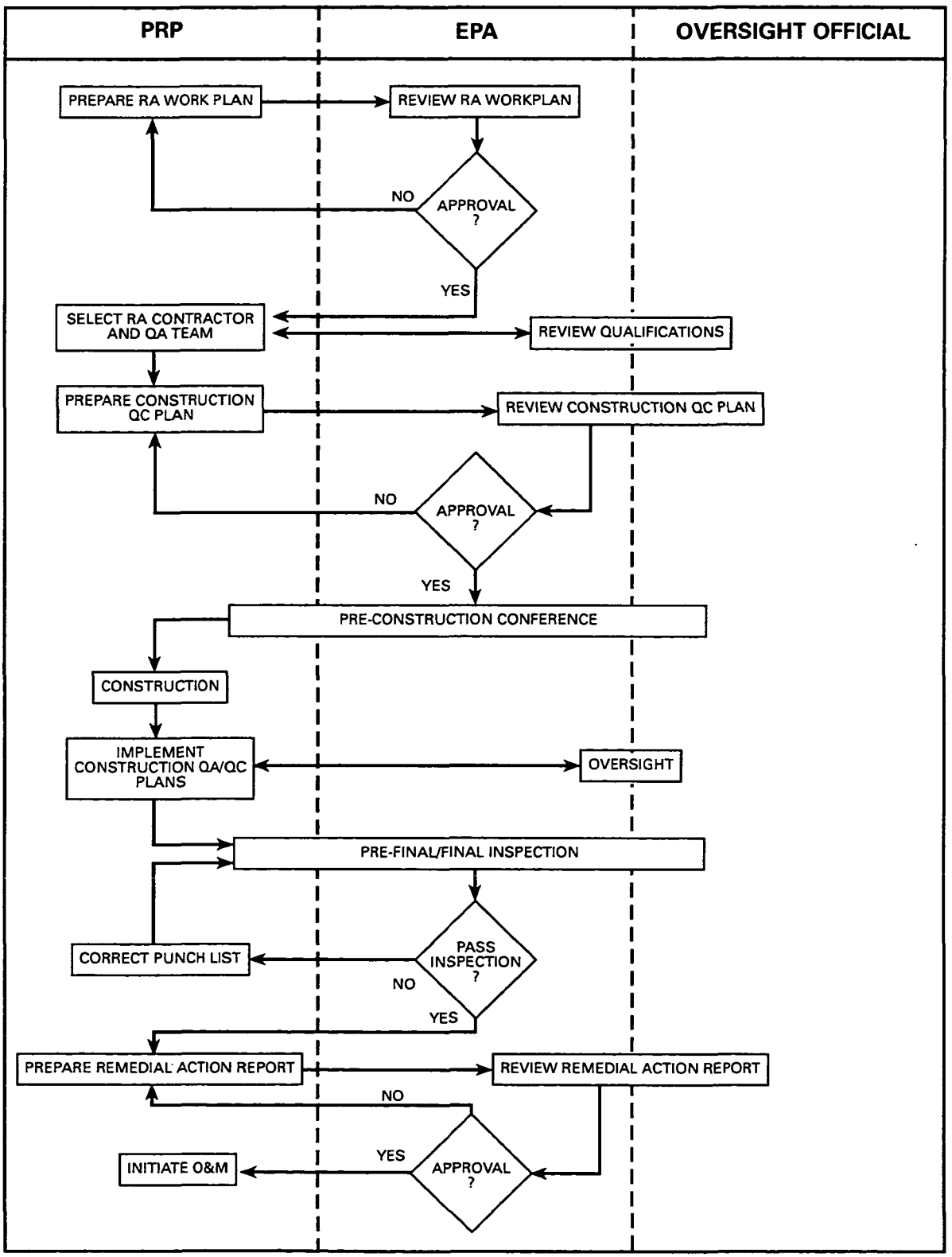
At the conclusion of the RD, the RPM should distribute to the community and other interested persons a fact sheet on the final engineering design. The fact sheet enables EPA to inform the public about activities related to the final design, including the schedule for implementation of the RA, a description of 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 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.

9.2.E Remedial Action Oversight

After completion of the RD, the RA, during which the actual implementation of the remedy occurs, begins. **Exhibit 9-6** presents a flow chart that illustrates the RA process of the focused approach to oversight. The "diamonds" represent critical decision or review points required of the RPM.

The RPM should use a high level of oversight at the onset of the RA. The appropriate level of oversight is determined by requirements specified in the settlement agreement, the complexity of the remedy, past performance of

9-6 Remedial Action Oversight Process



the PRP, the qualifications of the PRP's design and construction teams (including the QAT), and any other relevant factors affecting the design and implementation of the RA. This level of oversight may be adjusted accordingly, based upon the actual performance of the RA contractor, as implementation proceeds. The objective of the oversight program is to focus the RPM's 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.

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 and TRT, 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 or TRT 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.

9.2.E.1 Remedial Action Work Plan

The RA Work Plan is the basis for the PRP's approach to implementation of the 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, oversight official, and TRT should thoroughly review the RA 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 HASP 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, oversight official, and TRT will use this evaluation to assist in determining the initial level of oversight required for construction activities.

9.2.E.2 Remedial Action Contractor Qualifications

The PRP is responsible for selecting the RA contractor, whether through a competitive bidding process or through 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 and required licenses, 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 of 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 then provide a written notice of the contractors it finds acceptable, 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 professional's qualifications. The RPM, oversight official, and TRT 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.

9.2.E.3 Quality Assurance Team 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 by ensuring that the Construction QC Plan is being implemented effectively. The members of the QAT may be separate consultants working for the PRP under a contractual relationship or they may be in-house personnel assigned to the project.

In either case, the QAT must be independent of the contractor. EPA reviews and approves the selection of the QAT using the following criteria for guidance: evaluation of the professional and ethical reputation, as determined by inquiries with previous clients and other references; determination that the qualifications and expertise of the inspection personnel are 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 important for the QA Team to be independent of the contractor in order to assure unbiased and objective evaluations, EPA should insist on the use of an independent firm. In some 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, use its oversight officials and TRT, or enter into a cooperative agreement with the state to conduct QAT activities to ensure that the project is constructed properly.

9.2.E.4 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 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.

The oversight official and TRT should assist the RPM in reviewing each of the above plans. The review should focus on determining that the Con-

struction 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 and TRT in developing a strategy to spot check the PRP's QA program.

References

OSWER Directive 9355.5-01, "Guidance on EPA Oversight of Remedial Design and Remedial Actions Performed by Potentially Responsible Parties" Interim Final (April 1990).

American Society of Civil Engineers, *Quality in the Constructed Project: A Guideline for Owners, Designers and Constructors,* Volume 1-Preliminary Edition for Trial Use and Comment (May 1988).

9.2.F Preconstruction Conference

The PRP will initiate a pre-construction conference prior to the start of construction on the project in order to establish relationships among all parties involved in the RA implementation (e.g., RPM, oversight official, TRT members as appropriate, PRP, RD professional, QAT, and RA contractor). 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 HASP, reviewing the project schedule, reviewing roles and responsibilities of all parties, establishing procedures to resolve disputes or misunderstandings during construction, reviewing emergency actions and the Contingency Plan, and reviewing endpoint activities and procedures for project completion. The tone of this meeting will help the RPM determine the level of oversight necessary for the project.

The Superfund reform on PRP oversight requires that for all settling parties, the RPM offer to discuss, at least on an annual basis, EPA's oversight expectations for the coming year. Furthermore, to encourage a mutually cooperative relationship that can enhance the success of the project, the RPM should provide opportunity for these PRPs to suggest ideas to improve the efficiency of the oversight process. The RPM should actively consider project streamlining that can improve the project schedule or reduce overall project or oversight costs and still ensure that the remedy is effective and protective.

9.2.G Remedial Action Implementation

It is the RPM's responsibility to monitor PRP compliance with the settlement agreement (including 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 necessary. The RPM should develop a strategy for communicating with the PRP during the performance of the remedial action. This strategy should outline communication requirements, including circumstances that warrant immediate EPA notification, along with development

of a meeting schedule. Further information regarding reducing oversight at certain sites may be found in EPA guidance. Suggestions for minimizing the costs of oversight are found in EPA guidance on "Reducing Federal Oversight at Superfund Sites with Capable and Cooperative PRPs," and are described in Chapter VI, RI/FS Implementation.

References

OSWER Directive 9200.4-15, "Reducing Federal Oversight at Superfund Sites with Cooperative and Capable Parties" (July 31, 1996) (to be superseded by new guidance in 1999).

Remedial Design/Remedial Action Handbook, EPA 540-R-95-059.

OSWER Directive 9355.5-01, "Guidance on EPA Oversight of Remedial Design and Remedial Actions Performed by Potentially Responsible Parties" Interim Final (February1990).

9.2.G.1 Remedial Project Manager 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 regional counsel for advice on how to proceed in the event enforcement becomes necessary.

9.2.G.2 Shipment of CERCLA Wastes to Offsite Facilities

If CERCLA wastes will be transferred to an offsite location, it is the RPM's responsibility to ensure that waste shipments are sent only to EPA-accepted facilities and are in full compliance with the requirements of the Offsite Rule.

Reference

Sending Wastes Off Site?, EPA 540-F-97-006.

9.2.G.3 Oversight Official and Technical Review Team Role/ Responsibilities

The oversight official and TRT report to the RPM and support 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 and TRT members include: attendance at the pre-construction conference, progress briefings, and any other meetings as required; 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; and review of changes in work.

The oversight official and TRT are representatives of the EPA and do 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.

As work progresses, changes in construction may be required due to actual field conditions or new interpretations of plans and specifications. The RPM should utilize the oversight official and TRT to evaluate the impact of changes on the remedial requirements of the project. Construction changes should be evaluated quickly, since failure to do so could result in delay claims from construction contractors. The RPM should also notify the PRPs if such construction changes result in a significant change in EPA's conduct of oversight.

9.2.G.4 Responding to Immediate Danger or an Emergency

In the event that 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 HASP. 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 RPM must be notified.

During an emergency, the RPM, oversight official, and TRT should closely monitor the situation to determine that the HASP 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.

9.2.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; however, the RPM should receive a copy of the pre-final inspection report prepared by the RA contractor's construction manager. The PRP also conducts pre-final and final inspections of completed work with EPA, the oversight official, and if necessary, members of the TRT 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, oversight official, and/or TRT 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.

9.2.I Remedial Action Report

At the completion of the RA and after correction of all punch list items, the PRP (usually the Resident Engineer) prepares a 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 and TRT, reviews the RAR, 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.

References

"Close Out Procedures for National Priorities List Sites," EPA 540-R-98-016.

OSWER Directive 9355.0-39 FS, "Remedial Action Report" (June 1992).

9.2.J Construction Completion

At the end of construction for all Operable Units (OUs), the site can achieve an EPA "construction completion" designation. This category consists of sites awaiting deletion, sites awaiting deletion but for which CERCLA section 121(c) requires reviews for the remedy no less often than five years after initiation, and sites undergoing Long-Term Response Actions (LTRAs). (See NCP, section 300.425(d)(6)). Achieving this important milestone does not limit or modify the PRP's requirements as outlined in the CD or other settlement documents. Once the RPM conducts the last OU pre-final inspection and only minor punch list items remain, the RPM will prepare a Preliminary Close Out Report (PCOR) and submit to Headquarters for review. The designated regional official will sign the amended PCOR and send it to Headquarters to be recorded as a site construction completion.

References

"Close Out Procedures for National Priorities List Sites," EPA 540-R-98-016.

OSWER Directive 9200.3-14-ID, *Superfund/Oil Program Implementation Manual* (updated biennially).

9.3 Planning and Reporting Requirements

RPMs must ensure that current information on RD/RA activities is entered into CERCLIS 3/WasteLAN for the SCAP. This section discusses the planning and reporting requirements for RD/RA activities.

RD and RA activities are designed specifically for the site, OU, or project, and are reported in WasteLAN. Initial schedules for RDs and RAs are established when the RI/FS for the site is initiated. These initial schedules should be updated in WasteLAN as better planning data become available. RPMs are responsible for ensuring that accurate data are reported into CERCLIS 3/WasteLAN. The RPMs should enter the data or provide the information to the Information Management Coordinator (IMC) for entry. RDs and RAs are tracked by SCAP through CERCLIS.

9.3.A 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 3/WasteLAN as more accurate planning data become available. There are two separate SCAP activities, RD Start and RD Completion. **Exhibit 9-7** summarizes SCAP targets relevant to RDs.

9-7 SCAP Targets

Activity	SCAP	Quarterly	Annual
Remedial Design (RD) Starts			
Fund	Planning	X	X
PRP	Planning	X	X
Federal Facility	Measure	X	X
Remedial Design (RD) Completion			
Fund	Planning	X	X
PRP	Planning	X	X
Federal Facility	Measure	X	X

The following definitions are for RD starts and completions:

- **RD Starts** - The RD converts the remedy selected in the ROD into a final design document for RA. The obligation of funds for design assistance or technical assistance does not constitute an RD start. Pre-design activities will not be counted as an RD start. The definition of accomplishment for an RD start depends on the lead.

- Fund-financed (Includes Fund- and state-lead events) - A Fund RD start is counted when funds are obligated. An obligation is made when:
  - The Contract Officer (CO) signs a contract modification for the RD.
  - A Cooperative Agreement (CA) is signed by the Regional Administrator or a designee.
  - An Inter-Agency Agreement (IAG) is signed by the other federal agency.
- PRP-financed (Includes mixed funding federal/responsible party (MR), responsible party (RP), and PRP response under state oversight (PS) lead events) - For MR and RP-lead, the start is credited on the date the earlier of the following actions takes place:
  - If 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 begins upon the approval of the work plan to conduct these activities. If there is a new obligation of funds, the start of RD begins on the date when new funds are obligated. When an RD has been prepared by other parties or plans from a similar site will be used, the RD start date is the same as the RA start date.
  - The enforcement document under which the RD is to be conducted, becomes effective:
    - For an AOC, this is the date of signature of the AOC for RD by the RA or his designee, or the date of signature of an amendment to an existing AOC to include RD.
    - For a Unilateral Administrative Order (UAO), this is the date of the PRP's written notice of intent to comply with the UAO.
    - For a CD, this is either the date the CD is lodged by the Department of Justice (DOJ), or the date the CD is entered with the court (depending on the wording of the CD).
  - An official written notice to proceed is issued by EPA to the PRP.
  - For PS-lead sites, when the state issues an order or other comparable state enforcement document for RD (or RD/RA) or, if the RD is covered by a pre-existing state order, when the state issues an RD notice to proceed. 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 Fund-, PRP-, and federal facility-financed RD start goals are established prior to the fiscal year.

- **RD Completions** - An RD is complete when the RD converts the remedy selected in the ROD into a final design document for RA. The definition of accomplishment for an RD completion depends on the lead.
  - Fund-financed - For Fund or state-lead RD projects, an RD completion occurs when EPA approves, in writing, the final design document.
  - PRP-financed - An RD becomes complete when EPA approves, in writing, the final design document. For state enforcement-lead (PS) RDs, the RD becomes complete when the state approves the final design document.
  - Federal Facility - An RD becomes complete when EPA approves the final RD package.

  Separate SCAP targets are established for Fund/PRP versus federal facility RD completions.

9.3.B Remedial Action Activities

Remedial actions are planned on a site-specific basis and reported in CERCLIS 3/WasteLAN. The regions are responsible for identifying RA projects and associating planned obligations with these sites.

Four SCAP activities are tracked:

- RA Start.
- RA Contract Award.
- RA Completion.
- Final RA Completion.

RA completions and final RA completions are targeted on a combined basis.

In addition to RDs, RAs are tracked by SCAP through CERCLIS. **Exhibit 9-8** summarizes SCAP reporting relevant to RAs.

9-8 SCAP Targets/Measures for RAs

Activity	SCAP Reporting	Quarterly	Annual
RA Starts			
Fund	Planning	X	X
PRP	Planning	X	X
Federal Facility	Measure	X	X
RA Contract Award			
Fund	Planning	X	X
PRP	Planning	X	X
RA Completion			
Fund	Measure (part of ACT-6 and ACT-7)		
PRP	Measure (part of ACT-6 and ACT-7)	X	X
Federal Facility	Target	X	X

The following definitions are for RA starts and completions:

- **RA Start** - An RA start is the implementation of the remedy selected in the ROD that is intended to ensure protection of human health and the environment at a final NPL site. The definition of accomplishment for an RD start depends on the lead.
  - Fund-financed (Includes Fund or state-lead events) - Credit for an RA start is given on the date a contract modification for the RA is signed by the CO, or when the Interagency Agreement (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 occurs when EPA approves the PRP RD package (RD completion).
    - If the PRP conducts work under a state order or comparable enforcement document, and the site is covered by a state enforcement cooperative agreement or Superfund Memorandum of Agreement (SMOA) (PS-lead) with a schedule for RA work at the site, and EPA approved the ROD, the RA start occurs when the state approves the PRP RD package.

  - 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 (SubAction Name= PRPs Ntfy EPA, Intent to Comply) or the date the CD is referred to Headquarters or the DOJ (as recorded in WasteLAN). Where the PRP is in significant non-compliance with the UAO, credit will be withdrawn.
- Federal Facility - Credit for an RA start is given on the date when substantial, continuous, physical, onsite, remedial actions begin pursuant to CERCLA section 120. Federal facility RA starts are a SCAP measure.

The region should enter the Alternative Name, Media Name, Media Type, and the technology of the RA into the Response Action Type field (Selected Response Actions) and whether the RA is an early action or long-term action (Critical Indicator=Early Action or Long-Term Action). Fund and PRP RA starts are SCAP target planning measures.

- **RA Contract Award** - Award of the RA contract marks the initiation of on-site construction activities for the remedy selected in the ROD. Individual targets are negotiated in SCAP. An RA contract award triggers the date for completion of five-year reviews. The definition of accomplishment for an RA Contract Award depends on the lead.
  - Fund-financed (Includes Fund or state-lead events) - This category includes sites where EPA, a state, USACE, or BUREC has awarded a contract to initiate a Fund-financed RA. If the Alternative Remedial Contracting Strategy (ARCS) contractor is assigned RA responsibility, the award of the 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) - This category includes 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.
  - Federal Facility - At federal facilities, the date when the federal agency begins substantial and continuous physical action at a site, or the date when the federal agency takes equivalent action with its own work force, is treated as the equivalent of the award of an RA contract. Federal Facility award of RA contract is a SCAP measure.

- **RA Completion** - An 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.

  Accomplishment means the date when 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. Fund and PRP RA completions are separate targets in SCAP.

- **Final RA Completion** - A final RA is complete when:

  - Construction for all OUs is complete.
  - A pre-final inspection has been conducted.
  - A PCOR 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 should be reported in WasteLAN with the RA Subevent, Preliminary Close-Out Report Prepared (SubActionName= Prelim Close-Out Rep Prepared).
  - 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 (Action Name= Remedial Action or PRP RA).
  - An Interim Site Close-Out Report or Final Superfund Site Close-Out Report (SCOR) has been prepared. An Interim Site Close-Out Report (ICOR) should be prepared if the only activity remaining is Long Term Response Action (LTRA).

  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 (SubAction Name= Close Out Report).

The date of completion of the Preliminary Close-Out Report must be entered into WasteLAN with the Preliminary Close-Out Report Prepared subevent (SubAction Name= Prelim Close-Out Rep Prepared). The date of the letter accepting the RA Report must be entered into WasteLAN with the RA event (Action Name= Remedial Action or PRP 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 (SubAction Name= Close Out Report).

RA completions are included in SCAP measure ACT-6 (completion of a Response Action), and final RA completions are included in SCAP measure ACT-7 (NPL Site Construction Completion). Federal Facility RA Completions are a SCAP Target.

Coding guidance for events (RI/FS, ROD, RD/RA) is being developed by OERR/OPM.

9.4 Potential Problems/Resolutions

9.4.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 vehicles are ARCS and RACs. RPMs also should be aware that the Agency encourages use of the USACE for providing technical assistance. In addition, in-house technical assistance often is available (e.g., Office of Research and Development (ORD), Office of Emergency and Remedial Response/Technology Innovation Office (OERR/TIO)), which proves to be both cost-effective and timely. In addition to contractor support, EPA should assemble a technical review team comprised of various senior RPMs and specialty experts (e.g., a 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 (USFWS), NOAA, the Bureau of Reclamation, and Marine Fisheries.

9.4.B Compliance Incentives and Assistance

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.

Additional categories of compliance incentives include audit and compliance management programs developed and maintained by the regulated community, and partnerships between government and industry such as the Environmental Leadership Program. These policies encourage voluntary discovery, disclosure, and correction of violations or necessary cleanup before government investigation or response.

The primary purpose of compliance assistance is to provide clear and consistent descriptions of regulatory requirements to ensure that PRPs understand their obligations and are able to meet the requirements of environmental law. Additionally, compliance assistance can aid PRPs in finding cost-effective ways to comply through the use of pollution prevention and innovative technologies. General categories of compliance assistance include the following:

- Outreach by EPA or the states through the use of compliance guides, seminars, information services, and other means of assistance.
- Response to assistance requests.
- On-site assistance such as compliance consultations or audit management programs.

One of the Superfund Reforms announced in 1995 was the initiative to encourage and reward cooperative parties by reducing EPA oversight

activities at sites where quality work is being performed by such parties. This reform has been modified in recognition that, at all sites, RPMs strive to conduct the appropriate level of oversight, which will mean more or less oversight depending on numerous site-specific conditions. However, EPA believes that by increasing communication, cooperation, and early planning with PRPs, oversight activities and their resulting costs to PRPs can be reduced. Regions should work with states, local governments, communities, and PRPs, as appropriate, to develop effective partnerships in implementing this initiative.

References

Office of Site Remediation Enforcement (OSRE), "Superfund Reforms Annual Report FY1997."

OECA Memorandum "Operating Principles for an Integrated Enforcement and Compliance Assurance Program" (November 27, 1996).

OSWER Directive 9200.4-15, "Reducing Federal Oversight at Superfund Sites with Cooperative and Capable Parties" (July 31, 1996).

9.4.C Compliance Monitoring

Compliance monitoring consists of activities designed to determine compliance with applicable laws, regulations, permits, orders, and agreements. These monitoring actions should aid review and evaluation of PRP activities under Superfund. They should also determine whether conditions present an imminent and substantial endangerment. The basic categories of compliance monitoring activities include the following:

- **Surveillance** - obtaining general site information prior to actual site inspection.
- **On-site Inspection** - actual site inspection, traditionally confined to one medium and potentially including sampling, observations, record reviews, interviews, etc.
- **Investigations** - extensive study of a site or entity, potentially warranted when an inspection or record review indicates the potential for serious, widespread, and/or continuing civil or criminal violations.
- **Record reviews** - review of documents, possibly at several locations including EPA, state, and local offices, and/or the facility.
- **Targeted information gathering** - compilation of detailed information on the status of compliance and/or environmental conditions including items such as emission/discharge rates, operating logs, financial records, sampling results, etc.

If the RPM determines that the PRP is failing to comply with the terms of the CD, the RPM should generally approach the problem in a constructive manner. The RPM's first course of action is the following:

- Identify the problem and devise appropriate corrective action based on the terms agreed to in the CD 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.

Reference

OSWER Memorandum, "Follow-up on Compliance Monitoring" (June 28, 1991).

9.4.D Compliance Enforcement

Civil and criminal enforcement tools may be used to address issues of imminent and substantial endangerment to human health, welfare, or the environment; violation or non-compliance with environmental law; and recovery of costs for response actions. Enforcement tools also aid in eliminating any economic advantage for non-complying parties as well as providing a deterrent for similar behavior by other parties.

Oral notification for violations is rarely appropriate as the sole enforcement response. Therefore, written notice of a violation is the most suitable enforcement action for minor or inadvertent, first-time violations. Written notification is a required prerequisite for some statutes (e.g., Clean Air Act,

Safe Drinking Water Act). Violations discovered through regular inspections, tips, complaints, or other compliance monitoring should be addressed with judicial and/or administrative orders, penalty actions, or both. Cost recovery actions are appropriate in cases of significant expenditures from the Fund to conduct response actions.

9.4.E 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 regional counsel and the OERR Regional Coordinator for advice and assistance.

Section 104(e)(5)(b) of CERCLA authorizes the Agency either to seek an Administrative Order (AO) 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 to 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.

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 CD. 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 CD. 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 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 RA that it is undertaken pursuant to a CD.

Reference

OSWER Directive 9829.2, "Entry and Continued Access Under CERCLA" (June 5, 1987).

10. Operation and Maintenance

Chapter 10 Operation and Maintenance

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Chapter 10 Operation and Maintenance

10.1 Description of Activity

The National Contingency Plan (NCP) 40 Code of Federal Regulations (CFR) section 300.5 defines Operation and Maintenance (O&M) as "measures required to maintain the effectiveness of response actions." O&M generally will be required when 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, 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 Remedial Action (RA) objectives and remediation goals in the Record of Decision (ROD) or Consent Decree (CD) and is determined to be Operational and Functional (O&F). The guidelines and types of activities required for O&M at enforcement sites are identical to those at Fund-lead sites. At Potentially Responsible Party-lead (PRP-lead) ground water sites, O&M begins after the ground water system is considered O&F. Long-term operation of a ground water system is considered to be part of O&M.

Consistent with the NCP and in Fund-lead situations only, the Fund may be used for a period of up to 10 years following the O&F period to finance efforts to restore contaminated ground water or surface water to a level that ensures protection of public health and the environment. Activities required beyond the 10-year period are considered O&M.

Fund resources cannot be used to perform O&M activities. At enforcement sites, O&M may be conducted by the PRP(s), 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. O&M activities are one of the key elements evaluated by EPA during five-year reviews of sites where waste remains on site, preventing unlimited use and unrestricted exposure, or where the attainment of cleanup levels that allow unlimited use and unrestricted exposure will take longer than five years to achieve.

10.2 Procedures and Interactions

10.2.A Settlement Negotiations

It is essential that responsibility for O&M activities and oversight be addressed during CD negotiations. A description of required O&M activities and projected costs for the site should be available from the Feasibility Study and/or the ROD. If not, it is the Remedial Project Manager's (RPM's) responsibility to ensure that the Statement of Work (SOW) clearly spells out the O&M activities, the 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 must be set forth in the CD or accompanying SOW. Every effort should be made to have the PRPs perform the O&M. If the PRPs will not perform the O&M, then the negotiation team should ensure that the state will assume responsibility for these activities.

10.2.B Operation and Maintenance Plan

During the Remedial Design (RD), an O&M plan shall be prepared that clearly defines how the PRPs will perform the O&M activities required for the site and provides a detailed cost estimate. This requirement should be clearly defined in the 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 RA Report. **Exhibit 10-1** sets forth the basic elements of an O&M plan. Many of the items in an O&M plan will also be included in an O&M manual, but emphasis in an O&M manual is generally placed on technical items rather than funding and administration. At sites with multiple Operable Units (OUs), it is possible that each OU will require a distinct O&M activity. In this case, the O&M activities for each OU will commence following completion of the RA Report for that activity and EPA's acceptance of the work.

10.2.C Operation and Maintenance Manual

The O&M manual serves as a guide to understanding the purpose and function of the equipment and systems making up the overall facility. The manual provides all the technical information necessary to operate and maintain the remedy as well as guidance for operators and the state after state assumption of O&M responsibilities. Responsibility for developing the manual is shared by the remedial designer and the RA contractor. During the RD phase, the remedial designer drafts the O&M manual and submits it as part of the design plan, accompanied by design plans and specifications. The manual is finalized by the RA contractor during the RA phase with supplemental information specific to the actual equipment installed. The design of the manual should lend itself to modification by the RA contractor and state to reflect changing treatment system O&M needs. The following sections are typically included in an O&M manual:

- System description (including design philosophy and operation and control of the facilities).
- Personnel.
- Permits, standards, and approvals.

- Community involvement.
- Laboratory testing.
- Records.
- Maintenance.
- Emergency operating and response program.
- Safety issues.
- Utilities.
- Electrical systems.
- Appendices (schematics, plans, as-builts, inspection checklists, etc.).

It is the responsibility of the RPM (with the help of in-house experts, the United States Army Corps of Engineers, or a Response Action Contractor) to review the draft of the O&M manual to ensure completeness, consistency, and user-friendliness. The O&M manual becomes part of the State Superfund Contract (SSC) or Cooperative Agreement (CA) for Fund-lead sites, and should be referenced in the CD for PRP-lead sites.

10.2.D Operation and Maintenance Oversight

Responsibility for oversight of O&M activities is set forth in the settlement document. In cases where the state is a signatory of the CD, the state may agree to assume responsibility for oversight. In all other situations, EPA will provide oversight. The oversight agency must monitor the O&M activity for compliance with the terms of the settlement document and the O&M plan. Oversight activities during the O&M phase include conducting periodic site inspections (including review of on-site records and reports), conducting ongoing monitoring and review of O&M reports, performing five-year reviews, and oversight of other state or PRP activities to ensure O&M is being performed adequately.

References

The following references apply to this section, but also provide a useful context for Chapter 10 in its entirety.

"Close-out Procedures for National Priorities List Sites," EPA540-R-98-016.

Remedial Design and Remedial Action Handbook, EPA 540-R-95-059

Office of Solid Waste and Emergency Response (OSWER) Directive 9355.55-01 "Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties" Interim Final (February 1990).

OSWER Directive 9355.0-26, "Additional Clarification on Funding Ground or Surface Water Restoration Actions" (February 1989).

10-1 Basic Elements of an Operation and Maintenance Plan

A. Transfer of Operation and Maintenance (O&M) Responsibilities

1. Designation of the organizational unit of the state government responsible for O&M.
2. Identification of the availability of state funding mechanisms for O&M activities.
3. Milestone dates for state assumption of O&M responsibilities.

B. Description of Normal O&M

1. Description of tasks for operation.
2. Description of tasks for maintenance.
3. Description of prescribed treatment or operating conditions.
4. Schedule showing frequency of each O&M task.
5. Summary of O&M performance standards.
6. Criteria for determination of Operational and Functional.
7. Completion of O&M (conditions for O&M termination).
8. Description of site use and disposition of facilities following completion of O&M.

C. Description of Potential Operational Problems

1. Description and analysis of potential operational problems.
2. Sources of information regarding problems.
3. Common remedies.

D. Description of Routine Monitoring and Laboratory Testing

1. Description of monitoring tasks.
2. Description of required laboratory tests and their interpretation.
3. Description of Quality Assurance/Quality Control protocols.
4. Schedule of monitoring frequency and when, if so provided, to discontinue.

E. Description of Alternate O&M

1. List of alternate procedures to prevent undue hazard in the event of systems failure.
2. Analysis of vulnerability and additional resource requirements should a failure occur.

F. Safety Plan

1. Description of precautions, necessary equipment, etc., for site personnel.
2. List of safety tasks required in event of systems failure (may be linked to site safety plan developed during remedial response).
3. Transition strategy for modifying existing site Health and Safety Plan and Quality Assurance Project Plan.

G. Description of Personnel/Equipment

1. Summary of O&M staffing needs (including training and certification requirements).
2. List of equipment necessary for plan.
3. Installation of monitoring components.
4. Maintenance of site equipment.
5. Replacement schedule for equipment and installed components.

H. 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.
4. Costs of any contractual obligation (e.g., laboratory expenses).
5. Costs of operation (e.g., utilities, energy costs).

I. 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.

10.3 Planning and Reporting Requirements

O&M is made up of the activities required to maintain the effectiveness or the integrity of the response. Section 300.435 (f)(3) of the NCP states that "for Fund-financed remedial actions involving treatment or other measures to restore ground- or surface water quality to a level that assures protection of human health and the environment, the operation of such treatment or other measures for a period of up to 10 years after the remedy becomes operational and functional will be considered part of the remedial action. Activities required to maintain the effectiveness of such treatment or measures following the 10-year period, or after remedial action is complete, whichever is earlier, shall be considered O&M." The state or PRP is responsible for these activities for the period specified in the ROD or other appropriate documents.

Section 300.435(f) of the NCP states that "operation and maintenance (O&M) measures are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD, and is determined to be operational and functional, except for ground- or surface water restoration actions covered under 300.435(f)(4)." As defined in the *Superfund Program Implementation Manual (SPIM)*, the start of O&M is 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, SSC, or CD.

O&M planning in the Comprehensive Environmental Response, Compensation, and Liability Information System 3/Waste Local Area Network is site-specific, and is used for resource allocation purposes only. Funds for oversight of O&M are contained in the RA Advice Of Allowance. O&M is not tracked by the Superfund Comprehensive Accomplishments Plan.

Planning and reporting requirements are governed by the terms set forth in the settlement document. Generally, cost documentation records must be maintained for 10 years following the final claim in cases where preauthorization is part of the settlement. With the exception of 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 O&F (i.e., operating as designed).

Routine reports that summarize O&M activities should be prepared by the state or PRP on a regular basis (e.g., annually) and submitted to the RPM. The reports include items such as data collection, sampling results, discharge and emissions calculations, routine inspections, repairs, equipment changeouts, regular updates of the O&M manual and as-builts, community complaints and responses, and verification of the integrity of the institutional controls. Special reports on safety, emergencies, and other

unusual events such as fires, floods, or weather damage should be made available to EPA and other interested parties in a timely manner, as described in the terms of the SSC or CA for a Fund-lead site and the CD for a PRP-lead site.

Five-year review reports also include a discussion of O&M activities. The purpose of five-year reviews is to determine whether the RAs selected for a site remain protective of human health and the environment. For sites at which a post-Superfund Amendments and Reauthorization Act (SARA) remedy, upon attainment of the ROD cleanup levels, will not allow unlimited use and unrestricted exposure, section 121(c) of the Comprehensive Environmental Response, Compensation, and Liability Act and section 300.430(f)(4)(ii) of the NCP require EPA to conduct a five-year review. EPA also conducts policy reviews of sites where: 1) no hazardous substances will remain above levels that allow for unlimited use and unrestricted exposure after completion of the RA, but ROD-specified clean-up levels will require five or more years to attain, and 2) sites addressed pre-SARA at which the remedy, upon attainment of the ROD cleanup levels, will not allow unlimited use and unrestricted exposure. In some instances, the federal facility or state may conduct the five-year review.

For sites requiring five-year reviews, the federal facility, state, or PRP must provide data to document O&M activities and the effectiveness of the remedy at the site. PRPs may prepare a report or analysis based on these data that EPA will adapt to create the five-year review report. Depending on the type of remedy, these data may include records of equipment repairs, system modifications, sampling results, discharge and emission compliance reports, routine inspections, safety and emergency incident reports, and verification of institutional control integrity. The RPM may request annual O&M budget reports to assist in analyzing O&M activities and costs. Items of concern which should be focused on in five-year reviews are those that demonstrate the protectiveness and integrity of the remedy, or lack thereof. These items would include matters such as unexpected increases in O&M costs that may be an early indicator of remedy failure, ground water sampling results demonstrating plume capture and progress in restoring an aquifer, and maintenance logs indicating proper execution of the O&M program.

References

SCAP/Oil Quick Reference Coding Guide.

OSWER Directive 9200.3-14-1D, *Superfund/Oil Program Implementation Manual* (updated biennially).

OSWER Directive 9355.7-03A, "Second Supplemental Five Year Review Guidance" (December 21, 1995).

OSWER Directive 9355.7-02A, "Supplemental Five Year Review Guidance" (July 26, 1994).

OSWER Directive 9355.7-02FS1, "Structure and Components of Five Year Reviews" (August 1991).

OSWER Directive 9355.7-02, "Structure and Components of Five Year Reviews" (May 23, 1991).

National Oil and Hazardous Substances Pollution Contingency Plan, 40 Code of Federal Regulations (CFR) section 300.430 ("Remedial Investigation/Feasibility Study and Selection of Remedy") (1990).

Note: The four Five-Year Review documents listed above are currently being incorporated into a draft Five-Year Review guidance document.

10.4 Potential Problems/Resolutions

10.4.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 with money for O&M.

10.4.B Transfer of Property

RPMs, in conjunction with regional counsel, must ensure that the settlement provides for continuation and financing of O&M in the event that ownership of the property on which the site is located is transferred. 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 regional counsel.

10.4.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 resumption 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.

11. Site Completion and Deletion

Chapter 11 Site Completion and Deletion

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Chapter 11 Site Completion and Deletion

11.1 Description of Activity

11.1.A Introduction

Site completion and deletion from the National Priorities List (NPL) occur for sites after completion criteria are met. Site completion signifies that all response actions are complete, all cleanup levels have been met, and all requirements specified in the Records of Decision (RODs) have been implemented for the site. In most cases, the site deletion process begins when the site completion milestone has been met. Site deletion is the official determination by EPA that the site needs no further response under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); partial deletion signifies that a portion of the site, or an entire medium at the site, meets the requirements for deletion from the NPL. Public notification and state or tribal concurrence is required in the deletion process.

11.1.B Responsibilities

Responsibilities for site completion and deletion fall with the region and Remedial Project Manager (RPM), EPA Headquarters, and the state or tribe. Their roles are discussed in the following sections.

11.1.B.1 Role of the Region and RPM

The RPM verifies that the site is eligible for site completion status by applying site completion criteria. Once this status has been established, the RPM either prepares a Final Close Out Report (FCOR) or, in the case of state-lead sites, asks the state to prepare it. These reports are generally brief, but may be longer at complex sites with multiple Operable Units (OUs). Headquarters and the state or tribe should have an opportunity to review and comment on the report prior to final approval. Approval of the FCOR by the Regional Administrator (RA) establishes that either all appropriate response actions have been taken or that no action is required at the site.

In general, the deletion process from the NPL may begin once a site reaches the site completion milestone. In some cases, however, a site or portion of a site can be deleted without meeting the site completion or construction completion criteria. See Chapter 8, RD/RA Negotiations/Settlement, and Chapter 9, RD/RA Implementation, for a more detailed discussion of construction completion.

In most cases, the region initiates the deletion process; however, a state or an individual may also begin the process by specifically requesting the site deletion. The RPM initiates the deletion process by consulting with the appropriate state, obtaining state concurrence, compiling a deletion docket, preparing a Notice of Intent to Delete (NOID) or a Notice of Intent for Partial Deletion (NOIPD) for the public, arranging for its submission to the EPA Headquarters Coordinator for review, and arranging for its publication in the *Federal Register*. After a 30-day public comment period, the region answers comments in a responsiveness summary and places a final Notice of Deletion (NOD) or Notice of Partial Deletion (NOPD) in the *Federal Register*. This signifies deletion of the site (or a portion of the site) from the NPL.

11.1.B.2 Role of Headquarters

Headquarters reviews the FCOR before approval by the RA, reviews the proposed and final NOIDs and NOIPDs for national consistency, and helps prepare the responsiveness summary where appropriate.

11.1.B.3 Role of State or Tribe

The state or tribe has a variety of responsibilities throughout the completion and deletion processes. The state or tribe may prepare the FCOR at state- or tribal-lead sites and work with the region to determine if the site meets the criteria for deletion. The state or tribe also reviews the NOID or NOIPD and the NOD or NOPD prior to approval and publication. Sites cannot be deleted or partially deleted unless the state or tribe concurs with the deletion (see Section 4, Potential Problems/Resolutions).

11.1.C Statutory Authority

The following statutory and regulatory authority relates to site completion and deletion:

- Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. 9601, et. seq., section 105.
- National Oil and Hazardous Substances Pollution Contingency Plan, 40 Code of Federal Regulations part 300.425(e).

11.1.D Definitions

The following definitions relate to the site completion and deletion process:

- **Final Close Out Report (FCOR)** - A report documenting compliance with the statutory requirements of CERCLA and providing a consolidated record of all remedial activities at all of the site's OUs.
- **No Further Response Needed** - A decision that any of the three criteria identified in the National Contingency Plan (NCP) are met under 40 CFR 300.425(e)(1).
- **Notice of Deletion (NOD)** - A notice published in the *Federal Register* announcing the deletion of a site from the NPL.
- **Notice of Partial Deletion (NOPD)** - A notice published in the *Federal Register* announcing that a portion of a site is deleted from the NPL.
- **Notice of Intent to Delete (NOID)** - The *Federal Register* Notice of Intent to Delete a site from the NPL. The Notice contains information about the site and related cleanup activities, and provides the public with a 30-day comment period.
- **Notice of Intent for Partial Deletion (NOIPD)** - The *Federal Register* Notice of the Intent to Delete a Portion of the site from the NPL.
- **Partial Deletion** - The deletion of portions of a site, if those releases qualify for deletion. Such portions may be a defined geographic unit of the site, perhaps as small as a residential unit, or may be a specific medium at the site, e.g., ground water, depending on the nature or extent of the release(s).

- **Site Completion** - The completion of all response actions at an NPL site, as documented in a FCOR.
- **Site Deletion** - The removal of a site listing from the NPL. Sites may be deleted from the NPL when no further response is necessary to protect public health or the environment.

11.2 Procedures and Interactions

11.2.A Documentation of Site Completion

Exhibit 11-1 outlines the procedures for completion and deletion of a site or portion of a site.

The RPM is responsible for preparing the FCOR, which must describe completely all cleanup actions at the site and must provide the technical justification for site completion. Generally, the FCOR does not signify that the terms of Cooperative Agreements, Consent Decrees, or Administrative Orders have been satisfied, nor does it signify resolution of contractual or other administrative issues for Superfund activities. Deletion from the NPL does not disqualify a site from the requirement of five-year reviews; if waste is left onsite, five-year reviews must still be performed. The report is a final record of the site and must be complete and able to stand alone. See Chapter 8 RD/RA, Negotiations/Settlement, and Chapter 9, RD/RA Implementation, for more information about site completion.

11.2.B Determination That Site Deletion Criteria Are Met

In order for a site to be deleted from the NPL, the RPM, in consultation with the state or tribe, considers whether any of the following three criteria has been met:

- Responsible parties or other parties have implemented all appropriate response actions required.
- All appropriate Fund-financed responses under CERCLA have been implemented, and no further action is appropriate.
- The Remedial Investigation has shown that the release poses no significant threat to public health or the environment, and, therefore, taking remedial measures is not appropriate.

11.2.C Collection of Background Information

The RPM next compiles background information on the site, including the site history, a description of remedial activities undertaken, the extent and nature of community involvement and notification, and the determination that all appropriate CERCLA response actions have been completed in accordance with the goals and objectives of the applicable ROD. This information can usually be found in the FCOR. All appropriate background materials and records should be placed in a deletion docket created for the information repository.

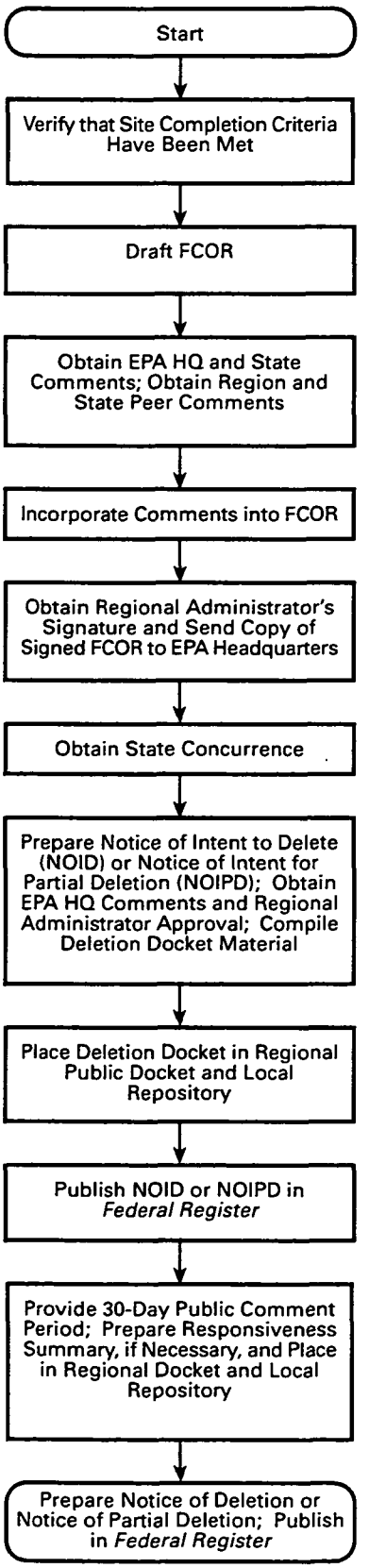
11.2.D Consultation with the State or Tribe

The RPM consults with the appropriate state or tribal agency prior to developing the NOID or NOIPD. Sites are not deleted or partially deleted from the NPL until the state or tribe has concurred with the deletion.

11.2.E Preparation of the NOID or NOIPD

The RPM produces a NOID or NOIPD. This document informs the public of EPA's intent to delete a site or a portion of a site from the NPL. The NOID should contain general information about the site, a list of contacts (including regional staff), and an outline of deletion criteria and procedures. A NOIPD should contain similar information as the NOID, but with stricter mapping and tracking requirements.

11-1 Site Completion and Deletion Procedures



If a partial deletion is being undertaken, the RPM also completes a data characterization package, including a Partial Site Deletion Collection Form, and a map that clearly shows the entire site and the portion to be deleted (including scale and date), with site coordinates for at least three reference points on the map. The map also must contain easily identifiable landmarks such as roads and water bodies. Requirements for submitting ensure that complete copies of the deletion docket are placed in the appropriate regional and local repositories.

Reference

"Notice of Policy Changes: Partial Deletion of Sites Listed on the NPL," 60 *Federal Register* 55466 (November 1, 1995).

11.2.F Public Involvement and Input

Public notification is required in the deletion process. To ensure public involvement, the RPM performs the following tasks:

- Publishes a NOID or NOIPD in the *Federal Register* that includes a solicitation of public comment for a minimum of 30 calendar days.
- Places copies of the information supporting the proposal of deletion in the information repository.
- Publishes a notice of availability of the NOID or NOIPD in a major local newspaper of general circulation.

11.2.G Preparation of the Responsiveness Summary

The RPM prepares a responsiveness summary that includes detailed responses to each significant comment received during the public comment period. Headquarters may provide assistance with this task where appropriate. The summary is placed in the regional docket and in the local repository.

11.2.H Preparation of the NOD or NOPD

Once the responsiveness summary has been approved by the RA and placed in the proper repositories, the RPM produces a NOD or NOPD that states that all appropriate Fund-financed responses under CERCLA have been implemented and that no further response is appropriate. It includes an effective date, a regional contact, and supplemental site information.

11.2.I State or Tribal Concurrence

The state or tribe has 30 working days to review the NOD or NOPD prior to its publication in the *Federal Register.*

11.2.J Public Notification of Deletion

The final step in the deletion process is to place the NOD or NOPD in the *Federal Register.* Site information should then be entered into the CERCLIS3/WasteLAN and Superfund NPL Assessment Program (SNAP) databases.

11.3 Reporting Requirements

In addition to submitting documents to Headquarters for approval, RPMs also ensure that accurate information is entered into CERCLIS 3/ WasteLAN for tracking purposes. This information includes the PCOR, FCOR, NOID, NOPD, NOIPD, and NOPD.

11.4 Potential Problems/Resolutions

11.4.A Disputes

The potential problem of disputes over deletion between the state and EPA or between PRPs and EPA has not yet been faced. EPA may need to develop guidance on this issue.

11.4.B Concurrence

Sites cannot be deleted without state or tribal approval.

11.4.C Releases from Deleted Sites

All releases from sites deleted from the NPL are eligible for further Fund-financed remedial action should future conditions warrant such action. If there is a significant release from a deleted site, the site is restored to the NPL without application of the Hazard Ranking System (see NCP section 300.430 (e)(3) for more information). Note that deletion of a site from the NPL does not affect potential response party liability or impede Agency efforts to recover costs associated with response actions.

Reference

National Oil and Hazardous Substance Pollution Contingency Plan, 40 Code of Federal Regulations section 300.430 ("Remedial Investigation/ Feasibility Study and Selection of Remedy") (1990).

11.5 Activities Checklist

1)_____ Produce FCOR to document site completion

2)_____ Determine if site deletion criteria are met

3)_____ Collect background information on site

4)_____ Consult with state or tribe on site deletion

5)_____ Produce a NOID or NOIPD

6)_____ Notify the public and obtain public input

7)_____ Prepare a responsiveness summary to public input

8)_____ Prepare a NOD or NOPD

9)_____ Obtain state concurrence on final deletion

10)____ Notify the public on final deletion

12. Cost Recovery

Chapter 12 Cost Recovery

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Chapter 12 Cost Recovery

12.1 Description of Activity

12.1.A Introduction

When the Agency uses Fund monies for a response action not inconsistent with the National Contingency Plan (NCP) at a site where there are financially viable Potentially Responsible Parties (PRPs), it is authorized to take an enforcement action against those PRPs to recover its costs. This action, under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 107, is known as a cost recovery action. Cost recovery can be pursued for the costs of a removal, Remedial Investigation/Feasibility Study (RI/FS), Remedial Design (RD), and Remedial Action (RA), including EPA's costs of overseeing PRP responses. The cost recovery actions taken may include issuance of demand letters, negotiations with PRPs, Alternative Dispute Resolution (ADR), administrative settlements, judicial settlements, and litigation.

Costs incurred by EPA under Resource Conservation and Recovery Act section 7003 also may be recoverable under CERCLA section 107. Courts have generally agreed that EPA can recover certain costs under section 107 for actions taken under other statutory authority as long as each of the elements of section 107(a) is satisfied. This means that the costs were: 1) incurred as part of a removal or RA; 2) incurred in responding to a release or threatened release of a CERCLA hazardous substance; and 3) not inconsistent with the NCP.

This chapter provides Remedial Project Managers (RPMs) and On-Scene Coordinators (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.

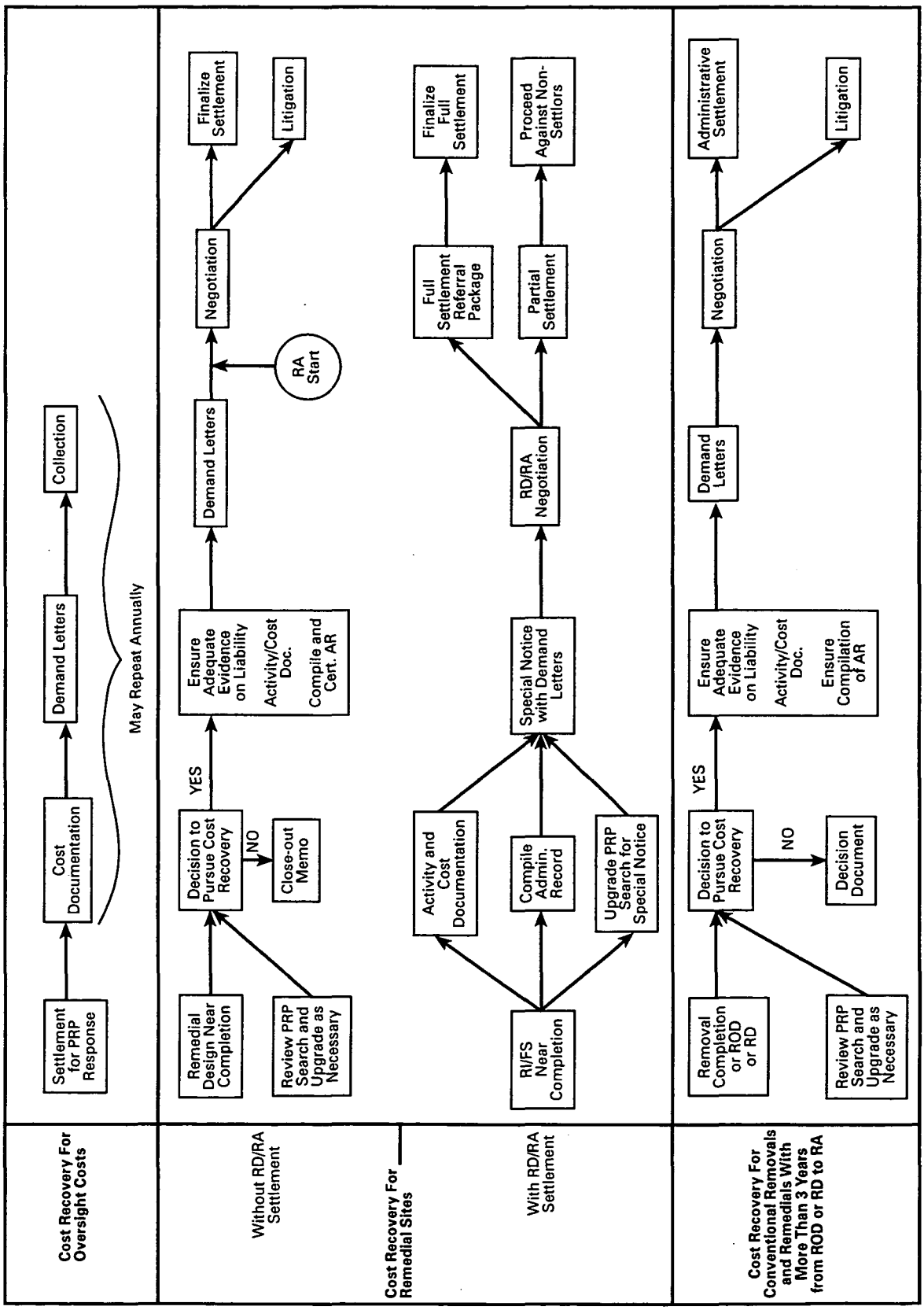
There are two major types of cost recovery actions:

- Cost Recovery for Removals.
- Cost Recovery for RAs.

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 may include the direct and indirect costs related to remedial and removal actions plus interest on these costs. All costs directly related to a specific cleanup are direct costs. Indirect costs include things such as employee overhead, rent, electricity, etc. Documents relevant to all aspects of the case must be compiled to support cost recovery. EPA must file cost recovery actions within certain periods specified in the statute. These statute of limitations (SOL) dates are discussed later in this chapter.

Each type of cost recovery action is discussed briefly below and **Exhibit 12-1** presents the process for each type of action.

12-1 Cost Recovery Process



12.1.B Cost Recovery for Removals

During the course of the Fund-lead removal action, the OSC is responsible for compiling the Administrative Record (AR) with assistance from regional counsel and the Administrative Record Coordinators, obtaining information on the identities of PRPs, and documenting the removal work undertaken and the costs incurred. As the removal proceeds, the OSC works with regional counsel to complete 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) ensuring that the liability information collected in the PRP search meets evidentiary standards; 2) documenting the costs of the removal action; and 3) reviewing the compilation of the AR. Check with regional management to identify the staff who perform these tasks as they vary by region. The first activity should be performed as the PRP search proceeds.

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, demand payment of the full cost of cleanup, and start the accrual of interest on costs. In a limited number of situations, the PRPs will respond to the demand letters by reimbursing the Agency immediately. After demand letters have been sent, follow-up phone calls may serve as an effective means to explain both what the demand letter means and, for those PRPs who are unfamiliar with it, the Superfund process. In most situations, the PRPs will seek to negotiate with the Agency over the extent of their liability for the costs incurred. If these negotiations result in a settlement, EPA and the PRPs may enter into an administrative cost reimbursement settlement pursuant to CERCLA section 122(h)(1) (or an Administrative Order on Consent (AOC) if the settlement calls for performance of a removal action as well as payment of costs). If the total response costs of the United States 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 (see section 2, "Prioritization of Cases") 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 by a litigation referral. In general, cost recovery cases involving post-Superfund Amendments and Reauthorization Act (SARA) removals (except those with section 104(c)(1)(C) waivers) must be filed within an SOL dated three years after completion of the removal.

Reference

Office of Site Remediation Enforcement (OSRE) Memorandum, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (September 30, 1998).

12.1.C Cost Recovery for Sites in the Remedial Process

Cost recovery activities at sites in the remedial process may include past expenditures for removals, RI/FS, or RD. The outcome of RD/RA negotiations and timing concerns related to possible SOL dates affect remedial cost recovery. When EPA incurs cleanup costs at a remedial site, there are five basic contexts in which it may recover its costs:

- **The Agency funds removal action or RI/FS, and PRPs agree to fund RD/RA.** The Agency usually recovers removal and RI/FS costs from the PRPs as part of the RD/RA settlement.
- **The Agency funds a removal action or RI/FS; one group of PRPs agrees to perform the RD/RA, but another group does not.** The Agency may sue the non-settlors separately for all or part of the removal and/or RI/FS costs.
- **The Agency funds the RD/RA because there was no settlement.** The Agency may seek to recover the costs of the entire response in a cost recovery action, which should be developed early in the remedial construction.
- **The period between completion of a Fund-lead removal action, RI/FS, or RD and initiation of on-site construction of a Fund-lead RA is likely to exceed three years.** EPA will sue to recover the costs of the response activity prior to the three-year break, and subsequently amend the complaint to add the costs of later activity.
- **The site has multiple remedial Operable Units (OUs).** On the assumption that there may be different SOL dates for different OUs, EPA will sue to recover the costs incurred at the first OU. If there are no apparent divisibility issues among the OUs, EPA will seek a declaratory judgment for costs at the remaining OUs, and, if necessary, sue to recover costs at the remaining OUs as they are incurred. If there are divisibility issues among the OUs, EPA will pursue separate cost recovery actions.

12.1.D Cost Recovery in Context of RD/RA Negotiations

When the Agency negotiates with the PRPs to perform the RD/RA at the site, all recoverable past 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 7, RD/RA Negotiations, for a more detailed discussion of the process of RD/RA negotiations.

The RPM works with regional counsel and the Civil Investigator (CI) to assure that the five major pre-litigation activities involved in remedial cost recovery are performed. These activities can be performed concurrently and usually occur near the time that the Record of Decision (ROD) is signed,

although their timing may vary when the Agency is seeking to recover other costs (e.g., removal, RI/FS) as well. Cost recovery personnel must:

- Ensure that the PRP liability information meets evidentiary standards.
- Complete and certify the AR.
- 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 (SNLs) 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 (CD).

12.1.E 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 the universe of PRPs, their liability and financial viability, and their contributions. This case, developed at the time the RA starts, will seek to recover EPA's past and future costs, plus interest. This process begins with the Case Team's preparation of a litigation referral package which will be sent to DOJ for action. The referral package must contain all pertinent facts and documents concerning the response decision and underlying record. The principal components of the litigation referral package include documentation of PRP liability, defenses, and viability; the work that was performed during the response activities; and the cost of those activities. DOJ places particular emphasis on the work performed 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. Assembling cost documentation will require the Case Team to coordinate its efforts with regional financial personnel, the Financial Management Division (FMD), and the Office of Site Remediation Enforcement (OSRE).

After the completed referral package is sent to DOJ, members of the Case Team will be called upon to perform litigation support activities. This may involve consultation with regional counsel on technical aspects of response authorization, time-consuming involvement in complex litigation, and testimony in court. The RPM/OSC 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.

12.1.F Recovery of Oversight Costs

Costs associated with oversight of PRP response actions, including removal actions, are fully recoverable under section 107 of CERCLA. CERCLA section 104 requires that, before the authorization of a PRP's conduct of the RI/FS, the PRP agrees to reimburse the Agency for RI/FS oversight costs. In other contexts, this reimbursement of oversight costs is required by EPA policy. The agreement to pay EPA's oversight costs is usually a part of the

settlement document for the PRP's response action. In order to minimize disputes and replenish the Hazardous Substance Superfund as quickly as possible, it is essential that projected oversight activities and oversight billing be discussed with PRPs during settlement negotiations. The consent agreement should specify the cost documentation to be provided by EPA. For each PRP or group of PRPs that has an agreement to pay oversight costs, EPA will issue an oversight bill that includes appropriate cost documentation or, if the region will not issue a bill (e.g., in cases where special accounts are used to pay oversight costs), provide an accounting of costs. It is essential to identify and resolve any oversight disputes early. The Agency policy is to bill PRPs annually. PRPs reimburse the Agency according to the schedule set out in the settlement document. RPM/OSCs should provide a copy of the settlement document to financial management so an account and tentative billing schedule can be established.

In *United States v. Rohm and Haas Co.*, 2 F.3d 1265 (1993), the U.S. Court of Appeals for the Third Circuit ruled that the costs of EPA's oversight of an RA conducted by a private party cannot be recovered under CERCLA. This aspect of the Rohm and Haas decision has not been followed outside the Third Circuit, but it is the law in parts of Regions 2 and 3.

References

OSRE Memorandum, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (September 30, 1998).

Office of Enforcement and Compliance Assurance (OECA) Memorandum, "Guidance on the Use of Section 7003 of RCRA" (October 20, 1997).

OSRE Memorandum, "Issue of 'Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs' and 'Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs'" (September 29, 1995).

OSRE Memorandum, "Cost Recovery Cases Where Site Costs Total Less Than $200,000" (April 26, 1995).

Office of Solid Waste and Emergency Response (OSWER) Directive 9835.11-1, "Model Litigation Report for CERCLA sections 106 and 107 and RCRA Section 7003 Actions" (June 21, 1989).

OSWER Directive 9832.13, "The Superfund Cost Recovery Strategy" (July 29, 1988).

OSWER Directive 9832.11, "Guidance on Documenting Decisions Not to Take Cost Recovery Actions" (June 7, 1988).

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs for CERCLA Section 107 Actions" (January 30,1985).

OSWER Directive 9832.1, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" (August 1983).

12.1.G Special Accounts

In October 1995, EPA announced its intention to encourage greater use of special accounts as a means to ensure that settlement funds received would be used for future response actions at a particular site. In June 1996, the Agency reached agreement with the Office of Management and Budget and the Department of Treasury that the interest earned by site-specific special accounts can be credited to these accounts and used to fund future response actions at the sites in question. As only the portion of settlement funds that represents payment towards future costs can be placed in a special account, it is critical to clearly state in the settlement document, in dollar amounts or percentages, what portion of the overall proceeds are in recognition of future costs and to be placed in a special account. Designation of how payments are to be treated is essential because, if payments are not identified in this way, the regional finance office may apply payments in a manner inconsistent with what the settlors originally intended. For existing settlements where past and future costs have been designated in the settlement document, the region should consider whether to establish a special account for the future costs component. Where such situations exist, the regional program office should submit a memorandum to the regional finance office asking it to set up a special account for that site.

Agency guidance sets forth specific requirements and procedures for disbursement of special account funds to a PRP. The guidance addresses, among other things, the circumstances under which a PRP may receive funds from a special account (e.g., if it agrees to perform a response action under a settlement agreement), the timing and amount of disbursements, and disposition of remaining amounts in the special account after work is complete. Prior written approval of the Director of OSRE's Regional Support Division (RSD) is required before making an offer to a PRP that includes the disbursement of special account funds to a PRP. The final draft of the settlement agreement also must be submitted to the RSD Director for review and approval.

The Office of the Comptroller's Financial Management Division is currently finalizing guidance for administering Special Accounts as part of its ongoing revisions of the Resources Management Directives System (RMDS), 2550D, Financial Management of the Superfund Program. The guidance will be added to RMDS 2550D as Chapter 15, "Financial Management of Cashout Special Accounts." The draft will serve as interim policy until it is approved and cleared for publication.

References

OSRE Memorandum, "Interim Final Guidance on Disbursement of Funds from EPA Special Accounts to CERCLA Potentially Responsible Parties" (November 3, 1998).

OSRE/Office of the Comptroller, "Update and Implementation of the Superfund Reform on Special Accounts" (February 7, 1997).

12.2 Procedures and Interactions

CERCLA establishes the liability of responsible parties for the costs incurred by the government when responding to a release of hazardous substances (see Chapter 3, Establishing CERCLA Liability, for a detailed discussion). There are two key statutory provisions:

- Section 107 of CERCLA authorizes the Agency to seek cost recovery and pre-judgment interest through judicial action.
- Section 122(h) of CERCLA authorizes the Agency to enter into administrative settlements with PRPs, but requires DOJ approval when the total response costs of the United States at the site exceed $500,000. The authority to settle cost recovery cases administratively was delegated to the Regional Administrators (RAs) by Delegation 14-14-D (Sept. 21, 1987) and re-delegated within many regions. Section 122(h)(3) of CERCLA provides the Agency with the authority to enforce these settlements.

The Agency's cost recovery strategy emphasizes negotiating administrative settlements whenever possible and litigating only when necessary.

12.2.A PRP Searches

PRP searches are collections of evidence of the PRPs' liability and financial viability, and are very important in every aspect of dealing with the PRPs. A PRP search that produces strong evidence will help EPA negotiate a more favorable settlement. In cases in which the PRPs refuse to conduct the response activity or to reimburse the government's costs, PRP searches provide much of the evidence of liability that will be used in future litigation.

The PRP search is a collection and analysis of information about each PRP's connection to the site. It includes title searches, a review of existing documentation such as waste manifests, responses to CERCLA section 104(e) information requests, interviews with knowledgeable parties, review of corporate research, and analyses of waste-in information. From this information a PRP Search Report is developed which describes in detail each PRP's involvement with the site and the evidence that proves that involvement.

Although the exigencies of the particular site and the value of the response action dictate the scope of the initial PRP search, the PRP search is a fundamental component of a response action. The search should be initiated as early as possible to assist in developing a site-specific enforcement strategy. The PRP search generally continues throughout the response activity at a site, and supplemental investigative work may be necessary for cost recovery.

PRP searches are discussed in detail in Chapter 4, PRP Search, Notification, and Information Exchange.

References

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

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

12.2.B 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 for settlement, litigation, or site close-out.

12.2.B.1 Prioritization of Cases

Once a response activity has been identified as a cost recovery candidate, regional management prioritizes the cases to ensure that regional resources are efficiently used to meet the objectives of the cost recovery program, which are to:

- Maximize return of revenue to the Fund.
- Initiate enforcement activity within strategic time frames, but no later than the date defined by the applicable SOL.
- Exploit deterrent effect of litigation to encourage recalcitrant parties to settle.
- Use administrative authority and dispute resolution procedures.

The Office of Solid Waste and Emergency Response (OSWER) has developed the following case priorities for cost recovery at sites with financially viable PRPs:

1. National Priorities List (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 SOL deadline is approaching.
2. Cases in which Fund-financed RD/RA has been initiated; a remedial case referral to DOJ should be scheduled for every site in this category.
3. Sites at which there has been a partial settlement providing the Agency with less than full relief and there are viable non-settlors.
4. 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 12 months after the completion of the removal action.
5. Sites at which total response costs are less than $200,000; current Agency guidance states that regions "do not have to pursue such cases vigorously (e.g., conduct extended PRP searches or send numerous demand letters and information requests), because it is likely that the cost of collection will exceed the amount recovered."

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: 1) lack of PRP unencumbered resources; 2) time constraints; and 3) EPA resource limitations. RPMs should work closely with regional counsel and OSRE's Regional Support Division to resolve any bankruptcy issues.

12.2.B.2 Timing

RPMs/OSCs must be aware of statutory time limits for filing cost recovery actions. A case cannot be filed after the statute of limitations has expired. Section 113(g)(2) of CERCLA 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 RA.

For purposes of defining the cost recovery SOL, removal actions include traditional removals, RI/FSs, and RDs. The SOL 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. All information should be verified, as mistakes can doom a cost recovery action.

Sites where the SOL is near expiration can be identified using EPA's Cost Recovery Targeting Report. By merging information on Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) planning obligations with IFMS data, this report presents a complete picture of recoverable past costs and the status of all past, ongoing, and planned efforts to address them.

CERCLA 113(g)(2) indicates that removal costs may be pursued as part of the cost recovery for RAs if the RA is initiated within three years of the completion of the removal.

In summary, a removal (not including an RI/FS) may be ready for cost recovery 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 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 referred 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. 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 maximum recovery for EPA. The importance of clearly documenting when a removal action was completed or a remedial action was initiated cannot be overemphasized.

References

OSRE Memorandum, "Cost Recovery Cases Where Site Costs Total Less Than $200,000" (April 26, 1995).

OSWER Directive 9832.9, "Cost Recovery Actions/Statute of Limitations" (June 12, 1987).

12.2.B.3 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 Decision Document (DD) and entered into WasteLAN.

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.

12.2.B.4 Decision Document

The DD is written by the enforcement or removal program staff person assigned to the case in consultation with regional counsel, and signed by the regional program director. The DD and its supporting documents are considered confidential; therefore, it should not be placed in the AR. Chapter 15, Records Management, discusses how to handle confidential files. Current Agency guidance states that regions may prepare an abbreviated DD for cases where total response costs are less than $200,000.

References

OSRE Memorandum, "Cost Recovery Cases Where Site Costs Total Less Than $200,000" (April 26, 1995).

OSWER Directive 9832.12, "Transmittal of the Superfund Cost Recovery Strategy" (July 29,1988).

OSWER Directive 9832.13, "Guidance on Documenting Decisions Not to Take Cost Recovery Actions" (June 7, 1988).

12.2.C Notification and Demand Requirements

Under CERCLA and current Agency policy, there are several different opportunities to notify PRPs of their potential liability for cleanup costs. For cost recovery purposes, the most important opportunities are the issuance of letters that include demands for reimbursement, such as notice letters or demand letters.

12.2.C.1 Special Notice Letters

Pursuant to CERCLA section 122(e)(1), SNLs are issued prior to Non-Time-Critical (NTC) removals, RI/FSs, and RD/RAs. 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 NTC removals, RI/FSs, and RD/RAs should include documentation of past costs. SNLs should include a demand for past as well as prospective work or costs. EPA may decide not to use these special notice procedures; however, pursuant to CERCLA section 122(a), EPA must notify the PRPs in writing and indicate why these procedures are inappropriate.

References

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)" (July 26, 1996).

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

12.2.C.2 Demand Letters

As a matter of policy, EPA sends a written demand letter to the PRPs prior to filing a cost recovery lawsuit. 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 regional management to determine who has authority to prepare and issue demand letters in the region.

Demand letters may be sent to each PRP for each separate response activity, such as removals, RI/FSs, RDs, and RAs, or for combined activities as appropriate. The optimum time for issuing demand letters varies, depending on the nature of the response. In coordination with regional counsel, the OSC should issue the letter for removal actions soon after the removal activities are completed and all necessary documents are compiled. For each OU of RAs, 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

OSRE Memorandum, "Transmittal of Sample Notice Letters: 1) Demand; 2) General Notice; 3) Special Notice; and 4) Follow-Up 104(e)" (July 26, 1996).

OSWER Directive 9832.18, "Written Demand for Recovery of Costs Incurred Under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)" (March 28, 1991).

12.2.C.3 Types of Costs and Pre-Judgment Interest

In accordance with CERCLA section 107, the demand letter should seek to recover interest from the date of the written demand for past costs or from the date that future costs are actually incurred. The demand letter should include a request for all costs, including:

- Costs incurred under EPA contracts with private contractors, including annual allocation costs.
- EPA direct costs, including costs such as EPA staff salaries, travel, and other miscellaneous, site-specific expenditures.
- Costs incurred under Interagency Agreements (IAGs), including the U.S. Army Corps of Engineers (USACE), DOJ, the Agency for Toxic Substances and Disease Registry (ATSDR), and the U.S. Coast Guard (USCG).
- Costs incurred under Cooperative Agreements (CAs), including state agreements.
- Technical Assistance Grants (TAGs).
- Indirect costs incurred by EPA for the response actions.
- Pre-judgment interest.
- Future costs.

Reference

Comptroller Policy Announcement 87-17, "Interest Rates for Debts Recoverable Under the Superfund Amendments and Reauthorization Act of 1986" (September 1987).

12.2.D Documentation Requirements

The region's site files will contain several types of documents that can be used to support a cost recovery action, including: 1) enforcement information, such as data on PRP liability; 2) the AR, relating to the selection of the response action; and 3) response activity and cost documentation.

This section discusses documents relating to the third category. The region's Cost Recovery Coordinator (CRC) or other cost recovery contacts prepare the referral and have primary responsibility for collecting and organizing cost recovery documentation.

References

OSRE Memorandum, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (September 30, 1998).

Office of Waste Programs Enforcement (OWPE)/Financial Management Division (FMD), "Delegation of Letter Report Responsibilities and New Guidance" (June 5, 1991).

FMD, "Historic Site-Specific Cost Reports in Superfund Contracts Active Prior to October 1, 1985" (June 26, 1989).

Office of Administration and Resource Management (OARM), "Superfund Financial Management and Recordkeeping Guidance for Federal Agencies" (January 1989).

FMD, "State Superfund Financial Management and Recordkeeping Guidance" (August 1987).

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs in CERCLA Section 107 Actions" (January 1985).

OSWER Directive 9832.1, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" (August 1983).

12.2.D.1 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 that support more than one response action (e.g., office space, electricity, and supplies for contract and EPA personnel who work on the response actions). Total cost is the sum of "direct" and "indirect" costs. Both types of costs are recoverable under CERCLA.

12.2.D.2 EPA Indirect Costs

Indirect costs, briefly described above, do not relate specifically to individual sites. For this reason, these costs are "allocated" to sites using accounting formulas. The process is similar to indirect cost accounting in private-sector firms, and results in a site-specific allocation of indirect costs, which are then incorporated in the cost package.

References

OSWER Directive 9832.5, "Policy on Recovering Indirect Costs in CERCLA Section 107 Cost Recovery Actions" (June 27, 1986).

Office of the Comptroller (OC), *Superfund Indirect Cost Manual for Cost Recovery Purposes* (March 1986).

12.2.D.3 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. Work performed documents prove that the response activities were actually undertaken (i.e., authorized and completed). Cost evidence documents prove 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 (TDDs), SOWs, and delivery orders.

- Evidence of contractor performance of work at the site and documentation of completion of that work, including documents such as Form 1955 for removals, monthly technical and financial status reports for Remedial Engineering Management (REM) contracts, and TDD or work assignment completion forms.

The Case Team should also 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 are generally admissible as evidence. Good documentation lays the foundation for successful settlement negotiations and litigation. Therefore, RPMs/OSCs should work closely with regional counsel to produce admissible evidence documenting the Agency's costs.

Cost documentation submitted by contractors frequently includes Confidential Business Information (CBI). In order to recover cleanup costs more efficiently and expeditiously, EPA may release Superfund response contractor CBI, with the contractor's consent, to PRPs in pre-litigation negotiations and during litigation. Such releases are made pursuant to a contractual agreement in pre-litigation negotiations or under a stipulation and protective order during litigation to ensure that distribution and use of the information is limited. The Agency also may release response contractor CBI, with the contractor's consent, to other EPA contractors or authorized representatives of the United States.

Reference

"Disclosure of Confidential Data to Authorized Representatives of the United States and Potentially Responsible Parties," Interim Rule, 58 Fed.Reg. 458-465 (January 5, 1993).

12.2.D.4 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 also may be required to produce the documents in court. CBI and Privacy Act information must be redacted (edited to delete confidential information).

The RPM and OSC 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 an RA) 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 actual dates of services provided by the contractor. The RPM/OSC should ensure that the dates are accurate because they are used to calculate SOLs and determine authorization issues under contracts. The RPM/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 IFMS, and there are a number of costs that are not reflected in that system. The RPM/OSC should be careful to see that costs of other agencies such as state agencies, ATSDR, DOJ, USCG, Federal Emergency Management Agency (FEMA), and Health and Human Services are included. In addition, the summary must be checked to see that all costs that PRPs have satisfied or paid are reflected in the cost summary, including settlements with other parties, and 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 state cost share 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.
- IAG expenditures.
- Cooperative Agreement (CA) 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 cost summaries are developed early in the case development process, they will need to be updated regularly as the various response action phases are initiated and completed. RPMs/OSCs should obtain updated cost summaries at critical stages of the response and litigation processes, and periodically (e.g., annually) during periods of substantial expenditure. Regular updating ensures that the most recent cost data are available for management review.

Cost summaries should be reviewed for completeness, to ensure that:

- They do not demand payment for amounts which have been previously recovered (e.g., bankruptcy proceeds, settlements).
- They do 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 there is no demand in excess of the 90 percent of such costs that the United States is entitled to claim.

Exhibit 12-2 outlines the type of material that should be included in cost summary reports.

12.2.E Documentation Procedures

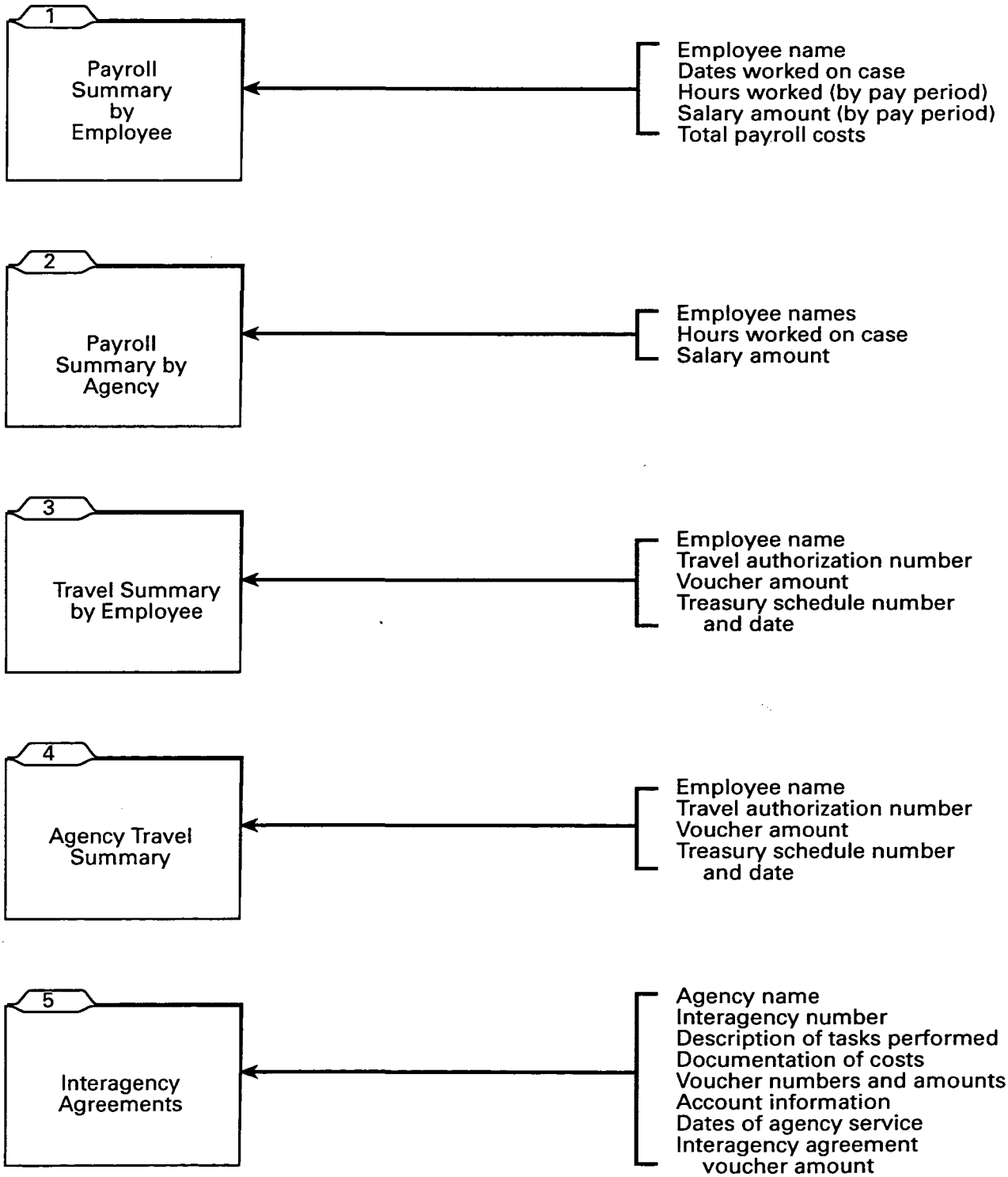
This section describes the procedures that are followed in assembling work performed and cost documentation for a cost recovery case. This process became a regional responsibility in January 1990, and requires joint activity by the regional CRC and Financial Management Officer (FMO). Cost recovery and 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 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.

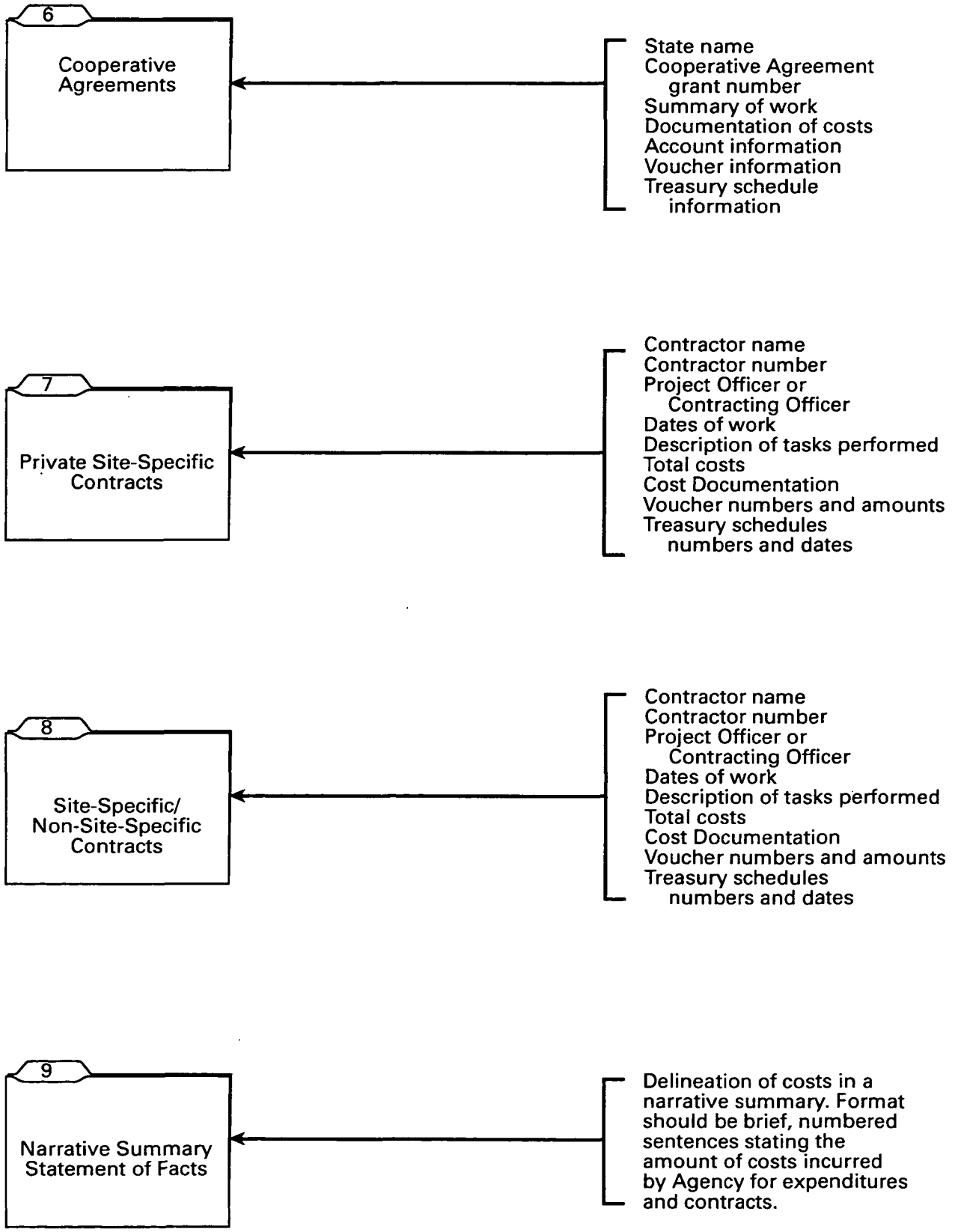
The regions assemble information for the following areas of costs:

- Agency site-specific regional payroll costs.
- Agency site-specific regional travel expenses.
- Other site-specific regional charges.
- Site-specific CAs.
- Non-site-specific CAs.
- Site-specific indirect costs.
- Site-specific Field Investigation Team costs.
- Site-specific Technical Assistance Team costs.
- Site-specific Superfund Technical Assessment and Response Team costs.
- Site-specific Response Action Contract costs.
- Site-specific Technical Enforcement Support costs.
- Site-specific Enforcement Support Services costs.
- Site-specific Emergency Response Cleanup Services costs.

12-2 Cost Summary Format



12-2 (cont.) Cost Summary Format



- Site-specific Emergency and Rapid Response Services costs.
- Site-specific Contract Laboratory Program costs.
- Site-specific REM costs.
- Site-specific Environmental Services Assistance Team costs.
- Site-specific Alternative Remedial Contracting Strategy costs.
- Site-specific Emergency Response Unit costs.
- Site-specific National Enforcement Investigation Center costs.
- TAG costs.
- 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 Interpretation Center and analyses of the photographs provided by the Environmental Monitoring Systems Laboratory.

After these costs are collected and categorized, they must be reconciled using information in SCORE$. This system is usually maintained and operated by the FMO in the region. The SCORE$ system downloads information on all site-specific accounts from the 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.

If there are any DOJ costs associated with the case, they should be included in the cost recovery action. DOJ is responsible for documenting their own costs and adding them to the amount in the referral from EPA. Although DOJ has responsibility for documenting its costs, the CRC, FMO, or 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.

Reference

Office of Compliance (OC)/OSRE, *Superfund Cost Recovery Procedures Manual* (September 1994).

12.2.F 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, regional counsel, and DOJ attorneys. 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.

12.2.F.1 Referral Package

To assist DOJ in preparing for cost recovery litigation, OSCs/RPMs should work with regional counsel 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.
- AR Index and Action Memorandum/ROD.
- PRP liability analysis.
- Anticipated defenses.
- Activity and cost documentation.
- Natural resource damages claims (summarizes communications with trustee).
- Enforcement history.
- Relief sought.
- Litigation/Settlement strategy.

Generally, the following remain in regional files:

- AR.
- 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 SOL concerns. 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. If the region does not include copies of supporting documents in the referral package, the documents must be identified in a specific inventory indicating the identity, location, and custodian of the documents. A general assertion that documentation is "available" will not suffice.

12.2.F.2 Litigation Support

RPMs and OSCs, with assistance from regional counsel and the CI, perform important duties in supporting cost recovery litigation. They:

- Ensure that the PRP search provides sound evidence of liability and, for generators, waste-in information.
- Ensure that the AR regarding the selection of remedy is compiled.
- Ensure that all activities and costs are documented.
- Provide the technical lead for the case and act as witnesses to the technical performance of the work at the site for which costs were incurred.
- Assist 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 OUs).

- Identify 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's statement is on file.
- Identify potential expert witnesses (e.g., hydrogeologists and soil scientists) to participate in negotiations, if necessary.
- Identify potential adverse witnesses (either fact or expert) and indicate the substance of expected testimony, if known.

In addition, RPMs and OSCs may be asked to assist regional counsel 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.

12.2.F.3 Litigation Management Plan

A litigation management plan should be developed by team members. This plan should be prepared in close coordination with DOJ. A list of the contents is shown in **Exhibit 12-3**.

12-3 Suggested Contents of a Site Litigation Management Plan

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 negotiations 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 positions.

As a practical matter, most cases do not go to trial and 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 regional counsel and DOJ attorneys.

References

Office of Enforcement Counsel (OEC) Memorandum, "Cost Recovery Referrals" (September 6, 1996).

OSWER Directive 9832.0, "Partial List of Documents Needed to Support Cost Recovery" (September 6, 1996).

OWPE Memorandum, "Issuance of Interim Rule: 'Disclosure of Confidential Data to Authorized Representatives of the United States and Potentially Responsible Parties,' 58 Fed. Reg. 458-465, January 5, 1993 (40 CFR Part 2)" (January 8, 1993).

OSWER Directive 9835.11-1, "Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003" (June 21, 1989).

OSWER Directive 9891.1-1a, "Procedures for Transmittal of CERCLA and RCRA Civil Judicial Enforcement Case Packages to Headquarters" (June 12, 1989).

OSWER Directive 9832.6, "Small Cost Recovery Referrals" (July 12, 1985).

OSWER Directive 9832.0, "Cost Recovery Referrals" (August 3, 1983).

12.2.G *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 substances 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.

12.2.G.1 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. 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.

It is no longer necessary to prepare a waste-in list or volumetric ranking before considering a party's eligibility for *de minimis* settlement; the region need only assess the individual PRP's waste contribution relative to the total volume of waste at the site.

De minimis settlements may be entered as either:

- AOCs.
- Judicial CDs.

The regions may issue AOCs when total response costs of the United States at the site are $500,000 or less. Under section 122(g)(4) of CERCLA and the EPA delegations, however, when total costs exceed $500,000 (excluding interest) and the settlement is embodied in an AOC, the RA must obtain the prior written approval of the Assistant Attorney General for the Environment and Natural Resources Division of DOJ, and consult with OSWER and OSRE.

All *de minimis* settlements must comply with the public comment procedures stipulated in section 122(i) of CERCLA.

"De micromis" settlements are a subset of *de minimis* settlements available to parties who contributed minuscule amounts of waste to a site; owners and operators are not eligible. The presumptive cutoff points for "de micromis" settlement are 0.002 percent of hazardous waste or 0.2 percent of Municipal Solid Waste at a site. If the region determines that absolute volumes are appropriate to use at a particular site, the presumptive cutoff points are 110 gallons or 200 pounds.

The Agency enters into "de micromis" settlements only where "de micromis" parties have been sued by other PRPs, face a concrete threat of suit, or convince the Agency that there is a reasonable expectation that they will face contribution litigation. "De micromis" settlements may be entered into in exchange for certain benefits other than the payment of money; accordingly, the Agency generally will not seek to recover any past costs from "de micromis" parties.

12.2.G.2 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 usually agrees 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, a settlement may not contain a remedy cost reopener; typically, the premiums in these settlements are higher than in settlements that contain remedy cost reopeners.

References

OSRE Memorandum, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (September 30, 1998).

OSRE Fact Sheet, "Revised De Micromis Guidance" (June 4, 1996).

OSRE/Department of Justice (DOJ) Memorandum, "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors" (June 3, 1996).

OSRE Memorandum, "Issuance of Revised Model De Minimis Contributor Consent Decree and Administrative Order on Consent" (September 29, 1995).

OSRE Memorandum, "Standardizing the De Minimis Premium" (July 7, 1995).

OWPE/Office of Enforcement (OE) Memorandum, "Communications Strategy for Settlements with Small Volume Waste Contributors" (September 30, 1993).

OSWER Directive 9834.7-1d, "Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A)" (July 30, 1993).

OSWER Directive 9834.7-1c, "Methodology for Early De Minimis Waste Contributor Settlements Under CERCLA 122(g)(1)(A)" (June 2, 1992).

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 9835.9, "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Miminis Settlements under Section 122(g)(1) and Settlements with Prospective Purchasers of Contaminated Property" (June 6, 1989).

OSWER Directive 9834.7, "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA" (June 1987).

12.2.H 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 of the United States at a facility exceed $500,000 (excluding interest), the RA must obtain the written approval of DOJ and consult with OSWER and OSRE.

References

OSRE Memorandum, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (September 30, 1998).

OSRE Memorandum, "Issue of 'Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs' and 'Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs'" (September 29, 1995).

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 9835.0, "Interim CERCLA Settlement Policy" (December 5, 1984).

12.2.I Enforcing Settlements

If a settling PRP fails to comply with the terms of a settlement, the matter should be referred to DOJ for civil action. Case referrals should occur within six months of the default date. CERCLA section 122(h)(3) 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 CERCLA section 109.

12.2.J Arbitration

Arbitration is a form of ADR that provides a forum for resolution of cost recovery claims without traditional litigation. The Administrative Dispute Resolution Act (5 U.S.C. 573 et seq.) (ADR Act) and section 122(h) of CERCLA specifically authorize the use of arbitration to resolve cost recovery claims.

Arbitration offers the Agency an expeditious method of resolving cost recovery claims without the expenditure of enforcement resources required for traditional litigation and lengthy enforcement negotiations. **Exhibit 12-4** shows a flowchart of the procedures.

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 party's decision and hearing procedures is at the sole discretion of the parties to the arbitration. Arbitrations are more streamlined than court litigation in terms of procedure and evidentiary requirements.

Entry into 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 *Federal Register* 23174 (May 30, 1989), set procedures for arbitration in cases where costs at a facility do not exceed $500,000 (excluding interest). In section 122(h) arbitrations, the decision of the neutral party, which is filed in the *Federal Register* for public comment, is binding on the parties except in cases of arbitrator misconduct.

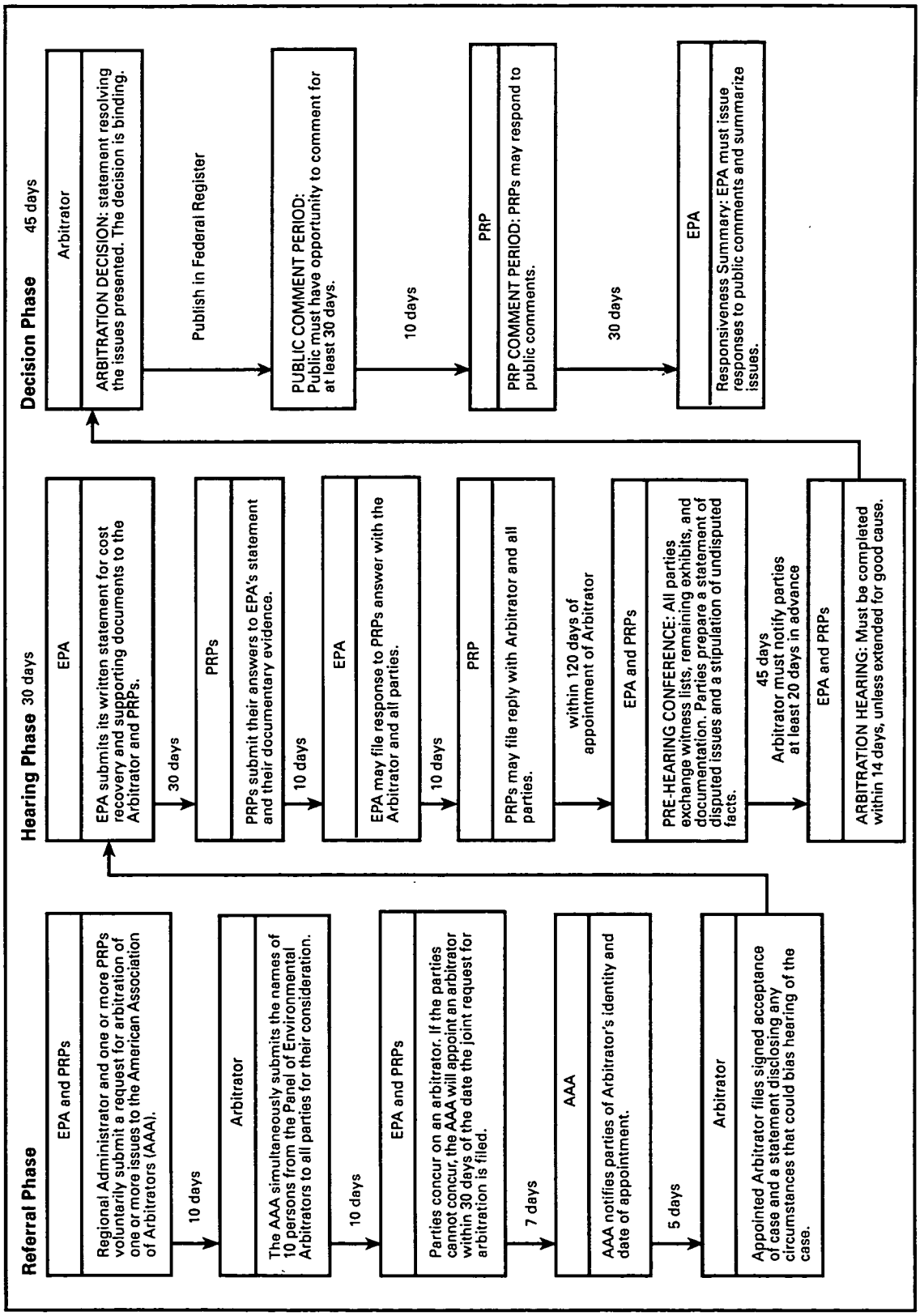
In other cases, hearing procedures and the binding nature of the neutral party's decision is at the discretion of the parties. The ADR Act establishes the permissible scope of arbitration decisions in cases involving federal claims and actions.

Agency expenditures in support of the use of arbitration and other forms of ADR (i.e., mediation, convening, allocation, and fact-finding) are recoverable costs, reimbursement of which may be obtained through settlement or legal action.

References

OSRE Memorandum, "Use of Alternative Dispute Resolution in Enforcement Actions" (May 1995)

12-4 Arbitration Procedures for CERCLA Cost Recovery Cases Pursuant to Section 122(h)(2)



"Arbitration Procedures for Small Superfund Cost Recovery Claims," 54 Fed. Reg. 23174 (May 30, 1989).

Office of the Administrator, "Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases" (August 1987).

12.2.K 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 cashout 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 8, RD/RA Negotiations/Settlement.

12.2.L Orphan Shares

The "orphan share" refers to the share attributable to identifiable insolvent or defunct parties at a site. Under principles of joint and several liability, this share is allocable to viable PRPs. However, in the interests of fairness and encouraging settlement, the Agency will consider compensating settling parties for the orphan share through forgiveness of past costs and projected oversight costs, subject to the amount of funding available for the Superfund program. While orphan share compensation is available for work settlements, the Agency, in its discretion, may also offer compensation to parties in cost recovery settlement negotiations.

Orphan share compensation may not exceed the lesser of: 1) the orphan share; 2) 25 percent of ROD-projected remedy or NTC removal costs; or 3) the sum of all unreimbursed past costs and projected costs of overseeing design and implementation of the ROD-selected remedy or NTC removal action. When projected remedial or NTC removal action costs exceed $30 million, any settlement including orphan share compensation requires pre-approval from Headquarters. The Agency may decide to compensate less than the maximum allowable amount based on consideration of equitable factors, including the size of the orphan share and the settling PRPs' cooperation with the Agency and fairness to other PRPs.

According to EPA's addendum to the interim CERCLA settlement policy, except in extraordinary cases, a party who enters into a consent agreement solely to settle liability for past costs should not receive any greater compromise based on orphan share considerations than a party who enters into a consent agreement to perform cleanup work.

References

OECA Memorandum, "Addendum to the 'Interim Settlement Policy' Issued on December 5, 1984" (September 30, 1997).

OSRE Fact Sheet, "Orphan Share Reform" (June 4, 1996).

OECA Memorandum, "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996).

12.2.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 bankruptcy petition, the RPM should have a working understanding of the process. The following discussion should help RPMs become familiar with pertinent concepts of bankruptcy law.

12.2.M.1 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.

12.2.M.2 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). To contest the discharge of their claim against the debtor, creditors must establish proof that they had a valid claim against the debtor's estate. 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, except that governmental units have at least 180 days to file a proof of claim.

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 applicable statutory deadlines. EPA has designated the Office of Enforcement and Compliance Assurance's (OECA's) Regional Support Division (RSD) as a central contact in Headquarters to receive all preliminary bankruptcy information. Each regional counsel's office, as well as RSD, has designated bankruptcy contacts. RSD, in cooperation with the regional bankruptcy contacts, will determine whether a particular multi-region bankruptcy matter should be handled as OECA-lead or region-lead.

The Bankruptcy Code requires a debtor to provide notice to all creditors, including EPA. Regional counsel takes the lead role in reviewing the debtor's notice and determining whether a proof of claim should be referred to DOJ for filing.

The following factors should be considered in evaluating whether to file a proof of claim in a bankruptcy case:

- Amount and priority of EPA's claim.

- Assets and liabilities of the bankruptcy estate.
- Impact on Agency resources.
- Fairness to other liable parties.

In addition, the decision to file may be influenced by time constraints and lack of information.

If the PRP has actually filed a petition for bankruptcy, DOJ and regional counsel 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.

12.2.M.3 Environmental Claims as Priorities

Typically, 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 responds to a release on the debtor's property after the bankruptcy petition has been filed. A lien for cleanup costs is created under section 107(l) of CERCLA, but it must be created before the debtor files for bankruptcy. The Bankruptcy Code prohibits any act to create, perfect, or enforce a lien against property of the bankruptcy estate once the debtor files. The lien continues to be enforced against the property until either the liability is fully satisfied or the claim becomes unenforceable by operation of the SOL.

Reference

OECA Memorandum, "Guidance on EPA Participation in Bankruptcy Cases" (September 30, 1997).

National Bankruptcy Lead Region Work Group, "A Bankruptcy Primer for the Regional Attorney" (February 1994).

OWPE/OE Memorandum, "Supplemental Guidance on Federal Superfund Liens" (July 29, 1993).

OSWER Directive 9832.12, "Guidance on Federal Superfund Liens" (September 22, 1987).

12.2.N Ability to Pay

Where appropriate, EPA may enter into settlements that reflect businesses' or individuals' limited ability to pay for cleanup work or recovery of response costs. ATP settlement is reserved for business PRPs who demonstrate that the amount sought by the government is likely to put them out of business or otherwise jeopardize their viability, and for both business and individual PRPs who demonstrate that payment of such an amount is likely to create an undue financial hardship. An undue financial hardship occurs when payment of the amount sought by the government is likely to render the PRP unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses.

The Agency evaluates requests for ATP settlement in two phases, a balance sheet phase and an income and cash-flow statement phase. In the balance sheet phase, the Case Team, consisting of EPA enforcement personnel and, where appropriate, DOJ staff, determines whether the ATP candidate can afford to make a single, up-front payment sufficient to pay the total amount sought by the Agency. If not, the Case Team analyzes the PRP's income and cash-flow statements to determine whether the PRP can make additional payments over time. These analyses establish income available for the settlement and enable the Agency to estimate an ATP settlement amount. EPA employs a variety of computer models to assist with ATP analysis, and plans to release additional computer models and develop manual financial screening protocols in the future.

Although an ATP settlement is based largely on the financial condition of the ATP candidate, other conditions should also be satisfied, including the following:

- The settling party has met its burden of demonstrating that the payment of the full amount sought by EPA is likely to create an undue financial hardship.
- The settlement should not release the ATP candidate from other site-related responsibilities.
- The ATP candidate must request the ATP settlement.
- An ATP analysis must consider the entire financial position of the ATP candidate.
- An ATP settlement is entered on an individual basis with each person as defined in CERCLA.
- The ATP settlement is in addition to expenditures that are recoverable from other sources.
- The ATP settlement should seek to resolve all of the ATP candidate's liability for response costs at the site.

References

OSRE Memorandum, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (September 30, 1998).

OSRE Memorandum, "General Policy on Superfund Ability to Pay Determinations" (September 30, 1997).

OSRE Fact Sheet, "Existing Ability to Pay Guidance and Models" (May 1995).

12.3 Planning and Reporting Requirements

12.3.A Planning

Cost recovery planning should be consistent with the priorities identified in the cost recovery strategy and should first address sites with pending expiration of the SOL. In selecting sites for cost recovery action, RPMs should consult the Cost Recovery Targeting Report. This report identifies sites which are eligible for cost recovery action (e.g., remedial starts, completed removals over $200K) and sorts the sites by an approximate SOL date. 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 Superfund Comprehensive Accomplishments Plan (SCAP) process. Information on the expenditures at the site can be taken from the cost documentation system maintained by the FMO 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.

12.3.B Budgeting

Funding for cost recovery activity is part of the Enforcement Case Budget. Data on the Case Budget can be found in CERCLIS 3/WasteLAN.

12.3.C Reporting Requirements

Cost planning, reporting and tracking relies on CERCLIS 3/WasteLAN, the national database. The database incorporates information on response and enforcement actions at sites and is the source for the SOL as well as SCAP 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 3/WasteLAN. RPMs/OSCs must work closely with IMCs, CRCs, 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 3/WasteLAN. Pre-SARA settlements should be reviewed to determine if CERCLIS 3/WasteLAN should be updated with information pertaining to the reimbursement of oversight costs.

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 as the SubAction Demand Letter Issued, or DD.

The "Past costs addressed (≥$200,000 target" includes cost recovery actions (at NPL and non-NPL sites) for reimbursement of Trust Fund amounts greater than or equal to $200,000. This target also captures administrative cost recovery settlements, section 106/107 or 107 judicial referrals for cost recovery, settlements for past costs under a CD (with no prior litigation referral), preparation of DDs or 10-point settlement analysis documents not to pursue cost recovery, and bankruptcy filings. It is vital to the management of the cost recovery program that sites with upcoming SOLs be addressed prior to the expiration of their SOL. Therefore, regions will not be allowed to substitute for targeted sites. A matrix of SCAP targets and measures relevant to cost recovery actions/decisions is presented as **Exhibit 12-5.**

12-5 SCAP Targets for Cost Recovery

Activity	SCAP Target	Quarterly Target	Annual Target
Partial Costs Addressed ≥$200,000	X	X	X

SCAP Measures for Cost Recovery

Activity	SCAP Plan/Report	Quarterly	Annual
Demand Letters Issued	X	X	X
Section 106, 106/107, 107 Case Resolution	X	X	X
Total Cost Recovery Settlements	X		X

The following are definitions for Cost Recovery-related targets and measures.

- **Section 107 or 106/107 Referrals** - Credit is given on the date of the RA's transmittal letter to OECA or DOJ as recorded in WasteLAN.
- **Settlement under CD (With No Prior Referral)** - Credit is given on the date of the RA's transmittal letter to Headquarters or DOJ as recorded in WasteLAN.
- **Cashout Settlements** - Credit is given on the date of the RA's transmittal letter to Headquarters or DOJ or when the RA signs the AOC for the cashout. This date must be recorded in WasteLAN.

- **DDs 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 RA signs the AOC for cost recovery. The date must be 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. These are recorded in CERCLIS 3/WasteLAN as the SubActions Creditors Committee Meeting and Bankruptcy Strategy Package.
- **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 one of the following occurs:
  - A CD is entered in court fully addressing the complaint with all parties.
  - The case is withdrawn.
  - The case is dismissed.
  - A trial is concluded and a judgment entered fully addressing the complaint.

The case resolution date (activity actual completion date) is one of the following:

- Date the CD is entered.
- Date the case is withdrawn.
- Date the case is dismissed.
- Date the judgment is entered.

The case resolution 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 OECA 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 CERCLIS 3/WasteLAN, see the SCAP/OIL Quick Reference Coding Guide or your IMC.

References

OSWER Directive 9200.3-14-1D, *Superfund/Oil Program Implementation Manual* (updated biennally).

SCAP/OIL Quick Reference Coding Guide.

13. Community Involvement

Chapter 13 Community Involvement

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Chapter 13 Community Involvement

13.1 Description of Activity

13.1.A Introduction

A site-specific and well-planned community involvement effort is an integral part of every Superfund response. The Superfund community involvement program promotes two-way communication between members of the public, including Potentially Responsible Parties (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 13-1** illustrates the relationship between community involvement activities and 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 involvement activities are affected when enforcement actions are initiated.

13.1.B Techniques for Effective Community Involvement

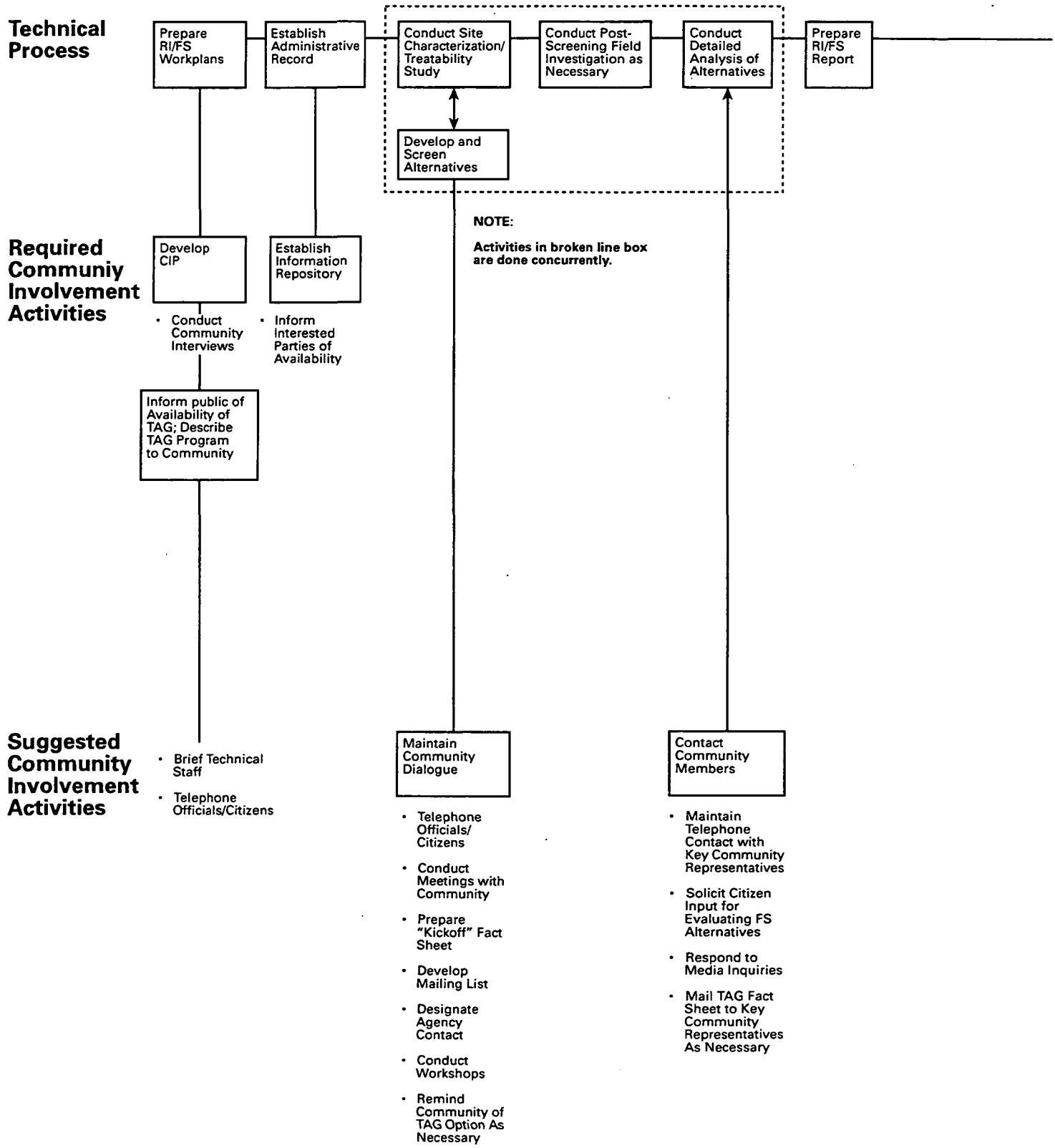
There are many techniques that can be used in a site-specific community involvement program. EPA has found that there can be no set formulas for deciding which techniques to use. Each community is different, and some community involvement programs may include tribes or multiple communities. The issues of importance to the public, the level of concern, the history of public involvement, and the socioeconomic background of the community vary from site to site. Community involvement efforts must, therefore, be tailored to the distinctive needs of each community. For instance, if the community is not fluent in English, bilingual fact sheets and notices may need to be provided. Also, the physical ability of the community to attend meetings should be evaluated. Efforts must also be tied to the technical response schedule and enforcement considerations for the site. Some general recommendations for working with the community include the following:

- Involve the community early in the process.
- Provide more information rather than less.
- Encourage regular meetings in areas of intense community awareness.

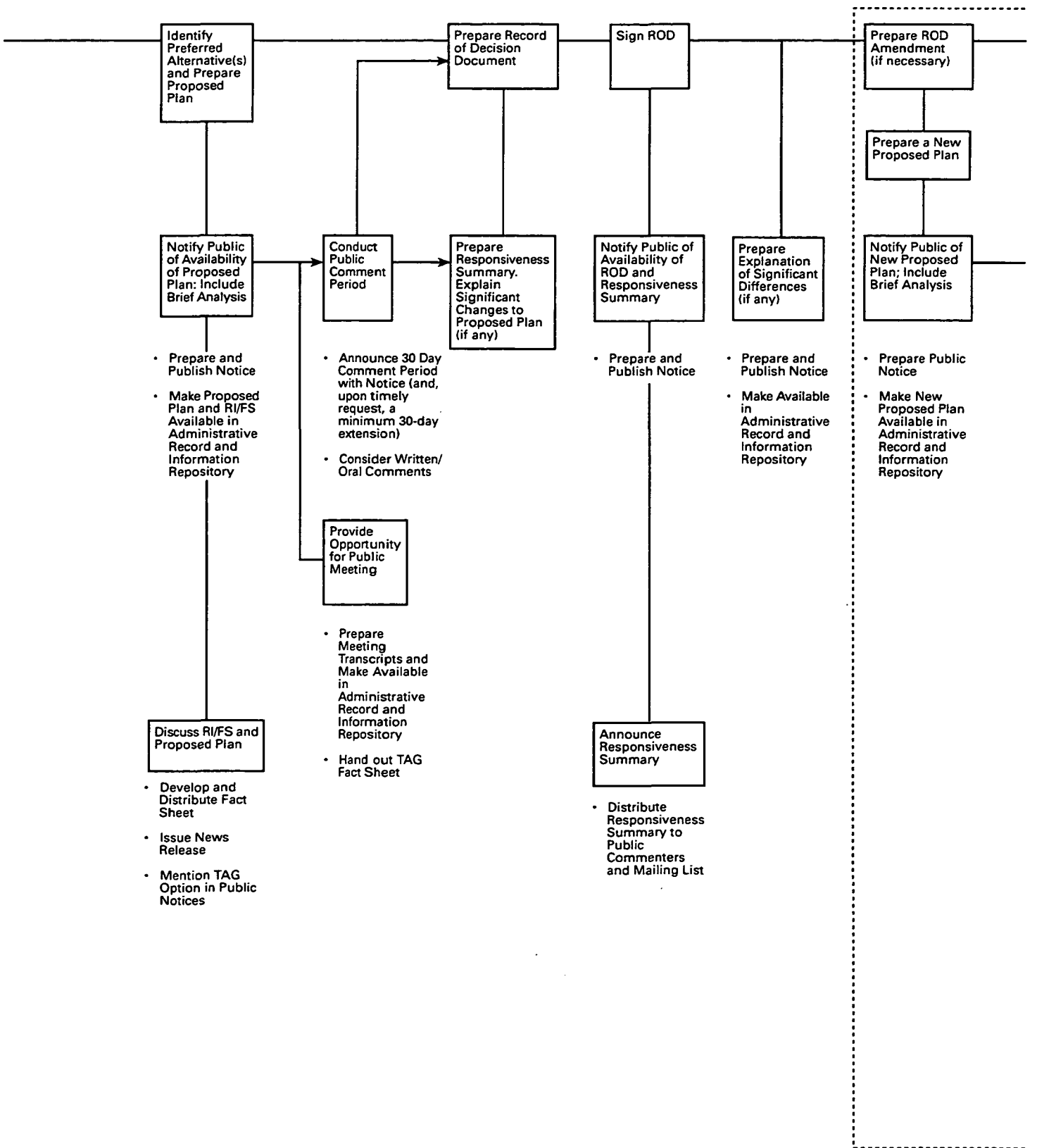
Specific techniques for ensuring open and candid communication include small group or one-on-one meetings and frequent telephone calls. Fact sheets, public meetings, newsletters, and press releases are also appropriate to ensure citizen understanding of issues and activities associated with a site. When 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 documents.

Tribes also require special consideration. Federally recognized tribes are unique sovereign nations. Section 126(a) of CERCLA authorizes EPA to provide a tribe with "substantially the same treatment" as a state for purposes of notification regarding hazardous waste sites, consultation on cleanup actions, access to information, and other provisions.

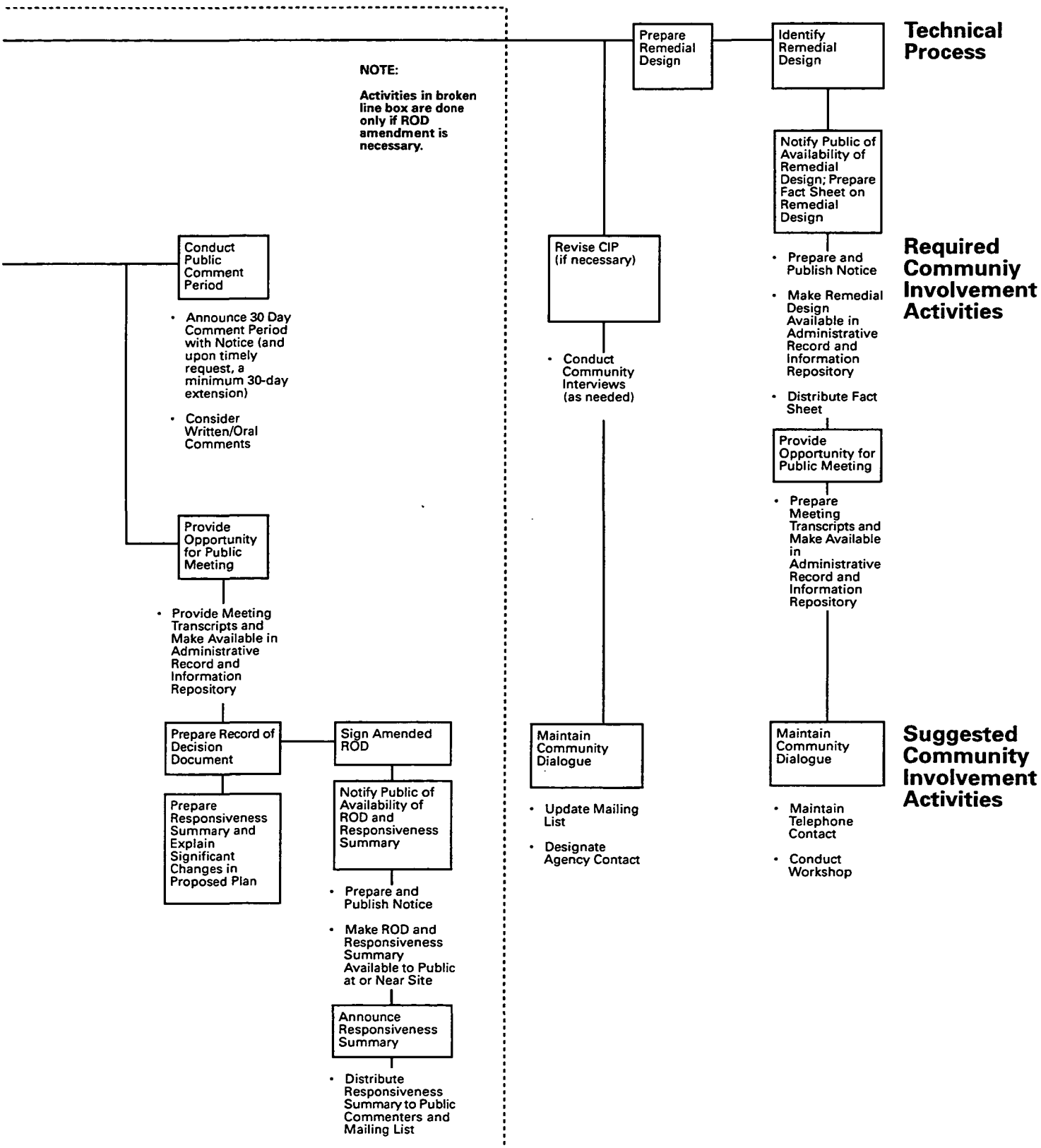
13-1 Relationship of Community Involvement Activities to the Superfund Technical Process



13-1 (cont.) Relationship of Community Involvement Activities to the Superfund Technical Process



13-1 (cont.) Relationship of Community Involvement Activities to the Superfund Technical Process



The federal government's legal and political relationship with tribes includes the federal trust responsibility that arises from Native American treaties, statutes, executive orders, judicial decisions, and the historical relations between the United States and tribes. The trust responsibility requires the federal government to consider the best interests of tribes, including protection of the tribal sovereignty of each tribal government, in its interaction with them and when taking actions that may affect them.

On April 29, 1994, President Clinton issued a directive to all executive departments and agencies of the federal government stating that "as executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty."

The President's directive requires that, in all activities relating to or affecting the government or treaty rights of tribes, the executive branch shall do the following:

- Operate within a government-to-government relationship with federally recognized tribes.
- Consult, to the greatest extent practicable and permitted by law, with tribal governments before taking actions that affect federally recognized tribes.
- Assess the impact of Agency activities on tribal trust resources, and assure that tribal interests are considered before the activities are undertaken.

Because of this unique and important relationship with tribes, it is important that tribes be considered and included in all aspects of the community involvement program.

Reference

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

13.1.C Community Involvement Plans

The formal name for organized EPA community involvement activities at a Superfund site, as required by the National Contingency Plan (NCP), is the Community Involvement Plan (CIP). This plan provides an overview of the community involvement 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 involvement approaches to be taken; and the timing of suggested activities. There are typically three appendices to the CIP: a mailing list of interested parties and suggested locations for meetings, information repositories, and Administrative Record (AR) files.

For enforcement sites, EPA regional offices are responsible for developing CIPs and associated activities. When EPA has negotiated an order with responsible parties, EPA is designated as the lead agency for community involvement. If the state negotiates the order, generally the state will have

the lead for community involvement, with EPA oversight. The conduct of community involvement at state-lead sites, however, is negotiable with EPA. The following sections of this chapter highlight these responsibilities by describing the following:

- Procedures and interactions of key community involvement players during enforcement actions.
- Planning and reporting requirements for community involvement during enforcement actions.
- Potential problems that may arise during community involvement activities, and potential resolutions.

Reference

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

13.1.D Community Involvement Lead

The lead agency, as defined in Section 300.5 of the NCP, is responsible for conducting community relations activities and for coordinating the activities among any other agencies that may be involved.

13.2 Procedures and Interactions

13.2.A Community Involvement Plan

Community involvement activities should be planned as early in the enforcement process as possible, generally before an RI/FS Special Notice Letter is sent to PRPs. Information gathered during community interviews provides the basis for the development of site-specific CIPs. The quantity and quality of the information gathered from interviews will directly affect the relevance and effectiveness of communications with the community. The process for conducting these interviews is detailed in Chapter 3 of *Community Relations in Superfund: A Handbook.*

Discussions about the site should be held with regional technical and legal staff in advance of the interviews so that the community involvement staff can be appraised of any situations that might impact these interviews. Regardless of whether or not viable PRPs have been identified, the Remedial Project Manager (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 Involvement Coordinator (CIC), the On-Scene Coordinator (OSC), regional counsel, the Environmental Justice Regional Coordinator, and the RPM, as well as equivalents at the state level when the state has the lead.

Reference

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

13.2.A.1 Coordination with Enforcement Staff

Careful planning and coordination of community involvement activities among the CIC, OSC, regional counsel, and RPM is crucial to prevent release of inaccurate or misleading information, or information that might be detrimental to the settlement and/or litigation process.

The CIC is ultimately responsible for ensuring that the community involvement requirements of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) are implemented. Therefore, final approval of the CIP should be by the CIC, with concurrence on specific sections by members of the team.

13.2.A.2 Consistency with Enforcement Actions

Community involvement activities outlined in a CIP for an enforcement site should be consistent with the settlement process and the schedule of enforcement actions. Community involvement staff may wish to document EPA's approach to coordinating and sharing information with PRPs within the CIP. Any special conditions or Agency interaction with the PRPs, however, should be spelled out in the Administrative Order or Consent Decree (CD), not in the CIP.

Early in the site remediation process, the public must be informed by publicly distributed fact sheets or at a public meeting if PRPs are willing to implement the CIP. However, community involvement staff must refrain from public discussion of details of PRP involvement with the site prior to a

CD being signed in order to avoid tension and mistrust between EPA and PRPs that might cause delays in the negotiations.

Assuming a site has not been referred to the Department of Justice (DOJ) for litigation, the CIP needs to inform the public of the possibility of litigation. EPA staff, therefore, 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 on the conduct of community involvement activities. Community involvement 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 DOJ 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 involvement activities.

13.2.B Recent Initiatives and Reforms

EPA has made several recent initiatives and reforms to improve the outreach and community involvement efforts of the Superfund program. The reforms reflect the Agency's efforts to enhance and develop community involvement beyond the regulatory requirements in the NCP. Several of the reforms are discussed below.

13.2.B.1 Regional Ombudsmen

The Regional Ombudsmen (RO) is responsible for resolving concerns and providing guidance to both regional personnel and to stakeholders, including the community. The RO can also identify sites requiring cleanups, assist in Brownfields area and environmental justice issues, and identify criminal cases.

13.2.B.2 Environmental Justice Initiatives

Several environmental justice initiatives have been implemented to benefit communities with socioeconomic disadvantages. For example, the Superfund Jobs Training Initiative was developed in response to the demand for local economic benefits stemming from Superfund site cleanups.

Reference

Office of Site Remediation Enforcement (OSRE) "Superfund Reforms Annual Report FY 1997."

13.2.B.3 Community Advisory Groups

Community Advisory Groups (CAGs) are committees, task forces, or boards made up of citizens with diverse community interests that provide a public forum for discussing the needs and concerns about the decision-making process at Superfund sites. CAGs may not be appropriate for every site, and the impetus for establishing one should come from the community. A CAG can be formed at any point in the cleanup process, but may be most effective if started early in the process.

References

"About the Community Advisory Group Toolkit: A Summary of the Tools," EPA 540-K-97-007.

"Community Advisory Toolkit for the Community," EPA 540-R-97-037.

"Community Advisory Groups at Superfund Sites," EPA 540-F-97-031 (Spanish).

"Community Advisory Groups at Superfund Sites," EPA 540-F-96-016.

"Superfund Today: Focus on Community Advisory Groups," EPA 540-K-96-005.

"Community Advisory Groups: Partners in Decisions at Hazardous Waste Sites," EPA 540-R-96-043.

Office of Solid Waste and Emergency Response (OSWER) Directive 9230.0-2, "Guidance for Community Advisory Groups at Superfund Sites" (December 1995).

13.2.B.4 Technical Assistance Grants

Technical Assistance Grants (TAGs) are grants of up to $50,000 that are available to community groups for hiring technical advisors who help the community understand site-related technical information. The Agency is close to completing a revised version of the TAG rule which contains several simplifying provisions, including a clarification of the statutory language regarding "not more than one grant may be made...with respect to a single facility." This clarification allows for non-concurrent TAGs at Superfund sites.

References

OSRE, "Superfund Reforms Annual Report FY 1997."

OSRE, "Superfund Reforms Annual Report FY 1996."

13.2.B.5 Technical Outreach Services for Communities

Technical Outreach Services for Communities (TOSC) is a technical assistance program created to aid communities dealing with hazardous substance issues regardless of their eligibility to receive a TAG. TOSC is a no-cost, non-advocate program supported by EPA's five university-based Hazardous Substance Research Centers (HSRCs). TOSC projects may be referred to the HSRCs by communities, EPA, states, or tribes. There are more than 90 TOSC programs underway, including TOSC for Brownfields projects.

13.2.B.6 Improved Public Access to Superfund Information

The National Superfund website has been redesigned to make it easier for the public to access and find Superfund program information, including online querying of Superfund data. All regional offices have developed homepages that include information such as site lists, site-specific information, and links to state Superfund activities.

13.2.B.7 Community Involvement Pilot Projects

Several pilot projects have been implemented to enhance community involvement in the enforcement process. For example, one pilot project was initiated at 13 sites in 9 of 10 EPA regions, where PRPs committed to conduct cleanup actions or investigations. Several community involvement techniques were tested, including inviting communities to review and comment on draft technical workplans and proactively sharing cleanup and remedy information with the public. The benefit of increased community involvement is increased goodwill from the public and in some instances, higher quality work products.

13.2.C PRP Involvement

EPA is the lead agency for developing and carrying out community involvement activities at enforcement-lead sites. PRPs may assist in community involvement activities at the discretion and under the oversight of the regional office. Specifically, PRPs should be included in community involvement activities at sites where they are conducting either the Remedial Investigation/Feasibility Study (RI/FS), the Remedial Design/Remedial Action (RD/RA), or both. PRP community involvement activities may include participation in public meetings and preparation of fact sheets, and should be reflected in the CIP. However, EPA will not negotiate with PRPs on the contents of press releases, fact sheets, or other documents distributed to the public.

13.2.C.1 Notice to PRPs

Notice letters are used to inform PRPs of their potential liability and to provide them with an opportunity to enter into negotiations, or to conduct or finance response activities. Notice letters should contain an invitation to participate in community involvement activities and an outline of the terms by which those activities may be conducted. The negotiation process is discussed in detail in Chapter 5, RI/FS Negotiations/Settlement, and Chapter 8, RD/RA Negotiations/Settlement.

13.2.C.2 Negotiations

Negotiations are generally conducted in confidential sessions between the PRPs and EPA or the state. The public should be informed that neither the public nor the technical advisor (if one has been hired through a TAG by a community) may participate in negotiations among EPA, DOJ, and the PRPs unless everyone agrees to allow such participation. Moreover, 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, which promotes a thorough and frank discussion of the issues between the parties in an effort to resolve differences. Confidentiality 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 involvement 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 to, or is in litigation, DOJ approval also should be obtained.

13.2.D Community Involvement During Removal Actions

EPA encourages public participation during removal actions to the extent possible. Removal actions, however, may not always allow for the same degree of participation as remedial actions because situations that require emergency removals do not allow for extensive public involvement. Adjustments to the community involvement process must be made to accommodate necessary time constraints. The NCP requires that a CIP 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 AR 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, usually 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 issued to compel a PRP to conduct or pay for a removal is a public document and should be made available to the affected community through the AR file. In addition, community involvement staff, the RPM, and regional counsel should discuss the terms of the order and describe the removal action to citizens, local officials (including tribal officials of any potentially affected tribes), 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.

13.2.E Community Involvement During Remedial Actions

Remedial actions generally permit ample time for community involvement. Meetings with small groups of citizens, local officials, tribes, and other interested parties are extremely helpful for sharing general information and for resolving questions. These meetings may also 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 involvement efforts. A discussion of how EPA encourages settlements also may be appropriate at this time.

References

OSWER Directive 9230.0-08, "Planning for Sufficient Community Relations (Superfund Management Review - No.43A)" (March 7, 1990).

OSWER/Office of Waste Programs Enforcement (OWPE) Fact Sheet, "The Superfund Enforcement Process: How it Works" (Summer 1988).

13.2.E.1 Community Involvement Following an RI/FS Order

RI/FS settlements usually are resolved as AOCs. The RI/FS workplan triggers the implementation of community involvement activities. When the PRPs are conducting an RI/FS, the settlement triggers a "kick-off" meeting with the public to explain the AOC and outline the next steps. Community involvement, 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 and any tribes which may be affected by the proposed action. A public announcement should be made about where the AR file will be located. The AR will include the detailed analysis of alternatives and all RI/FS information the Agency considers in selecting a final remedy. It should be used as a tool to facilitate public involvement in that selection.

13.2.E.2 Proposed Plan and Public Comment

When the RI/FS is complete, the lead agency will issue a Proposed Plan and publish a notice announcing the start of a public comment period. At a minimum, the notice should 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. The Proposed Plan also may be distributed to all interested parties, including TAG and CAG organizations, and those on the site mailing list. 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 may be extended to 60 days upon a responsible request by the public.

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 AR file, and may be distributed through the information repositories or upon request.

After the public comment period on the Proposed Plan has closed and the ROD has been finalized, a responsiveness summary is prepared, which 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. Both the responsiveness summary and the ROD will be placed in the AR file and other information repositories. In addition, the responsiveness summary may be distributed to commentors and those on the site mailing list.

References

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

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

13.2.E.3 Public Notice and Comment on Consent Decrees for RD/RAs

If a negotiated settlement under CERCLA section 106 is reached, the proposed CD will be submitted to the U.S. District Court for approval, as required under CERCLA section 122(d)(1). At the time DOJ lodges the CD 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 CD before its entry by the court as a final judgment.

Responsible parties who are non-settlers to the agreement usually take this opportunity to raise their own concerns. They may file a court case to block entry of the CD. States or tribes may do likewise if they believe a CD 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 CD 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 CD has been lodged as a proposed judgment with the court. For PRP-lead sites, DOJ should notify 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 involvement staff are informed of this.

Community involvement 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 CD may be obtained and the location of other relevant documents. The procedures for public comment on the CD and a contact name for obtaining further information should also be announced. The public notice and press release for the CD 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 CD. Comments must be addressed in the responsiveness summary for the ROD Amendment, not the CD. 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. These meetings should be documented, and significant oral comments received during the meeting should be addressed in a response to comments documented on the CD.

Once the public comment period on the proposed CD 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 CD to make it legally binding. Responses to comments are released to the public at the same time. The Agency should use the AR and other information repositories to make these documents available to the public. A third press release may be issued at this time announcing entry of the CD.

13.2.E.4 Community Involvement During PRP Remediation

The lead agency retains responsibility for community involvement during a PRP-lead remediation that conforms with a CD or any enforcement order. The scope and nature of community involvement activities will be the same as for Fund-lead response actions. When PRPs participate in community involvement activities at the site, EPA, state, tribal, and PRP roles should be explicitly defined. A PRP may not have been involved in the initial stages of the CIP, but later may show sufficient interest, commitment, and capability to warrant some level of participation. The CIC should then re-evaluate the PRP's role in conducting community involvement, and a new CIP may be developed. PRP involvement in community involvement activities also may be addressed in the CD or other enforcement orders.

Reference

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 1991).

13.2.F Other Enforcement Actions

Section 122(i) of CERCLA requires the lead agency to publish a notice of proposed settlements for AOCs under sections 122(g)(4) (*de minimis* settlements) and 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 *Federal Register* notice. For further information on response to comments, see Chapter 6 of *Community Relations in Superfund: A Handbook.*

Reference

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

13.2.F.1 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 involvement activities. Community involvement 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 the CIP should be implemented 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.

13.2.F.2 Cost Recovery

During cost recovery litigation, especially those following the start of Fund-financed RAs, community interest in the site may have lessened, unless other operable units remain that need to be addressed. In these cases, 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.

13.2.G Administrative Record

Section 113(k)(1) of CERCLA requires the establishment of an AR file containing the information upon which the selection of a response action is based. It also requires that a copy of the AR file be located at or near the site. Section 113(k)(2) requires that the Agency promulgate regulations outlining procedures for interested persons to participate in developing the AR file. Subpart I of the NCP details how the AR 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.

The AR 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 AR file. Second, the AR represents the information that was available to and considered by the Agency at the time of its decision; therefore, if the Agency is challenged concerning the adequacy of a response action, judicial review of that selection will be limited to the AR. A complete AR 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.

From the RI through the selection of remedy, the AR file will be available for public inspection at a central regional location, at or near the site. The AR is the public's most complete source of information upon which the lead agency bases its decisions when selecting a response action, and should be used as a tool for facilitating public involvement.

Publicly released documents concerning response selection should be made available to all interested parties at the same time. If EPA requests that PRPs 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 CIP for a remedial action should be made available to the public no later than the time the RI phase begins, 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, 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.

The CIC's duties concerning the relationship of the AR file to the information repositories, public notices, and public comments are described in Chapter 6 of *Community Relations In Superfund: A Handbook.* Additional information on the roles of the CIC, OSC, RPM, and regional counsel in the development and maintenance of the AR can be found in this handbook, in Chapter 15, Records Management, and in "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

References

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

13.3 Planning and Reporting Requirements

13.3.A Superfund Comprehensive Accomplishments Plan

Superfund Comprehensive Accomplishments Plan (SCAP) planning activities take place at the beginning of each fiscal year. The site team, including the RPM, CIC, and regional counsel decides the course of community involvement activities for each site by quarter. For PRP-lead sites, the enforcement case budget provides funding for community involvement.

Site-specific characteristics affect the costs of community involvement at Superfund sites. The unique features of each region and the specific characteristics of each site necessitate individualized community involvement programs to accommodate different levels of interaction with the public.

13.3.A.1 Range of Activities

The range of activities conducted for Superfund community involvement may include developing brochures, writing CIPs, 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 involvement staff in the regional Superfund management office usually works with the RPM to conduct these activities.

13.3.A.2 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 involvement activities at Superfund sites, such as the following:

- 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.

13.3.B Case Budget

The enforcement case budget provides funds for community involvement for RI/FS and RD/RA activities when a PRP lead is expected. The CIP 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 CIP should be funded concurrently with the RD/RA negotiations and CRI for the RD/RA oversight. The enforcement case budget does not fund community involvement at federal, state, or federal-enforcement lead sites. The community involvement lead should be responsible for activities funded by the enforcement case budget.

13.4 Potential Problems/Resolutions

This section discusses specific problems that may occur during community involvement activities at enforcement sites and suggests methods for resolving these issues.

13.4.A Volatile Public Meeting

Keeping citizens informed from the beginning of the process will help to avoid volatile situations. Perceived health and safety concerns posed by a hazardous waste site, however, can sometimes lead community members to react emotionally during public meetings and informational briefings. 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.

13.4.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 minimize the likelihood that undetected concerns 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 involvement staff should devote time to developing and implementing extensive outreach efforts.

13.4.C PRP Involvement

As outlined in Chapter 6 of *Community Relations in Superfund: A Handbook,* PRPs may participate in community involvement activities. This may include developing fact sheets and brochures on clean-up 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 involvement 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 involvement activities. When EPA produces a fact sheet or other outreach document, those materials also should be distributed to the PRP.

Reference

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

13.4.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, however, 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 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 and express concerns about the site. To overcome this barrier to public expression, the CI team should invite private communication through mail, telephone hotline, or information request forms published in a local newspaper, and provide assurances of anonymity.

14. State Enforcement

Chapter 14 State Involvement in CERCLA Enforcement

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Chapter 14 State Involvement in CERCLA Enforcement

14.1 Description of Activity

14.1.A Introduction

This chapter focuses on state involvement in the Superfund enforcement process, primarily addressing potential agreements and funding mechanisms between EPA and states involved in the Superfund process. The chapter also addresses the effects of several Superfund Administrative Reforms that were designed to increase state involvement in the Superfund enforcement process. These reforms have affected EPA policies addressing state voluntary cleanup programs, deferral of National Priorities List (NPL) listings while states oversee Potentially Responsible Party (PRP) responses, block funding of Superfund cooperative agreement resources, and state involvement in remedy selection. Information in this chapter should be used in conjunction with subpart F of the National Contingency Plan (NCP)("State Involvement in Hazardous Substance Response"), Subpart O of 40 Code of Federal Regulations (CFR) part 35 ("Cooperative Agreements and Superfund State Contracts for Superfund Response Actions"), and the EPA guidances that are cited throughout the chapter.

14.1.B Background Information

The Comprehensive Environmental Response, Compensation, and Liability Act (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:

- PRP searches.
- Issuance of notice letters to PRPs.
- Negotiations with PRPs to secure their commitment for site cleanup.
- Administrative or judicial enforcement actions to compel PRP cleanup.
- Oversight of PRP response activities.

14.1.C State Roles in CERCLA Enforcement

Section 121(f) of CERCLA, as amended by the Superfund Amendments and Reauthorization Act, requires EPA to promulgate regulations that provide for 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 Applicable or Relevant and Appropriate Requirements (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.

EPA's strategy for state involvement in enforcement emphasizes maximizing the number of sites that can be cleaned up by enhancing and fully utilizing

state capability and by 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) of the NCP provides that state concurrence on a Record of Decision (ROD) is not a prerequisite to EPA's selecting a remedy, i.e., signing the 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. However, remedies at a state-lead enforcement site (i.e., Fund-financed site) must be consistent with the NCP and with EPA policies and guidances. At any site, remedies consistent with the NCP ensure successful cost recovery efforts and reduce difficulties in deleting sites from the NPL once remedies have been implemented.

Section 104(d)(1) of CERCLA authorizes EPA to enter into a contract or Cooperative Agreement (CA) with capable states to take response actions. Section 300.505 of the NCP describes the requirements for an EPA/State Superfund Memorandum of Agreement (SMOA). Subpart O of 40 CFR Part 35 details requirements and procedures for Core Program CAs, site-specific CAs, and Superfund State Contracts (SSCs).

References

40 Code of Federal Regulations (CFR) part 35 Subpart O ("Cooperative Agreements and Superfund State Contracts for Superfund Response Actions") (1994).

Office of Solid Waste and Emergency Response (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).

National Oil and Hazardous Substance Pollution Contingency Plan (NCP), 40 CFR section 300.505 ("EPA/State Superfund Memorandum of Agreement (SMOA)") (1990).

NCP, 40 CFR section 300.515 ("Requirements for state involvement in remedial and enforcement response") (1990).

14.1.D Tribal Roles in CERCLA Enforcement

Opportunities for tribal participation in the Superfund process are similar to those for states. Section 300.515(b) of the NCP provides that an Indian tribe will be afforded substantially the same opportunity as a state to participate in the Superfund process and receive federal funds if the tribe meets three standards:

- It is a federally recognized Indian tribe.
- It has a tribal governing body that is currently performing governmental functions to promote the health, safety, and welfare of the affected population or to protect the environment within a defined geographic area.

- It has jurisdiction over a site at which Fund-financed response is contemplated.

Section 300.505 of the NCP explicitly provides that tribes that meet these standards may also enter into SMOAs with EPA.

There are some differences in the treatment of states and tribes. CERCLA section 104(c)(3) exempts tribes from the requirement that states provide assurances regarding future maintenance and cost-sharing at remedial action sites. In addition, Subpart O of 40 CFR Part 35 separately addresses state and tribal requirements for receiving certain CAs.

References

40 CFR part 35, Subpart O ("Cooperative Agreements and Superfund State Contracts for Superfund Response Actions") (1994).

NCP, 40 CFR section 300.505 ("EPA/State Superfund Memorandum of Agreement (SMOA)") (1990).

NCP, 40 CFR section 300.515 ("Requirements for state involvement in remedial and enforcement response") (1990).

14.1.E State Remediation Programs

Many states have statutes that authorize state environmental agencies to remediate or compel private parties to remediate releases of hazardous substances. This authority can take many forms, from state responsibility for 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. As specified in section 122(e)(6) of CERCLA, however, after Remedial Investigation/Feasibility Study (RI/FS) work has been initiated at an NPL site by EPA or the PRPs (pursuant to an Administrative Order or Consent Decree (CD)), no PRP may undertake any remedial action at the facility unless the action is authorized by EPA.

14.1.F State Voluntary Cleanup Programs

More than thirty states have adopted statutes, regulations, or administrative provisions under which private parties that voluntarily agree to clean up a contaminated site are offered some protection from future state enforcement action at the site. These programs are referred to as state voluntary cleanup programs (VCPs). Regions and states may negotiate Memoranda of Agreement (MOAs) that help define a division of labor between the region and the state by defining what kinds of sites should be addressed by the VCP and by providing that generally EPA does not anticipate pursuing CERCLA response actions at sites that are participating in the state's VCP, unless EPA determines that there may be an imminent and substantial endangerment to the public health, welfare, or the environment. EPA's policy on voluntary cleanup programs is further discussed later in this chapter.

14.1.G The Superfund Enhanced State and Tribal Role Initiative

In November 1996, the Assistant Administrators for OSWER and the office of Enforcement and Compliance Assurance (OECA) issued a policy message commissioning work to identify and analyze major issues/barriers to enhancing the role of states and tribes in Superfund. This message stressed the importance of EPA, in coordination with states and tribes, proactively working through issues surrounding state readiness, assistance to states, EPA-state program agreements, and the unique considerations of enhancing tribal participation. The statement asked for recommendations on how EPA can work to further build "strong partnerships" between the federal government and states and tribes.

Workgroups consisting of EPA, state, and tribal representatives were formed around these issue areas. A broad-based group of Superfund program and enforcement personnel, and a council of senior state, tribal, and EPA executives, oversaw the direction of the workgroups. These groups have completed the work of crafting a comprehensive plan to enhance the state and tribal role in Superfund. The plan, issued in March 1998, is entitled "Plan to Enhance the Role of States and Tribes in the Superfund Program."

In May 1998, EPA directed the regions to pilot the concepts in the plan with a state and tribe in their region. Many proposals have been submitted by both states and tribes interested in piloting different parts of the plan. EPA will implement the pilots with states and tribes, and evaluate the effectiveness of the plan in enhancing the role of states and tribes for future Superfund work.

Reference

OSWER Directive 9375.3-03, "Plan to Enhance the Role of States and Tribes in the Superfund Program" (March 1998).

14.2 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 opportunity under CERCLA for the coordination and sharing of enforcement 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 (EPA-lead enforcement sites).
- States assume lead responsibility relying on state enforcement authority through a cooperative agreement (state-lead enforcement 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, absent a SMOA or CA, through participation in "annual consultation" (see 40 CFR section 300.515(h)(1)). (Non-Fund-financed state-lead sites).

Another potential relationship between EPA and the states can be established through the use of Core Program CAs. The Core Program provides funding for states to develop state capabilities, including site remediation enforcement under state authority.

Reference

NCP, 40 CFR section 300.515 ("Requirements for state involvement in remedial and enforcement response") (1990).

14.2.A The Roles of the State and EPA in PRP Oversight

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 established for both the lead agency and the 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 this distinction between lead and support roles is where states or EPA can have primary responsibilities for specific tasks (e.g., community involvement) while the other has the overall lead for the clean up process at the site. Lead agency designation for Fund-financed response activities 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 the lead being designated separately for each major event, such as the RI/FS and the Remedial Design/Remedial Action (RD/RA).

Whenever a state negotiates with PRPs to undertake a response action, the state should attempt to obtain a commitment from the PRPs to pay for EPA's oversight costs prior to requesting funds from EPA. Where PRPs do not agree to pay for EPA's oversight costs, these costs become part of EPA's response costs, which EPA should later seek to recover from the 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 in the "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites." Because CA funds are 100 percent federal, the money that is reimbursed to EPA must go into the Trust Fund to be reappropriated later. In applying for an enforcement CA to fund state oversight of PRPs, the state applicant must demonstrate that "it has taken all necessary action to compel PRPs to fund the oversight" of negotiated cleanup activities. (See 40 CFR 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 including the state's staff resources, level of confidence resulting from past experience with the state, and site-specific factors such as complexity or national significance of the response action. More detailed information is available in the "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites."

Where EPA has the lead for oversight, it encourages the state to conduct oversight tasks 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 the services of 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 "CERCLA Funding of PRP Oversight by States at NPL Sites."

States also may be involved in three-party agreements (EPA/state/PRP). Although the Agency does not generally encourage the use of three-party agreements (as resource duplication may occur), it remains a viable option where EPA and a state work together.

EPA may also defer consideration of listing NPL-caliber sites to allow states to initiate and oversee response actions conducted and funded by PRPs under state law. The primary goal of the deferral program is to accelerate the rate of response actions by encouraging a greater state role. States may participate in the deferral program on an area-wide basis by agreeing to generic procedures and standards in a MOA with the region, or may participate on a site-specific basis. States participating in the deferral program should have statutory, regulatory, or administrative provisions that

ensure that remedies at deferred sites will be protective of human health and the environment, and sufficient capabilities, resources, and expertise to ensure that the response action will be substantially similar to a response conducted under CERCLA (i.e., it will be a "CERCLA-protective" cleanup).

A site is eligible for deferral until a state or contractor is tasked by EPA to develop a Hazard Ranking System package for that site; a listing process should not be halted in favor of deferral without a compelling reason. Deferral site candidates should be of NPL caliber and should have viable and cooperative PRPs willing to enter into an enforceable agreement to conduct all response actions. Consequently, Fund resources generally are not used to conduct response actions at deferred sites. A region may enter into a CA with a state for Non-Time-Critical removal or pre-remedial activity if PRPs at a deferred site become uncooperative or bankrupt. In addition, regions may enter into a Core Program CA with a state to provide funding to develop or enhance the state's deferral program capabilities, and may provide site-specific funding for site assessment or enforcement and oversight activities.

References

OSWER Directive 9375.6-11, "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (May 3, 1995).

40 CFR section 35.6155 ("State, political subdivision on Indian Tribe-lead enforcement Cooperative Agreements") (1990).

OSWER Directive 9831.7, "Supporting State Attorneys General CERCLA Remedial and Enforcement Response Activities at NPL Sites" (June 21, 1988).

OSWER Directive 9831.6a, "Guidance on CERCLA Funding of State Enforcement Actions at National Priorities List Sites" (April 7, 1988).

OSWER Directive 9831.6b, "Guidance on CERCLA Funding of Potentially Responsible Party Oversight by States at National Priorities List sites" (April 7, 1988).

OSWER Directive 9831.6c, "Cost Estimates for Budgeting State Enforcement Activities" (April 7, 1988).

OSWER Directive 9831.6d, "Recommended Procedures for Headquarters/ Regional Review and Concurrence of Initial Enforcement Cooperative Agreements" (April 7, 1988).

OSWER Directive 9831.3, "EPA-State Relationship in Enforcement Actions for Sites on the NPL" (October 2, 1984).

14.2.B CAs and Core Program Funding

EPA funding of state enforcement activities is related to encouraging or compelling PRPs to undertake response activities to clean up a site (such as negotiations for RI/FSs and RD/RAs) and to conduct necessary technical, administrative and enforcement activities during their oversight of PRPs' response (such as compiling the Administrative Record (AR), 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, the Superfund CA, is the vehicle through which EPA can provide funds to states to assume responsibility as lead or support agencies for response. CAs for remedial action address only one site. Pre-remedial action CAs, including enforcement CAs, may address multiple sites. Core Program CAs may be used for non-site-specific activities that support state implementation of CERCLA. See subpart O of 40 CFR 35 for more information.

The second type of response agreement, the SSC, is used to ensure state involvement and to obtain the state assurances required under section 104 of CERCLA prior to remedial action (see section 126 of CERCLA for tribal responsibilities). SSCs are only applicable to Fund-lead activities at sites. SSCs are not generally applicable to enforcement activities at sites, because state assurances are not required for enforcement actions. Funding through enforcement CAs may be for state-lead or state-support enforcement activities. State-support activities include a review role for the state.

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 Core Program 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 PRP-lead cleanups, and provide clerical support.
- Efforts necessary to build infrastructure procedures for AR 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 involvement programs. Core Program CAs can provide funding for document review, development, and refinement of the enforcement program as long as such activities are not site-specific. 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.

References

NCP, 40 CFR section 300.515 ("Requirements for state involvement in remedial and enforcement response") (1990).

OSWER Directive 9375.2-01, "State Core Program Funding Cooperative Agreements" (December 12, 1987).

14.2.C State and Tribal Superfund Consolidated Funding

In the context of Superfund, the term block funding simply means consolidation of multiple response activities under a single CA, with a single scope of work and budget. These "consolidated" funding agreements exclude remedial action CAs due to cost-sharing and other state assurances that must be provided site-specifically. The overall goals for utilizing Superfund block funding include: developing assistance agreements that provide states with considerable flexibility in directing funds in support of the Superfund program; reducing the administrative burden on both the states and EPA; and complying with the existing law and regulations governing these agreements.

Consolidated funding is intended to enhance states' flexibility to redirect CA funds between and among sites and activities (to the extent allowed by the applicable Superfund Advice of Allowance (AOA)), expand state and tribal flexibility to transfer funds among sites and activities within the approved tasks for the CA without prior EPA approval, reduce the need for amendments when scope of work changes are needed, and reduce other specific administrative budget and reporting requirements, where appropriate. By reducing these budget and reporting requirements, block funding produces transaction cost resource savings for both levels of government. These streamlining options are accomplished through deviation from part 31 and part 35 of Subpart O. Over 60 deviation requests for block funding activities have been approved.

To institutionalize the benefits of consolidated funding, the Office of Emergency and Remedial Response (OERR) coordinates with the Office of the Comptroller to ensure that regions are allowed to shift funds from existing CAs to block funding CAs. OERR also coordinates with the Grants Division to review and approve deviation requests.

This initiative has resulted in fewer CA amendments, saving both EPA and states a great deal of time and resources that are better spent on cleanups. For example, Illinois EPA submitted seven CA applications in 1996, but only a single CA amendment in 1997. Block funding has also allowed Illinois EPA to move from quarterly reporting to biannual reporting. While Illinois EPA continues to send quarterly financial statements for cost recovery purposes, project status updates are now sent on a biannual basis. The block grant allows Illinois EPA to transfer money from one project to another based on need and changing program priorities. Each budget shift must be reported, but prior EPA approval is not needed and delays associated with CA application preparation and processing are greatly reduced.

14.2.D Development of the Lead Agency Enforcement CA

In developing state-lead enforcement CAs, EPA evaluates states' ability to perform the response action and enforcement. Specifically, a state must demonstrate that it has the authority, jurisdiction, and necessary administrative capabilities to take enforcement action(s) to compel PRP cleanup of the site, or to recover cleanup costs. The region evaluates the state's ability to conduct the response action and the ability to function as the lead enforcement agency. Before EPA funds state response or oversight activities under a CA, the state has assured that their response actions and oversight of PRPs will be consistent with CERCLA and the NCP.

Certain state activities cannot be funded under state enforcement CAs. Detailed information can be found in subpart F of the NCP, subpart O of 40 CFR part 35, and in the "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites."

References

40 CFR part 31 ("Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments") (1997).

NCP, 40 CFR section 300.515 ("Requirements for state involvement in remedial and enforcement response") (March 8, 1990).

NCP, 40 CFR part 300, subpart F ("State Involvement in Hazardous Substance Response") (1990).

OSWER Directive 9831.7, "Supporting State Attorneys General CERCLA Remedial and Enforcement Response Activities at NPL Sites" (June 21, 1988).

OSWER Directive 9831.6a, "Guidance on CERCLA Funding of State Enforcement Actions at National Priorities List Sites " (April 7, 1988).

OSWER Directive 9831.6b, "Guidance on CERCLA Funding of Potentially Responsible Party Oversight by States at National Priorities List sites" (April 7, 1988).

OSWER Directive 9831.6c, "Cost Estimates for Budgeting State Enforcement Activities" (April 7, 1988).

OSWER Directive 9831.6d, "Recommended Procedures for Headquarters/ Regional Review and Concurrence of Initial Enforcement Cooperative Agreements" (April 7, 1988).

OSWER Directive 9355.2-1, *Superfund State-lead Remedial Project Management Handbook* (December 1986).

14.2.E Sections in a CA Application

Some of the significant sections that may be 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 or any other CERCLA authority 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 complete 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 AR, community involvement, and the scope of work. The planning and reporting requirements of these state enforcement actions are presented in section 3 of this chapter.

14.2.F Development of the Superfund Memorandum of Agreement

A 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 in the relationship occur.

The SMOA is 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 state 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 discussed in subpart F of the NCP and the "Interim Final Guidance on Preparation of a Superfund Memoranda of Agreement (SMOA)." The guidance presents a model SMOA suggesting language and content for later adaptation by EPA regions and states.

Reference

NCP, 40 CFR section 300.505 ("EPA/State Superfund Memorandum of Agreement (SMOA)") (1990).

NCP, 40 CFR section 300.515 ("Requirements for state involvement in remedial and enforcement response") (1990).

OSWER Directive 9375.0-01, "Interim Final Guidance on Preparation of Superfund Memoranda of Agreement (SMOAs)" (May 8, 1989).

14.2.G 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:
  - Negotiated response actions with qualified PRPs are essential to an effective program for the cleanup of NPL sites.
  - 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.
  - 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:
  - Designate the lead and support agencies for enforcement actions at NPL sites during the annual planning process.
  - Indicate those sites where the support agency will be requested to concur on the lead agency's ROD or other decision document. EPA retains final approval authority on RODs where it has provided monies to states for oversight/enforcement activities.
  - Develop site-specific enforcement strategy outlines with time frames during the annual planning process.
  - Set forth response action commitments and settlements with PRPs in enforceable documents indicating the lead agency responsible for all Superfund communication with PRPs.
  - 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.

- Provide draft and final enforcement documents to the support agency prior to issuance to the PRPs.
- Allow for assistance requests by lead agency to support agency at any time during the enforcement and negotiation process.
- Have the lead agency notify PRPs of a planned RI/FS and determine their willingness and ability to conduct the RI/FS.
- Provide the state an opportunity to be a party to any enforcement document in which it chooses to participate.
- 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 the "Interim Final Guidance on Preparation of Superfund Memoranda of Agreement (SMOA)":

- Introduction and statement of purpose.
- Agreement concerning roles and responsibilities.
- Lead state agency designation.
- Site-specific designation of lead/support agency.
- Remedial Project Manager (RPM)/support agency coordinator designations.
- Support agency concurrence.
- Points of contact.
- Planning/coordination processes.
- Removal actions.
- Enforcement expectations and policy.
- Federal facilities contacts and process.
- 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 addresses roles of the state, federal facilities, and EPA in SMOAs, Interagency Agreements, and other processes.

Reference

OSWER Directive 9375.0-01, "Interim Final Guidance on Preparation of Superfund Memoranda of Agreement (SMOAs)" (May 8, 1989).

14.2.H EPA Approval of State Remedies

EPA retains remedy selection authority when the response is Fund-financed. States retain remedy selection authority when they are acting under state authority without a CA with EPA. EPA, however, may not be bound by a state-selected remedy unless the Regional Administrator has expressly concurred in writing. At non-Fund-financed state-lead enforcement sites where the state does not have a CA 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 such sites within reasonable time frames.

The Pilot Remedy Selection By Selected States and Tribes Superfund Reform offers a further opportunity to use the capabilities of states to help achieve cleanup goals. The reform established a pilot program in which states and tribes enter into agreements with EPA allowing them to supervise the remedy selection process at certain NPL sites with reduced EPA oversight. EPA must concur on the final ROD. This program is also discussed in Chapter 7, Selection of Remedy.

14.2.I State Voluntary Cleanup Programs

More than thirty states now have VCPs under which private parties that voluntarily agree to clean up a contaminated site are offered some protection from future state enforcement action at the site, often in the form of a "no further action" letter or "certificate of completion" from the state. Such state commitments do not affect EPA's authority to respond to actual or threatened releases of hazardous substances under CERCLA. However, EPA guidance on VCPs encourages regions to use the negotiation of voluntary cleanup plan MOAs as an opportunity to define a division of labor between the region and the state by defining what kinds of sites should be addressed under a VCP. EPA guidance provides model language, presented in part below, for stating a region's intended treatment of sites participating in a VCP covered by a MOA:

> Although nothing in this MOA constitutes a release from liability under applicable federal law, generally EPA does not anticipate taking removal or remedial action at sites involved in this VCP unless EPA determines that there may be an imminent and substantial endangerment to public health, welfare, or the environment.

EPA guidance describes six baseline criteria that it employs to evaluate the adequacy of state VCPs. These criteria are to be considered when negotiating a MOA. A VCP should:

- Provide opportunities for meaningful community involvement.
- Ensure that voluntary response actions are protective of human health and the environment.

- Have adequate resources to ensure that voluntary response actions are conducted in an appropriate and timely manner, and that both technical assistance and streamlined procedures, where appropriate, are available from the state agency responsible for the VCP.
- Provide mechanisms for the written approval of response action plans and a certification or similar documentation indicating that the response actions are complete.
- Provide adequate oversight to ensure that voluntary response actions are conducted in a manner that ensures protection of human health and the environment.
- Show the capability, through enforcement or other authorities, of ensuring completion of response actions if the volunteering party conducting the response action fails or refuses to complete the necessary response actions, including operation and maintenance or long-term monitoring activities.

Reference

OSWER/Office of Enforcement and Compliance Assurance (OECA) Memorandum, "Interim Approaches for Regional Relations with State Voluntary Cleanup Programs" (November 14, 1996).

14.3 Planning and Reporting Requirements

EPA defines state-lead enforcement as the state having primary responsibility for a 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 be 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:

- Superfund Comprehensive Accomplishments Plan (SCAP) process related to state enforcement.
- State-lead enforcement and related mandates.
- Classification of site leads.
- Comprehensive Environmental Response, Compensation, and Liability Information System 3/ Waste Local Area Network (CERCLIS 3/WasteLAN) and related Agency and state responsibilities.
- Different types of state leads.

14.3.A Superfund Comprehensive Accomplishments Plan

Regions are required to report progress on state enforcement-lead sites as they would any other site. This includes state enforcement 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 (additional information on activity and event lead codes is presented later in this chapter).

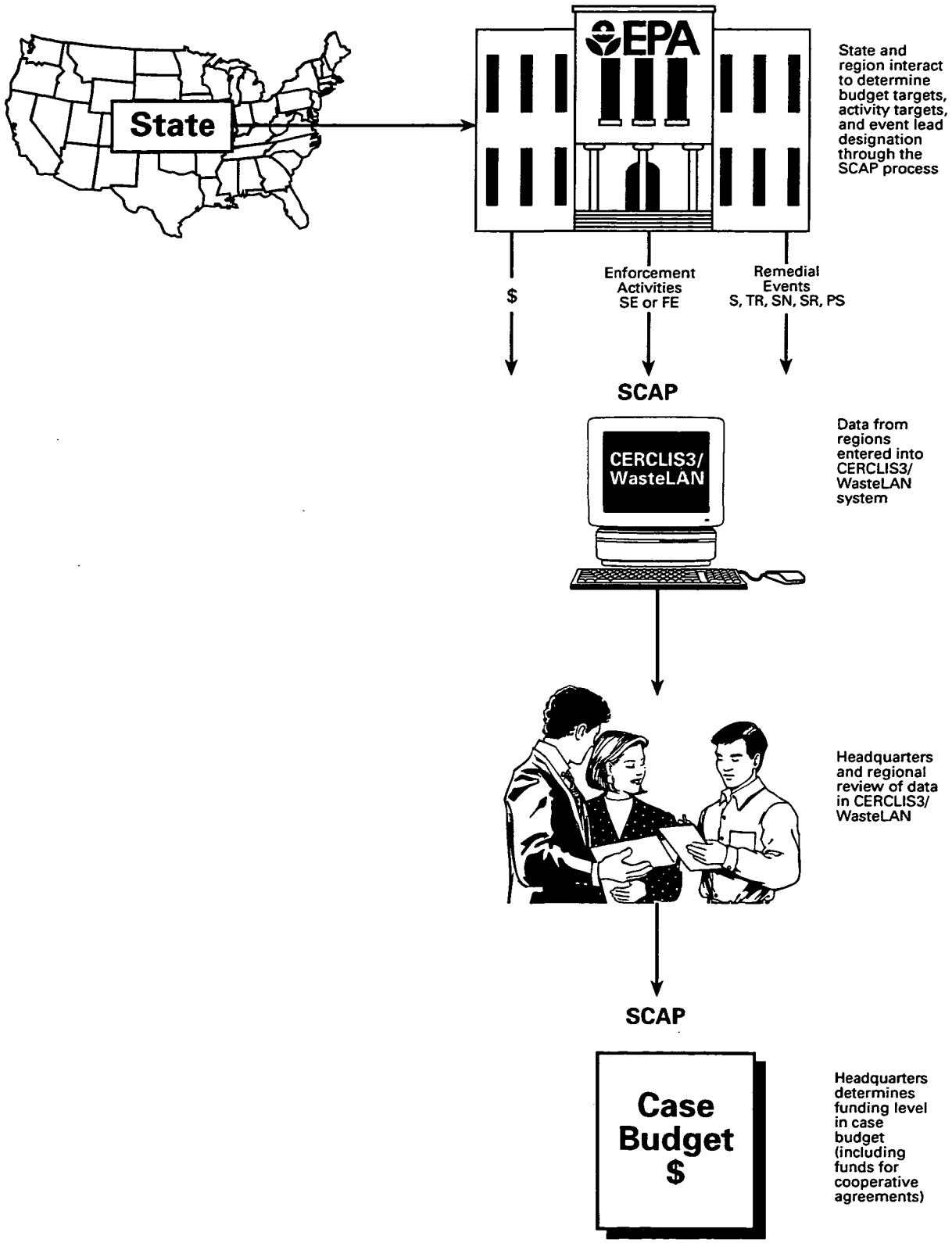
After a hazardous waste site is identified, EPA or a state initiates an investigation to identify PRPs associated with the site. On the basis of this preliminary PRP search, EPA (in coordination with the state) may make an initial determination of how cleanup of the release will be managed and who will 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.

14.3.B CERCLIS 3/ WasteLAN

The relationship of states to the budgetary planning process is graphically presented in **Exhibit 14-1**. The relationship begins when the regional office, together with the state, determines activity and event targets for SCAP. These targets are reviewed by EPA Headquarters through CERCLIS 3/WasteLAN and are used to revise SCAP and to determine the case budget.

The CERCLIS 3/WasteLAN system uses a series of activity and event codes to designate the lead agency. A discussion of these codes follows.

14-1 Relationship of States to Budgetary Planning Process



14.3.B.1 Activity Leads

A lead code must be placed in CERCLIS 3/WasteLAN for all events and activities. For RI/FS, RD, RA, Operation and Maintenance, 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.

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. Fund dollars are used to pay or partially pay for the enforcement and response activities at state enforcement lead sites through CAs. 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.

14.3.B.2 Event Leads

Event types are codes for a specific response, a non-response, or a support event within the pre-remedial, remedial, removal, and community involvement components of the Superfund program.

States or tribes have a role in the following event codes:

- **S** - S stands for state-lead site where events are paid with Fund dollars.
- **TR** - TR stands for tribal-lead site where events are paid with Fund dollars.
- **SN** - SN is used to designate state-funded events where no 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 CAs covering the site.
- **PS** - PS is used for a PRP response under a state order, when Fund money is supporting CAs with states conducting state-lead oversight; or for sites not receiving Fund money that receive EPA oversight through SMOAs, state/EPA agreements or CAs.

Reference

OSWER Directive 9200.3-14-1D, *Superfund/Oil Program Implementation Manual* (updated biennially).

SCAP/OIL Quick Reference Coding Guide.

14.4 Potential Problems/Resolutions

This section discusses specific issues RPMs may confront during state enforcement activities and suggests methods for resolving these issues.

14.4.A Forum Shopping by PRPs

This situation occurs when PRPs negotiate separately with state and federal authorities to identify their best deal. The PRP is unable to get liability releases from federal and state authorities 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 with both EPA and the state in developing a settlement.

14.4.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.

14.4.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.

14.4.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.

14.4.E SMOA Development

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.

14.4.F State Challenges to RD/RA Consent Decrees

Pursuant to CERCLA section 121(f)(2)(B), states can challenge ARARs in CDs. These challenges can be a major source of delay. RPMs should establish and maintain contact with the state throughout the process to avoid delays.

15. Records Management

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Chapter 15 Records Management

15.1 Description of Activity

Records Management is critical to the success of the Superfund enforcement program. Due to the involvement of numerous federal and state agencies, contractors, Remedial Project Managers (RPMs), On-Scene Coordinators (OSCs), and Potentially Responsible Parties (PRPs) at a site over a potentially extended time period, good file organization is necessary to document site activities. Within Superfund, there are three primary areas of file management: the site file, the Administrative Record (AR) file, and the cost documentation file.

The site file contains all acquired site-specific information.

The AR file is a subset of the site file. As mandated by section 113(k) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the AR 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 AR 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 AR. Note that there may be other ARs to support other decisions taken by the Agency (e.g., a deletion AR). The documents that should be included in AR files supporting other decisions are identified in guidances addressing those decisions.

The cost documentation file consists of Headquarters and regional documentation of expenditures that is required in order to recover Fund expenditures under section 107 of CERCLA.

15.2 Procedures and Interactions

15.2.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** - Consist of all acquired information for a Remedial Action (RA).
- **Removal site files** - 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. Note that the removal site file and remedial site file may be merged at a site where both removal and remedial actions take place.

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.

15.2.A.1 Remedial Site Files

The RPM is responsible for developing and maintaining accurate and complete files of the activities pertaining to the site.

15.2.A.1.1 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 15-1**.

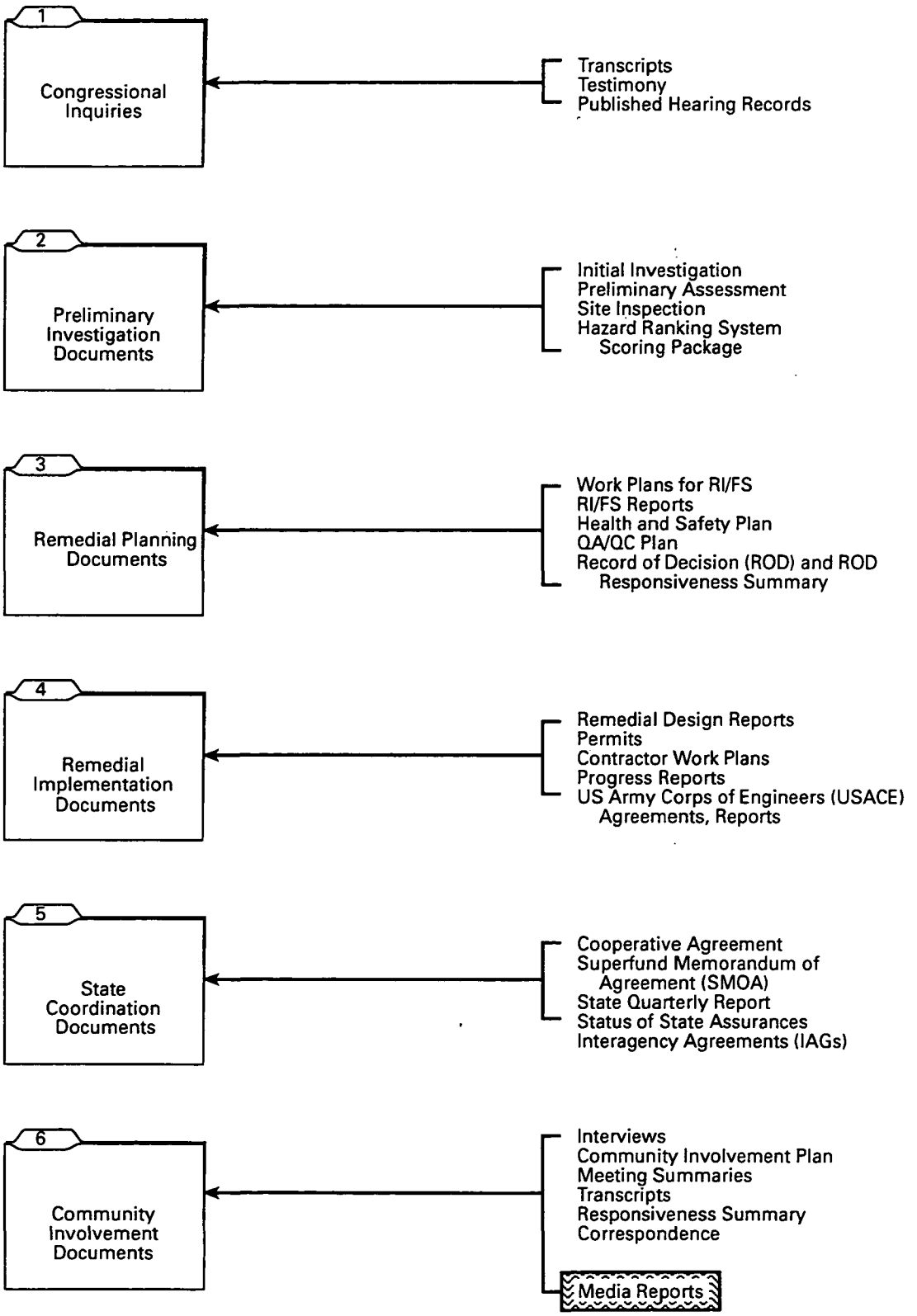
15.2.A.1.2 Collection of Field Data

Site-specific data quality objectives will govern the data management methods used, and the site's Quality Assurance Project Plan/Field Sampling Plan will identify both field and analytic data to be acquired and the standard operating procedures to be used. A data security system must be implemented to safeguard the chain of custody records and document control for field data. More specific guidance is available in "Data Quality Objectives for Remedial Response Activities."

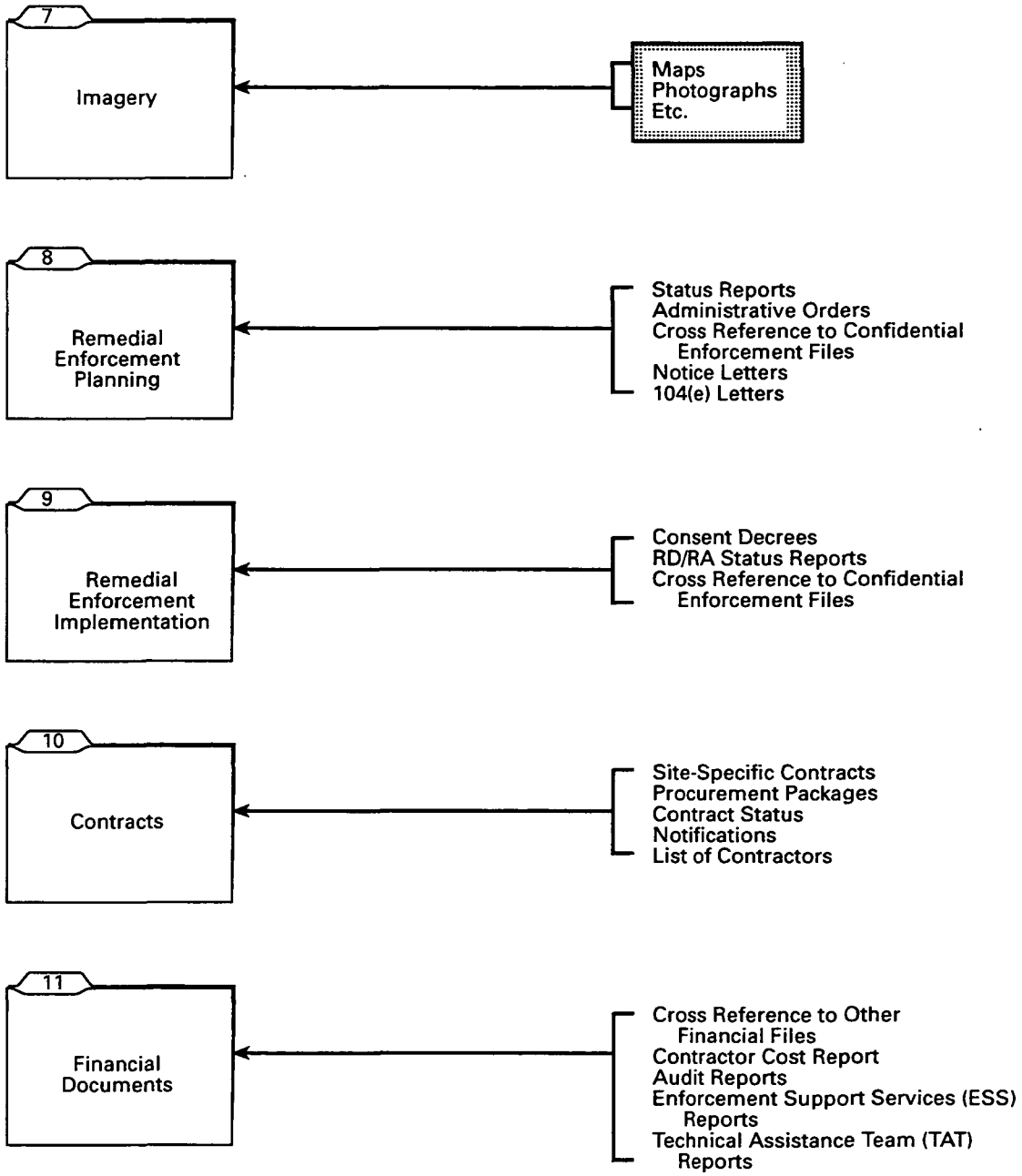
15.2.A.1.3 File Management Process

The RPM should complete the appropriate forms and reports and file them according to the regional file structure. Files should be distributed to the regional office from the site regularly, 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 AR should be copied from the site file and maintained in a separate AR file. CERCLA requires that the AR 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. Documents in the site file are subject to disclosure in response to Freedom of Information Act (FOIA) requests unless the documents fall within a FOIA exemption. Privileged documents should be clearly marked prior to filing to facilitate responding to document requests later.

15-1 Model Remedial File Structure



15-1 (cont.) Model Remedial File Structure



15.2.A.2 Removal Site Files

Removal site file management has typically been the responsibility of the OSC, with assistance from other EPA regional staff, contractors, and the U.S. Coast Guard Strike Team. Each region should clearly assign responsibility for each of the file management functions.

15.2.A.2.1 File Content and Structure

Removal site files include documentation of all aspects of the removal: operational, legal, financial, community involvement, 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 15-2** for an example of a model file structure and component documents.

15.2.A.2.2 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 quality assurance/quality control project plans for the removal site. A data security system should be implemented to safeguard chain of custody records and document control procedures for field data.

15.2.A.2.3 File Management Process

Similar to RPM responsibilities for the remedial site file, the OSC should 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 should be distributed to the regional office from the site regularly, 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 AR should be copied from the site file and maintained in a separate AR file. The site file, unlike the AR file, need not be available for public review, but is subject to FOIA. The following section offers guidance on documents to be included in the AR.

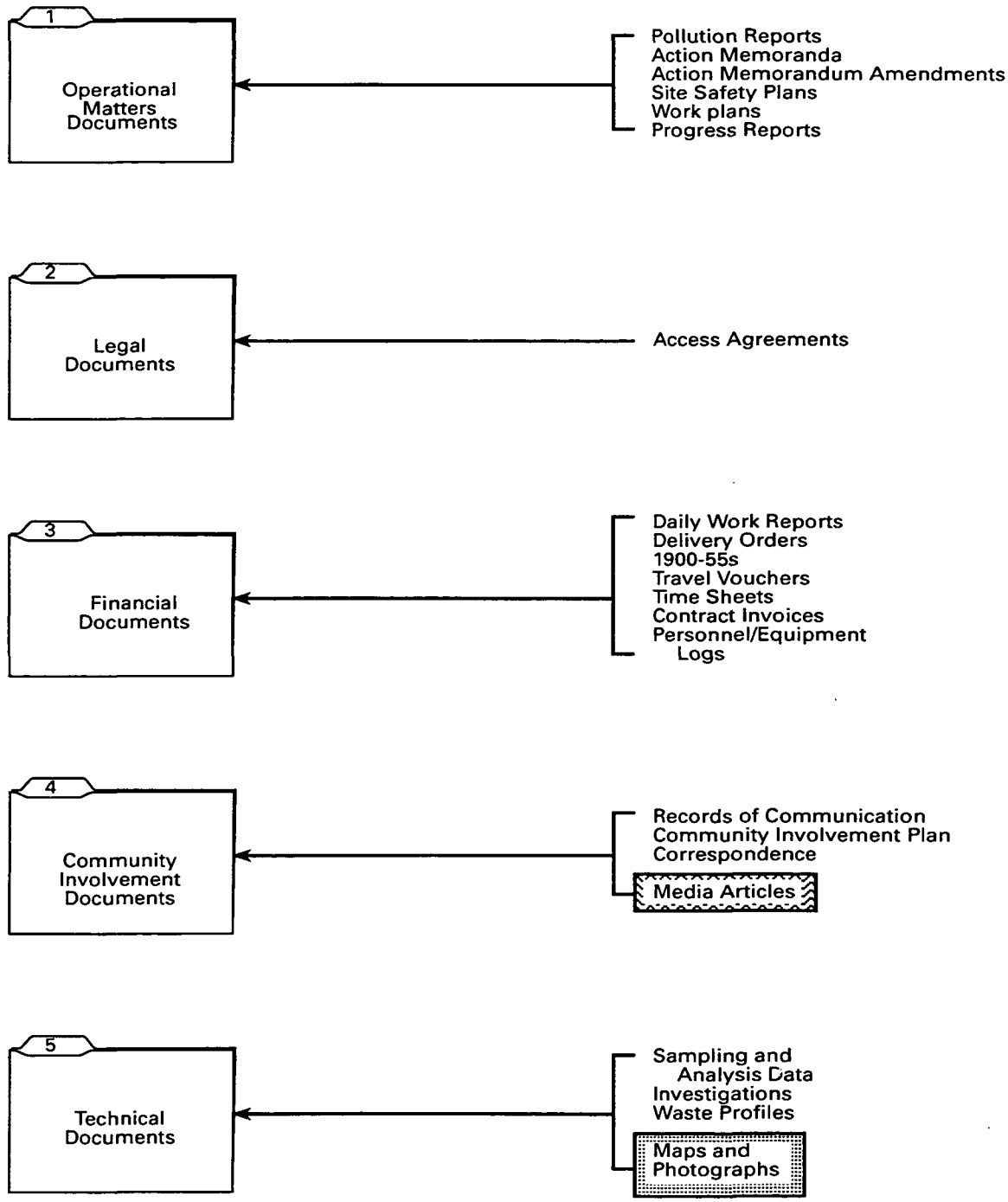
Reference

Office of Solid Waste and Emergency Response (OSWER) Directive 9355.07B, "Data Quality Objectives for Remedial Response Activities" (March 1987).

15.2.B Administrative Record Files

The AR 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 ARs 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 AR. This section discusses the major requirements for the AR with regard to content and non-EPA involvement, and some specific requirements for different types of Superfund actions. Although the terms "AR file" and "AR" often are used interchangeably, the "AR file" refers to the collection of documents that have been selected from the site file for inclusion in the AR before a decision document is signed. After the decision document is signed, the AR file becomes the "AR." Detailed information on compiling the AR file for selection of response actions is contained in the 1990 AR guidance.

15-2 Model Removals File Structure



References

National Oil and Hazardous Substance Pollution Contingency Plan (NCP), 40 Code of Federal Regulations (CFR) section 300.800 ("Establishment of an administrative record") (1990).

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

15.2.B.1 File Content and Structure

The record should consist of the documents considered or relied upon in the selection of a CERCLA response action, regardless of whether the documents support or oppose the Agency's selected action. Voluminous documents may be referenced in the AR file and made available to the public upon request. Documents in the AR file should include relevant writings, graphs, charts, photographs, and data compilations, but the file should 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 (RI) is begun. See **Exhibit 15-3** 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 AR 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 AR file.

Reference

NCP, 40 CFR section 300.810 ("Contents of the administrative record file") (1990).

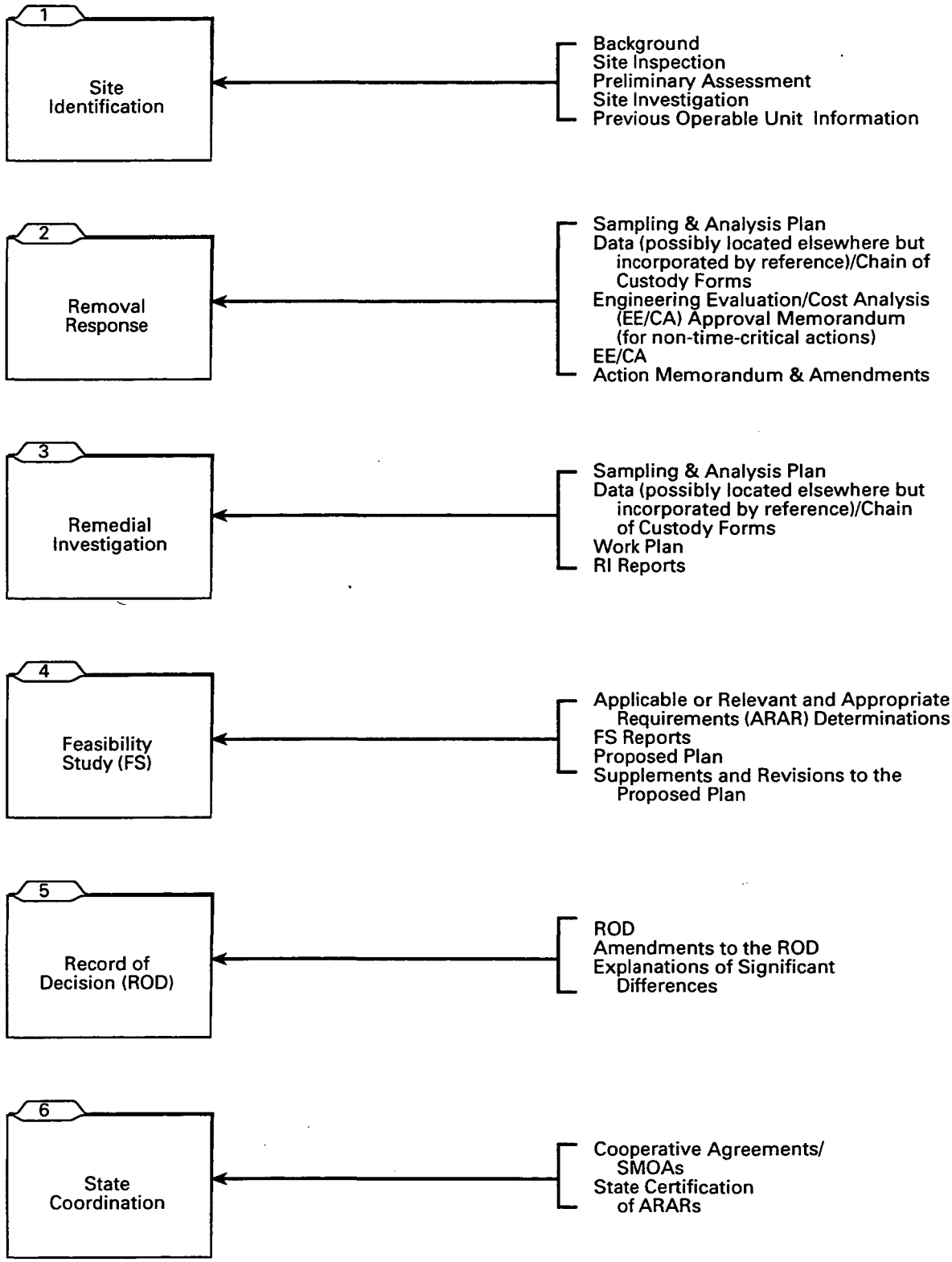
15.2.B.2 EPA Roles

The OSC, RPM, enforcement staff, regional counsel, Community Involvement Coordinator (CIC), contractors, and the AR coordinator are all involved in establishing AR files. The AR coordinator has the duty of ensuring adequate compilation and maintenance of the record files but is not responsible for deciding which documents to include in the files. Those decisions should be made by the OSC or RPM in consultation with regional counsel. **Exhibit 15-4** identifies recommended roles for AR development.

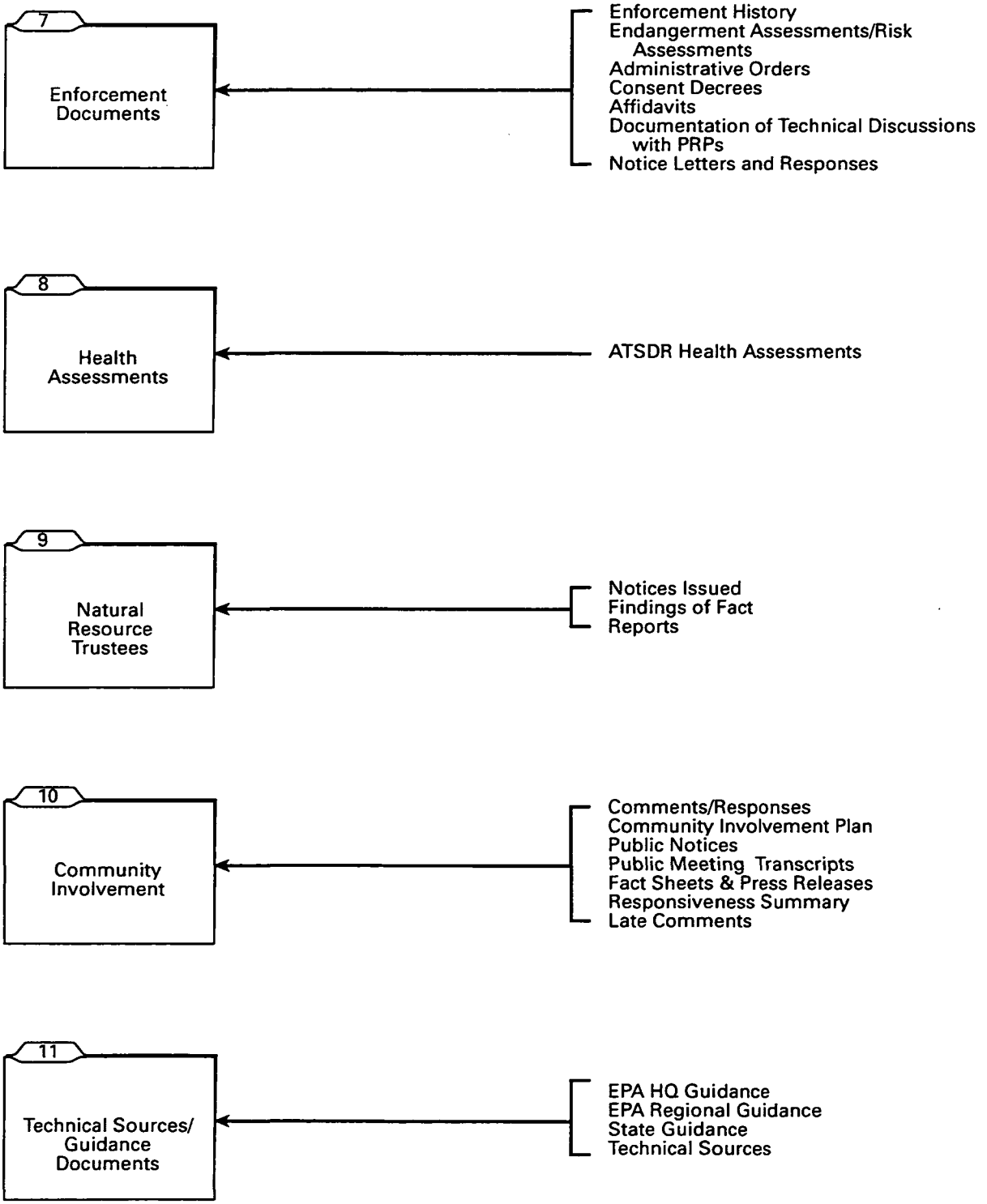
When there is a question about including certain documents in the AR file, such documents can be segregated and reviewed by the RPM and the regional counsel at 3- or 4-month intervals (this should be done more often for removals). At critical times, such as prior to the public comment period, the issues regarding these documents should be resolved and, if appropriate, the documents included in the record file.

Each separate response action at a site (remedial action operable unit, interim action, or removal action) should be supported by an AR 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 issue. Public

15-3 Model Administrative Record File Structure



15-3 (cont.) Model Administrative Record File Structure



participation in the process is discussed later in this chapter and in more detail in Chapter 13, Community Involvement.

15-4 Recommended Roles for Administrative Record Development

Tasks	RPM/ OSC	RC	ARC	CIC	Contractor
Develop compilation schedule & procedures			X		
Develop maintenance and update procedures			X		
Coordinate efforts to obtain necessary documents	X	X	X	X	X
Technical/legal review of documents & index	X	X			
Screen privileged documents	X	X			
Check adequacy & completeness of AR	X	X			
Organize & photocopy documents					X
Make site repository arrangements	X		X	X	
Issue public notices			X	X	

15.2.B.3 Involvement of Other Parties

The AR file for a federal-lead site should reflect any state or tribal involvement in the selection of a response action (the following discussion of state involvement also applies to tribes). For guidance on documentation of state involvement in the response selection, see the "Final Guidance on ARs for Selection of CERCLA Response Actions."

Where a state has been officially designated as the lead agency, the state must compile and maintain the AR file in accordance with the NCP (see 40 CFR sections 300.800-825). 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 Remedial Investigation/Feasibility Study (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 roles and responsibilities regarding the AR should be incorporated into the Superfund Memorandum of Agreement (SMOA) or cooperative agreement. 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 AR file in accordance with the NCP (see 40 CFR sections 300.800-825). At NPL sites and any other site where EPA is involved in selecting a response action at a federal facility, the federal agency should 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. Interagency Agreements (IAGs) should spell out procedures for compiling and maintaining the record file.

Executive Order 13016 (August 28, 1996) delegated authority to issue CERCLA section 106 orders to a number of federal departments that act as federal resource managers, including the Departments of Interior, Commerce, Agriculture, Defense, and Energy. Where federal agencies other than EPA issue a CERCLA section 106 order to PRPs, the agency issuing the order is responsible for creating and maintaining the AR supporting that action.

References

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

NCP, 40 CFR part 300, subpart I ("Administrative Record for Selection of Response Action")(1990).

15.2.B.4 Community Involvement

Sections 300.815 and 300.820 of the NCP specify that the AR shall be made available to the public. In satisfying this provision, the Agency must comply with all relevant public participation procedures outlined in the NCP (see also *Community Relations in Superfund: A Handbook* and "Community Relations During Enforcement Activities and Development of the Administrative Record").

In general, the AR 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 AR file to establish a complete record for purposes of judicial review.

The AR also should document the award of technical assistance grants to community groups for use in hiring a technical advisor to help the community understand technical information related to the site and participate more effectively in the Superfund process. Information about the establishment of a community advisory group and its participation in the Superfund process should also be documented in the AR. Any involvement of the Superfund regional ombudsman in facilitating the participation of community stakeholders should also be documented.

The AR file should contain relevant information brought to the Agency's attention by the public, including reports, data, and other information generated by outside parties and submitted to the Agency.

The Agency should request that substantive verbal 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 verbal comments on which it will want to rely.

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 AR 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 the "Interim Final Guidance on Preparing Superfund Decision Documents."

In all cases, the Agency should publish a notice of availability of the AR file when the AR file first is made available for public inspection in the vicinity of the site. The notice should explain the purpose of the AR 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 involvement mailing list. This notice should also be sent to all known PRPs if they are not already included on the community involvement mailing list.

The availability of the AR file will vary depending upon the nature of the response action. Different procedures are outlined below for remedial and removal response actions.

References

Community Relations in Superfund: A Handbook, EPA 540-R-92-009.

NCP, 40 CFR section 300.815 ("Administrative record file for a remedial action") (1990).

NCP, 40 CFR section 300.820 ("Administrative record file for a removal action") (1990).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October 1989).

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities," (November 3, 1988).

15.2.B.4.1 Remedial Actions

Section 300.815 of the NCP requires that the public be provided the opportunity to review and comment on the AR file for remedial actions. The AR 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.

Reference

NCP, 40 CFR section 300.815 ("Administrative record file for a remedial action") (1990).

15.2.B.4.2 Removal Actions

Section 300.820 of the NCP requires that the public be provided the opportunity to review and comment on the AR file for removal actions. These requirements are also discussed in Chapter 2, Removals.

Emergency removal actions initiated within hours and lasting less than 30 days

The AR file must be made available to the public no later than 60 days after initiation of removal activity at the site. The AR file must be maintained in the regional office, but need not be made available at or near the site. Public comment on the AR file should be held when appropriate.

Other time-critical removals, including emergency removals lasting more than 30 days

The AR file must be made available to the public no later than 60 days after the initiation of removal activity at the site. The AR file must be established at the regional office and made available for public inspection at or near the site. Public comment on the AR 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 AR 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 AR file following the public comment period.

Non-Time-Critical removals

The AR file must be available for public inspection when the engineering evaluation/cost analysis is made available for public comment. The AR 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.

References

NCP, 40 CFR section 300.805 ("Location of the administrative record file") (1990).

NCP, 40 CFR section 300.820 ("Administrative record file for a removal action") (1990).

15.2.B.5 Excluded and Privileged Information

Documents should be excluded from the AR 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 and cost documentation information. 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 AR file may be protected from public disclosure on the basis of an applicable privilege or FOIA exemption. The RPM/OSC and regional counsel share responsibility for deciding which documents are not subject to disclosure. Any such protected documents that were 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 each document in the confidential file should be inserted in the portion of the record file available to the public and included in the index. Types of privilege include the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege. Courts have interpreted FOIA exemption 5 as encompassing these traditional evidentiary privileges. Further information protected under FOIA includes trade secrets and commercial or financial information (exemption 4); personal information such as personnel or medical files (exemption 6); and certain investigatory records compiled for law enforcement purposes (exemption 7). In situations involving attorney-client privilege and deliberative process privilege, regional counsel should be consulted for proper procedure.

15.2.B.6 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 AR file. Post-decision documents may be added to the AR 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 AR 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 Agency receives information that causes it to 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 AR 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 AR 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 AR file.

References

NCP, 40 CFR section 300.825 ("Record requirements after the decision document is signed") (1990).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (October 1989) (Chapter 8, "Post-ROD Significant Changes").

15.2.B.7 Certification

When a selected remedy becomes the subject of litigation and the record is filed in court, the Agency must certify that the AR is complete. Such certification should be signed by the regional administrator's designee after consultation with regional counsel. Any certification of the record should be made by program staff, and not legal staff.

In addition, the region may choose to have the AR coordinator certify that the record was compiled and maintained in accordance with applicable Agency regulations and guidance, although this second certification is not required.

15.2.B.8 Models

Models of the AR file structure, index, certification, and notice of public availability are available as guidance for their preparation.

References

Draft Model Regional Records Management Operating Procedures Manual, EPA/IMSD-91-020.

OSWER Directive 9360.2-01, "Model Program for Removal Site File Management" (July 1988).

Region 1 Guidance, "Region 1 Records Center Operations Manual."

Region 9 Site File Guidance, "Reference Manual for Superfund Staff."

15.2.C Cost Documentation File

Cost documentation is a cooperative effort among the RPM, OSC, other Case Team members, regional Financial Management Office (FMO), Headquarters' Financial Management Office (HQ-FMO), Office of Site Remediation Enforcement, and Department of Justice.

For the Agency to litigate successful cost recovery actions 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 from a facility 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 a 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.

15.2.C.1 File Content and Structure

The cost documentation file should include documents showing both the work performed and the costs associated with that work. Work performed documents prove that the response activities were both authorized and completed. The cost documentation file should include the following categories of work performed documents:

- Documents authorizing the performance of work and defining the scope of that work, including action memoranda, work plans, work assignments, and Technical Directive Documents (TDDs).
- Documents authorizing changes in the scope or cost of work done at a site, including work plan revisions and contract modifications.
- Documents providing evidence of the performance or completion of work at the site, including Form 1955s (for removals), monthly technical and financial status reports for Remedial Engineering Management contracts, and TDD or work assignment completion forms.
- State Cooperative Agreements (CAs) or Superfund state contracts.
- Interagency Agreements (IAGs).

The cost documentation file should include documents reflecting the following categories of costs:

- Site-specific payroll costs (Headquarters and region).
- Site-specific travel expenditures (Headquarters and region).
- Site-specific CA costs.
- Non-site-specific CA costs.

- Site-specific indirect costs.
- Site-specific Field Investigation Team costs.
- Site-specific Technical Assistance Team costs.
- Site-specific Enforcement Support Services (ESS) costs.
- Site-specific Emergency Response Cleanup Services costs.
- Site-specific Contract Laboratory Program costs.
- Site-specific Remedial Engineering Management costs.
- Site-specific Environmental Services Assistance Team costs.
- Site-specific Alternative Remedial Contract Strategy (ARCS) costs.
- Site-specific Emergency Response Unit costs.
- Site-specific National Enforcement Investigation Center costs.
- Site-specific Environmental Photographic Interpretation Center costs.
- Technical Assistance Grant costs.
- IAG costs.
- Miscellaneous costs related to Agency response activity.

References

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs for CERCLA section 107 Actions" (January 30, 1985).

OSWER Directive 9832.1, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" (August 1983).

15.2.C.2 File Management Process

The cost recovery coordinator, in coordination with the regional FMO, coordinates the collection, assembly, and summary 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 12, Cost Recovery.

15.2.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 AR files. In most regions, there is an AR coordinator who takes responsibility for those files. The responsibilities and those who handle them differ from region to region.

15.2.D.1 Superfund Document Management System

The Superfund Document Management System (SDMS) is an automated imaging and indexing system designed to meet Superfund site file documentation and records management needs. SDMS allows regions to organize site files into an electronic database that can be stored on optical

disk or CD-ROM. SDMS helps resolve storage problems created by the large volume of site files, facilitates the selection of documents for the AR file, and enhances public access to site documentation.

SDMS allows regions to electronically index site file documents by entering data for each document into selected fields (e.g., author, addressee, date, title). Users can then search these fields to locate documents, each of which can be assigned a unique document number by SDMS. Selected documents can also be scanned and reproduced by SDMS. Optical character recognition technology also allows the full text of documents to be stored in SDMS (in addition to an image of the document). SDMS relates each document's image to its full text and index entries, allowing searches of scanned documents by any word in the text, any indexed field, or a combination of text and field. At the conclusion of a search, the user may display or print out the image or text of the document.

An "SDMS Core Documents" list has been compiled by an SDMS workgroup of regional and Office of Solid Waste and Emergency Response (OSWER) personnel. The 1990 AR guidance, which identified documents to be included in an AR, provided the foundation for the core documents list. Consequently, if the core documents are scanned into SDMS, the majority of ARs can be pulled together in SDMS. Software is now available that allows regions to create a CD-ROM containing the AR for a site using the document images stored in SDMS.

Public access to site documents is greatly enhanced by SDMS. SDMS allows regions to provide the public (and PRPs) with the entire AR for a site on CD-ROM, greatly reducing both the difficulty of obtaining site documentation and the region's use of resources to support dissemination of that documentation to the public. SDMS also allows for more efficient response to FOIA requests, as regional or contractor personnel can locate requested documents using SDMS and then provide a response either by printing out the relevant document images or by transferring the images to a CD-ROM. EPA has created a tutorial for public use that instructs the user on how to access documents on the CD-ROM. Regions may also maintain public access modules at which the public may use SDMS to obtain site information. SDMS includes features that allow the region to restrict public access to confidential information contained in SDMS.

SDMS questions and concerns are addressed by the SDMS workgroup, which is headed by Verne McFarland of Region 6 (214-665-6617). The workgroup is working to resolve technology compatibility issues with the goal of connecting SDMS to other EPA databases, including the Comprehensive Environmental Response, Compensation, and Liability Information System 3.

Reference

OSWER Directive 9833.3A-1, "Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (December 3, 1990).

15.2.D.2 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 the references for this subsection. In addition, many regions have developed regional records management manuals.

References

OSWER-IM, "Procedures for the Transfer of Contract Laboratory Program Files for Storage in the Federal Records Center (FRC)" (August 1992).

Draft Model Regional Records Management Operating Procedures Manual, EPA/IMSD 91-020.

15.2.D.2.1 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 the draft regional records management manual. Guidance on disposition of Agency records is being developed by OSWER-Information Management (IM) and the Office of Information Resources Management (OIRM). EPA records control schedules describing records disposition standards for Superfund site documentation include:

- Administrative Records - Superfund Site-Specific (EPA Series No. 019R).
- Removal Site Files - Superfund Site-Specific (EPA Series No. 013A).
- Remedial Site Files - Superfund Site-Specific (EPA Series No. 014A).
- Superfund Document Management System (SDMS) (EPA Series No. 049A).

Reference

Draft Model Regional Records Management Operating Procedures Manual, EPA/IMSD 91-020.

15.2.D.2.2 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-IM staff at 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's *Records Management Manual.*

Reference

Office of Information Resources Management 2160, *Records Management Manual* (1986).

15.3 Planning and Reporting Requirements

15.3.A Setting Priorities

Regions should set priorities for the order in which they plan to organize site files and compile ARs and cost documentation files. Regions should make a concentrated effort to implement the requirements of the proposed regulations with regard to removal and remedial ARs and cost documentation files compilation.

15.3.B Planning

Records management plans for site files, cost documentation files, and AR files are region-specific and depend on the state of the region's record system and the methodology employed.

15.3.C Budget

Funding for organizing site files is provided from a lump-sum records management budget managed by the Superfund enforcement support section. Most regions will have sites which vary in size and complexity and will have to balance their budgets accordingly.

Funding for AR compilation can be obtained through ARCS, ESS, Superfund Technical Assistance and Response Team (START), or 8(a) contracts. These contracts may be used for AR compilation for RI/FS (Alternative Remedial Contracting Strategy), removals (START), or PRP oversight (ESS).

15.4 Potential Problems/Resolutions

15.4.A Space

Lack of space for records storage is a common problem in the regions. SDMS (discussed in section 2 of this chapter) should make it possible for regions to send the hard copies of files that have been scanned and indexed into SDMS to a federal records center. Quality control measures should be taken to ensure the adequacy of SDMS records before hard copies are sent to a federal records center.

15.4.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 CICs can be helpful in identifying facilities, and, in some cases, transporting the records.

15.4.C Regional Counsel and RPM Involvement

Regions have experienced difficulty in obtaining adequate and timely participation by the regional counsel and RPM/OSC in the AR due to their heavy workloads. Furthermore, the regional counsel and RPM/OSC perceptions may vary as to what they believe should be included in the AR file. Several regions have found training to be helpful and that early joint involvement by the RPM/OSC and regional counsel in record compilation can facilitate the process.

16. Targeting Accomplishments and Measuring Performance

Chapter 16 Targeting Accomplishments and Measuring Performance

(Undergoing major revision at the time of this printing.
The final version will be posted on EPA OSRE's Intranet
for downloading when available.)

Glossary

Enforcement Glossary

The following terms are defined to help the reader understand the discussions in this handbook. Complete and authoritative definitions are to be found in CERCLA, The National Contingency Plan, Agency Guidance and Policy and Case Law.

10-point Settlement Analysis: An evaluation of a proposed settlement according to 10 factors prescribed in EPA's December 5, 1984 "Interim CERCLA Settlement Policy." The analysis is a privileged document prepared and submitted to the Department of Justice (DOJ) by regional counsel for every settlement requiring DOJ approval.

Action Memorandum: The primary decision document for a removal action. An action memorandum documents the need for a removal response, identifies the proposed action, and explains the rationale for the removal.

Administrative Order on Consent (AOC): A legal document that formalizes an agreement reached between EPA and one or more Potentially Responsible Parties (PRPs) to address, in whole or in part, the PRPs' responsibility for a site. An AOC is legally enforceable, but does not have to be approved by a court. AOCs are commonly used when PRPs agree to conduct a removal or Remedial Investigation/Feasibility Study, reimburse past costs (where the cost of the response action does not exceed $500,000), or enter a *de minimis* settlement. An AOC may not be used for an agreement to conduct a remedial action.

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 Record (AR) File: A file consisting of documents that have been selected for inclusion in the AR because those documents will be "considered or relied upon" to select a planned response at a site. When the Decision Document (e.g., a Record of Decision) is signed, the AR file becomes the AR for that decision. Except in limited circumstances, such as when a Decision Document is amended, documents are not added to the AR after the Decision Document is signed.

Administrative Reforms: An ongoing EPA review of Superfund program policies and administrative procedures, begun in 1993, and designed to increase the Superfund program's speed, fairness, and efficiency.

Administrative Subpoena: A legal document 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 "necessary and appropriate" to gather information to perform a Non-Binding Preliminary Allocation of Responsibility or "for otherwise implementing CERCLA section 122." The Agency may use administrative subpoenas as initial information gathering tools, but prefers using section 104(e) requests before resorting to them.

Advice of Allowance (AOA): The mechanism used by the Office of the Comptroller to distribute funds to the regions to carry out the planned obligations identified through the Superfund Comprehensive Accomplishments Plan process.

Alternative Dispute Resolution (ADR): A variety of processes that allows parties to resolve their disputes without resorting to litigation. ADR employs neutral third parties to aid in the resolution of disputes through methods that include arbitration, mediation, mini-trials, and fact finding.

Arbitrary and Capricious: A term used to characterize a willful and unreasonable decision or action of an administrative agency or inferior court that is taken without consideration of, or in disregard of, facts or without determining principle. Under CERCLA section 113(j)(2), a court ruling on a challenge to an Agency response action decision will apply the "arbitrary and capricious" standard of review. This means that the court will uphold the Agency's decision unless the challenger can show that it was arbitrary and capricious.

Arbitration: An Alternative Dispute Resolution technique using a neutral third party to hear stipulated issues pursuant to procedures specified by the parties. Depending on 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. EPA does not use binding arbitration.

Carve-Out Order: An Administrative Order on Consent under which a Potentially Responsible Party (PRP) agrees to do a portion of the work required at a site. EPA may then pursue other PRPs to perform or pay for the remainder of the work.

Cashout: A settlement that requires Potentially Responsible Parties (PRPs) to provide up-front financing for a portion of a response action instead of performing the work themselves. Mixed-funding and *de minimis* settlements are forms of cashout settlement.

CERCLA Section 106(b) Reimbursement Petition: A petition seeking reimbursement by EPA of the reasonable costs plus interest of performing a response action pursuant to a Unilateral Administrative Order. A person may be entitled to reimbursement if he/she can establish that he/she is not liable for response costs under CERCLA section 107(a), or that the Agency's selection of response action was arbitrary and capricious or otherwise not in accordance with law.

CERCLIS 3: EPA's Comprehensive Environmental Response, Compensation, and Liability Information System 3, the national information management system for the Superfund program. CERCLIS 3 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 human health or the environment. The term "cleanup" is sometimes used interchangeably with the terms remedial action, removal action, response action, or corrective action.

Coast Guard Strike Team: A special team established by the U.S. Coast Guard to assist OSCs/RPMs in their spill preparedness and response duties. A strike team provides trained personnel and specialized equipment to assist in training for spill response, stabilizing and containing spills, and monitoring or directing the response actions of responsible parties and/or contractors. There are three strike teams, Atlantic, Gulf, and Pacific.

Comment Period: Formal period of time provided for the public to review and comment on a proposed EPA action, rulemaking, or settlement.

Community Involvement: 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's decision-making process.

Community Involvement Coordinator (CIC): Lead-agency staff member who works to inform the public about and involve the public in the Superfund process and cleanup actions.

Community Involvement Plan (CIP): 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, nature and history of community involvement, and concerns expressed during community

interviews. In addition, the plan outlines methodologies and timing for continued interaction between the Agency and the public at the site.

Confidential Business Information (CBI): Privileged information about a business's products, processes, operations, and activities. Claims that business information is entitled to confidential treatment must comport with the requirements of 40 CFR Part 2.

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). The CD outlines the terms on 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 that allows a Potentially Responsible Party (PRP) to seek to recover response costs from another PRP. Contribution actions arise under CERCLA because joint and several liability allows EPA to seek work or recover response costs from fewer than all the PRPs who are liable for a hazardous substance release. If the Agency settles with or wins a case against a sub-group of PRPs, they can seek recovery of a proportional share of the response costs from other PRPs who contributed to the release but did not settle with EPA.

Contribution Protection: Immunity from contribution actions by other PRPs authorized by CERCLA and granted by EPA in respect of matters covered in an administrative or judicial settlement that resolves the settlor's CERCLA liability.

Cooperative Agreement (CA): Mechanism used by EPA to provide Superfund 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.

Core Program Cooperative Agreement: A Cooperative Agreement between EPA and a state or tribe for funding CERCLA implementation activities that are not directly assignable to specific sites. The Core Program is intended to develop and maintain the ability of states and tribes to participate in the CERCLA response program. Core Program funding may be used for a broad range of non-site-specific purposes, including the development of generic Community Involvement Plans and Quality Assurance Project Plans, the development of legal authorities and enforcement support associated with efforts to compel Potentially Responsible Parties to conduct or pay for studies and/or remediation, and the hiring and training of staff to manage publicly funded cleanups and oversee PRP-lead cleanups.

Cost Recovery: A process by which the United States seeks to recover money previously expended in performing any response action from parties liable under CERCLA section 107(a). Recoverable response costs include both direct and indirect costs.

Covenant Not to Sue: A contractual agreement authorized by CERCLA section 122(f) and embodied in a Consent Decree or Administrative Order on Consent, in which the Agency agrees not to sue settling Potentially Responsible Parties (PRPs) for matters addressed in the settlement. EPA's covenant not to sue is given in exchange for the PRPs' 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. Under CERCLA, the use of covenants not to sue is discretionary. The Agency usually agrees to such releases from future liability only if the terms of the covenant include "reopeners."

Data Characterization Package: A package of information that must be included with a Notice of Intent for Partial Deletion, including a Partial Site Deletion Collection Form and a map clearly showing the portion of the site to be deleted.

Declaratory Judgment: A binding adjudication of the rights and statuses of litigants. The United States may file a claim seeking declaratory judgment on CERCLA liability for past and future response costs at a site. If declaratory judgment on liability is granted, the U.S. does not have to prove liability in any future action with the defendant.

Deletion Docket: Background materials and records that must be placed in the information repository prior to preparing a Notice of Intent to Delete or Notice of Intent for Partial Deletion.

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 micromis" Settlement: An agreement, either administrative or judicial, between EPA and parties that contributed minuscule amounts of hazardous substances to a site. "De micromis" settlements are entered into under the *de minimis* contributor settlement authority of CERCLA section 122(g), but do not require any payment from settling parties.

***De Minimis* Contributor**: As defined by CERCLA section 122(g)(1)(A), a Potentially Responsible Party (PRP) who is determined to be responsible for only a minor portion of the response costs at a facility based on the volume, toxicity, or other hazardous effects of the hazardous substances contributed to the facility compared to other hazardous substances at the facility.

***De Minimis* Landowner**: As defined by CERCLA section 122(g)(1)(B), a Potentially Responsible Party who is a past or present owner of the real property at which a facility is located and 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.

***De Minimis* Settlement**: An agreement, either administrative or judicial, authorized by CERCLA section 122(g), between EPA and Potentially Responsible Parties for a minor portion of response costs.

De Novo: Generally, a new hearing. At a *de novo* hearing, the court hears the case as a 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 is the court selecting the remedy.

Discovery: A pre-trial procedure that enables parties to learn the relevant facts about a 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 legal 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 controlling surface activities.

Emergency Removal: A removal 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.

Eminent Domain: The power of the government to take private property for public use. Under the U.S. Constitution, just compensation must be paid to the owners of property so taken.

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 requirements of different environmental laws and related regulatory requirements.

Enforcement Specialist: An EPA job classification for persons with special expertise in the drafting of General and Special Notice Letters, compilation of cost documentation packages, and preparing for negotiations.

Environmental Appeals Board (EAB): The final EPA decision maker on administrative appeals under all major environmental statutes that EPA administers. The Administrator has also delegated to EAB authority to rule on CERCLA section 106(b) reimbursement petitions.

Explanation of Significant Difference (ESD): A document that explains a significant change to the Record of Decision made when new information is discovered about a site or difficulties are encountered during the Remedial Design/Remedial Action phase of cleanup. An ESD is included in the Administrative Record to inform the public of any significant changes that are being made to the selected remedy.

Extraordinary Circumstances: Situations that justify the deletion of standard reopeners in Consent Decrees. This release is granted infrequently and in response to unusual conditions related to liability, viability, or physical circumstances of the site or Remedial Action.

Federal Lien: A lien in favor of the United States authorized by CERCLA section 107(1) that may be imposed on a facility that is subject to a response action. The lien arises when the Potentially Responsible Party (PRP) receives written notice of potential liability for response costs under CERCLA, or the Agency actually incurs response costs at a particular site. The lien becomes enforceable once it has been "perfected", which requires notice to the PRP of EPA's intent to perfect the lien, and an opportunity to be heard. 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 on 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, large university libraries, and through the Internet (1994 - present).

Federally Permitted Release: As defined by CERCLA section 101(10), a release that complies with the terms of a permit issued under federal law, e.g., the Clean Water Act or Clean Air Act. Under CERCLA section 107(j), the costs of responding to federally permitted releases may not be recovered under CERCLA authority.

Fiduciary: As defined by CERCLA section 107(n)(5) a person acting for the benefit of another party, such as a trustee, executor, or custodian. CERCLA section 107(n) limits fiduciary liability.

Final Close-Out Report (FCOR): A report documenting compliance with the statutory requirements of CERCLA and providing a consolidated record of all remedial activities at all of the site's Operable Units.

Five-Year Review: A review of a remedial action to assure that human health and the environment are being protected. CERCLA section 121(c) requires such reviews at least once every five years at each site with a remedial action that results in hazardous substances remaining at the site.

Force Majeure: A term used to describe circumstances or events that are beyond the control of the parties, could not be avoided by the exercise of due care, and therefore excuse non- or untimely performance of the terms of an agreement. *Force majeure* provisions are included in Administrative Orders on Consent and Consent Decrees, and stipulate that the PRPs shall notify EPA of any circumstances or events that may delay or prevent work.

Full Release: An agreement by EPA to release a Potentially Responsible Party from any further liability for response costs or work at a site.

Fund: The Hazardous Substance Superfund established by CERCLA to help pay for cleanup of hazardous waste sites and for legal action against those responsible for the sites. The fund is financed primarily with a tax on crude oil and specified, commercially used chemicals.

Fund-lead: A designation referring to site activities undertaken by EPA with Fund financing.

General Notice Letter (GNL): A notice to inform Potentially Responsible Parties of their potential liability for past and future response costs, the possible future use of CERCLA section 122(e) special notice procedures, and the subsequent moratorium and formal negotiation period.

Generator: As defined by CERCLA section 107(a)(3), 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 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 for 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 rank it should have compared to other sites on the list. A site must score 28.5 or higher to be placed on the NPL.

Indemnification: Reimbursement for or security against loss or damage. Administrative Orders on Consent and Consent Decrees contain indemnification provisions that protect the United States from claims arising from the respondents' acts or omissions in carrying out the agreement.

Independent Government Cost Estimate (IGCE): An estimate of the cost of a proposed action developed independently by the government for use in evaluating contractor-estimated and actual costs to implement the action.

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: The place 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 more than 45 days. Typical community repository locations include public libraries or municipal offices.

Information Request Letter: Formal written request for information authorized by CERCLA sections 104(e)(2)(A) through (C), issued during an administrative investigation.

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.

Institutional Controls: Actions taken to limit future access to or use of a site, including deed restrictions, that are implemented to minimize human exposure to hazardous substances remaining on site and/or impacts of the Remedial Action.

Joint and Several Liability: Liability of each of several parties to satisfy the whole claim. When two or more Potentially Responsible Parties (PRPs) are involved at a site and the harm is indivisible, each PRP may be held individually liable for the cost of the entire response action.

Judicial Review: A court's review of a decision rendered by a federal agency or department, or a court's review of an appeal challenging a finding of fact or law. Under CERCLA, for example, the court provides judicial review prior to entry of a Consent Decree. In addition, a federal Court of Appeals will provide judicial review of an EPA decision upon submission of a petition by a Potentially Responsible Party. The jurisdiction of the court and the scope of its review are defined by CERCLA section 113(h) and the Judicial Review Act, 28 U.S.C. sections 2341-2351.

Land Ban: Provisions of the 1984 Hazardous and Solid Waste Amendments of RCRA and implementing regulations at 40 CFR Part 268 that restrict the land disposal of certain hazardous wastes; formally known as the Land Disposal Restrictions.

Lead Agency: The agency that provides the RPM or OSC who primarily plans and implements cleanup actions. This includes 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.

Mediation: An Alternative Dispute Resolution technique using a neutral party with no decision-making authority to aid the parties in their negotiations.

Minitrial: An Alternative Dispute Resolution technique using 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.

Mixed Funding: Settlements whereby EPA settles with fewer than all Potentially Responsible Parties for less than 100 percent of the response costs. The settlement must provide a substantial portion, greater than 50 percent, 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, cashout, and mixed work.

Mixed Work: A type of mixed funding settlement whereby EPA and the Potentially Responsible Parties (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 pursuant to subsequent settlements or Unilateral Administrative Orders.

Moratorium: The period of time after Special Notice Letters are issued during which EPA may not undertake Remedial Investigation/Feasibility Study or Remedial Action work at the site. EPA also will not seek to compel Potentially Responsible Party action at the site during the moratorium.

National 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 section 311 of the Clean Water Act, as amended by the Oil Pollution Act of 1990, to discharges of oil.

National Priorities List (NPL): The NPL is maintained by EPA and identifies those facilities, sites, or other releases that EPA has determined warrant further evaluation to determine what CERCLA-financed Remedial Action, if any, may be required to protect human health and the environment.

National Remedy Review Board (NRRB): The NRRB reviews proposed Superfund cleanup decisions that meet cost-based review criteria to assure they are consistent with Superfund law, regulations, and guidance.

Natural Resource 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 National Contingency Plan.

Natural Resource Trustees: Federal, state, or tribal officials acting on behalf of the public (or a tribe) as trustees for the management and protection of natural resources as described in Subpart G of the National Contingency Plan, 40 CFR Part 300.600.

Natural Resources: Land, fish, wildlife, air, water, ground water, 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.

Neutral Evaluation: An Alternative Dispute Resolution (ADR) technique using a neutral party to assist a negotiation team in evaluating the potential for settlement and/or use of ADR professionals.

No Further Response Needed: The EPA decision that no further remediation is appropriate for a site determined to meet any of the three criteria identified in the National Contingency Plan section 300.425(e)(1).

Non-Binding Preliminary Allocation of Responsibility (NBAR): An allocation of the total cost of response among Potentially Responsible Parties (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.

Non-Time-Critical Removal: A removal for which the lead agency, based on a site evaluation, determines that there are more than six months of planning time available before on-site activities must begin.

Notice of Deletion (NOD): A notice published in the Federal Register announcing a site's deletion from the National Priorities List.

Notice of Intent for Partial Deletion (NOIPD): A Federal Register notice announcing the intent to delete a portion of a site from the National Priorities List.

Notice of Intent to Delete (NOID): A Federal Register notice announcing the intent to delete a site from the National Priorities List, providing site information, including related cleanup activities, and a 30-day public comment period.

Notice of Partial Deletion (NOPD): A notice published in the Federal Register announcing that a portion of a site has been deleted from the National Priorities List.

Operable Unit (OU): A designation for a portion of a site with defined boundaries and at which site actions are uniquely planned, executed, and tracked.

Operation and Maintenance (O&M): Those activities required for maintaining the effectiveness or integrity of the remedy once it is constructed or installed.

Orphan Share: A portion of cleanup costs that is assigned to insolvent or defunct Potentially Responsible Parties (PRPs) and which may be allocated to viable PRPs under principles of joint and several liability.

Outputs: Quantitative or qualitative measures of important activities, work products, or actions. The National Enforcement and Compliance Assurance Plan groups them under five headings: Enforcement Fairness/ Reduce Transaction Cost, Removal, Cost Recovery, Construction Completions, and Brownfields.

Owner or Operator: As defined by CERCLA section 107(a)(1) and (2), the owner or operator of a vessel or a facility, or any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. It does not include a unit of state or local government that acquired ownership or control involuntarily through bankruptcy, tax delinquency, or abandonment.

Partial Deletion: Deletion of portions of a site from the National Priorities List, including a geographic unit or a specific medium.

Performance Bond: A guarantee given by a contractor that a work assignment will be completed according to its terms and within the agreed time.

Performance Standards: Provisions in Consent Decrees and Administrative Orders specifying levels of performance that site activities must achieve; often incorporated by reference in the Record of Decision. The inclusion of such performance standards enables the Agency to assure measurable levels of cleanup that provide the desired level of protectiveness.

Person: An individual, firm, corporation, association, partnership, joint venture, commercial entity, the United States, or a state, municipality, or 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 that may be liable under CERCLA section 107(a) for CERCLA response costs.

Potentially Responsible Party (PRP)-lead: Designation for EPA-approved site activities undertaken and financed by PRPs.

Preauthorization: A type of mixed funding settlement whereby EPA preauthorizes a claim against the Fund by the Potentially Responsible Parties (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.

Preliminary Site Close-Out Report (PCOR): 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, approval of the work plan, and establishment of institutional controls.

Premium: A sum in addition to the cost of the response action that is paid or agreed to be paid by a Potentially Responsible Party to cover risks associated with a settlement. For example, a premium may be part of an early *de minimis* settlement due to potential inaccuracy of total response cost estimates or remedy failure.

Privileged: Term used to describe documents, communications, and other information that does not have to be disclosed in a legal proceeding, and in some instances is forbidden to be disclosed.

Prospective Purchaser Agreement (PPA): An agreement between EPA and a prospective purchaser of contaminated property. The PPA provides the federal government's promise or covenant not to sue the purchaser to recover the cost of cleaning up contamination that existed at the time of purchase.

Recalcitrant: Term used to describe a Potentially Responsible Party who fails to cooperate with EPA in reaching settlement or fails to comply with a settlement or order.

Record of Decision (ROD): The official Agency Decision Document that describes the remedial cleanup alternatives considered, the selected remedy, and the technical background of the decision, and explains how the decision complies with the law.

Recusal: The voluntary or involuntary disqualification 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 related to the matter under consideration; specifically, he/she cannot see any correspondence or participate in any meeting or negotiations related to the issue.

Regional Support Division (RSD): The division within EPA's Office of Site Remediation Enforcement that is the primary point of contact for EPA regions concerning contemplated civil and administrative enforcement actions in the Superfund, RCRA Corrective Action, Underground Storage Tank, and Oil Pollution Act programs. RSD is responsible for ensuring compliance with and enforcement of applicable EPA remediation statutes and regulations, reviewing civil and administrative cases of national significance, and ensuring consistency of individual cases with established EPA policies.

Remand: Return of a case to either a lower court or an administrative agency for further action.

Reopeners: Contractual provisions that preserve the Agency's right to compel Potentially Responsible Parties to undertake additional response actions or to pay costs for Agency response actions in addition to those agreed to in the settlement. Reopeners 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. Reopeners restrict the covenant not to sue by defining the conditions under which the settlement may be re-examined.

Responsiveness Summary: Detailed responses to each significant comment that is received during a public comment period.

"Sacred clauses": An expression used to describe language in a model document from which a settlement may deviate only with the concurrence of the Office of Enforcement and Compliance Assurance.

Superfund Comprehensive Accomplishment Plan (SCAP) Projection Measure: A regional estimate of what it will accomplish during a reporting period; used to establish numerical goals prior to a fiscal year.

Superfund Comprehensive Accomplishment Plan (SCAP) Reporting Measure: An actual accomplishment of a site activity that is important in monitoring overall program progress.

Superfund Comprehensive Accomplishment Plan (SCAP) Targeted Measure: A pre-determined, quarterly or annual, numerical goal that is established prior to the fiscal year in which the designated activities will take place.

Secured Creditor Exemption: An exemption from liability set forth in CERCLA sections 101(20)(A), (E), and (F) that applies to lenders (e.g., banks) that, without participating in the management of the facility, hold indicia of ownership in a facility in order to protect a security interest (e.g., a mortgage).

Settlement: The resolution of a claim. Settlement occurs when the federal and/or state agency has a written agreement regarding the payment and conduct of specified response actions. Settlements may be achieved administratively through an Administrative Order on Consent or judicially through a Consent Decree.

Settlement Judge: An Alternative Dispute Resolution technique using a judge other than the one hearing the case to act as mediator of the parties' settlement discussions. A settlement judge usually gives his/her opinion as to the probable outcome of the case.

Severability: Provision in an Administrative Order that the respondent must comply with all other provisions of the order should a court invalidate a particular provision.

Site Completion: Completion of all response actions at an NPL site as documented in a Final Close-Out Report.

Site Deletion: Removal of a site from the NPL when no further response is needed to protect public health or the environment.

Special Account: A site-specific account that may be established under the authority of CERCLA section 122(b)(3) to hold the future costs component of a cashout settlement to fund future response actions at the site.

Special Master: A court-appointed official 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, in cases requiring the interpretation of complicated technical data or voluminous amounts of information.

Special Notice Letter (SNL): A written notice to a PRP providing information on potential liability, conditions of the negotiation moratorium, future response actions, and a demand for past costs. The SNL is authorized under CERCLA section 122(e)(1) and triggers the start of a negotiation moratorium.

Statute of Limitations (SOL): The statutorily defined period of time within which the United States, on behalf of EPA, must file a claim for cost recovery. If a claim is not filed within the SOL, the United States will forfeit its right to recover its costs.

Statutory Penalties: Penalties authorized by a statute. For example, under CERCLA, if Potentially Responsible Parties do not comply with an Administrative Order, they may be sued for statutory penalties of up to $27,500 per day under section 106(b)(1) of CERCLA as modified pursuant to EPA's Civil Monetary Penalty Inflation Adjustment Rule.

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 Consent Decree.

Strict Liability: Legal responsibility for damages without regard to fault or diligence. The strict liability standard in CERCLA means that the federal government can hold Potentially Liable Parties liable without regard to their fault, diligence, negligence, or motive.

Subject Matter Expert: Someone who is versed in a specialized area of enforcement, such as Remedial Design/ Remedial Action settlement tools, and is available as a resource to those involved in the enforcement process.

Summary Judgment: Judgment rendered before trial in a civil case because the court finds that there is no genuine issue before it.

Takings: Governmental acts that convert private property to public property. Takings may arise from acts of permanent physical occupancy or from regulation that prevents the owner from making any economically viable use of the property. The occupancy or regulatory action need not be permanent to be considered a taking. The Fifth and Fourteenth Amendments of the U.S. Constitution bar the taking of private property by federal or state governments without just compensation. Under CERCLA, takings issues have arisen in connection with occupancy of property by EPA for the purpose of conducting response actions.

Technical Assistance Grant (TAG): A grant of up to $50,000 to enable citizens to hire independent technical advisors to help them understand information related to cleanup of a specific Superfund site.

Technical Impracticability Waiver: Waiver of an Applicable or Relevant and Appropriate Requirement (ARAR) available under NCP section 300.430(f)(1)(ii)(C)(3) on the ground that compliance with the ARAR is technically impracticable from an engineering perspective.

Time-Critical Removal: A removal for which the lead agency determines, based on a site evaluation, that there are fewer than six months of planning time available before on-site activities must begin.

Tolling Agreement: An agreement between EPA and Potentially Responsible Parties to delay the running of the Statute of Limitations for cost recovery actions.

Transporter: As defined by CERCLA section 107(a)(4), 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 a threatened release which causes the incurrence of response costs, of a hazardous substance.

Treble Damages: Sum at least equal to but not more than three times the amount of site response costs. Under CERCLA section 107(c)(3), if EPA conducts a cleanup as a result of the Potentially Responsible Parties' non-compliance with an Administrative Order, damages may be assessed in the maximum amount of three times the amount of the response costs. Damages may be assessed in addition to recovery of response costs.

Unilateral Administrative Order (UAO): An order issued by EPA, authorized by CERCLA section 106, requiring the Potentially Responsible Parties 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.

Volumetric Ranking: Method of ranking Potentially Responsible Parties' responsibility for cleanup effort according to the amount of waste they contributed to a site.

WasteLAN: The regional computer interface with the CERCLIS 3 database.

On line Information
Sources

On-Line Information Sources

The following sources offer access to a wealth of EPA Superfund enforcement, technical program, and related information. Most of the sources offer direct access to documents and other resources that can be down-loaded and printed, as well as links to related pages, references, and points of contact. Others, such as NTIS, offer the opportunity to locate and order documents. Also included are sources of information regarding other federal departments' hazardous waste site cleanup programs.

1) **EPA Intranet** - These pages are accessible only by EPA employees using EPA computers (and by a limited number of EPA contractors who support Intranet operations). EPA Agency-wide Intranet, called "EPA@Work" is intranet.epa.gov. EPA Headquarters Intranet, which carries information pertaining only to Headquarters, is intranet.epa.gov/hqintran.

   OERR Work Net - From the page itself, "This is OERR's private (Intranet) area on the world wide web. Work Net is the place where Superfund and Oil personnel can share information and news, comment on draft documents and proposals, keep up-to-date on OERR workgroups, find out about training opportunities, and altogether keep each other better informed about the happenings in this ever-changing program."

2) **EPA Public Web Pages** - These pages have been created by EPA for public use and are maintained through the EPA website.

   - **EPA Homepage** - This homepage is the starting point for all EPA programs, offices, issues, etc. with additional links to useful non-EPA resources.
     — http://www.epa.gov
   - **EPA OECA Homepage** - This homepage is the starting point for the EPA Office of Enforcement and Compliance Assurance and contains links to EPA programs, offices, and issues related to EPA's multi-media enforcement and compliance programs.
     — http://www.epa.gov/oeca
   - **EPA OSRE Homepage** - The Office of Site Remediation Enforcement homepage provides information regarding EPA's CERCLA enforcement program organization, responsibilities, and initiatives as well as numerous links to other pages of interest to the Superfund enforcement community.
     — http://www.epa.gov/oeca/osre.html
   - **EPA OSRE Documents** - Available as a Link from the OSRE homepage, this page offers online access of OSRE documents.
     — http://www.epa.gov/oeca/osre/osredoc.html
   - **EPA OSWER Homepage** - The EPA Office of Solid Waste and Emergency Response homepage provides extensive information on EPA's solid and hazardous waste program organization, operation, initiatives, and activities.
     — http://www.epa.gov/swerrims/
   - **EPA Superfund Homepage** - The homepage for EPA's Superfund program includes the "Superfund Hazardous Waste Site Advanced Query Form," a useful tool for obtaining site information.
     — http://www.epa.gov/superfund
   - **EPA RCRA Homepage** - This is the homepage for EPA's RCRA Program.
     — http://www.epa.gov/rcraonline
   - **EPA Envirofacts** - This site provides access to a national information system for a single point of access to data extracted from seven major EPA databases.
     — http://www.epa.gov/enviro

- **Clu-In** - Run by the EPA Technology Innovation Office, this site provides information on innovative treatment technology to the hazardous waste remediation community.
  — http://www.clu-in.com

3) **EPA Hotlines**

- **EPA RCRA, Superfund & EPCRA Hotline** - The hotline offers easy point-of-access for site and program information.
  — (800)424-9346
  — http://www.epa.gov/epaoswer/hotline

4) **Other Federal Departments**

Department of Defense - Environmental Cleanup Office Web Page - This web page of the DoD's Office of Environmental Cleanup, which is charged with developing policy and overseeing the Defense Environmental restoration Program (DERP).
— http://www.dtic.mil/envirodod/about.html

- **Department of Defense** - Environmental Network and Information Exchange - DENIX provides access to environmental legislative, compliance, restoration, cleanup, safety & occupational health, security, and DoD guidance information regarding DoD environmental programs.
  — http://www.denix.osd.mil/
- **Department of Energy** - Environmental Management - The web page of the DOE Office of Environmental Management (EM) provides information regarding the DOE's program to consolidate, centralize, and promote cleanup of contaminated waste sites and surplus facilities within the DOE Complex.
  — http://www.em.doe.gov/
- **Department of Justice** - Environment and Natural Resources Division - This web page provides access to information and resources regarding the Division's responsibilities including prosecution of criminal environmental cases, defense of EPA's rulemakings and administrative actions against challenge, and enforcement of the nation's environmental laws.
  — http://www.usdoj.gov/enrd/enrd-home.html

5) **Federal Regulations, Statutes, and Summaries**

- ***Federal Register*** - Database for the 1995, 1996, 1997 and 1998 Federal Register.
  — http://www.gpo.gov/su_docs/aces/aces140.html
- **Code of Federal Regulations (CFR)** - Database for the CFR.
  — http://www.access.gpo.gov/nara/cfr/index.html
- **Summaries of Environmental Laws Administered by EPA** - Summaries of the 12 major statutes that form the legal basis for EPA programs can be found on this site.
  — http://www.cnie.org/nle/leg-8.html

6) **Other Resources**

- **Superfund Document Search** - Users can search for Superfund-related documents by Number (EPA, OSWER, NTIS) or by Keyword.
  — http://superfund.fedworld.gov/search.html
- **National Technical Information Service (NTIS)** - Users can search for and order Agency documents and publications.
  — http://www.ntis.gov

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