









## Negotiations for the RI/FS

The PRP may conduct the RI/FS if EPA determines the PRP is qualified to conduct the RI/FS and if the PRP agrees to reimburse EPA for the cost of oversight. The terms of this agreement to conduct the RI/FS are outlined in either an Administrative Order on Consent or a Consent Decree, both of which are enforceable in court. If negotiations do not result in an order or a decree, EPA may use Trust Fund monies to perform the RI/FS and seek reimbursement for its costs.

## Negotiations for the RD/RA

Where a special notice is used, the moratorium for RD/RA may be extended to a total of 120 days. The terms of the agreement to conduct the RD/RA are outlined in a Consent Decree, which all parties sign and is entered in court. If negotiations do not result in a settlement, EPA may conduct the remedial activity using Trust Fund monies, and sue for reimbursement of its costs with the assistance of the Department of Justice(DOJ). Or EPA may issue a unilateral administrative order or directly file suit to force the PRPs to conduct the remedial activity.

## Administrative Record

The information used by EPA to select a remedy at a site must be made available to the public. This information, including public comments, is compiled and maintained in the administrative record files. The administrative record serves two main purposes. First, it ensures an opportunity for public involvement in the selection of a remedy at a site. Second, it provides a basis for judicial review of the selection.

## TOOLS FOR ENFORCEMENT

In addition to outlining the procedures for the enforcement process, CERCLA provides tools that are designed to help EPA achieve settlements. The CERCLA settlement authorities may be used by EPA to foster negotiations with PRPs instead of taking them to court. EPA believes that PRPs should be involved early in the Superfund process at a site. It is in the best interest of PRPs to negotiate with EPA and to conduct the RI/FS, as this can keep the process smooth and costs can be controlled. EPA actively promotes settlements with PRPs using tools in SARA and is continuing to work towards improvements in the settlement process itself. These new SARA tools include, but are not limited to:

### Mixed Funding

CERCLA authorizes the use of "mixed funding." In mixed funding, settling PRPs and EPA share the costs of the response action and EPA pursues viable non-settlers for the costs EPA incurred. Through guidance, EPA discusses the use of three types of mixed funding arrangements. These are "preauthorization," where the PRPs conduct the remedial action and EPA agrees to reimburse the PRPs for a portion of their response costs "cash-outs," where PRPs pay for a portion of the remedial costs and EPA conducts the work; and "mixed work," where EPA and PRPs both agree to conduct and finance discrete portions of a remedial action. EPA prefers a "preauthorized" mixed-funding agreement, where PRPs conduct the work.

EPA encourages the use of mixed funding to promote settlement and site remediation, but will continue to seek 100 percent of response costs from PRPs where possible. Use of mixed funding does not change EPA's approach to determining liability. PRPs may be held jointly and severally liable and EPA will seek to recover EPA's mixed funding share from non-settling PRPs whenever possible.

### De Minimis Settlements

De minimis settlements are smaller agreements separate from the larger settlement for the chosen remedy. Under de minimis settlements, relatively small contributors of waste to a site, or certain "innocent" landowners, may resolve their liability. Innocent landowners are parties who brought property without knowing that it was used for hazardous waste handling. Or EPA may enter into de minimis settlement agreements with a party where the settlement includes only a minor portion of the response costs and when the amount of waste represents a relatively minor amount and is not highly toxic, compared to other

hazardous substances at the facility. De minimis settlements also may be used where the PRP is a site owner who did not conduct or permit waste management or contribute to the release of hazardous substances. De minimis settlements are typically used in conjunction with covenant not to sue agreements. These agreements generally will be in the form of administrative orders on consent and are available for public comment.

#### Covenants Not To Sue

A covenant not to sue may be used to limit the present and future liability of PRPs, thus encouraging them to reach a settlement early. However, agreements generally include "reopeners" that would allow EPA to hold parties liable for conditions unknown at the time of settlement or for new information indicating that the remedial action is not protective of human health and the environment. In some cases, such as de minimis settlements, releases may be granted without reopeners. Covenants not to sue are likely to be used only in instances where the negotiating PRP is responsible for only a very small portion of a site, and, therefore, EPA is assured that any future problems with the site are not likely to be the result of that PRP's contribution.

#### Non-binding Allocations of Responsibility (NBAR)

NBAR is a process for EPA to propose a way for PRPs to allocate costs among themselves. EPA may decide to prepare an NBAR when the Agency determines this allocation is likely to promote settlement. An NBAR does not bind the government or PRPs and cannot be admitted as evidence or reviewed in any judicial proceeding, including citizen suits. Since each PRP may be held liable for the entire cost of response, regardless of the size of its contribution to a site, knowing EPA's proposed allocation scheme may encourage the PRPs to settle out of court rather than run the risk of being held fully responsible.

#### STATE PARTICIPATION

The Superfund program allows for and encourages State participation in enforcement activities. First, EPA is required to notify the State of negotiations with PRPs and provide the opportunity for the State to participate. States may be a party to any settlement in which they participate. In addition, EPA is authorized to provide funds to States to allow State participation in enforcement activities and to finance certain State-lead enforcement actions.

#### PUBLIC PARTICIPATION/COMMUNITY RELATIONS

EPA policy and the Superfund law establish a strong program of public participation in the decision-making process at both Fund-lead and enforcement sites. The procedures and policy for public participation at enforcement sites are basically the same as for non-enforcement sites. This fact sheet is limited to those special differences in community relations when the Agency is negotiating with or pursuing litigation against PRPs. The contact listed below has numerous fact sheets on the Superfund program, including a fact sheet on Public Involvement.

Community relations at enforcement-lead sites may differ from community relations activities at Fund-lead sites because negotiations between EPA, DOJ and PRPs generally focus on the issue of liability. The negotiation process, thus, requires that some information be kept confidential and is not usually open to the public.

When these discussions deal with new technical information that changes or modifies remedial decisions, this information will be documented and placed in the administrative record files. This process provides the public with critical information and enables the Agency to move quickly towards settlement. Information on enforcement strategy; details of the negotiations, such as the behavior, attitudes, or legal positions of responsible parties; and evidence or attorney work product material developed during negotiations, must remain confidential.