Appendix A

INTERIM GUIDANCE ON PRP PARTICIPATION IN THE RI/FS PROCESS*

I. INTRODUCTION

This memorandum sets forth the policy and procedures governing the participation of potentially responsible parties (PRPs) in the development of remedial investigations (RI) and feasibility studies (FS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986. This memorandum discusses:

- o The initiation of enforcement activities including PRP searches and PRP notification;
- o The circumstances in which PRPs may conduct the RI/FS;
- o The development of enforceable agreements governing PRP RI/FS activities;
- o Initiation of PRP RI/FS activities and oversight of the RI/FS by EPA;
- o EPA control over PRP RI/FS activities; and
- o PRP participation in Agency-financed RI/FS activities.

More detailed information regarding each of the above topics is included in Attachments 1-4 of this appendix.

This document is consistent with CERCLA and EPA guidance in effect as of October 1988, and is intended to supersede the March 20, 1984 memorandum from Assistant Administrators Lee M. Thomas and Courtney M. Price entitled "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies Under CERCLA" (OSWER Directive No. 9835.1). Users of this guidance should consult the RI/FS Guidance or any relevant guidance or policies issued after distribution of this document before establishing EPA/PRP responsibilities for conducting RI/FS activities. Additional guidance regarding procedures for EPA oversight activities will be available in the Office of Waste Program Enforcement's (OWPE) forthcoming "Guidance Manual on

*This memorandum was signed by the AA OSWER and released for distribution on May 16, 1988. Technical clarifications/updates have been made to this guidance for insertion into Appendix A of the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies" (October 1988-OSWER Directive No. 9355.3-01) (Referred to herein as the RI/FS Guidance).

Oversight of Potentially Responsible Party Remedial Investigation and Feasibility Studies".

II. BACKGROUND

Sections 104/122 of CERCLA provide PRPs with the opportunity to conduct the RI/FS when EPA determines (1) that the PRPs are qualified to conduct such activities and (2) they will carry out the activities in accordance with CERCLA requirements and EPA procedures.[1] The Agency will continue its policy of early and timely PRP searches as well as early PRP notification and negotiation for RI/FS activities.

It is also the policy of EPA to encourage the early and active participation of PRPs in conducting RI/FS activities. EPA believes that early participation of PRPs in the remedial process will encourage PRP implementation of the selected remedy. PRP participation in RI/FS activities will ensure that they have a better and more complete understanding of the selected remedy, and thus will be more likely to agree on implementation of the remedy. Remedial activities performed by PRPs will also conserve Fund monies, thus making additional resources available to address other sites.

As part of the Agency's effort to encourage PRP participation in remedial activities, EPA will consider the PRPs' role in conducting RI/FS activities when assessing an overall settlement proposal for the remedial design and remedial action. For example, when the Agency performs a non-binding allocation of responsibility (NBAR), the Agency may consider previous PRP efforts and cooperation. This will provide an additional incentive for PRPs to be cooperative in conducting RI/FS activities.

Although EPA encourages PRP participation in conducting the RI/FS, the Agency and CERCLA impose certain conditions governing their participation. These conditions are intended to assure that the RI/FS performed by the PRPs is consistent with Federal requirements and that there is adequate oversight of those activities. These conditions are discussed both in Section III and Attachment I of this memorandum.

At the discretion of EPA, a PRP (or group of PRPs) may assume full responsibility for undertaking RI/FS activities pursuant to Sections 104/122 of CERCLA. The terms and conditions governing the RI/FS activities should be specified in an Administrative Order. The use of Administrative Orders is authorized in CERCLA Section 122(d)(3); they are the preferred type of agreement for RI/FS activities since they are authorized internally and therefore, may be negotiated more quickly

---

[1] The legal authority to enter into agreements with PRPs is found in CERCLA Section 122(a). This section then refers to response actions conducted pursuant to Section 104(b). For the purposes of this guidance, Sections 104/122 will be cited when referring to such authority.

than Consent Decrees. Before SARA, Administrative Orders were signed using the authorities of Section 106 of CERCLA. New provisions in SARA allow for Orders to be signed using the authorities of Sections 104/122; Section 104/122 Orders do not require EPA to make a finding of imminent and substantial endangerment.

RI/FS activities developed subsequent to the Administrative Order are set forth in a Statement of Work, which is then embodied or incorporated by reference into the Order. A Work Plan describing detailed procedures and criteria by which the RI/FS will be performed is developed by the PRPs and, after approval by EPA, should also be incorporated by reference into the Administrative Order.

It is the responsibility of the lead agency to ensure the quality of the effort if the PRPs assume responsibility for conducting the RI/FS. Therefore, EPA will establish oversight procedures and project controls to ensure that the response actions are consistent with CERCLA and the National Contingency Plan (NCP). Section 104(a)(1) of CERCLA mandates that no PRP be allowed to undertake an RI/FS unless EPA determines that the party(ies) conducting the RI/FS is qualified to do so. In addition, Section 104(a)(1) requires that a qualified party be contracted with or arranged for to assist in overseeing and reviewing the conduct of the RI/FS and, that the PRPs agree to reimburse EPA for the costs associated with the oversight contract or arrangement.

III. INITIATION OF ENFORCEMENT ACTIVITIES

As part of effective management of enforcement activities, timely settlements for RI/FS activities are to be pursued. This includes conducting PRP searches early in the site discovery process and subsequent notification to all PRPs of their potential liability and of their opportunity to perform response activities. Guidance on conducting timely and effective PRP searches is contained in the guidance manual, "Potentially Responsible Party Search Manual" (August 17, 1987 - OSWER Directive No. 9834.6).

EPA policy has been to notify PRPs of their potential liability for the planned response activities, to exchange information about the site, and to provide PRPs with an opportunity to undertake or finance the response activities themselves. In the past this has been accomplished by issuing a "general notice" letter to the PRPs. In addition to the use of the general notice letter, Section 122(e) of CERCLA now authorizes EPA to use "special notice" procedures, which for an RI/FS, establish a 60 to 90 day moratorium and formal negotiation period. The purpose of the moratorium is to provide time for formal negotiation between EPA and the PRPs for conduct of RI/FS activities. In particular, use of the special notice procedures triggers a 60 day moratorium on EPA conduct of the RI/FS. During the 60 day moratorium, if the PRPs provide EPA with a "good faith offer" to conduct or finance the RI/FS, the negotiation period can be extended to a total of 90 days. EPA considers a good faith offer to be a written proposal where the PRPs make a showing of their qualifications and willingness to conduct or finance the RI/FS. Minor deficiencies in the PRPs' initial submittals should not be grounds for a

determination that the offer is not a good faith offer or that the PRPs are unable to perform the RI/FS.

To facilitate, among other things, PRP participation in the RI/FS process, Section 122(e)(1) requires the special notice letter to provide the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of substances at the site, to the extent this information is available at the time of special notice. Regions are encouraged to release this information to PRPs when the notice letters are issued. To expedite settlements, Regions are also encouraged to give PRPs as much guidance as possible concerning the RI/FS process. It is appropriate to transmit to PRPs copies of important guidance documents such as the RI/FS Guidance, as well as model Administrative Orders and Statements of Work. A model Administrative Order can be found in the memorandum from Gene Lucero entitled, "Model CERCLA Section 106 Consent Order for an RI/FS" (January 31, 1985 - OSWER Directive No. 9835.5). This model order is currently being revised to reflect SARA requirements and will be forthcoming. A model Statement of Work has been included as Appendix C to the RI/FS Guidance, while a model Statement of Work for PRP-lead RI/FSs is currently being developed by OWPE. Other Regional and Headquarters guidance relating to technical issues may be given to PRPs, as well as examples of project plans (plans that must be developed prior to the conduct of the RI/FS) that are of high quality. A description of the required project plans is included in Attachment II.

Although use of the special notice procedures is discretionary, Regions are encouraged to use these procedures in the majority of cases. If EPA decides not to employ the special notice procedures described in Section 122(e), the Agency will notify the PRPs in writing of such a decision, including an explanation as to why EPA believes the use of the special notice procedures is inappropriate. Additional information on the content of special notice letters, including the use of these notice provisions, can be found in the memorandum entitled "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987 - OSWER Directive No. 9834.10).

Section 121(f)(1) requires that the State be notified of PRP negotiations and that an opportunity for State participation in such negotiations be provided. In addition, Section 122(j)(1) requires that if a release or threat of release at the site in question may have resulted in damages to natural resources, EPA must notify the appropriate Federal or State Trustee and provide an opportunity for the Trustee to participate in the negotiations. To simplify the notification of Federal Trustees, the Agency intends to provide a list of projects in the Superfund Comprehensive Accomplishments Plan (SCAP) to the Trustees as notice to participate in the negotiations. In those cases where there is reason to believe that a significant natural resource will be affected, direct coordination with the Federal and/or State Trustee will be required.

IV. CONDITIONS FOR EPA INVOLVEMENT IN, AND PRP INITIATION OF, RI/FS ACTIVITIES

Under Section 104(a)(1) EPA may authorize PRPs to conduct RI/FS activities at any site, provided the PRPs can do so promptly and properly and can meet the conditions specified by EPA for conducting the RI/FS. These conditions are discussed in Attachment I of this appendix and involve the scope of activities, the organization of the PRPs, and the PRPs' (and their contractors') demonstrated expertise. EPA encourages PRPs to conduct the RI/FS provided that the PRPs commit in an Order (or Consent Decree) under CERCLA Sections 104/122 (or Sections 106/122 for a Decree) to conduct a complete RI/FS to the satisfaction of EPA, under EPA oversight.[2] Oversight of RI/FS activities by the lead agency is required by Section 104(a)(1) and is intended to assure that the RI/FS is adequate for lead agency identification of an appropriate remedy, and that it will otherwise meet the Agency requirements of CERCLA, the NCP, and relevant Agency guidance. EPA will allow PRPs to conduct RI/FS activities and will provide review and oversight under the following general circumstances.

EPA's priority is to address those NPL sites that have been identified on the SCAP. The SCAP is an EPA management plan which identifies site- and activity-specific Superfund financial allocations for each quarter of the current fiscal year. When employing Section 122(e) notice procedures, EPA will notify PRPs of its intention to conduct RI/FS activities at NPL sites in a manner that allows at least 90 days notice before obligating the funds necessary to complete the RI/FS (see Section III of this guidance). During this time frame PRPs may elect to conduct the RI/FS, under the review and oversight of EPA. If the PRPs agree to conduct the RI/FS they must meet the conditions discussed in Attachment I. The scope and terms for conducting the studies are embodied in an Agreement; as mentioned in Section II, Administrative Orders are the preferred type of Agreement for RI/FS activities.

EPA will not engage in lengthy discussions with PRPs over whether the PRPs will conduct the RI/FS; rather, EPA will adhere to the time frames established by the Section 122 special notice provisions. In most instances, once Fund resources have been obligated to conduct the RI/FS, the PRPs will no longer be eligible to conduct the RI/FS activities at the site.

The actions described below are typically taken to initiate RI/FS activities:

- EPA develops a site-specific Statement of Work (SOW) in advance of the scheduled RI/FS start. This SOW is then provided to the PRPs along with a draft of the Administrative Order (or

---

[2] For a State-lead enforcement site the State is responsible for oversight unless otherwise specified in the agreement between the State and EPA. EPA should maintain communication with the State to ensure that the State is providing oversight of the remedial activities.

Consent Decree) at the initiation of negotiations. (PRPs may, with EPA approval, submit a single site plan that incorporates the elements of an SOW and a detailed Work Plan as a first deliverable once the Agreement has been signed. This combined site plan must clearly set forth the scope of the proposed RI/FS and would be incorporated into the Agreement in place of the SOW.)

- o Final provisions of the SOW are negotiated with the Order.
- o EPA determines whether the PRPs possess the necessary capabilities to conduct an RI/FS in a timely and effective manner (conducted simultaneously with other negotiations).
- o EPA develops a Community Relations Plan specifying any activities that may be required of the PRPs. (Community relations activities are discussed in Attachment II.)
- o EPA determines contractor and staff resources required for oversight and initiates planning the necessary oversight requirements. This process may include preparing a Statement of Work, if a contractor is to develop an "oversight plan."
- o EPA and PRPs identify and procure any necessary assistance.
- o PRPs submit a Work Plan to EPA for Agency review and approval. The Work Plan must present the methodology and rationale for conducting the RI/FS as well as detailed procedures and requirements, if such procedures have not been set forth in the Agreement. This Work Plan, which in most instances is one of the first deliverables under the Order, is commonly incorporated into the Agreement following EPA approval.
- o PRPs are responsible for obtaining access to the site; however, if access cannot be obtained, EPA, with the assistance of DOJ, will secure access subject to PRP reimbursement for the costs incurred in securing such access.

These standardized actions ensure that the scope of the RI/FS activities to be conducted by the PRPs, and the procedures by which the RI/FS is performed, are consistent with EPA policy and guidance. Additional actions may be required either for a technically complex site or for a site where a number of PRPs are involved. Regardless of the circumstances, the actions listed in this section should be negotiated as expeditiously as possible. Specific elements of these actions are discussed in Attachment II.

V. DEVELOPMENT OF THE RI/FS ADMINISTRATIVE ORDER OR CONSENT DECREE

The PRPs must respond to EPA's notice letter by either declining, within the time specified, to participate in the RI/FS, or by offering a good faith proposal to EPA for performing the RI/FS. Declining to participate in the RI/FS may be implied if the PRPs do not negotiate during

the moratorium established by the notice letter. If the PRPs have declined to participate, or the time specified has lapsed, EPA will obligate funds for performing the RI/FS. If a good faith proposal is submitted, EPA will negotiate with the PRPs on the scope and terms for conducting the RI/FS.

The results of successful negotiations will, in most cases, be contained in an Administrative Order, or where the site is in litigation, in a Judicial Consent Decree entered into pursuant to Section 122(d) of CERCLA. Guidance for the development of an Administrative Order is provided in OWPE's document "Administrative Order: Workshop and Guidance Materials" (September 1984), and in the memorandum from Gene Lucero entitled "Model CERCLA Section 106 Consent Order for an RI/FS" (January 31, 1985). (The latter guidance is currently being revised since the provisions in SARA allow for Orders to be signed using the authorities of Sections 104/122.)

An Administrative Order (or Consent Decree) will generally contain the scope of activities to be performed (either as a Statement of Work or Work Plan), the oversight roles and responsibilities, and enforcement options that may be exercised in the event of noncompliance (such as stipulated penalties). In addition to the above, the Agreement will typically include the following elements, as agreed upon by EPA, the PRPs, and other signatories to the Agreement.

- o Jurisdiction - Describes EPA's authority to enter into Administrative Orders or Consent Decrees.

- o Parties bound - Describes to whom the Agreement applies and is binding upon.

- o Purpose - Describes the purpose of the Agreement in terms of mutual objectives and public benefit.

- o Findings of fact, determination, and conclusions of law - Provides an outline of facts upon which the Agreement is based, including the fact that PRPs are not subject to a lesser standard of liability and will not receive preferential treatment from the Agency in conducting the RI/FS.

- o Notice to the State - Verifies that the State has been notified of pending site activities.

- o Work to be performed - Provides that PRPs submit project plans to the lead-agency for review and approval before commencing RI/FS activities. Project plans are those plans developed in order to effectively conduct the RI/FS project and include: a Work Plan, describing the methodology, rationale, and schedule of all tasks to be performed during the RI/FS; a Sampling and Analysis Plan, describing the field sampling procedures to be performed as well as the quality assurance procedures which will be followed for sampling and analysis (including a description of how the data gathered during the RI/FS will be

managed) and the analytical procedures to be employed; and a Health and Safety Plan describing health and safety precautions to be exercised while onsite. (More information on the contents of these project plans can be found in Attachment II of this appendix.)

- Compliance with CERCLA, the NCP, and Relevant Agency Guidance - Specifies that the actions at a site will comply with the requirements of CERCLA, the NCP, and relevant Agency guidance determined to be appropriate for site remediation.

- Reimbursement of costs - Specifies that PRPs will assume all costs of performing the work required by the Agreement. In addition, this section commits PRPs to reimbursement of costs associated with oversight activities. This includes reimbursement for qualified party assistance in oversight, as required by Section 104(a)(1). This section should also specify the nature and kind of cost documentation to be provided and the process for billing and receiving payment.

- Reporting - Specifies the type and frequency of reporting that PRPs must provide to EPA. Normally the reporting requirements will, at a minimum, include the required project plans as well as those deliverables required by the RI/FS Guidance. Additional reporting requirements are left to the discretion of the Regions. That is, Regions may require additional deliverables such as interim reports on particular RI or FS activities.

- Designated EPA, State, and PRP project coordinators - Specifies that EPA, the State, and PRPs shall each designate a project coordinator.

- Site access and data availability - Stipulates that PRPs shall allow access to the site by EPA, the State, and oversight personnel. Access will be provided for inspection and monitoring purposes that in any way pertain to the work undertaken pursuant to the Order. In addition, access will be provided in the event of project takeover. This section also stipulates that EPA will be provided with all currently available data.

- Record preservation - Specifies that all records must be maintained by both parties for a minimum of 6 years after termination of the Agreement, followed by a provision requiring PRPs to offer the site records to EPA before destruction.

- Administrative record requirements - Provides that all information upon which the selection of remedy is based must be submitted to EPA in fulfillment of the administrative record requirements pursuant to Section 113 of CERCLA. (Additional information on administrative record requirements is contained in Attachment III.)

- Dispute resolution - Specifies steps to be taken if a dispute occurs. The Administrative Order states that with respect to all submittals and work performed, EPA will be the final arbiter, while the court is the final arbiter for a Consent Decree. (More information on dispute resolution can be found in Attachment IV of this appendix.)

- Delay in performance/stipulated penalties - Specifies EPA's authority to invoke stipulated penalties for noncompliance with Order or Decree provisions. Section 121 of CERCLA requires that Consent Decrees contain provisions for penalties in an amount not to exceed $25,000 per day. In addition to stipulated penalties, Section 122(l) provides that Section 109 civil penalties apply for violations of Administrative Orders and Consent Decrees. Delays that endanger public health and/or the environment may result in termination of the Agreement and EPA takeover of the RI/FS. (More information on stipulated penalties can be found in the Office of Enforcement and Compliance Monitoring's (OECM) "Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees" (September 21, 1987) and in Attachment IV of this appendix.)

- Financial assurance - Specifies that PRPs should have adequate financial resources or insurance coverage to address liabilities resulting from their RI/FS activities. When using contractors, PRPs should certify that the contractors have adequate insurance coverage or that contractor liabilities are indemnified.

- Reservation of rights - States that PRPs are not released from all CERCLA liability through compliance with the Agreement, or completion of the RI/FS. PRPs may be released from liability relating directly to RI/FS requirements, if PRPs complete the RI/FS activities to the satisfaction of EPA.

- Other claims - Provides that nothing in the Agreement shall constitute a release from any claim or liability other than, perhaps, for the cost of the RI/FS, if completed to EPA satisfaction. Also provides that nothing in the Agreement shall constitute preauthorization of a claim against the Fund under CERCLA. This section should also specify the conditions for indemnification of the U.S. Government.

- Subsequent modifications/additional work - Specifies that the PRPs are committed to perform any additional work or subsequent modifications which are not explicitly stated in the Work Plan, if EPA determines that such work is needed to enable the selection of an appropriate response action. (Attachment IV contains additional information on this clause.)

VI. STATEMENT OF WORK AND WORK PLAN

Based upon available models and guidance, the Region should present to the PRPs at the initiation of negotiations a Statement of Work (SOW) and draft Administrative Order. The SOW describes the broad objectives and general activities to be undertaken in the RI/FS. (The PRPs may develop the SOW if it is determined to be appropriate for a particular case.) Once the PRPs receive the SOW they develop a more detailed Work Plan, which should be incorporated by reference into the Order following EPA approval. The Work Plan expands the tasks described in the SOW and presents the rational and methodology (including detailed procedures and schedules) for conducting the RI/FS. It should be noted that EPA, rather than the PRPs, may develop the work plan in the event of unusual circumstances.

VII. REVIEW AND OVERSIGHT OF THE RI/FS

To ensure that the RI/FS conforms to the NCP and the requirements of CERCLA, including Sections 104(a)(1) and 121, EPA will review and oversee PRP activities. Oversight is also required to ensure that the RI/FS will result in sufficient information to allow for remedy selection by the lead agency.

The oversight activities that EPA, the State, and other oversight personnel will be performing should be determined prior to the initiation of the RI/FS. Different mechanisms will be used for the review and oversight of different PRP products and activities. These mechanisms, and corresponding PRP activities, should be determined and if possible incorporated in the Order. Generally, the following oversight activities should be specified:

- Review of plans, reports, and records;
- Oversight of field activities (including maintenance of records and documentation);
- Meetings; and
- Special studies.

Section 104(a)(1) requires that the President contract with or arrange for a "qualified person" to assist in the oversight and review of the conduct of the RI/FS. EPA believes that qualified persons, for the purposes of overseeing RI/FS activities, are those firms or individuals with the professional qualifications, expertise, and experience necessary to provide assurance that the Agency is conducting meaningful and effective oversight of PRP activities. In this context, the qualified person generally will be either an ARCs, TES, or REM contractor. EPA employees, employees of other Federal agencies, State employees, or any other qualified person EPA determines to be appropriate however, may be asked to perform the necessary oversight functions.

As part of the Section 104 requirements, PRPs are required to reimburse EPA for qualified party oversight costs. It is Agency policy to recover all response costs at a site including all costs associated with oversight. Additional guidance on oversight and project control activities is presented in Attachments III and IV, respectively.

VIII. CONTROL OF ACTIVITIES

EPA will usually not intervene in a PRP RI/FS if activities are conducted in conformance with the conditions and terms specified by the Order. When deficiencies are detected, EPA will take immediate steps to correct the PRP activities. Deficiencies will be corrected through the use of the following activities: (1) identification of the deficiency; (2) demand for corrective measures; (3) use of dispute resolution mechanisms, where appropriate; (4) imposition of penalties; and if necessary, (5) PRP RI/FS termination and project takeover or judicial enforcement. These activities are described in detail in Attachment IV of this appendix.

IX. PRP PARTICIPATION IN AGENCY-FINANCED RI/FS ACTIVITIES

PRPs that elect not to perform the RI/FS should be allowed an opportunity for involvement in a Fund-financed RI/FS. Private parties may possess technical expertise or knowledge about a site which would be useful in developing a sound RI/FS. Involvement by PRPs in the development of a Fund-financed RI/FS may also expedite remediation by identifying and satisfactorily resolving differences between the Agency and private parties.

Section 113(k)(2)(B) requires that interested persons, including PRPs, be provided an opportunity for participation in the development of the administrative record. PRP participation may include the submittal of information, relevant to the selection of remedy, for inclusion in the record and/or the review of record contents and submittal of comments on such contents.

The extent of additional PRP involvement will be left to the discretion of the Region and may include activities such as:

- Access to the site to observe sampling and analysis activities;
- Access to validated data and draft reports.

With respect to PRP access to a site, it is within the Regions' discretion to impose conditions based on safety and other relevant considerations. To the extent that the Region determines that access is appropriate under the circumstances, PRPs must reimburse EPA for all identifiable costs incurred with the connection of the accesses afforded the PRPs, and must execute appropriate releases in favor of the EPA and its contractors. With respect to providing data, it should be noted that the Region is required to allow private citizens access to the same

information that is provided to the PRPs. The Regions must therefore take this into consideration when determining the extent of the PRP's involvement in a Fund-financed RI/FS.

Aside from participation in the administrative record, which is a statutory requirement, the final decision whether to permit PRPs to participate in other aspects of the Fund-financed RI/FS (as well as the scope of any participation) rests with the Regions. This decision should be based on the ability of PRPs to organize themselves so that they can participate as a single entity, and the ability of PRPs to participate without undue interference with or delay in completion of the RI/FS, and other factors that the Regions determine are relevant. The Region may terminate PRP participation in RI/FS development if unnecessary expenses or delays occur.

X. CONTACT

For further information on the subject matter discussed in this interim guidance, please contact Susan Cange (FTS 475-9805) of the Guidance and Oversight Branch, Office of Waste Program Enforcement.

ATTACHMENT I

CONDITIONS FOR PRP CONDUCT OF THE RI/FS

Organization and Management

When several potentially responsible parties are involved at a site they must be able to organize themselves quickly into a single representative body to negotiate with EPA. To facilitate this negotiation process, EPA will make available the names and addresses of other PRPs, in accordance with the settlement provisions of CERCLA Section 122(e). Either a single PRP or an organized group of PRPs may assume responsibility for development of the RI/FS.

Scope of Activities

As part of the negotiation process PRPs must agree to follow the site-specific Statement of Work (SOW) as the basis for conducting an RI/FS. PRPs are required to submit an RI/FS Work Plan setting forth detailed procedures and tasks necessary to accomplish the RI/FS activities described in the SOW. EPA may approve reasonable modifications to the SOW and will reject any requests for modifications that are not consistent with CERCLA (as amended by SARA), the NCP, the requirements set forth in this guidance document, the RI/FS Guidance, or other relevant CERCLA guidance documents.

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, and any amendments that may be reasonably anticipated to that document. In addition, PRPs 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. PRPs must also demonstrate that they possess the financial capability to conduct and complete the RI/FS in a timely and effective manner. These capabilities are discussed briefly below.

- Demonstrated Technical Capability

PRPs should be required to demonstrate the technical capabilities of key personnel involved in executing the project. Personnel qualifications may be demonstrated by submitting resumes and references. PRPs may demonstrate the capabilities of the firm that will perform the work by outlining their past areas of business, relevant projects and experience, and overall familiarity with the types of activities to be performed as part of the remedial investigation and feasibility study.

It is important that qualified firms be retained for performing RI/FS activities. Firms that do not have the necessary expertise for performing RI/FS studies may create unnecessary delays in the project

and may create situations which further endanger public health or the environment. These situations may be created when PRP contractors submit insufficient project plans, submit deficient reports, or perform inadequate field work. Furthermore, excessive Agency oversight may be required in the event that an unqualified contractor performs the RI/FS; the Agency may have to significantly increase its workload by providing repeated reviews of project plans, reports, and oversight of field activities.

The PRPs must also demonstrate the technical capabilities of the laboratory chosen to do the analysis of samples collected during the RI/FS. If a non-CLP laboratory is selected, EPA may require a submission from the laboratory which provides a comprehensive statement of the laboratories' personnel qualifications, equipment specifications, security measures, and any other material necessary to prove the laboratory is qualified to conduct the work.

o Demonstrated Management Capability

PRPs must demonstrate that they have the administrative capabilities necessary for conducting the RI/FS in a responsible and timely manner. A management plan should be submitted to EPA either during negotiations or as a part of the Work Plan which includes a discussion of roles and responsibilities of key personnel. This management plan should include an RI/FS team organization chart describing responsibilities and lines of authority. Positions and responsibilities should be clearly related to technical and managerial qualifications. The PRPs should also demonstrate an understanding of effective communications, information management, quality assurance, and quality control systems. PRPs usually procure the services of consultants to conduct the required RI/FS activities. The consultants must demonstrate, in addition to those requirements stated above, effective contract management capabilities.

o Demonstrated Financial Capability

The PRPs should develop a comprehensive and reasonable estimate of the total cost of anticipated RI/FS activities. EPA will decide on a case-by-case basis if the PRPs will be required to demonstrate that they have the necessary financial resources available and committed to conduct the RI/FS activities. The resources estimated should be adequate to cover the anticipated costs for the RI/FS as well as the costs for oversight, plus a margin for unexpected expenses. If, during the conduct of the RI/FS the net worth of the financial mechanism providing funding for the RI/FS is reduced to less than that required to complete the remaining activities, the PRPs should immediately notify EPA. Under conditions specified in the Order, PRPs are required to complete the RI/FS regardless of initial cost estimates or financial mechanisms.

- 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 the EPA for review. Verification should be made that the PRPs' consultants have no conflict of interest with respect to the project. Any consultants having current EPA assignments as prime contractors or as subcontractors must obtain approval from their EPA Contract Officers before performing work for PRPs. Lack of clarification on possible conflicts of interest may delay the PRP RI/FS. EPA will reserve the right to review the PRPs' proposed selection of consultants and will disapprove their selection if, in EPA's opinion, they either do not possess adequate technical capabilities or there exists a conflict of interest. It should be noted that the responsibility for selection of consultants rests with the PRPs.

ATTACHMENT II

INITIATION OF PRP RI/FS ACTIVITIES

Development of the Statement of Work

After the PRPs have been identified in the PRP Search Report they are sent either a general notice letter followed by a special notice letter or a general notice letter followed by an explanation pursuant to Section 122(a) why special notice procedures are not being used. EPA will engage in negotiations with those PRPs who have submitted a good faith offer in response to the notice letter and therefore have volunteered to perform the RI/FS. While the PRPs are demonstrating their capabilities for conducting the RI/FS, EPA will negotiate the terms of the Administrative Order. Either an acceptable Statement of Work or Work Plan must be incorporated by reference into the Agreement.

The Statement of Work (SOW) is typically developed by EPA and describes, in a comprehensive manner, all RI/FS activities to be performed, as reasonably anticipated, prior to the onset of the project. The SOW focuses on broad objectives and describes general activities that will be undertaken to achieve these objectives. Detailed procedures by which the work will be accomplished are not presented in the SOW, but are described in the subsequent Work Plan that is developed by the PRPs. In certain instances, with the approval of EPA, PRPs may prepare a single site plan incorporating the elements of an SOW and a Work Plan. In such instances, the site plan will be incorporated into the Order in place of the broader SOW.

- Use of the EPA Model SOW

EPA has developed a model SOW defining a comprehensive RI/FS effort which is contained in the RI/FS Guidance. Additionally, a model SOW for a PRP-lead RI/FS is being developed by OWPE and will be forthcoming. The Regions should develop a site-specific SOW based upon the model(s). RI/FS projects managed by PRPs will involve, at a minimum, all relevant activities set forth in the EPA model SOW. Further, all plans and reports identified as deliverables in the EPA model SOW must be identified as deliverables in the site-specific SOW and/or the Work Plan developed by the PRPs. Additional deliverables may be required by the Regions and should be added to the Administrative Order.

- Modification of the EPA Draft SOW Requirements

The activities set forth in the model SOW are considered by EPA to be the critical RI/FS activities that are required by the NCP. PRPs should present detailed justifications for any proposed modifications and amendments to the activities set forth in the SOW. EPA will review all proposed modifications and approve or disapprove their inclusion in the SOW based on available information, EPA policy and guidance, overall program objectives, and the requirements of the NCP and CERCLA. EPA

will not allow modifications that, in the judgment of the Agency, will lead to an unsatisfactory RI/FS or inconsistencies with the NCP.

Review of the RI/FS Project Plans

RI/FS project plans include those plans developed for the RI/FS. At a minimum the project plans should include a Work Plan, a Sampling and Analysis Plan, a Health and Safety Plan, and a Community Relations Plan. The Community Relations Plan is developed by EPA and should include a description of the PRPs' role in community relations activities, if any. EPA review and approval of the work plan and sampling and analysis plan will usually be required before PRPs can begin site activities. An example when limited project activities may be initiated prior to approval of the project plans would be if additional information is required to complete the Sampling and Analysis Plan. Additionally, conditional approvals to the Work Plan and Sampling and Analysis Plan may be provided in order to initiate field activities in a more timely manner. It should be noted that EPA does not "approve" the PRPs' Health and Safety Plan but rather, it is reviewed to ensure the protection of public health and the environment. The PRPs may be required to amend the plan if EPA determines that it does not adequately provide for such protection.

o Contents of the Work Plan

The Work Plan expands the tasks of the SOW, and the responsibilities specified in the Agreement, by presenting the rationale and methodology (including detailed procedures) for conducting the RI/FS. Typically the Work Plan is developed after the draft Order and then incorporated into the Agreement. In some cases however, it may be appropriate for EPA to develop the Work Plan prior to actual negotiation with the PRPs and attach the plan to the draft Agreement. The PRP RI/FS Work Plan must be consistent with current EPA guidance. Guidance on developing acceptable Work Plans is available in the RI/FS Guidance. Additional guidance will be forthcoming in the proposed NCP. Once the Work Plan is approved by EPA, it becomes a public document and by the terms of the Agreement, should be incorporated by reference into that document. The Work Plan should, at a minimum, contain the following elements.

Introduction/Background Statement - PRPs should provide an introductory or background statement describing their understanding of the work to be performed at the site. This should include historical site information and should highlight present site conditions.

Objectives - A statement of what is to be accomplished and how the information will be utilized.

Scope - A detailed description of the work to be performed including a definition of work limits.

Management Plan - A description of the project management showing personnel with authority and responsibility for the appropriate aspects of the project and specific tasks to be performed. A

single person should be identified as having overall responsibility for the project and specific tasks to be performed.

Work Schedule - A statement outlining the schedule for each of the required activities. This could be presented in the form of a Gantt or milestone chart. The schedule in the work plan must match that in the draft order.

Deliverables - A description of the work products that will be submitted and their schedule for delivery. The schedule should include specific dates, if possible. Overwise, the schedule should be in terms of the number of days/week after approval of the work plan.

o Contents of the Sampling and Analysis Plan.

A Sampling and Analysis Plan (SAP) must be submitted by the PRPs before initiation of relevant field activities. This plan contains two separate elements: a Field Sampling Plan and a Quality Assurance Project Plan. These documents were previously submitted as separate deliverables, but are now combined into one document. Though the SAP is typically implemented by PRP contractors, it is the responsibility of the PRPs to ensure that the goals and standards of the plan are met. (Verification that the goal and standards of the SAP are met will also be part of EPA's oversight responsibilities.) The SAP should contain the following elements:

Field Sampling Plan - The Field Sampling Plan includes a detailed description of all RI/FS sampling and analytical activities that will be performed. These activities should be consistent with the NCP and relevant CERCLA guidance. Further guidance on developing Field Sampling Plans is presented in the RI/FS Guidance.

Quality Assurance Project Plan - The SAP must include a detailed description of quality assurance/quality control (QA/QC) procedures to be employed during the RI/FS. This section is intended to ensure that the RI/FS is based on the correct level or extent of sampling and analysis required to produce sufficient data for evaluating remedial alternatives for a specific site. A second objective is to ensure the quality of the data collected during the RI/FS. Guidance on appropriate QA/QC procedures may be found in the RI/FS Guidance as well as "Data Quality Objectives for the RI/FS Process" (March 1987 - OSWER Directive No. 9355.0-7B).

If the SAP modifies any procedures established in relevant guidance, it must provide an explanation and justification for the change.

o Other Project Plans

Other project plans that are likely to be required in the RI/FS process include the Health and Safety Plan and the Community Relations Plan.

Health and Safety Plan - PRPs should include a Health and Safety Plan either as part of the Work Plan or as a separate document. The Health and Safety Plan should address the measures taken by the PRPs to ensure that all activities will be conducted in an environmentally safe manner for the workers and the surrounding community. EPA reviews the Health and Safety Plan to ensure protection of public health and the environment. EPA does not, however, "approve" this plan. Guidance on the appropriate contents of a Health and Safety Plan may be found in the RI/FS Guidance. In addition, Health and Safety requirements are found in "OSHA Safety and Health Standards: Hazardous Waste Operations and Emergency Response" (40 CFR Part 1910.120).

Community Relations Plan - EPA must prepare a Community Relations Plan for each NPL site. The extent of PRP involvement in community relations activities should be detailed in this plan. Additional information on Community Relations activities is contained below.

o Review and Approval

PRPs must submit all of the required RI/FS project plans (with the exception of the Community Relations Plan which is developed by EPA) to EPA for review, and in the case of the Work Plan and SAP, approval. EPA will review the plans for their technical validity and consistency with the NCP and relevant EPA guidance. Typically, the Agency must review and approve these plans before PRPs can begin any site activities. Any disagreements that arise between EPA and PRPs over the contents of the plans should be resolved according to the procedures set forth in the dispute resolution section of the relevant EPA/PRP Agreement.

Community Relations

EPA is responsible for developing and implementing an effective community relations program, regardless of whether RI/FS activities are Fund-financed or conducted by PRPs. At State-lead enforcement sites, funded by EPA under Superfund Memoranda of Agreement (see the "Draft Guidance on Preparation of a Superfund Memorandum of Agreement (October 5, 1987 - OSWER Directive No. 9375.0-01)), the State has the responsibility for development and implementation of a community relations program. PRPs may, under certain circumstances, assist EPA or the State in implementing the community relations activities. For example, PRPs may wish to participate in community meetings and in preparing fact sheets. PRP participation in community relations activities would, however, be at the discretion of the Regional Office, or the State, and would require oversight by the lead-agency. EPA will not under any circumstances negotiate press releases with PRPs.

EPA designs and implements community relations activities according to CERCLA and the NCP. A Community Relations Plan must be developed by EPA for all NPL sites as described by the EPA guidance, "Community Relations in Superfund: A Handbook" (U.S. EPA, 1988 - OSWER Directive No. 9230.0-03). The Community Relations Plan must be independent of negotiations with PRPs. Guidance for conducting community relations activities at Superfund enforcement sites is

specifically addressed by Chapter VI of the Handbook and the EPA memo entitled "Community Relations Activities at Superfund Enforcement Sites--Interim Guidance" (November 1988 - OSWER Directive No. 9230.0-3B). In some instances the decision regarding PRP participation in community relations activities will be made after the Community Relations Plan has been developed. As a result, the plan will need to be modified by EPA to reflect Agency and PRP roles and responsibilities.

EPA, or the State, will provide the Community Relations Plan to all interested parties at the same time. In general, if the case has not been referred to the Department of Justice (DOJ) for litigation, community relations activities during the RI/FS should be the same for Fund- and PRP-lead sites. If the case has been (or may potentially be) referred to DOJ for litigation, constraints will probably be placed on the scope of activities. The EPA Community Relations Plan may be modified after consultation with the technical enforcement staff, the Regional Counsel and other negotiation team members, including, if the case is referred, the lead DOJ or Assistant United States Attorneys (i.e., the litigation team). This technical and legal staff must be consulted prior to any public meetings or dissemination of fact sheets or other information; approval must be obtained prior to releases of information and discussions of technical information in advance. PRP participation in implementing community relations activities will be subject to EPA (or State) approval in administrative settlements and EPA/DOJ in civil actions. Key activities specific to community relations programs for enforcement sites include the following:

o Public Review of Work Plans for Administrative Orders

The PRP Work Plan, as approved by EPA, is incorporated into the Administrative Order (or Consent Decree). Once the Agreement is signed, it becomes a public document. Although there is no requirement for public comment on an Administrative Order, Regional staff are encouraged to announce, after the Order is final, that the PRP is conducting the RI/FS. Publication of notice and a corresponding 30-day comment period is required however, for Consent Decrees.

o Availability of RI/FS Information from the PRPs

PRPs, in agreeing to conduct the RI/FS, must also agree to provide all information necessary for EPA to implement a Community Relations Plan. The Agreement should identify the types of information that PRPs will provide, and contain conditions concerning the provision of this information. EPA should provide the PRPs with the content of the plan so that the PRPs can fully anticipate the type of information that will be made public. All information submitted by PRPs will be subject to public inspection (i.e., available through Freedom of Information Act requests, public dockets, or the administrative record) unless the information meets an exemption. An example would be if the information is deemed either as enforcement sensitive by EPA, or business confidential by EPA (based on the PRPs' representations), in conformance with 40 CFR Part 2.

Development of the ATSDR Health Assessment

Section 104(j)(6) of CERCLA requires the Agency for Toxic Substances and Disease Registry (ATSDR) to perform health assessments at all NPL facilities according to a specified schedule. The purpose of the health assessment is to assist in determining whether any current or potential threat to human health exists and to determine whether additional information on human exposure and associated health risks is needed.

The EPA remedial project manager (RPM) should coordinate with the appropriate ATSDR Regional representative for initiation of the health assessment. In general, the health assessment should be initiated at the start of the RI/FS. The ATSDR Regional representative will provide information on data needs specific to performing a health assessment to ensure that all necessary data will be collected during the RI.

The RPM and the ATSDR Regional representative should also coordinate the transmission and review of pertinent documents dealing with the extent and nature of site contamination (i.e., applicable technical memoranda and the draft RI). As ATSDR has no provisions for withholding documents, if requested by the public, the RPM must discuss enforcement sensitive documents and drafts with the ATSDR Regional representative rather than providing copies to them. This will ensure EPA's enforcement confidentiality. Further guidance on coordination of RI/FS activities with ATSDR can be found in the document entitled "Guidance for Coordinating ATSDR Health Assessment Activities with the Superfund Remedial Process" (March 1987 - CSWER Directive No. 9285.4-02).

Identification of Oversight Activities

EPA will review RI/FS plans and reports as well as provide field oversight of PRP activities during the RI/FS. To ensure that adequate resources are committed and that appropriate activities are performed, EPA should develop an oversight plan that defines the oversight activities that must be performed including EPA responsibilities, RI/FS products to be reviewed, and site activities that EPA will oversee. In planning for oversight, EPA should consider such factors as who will be performing oversight and the schedule of activities that will be monitored. A tracking system for recording PRP milestones should be developed. This system should also track activities performed by oversight personnel and other appropriate cost items such as travel expenses.

Identification and Procurement of EPA Assistance

In accordance with Section 104(a)(1) EPA must arrange for a qualified party to assist in oversight of the RI/FS. The following section provides guidance for identifying and procuring such assistance for EPA activities.

- Assistance for EPA Activities

As specified in Section 104(a)(1), EPA is required to contract with or arrange for a qualified person to assist in oversight of the RI/FS. Qualified individuals are those groups with the professional qualifications, expertise, and experience necessary to provide assurance that the Agency is conducting appropriate oversight of PRP RI/FS activities.

Normally, EPA will obtain oversight assistance either through the Technical Enforcement Support (TES) contract, the Alternative Remedial Contracts Strategy Contract (ARCS), or occasionally through the Remedial Action (REM) contracts. In some cases oversight assistance may be provided by States through the use of Cooperative Agreements. Oversight assistance may also be obtained through the U.S. Army Corps of Engineers or other governmental agencies; interagency Agreements should be utilized to obtain such assistance.

ATTACHMENT III

REVIEW AND OVERSIGHT OF THE RI/FS

Review of Plans, Reports, and Records

EPA will review all RI/FS products which are submitted to the Agency as specified in the Work Plan or Administrative Order. PRPs should ensure that all plans, reports, and records are comprehensive, accurate, and consistent in content and format with the NCP and relevant EPA guidance. After this review process, EPA will either approve or disapprove the product. If the product is found to be unsatisfactory, EPA will notify the PRPs of the discrepancies or deficiencies and will require corrections within a specified time period.

o Project Plans

EPA will review all project plans that are submitted as deliverables in fulfillment of the Agreement. These plans include the Work Plan, the Sampling and Analysis Plan (including both the Field Sampling Plan and the Quality Assurance Project Plan), and the Health and Safety Plan. If the initial submittals are not sufficient in content or scope, the RPM will request that the PRPs submit revised document(s) for review. EPA does not "approve" the PRP's Health and Safety Plan but rather, it is reviewed to ensure the protection of public health and the environment. The PRP's Work Plan and Sampling and Analysis Plan, on the other hand, must be reviewed and approved prior to the initiation of field activities. Conditional approval to these plans may be provided in order to initiate field activities in a more timely manner.

The PRPs may be required to develop additional Work Plans or modify the initial Work Plan contained in or created pursuant to the Agreement. These changes may result from the need to: (1) re-evaluate the RI/FS activities due either to changes in or unexpected site conditions; (2) expand the initial Work Plan when additional detail is necessary; or (3) modify or add products to the Work Plan based on new information (e.g., a new population at risk). EPA will review and approve all Work Plans and/or modifications to Work Plans once they are submitted for review.

o Reports

PRPs will, at a minimum, submit monthly progress reports, technical memorandums or reports, and the draft and final RI/FS reports as required in the Agreement. To assist in the development of the RI/FS and review of documents, additional deliverables may be specified by the Region and included in the Agreement. These reports and deliverables will be reviewed by EPA to ensure that the activities specified in the Order and approved Work Plan are being properly implemented. These reports will generally be submitted according to the conditions and schedule set forth in the Agreement. Elements of the PRP reports are discussed below.

Monthly Progress Reports - The review of monthly progress reports is an important activity performed during oversight. These reports should provide sufficient detail to allow EPA to evaluate the past and projected progress of the RI/FS. PRPs should submit these written progress reports to the RPM. The report should describe the actions and decisions taken during the previous month and activities scheduled during the upcoming reporting period. In addition, technical data generated during the month (i.e., analytical results) should be appended to the report. Progress reports should also include a detailed statement of the manner and extent to which the procedures and dates set forth in the Agreement/Work Plan are being met. Generally, EPA will determine the adequacy of the performance of the RI/FS by reviewing the following subjects discussed in progress reports:

o Technical Summary of Work

The monthly report will describe the activities and accomplishments performed to date. This will generally include a description of all field work completed, such as sampling events and installation of wells; a discussion of analytical results received; a discussion of data review activities; and a discussion of the development, screening, and detailed analysis of alternatives. The report will also describe the activities to be performed during the upcoming month.

o Schedule

EPA will oversee PRP compliance with respect to those schedules specified in the Order. Delays, with the exception of those specified under the Force Majeure clause of the Agreement, may result in penalties, if warranted. The RPM should be immediately notified if PRPs cannot perform required activities or cannot provide the required deliverables in accordance with the schedule specified in the Work Plan. In addition, PRPs should notify the RPM when circumstances may delay the completion of any phase of the work or when circumstances may delay access to the site. PRPs should also provide to the RPM, in writing, the reasons for, and the anticipated duration of, such delays. Any measures taken or to be taken by the PRPs to prevent or minimize the delay should be described including the timetables for implementing such measures.

o Budget

The relationship of budgets to expenditures should be tracked where the RI/FS is funded with a financial mechanism established by the PRPs. If site activities require more funds than originally estimated, EPA must be assured that the PRPs are financially able to undertake additional expenditures. While EPA does not have the authority to review or approve a PRP budget, evaluating costs during the course of the RI/FS allows EPA to effectively monitor activity to ensure timely

completion of RI/FS activities. If the PRPs run over budget, EPA must be assured that they can continue the RI/FS activities as scheduled. Therefore, if specified in the Agreement, PRPs should submit budget expenditures and cost overrun information to EPA. Budget reports need not present dollar amounts, but should indicate the relationship between remaining available funds and the estimate of the costs of remaining activities.

o Problems

Any problems that the PRPs encounter which could affect the satisfactory performance of the RI/FS should be brought to the immediate attention of EPA. Such problems may or may not be a force majeure event, or caused by a force majeure event. EPA will review problems and advise the PRPs accordingly. Problems which may arise include, but are not limited to:

- Delays in mobilization or access to necessary equipment;
- Unanticipated laboratory/analytical time requirements;
- Unsatisfactory QA/QC performance;
- Requirements for additional or more complex sampling;
- Prolonged unsatisfactory weather conditions;
- Unanticipated site conditions; and
- Unexpected, complex community relations activities.

Other Reports - All other reports, such as technical reports and draft and final RI/FS reports, should be submitted to EPA according to the schedule contained in the Order or the approved Work Plan. EPA will review and approve these reports as they are submitted. Suggested formats for the RI/FS reports are presented in the RI/FS Guidance.

o Records

PRPs should preserve all records, documents, and information of any kind relating to the performance of work at the site for a minimum of 6 years after completion of the work and termination of the Administrative Order. After the 6-year period, the PRPs should offer the records to EPA before their destruction.

Document control should be a key element of all recordkeeping. The following activities require careful recordkeeping and will be subject to EPA oversight:

Administration - PRP administrative activities should be accurately documented and recorded. Necessary precautions to prevent errors

or the loss or misinterpretation of data should be taken. At a minimum, the following administrative actions should be documented and recorded:

- Contractor work plans, contracts, and change orders;
- Personnel changes;
- Communications between and among PRPs, the State, and EPA officials regarding technical aspects of the RI/FS;
- Permit application and award (if applicable); and
- Cost overruns.

Technical Analysis - Samples and data should be handled according to procedures set forth in the Sampling and Analysis Plan. Documentation establishing adherence to these procedures should include:

- Sample labels;
- Shipping forms;
- Chain-of-custody forms; and
- Field log books.

All analytical data in the RI/FS process should be managed as set forth in the Sampling and Analysis Plan. Such analytical data may be the product of:

- Contractor laboratories;
- Environmental and public health studies; and
- Reliability, performance, and implementability studies of remedial alternatives.

Decision Making - Actions or communications among PRPs that involve decisions affecting technical aspects of the RI/FS should be documented. Such actions and communications include those of the project manager (or other PRP management entity), steering committees, or contractors.

o Administrative Record Requirements

Section 113(k) of CERCLA requires that the Agency establish an administrative record upon which the selection of a response action is based. A suggested list of documents which are most likely to be included in any adequate administrative record is provided in the memorandum entitled "Draft Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (June 23, 1988 - OSWER Directive No. 9833.3A). More detailed guidance will be forthcoming, including guidance provided in

the revisions to the NCP. There are, however, certain details associated with compiling and maintaining an administrative record that are unique to PRP RI/FS activities.

EPA is responsible for compiling and maintaining the administrative record, and generating and updating an index. If EPA and the PRPs mutually agree, the PRPs may be allowed to house and maintain the administrative record file at or near the site; they may not, however, be responsible for the actual compilation of the record. Housing and maintaining the administrative record would include setting up a publicly accessible area at or near the site and ensuring that documents remain and are updated as necessary. EPA must always be responsible for deciding whether documents are included in the administrative record; transmitting records to the PRPs; and maintaining the index to the repository.

The information which may comprise the administrative record must be available to the public from the time an RI/FS Work Plan is approved by EPA. Once the Work Plan has been approved the PRPs must transmit to EPA, at reasonable, regular intervals, all of the information that is generated during the RI/FS that is related to selection of the remedy. The required documentation should be specified in the Administrative Order. The Agreement should also specify those documents generated prior to the RI/FS that must be obtained from the PRPs for inclusion in the record file. This may include any previous studies conducted under State or local authorities, management documents held by the PRPs such as hazardous waste shipping manifests, and other information about site characteristics or conditions not contained in any of the above documents.

Field Activities

c Field Inspections

Field inspections are an important oversight mechanism for determining the adequacy of the work performed: EPA will therefore conduct field inspections as part of its oversight responsibilities. The oversight inspections should be performed in a way that minimizes interference with PRP site activities or undue complication of field activities. EPA will take corrective steps, as described in Section VII and Attachment IV of this appendix, if unsatisfactory performance or other deficiencies are identified.

Several field-related tasks may be performed during oversight inspections. These tasks include:

On-site presence/inspection - As specified in Section 104(e)(3), EPA reserves the right to conduct on-site inspections at any reasonable time. EPA will therefore establish an on-site presence to assure itself of the quality of work being conducted by PRPs. At a minimum, field oversight will be conducted during critical times, such as the installation of monitoring wells and during sampling events. EPA will focus on whether the PRPs adhere to procedures specified in the SOW and Work Plan(s), especially those concerning QA/QC procedures. Further guidance regarding site characterization

activities is presented in the RI/FS Guidance, the "Compendium of Superfund Field Operations Methods" (August 1987 - OSWER Directive No. 9355.0-141), the "RCRA Ground Water Technical Enforcement Guidance Document" (September 1986 - OSWER Directive No. 9950.1), the NEIC Manual for Groundwater/Subsurface Investigations at Hazardous Waste Sites (U.S. EPA, 1981c), and OWPE's forthcoming "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies."

Collection and analysis of samples - EPA may collect a number of QA/QC samples, including blank, duplicate, and split samples. The results of these sample analyses will be compared to the results of PRP analyses. This comparison will enable EPA to identify potential quality control problems and therefore help to evaluate the quality of the PRP investigation.

Environmental Monitoring - EPA may supplement any PRP environmental monitoring activity. Such supplemental monitoring may include air or water studies to determine additional migration of sudden releases that may have occurred as a result of site activities.

QA/QC Audits

EPA may either conduct, or require the PRPs to conduct (if specified in the Agreement), laboratory audits to ensure compliance with proper QA/QC and analytical procedures, as specified in the Sampling and Analysis Plan. These audits will involve on-site inspections of laboratories used by PRPs and analyses of selected QA/QC samples. All procedures must be in accordance with those outlined in The User's Guide to the Contract Laboratory Program, (U.S. EPA, 1986) or otherwise specified in the Sampling and Analysis Plan.

Chain-of-Custody

Chain-of-custody procedures will be evaluated by EPA. This evaluation will focus on determining if the PRPs and their contractors adhere to the procedures set forth in the Sampling and Analysis Plan. Proper chain-of-custody procedures are described in the National Enforcement Investigation Center (NEIC) Policies and Procedures Manual, (U.S. EPA, 1981b). Evaluation of chain-of-custody procedures will occur during laboratory audits as well as during on-site inspections of sampling activities.

Meetings

Meetings between EPA, the State, and PRPs should be held on a regular basis (as specified in the Agreement) and at critical times during the RI/FS. Such critical times may at a minimum include when the SOW and the Work Plan are reviewed, the RI is in progress and completed, remedial alternatives are developed and screened, detailed analysis of the alternatives is performed, and the draft and final RI/FS reports are

submitted. These meetings will discuss overall progress, discrepancies in the work performed, problems encountered in the performance of RI/FS activities and their resolution, community relations, and other related issues and concerns. While meetings may be initiated by either the PRPs or EPA at any time, they will generally be conducted at the stages of the RI/FS listed below.

o Initiation of Activities

EPA, the State, and the PRPs may meet at various times before field activities begin to discuss the initial planning of the RI/FS. Meetings may be arranged to discuss, review, and approve the SOW; to develop the EPA/PRP Agreement; and to develop, review, and approve the Work Plan.

o Progress

EPA may request meetings to discuss the progress of the RI/FS. These meetings should be held at least quarterly and will focus on the items submitted in the monthly progress reports and the findings from EPA oversight activities. Any problems or deficiencies in the work will be identified and corrective measures will be requested (see Section VIII and Attachment IV) of this appendix.

o Closeout

EPA may request a closeout meeting upon completion of the RI/FS. This meeting will focus on the review and approval of the final RI/FS report, termination of the RI/FS Agreement, and any final on-site activities which the PRPs may be required to perform. These activities may include maintaining the site and ensuring that fences and warning signs are properly installed. The transition to remedial design and remedial action will also be discussed during this meeting.

Special Studies

EPA may determine that special studies related to the PRP RI/FS are required. These studies can be conducted to verify the progress and results of RI/FS activities or to address a specific complex or controversial issue. Normally, special studies are performed by the PRPs; however, there may be cases in which EPA will want to conduct the independent studies. The PRPs should be informed of any such studies and given adequate time to provide necessary coordination of site personnel and resources. If not provided for in the Agreement, modifications to the Work Plan may be required.

ATTACHMENT IV

CONTROL OF ACTIVITIES

Identification of Deficiencies

Oversight activities may identify unsatisfactory or deficient PRP performance. The determination of such performance may be based upon findings such as:

- o Work products are inconsistent with the SOW or Work Plan;
- o Technical deficiencies exist in submittals or other RI/FS products;
- o Unreasonable delays occur while performing RI/FS activities; and
- o Procedures are inconsistent with the NCP.

Corrective Measures

The need to perform corrective measures may arise in the event of deficiencies in reports or other work products, or unsatisfactory performance of field or laboratory activities. When deficiencies are identified corrective measures may be sought by: (1) notifying the PRPs; (2) describing the nature of the deficiency; and (3) either requesting the PRPs to take whatever actions they regard as appropriate or setting forth appropriate corrective measures. The following subsections describe this process for each of the two general types of activities that may require corrective measures.

- o Corrective Measures Regarding Work Products

Agency review and approval procedures for work products generally allow three types of responses: (1) approval; (2) approval with modifications; and (3) non-approval. Non-approval of a work product (including project plans) immediately constitutes a notice of deficiency. EPA will immediately notify the PRPs if any work product is not approved and will explain the reason for such a finding.

Approval with modifications will not lead to a notice of deficiency if the modifications are made by the PRPs without delay. If the PRPs significantly delay in responding to the modifications, the RPM would issue a notice of deficiency to the PRP project manager detailing the following elements:

- A description of the deficiency or a statement describing in what manner the work product was found to be deficient or unsatisfactory;

- Modifications that the PRPs should make in the work product to obtain approval;

- A request that the PRPs prepare a plan, if necessary, or otherwise identify actions that will lead to an acceptable work product;

- A schedule for submission of the corrected work product;

- An invitation to the PRPs to discuss the matter in a conference; and

- A statement of the possibility of EPA takeover at the PRPs' expense, EPA enforcement, or penalties (as appropriate).

o Corrective Measures Regarding Field Activities

When the lead agency discovers that the PRPs (or their contractors) are performing the RI/FS field work in a manner that is inconsistent with the Work Plan, the PRPs should be notified of the finding and asked to voluntarily take appropriate corrective measures. The request is generally made at a progress meeting, or, if immediate action is required, at a special meeting held specifically to discuss the problem. If corrective measures are not voluntarily taken, the RPM should, in conjunction with appropriate Regional Counsel, issue a notice of deficiency containing the following elements:

- A description of the deficiency;

- A request for an explanation of the failure to perform satisfactorily and a plan for addressing the necessary corrective measures;

- A statement that failure to present an explanation may be taken as an admission that there is no valid explanation;

- An invitation to discuss the matter in a conference (where appropriate);

- A statement that stipulates penalties may accrue or are accruing, project termination may occur, and/or civil action may be initiated if appropriate actions are not taken to correct the deficiency; and

- A description of the potential liabilities incurred in the event that appropriate actions are not taken.

Modifications to the Work Plan/Additional Work

Under the Administrative Order (or Consent Decree), PRPs agree to complete the RI/FS, including the tasks required under either the original Work Plan or a subsequent or modified Work Plan. This may

include determinations and evaluations of conditions that are unknown at the time of execution of the Agreement. Modifications to the original RI/FS Work Plan are frequently required as field work progresses. Work not explicitly covered in the 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 clauses for modifications to the Work Plan are included in the Agreement so that the PRPs will carry out the modifications as the need for them is identified. To facilitate negotiation on these points, EPA may consider one or more of the following provisions in the Agreement for addressing such situations:

- Defining the limits of additional work requirements;
- Specifying the dispute resolution process for modified Work Plans and additional work requirements;
- Defining the applicability of stipulated penalties to any additional work which the PRPs agree to undertake.

Dispute Resolution

As discussed elsewhere in this guidance, the RI/FS Order developed between EPA and the PRPs sets forth the terms and conditions for conducting the RI/FS. An element of this Agreement is a statement of the specific steps to be taken if a dispute arises between EPA (or its representatives) and the PRPs. These steps should be well defined and agreed upon by all signatories to the Agreement.

A dispute with respect to the Order is followed by a specific period of discussion with the PRPs. After the discussion period, EPA issues a final decision which becomes incorporated into the Agreement. Administrative Orders should clarify that with respect to all submittals and work performed, EPA will be the final arbiter. The court, on the other hand, is the final arbiter for Consent Decrees.

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. Section 121 provides up to $25,000 per day in stipulated penalties for violations of a Consent Decree while Section 122 allows EPA to seek or impose civil penalties for violations of Administrative Orders.[3] Penalties should begin to accrue on the first

[3] In order to provide for stipulated penalties in an Administrative Order the parties must voluntarily include them in the terms of the Agreement.

day of the deficiency and continue to be assessed until the deficiency is corrected. The type of violation (i.e., reporting requirements vs. implementation of construction requirements), as well as the amounts should be specified as stipulated penalties in the Agreement to avoid negotiations on this point which may delay the correction. The amounts should be set pursuant to the criteria of Section 109 and as such must take into account the nature, circumstances, extent, and gravity of the violations as well as the PRPs' ability to pay, prior history of violations, degree of culpability, and the economic benefit resulting from noncompliance. Additional information on stipulated penalties can be found in OECM's "Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees" (September 27, 1987).

Project Takeover

Generally, EPA will consult with PRPs to discuss deficiencies and corrective measures. If these discussions fail, EPA has two options: (1) pursue legal action to force the PRPs to continue the work; or (2) take over the RI/FS. If taking legal action will not significantly delay implementation of necessary remedial or removal actions, EPA may commence civil action against the noncomplying PRP to enforce the Administrative Order. Under a Consent Decree, the matter would be presented to the court in which the Decree was filed to enforce the provisions of the Decree.

If a delay in RI/FS activities endangers public health and/or the environment or will significantly delay implementation of necessary remedial actions, EPA should move to replace the PRP activities with Fund-financed actions. The RPM will take the appropriate steps to assume responsibility for the RI/FS, including issuing a stop-work order to the PRPs and notifying the EPA remedial contractors. In issuing stop work orders; RPMs should be aware that Fund resources may not be automatically available. But, in the case of PRP actions which threaten human health or the environment, there may be no other course of action. Once this stop work order is issued, a fund-financed RI/FS will be undertaken consistent with EPA funding procedures.

WDR378/029