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

983410

OCT 19 1987

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Transmittal of Notice Letter Guidance

FROM: Gene Lucero, Director
Office of Waste Programs Enforcement

TO: Addressees

Attached is the "Interim Guidance on Notice Letters, Negotiations, and Information Exchange." Note that Appendix C containing model notice letters is not included in this package, but will be distributed under separate cover in the next couple of weeks.

Attachment

Addressees:

Directors, Waste Management Divisions, Regions I,IV,V,VII,VIII
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Region III
Directors, Air and Waste Management Division, Regions II,VI
Director, Toxics and Waste Management Division, Region IX
Director, Hazardous Waste Division, Region X

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INTERIM GUIDANCE ON NOTICE LETTERS, NEGOTIATIONS, AND INFORMATION EXCHANGE

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Interim Guidance on Notice Letters, Negotiations, and Information Exchange

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators

I. INTRODUCTION

The Superfund Amendments and Reauthorization Act of 1986 (SARA), which amends the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), maintains the importance of a strong Superfund enforcement program.[1] In particular, SARA emphasizes the importance of entering into negotiations and reaching settlements with potentially responsible parties (PRPs) to allow PRPs to conduct or finance response actions. SARA generally codified the Agency's Interim CERCLA Settlement Policy but also established some new authorities and procedures that were designed to facilitate settlements.

A fundamental goal of the CERCLA enforcement program is to facilitate voluntary settlements. EPA believes that such settlements are most likely to occur when EPA interacts frequently with PRPs. Frequent interaction is important because it provides the opportunity to share information about a site and may reduce delays in conducting response actions caused by the lack of communication. Important mechanisms for promoting interaction and facilitating communication between EPA and PRPs include issuing notice letters, entering into negotiations, and exchanging information with PRPs.

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[1] CERCLA of 1980 as amended by SARA of 1986 is referred to in this guidance as CERCLA.

This guidance replaces the October 12, 1984 guidance on "Procedures for Issuing Notice Letters" and the October 9, 1985 guidance on "Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information." [2] Although certain procedures and the timing of various activities have been modified, this guidance retains many fundamental aspects of the October 12, 1984 and October 9, 1985 guidances. In particular, this guidance re-emphasizes the importance of timely issuance of notice letters and the exchange of information between EPA and PRPs. In addition, this guidance incorporates a moratorium and "formal" period of negotiation (referred to as a negotiation moratorium) into the settlement process. EPA's commitment to carrying out these activities is crucial for supporting our fundamental goal of facilitating negotiated settlements.

II. PURPOSE AND SCOPE OF GUIDANCE

The purpose of this guidance is to assist the Regions in establishing procedures for the issuance of notice letters to PRPs, for the conduct of negotiations between EPA and PRPs, and for the exchange of information between EPA and PRPs.

This guidance addresses the use of both "general" and "special" notice letters for removal and remedial actions. Special notice letters differ from general notice letters because special notices trigger the negotiation moratorium. The negotiation moratorium is the period of time where a moratorium is imposed on certain EPA actions and a period of "formal" negotiations is established between EPA and PRPs.

Use of both general and special notice letters are discretionary. However, the Regions are expected to issue general and special notices for the vast majority of remedial actions. Such notice letters will be issued for remedial investigations/feasibility studies (RI/FSs) and remedial designs/remedial actions (RD/RAs). Although it is generally appropriate to issue a "removal notice" for all removal actions, the Regions are not expected to invoke the §122(e) special notice procedures for most removals.

This guidance also addresses the timing, duration, and conclusion of the negotiation moratorium. Finally, this guidance discusses the process of information exchange between EPA and PRPs, including requests for and releases of site-specific information.

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[2] These guidances were issued under OSWER Directive Numbers 9834.1 and 9834.2, respectively.

III. STATUTORY AUTHORITY

A. SETTLEMENTS

Sections 104(a), 122(a), and 122(e)(6) authorize settlements and establish certain conditions for allowing PRPs to conduct or finance response actions. Section 104(a) authorizes EPA to enter into an agreement with PRPs to allow PRPs to conduct or finance response actions in accordance with §122 if EPA determines that the PRPs will conduct the response action properly and promptly. Under §104(a), PRPs cannot conduct the RI/FS unless EPA determines that the PRP is qualified to perform the RI/FS, EPA contracts with or arranges for a qualified person other than the PRP to assist EPA in overseeing and reviewing the RI/FS, and the PRP agrees to reimburse the Fund for the costs EPA incurs in overseeing and reviewing the PRP's RI/FS.

Section 122(a) similarly authorizes EPA to enter into agreements with PRPs to perform response actions if EPA determines the action will be conducted properly. Section 122(a) also provides for EPA, when practicable and in the public interest, to facilitate settlements with PRPs to expedite effective remedial actions and to minimize litigation.

Section 122(e)(6) provides that no PRP may undertake any remedial action at a facility where EPA or a PRP pursuant to an administrative order or consent decree under CERCLA has initiated an RI/FS unless the remedial action has been authorized by EPA.

B. SPECIAL NOTICE PROCEDURES AND INFORMATION RELEASE

Sections 122(e) and 122(a) contain provisions relating to the special notice procedures and the release of information to PRPs. Section 122(e) provides for EPA to utilize the special notice procedures if EPA determines that a period of negotiation would facilitate an agreement with PRPs and would expedite remedial actions. Section 122(e) also provides for EPA to release certain information to PRPs. Such information includes, to the extent available, the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of the substances at the facility.[3] In

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[3] Congress recognized that there may be limitations to the availability of information at early phases of the response action. In particular, Congress noted that the RI/FS special notice need not be accompanied by information on volume and nature of waste and ranking if this information is not available at the start of the RI/FS. A separate notice and information release should be provided for private parties who actually conduct the remedial action and information on volume, nature and ranking of wastes should be made available routinely at this

addition, this section provides for EPA to make such information available in advance of the special notice upon request by a PRP in accordance with procedures provided by EPA.

Issuance of a special notice triggers a moratorium on the commencement of certain actions by EPA under §104 or §106. The purpose of the moratorium is to provide for a period of negotiation between EPA and PRPs. The moratorium prohibits EPA from commencing any response action under §104(a), and an RI/FS under §104(b), or an action under §106 for 60 days after receipt of the notice. If EPA determines that a "good faith offer" has been submitted by the PRP within 60 days after receipt of the special notice, EPA shall not commence an action under §104(a) or take any action against any person under §106 for an additional 60 days or commence an RI/FS under §104(b) for an additional 30 days.

Under §122(e)(2)(a), EPA may commence any additional other studies or investigations authorized under §104(b), including the remedial design, during the negotiation period. Under §122(e)(2)(C), if an additional PRP is identified during the negotiation period or after an agreement has been entered into, EPA may bring the additional party into the negotiation or may enter into a separate agreement with the PRP. Under §122(e)(5), EPA is not prohibited from undertaking a response or enforcement action during the negotiation period when there is a significant threat to public health or the environment.

Section 122(a) provides that if EPA decides not to use the special notice procedures established under §122(e), EPA is required to notify PRPs in writing of this decision along with an explanation why it is inappropriate to use such procedures. The decision by EPA to use or not to use the special notice procedures is not subject to judicial review.

IV. INFORMATION EXCHANGE

The exchange of information between EPA and PRPs is crucial for facilitating settlements. Information exchange should be an ongoing process of communication. EPA uses information obtained from PRPs to determine potential liability, to determine the need for response, and to support the selection of the remedy. PRPs use information obtained from EPA to organize among themselves and to develop a "good faith offer" to conduct or finance response actions.

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time. See the Conference Report on the Superfund Amendments and Reauthorization Act of 1986, 99 Cong., 2d Sess. Report 99-962 pp. 253 (1986).

A. INFORMATION REQUESTS

EPA may request information from PRPs about various activities and conditions under §104(e) of CERCLA and under §3007(a) of the Resource Conservation and Recovery Act (RCRA). In addition, EPA may issue administrative subpoenas under §122(e)(3)(b) of CERCLA. Information commonly requested includes details concerning waste operations and waste management practices, the type and amount of substances contributed by each PRP, as well as the name of other PRPs that contributed substances to the site.

Information requests should be issued as early as practicable and may be issued as a separate letter during the PRP search process, as part of the general notice letter, or through an administrative subpoena. A detailed discussion about the use of information request letters and administrative subpoenas is contained in the forthcoming "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas under CERCLA §§104(e) and 122(e)."

The Regions have the discretion to decide whether to issue an information request as a separate letter during the PRP search or as a component of a general notice letter. Issuing a separate information request letter in advance of the general notice may be advantageous in situations where information from PRPs is needed to determine whether it is appropriate to issue a notice letter to such parties.

Information requests should be developed in accordance with the forthcoming guidance on information requests and administrative subpoenas as mentioned above. An information request should also indicate that EPA plans to vigorously enforce information requests with the new enforcement tools authorized under SARA which include issuing orders under §104(e)(5). Finally, the information request should indicate that it is the PRPs responsibility to inform EPA whether information they provide to EPA is confidential and subject to protection under §104(e) of CERCLA.

B. INFORMATION RELEASE

It is important to gather and release site-specific information to PRPs as soon as reasonably practicable. Gathering and releasing such information early in the process will not only expedite response and enforcement activities but will help PRPs organize and negotiate among themselves as well.

As indicated, §122(e)(1) provides for the release of certain information to PRPs to the extent such information is available. Such information includes the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and

a ranking by volume of the substances at the facility. This information is to be provided to PRPs in advance of the special notice in accordance with procedures developed by EPA.

Congress recognized the limitations to EPA's ability to make certain information available to PRPs, especially early in the response process. Therefore, this information can be released only to the extent such information is available. If the Regions have information on volume, the Regions should develop volumetric rankings and should make such information available to PRPs as soon as practicable. However, due to their preliminary and summary nature, EPA will not expend resources to explain or defend any list or ranking. Lists or rankings released to PRPs and others should always contain appropriate disclaimers.

The Regions are encouraged to release information to PRPs as soon as reasonably possible. The Regions may respond directly to individual PRP requests for information, may use the notice letters as vehicles to release such information to PRPs, or may establish alternative mechanisms in some situations as discussed below. The Regions are strongly encouraged to use the notice letters to release site-specific information. In particular, use of the general notice may provide a convenient opportunity to release information in advance of the special notice pursuant to the statutory provision that EPA release such information in advance of the special notice in accordance with procedures developed by EPA.

Although it is generally preferable to release information to individual PRPs through notice letters, alternative mechanisms may be used in unusual circumstances. For example, in instances where there are many PRPs and/or where there is a substantial amount of information to be released, the Regions may consider making the information available through a central mechanism (e.g. through a PRP steering committee if one has been formed and if the committee has agreed to be a clearinghouse for distributing information to other PRPs). An alternative would be to indicate in the notice letter that the Region has site-specific information that will be made available to the PRPs in a manner specified in the letter.

V. NOTICE LETTERS AND NEGOTIATION MORATORIUM FOR RI/FS AND RD/RA

This guidance creates a systematic process for issuing three separate notice letters for remedial actions. The three notice letters are 1) the general notice, 2) the RI/FS special notice, and 3) the RD/RA special notice. Even though the RI/FS and RD/RA special notice letters are separate letters, they are discussed in the same section below since the content of these letters is basically the same. In instances where the content of the RI/FS and RD/RA special notices differ, separate sections are presented.

Also, this guidance is written with the assumption that each notice letter will be issued in sequence. Consequently, the guidance has been structured so that certain information provided or requested in one letter is not repeated in a subsequent letter. The content of actual letters may, however, need to be modified in situations where this process is not followed.

For example, there may be a situation where site activities are already underway and where the Region is ready to issue the RI/FS special notice but has not issued a general notice. In this instance, it would not be necessary to wait to send the special notice until after a general notice is issued. However, it may be appropriate to include certain aspects of the general notice into the special notice.

A. PURPOSE OF NOTICE LETTERS

The purpose of the general notice is to inform PRPs of their potential liability for future response costs, to begin or continue the process of information exchange, and to initiate the process of "informal" negotiations. In addition, the general notice informs PRPs about the possible use of the §122(e) special notice procedures and the subsequent moratorium and "formal" negotiation period.

The purpose of the special notice is similar to the general notice, except that the special notice is also used to invoke the statutory moratorium on certain EPA actions and to initiate the process of "formal" negotiations. Although the general notice does not trigger a moratorium on any EPA action and does not invoke a "formal" period of negotiation, the general notice is expected to initiate a dialogue between EPA and PRPs. Issuance of a general notice should be viewed as a mechanism for initiating negotiations whereas issuance of a special notice should be viewed as a mechanism for concluding negotiations.

The term "informal" negotiations does not mean that such negotiations are not serious efforts to reach a settlement. Rather "informal" negotiations refers to any negotiations that are not conducted as part of the negotiation moratorium triggered by issuance of a special notice under §122(a). The terms "informal" and "formal" negotiations are used to draw a distinction between negotiations which are and are not covered by the §122(e) moratorium.

B. GENERAL NOTICE LETTER

Agency notification procedures should provide PRPs with sufficient time to organize and develop a reasonable offer to conduct or finance the response action. Toward this end, the

Regions should contact PRPs prior to issuing a §122(e) special notice by issuing a general notice letter.

1. Whether to Issue General Notice

A general notice letter should be issued at the vast majority of sites that are proposed for or listed on the National Priorities List (NPL) where negotiations for the RI/FS and RD/RA have not yet been initiated. Circumstances where it may not be appropriate to issue the general notice include sites where a notice pursuant to previous guidance was issued prior to the reauthorization of CERCLA or where the Region is ready to issue a special notice at the site. These exceptions are important for minimizing any possible disruption to ongoing activities.

2. Timing of General Notice

The general notice letter should be sent to PRPs as early in the process as possible, preferably once the site has been proposed for inclusion on the NPL. Early receipt of the general notice will ensure that PRPs have adequate knowledge of their potential liability as well as a realistic opportunity to participate in settlement negotiations. When a separate information request letter has been sent to PRPs prior to the general notice, the information request should be sent as early as possible to avoid any delay in issuing the general notice.

3. Recipients of General Notice

General notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under §107 of CERCLA. If there is doubt about whether available information supports issuance of the general notice, separate information request letters may be sent to such parties prior to issuing the notice. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

If additional PRPs are identified after the general notice but before the RI/FS special notice is issued, the Regions should provide a general notice to those additional PRPs. If additional PRPs are identified after general and special notices are issued, the additional PRPs need not receive a general notice before receiving the appropriate special notice. However, relevant aspects of the general notice should be incorporated into the special notice.

Copies of the general notice should be provided to the Regional administrative record coordinator, the appropriate State

representative, the State or Federal trustee if a trustee for natural resources has been designated, and to EPA headquarters at the same time notices are sent to PRPs. The copies of notices to headquarters should be sent to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement (OWPE).

Providing copies to the administrative record coordinator is important for ensuring that the notice is placed in the administrative record.[4] Providing copies to the State representative and the State or Federal trustee is important for ensuring that States are appropriately informed about possible future negotiations.[5] Providing copies to OWPE is essential for permitting entry into the Superfund Enforcement Tracking System (SETS). Entry into sets will facilitate our efforts to track site activities and to respond to Congressional and other inquiries. Direct Regional input of data into SETS on notice letter recipients is planned for FY 1988.

It is not necessary to provide copies of each general notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one general notice with a list of other parties who have received the letter would suffice.

4. Contents of General Notice

The general notice letter should contain the following components: a) a notification of potential liability for response costs, b) a discussion about future notices and the possible future use of special notice procedures, c) a general discussion about site response activities, d) a request for information about the site (if appropriate), e) the release of certain site-specific information (where available), f) a discussion about the merits of forming a PRP steering committee, g) a notice regarding the development of an administrative record, and h) a deadline for response to the letter and information on the EPA representative to contact.

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[4] A discussion about placing notice letters in the administrative record is covered in the forthcoming "Guidance on the Administrative Record for Selecting a Response Action Under CERCLA" and in the preamble to the forthcoming revisions to the National Contingency Plan.

[5] State participation in negotiations is covered in the forthcoming "Interim Guidance on EPA-State Relations in CERCLA Enforcement."

a. Potential liability: The letter should inform parties that they are potentially liable for response costs under §107 of CERCLA, including the costs of conducting the RI/FS and RD/RA. The letter should define the scope of potential liability and should briefly explain why the parties have been identified as PRPs.

b. Future notice under §122(a) or §122(e): The letter should indicate that EPA will notify the party at an appropriate point in the future. The letter should specify that this notice will either be a §122(a) notice or a §122(e) special notice and should explain what these notices are.

The letter should indicate that the §122(a) notice is a notice which informs parties that EPA will not use the §122(e) special notice procedures. The letter should indicate that the notice will provide an explanation for the decision not to use the special notice procedures.

The letter should also indicate that a §122(e) special notice will invoke the negotiation moratorium. The letter should make clear that issuance of a §122(e) special notice letter is discretionary and may be used if EPA determines that use of such procedures would facilitate an agreement and expedite remedial action. The letter should also explain the purpose of the special notice and the subsequent negotiation moratorium. Informing PRPs about the special notice procedures and the negotiation moratorium will alert PRPs to possible future negotiations and increase their awareness of their opportunities for participation in such negotiations.

c. Site response activities: The letter should generally discuss the activities EPA plans to undertake at the site. Where appropriate, such activities should include scheduled start or completion dates for the RI/FS or RD/RA. Instances where it may not be appropriate to provide start or completion dates include situations where the general notice is issued very early in the process and where specific dates have not yet been set, or where it is expected that target dates are likely to change significantly.

d. Information request: The letter should request information on substances sent to or present at the site and the names of other PRPs pursuant to §104(e) of CERCLA and/or §3007(a) of RCRA if a separate information request has not already been issued. The content of the information request should be consistent with the forthcoming "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas Under CERCLA §104(e) and §122(e)."

e. Information release: At a minimum, the letter should release the names and addresses of other PRPs who have received the general notice letter. In addition, to the extent such information is available, the letter should include the volume and nature of substances contributed by each PRP and a ranking by volume of the substances at the facility if such information has not been previously released.

f. PRP steering committee: The letter should request that the PRPs identify a member of their organization who will represent their interests. In addition, the letter should recommend that PRPs form a steering committee to represent the group's interests in possible future negotiations. The letter should indicate that establishing a steering committee is important for facilitating negotiations with EPA.

g. Administrative record: The letter should be used as a vehicle for informing PRPs of the availability of an administrative record that will contain documents which form the basis for the Agency's decision on the selection of remedy. The letter should indicate that the record will be open to the public for inspection and comment. The letter should also provide information regarding the opening of the record and where it will be located.

h. PRP response and EPA contact: The letter should encourage PRPs to notify EPA by a specified date of their interest to participate in future negotiations. The letter should indicate that PRPs may respond as a group through a steering committee if one has been formed. The letter should also provide a cut off date for voluntary compliance with information requests (if a request for information is contained in the general notice). An appropriate time frame for the PRP response to an information request is generally thirty days from receipt of the letter. Finally, the letter should provide the name, phone number, and address of the EPA representative to contact.

C. RI/FS and RD/RA SPECIAL NOTICE LETTERS

Prior to EPA's conduct of the RI/FS and RD/RA, the Regions should either issue the special notice to PRPs or provide PRPs with an explanation why it was not appropriate to use the special notice procedures. Issuance of the special notice triggers a moratorium on EPA's conduct of the RI/FS and remedial action. While the statute does not impose a moratorium on EPA's conduct of the remedial design, the Agency will not generally conduct such activities during the moratorium. 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 or finance response activities.

The negotiation moratorium may last a total of 90 days for the RI/FS and 120 days for the RD/RA if EPA receives a "good faith offer" from PRPs within the first 60 days of the moratorium. The negotiation moratorium would conclude after 60 days if the PRPs do not provide EPA with a "good faith offer."

The initial 60 day moratorium begins on the date the PRPs receive the special notice via certified mail. In instances where there is more than one PRP and PRPs are likely to receive the special notice on different days, the date the moratorium begins should be 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 begins and ends.

1. Whether to Issue RI/FS and RD/RA Special Notice

EPA has the discretion to use the special notice procedures when EPA determines that a period of negotiation would facilitate an agreement with PRPs and would expedite remedial actions. The Agency believes entering into such negotiations would generally facilitate settlements and plans to utilize the RI/FS and RD/RA special notice procedures in the vast majority of cases.

There are, however, some circumstances where it would generally not be appropriate to use such procedures. Such circumstances include 1) where past dealings with the PRPs strongly indicate they are unlikely to negotiate a settlement, 2) where EPA believes the PRPs have not been negotiating in good faith, 3) where no PRPs have been identified at the conclusion of the PRP search, 4) where PRPs lack the resources to conduct response activities, 5) where there are ongoing negotiations, or 6) where notice letters were already sent prior to the reauthorization of CERCLA and onging negotiations would not benefit by issuance of a special notice.

Special notices may be issued for operable units of remedial actions. The test for determining whether to issue a special notice for an operable unit is generally the same as for full-scale remedial actions. The general expectation is that separate special notices will be issued for each separate operable unit as long as issuing the notice would facilitate an agreement and would expedite the remedial action. However, special notices may also be issued for only major operable units or may cover a series of operable units if appropriate under the circumstances at the site.

For example, if several operable units will be conducted at a site as relatively separate and distinct response actions, it may be appropriate to consider using separate special notices which would trigger separate negotiation moratoriums. If a series of operable units will make up a remedial action it may be

appropriate to issue the special notice to cover only the major operable unit(s) or to cover several operable units.

2. Notifying PRPs When Not Appropriate to Issue RI/FS and RD/RA Special Notice

In instances where EPA decides it is inappropriate to issue the special notice, §122(a) provides for EPA to notify PRPs in writing of that decision. The notice must indicate the reasons why the Region determined that issuing the special notice and entering into "formal" negotiations was not appropriate. The notice should be provided to all PRPs that have been identified to date as well as to the Regional administrative record coordinator for placement in the record. Such notices should be provided as soon as practicable. In instances where the RI/FS or RD/RA have not yet been initiated, the notice should be sent prior to the initiation of such activities if possible.

In addition, the §122(a) notice should be used as a vehicle for informing PRPs that the Agency will establish or has established an administrative record containing technical documents supporting the Agency's decision on the selection of remedy. The notice should indicate that the record is open for public inspection and comment and should specify where the record will be or has been located.

3. DOJ Role in RI/FS and RD/RA Negotiations

The Regions should notify the Chief of the Environmental Enforcement Section in the Department of Justice (DOJ) prior to issuing special notice letters where settlement by a consent decree is contemplated. A copy of this memorandum should also be provided to the Office of Waste Programs Enforcement and the Office of Enforcement and Compliance Monitoring in Headquarters.

The memorandum to DOJ should indicate when the Region intends to issue the special notice. Because most RI/FS negotiations involve consent orders, notice to DOJ on the RI/FS is not ordinarily necessary. However, where a site is in litigation or where settlement by consent decree is expected, DOJ should be notified at least 30 days prior to issuing the RI/FS special notice. In addition, where the resolution of the matter by an administrative order is expected to involve a compromise of past or future response costs and the total response costs will exceed $500,000, DOJ is to be notified. DOJ's role will be to review the compromise of the claim pursuant to section 122(h)(1) but not to review the administrative order for the RI/FS. For RD/RA negotiations, the notice should be sent to DOJ at least 60 days prior to issuing the RD/RA special notice. The memorandum should also identify the EPA Regional representative DOJ should contact.

In addition, the Regions should consult with the Chief of the Environmental Enforcement Section prior to sending a copy of any draft consent decree or any outline of a draft consent decree to PRPs. The Regions are encouraged to include a draft consent decree with the RD/RA special notice or soon thereafter as discussed below.

4. Timing of RI/FS Special Notice

It is important that PRPs receive the RI/FS special notice letter as soon as practicable. Of greater importance, the letter must 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 an agreement providing for the PRPs to conduct or finance the RI/FS. Timely receipt of the special notice will have a significant effect on the PRPs ability for meaningful participation in formal negotiations.

The RI/FS special notice letter should be sent to PRPs no later than 90 days prior to the scheduled date for initiating the RI/FS. The scheduled date for initiating the RI/FS refers to the date funds will be obligated to commence response activities. A minimum of 90 days is important for ensuring that the negotiation moratorium does not delay initiation of the RI/FS in the event negotiations do not result in a settlement. The time for service by mail should be taken into account.

5. Timing of RD/RA Special Notice

The timing of the RD/RA special notice letter will have a significant impact on both the success of negotiations and on EPA's ability to move forward with implementing a remedy without delay. As indicated earlier, "formal" negotiations pursuant to special notice are not the sole vehicle for reaching settlements. "Informal" negotiations must occur throughout the process and in advance of the special notice. To assure that "formal" negotiations are productive, EPA must initiate PRP search and information exchange activities as well as "informal" negotiations as early as possible.

The primary purpose of the special notice procedures is to facilitate settlements through negotiation. A primary concern in determining when to issue an RD/RA special notice is whether there is a likelihood that meaningful negotiations can be conducted at a given stage in the process. Another concern is that, to the extent practicable, the negotiations must be scheduled to minimize any delay in the remedial design and remedial action. A final concern is that negotiations be carried out in a way that does not undermine or have the appearance of undermining the public participation process.

This guidance establishes an approach which identifies when the Regions must generally issue the RD/RA special notice letter. The Regions may, however, adopt an alternative approach under appropriate circumstances. Appendix A contains illustrations of the three approaches discussed below. [6]

a. General Approach: Issue special notice when release draft FS and proposed plan for public comment. The Regions generally must issue the RD/RA special notice when the draft feasibility study (FS) and proposed plan [7] are released to the public for comment. As shown in Appendix A, issuance of the special notice with the release of the draft FS and proposed plan triggers the initial 60 day negotiation moratorium. The initial 60 day negotiation moratorium begins at the start of the 30 day public comment period and, in conjunction with the first 30 days of the 60 day extended negotiation moratorium, is concurrent with the Record of Decision (ROD) review and approval process. The remaining 30 days of the extended negotiation moratorium is concurrent with the initial phases of the remedial design. EPA's ability to sign the ROD is not affected by the duration of the negotiation moratorium. The ROD may be signed at any point after the close of the public comment period and the preparation of the responsiveness summary for the public.

In most cases, commencing formal negotiations at the same time that the draft FS and proposed plan are released will properly balance the considerations stated earlier relating to EPA's ability to conduct meaningful negotiations, to minimize delay in implementing the RD/RA, and to maintain the integrity of the public participation process. Under this approach, formal opportunity for PRP involvement would begin at an early yet concrete stage in the process. Early participation may be especially advantageous in situations where PRPs have not been previously or substantially involved in RI/FS activities. In addition, PRPs and the public would have knowledge of the possible range of alternatives through the draft FS and proposed

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[6] The time periods depicted in the following discussion and illustrated in Appendix A reflect "best case" scenarios where various response and enforcement activities are expected to be carried out without delay. For example, the public comment period lasts 30 days and does not take into account a possible extension.

[7] The proposed plan refers to the public participation document developed pursuant to §117(a). This is a non-legal, non-technical document that describes the alternatives in the FS, and specifies and provides a brief analysis of EPA's preferred alternative. A more detailed discussion of the proposed plan will be contained in the forthcoming "Guidance on Documenting Decisions at Superfund Sites" (referred to as the ROD Guidance).

plan prior to "formal" negotiations. This information is important for assisting the PRPs in developing a meaningful "good faith offer" for conducting or financing the RD/RA.

b. Alternative Approach: Issue special notice prior to release of draft FS and proposed plan for public comment. Although the Regions generally will issue the RD/RA special notice when the draft FS and proposed plan are released to the public for comment, the Regions are encouraged to issue the special notice earlier in the process if this action would facilitate the prospects for reaching a settlement. If a Region chooses to follow this approach, the Region should include with the special notice a summary or fact sheet of the alternatives EPA has screened and the alternatives the Agency is currently considering. *

As shown in Appendix A, the RD/RA special notice may be issued prior to EPA's release of the draft FS and proposed plan. Issuance of the special notice triggers the initial 60 day negotiation moratorium. The initial negotiation moratorium is concurrent with the review and release of the draft FS and proposed plan. The initial negotiation moratorium is completed prior to the initiation of the public comment period. The public comment period is concurrent with the first 30 days of the extended negotiation moratorium. The remaining 30 days of the extended negotiation moratorium is concurrent with the ROD review and approval process. The ROD could be signed and the negotiation moratorium could be concluded at about the same time. EPA's ability to sign the ROD is not affected by the negotiation moratorium. The ROD may be signed at any point after the close of the public comment period and the preparation of the responsiveness summary for the public.

In many cases, providing special notice at this early stage may be inappropriate because too much uncertainty would exist about the remedy to allow for meaningful negotiations. However, under other circumstances it may be appropriate to issue the

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* Release of a summary or fact sheet on the alternatives that have been screened and the alternatives that are being considered is important for facilitating negotiations at this early stage in the remedial process. This information will be useful to PRPs in developing their "good faith offer" for conducting or financing a response action and will be important for informing PRPs about the alternatives the Agency is considering at the site. The Regions should include the summary of alternatives or fact sheet in the administrative record for each site.

special notice early in the process, especially in situations where there is a relatively small group of PRPs, it is clear what the remedy is likely to be, and the remedy is not likely to be controversial.

Where circumstances permit issuance of the special notice at this early stage, an advantage to this approach is that the ROD review and approval process and the negotiation moratorium could be concluded at about the same time. This would help assure that cleanup occurs as soon as possible whether through a negotiated settlement or Fund-financed action. In addition, there would be an early opportunity to inform PRPs of various remedial alternatives under consideration by EPA prior to EPA's identification of the proposed plan. Early participation may be advantageous where PRPs have not been previously or substantially involved in RI/FS activities.

c. Alternative Approach: Issue special notice when the ROD is signed. Although the Regions generally will issue the RD/RA special notice letter when the draft FS and proposed plan are released to the public for comment, there may be some limited circumstances where it is appropriate to issue the notice later in the process (i.e. when the ROD is signed). This approach may be followed, however, only where the Region can provide adequate justification and where the Region has obtained prior approval from Headquarters. Approval must be obtained in writing from the Directors of the Office of Waste Programs Enforcement and the Office of Emergency and Remedial Response.

As shown in Appendix A, under this approach the RD/RA special notice would not be issued until the ROD is signed. Thus, the entire 60 to 120 day negotiation moratorium would not occur until the remedial design phase.

An advantage to this approach is that since the ROD would be signed and the remedy would be selected at the start of the RD/RA negotiation moratorium, the PRPs would know precisely which remedy the "good faith offer" and the negotiations should focus on. In addition, since the negotiations would begin after the close of the public comment period, the PRPs and EPA would have the benefit of knowing the public comments.

The major disadvantage to this approach is that the negotiation moratorium would not occur until the end of the process (i.e. not until the beginning of the remedial design phase). Issuing the special notice at this point would create the greatest potential for a subsequent delay in implementing the remedy.

Instances where it may, however, be appropriate to issue the special notice later in the process (i.e. not until the ROD is signed) may be where more time is needed to conduct informal negotiations, where the site is particularly complex, or where there is an extraordinarily large number of PRPs (e.g. hundreds of PRPs). Another example may be where there is little expectation that a Fund-financed remedial action will occur in the near future at an enforcement-lead site. If Fund-financed activities are not expected to occur and a later moratorium would facilitate cleanup, it may be less important to initiate and conclude negotiations early in the process.

6. Recipients of RI/FS and RD/RA Special Notice

The RI/FS and RD/RA special notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under §107 of CERCLA. If there is doubt about whether available information supports issuance of the RI/FS and RD/RA special notices, separate information request letters may be sent to such parties prior to issuing such notice. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

Section 122(e)(2)(C) authorizes EPA to bring additional parties into negotiations or to enter into a separate agreement with parties when additional PRPs are identified during the negotiation period or after an agreement has been entered into. The Regions may provide a special notice to additional parties if they are identified after issuance of the RI/FS special notice letter. However, issuance of a special notice to additional parties would not change the duration of the negotiation moratorium. The special notice may invite PRPs to participate in remaining negotiations, but would not extend the pre-existing negotiation moratorium.

Copies of the special notices should be provided to the Regional administrative record coordinator, the appropriate State representative, the State or Federal trustee if a trustee for natural resources has been designated, and to EPA headquarters at the same time notices are sent to PRPs. The copies of notices to headquarters should be sent to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement (OWPE).

Providing copies to the administrative record coordinator is important for ensuring that the notice to be placed in the record. Providing copies to the State representative and the State or Federal trustee is important for ensuring that States are appropriately informed about pos[illegible] future negotiations. Providing copies to OWPE is essenti[illegible] permitting entry into

the Superfund Enforcement Tracking System (SETS). Entry into sets will facilitate our efforts to track site activities and to respond to Congressional and other inquiries. Direct Regional input of data into SETS on notice letter recipients is planned for FY 1988.

It is not necessary to provide copies of each special notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one special notice with a list of other parties who have received the letter would suffice.

7. Contents of RI/FS and RD/RA Special Notice

The RI/FS and RD/RA special notice letters should contain the following components: a) a notification of potential liability, b) a discussion about the special notice and subsequent negotiation moratorium, c) a discussion about the response activities to be conducted, d) a copy of a statement of work or workplan and a draft administrative order on consent for the RI/FS, e) a copy of a draft consent decree for the RD/RA (if possible), f) a discussion about what constitutes a "good faith offer" for the RI/FS, g) a discussion about what constitutes a "good faith offer" for the RD/RA, h) a release of certain site-specific information (where available and appropriate), i) a demand for payment of EPA costs incurred to date, j) a notification about the administrative record, and k) a deadline for response to the letter and the name of the EPA representative to contact.

a. Potential liability: The letter should specify that PRPs are potentially liable for the costs of conducting the RI/FS or the RD/RA. A detailed discussion about potential liability is not necessary particularly if the RI/FS or RD/RA special notice references the general notice.

b. Special notice and formal negotiations: The letter should discuss the purpose of the special notice and the subsequent negotiation moratorium. The level of detail will depend upon whether the PRP has received the general notice and whether the general notice provided an adequate discussion. At a minimum, the letter should make clear that EPA is inviting PRPs to participate in "formal" negotiations for PRP conduct of the RI/FS or RD/RA and that this letter automatically triggers the formal negotiation period. In addition, it is important that the special notice indicate the date the negotiation moratorium will conclude in the absence of and in the event of a "good faith offer." Finally, the letter should explain that a consent order or consent decree should be finalized by the end of the moratorium.

c. Response actions to be conducted: The letter should identify the response activities EPA plans to conduct at the site and provide scheduled dates for initiating such activities if appropriate.

d. Statement of work or workplan and draft administrative order on consent for RI/FS special notice: The letter should provide a statement of work or workplan and draft administrative order (AO) on consent. Such information is crucial to PRPs in their development of a "good faith offer" to EPA for conducting or financing the RI/FS and for ultimately facilitating settlements. The Regions are encouraged to provide the draft AO on consent with the notice letter if practicable. At a minimum, the letter should contain a copy of the statement of work with the expectation that the draft AO will follow as soon as practicable.

e. Draft consent decree for RD/RA special notice: The letter should contain a copy of the draft consent decree if possible. It is important that PRPs have the draft consent decree at the start of negotiations or soon thereafter since the decree contains important information which will assist PRPs in developing their "good faith offer" to EPA.

f. "Good faith offer" for RI/FS: The letter should indicate that a "good faith offer" is a written proposal which demonstrates the PRP's qualifications and willingness to conduct or finance the RI/FS. A "good faith offer" for the RI/FS should include the following:

- a statement of the PRPs willingness to conduct or finance the RI/FS which is generally consistent with EPA's statement of work or work plan and draft administrative order on consent or provides a sufficient basis for further negotiations;

- a paragraph-by-paragraph response to EPA's statement of work or workplan and draft administrative order on consent;

- a detailed statement of work or workplan identifying how the PRPs plan to proceed with the work;

- a demonstration of the PRPs technical capability to undertake the RI/FS. This should include a requirement that PRPs identify the firm they expect will conduct the work or that PRPs identify the process they will undertake to select a firm;

- a demonstration of the PRPs financial capability to finance the RI/FS;

- a statement of the PRPs willingness to reimburse EPA for the costs EPA incurs in overseeing the PRP conduct of the RI/FS as required by §104(a)(1); and

- the name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

g. "Good faith offer" for RD/RA: The letter should indicate that a "good faith offer" is a written proposal which demonstrates the PRPs qualifications and willingness to conduct or finance the RD/RA. A "good faith offer" for the RD/RA should include the following:

- a statement of the PRPs willingness to conduct or finance the RD/RA which is generally consistent with EPA's proposed plan or which provides a sufficient basis for further negotiations in light of EPA's proposed plan;

- a paragraph-by-paragraph response to EPA's draft consent decree, including a response to other documents that may have been attached to the decree such as a technical scope of work for the proposed plan or access or preauthorization agreements;

- a detailed "statement of work" or "workplan" identifying how PRPs plan to proceed with the work;

- a demonstration of the PRPs technical capability to undertake the RD/RA. This should include a requirement that PRPs identify the firm they expect will conduct the work or that PRPs identify the process they will undertake to select a firm;

- a demonstration of the PRPs capability to finance the RD/RA;

- a statement of the PRPs willingness to reimburse EPA for past response and oversight costs;

- a discussion about the PRPs position on releases from liability and reopeners to liability; and

- the name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

h. Information release: To the extent such information is available and to the extent such information has not been previously released, the letter should contain information on the names and addresses of other PRPs, the volume and nature of

substances contributed by each PRP, and a ranking by volume of the substances at the facility. Note that the release of information with the RI/FS and RD/RA special notices is not intended to require the release of information previously provided to PRPs.

i. Demand for payment: The letter should include a demand that PRPs reimburse EPA for the costs the Agency has incurred in conducting response activities at the site pursuant to §107(a). The letter should identify the action EPA undertook and the cost of conducting the action. The letter should also indicate that the Agency anticipates expending additional funds on activities covered by this notice and other specified future activities. Finally, the letter should demand payment of interest for past and future response costs incurred by EPA pursuant to §107(a). Notice letters should not be delayed to obtain cost information where such information has not been previously collected.

j. Administrative record: The letter should be used as a vehicle for informing PRPs of the availability of an administrative record containing documents that form the basis for the Agency's decision on the selection of remedy. The letter should indicate that the record is open to the public for inspection and comment. The letter should also indicate where the record will be or has been located.

k. PRP response and EPA contact person: The letter should encourage PRPs to notify EPA of their interest to participate in negotiations. The letter should indicate that PRPs may respond as a group through a steering committee if a committee has been formed. In addition, the letter should provide the name, phone number, and address of the EPA representative to contact.

D. CONCLUSION OF NEGOTIATION MORATORIUM AND DEADLINE MANAGEMENT FOR RI/FS AND RD/RA

At the conclusion of the §122(e) negotiation moratorium, the Regions should have a fully negotiated administrative order on consent for the RI/FS and a fully negotiated consent decree for the RD/RA which has been signed by the PRPs. A signed document is necessary to show that an agreement has, in fact, been reached. *

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* Pre-SARA guidance for drafting an administrative order is provided in "Superfund Administrative Order: Workshop and Guidance Materials" (1985) and for drafting a consent decree in "Guidance on Drafting Consent Decrees in Hazardous Waste Cases" (May 1, 1985). These guidances are being revised to include SARA's requirements.

At the conclusion of the 120 day moratorium for the RD/RA a determination must be made on whether to continue settlement activities, whether the site should be cleaned up using Superfund money, or whether to initiate a §106 enforcement action. A continuation of settlement activities may include seeking an extension to the 120 day negotiation moratorium as discussed below, or sending a consent decree to the Department of Justice for lodging in the appropriate district court.

In instances where an agreement has been reached and fully negotiated but PRPs have not yet obtained signatures, it may be necessary to obtain an extension to the negotiation moratorium. Extensions may also be necessary where the agreement has not been fully negotiated but all major issues are resolved and outstanding issues are well defined and final language is imminent. Extensions to the negotiation moratorium can be obtained only in certain circumstances as discussed in the February 12, 1987 "Interim Guidance: Streamlining the CERCLA Settlement Decision Process." [10]

The timing of special notice letters will have a significant affect on our ability to successfully conclude negotiations at the end of the moratorium period. The Streamlined Settlement Policy provides for two different processes for obtaining extensions for the RI/FS and RD/RA moratoriums. The policy indicates that the Regional Administrator has the discretion to terminate or extend negotiations for the RI/FS after 90 days. However, extension of negotiations beyond an additional 30 days should be authorized by the Regional Administrator only in limited cases.

Relating to the RD/RA moratorium, the Streamlined Settlement Policy provides for either Regional or Headquarters approval of an extension under certain circumstances. An extension to the 120 day RD/RA moratorium may be granted for an additional 30 days by the Regional Administrator when settlement is likely and imminent. An additional extension beyond the 30 days may be approved only by the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER) and only in rare and extraordinary circumstances.

This guidance re-emphasizes the importance of meeting the 90 day moratorium for the RI/FS and the 120 day moratorium for the RD/RA. To aid that policy, this guidance identifies three circumstances where the Regional Administrator and Assistant Administrator for OSWER may consider granting such extensions for the RD/RA moratorium.

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[10] This guidance was issued under OSWER Directive #9832.9.

First, it may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day moratorium for the RD/RA if EPA selects a remedy in the ROD which is significantly different from the Agency's stated preference in the proposed plan. This could mean that the focus of negotiations could change significantly, requiring additional time to reach agreement with PRPs.

The second example applies to Fund-lead sites. It may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day negotiation moratorium for the RD/RA if non-enforcement activities at the site (e.g. an extended public comment period or an extended ROD review and approval process) cause a significant delay in the Agency's ability to move forward in implementing a Fund-financed remedy. An extension to the negotiation moratorium may be especially appropriate if there is reason to believe a negotiated settlement is imminent. In other words, if the Fund is not ready to move forward in implementing the remedy at the end of the 120 day negotiation moratorium there is no reason to conclude negotiations if there is reason to believe an agreement can be reached.

The third example applies to enforcement-lead sites. It may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day negotiation moratorium for the RD/RA after a §106 litigation referral has been prepared and referred to the Department of Justice (DOJ) for action. In fact, the preparation and referral of a case to DOJ may be an important mechanism for providing the necessary impetus for reaching a voluntary settlement. In many cases it may be appropriate to issue a unilateral administrative order concurrent with the referral.

VI. NOTICE LETTERS AND NEGOTIATION MORATORIUM FOR REMOVAL ACTIONS

The notice letter process for removal actions differs from the notification process for remedial actions. As discussed above, the notification process for remedial actions involves issuance of three notice letters. The notification process for removals will involve only one notice letter which may or may not invoke the §122(e) special notice procedures as discussed below.

A. NOTICE LETTERS

1. Whether to Issue Removal Notice

The Regions should attempt to contact PRPs prior to initiating a Fund-financed removal action to inform PRPs of their potential liability where EPA will incur response costs or

to secure a private party response. This guidance encourages the Regions to seek PRP response through a written notice letter but the Regions may contact PRPs verbally (with a written follow-up notice). This is consistent with the guidance on "Issuance of Administrative Orders for Immediate Removal Actions" (2/21/84).

The Regions should issue notice letters to readily identifiable PRPs for removal actions in the vast majority of cases. The content of the notice will vary depending whether the notice will be used simply to notify PRPs of their potential liability for an action EPA has already taken or is about to take, whether the notice will be used to encourage a private party response through "informal" negotiations (i.e. negotiations not triggered by the §122(e) special notice procedures), or whether the notice will be used as a mechanism for invoking the §122(e) special notice procedures which provide for "formal" negotiations between EPA and PRPs.

2. <u>When to Use Special Notice Procedures for Removals</u>

The Regions should consider using the §122(e) special notice procedures only for those removals where the threat is of a nature that it is not necessary to initiate an onsite removal action for at least six months. The "six month planning time period" begins once the site evaluation is completed. This means that for the vast majority of removal actions the Regions will not be required to utilize the special notice procedures. It is not appropriate to utilize special notices for most removal actions because the subsequent moratorium may interfere with the Agency's ability to implement the remedy in a timely manner. In addition, it may not be worth expending the time and resources to enter into formal negotiations when a removal will be a relatively short term and inexpensive response action.

The Regions should include the following factors in their determination of whether it is appropriate to utilize the special notice procedures for removals with a six month planning lead time: 1) whether viable PRPs have been identified, 2) whether the PRPs are expected to respond favorably to the invitation to participate in negotiations and to conduct or finance the removal action, 3) whether issuance of the special notice could delay implementation of the removal action, and 4) whether it may be more appropriate to enter into "informal" negotiations in lieu of "formal" negotiations under §122(e).

In determining the PRPs viability, the Region should inquire about the PRPs financial and technical capability for conducting and/or financing the removal action in an effective and timely manner. In determining the PRPs willingness to undertake or finance the removal action, the Region should, at a minimum, obtain a verbal agreement from the PRPs prior to issuance of the special notice. In determining whether the special notice may

delay implementation of the remedy or in determining whether to enter into "informal" rather than "formal" negotiations, the Regions should consider whether the §122(e) negotiation moratorium would interfere with other activities at the site.

3. Notifying PRPs When Not Appropriate to Utilize Special Notice Procedures for Removals

EPA's decision on whether to use the special notice procedures for any response action is clearly discretionary. However, §122(a) requires the Agency to notify PRPs in writing when the Agency decides not to utilize such procedures. The removal notice provides a convenient vehicle for informing PRPs of EPA's decision not to utilize the special notice procedures. The notice should, therefore, inform PRPs of EPA's decision not to utilize such procedures when this determination has been made and should provide an explanation for that decision.

4. DOJ Role in Removal Negotiations

The Regions should consult with the Chief of the Environmental Enforcement Section of DOJ prior to issuing a special notice letter for removal actions where settlement by consent decree is contemplated, or where the settlement is expected to involve a compromise of past or future response costs and the total response costs will exceed $500,000. The Regions should consult with DOJ prior to releasing a draft consent decree to PRPs.

5. Timing of Removal Notice

A removal notice that does not invoke the special notice procedures should be provided to PRPs as soon as practicable. For removal notices that invoke the special notice procedures, the notice should be issued as early as possible but no later than 120 days before the scheduled date for initiating the removal action. The scheduled date for initiating the removal action is the date removal extramural cleanup contractor funds will be obligated and onsite cleanup will begin.

The timing of a notice which invokes the special notice procedures is critical because issuance of the notice triggers the subsequent 60 to 120 day moratorium on EPA conduct of the removal action. (The moratorium would last only 60 days in instances where the PRPs do not provide EPA with a "good faith offer"). Issuing the special notice at least 120 days before EPA will begin the removal ensures that the subsequent 120 day moratorium does not affect EPA's ability to implement the removal action in the event negotiations do not result in an agreement for PRP conduct of the removal action.

6. Recipients of Removal Notice

The removal notice should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under §107 of CERCLA. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

Copies of removal notices should be provided to the Regional administrative record coordinator, the appropriate State representative, and to headquarters. Providing copies to the administrative record coordinator is important for ensuring that the notice to be placed in the record. Providing copies to the State representative is important for ensuring that States are appropriately informed about possible future negotiations.

Providing copies to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement for entry into the Superfund Enforcement Tracking System (SETS). Copies should be sent to OWPE at the same time they are sent to PRPs. Providing copies to OWPE is essential for facilitating our efforts to track site activities and to respond to Congressional and other inquiries.

It is not necessary to provide copies of each removal notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one removal notice with a list of other parties who have received the letter would suffice.

7. Contents of Removal Notice

As indicated, the content of the removal notice will vary depending upon whether the purpose of the letter is to simply inform PRPs of their potential liability or whether the letter will also be used to provide an opportunity for PRP involvement in negotiations either through "informal" or "formal" negotiations. The following highlights the components that should be included in the three different types of removal notices. The specific content of each component of the removal notice should be essentially the same as described earlier for RI/FS and RD/RA general and special notices, except where otherwise specified.

a. Notice of potential liability: If the purpose of the removal notice is simply to inform PRPs of their potential liability and to provide notice that the Agency has or is about to take a response action, the notice should contain the following components: a notice of potential liability; a discussion about site response activities that have been or will

be conducted at the site; a notice on the availability of an administrative record; and a notice pursuant §122(a) that the special notice procedures will not be used.

The notification under §122(a) should inform PRPs that the Agency will not (or did not) use the §122(e) special notice procedures for this particular response action and should provide an explanation for that decision. The letter should indicate that it is the Agency's policy not to use the special notice procedures for removals unless there is a six month planning lead time prior to the initiation of the response action. If the response action does involve a removal with a six month planning lead time but the Agency made a case-specific determination not to use the special notice procedures, the letter should provide an explanation why the use of such procedures was determined to be inappropriate for that particular response action.

b. Notice of potential liability and opportunity to enter into "informal" negotiations: If the purpose of the removal notice is to inform PRPs of their potential liability and to provide PRPs with an opportunity to enter into negotiations with EPA without invoking the §122(e) special notice procedures, the notice should contain the following components: a notice of potential liability; a discussion about site response activities that will be conducted at the site; a copy of the statement of work or workplan and draft administrative order on consent; a notification pursuant to §122(a) that the special notice procedures will not be used; a request that PRPs notify EPA within a specified period of time of their interest to participate in negotiations; a notice on the availability of the administrative record; and information on the EPA representative to contact. The §122(a) notification should contain the same information discussed in the proceeding paragraph.

c. Notice of potential liability and opportunity to enter into "formal" negotiations pursuant to §122(e) special notice procedures: If the purpose of the removal notice is to inform PRPs of their potential liability and to provide PRPs with an opportunity to enter into negotiations with EPA using the §122(e) special notice procedures, the notice should contain the following components: a notice of potential liability; a discussion about site response activities that will be conducted at the site; a discussion about the special notice procedures and the negotiation moratorium; a copy of the statement of work or workplan and draft administrative order on consent; a discussion about what constitutes a "good faith offer"; a request that PRPs notify EPA within a specified period of time indicating their interest to participate in negotiations; a notice on the availability of the administrative record; and information on the EPA representative to contact. The "good faith offer" should contain essentially the same components as described above for the RD/RA.

B. CONCLUSION OF NEGOTIATION MORATORIUM AND DEADLINE MANAGEMENT FOR REMOVALS

At the conclusion of the §122(e) negotiation moratorium for removal actions, the Regions should have a fully negotiated administrative order on consent which has been signed by the PRPs. (Where appropriate, a signed consent decree should be provided). A signed administrative order on consent (or a consent decree) will show that the negotiations have been successfully completed.

The expectation is that the negotiations will be concluded at the end of the 120 day moratorium and the Regions are strongly encouraged to conclude the negotiations within this period of time. In instances where the negotiations do not result in an agreement, the Regions may seek an extension to the 120 day moratorium, issue an administrative order, or proceed with a Fund-financed removal. Note that the Regional Administrator may grant an extension to the 120 day moratorium only in limited and appropriate circumstances.

C. ADMINISTRATIVE ORDERS AND NEGOTIATION MORATORIUM FOR REMOVALS

In most instances, use of the special notice procedures for removal actions will not affect existing policy on issuing administrative orders for removals since the special notice procedures will be issued for only a small portion of removals. For details on the Agency's policy on administrative orders refer to the guidance on "Issuance of Administrative Orders for Immediate Removals" (2/21/84).

It is necessary, however, to modify existing policy in one respect. In instances where Regions use the special notice procedures for a removal action and where issuance of an administrative order is necessary and appropriate, the Regions should not issue the order until the end of the negotiation moratorium. This ensures that the negotiation moratorium will be used to negotiate voluntary settlements.

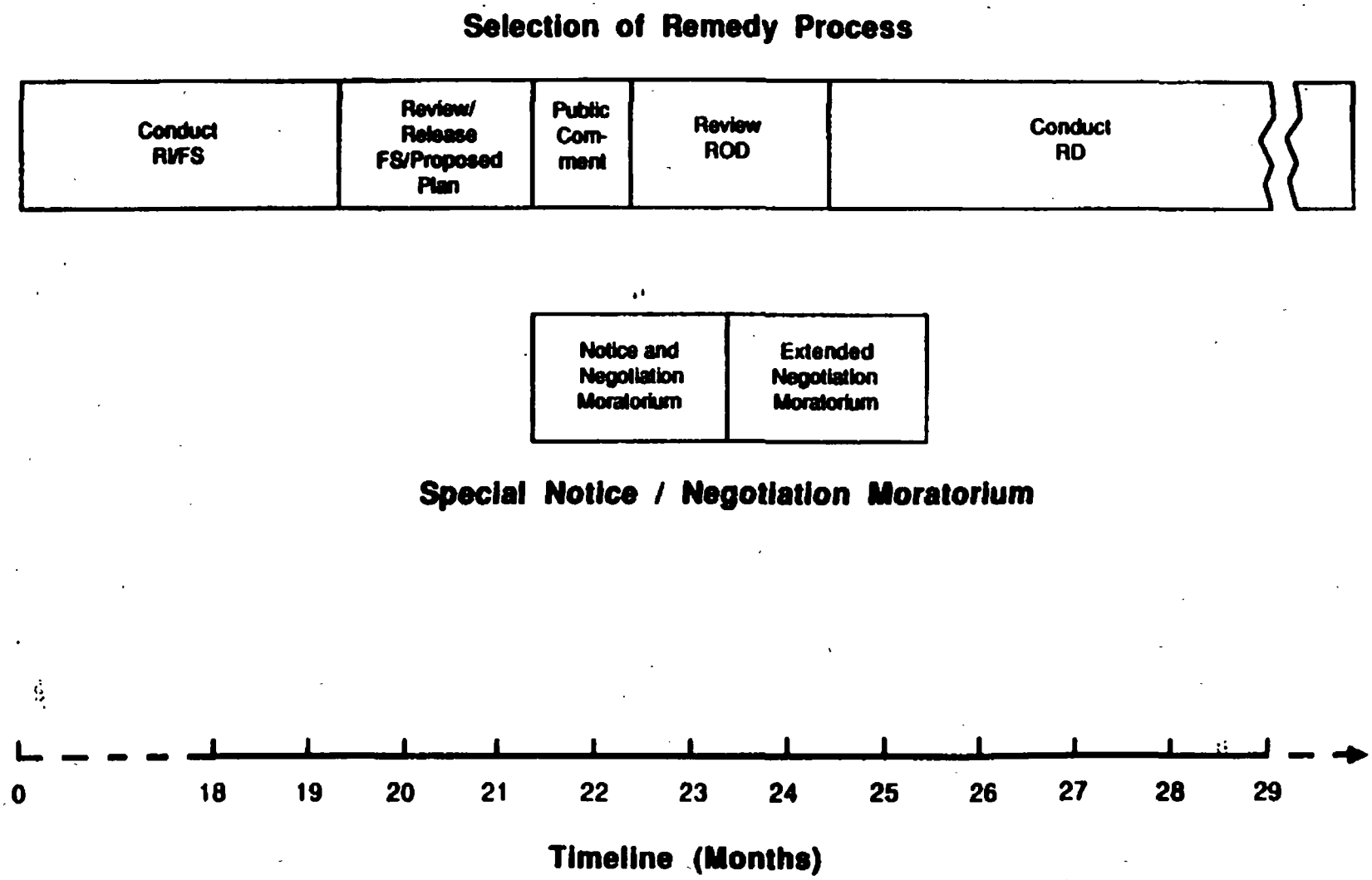
VII. DISCLAIMER

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

VIII. FOR FURTHER INFORMATION

For further information or questions concerning this guidance, please contact Kathy MacKinnon in the Office of Waste Programs Enforcement at FTS-475-6770.

A. General Approach: Issue RD / RA Special Notice When Release Draft FS and Proposed Plan



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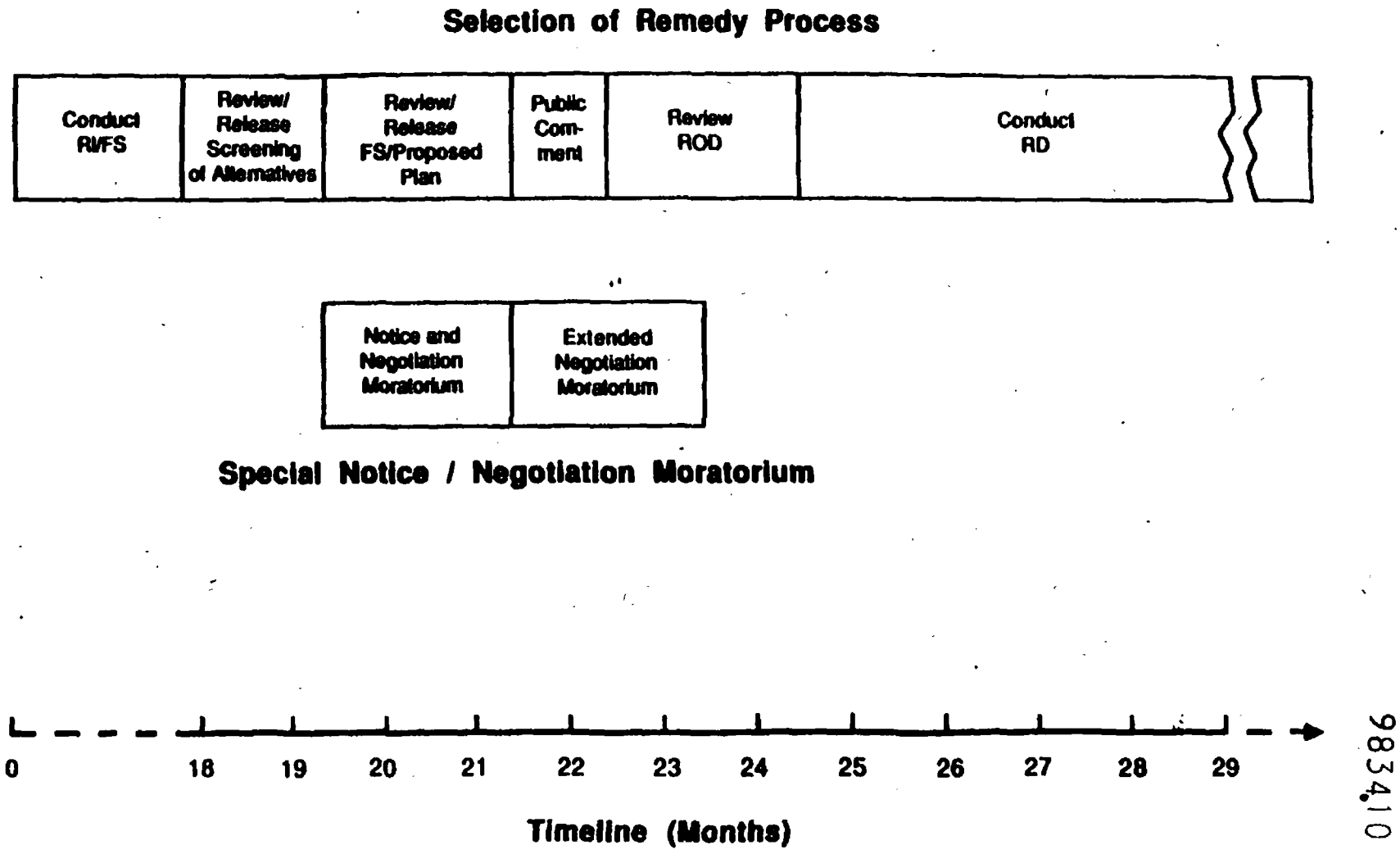
Appendix A

Timing of RD/RA Special Notice Letter

B. Alternative Approach: Issue RD / RA Special Notice Prior to Release of Draft FS and Proposed Plan



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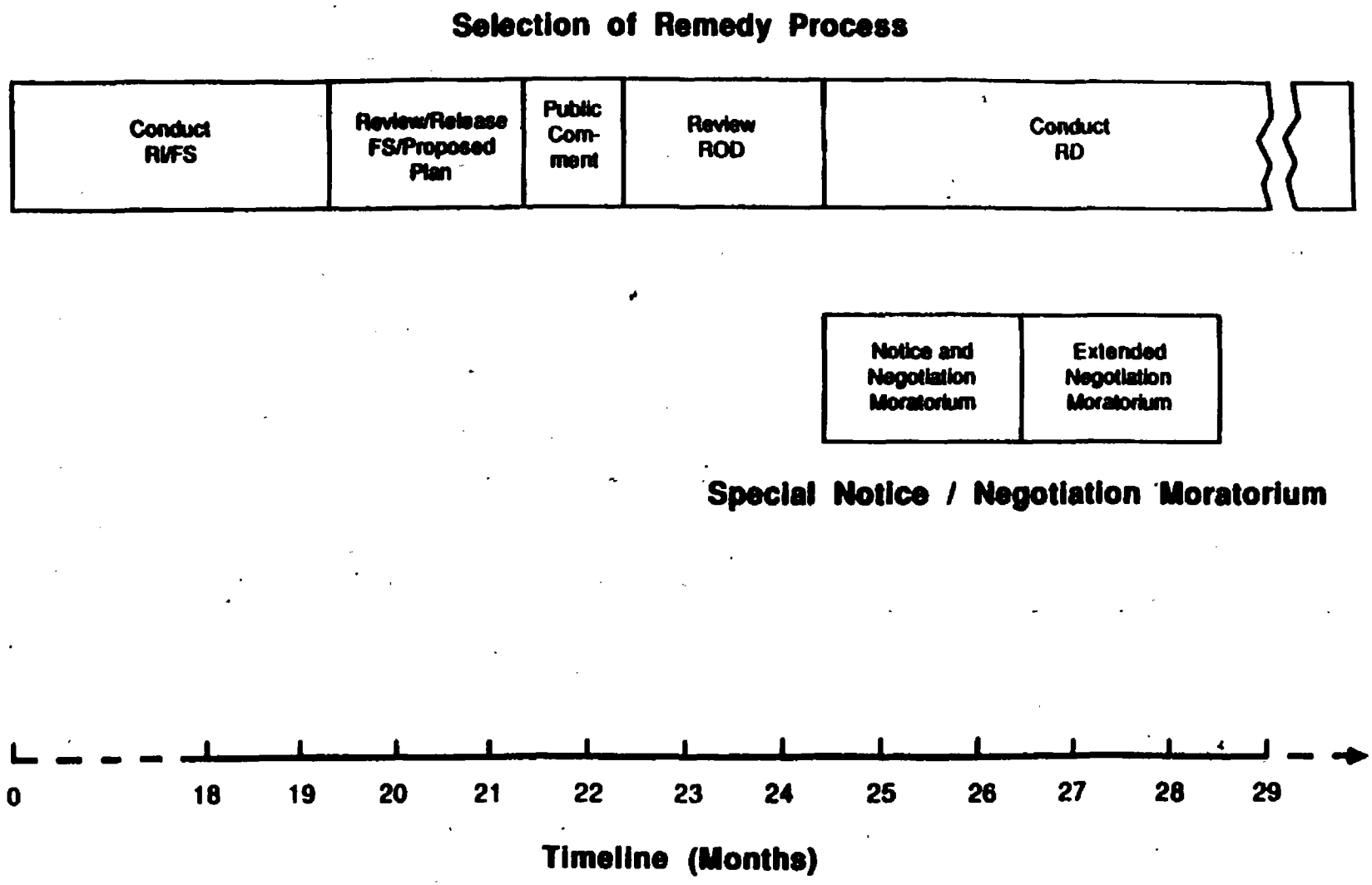
C. Alternative Approach: Issue RD / RA Special Notice Once ROD Signed



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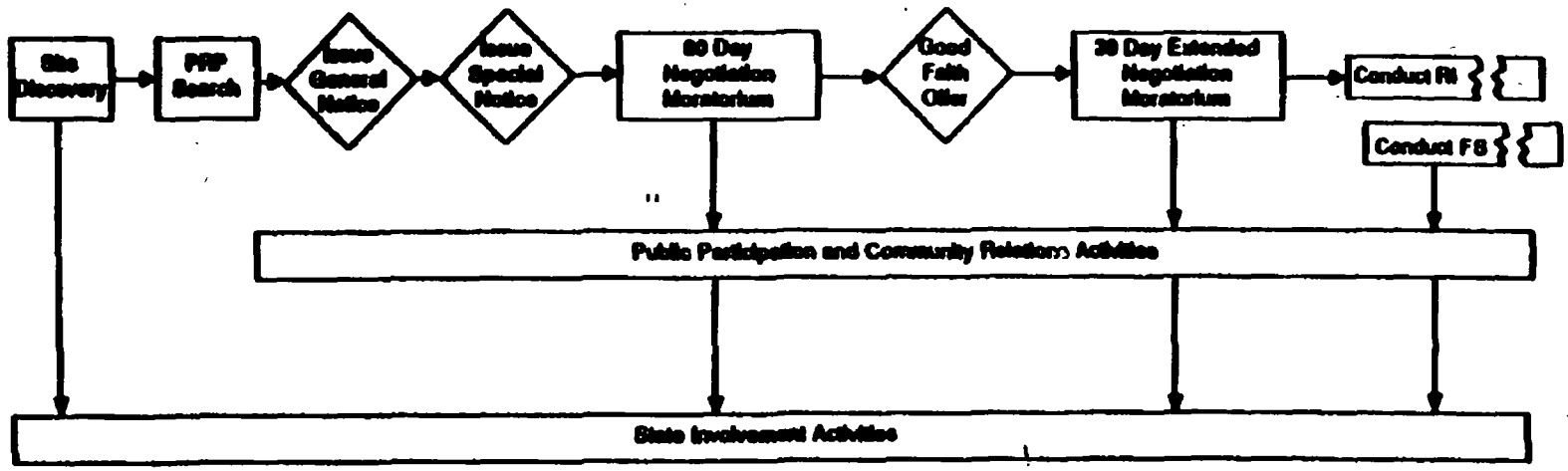
Appendix B

PRP Settlement Process for RI/FS and RD/RA

PRP Settlement Process for RI / FS



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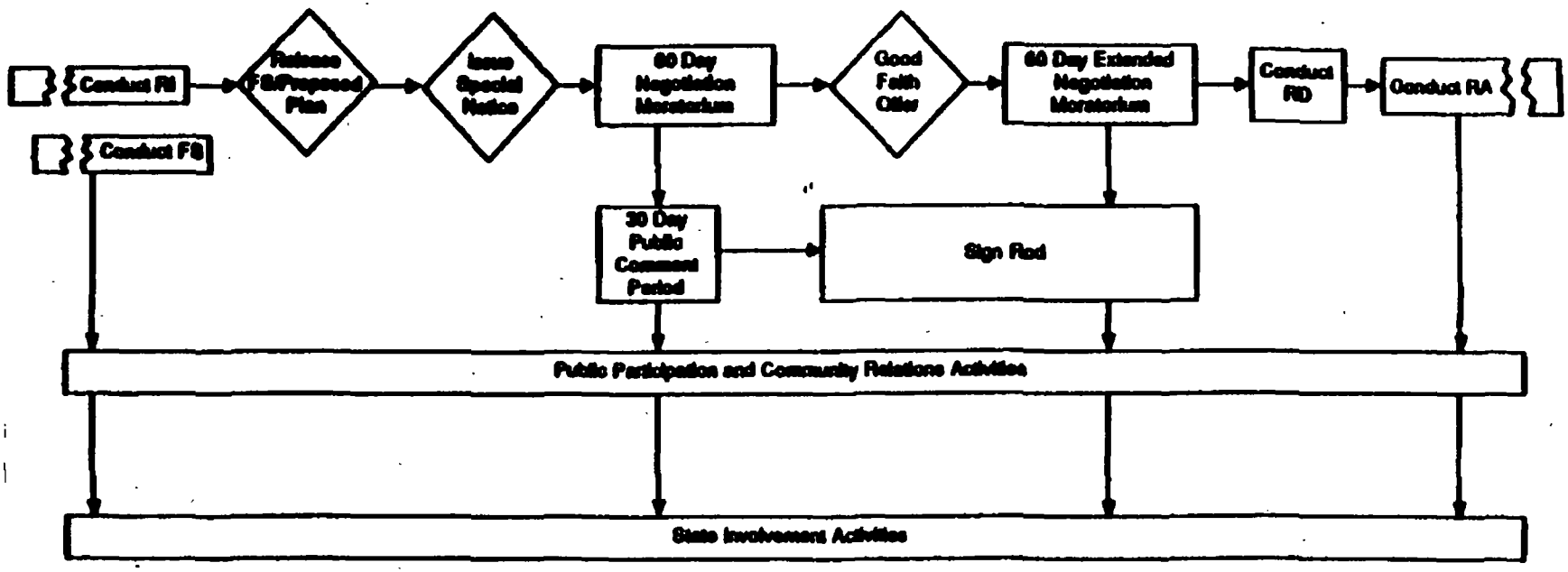
PRP Settlement Process for RD / RA



98341

	Allotment
Osage County	$238,800
Navajo Lands	$89 000
Reserved	$247 400
Total	2,000,000

Dated: February 5, 1988.

Lawrence J. Jensen,

Assistant Administrator for Water.

[FR Doc. 88-3776 Filed 2-22-88, 8:45 am]

BILLING CODE 6560-50-M

[FRL-3330-5]

Superfund Program; Notice Letters, Negotiations and Information Exchange

AGENCY: Environmental Protection Agency

ACTION: Request for Public Comment.

SUMMARY: The Agency is publishing the "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" today to inform the public about these guidelines and to solicit public comment. This guidance covers the use of the section 122(e) special notice procedures and other related settlement authorities under section 122 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (hereinafter referred to as "CERCLA").

DATE: Comments must be provided on or before April 25, 1988.

ADDRESS: Comments should be addressed to Kathy MacKinnon, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, Guidance and Oversight Branch (WH-527), 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kathy MacKinnon, U.S. Environmental Protection Agency Office of Waste Programs Enforcement, Guidance and Oversight Branch (WH-527), 401 M Street, SW., Washington, DC 20460 (202) 475-6770

SUPPLEMENTARY INFORMATION: The guidance emphasizes the importance of reaching voluntary settlements with potentially responsible parties (PRPs) and uses notice letters, negotiations, and information exchange as mechanisms for facilitating settlements. The guidance establishes a process for issuing notice letters to PRPs including the use of the special notice procedures under section 122(e) of CERCLA. The guidance establishes separate notification processes for removal and remedial actions.

The guidance also discusses the Agency's general policy for exchanging information with PRPs, including a discussion about EPA's release of information under section 122(e)(1) of CERCLA and EPA's authorities to request information from PRPs under sections 104(e) and 122(e)(3)(b) of CERCLA and section 3007(a) of the Resource Conservation and Recovery Act (RCRA).

Finally, the guidance discusses various aspects of the negotiation process. This includes a discussion about negotiation moratoriums that are triggered by the use of the section 122(e) special notice procedures. This also includes a discussion about concluding negotiations and managing negotiation deadlines.

The Agency encourages public comment and will reevaluate this interim guidance in response to such comments.

The interim guidance follows.

Date: November 25, 1987

Acting Assistant Administrator for Solid Waste and Emergency Response.

INTERIM GUIDANCE ON NOTICE LETTERS, NEGOTIATIONS, AND INFORMATION EXCHANGE

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Appendix A: Timing of RD/RA Special Notice Letter Appendix B: PRP Settlement process for RI/FS and RD/RA Appendix C: Model Notice Letters (To be sent to EPA regions at a later date)

Memorandum

SUBJECT: Interim Guidance on Notice Letters, Negotiations, and Information Exchange

FROM: J. Winston Porter, Assistant Administrator

TO: Regional Administrators

I. Introduction

The Superfund Amendments and Reauthorization Act of 1986 (SARA), which amends the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), maintains the importance of a strong Superfund enforcement program.[1] In particular, SARA emphasizes the importance of entering into negotiations and reaching settlements with potentially responsible parties (PRPs) to allow PRPs to conduct or finance response actions. SARA generally codified the Agency's Interim CERCLA Settlement Policy but also established some new authorities and procedures that were designed to facilitate settlements.

A fundamental goal of the CERCLA enforcement program is to facilitate voluntary settlements. EPA believes that such settlements are most likely to occur when EPA interacts frequently with PRPs. Frequent interaction is important because it provides the opportunity to share information about a site and may reduce delays in conducting response actions caused by the lack of communication. Important mechanisms for promoting interaction and facilitating communication between EPA and PRPs

[1] CERCLA of 1980 as amended by SARA of 1986 is referred to in this guidance as CERCLA.

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include issuing notice letters, entering into negotiations, and exchanging information with PRPs.

This guidance replaces the October 12, 1984 guidance on "Procedures for Issuing Notice Letters" and the October 9, 1985 guidance on "Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information."[8] Although certain procedures and the timing of various activities have been modified, this guidance retains many fundamental aspects of the October 12, 1984 and October 9, 1985 guidances. In particular, this guidance re-emphasizes the importance of timely issuance of notice letters and the exchange of information between EPA and PRPs. In addition, this guidance incorporates a moratorium and "formal" period of negotiation (referred to as a negotiation moratorium) into the settlement process. EPA's commitment to carrying out these activities is crucial for supporting our fundamental goal of facilitating negotiated settlements.

II. Purpose and Scope of Guidance

The purpose of this guidance is to assist the Regions in establishing procedures for the issuance of notice letters to PRPs, for the conduct of negotiations between EPA and PRPs, and for the exchange of information between EPA and PRPs.

This guidance addresses the use of both "general" and "special" notice letters for removal and remedial actions. Special notice letters differ from general notice letters because special notices trigger the negotiation moratorium. The negotiation moratorium is the period of time where a moratorium is imposed on certain EPA actions and a period of "formal" negotiations is established between EPA and PRPs.

Use of both general and special notice letters are discretionary. However, the Regions are expected to issue general and special notices for the vast majority of remedial actions. Such notice letters will be issued for remedial investigations/feasibility studies (RI/FSs) and remedial designs/remedial actions (RD/RAs). Although it is generally appropriate to issue a "removal notice" for all removal actions, the Regions are not expected to invoke the section 122(e) special notice procedures for most removals.

This guidance also addresses the timing, duration, and conclusion of the negotiation moratorium. Finally, this guidance discusses the process of information exchange between EPA and PRPs, including requests for and releases of site-specific information.

III. Statutory Authority

A. Settlements

Sections 104(a), 122(a), and 122(e)(6) authorize settlements and establish certain conditions for allowing PRPs to conduct or finance response actions. Section 104(a) authorizes EPA to enter into an agreement with PRPs to allow PRPs to conduct or finance response actions in accordance with section 122 if EPA determines that the PRPs will conduct the response action properly and promptly. Under section 104(a), PRPs cannot conduct the RI/FS unless EPA determines that the PRP is qualified to perform the RI/FS. EPA contracts with or arranges for a qualified person other than the PRP to assist EPA in overseeing and reviewing the RI/FS, and the PRP agrees to reimburse the Fund for the costs EPA incurs in overseeing and reviewing the PRP's RI/FS.

Section 122(a) similarly authorizes EPA to enter into agreements with PRPs to perform response actions if EPA determines the action will be conducted properly. Section 122(a) also provides for EPA, when practicable and in the public interest, to facilitate settlements with PRPs to expedite effective remedial actions and to minimize litigation.

Section 122(e)(6) provides that no PRP may undertake any remedial action at a facility where EPA or a PRP pursuant to an administrative order or consent decree under CERCLA has initiated an RI/FS unless the remedial action has been authorized by EPA.

B. Special Notice Procedures and Information Release

Sections 122(e) and 122(a) contain provisions relating to the special notice procedures and the release of information to PRPs. Section 122(e) provides for EPA to utilize the special notice procedures if EPA determines that a period of negotiation would facilitate an agreement with PRPs and would expedite remedial actions. Section 122(e) also provides for EPA to release certain information to PRPs. Such information includes, to the extent available, the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP and a ranking by volume of the substances at the facility.[9] In addition, this section provides for EPA to make such information available in advance of the special notice upon request by a PRP in accordance with procedures provided by EPA.

Issuance of a special notice triggers a moratorium on the commencement of certain actions by EPA under section 104 or section 106. The purpose of the moratorium is to provide for a period of negotiation between EPA and PRPs. The moratorium prohibits EPA from commencing any response action under section 104(a), and an RI/FS under section 104(b), or an action under section 106 for 60 days after receipt of the notice. If EPA determines that a "good faith offer" has been submitted by the PRP within 60 days after receipt of the special notice, EPA shall not commence an action under section 104(a) or take any action against any person under section 106 for an additional 60 days or commence an RI/FS under section 104(b) for an additional 30 days.

Under section 122(e)(2)(a), EPA may commence any additional other studies or investigations authorized under section 104(b), including the remedial design, during the negotiation period. Under section 122(e)(2)(C), if an additional PRP is identified during the negotiation period or after an agreement has been entered into, EPA may bring the additional party into the negotiation or may enter into a separate agreement with the PRP. Under section 122(e)(5), EPA is not prohibited from undertaking a response or enforcement action during the negotiation period when there is a significant threat to public health or the environment.

Section 122(a) provides that if EPA decides not to use the special notice procedures established under section 122(e), EPA is required to notify PRPs in writing of this decision along with an explanation why it is inappropriate to use such procedures. The decision by EPA to use or not to use the special notice procedures is not subject to judicial review.

IV. Information Exchange

The exchange of information between EPA and PRPs is crucial for facilitating settlements. Information exchange should be an ongoing process of communication. EPA uses information

[8] These guidances were issued under OSWER Directive Numbers 9834.1 and 9834.2, respectively.

[9] Congress recognized that there may be limitations to the availability of information at early phases of the response action. In particular, Congress noted that the RI/FS special notice need not be accompanied by information on volume and nature of waste and ranking if this information is not available at the start of the RI/FS. A separate notice and information release should be provided for private parties who actually conduct the remedial action and information on volume, nature and ranking of wastes should be made available routinely at this time. See the Conference Report on the Superfund Amendments and Reauthorization Act of 1986, 99 Cong., 2d Sess., Report 99-962, p. 253 (1986).

obtained from PRPs to determine potential liability, to determine the need for response, and to support the selection of the remedy. PRPs use information obtained from EPA to organize among themselves and to develop a "good faith offer" to conduct or finance response actions.

A. Information Requests

EPA may request information from PRPs about various activities and conditions under section 104(e) of CERCLA and under section 3007(a) of the Resource Conservation and Recovery Act (RCRA). In addition, EPA may issue administrative subpoenas under section 122(e)(3)(b) of CERCLA. Information commonly requested includes details concerning waste operations and waste management practices, the type and amount of substances contributed by each PRP, as well as the name of other PRPs that contributed substances to the site.

Information requests should be issued as early as practicable and may be issued as a separate letter during the PRP search process, as part of the general notice letter, or through an administrative subpoena. A detailed discussion about the use of information request letters and administrative subpoenas is contained in the forthcoming "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas under CERCLA sections 104(e) and 122(e)."

The Regions have the discretion to decide whether to issue an information request as a separate letter during the PRP search or as a component of a general notice letter. Issuing a separate information request letter in advance of the general notice may be advantageous in situations where information from PRPs is needed to determine whether it is appropriate to issue a notice letter to such parties.

Information requests should be developed in accordance with the forthcoming guidance on information requests and administrative subpoenas as mentioned above. An information request should also indicate that EPA plans to vigorously enforce information requests with the new enforcement tools authorized under SARA which include issuing orders under section 104(e)(5). Finally, the information request should indicate that it is the PRPs responsibility to inform EPA whether information they provide to EPA is confidential and subject to protection under section 104(e) of CERCLA.

B. Information Release

It is important to gather and release site-specific information to PRPs as soon as reasonably practicable. Gathering and releasing such information early in the process will not only expedite response and enforcement activities but will help PRPs organize and negotiate among themselves as well.

As indicated, section 122(e)(1) provides for the release of certain information to PRPs to the extent such information is available. Such information includes the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of the substances at the facility. This information is to be provided to PRPs in advance of the special notice in accordance with procedures developed by EPA.

Congress recognized the limitations to EPA's ability to make certain information available to PRPs, especially early in the response process. Therefore, this information can be released only to the extent such information is available. If the Regions have information on volume, the Regions should develop volumetric rankings and should make such information available to PRPs as soon as practicable. However, due to their preliminary and summary nature, EPA will not expand resources to explain or defend any list or ranking. Lists or rankings released to PRPs and others should always contain appropriate disclaimers.

The Regions are encouraged to release information to PRPs as soon as reasonably possible. The Regions may respond directly to individual PRP requests for information, may use the notice letters as vehicles to release such information to PRPs, or may establish alternative mechanisms in some situations as discussed below. The Regions are strongly encouraged to use the notice letters to release site-specific information. In particular, use of the general notice may provide a convenient opportunity to release information in advance of the special notice pursuant to the statutory provision that EPA release such information in advance of the special notice in accordance with procedures developed by EPA.

Although it is generally preferable to release information to individual PRPs through notice letters, alternative mechanisms may be used in unusual circumstances. For example, in instances where there are many PRPs and/or where there is a substantial amount of information to be released, the Regions may consider making the information available through a central mechanism (e.g. through a PRP steering committee if one has been formed and if the committee has agreed to be a clearinghouse for distributing information to other PRPs). An alternative would be to indicate in the notice letter that the Region has site-specific information that will be made available to the PRPs in a manner specified in the letter.

V. Notice Letters and Negotiation Moratorium for RI/FS and RD/RA

This guidance creates a systematic process for issuing three separate notice letters for remedial actions. The three notice letters are (1) the general notice, (2) the RI/FS special notice, and (3) the RD/RA special notice. Even though the RI/FS and RD/RA special notice letters are separate letters, the are discussed in the same section below since the content of these letters is basically the same. In instances where the content of the RI/FS and RD/RA special notices differ, separate sections are presented.

Also, this guidance is written with the assumption that each notice letter will be issued in sequence. Consequently, the guidance has been structured so that certain information provided or requested in one letter is not repeated in a subsequent letter. The content of actual letters may, however, need to be modified in situations where this process is not followed.

For example, there may be a situation where site activities are already underway and where the Region is ready to issue the RI/FS special notice but has not issued a general notice. In this instance, it would not be necessary to wait to send the special notice until after a general notice is issued. However, it may be appropriate to include certain aspects of the general notice into the special notice.

A. Purpose of Notice Letters

The purpose of the general notice is to inform PRPs of their potential liability for future response costs, to begin or continue the process of information exchange, and to initiate the process of "informal" negotiations. In addition, the general notice informs PRPs about the possible use of the section 122(e) special notice procedures and the subsequent moratorium and "formal" negotiation period.

The purpose of the special notice is similar to the general notice, except that the special notice is also used to invoke the statutory moratorium on certain EPA actions and to initiate the process of "formal" negotiations. Although the general notice does not trigger a moratorium on any EPA action and does not invoke a "formal" period of negotiation, the general notice is expected to initiate a dialogue between

EPA and PRPs. Issuance of a general notice should be viewed as a mechanism for initiating negotiations whereas issuance of a special notice should be viewed as a mechanism for concluding negotiations.

The term "informal" negotiations does not mean that such negotiations are not serious efforts to reach a settlement. Rather "informal" negotiations refers to any negotiations that are not conducted as part of the negotiation moratorium triggered by issuance of a special notice under section 122(a). The terms "informal" and "formal" negotiations are used to draw a distinction between negotiations which are and are not covered by the section 122(e) moratorium.

B. General Notice Letter

Agency notification procedures should provide PRPs with sufficient time to organize and develop a reasonable offer to conduct or finance the response action. Toward this end, the Regions should contact PRPs prior to issuing a section 122(e) special notice by issuing a general notice letter.

1. Whether To Issue General Notice

A general notice letter should be issued at the vast majority of sites that are proposed for or listed on the National Priorities List (NPL) where negotiations for the RI/FS and RD/RA have not yet been initiated. Circumstances where it may not be appropriate to issue the general notice include sites where a notice pursuant to previous guidance was issued prior to the reauthorization of CERCLA or where the Region is ready to issue a special notice at the site. These exceptions are important for minimizing any possible disruption to ongoing activities.

2. Timing of General Notice

The general notice letter should be sent to PRPs as early in the process as possible, preferably once the site has been proposed for inclusion on the NPL. Early receipt of the general notice will ensure that PRPs have adequate knowledge of their potential liability as well as a realistic opportunity to participate in settlement negotiations. When a separate information request letter has been sent to PRPs prior to the general notice, the information request should be sent as early as possible to avoid any delay in issuing the general notice.

3. Recipients of General Notice

General notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. If there is doubt about whether available information supports issuance of the general notice, separate information request letters may be sent to such parties prior to issuing the notice. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

If additional PRPs are identified after the general notice but before the RI/FS special notice is issued, the Regions should provide a general notice to those additional PRPs. If additional PRPs are identified after general and special notices are issued, the additional PRPs need not receive a general notice before receiving the appropriate special notice. However relevant aspects of the general notice should be incorporated into the special notice.

Copies of the general notice should be provided to the Regional administrative record coordinator, the appropriate State representative, the State or Federal trustee if a trustee for natural resources has been designated, and to EPA headquarters at the same time notices are sent to PRPs. The copies of notices to headquarters should be sent to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement (OWPE).

Providing copies to the administrative record coordinator is important for ensuring that the notice is placed in the administrative record.[4] Providing copies to the State representative and the State or Federal trustee is important for ensuring that States are appropriately informed about possible future negotiations.[5] Providing copies to OWPE is essential for permitting entry into the Superfund Enforcement Tracking System (SETS). Entry into sets will facilitate our efforts to track site activities and to respond to Congressional and other inquiries. Direct Regional input of data into SETS on notice letter recipients is planned for FY 1988.

It is not necessary to provide copies of each general notice to the administrative record coordinator, State representative, State or Federal trustee or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one general notice with a list of other parties who have received the letter would suffice.

4. Contents of General Notice

The general notice letter should contain the following components: (a) A notification of potential liability for response costs, (b) a discussion about future notices and the possible future use of special notice procedures, (c) a general discussion about site response activities, (d) a request for information about the site (if appropriate), (e) the release of certain site-specific information (where available), (f) a discussion about the merits of forming a PRP steering committee, (g) a notice regarding the development of an administrative record, and (h) a deadline for response to the letter and information on the EPA representative to contact.

a. *Potential liability:* The letter should inform parties that they are potentially liable for response costs under section 107 of CERCLA, including the costs of conducting the RI/FS and RD/RA. The letter should define the scope of potential liability and should briefly explain why the parties have been identified as PRPs.

b. *Future notice under section 122(a) and section 122(e):* The letter should indicate that EPA will notify the party at an appropriate point in the future. The letter should specify that this notice will either be a section 122(a) notice or a section 122(e) special notice and should explain what these notices are.

The letter should indicate that the section 122(a) notice is a notice which informs parties that EPA will not use the section 122(e) special notice procedures. The letter should indicate that the notice will provide an explanation for the decision not to use the special notice procedures.

The letter should also indicate that a section 122(e) special notice will invoke the negotiation moratorium. The letter should make clear that issuance of a section 122(e) special notice letter is discretionary and may be used if EPA determines that use of such procedures would facilitate an agreement and expedite remedial action. The letter should also explain the purpose of the special notice and the subsequent negotiation moratorium. Informing PRPs about the special notice procedures and the negotiation moratorium will alert PRPs to possible future negotiations and increase their awareness of their opportunities for participation in such negotiations.

[4] A discussion about placing notice letters in the administrative record is covered in the forthcoming "Guidance on the Administrative Record for Selecting a Response Action Under CERCLA" and in the preamble to the forthcoming revisions to the National Contingency Plan.

[5] State participation in negotiations is covered in the forthcoming "Interim Guidance on EPA-State Relations in CERCLA Enforcement."

c. *Site response activities:* The letter should generally discuss the activities EPA plans to undertake at the site. Where appropriate, such activities should include scheduled start or completion dates for the RI/FS or RD/RA. Instances where it may not be appropriate to provide start or completion dates include situations where the general notice is issued very early in the process and where specific dates have not yet been set, or where it is expected that target dates are likely to change significantly.

d. *Information request:* The letter should request information on substances sent to or present at the site and the names of other PRPs pursuant to section 104(e) of CERCLA and/or section 3007(a) of RCRA if a separate information request has not already been issued. The content of the information request should be consistent with the forthcoming "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas Under CERCLA Sections 104(e) and 122(e)."

e. *Information release:* At a minimum the letter should release the names and addresses of other PRPs who have received the general notice letter. In addition, to the extent such information is available, the letter should include the volume and nature of substances contributed by each PRP and a ranking by volume of the substances at the facility if such information has not been previously released.

f. *PRP steering committee:* The letter should request that the PRPs identify a member of their organization who will represent their interests. In addition, the letter should recommend that PRPs form a steering committee to represent the group's interests in possible future negotiations. The letter should indicate that establishing a steering committee is important for facilitating negotiations with EPA.

g. *Administrative record:* The letter should be used as a vehicle for informing PRPs of the availability of an administrative record that will contain documents which form the basis for the Agency's decision on the selection of remedy. The letter should indicate that the record will be open to the public for inspection and comment. The letter should also provide information regarding the opening of the record and where it will be located.

h. *PRP response and EPA contact:* The letter should encourage PRPs to notify EPA by a specified date of their interest to participate in future negotiations. The letter should indicate that PRPs may respond as a group through a steering committee if one has been formed. The letter should also provide a cut off date for voluntary compliance with information requests (if a request for information is contained in the general notice). An appropriate time frame for the PRP response to an information request is generally thirty days from receipt of the letter. Finally, the letter should provide the name, phone number, and address of the EPA representative to contact.

C. RI/FS and RD/RA Special Notice Letters

Prior to EPA's conduct of the RI/FS and RD/RA, the Regions should either issue the special notice to PRPs or provide PRPs with an explanation why it was not appropriate to use the special notice procedures. Issuance of the special notice triggers a moratorium on EPA's conduct of the RI/FS and remedial action. While the statute does not impose a moratorium on EPA's conduct of the remedial design, the Agency will not generally conduct such activities during the moratorium. 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 or finance response activities.

The negotiation moratorium may last a total of 90 days for the RI/FS and 120 days for the RD/RA if EPA receives a "good faith offer" from PRPs within the first 60 days of the moratorium. The negotiation moratorium would conclude after 60 days if the PRPs do not provide EPA with a "good faith offer."

The initial 60 day moratorium begins on the date the PRPs receive the special notice via certified mail. In instances where there is more than one PRP and PRPs are likely to receive the special notice on different days, the date the moratorium begins should be 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 begins and ends.

1. Whether To Issue RI/FS and RD/RA Special Notice

EPA has the discretion to use the special notice procedures when EPA determines that a period of negotiation would facilitate an agreement with PRPs and would expedite remedial actions. The Agency believes entering into such negotiations would generally facilitate settlements and plans to utilize the RI/FS and RD/RA special notice procedures in the vast majority of cases.

There are, however, some circumstances where it would generally not be appropriate to use such procedures. Such circumstances include (1) where past dealings with the PRPs strongly indicate they are unlikely to negotiate a settlement, (2) where EPA believes the PRPs have not been negotiating in good faith, (3) where no PRPs have been identified at the conclusion of the PRP search, (4) where PRPs lack the resources to conduct response activities, (5) where there are ongoing negotiations, or (6) where notice letters were already sent prior to the reauthorization of CARCLA and ongoing negotiations would not benefit by issuance of a special notice.

Special notices may be issued for operable units of remedial actions. The test for determining whether to issue a special notice for an operable unit is generally the same as for full-scale remedial actions. The general expectation is that separate special notices will be issued for each separate operable unit as long as issuing the notice would facilitate an agreement and would expedite the remedial action. However, special notices may also be issued for only major operable units or may cover a series of operable units if appropriate under the circumstances at the site.

For example, if several operable units will be conducted at a site as relatively separate and distinct response actions, it may be appropriate to consider using separate special notices which would trigger separate negotiation moratoriums. If a series of operable units will make up a remedial action it may be appropriate to issue the special notice to cover only the major operable unit(s) or to cover several operable units.

2. Notifying PRPs When Not Appropriate To Issue RI/FS and RD/RA Special Notice

In instances where EPA decides it is inappropriate to issue the special notice, section 122(a) provides for EPA to notify PRPs in writing of that decision. The notice must indicate the reasons why the Region determined that issuing the special notice and entering into "formal" negotiations was not appropriate. The notice should be provided to all PRPs that have been identified to date as well as to the Regional administrative record coordinator for placement in the record. Such notices should be provided as soon as practicable. In instances where the RI/FS or RD/RA have not yet been initiated, the notice should be sent prior to the initiation of such activities if possible.

In addition, the section 122(a) notice should be used as a vehicle for informing PRPs that the Agency will establish or has established an

administrative record containing technical documents supporting the Agency's decision on the selection of remedy. The notice should indicate that the record is open for public inspection and comment and should specify where the record will be or has been located.

3. DOJ Role in RI/FS and RD/RA Negotiations

The Regions should notify the Chief of the Environmental Enforcement Section in the Department of Justice (DOJ) prior to issuing special notice letters where settlement by a consent decree is contemplated. A copy of this memorandum should also be provided to the Office of Waste Programs Enforcement and the Office of Enforcement and Compliance Monitoring in Headquarters.

The memorandum to DOJ should indicate when the Region intends to issue the special notice. Because most RI/FS negotiations involve consent orders, notice to DOJ on the RI/FS is not ordinarily necessary. However, where a site is in litigation or where settlement by consent decree is expected, DOJ should be notified at least 30 days prior to issuing the RI/FS special notice. In addition, where the resolution of the matter by an administrative order is expected to involve a compromise of past or future response costs and the total response costs will exceed $500,000, DOJ is to be notified. DOJ's role will be to review the compromise of the claim pursuant to section 122(h)(1) but not to review the administrative order for the RI/FS. For RD/RA negotiations the notice should be sent to DOJ at least 60 days prior to issuing the RD/RA special notice. The memorandum should also identify the EPA Regional representative DOJ should contact.

In addition, the Regions should consult with the Chief of the Environmental Enforcement Section prior to sending a copy of any draft consent decree or any outline of a draft consent decree to PRPs. The Regions are encouraged to include a draft consent decree with the RD/RA special notice or soon thereafter as discussed below.

4. Timing of RI/FS Special Notice

It is important that PRPs receive the RI/FS special notice letter as soon as practicable. Of greater importance, the letter must 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 an agreement providing for the PRPs to conduct or finance the RI/FS. Timely receipt of the special notice will have a significant effect on the PRPs ability for meaningful participation in formal negotiations.

The RI/FS special notice letter should be sent to PRPs no later than 90 days prior to the scheduled date for initiating the RI/FS. The scheduled date for initiating the RI/FS refers to the date funds will be obligated to commence response activities. A minimum of 90 days is important for ensuring that the negotiation moratorium does not delay initiation of the RI/FS in the event negotiations do not result in a settlement. The time for service by mail should be taken into account.

5. Timing of RD/RA Special Notice

The timing of the RD/RA special notice letter will have a significant impact on both the success of negotiations and on EPA's ability to move forward with implementing a remedy without delay. As indicated earlier, "formal" negotiations pursuant to special notice are not the sole vehicle for reaching settlements. "Informal" negotiations must occur throughout the process and in advance of the special notice. To assure that "formal" negotiations are productive, EPA must initiate PRP search and information exchange activities as well as "informal" negotiations as early as possible.

The primary purpose of the special notice procedures is to facilitate settlements through negotiation. A primary concern in determining when to issue an RD/RA special notice is whether there is a likelihood that meaningful negotiations can be conducted at a given stage in the process. Another concern is that, to the extent practicable, the negotiations must be scheduled to minimize any delay in the remedial design and remedial action. A final concern is that negotiations be carried out in a way that does not undermine or have the appearance of undermining the public participation process.

This guidance establishes an approach which identifies when the Regions must generally issue the RD/RA special notice letter. The Regions may, however, adopt an alternative approach under appropriate circumstances. Appendix A contains illustrations of the three approaches discussed below.[6]

a. *General Approach: Issue special notice when release draft FS and proposed plan for public comment.* The Regions generally must issue the RD/RA special notice when the draft feasibility study (FS) and proposed plan[7] are released to the public for comment. As shown in Appendix A, issuance of the special notice with the release of the draft FS and proposed plan triggers the initial 60 day negotiation moratorium. The initial 60 day negotiation moratorium begins at the start of the 30 day public comment period and, in conjunction with the first 30 days of the 60 day extended negotiation moratorium, is concurrent with the Record of Decision (ROD) review and approval process. The remaining 30 days of the extended negotiation moratorium is concurrent with the initial phases of the remedial design. EPA's ability to sign the ROD is not affected by the duration of the negotiation moratorium. The ROD may be signed at any point after the close of the public comment period and the preparation of the responsiveness summary for the public.

In most cases, commencing formal negotiations at the same time that the draft FS and proposed plan are released will properly balance the considerations stated earlier relating to EPA's ability to conduct meaningful negotiations, to minimize delay in implementing the RD/RA, and to maintain the integrity of the public participation process. Under this approach, formal opportunity for PRP involvement would begin at an early yet concrete stage in the process. Early participation may be especially advantageous in situations where PRPs have not been previously or substantially involved in RI/FS activities. In addition, PRPs and the public would have knowledge of the possible range of alternatives through the draft FS and proposed plan prior to "formal" negotiations. This information is important for assisting the PRPs in developing a meaningful "good faith offer" for conducting or financing the RD/RA.

b. *Alternative Approach: Issue special notice prior to release of draft FS and proposed plan for public comment.* Although the Regions generally will issue the RD/RA special notice when

[6] The time period depicted in the following discussion and illustrated in Appendix A reflects "best case" scenarios where various response and enforcement activities are expected to be carried out without delay. For example, the public comment period lasts 30 days and does not take into account a possible extension.

[7] The proposed plan refers to the public participation document developed pursuant to section 117(a). This is a non-legal, non-technical document that describes the alternatives in the FS and specifies and provides a brief analysis of EPA's preferred alternative. A more detailed discussion of the proposed plan will be contained in the forthcoming "Guidance on Documenting Decisions at Superfund Sites" (referred to as the ROD Guidance).

the draft FS and proposed plan are released to the public for comment, the Regions are encouraged to issue the special notice earlier in the process if this action would facilitate the prospects for reaching a settlement. If a Region chooses to follow this approach, the Region should include with the special notice a summary or fact sheet of the alternatives EPA has screened and the alternatives the Agency is currently considering.[8]

As shown in Appendix A, the RD/RA special notice may be issued prior to EPA's release of the draft FS and proposed plan. Issuance of the special notice triggers the initial 60 day negotiation moratorium. The initial negotiation moratorium is concurrent with the review and release of the draft FS and proposed plan. The initial negotiation moratorium is completed prior to the initiation of the public comment period. The public comment period is concurrent with the first 30 days of the extended negotiation moratorium. The remaining 30 days of the extended negotiation moratorium is concurrent with the ROD review and approval process. The ROD could be signed and the negotiation moratorium could be concluded at about the same time. EPA's ability to sign the ROD is not affected by the negotiation moratorium. The ROD may be signed at any point after the close of the public comment period and the preparation of the responsiveness summary for the public.

In many cases, providing special notice at this early stage may be inappropriate because too much uncertainty would exist about the remedy to allow for meaningful negotiations. However, under other circumstances it may be appropriate to issue the special notice early in the process, especially in situations where there is a relatively small group of PRPs, it is clear what the remedy is likely to be, and the remedy is not likely to be controversial.

Where circumstances permit issuance of the special notice at this early stage, an advantage to this approach is that the ROD review and approval process and the negotiation moratorium could be concluded at about the same time. This would help assure that cleanup occurs as soon as possible whether through a negotiated settlement or Fund-financed action. In addition, there would be an early opportunity to inform PRPs of various remedial alternatives under consideration by EPA prior to EPA's identification of the proposed plan. Early participation may be advantageous where PRPs have not been previously or substantially involved in RI/FS activities.

c. *Alternative Approach: Issue special notice when the ROD is signed.* Although the Regions generally will issue the RD/RA special notice letter when the draft FS and proposed plan are released to the public for comment, there may be some limited circumstances where it is appropriate to issue the notice later in the process (i.e. when the ROD is signed). This approach may be followed, however, only where the Region can provide adequate justification and where the Region has obtained prior approval from Headquarters. Approval must be obtained in writing from the Directors of the Office of Waste Programs Enforcement and the Office of Emergency and Remedial Response.

As shown in Appendix A, under this approach the RD/RA special notice would not be issued until the ROD is signed. Thus, the entire 60 to 120 day negotiation moratorium would not occur until the remedial design phase.

An advantage to this approach is that since the ROD would be signed and the remedy would be selected at the start of the RD/RA negotiation moratorium, the PRPs would know precisely which remedy the "good faith offer" and the negotiations should focus on. In addition, since the negotiations would begin after the close of the public comment period, the PRPs and EPA would have the benefit of knowing the public comments.

The major disadvantage to this approach is that the negotiation moratorium would not occur until the end of the process (i.e. not until the beginning of the remedial design phase). Issuing the special notice at this point would create the greatest potential for a subsequent delay in implementing the remedy.

Instances where it may, however, be appropriate to issue the special notice later in the process (i.e. not until the ROD is signed) may be where more time is needed to conduct informal negotiations, where the site is particularly complex, or where there is an extraordinarily large number of PRPs (e.g. hundreds of PRPs). Another example may be where there is little expectation that a Fund-financed remedial action will occur in the near future at an enforcement-lead site. If Fund-financed activities are not expected to occur and a later moratorium would facilitate cleanup, it may be less important to initiate and conclude negotiations early in the process.

6. Recipients of RI/FS and RD/RA Special Notice

The RI/FS and RD/RA special notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. If there is doubt about whether available information supports issuance of the RI/FS and RD/RA special notices, separate information request letters may be sent to such parties prior to issuing such notice. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

Section 122(e)(2)(C) authorizes EPA to bring additional parties into negotiations or to enter into a separate agreement with parties when additional PRPs are identified during the negotiation period or after an agreement has been entered into. The Regions may provide a special notice to additional parties if they are identified after issuance of the RI/FS special notice letter. However, issuance of a special notice to additional parties would not change the duration of the negotiation moratorium. The special notice may invite PRPs to participate in remaining negotiations, but would not extend the pre-existing negotiation moratorium.

Copies of the special notices should be provided to the Regional administrative record coordinator, the appropriate State representative, the State or Federal trustee if a trustee for natural resources has been designated, and to EPA headquarters at the same time notices are sent to PRPs. The copies of notices to headquarters should be sent to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement (OWPE).

Providing copies to the administrative record coordinator is important for ensuring that the notice to be placed in the record. Providing copies to the State representative and the State or Federal trustee is important for ensuring that States are appropriately informed about possible future negotiations. Providing copies to OWPE is essential for permitting entry into the Superfund

[8] Release of a summary or fact sheet on the alternatives that have been screened and the alternatives that are being considered is important for facilitating negotiations at this early stage in the remedial process. This information will be useful to PRPs in developing their "good faith offer" for conducting or financing a response action and will be important for informing PRPs about the alternatives the Agency is considering at the site. The Regions should include the summary of alternatives or fact sheet in the administrative record for each site.

Enforcement Tracking System (SETS). Entry into SETS will facilitate our efforts to track site activities and to respond to Congressional and other inquiries. Direct regional input of data into SETS on notice letter recipients is planned for FY 1988.

It is not necessary to provide copies of each special notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one special notice with a list of other parties who have received the letter would suffice.

7. *Contents of RI/FS and RD/RA Special Notices*

The RI/FS and RD/RA special notice letters should contain the following components: (a) A notification of potential liability, (b) a discussion about the special notice and subsequent negotiation moratorium, (c) a discussion about the response activities to be conducted, (d) a copy of a statement of work or workplan and a draft administrative order on consent for the RI/FS, (e) a copy of a draft consent decree for the RD/RA (if possible), (f) a discussion about what constitutes a "good faith offer" for the RI/FS, (g) a discussion about what constitutes a "good faith offer" for the RD/RA, (h) a release of certain site-specific information (where available and appropriate), (i) a demand for payment of EPA costs incurred to date, (j) a notification about the administrative record, and (k) a deadline for response to the letter and the name of the EPA representative to contact.

a. *Potential liability:* The letter should specify that PRPs are potentially liable for the costs of conducting the RI/FS or the RD/RA. A detailed discussion about potential liability is not necessary particularly if the RI/FS or RD/RS special notice references the general notice.

b. *Special notice and formal negotiations:* The letter should discuss the purpose of the special notice and the subsequent negotiation moratorium. The level of detail will depend upon whether the PRP has received the general notice and whether the general notice provided an adequate discussion. At a minimum, the letter should make clear that EPA is inviting PRPs to participate in "formal" negotiations for PRP conduct of the RI/FS or RD/RA and that this letter automatically triggers the formal negotiation period. In addition, it is important that the special notice indicate the date the negotiation moratorium will conclude in the absence of and in the event of a "good faith offer." Finally, the letter should explain that a consent order or consent decree should be finalized by the end of the moratorium.

c. *Response actions to be conducted:* The letter should identify the response activities EPA plans to conduct at the site and provide scheduled dates for initiating such activities if appropriate.

d. *Statement of work or workplan and draft administrative order on consent for RI/FS special notice:* The letter should provide a statement of work or workplan and draft administrative order (AO) on consent. Such information is crucial to PRPs in their development of a "good faith offer" to EPA for conducting or financing the RI/FS and for ultimately facilitating settlements. The Regions are encouraged to provide the draft AO on consent with the notice letter if practicable. At a minimum, the letter should contain a copy of the statement of work with the expectation that the draft AO will follow as soon as practicable.

e. *Draft consent decree for RD/RA special notice.* The letter should contain a copy of the draft consent decree if possible. It is important that PRPs have the draft consent decree at the start of negotiations or soon thereafter since the decree contains important information which will assist PRPs in developing their "good faith offer" to EPA.

f. *"Good faith offer" for RI/FS.* The letter should indicate that a "good faith offer" is a written proposal which demonstrates the PRP's qualifications and willingness to conduct or finance the RI/FS. A "good faith offer" for the RI/FS should include the following:

- A statement of the PRPs willingness to conduct or finance the RI/FS which is generally consistent with EPA's statement of work or work plan and draft administrative order on consent or provides a sufficient basis for further negotiations;
- A paragraph-by-paragraph response to EPA's statement of work or workplan and draft administrative order on consent;
- A detailed statement of work or workplan identifying how the PRPs plan to proceed with the work;
- A demonstration of the PRPs technical capability to undertake the RI/FS. This should include a requirement that PRPs identify the firm they expect will conduct the work or that PRPs identify the process they will undertake to select a firm;
- A demonstration of the PRPs financial capability to finance the RI/FS;
- A statement of the PRPs willingness to reimburse EPA for the costs EPA incurs in overseeing the PRP conduct of the RI/FS as required by section 104(a)(1); and
- The name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

g. *"Good faith offer" for RD/RA:* The letter should indicate that a "good faith offer" is a written proposal which demonstrates the PRPs qualifications and willingness to conduct or finance the RD/RA. A "good faith offer" for the RD/RA should include the following:

- A statement of the PRPs willingness to conduct or finance the RD/RA which is generally consistent with EPA's proposed plan or which provides a sufficient basis for further negotiations in light of EPA's proposed plan;
- A paragraph-by-paragraph response to EPA's draft consent decree including a response to other documents that may have been attached to the decree such as a technical scope of work for the proposed plan or access or preauthorization agreements;
- A detailed "statement of work" or "workplan" identifying how PRPs plan to proceed with the work;
- A demonstration of the PRPs technical capability to undertake the RD/RA. This should include a requirement that PRPs identify the firm they expect will conduct the work or that PRPs identify the process they will undertake to select a firm;
- A demonstration of the PRPs capability to finance the RD/RA;
- A statement of the PRPs willingness to reimburse EPA for past response and oversight costs;
- A discussion about the PRPs position on releases from liability and reopeners to liability; and
- The name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

h. *Information release:* To the extent such information is available and to the extent such information has not been previously released, the letter should contain information on the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of the substances at the facility. Note that the release of information with the RI/FS and RD/RA special notices is not intended to require the release of information previously provided to PRPs.

i. *Demand for payment:* The letter should include a demand that PRPs reimburse EPA for the costs the Agency has incurred in conducting response activities at the site pursuant to section 107(a). The letter should identify the

action EPA undertook and the cost of conducting the action. The letter should also indicate that the Agency anticipates expending additional funds on activities covered by this notice and other specified future activities. Finally, the letter should demand payment of interest for past and future response costs incurred by EPA pursuant to section 107(a). Notice letters should not be delayed to obtain cost information where such information has not been previously collected.

j. *Administrative record.* The letter should be used as a vehicle for informing PRPs of the availability of an administrative record containing documents that form the basis for the Agency's decision on the selection of remedy. The letter should indicate that the record is open to the public for inspection and comment. The letter should also indicate where the record will be or has been located.

k. *PRP response and EPA contact person:* The letter should encourage PRPs to notify EPA of their interest to participate in negotiations. The letter should indicate that PRPs may respond as a group through a steering committee if a committee has been formed. In addition, the letter should provide the name, phone number, and address of the EPA representative to contact.

D. Conclusion of Negotiation Moratorium and Deadline Management for RI/FS and RD/RA

At the conclusion of the section 122(e) negotiation moratorium, the Regions should have a fully negotiated administrative order on consent for the RI/FS and a fully negotiated consent decree for the RD/RA which has been signed by the PRPs. A signed document is necessary to show that an agreement has, in fact, been reached.[9]

At the conclusion of the 120 day moratorium for the RD/RA a determination must be made on whether to continue settlement activities, whether the site should be cleaned up using Superfund money, or whether to initiate a section 106 enforcement action. A continuation of settlement activities may include seeking an extension to the 120 day negotiation moratorium as discussed below, or sending a consent decree to the Department of Justice for lodging in the appropriate district court.

[9] Pre SARA guidance for drafting an administrative order is provided in "Superfund Administrative Order Workshop and Guidance Materials" (1985) and for drafting a consent decree in "Guidance on Drafting Consent Decrees in Hazardous Waste Cases" (May 1, 1985). These guidances are being revised to include SARA's requirements.

In instances where an agreement has been reached and fully negotiated but PRPs have not yet obtained signatures, it may be necessary to obtain an extension to the negotiation moratorium. Extensions may also be necessary where the agreement has not been fully negotiated but all major issues are resolved and outstanding issues are well defined and final language is imminent. Extensions to the negotiation moratorium can be obtained only in certain circumstances as discussed in the February 12, 1987 "Interim Guidance: Streamlining the CERCLA Settlement Decision Process."[10]

The timing of special notice letters will have a significant affect on our ability to successfully conclude negotiations at the end of the moratorium period. The Streamlined Settlement Policy provides for two different processes for obtaining extensions for the RI/FS and RD/RA moratoriums. The policy indicates that the Regional Administrator has the discretion to terminate or extend negotiations for the RI/FS after 90 days. However, extension of negotiations beyond an additional 30 days should be authorized by the Regional Administrator only in limited cases.

Relating to the RD/RA moratorium, the Streamlined Settlement Policy provides for either Regional or Headquarters approval of an extension under certain circumstances. An extension to the 120 day RD/RA moratorium may be granted for an additional 30 days by the Regional Administrator when settlement is likely and imminent. An additional extension beyond the 30 days may be approved only by the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER) and only in rare and extraordinary circumstances.

This guidance re-emphasizes the importance of meeting the 90 day moratorium for the RI/FS and the 120 day moratorium for the RD/RA. To aid that policy, this guidance identifies three circumstances where the Regional Administrator and Assistant Administrator for OSWER may consider granting such extensions for the RD/RA moratorium.

First, it may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day moratorium for the RD/RA if EPA selects a remedy in the ROD which is significantly different from the Agency's stated preference in the proposed plan.

[10] This guidance was issued under OSWER Directive #9835.9.

This could mean that the focus of negotiations could change significantly, requiring additional time to reach agreement with PRPs.

The second example applies to Fund-lead sites. It may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day negotiation moratorium for the RD/RA if non-enforcement activities at the site (e.g. an extended public comment period or an extended ROD review and approval process) cause a significant delay in the Agency's ability to move forward in implementing a fund-financed remedy. An extension to the negotiation moratorium may be especially appropriate if there is reason to believe a negotiated settlement is imminent. In other words, if the Fund is not ready to move forward in implementing the remedy at the end of the 120 day negotiation moratorium there is no reason to conclude negotiations if there is reason to believe an agreement can be reached.

The third example applies to enforcement-lead sites. It may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day negotiation moratorium for the RD/RA, after a section 106 litigation referral has been prepared and referred to the Department of Justice (DOJ) for action. In fact, the preparation and referral of a case to DOJ may be an important mechanism for providing the necessary impetus for reaching a voluntary settlement. In many cases it may be appropriate to issue a unilateral administrative order concurrent with the referral.

VI. Notice Letters and Negotiation Moratorium for Removal Actions

The notice letter process for removal actions differs from the notification process for remedial action. As discussed above, the notification process for remedial actions involves issuance of three notice letters. The notification process for removals will involve only one notice letter which may or may not invoke the section 122(e) special notice procedures as discussed below.

A. Notice Letters

1. Whether To Issue Notice for Removals

The Regions should attempt to contact PRPs prior to initiating a Fund-financed removal action to inform PRPs of their potential liability where EPA will incur response costs or to secure a private party response. This guidance

encourages the Regions to seek PRP response through a written notice letter, but the Regions may contact PRPs verbally (with a written follow-up notice). This is consistent with the guidance on "Issuance of Administrative Orders for Immediate Removal Actions" (2/21/84).

The Regions should issue notice letters to readily identifiable PRPs for removal actions in the vast majority of cases. The content of the notice will vary depending whether the notice will be used simply to notify PRPs of their potential liability for an action EPA has already taken or is about to take, whether the notice will be used to encourage a private party response through "informal" negotiations (i.e. negotiations not triggered by the section 122(e) special notice procedures), or whether the notice will be used as a mechanism for invoking the section 122(e) special notice procedures which provide for "formal" negotiations between EPA and PRPs.

2. When to Use Special Notice Procedures for Removals

The Regions should consider using the section 122(e) special notice procedures only for those removals where the threat is of a nature that is not necessary to initiate an onsite removal action for at least six months. The "six month planning time period" begins once a site evaluation is completed. This means that for the vast majority of removal actions the Regions will not be required to utilize the special notice procedures. It is not appropriate to utilize special notices for most removal actions because the subsequent moratorium may interfere with the Agency's ability to implement the remedy in a timely manner. In addition, it may not be worth expending the time and resources to enter into formal negotiations when a removal will be a relatively short term and inexpensive response action.

The Regions should include the following factors in their determination of whether it is appropriate to utilize the special notice procedures for removals with a six month planning lead time: (1) Whether viable PRPs have been identified, (2) whether the PRPs are expected to respond favorably to the invitation to participate in negotiations and to conduct or finance the removal action, (3) whether issuance of the special notice could delay implementation of the removal action, and (4) whether it may be more appropriate to enter into "informal" negotiations in lieu of "formal" negotiations under section 122(e).

In determining the PRPs viability, the Region should inquire about the PRPs financial and technical capability for conducting and/or financing the removal action in an effective and timely manner. In determining the PRPs willingness to undertake or finance the removal action, the Region should, at a minimum, obtain a verbal agreement from the PRPs prior to issuance of the special notice. In determining whether the special notice may delay implementation of the remedy or in determining whether to enter into "informal" rather than "formal" negotiations, the Regions should consider whether the section 122(e) negotiation moratorium would interfere with other activities at the site.

3. Notifying PRPs When Not Appropriate To Utilize Special Notice Procedures for Removals

EPA's decision on whether to use the special notice procedures for any response action is clearly discretionary. However, section 122(a) requires the Agency to notify PRPs in writing when the Agency decides not to utilize such procedures. The removal notice provides a convenient vehicle for informing PRPs of EPA's decision not to utilize the special notice procedures. The notice should, therefore, inform PRPs of EPA's decision not to utilize such procedures when this determination has been made and should provide an explanation for that decision.

4. DOJ Role in Removal Negotiations

The Regions should consult with the Chief of the Environmental Enforcement Section of DOJ prior to issuing a special notice letter for removal actions where settlement by consent decree is contemplated, or where the settlement is expected to involve a compromise of past or future response costs and the total response costs will exceed $500,000. The Regions should consult with DOJ prior to releasing a draft consent decree to PRPs.

5. Timing of Notice for Removals

A removal notice that does not invoke the special notice procedures should be provided to PRPs as soon as practicable. For removal notices that invoke the special notice procedures, the notice should be issued as early as possible but no later than 120 days before the scheduled date for initiating the removal action. The scheduled date for initiating the removal action is the date removal extramural cleanup contractor funds will be obligated and onsite cleanup will begin.

The timing of a notice which invokes the special notice procedures is critical because issuance of the notice triggers the subsequent 60 to 120 day moratorium on EPA conduct of the removal action. (The moratorium would last only 60 days in instances where the PRPs do not provide EPA with a "good faith offer"). Issuing the special notice at least 120 days before EPA will begin the removal ensures that the subsequent 120 day moratorium does not affect EPA's ability to implement the removal action in the event negotiations do not result in an agreement for PRP conduct of the removal action.

6. Recipients of Notice for Removals

The removal notice should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

Copies of removal notices should be provided to the Regional administrative record coordinator, the appropriate State representative, and to headquarters. Providing copies to the administrative record coordinator is important for ensuring that the notice be placed in the record. Providing copies to the State representative is important for ensuring that States are appropriately informed about possible future negotiations.

Providing copies to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement for entry into the Superfund Enforcement Tracking System (SETS). Copies should be sent to OWPE at the same time they are sent to PRPs. Providing copies to OWPE is essential for facilitating our efforts to track site activities and to respond to Congressional and other inquiries.

It is not necessary to provide copies of each removal notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one removal notice with a list of other parties who have received the letter would suffice.

7. Contents of Notice for Removals

As indicated, the content of the removal notice will vary depending upon whether the purpose of the letter is to simply inform PRPs of their potential liability or whether the letter will also be used to provide an opportunity for PRP involvement in negotiations either through "informal" or "formal"

negotiations. The following highlights the components that should be included in the three different types of removal notices. The specific content of each component of the removal notice should be essentially the same as described earlier for RI/FS and RD/RA general and special notices, except where otherwise specified.

a. *Notice of potential liability:* If the purpose of the removal notice is simply to inform PRPs of their potential liability and to provide notice that the Agency has or is about to take a response action, the notice should contain the following components: a notice of potential liability, a discussion about site response activities that have been or will be conducted at the site; a notice on the availability of an administrative record, and a notice pursuant to section 122(a) that the special notice procedures will not be used.

The notification under section 122(a) should inform PRPs that the Agency will not (or did not) use the section 122(e) special notice procedures for this particular response action and should provide an explanation for that decision. The letter should indicate that it is the Agency's policy not to use the special notice procedures for removals unless there is a six month planning lead time prior to the initiation of the response action. If the response action does involve a removal with a six month planning lead time but the Agency made a case-specific determination not to use the special notice procedures, the letter should provide an explanation why the use of such procedures was determined to be inappropriate for that particular response action.

b. *Notice of potential liability and opportunity to enter into "informal" negotiations.* If the purpose of the removal notice is to inform PRPs of their potential liability and to provide PRPs with an opportunity to enter into negotiations with EPA without invoking the section 122(e) special notice procedures, the notice should contain the following components: a notice of potential liability; a discussion about site response activities that will be conducted at the site, a copy of the statement of work or workplan and draft administrative order on consent, a notification pursuant to section 122(a) that the special notice procedures will not be used; a request that PRPs notify EPA within a specified period of time of their interest to participate in negotiations; a notice on the availability of the administrative record; and information on the EPA representative to contact. The section 122(a) notification should contain the same information discussed in the preceding paragraph.

c. *Notice of potential liability and opportunity to enter into "formal" negotiations pursuant to section 122(e) special notice procedures:* If the purpose of the removal notice is to inform PRPs of their potential liability and to provide PRPs with an opportunity to enter into negotiations with EPA using the section 122(e) special notice procedures, the notice should contain the following components, a notice of potential liability; a discussion about site response activities that will be conducted at the site; a discussion about the special notice procedures and the negotiation moratorium; a copy of the statement of work or workplan and draft administrative order on consent; a discussion about what constitutes a "good faith offer", a request that PRPs notify EPA within a specified period of time indicating their interest to participate in negotiations, a notice on the availability of the administrative record; and information on the EPA representative to contact. The "good faith offer" should contain essentially the same components as described above for the RD/RA.

B. Conclusion of Negotiation Moratorium and Deadline Management for Removals

At the conclusion of the section 122(e) negotiation moratorium for removal actions, the Regions should have a fully negotiated administrative order on consent which has been signed by the PRPs. (Where appropriate, a signed consent decree should be provided). A signed administrative order on consent (or a consent decree) will show that the negotiations have been successfully completed.

The expectation is that the negotiations will be concluded at the end of the 120 day moratorium and the Regions are strongly encouraged to conclude the negotiations within this period of time. In instances where the negotiations do not result in an agreement, the Regions may seek an extension to the 120 day moratorium, issue an administrative order, or proceed with a Fund-financed removal. Note that the Regional Administrator may grant an extension to the 120 day moratorium only in limited and appropriate circumstances.

C. Administrative Orders and Negotiation Moratorium for Removals

In most instances, use of the special notice procedures for removal actions will not affect existing policy on issuing administrative orders for removals since the special notice procedures will be issued for only a small portion of removals. For details on the Agency's policy on administrative orders refer to the guidance on "Issuance of Administrative Orders for Immediate Removals" (2/21/84).

It is necessary, however, to modify existing policy in one respect. In instances where Regions use the special notice procedures for a removal action and where issuance of an administrative order is necessary and appropriate, the Regions should not issue the order until the end of the negotiation moratorium. This ensures that the negotiation moratorium will be used to negotiate voluntary settlements.

VII. Disclaimer

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

VIII. For Further Information

For further information or questions concerning this guidance, please contact Kathy MacKinnon in the Office of Waste Programs Enforcement at FTS-475-6770.

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