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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Interim Policy on Managing the Duration of Remedial Design/Remedial Action Negotiations

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TO: Regional Counsel, Regions I-X
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This memorandum sets forth revised, interim procedures for managing the duration of remedial design/remedial action (RD/RA) negotiations. The Office of Site Remediation Enforcement's (OSRE) objective is to strengthen our negotiation practice, shorten the duration of negotiations, and achieve timely settlements. We recognize these revised procedures represent a new way of doing business and will require the commitment of all involved. OSRE will evaluate this Interim Policy eighteen months after implementation (see Section IV).

This Interim Policy supersedes that portion of prior guidance specifically related to requesting approval to continue RD/RA negotiations beyond certain set dates.¹ For all new RD/RA negotiations, the Regions should follow the processes set forth in this memo. For negotiations that are currently underway, Regions should consult with their Headquarters (HQ) Regional Liaison and OSRE Branch Chief to determine whether to apply the new or the former process.

I. Purpose – To Strengthen the Negotiation Process

Meeting the Agency's cleanup goals is a top priority for Superfund enforcement, and enforcement plays an important role in helping achieve timely RD/RA cleanups. Through our efforts in efficiently negotiating RD/RA settlements or using other enforcement tools, we can directly impact site cleanup. We believe by working together on a systematic approach to negotiations, where settlement is preferred but other potential enforcement options may be part of the strategy, EPA can advance the goals of the cleanup program, improve the process of negotiation, promote RD/RA cleanups, and help reach construction completions.

¹ See Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites, OSRE, June 17, 1999, pp. 5-6 ("Negotiation Strategies").

The duration of RD/RA negotiations has grown over the years, and OSRE is committed to working with the Regions, the Superfund Program, and the Department of Justice (DOJ) to find ways to tighten these timeframes in order to begin cleanups as soon as practicable.² Therefore, OSRE is proposing fundamental changes in managing RD/RA negotiations by shifting from a system that requires Regions to request approval from HQ to extend negotiations past certain milestones, to one in which Regions engage in a dialogue with HQ and DOJ about the progress of negotiations. Our goal is to empower negotiation teams to engage in earlier, more frequent dialogues with an eye toward collectively resolving issues slowing progress toward settlement.

II. Implementation of the Interim Policy

The Interim Policy emphasizes promptly concluding RD/RA negotiations and more aggressively utilizing our enforcement tools. Implementation of this process involves several key elements: (1) earlier enforcement involvement at the proposed plan stage; (2) the incorporation of contingency planning into the negotiations process; and (3) engaging Office of Regional Counsel (ORC), Program, OSRE, and DOJ in a more systematic way that pushes negotiators to commit to specific timeframes and benchmarks throughout the process. We believe these are ambitious yet realistic expectations for all those involved with the negotiations.

EPA should evaluate all available enforcement and settlement tools throughout the negotiation process, including: (1) bifurcation of the RD and RA to get work started sooner; or (2) the potential/need for fund-lead or enforcement-leverage options, e.g., mixed funding, mixed work, and issuing unilateral administrative orders (UAOs) for all or part of the work. We encourage use of EPA's UAO authority in appropriate cases as a key component to expediting the RD/RA negotiation process. Current guidance promotes the use of a UAO in the face of unsuccessful negotiations, either by issuing a UAO with a delayed effective date, issuing a UAO for RD only while continuing to pursue a settlement for RA, or issuing UAOs to all appropriate parties for RD and RA.³ Potentially Responsible Parties (PRPs) should know during negotiations that EPA is willing and ready to issue a UAO if settlement is unreasonably delayed.

As negotiations progress, Status Conferences will be set up to discuss the best ways to overcome obstacles and move forward toward settlement or other enforcement options. During the Status Conferences, participants will discuss the associated benchmarks and address situations in which the benchmarks have not been met. These Status Conferences will replace the existing system of requesting Regional Administrator approval to extend negotiations past 120 days after issuing Special Notice Letter (SNL), Director/RSD/OSRE approval to extend past 180 days, and Director/OSRE approval to extend past 240 days. The Roles Chart will be amended to reflect these changes to the process for continuing negotiations.

² Median duration has increased from 197 days during 1990-1993 to 305 days during 2004-2008. Data Source: CERCLIS, November 2008.

³ See Negotiation Strategies, June 17, 1999, pp. 5-7; Integrated Timeline for Superfund Site Management, OSWER Directive Number 9851.3, June 11, 1990, p. 6; Superfund Enforcement Strategy and Implementation Plan, Office of Waste Programs Enforcement, September 26, 1989, p.19.

A. Negotiation Status Conferences: Benchmarks and Accountability

Dialogue and planning will drive this new approach. Through systematically elevated Status Conferences, we will focus our attention on understanding the reasons for delays and explore strategies to resolve them. To implement this revised system, we developed a timeline for setting up Status Conferences based on signing of the Record of Decision (ROD), issuance of SNL, and conclusion of negotiations. The conferences themselves could be incorporated into regional dockets, set up as conference calls, or scheduled to correspond with other meetings or conferences. If the Status Conference date falls within either two weeks before or two weeks after a scheduled Regional docket, the conference date may be adjusted to coincide with the scheduled docket. This will take advantage of the fact that DOJ, HQ, and Regional staff are already scheduled to participate in a meeting or a call.

The initial expectation is the development of a RD/RA Negotiation Plan, including the overall strategy, benchmarks, and deadlines, prior to the ROD.⁴ The Negotiation Plan would include, for example, when and under what conditions the Region would issue a UAO for some or all of the work, consideration of an Administrative Order on Consent (AOC) for RD, or if applicable, an analysis of relevant case law. The Negotiation Plan would also take into account, as needed, coordination with Natural Resource Trustees, the State, and/or the involvement of Federal PRPs. When developing the Negotiation Plan, the Regional Attorney and the Remedial Project Manager should establish firm negotiation schedules and identify potential obstacles along with strategies to address them. OSRE is working with Regions 1 and 7 to develop a template for a Negotiation Plan that will incorporate the necessary elements.

During this process, the negotiation team can determine whether it would be appropriate and useful to include an OSRE staff person as part of the team. Potential candidates for OSRE participation in the negotiations are those that may require prior written approval in the future (e.g. possible special account disbursement, sites greater than \$100 million, etc.) or those where the Region anticipates other complexities associated with the case. An OSRE participant would benefit from the negotiation experience and could help expedite the status conference process. If the team would like to invite OSRE participation, the Regional Attorney can contact the HQ Regional Liaison who will raise the request with his or her Branch Chief and Division Director.

The other baseline expectation is that the Regions would submit the Negotiation Plan with the Pre-Referral Negotiation (PRN) package to DOJ approximately 30 days after the ROD.⁵ These expectations are well grounded in current guidance and would assure that the negotiation team addresses issues that often delay the negotiations down the road.⁶ In some

⁴ See CERCLA Enforcement Project Management Handbook, November 2002, p. 8-1 (“Enforcement Handbook”). For a list of topics to be included in the Negotiation Plan, see Section 8.2.B.1 of the Enforcement Handbook, available at: <http://intranet.epa.gov/oeca/osre/documents/hbk-pdf/chapter8.pdf>.

⁵ Note: DOJ has 30 days of receipt of a complete PRN to provide comments to the Region, *see* Pre-Referral Negotiation Procedures for Superfund Enforcement Cases, October 12, 1990, p. 8. Some Regions already strive to get the PRN out as early as appropriate. DOJ uses the PRN to assign an attorney to the case.

⁶ See Pre-Referral Negotiation Procedures for Superfund Enforcement Cases, October 12, 1990, p. 7 (“Identification of the ROD (or the most recent version of the draft ROD or proposed plan if the ROD is not yet issued), which will be an attachment for informational purposes, and discussion of significant remedy issues, such as public, state or local government, or RP opposition to the proposed plan to chosen remedy, if known”) (listing the information that

cases, a partially drafted PRN can be submitted prior to the ROD and then supplemented as necessary. A partial PRN should include key elements, such as the description of the site, identification of PRPs and their liability and defenses, identification of any state or trustee involvement, any potential federal PRPs and contacts to date, and any special circumstances.

1. Timeline for Tracking Negotiation Status

Generally speaking, RD/RA Negotiations start on the date SNL is issued.⁷ EPA guidance anticipates that SNL will be issued no later than 90 days after the ROD is issued.⁸ Using this 90-day timeframe is consistent with, and integral to, the policy of submitting the PRN and Negotiation Plan to DOJ shortly after the ROD is issued and takes into account the 30-day comment period that DOJ has to review the PRN. See Section II.B. for the process to follow if SNL is delayed beyond 90 days after the ROD is issued.

Our goal is to complete RD/RA negotiations within 120 days. We developed the following timeline that will apply to new RD/RA negotiations, using that 120-day timeframe as a baseline and understanding that situations will sometimes necessitate additional time. The attached flowchart illustrates each stage of the timeline. For each Status Conference, examples of benchmarks⁹ that would be expected to be completed at that stage of negotiation are listed below as well as expected outcomes of the conferences:

- a. Negotiation Status Conference 1 at Day 120 from SNL: If a settlement has not been sent out for signature by Day 120 from the date SNL was issued, there will be a Conference with the Regional and DOJ staff attorneys, Regional Counsel Branch Chief, Superfund Program Section Chief, and the HQ Regional Liaison, who will evaluate status based on benchmarks in the Negotiation Plan, identify barriers, and elevate issues if appropriate.
 - i. Benchmarks: Examples - drafted UAO for RD/RA or RD; enforcement leverage analysis; and analysis of Fund-lead RD or RD AOC potential.
 - i. Negotiation Plan will be revised with concrete dates for every step.¹⁰
 - iii. Status Memo: the EPA negotiation team will submit a short status memo to the Regional Counsel, the Superfund Division Director,

should be included with the PRN); Enforcement Handbook, November 2002, p. 8-3 (“Generally the pre-referral package should be provided to DOJ at least 60 days prior to the issuance of the RD/RA Special Notice Letters”), p. 8-10 (“The detailed RD/RA negotiation plan, in combination with the site overview and other existing components of the site management plan . . . should comprise the pre-referral litigation report”).

⁷ See Superfund Program Implementation Manual, Fiscal Year 2009/2010, OSWER Directive 9200.3-14-1G-T, March 31, 2009, pp. C-7 – C-9.

⁸ See Enforcement Handbook, November 2002, p. 8-3 (“Issuance of special notice should occur between the time the Proposed Plan and draft Feasibility Study (FS) are released to the public, and the date the ROD is signed, or shortly thereafter”); Integrated Timeline for Superfund Site Management, June 11, 1990, p. 2 (“Issuing special notice for RD/RA shortly before or upon signature of the ROD”) (listing key steps in cleanup process).

⁹ The Negotiation Plan would include the site-specific benchmarks and associated deadlines.

¹⁰ If negotiations proceed according to the Plan, subsequent Negotiation Status Conferences would be expected to be brief check-in meetings to go over the schedule for negotiation completion. However, if additional issues are raised that will delay negotiations, the Negotiation Plan should be revised and subsequent Negotiation Status Conferences should address those additional issues.

- and Assistant Chief or Senior Attorney/DOJ, copying the RSD Branch Chief, summarizing the Status Conference and the strategy for moving forward.¹¹
- b. Negotiation Status Conference 2 at Day 240 from SNL: If a settlement has not been sent out for signature by Day 240 from the date SNL was issued, there will be a Conference with the Regional Counsel Branch Chief, Superfund Program Branch Chief, Director/RSD/OSRE, and Assistant Chief or Senior Attorney/DOJ.
- i. Benchmarks: Examples – look for progress on Negotiation Plan; determine a deadline for issuing UAO; UAO ready to issue or issue with delayed effective date; drafted AOC for RD.
 - ii. Status Memo Update: the EPA negotiation team will submit an updated status memo to the Regional Counsel, Superfund Division Director, Director/OSRE, and Assistant Chief or Senior Attorney/DOJ, summarizing the Status Conferences and the strategy for moving forward. The memo will identify whether a UAO has been prepared, explain any rationale for not doing so, and expressly justify the decision to continue negotiations.
- c. Negotiation Status Conference 3 at Day 300 from SNL: If a settlement has not been sent out for signature by Day 300 from the date SNL was issued, there will be a Conference with the Regional Counsel, Superfund Division Director, Director/OSRE, and Section Chief or Deputy Chief/DOJ.
- i. Benchmarks: Development of a focused agenda with recommended options for specific next steps.
 - ii. Status Memo Update: the EPA negotiation team will submit an updated status memo to the Regional Administrator, Principal Deputy AA/OECA, and Section Chief or Deputy Chief/DOJ summarizing the Status Conferences and the strategy for moving forward. The memo will attach a draft UAO if appropriate and will recommend whether to continue negotiations and how to assure a very prompt (< 45 days) conclusion.
- d. Monitoring Consent Decree (CD) Lodging and Entry
- i. According to EPA guidance, DOJ should lodge the CD within 30 days of receipt of the final executed settlement from the Region and should move for entry of the CD within 45 days after lodging (assuming no significant comments).¹² While delays inconsistent with that guidance are outside the scope of this Interim Policy, we encourage the Regions to work with DOJ, and OSRE where appropriate, to have the agreement before the Court as quickly as possible in order to get the cleanup started.

¹¹ The Status Memos can be informal (e.g. bullet points in an email) and are meant to provide a brief overview of the current situation and outcome of the conference.

¹² Pre-Referral Negotiation Procedures for Superfund Enforcement Cases, October 12, 1990, p. 12 (issued by OECA and OSWER and concurred by Assistant Attorney General, Environment and Natural Resources Division/DOJ).

B. Deviations from the RD/RA Negotiation Tracking Timeline

1. **Delayed Special Notice:** When SNL is not issued 90 days after the ROD, the following process should be used to keep the negotiation start as timely as possible:
 - a. Day 90 From ROD - SNL Status Conference 1: If SNL has not been issued by Day 90 from ROD, there will be a Conference with Regional Counsel Branch Chief, Superfund Program Section Chief, Regional and DOJ staff attorneys (if PRN has been submitted and a case attorney has been assigned), and HQ Regional Liaison who will evaluate status, identify barriers, and elevate issues if appropriate.
 - i. Negotiation Plan will be revised with concrete dates for every step.
 - ii. Benchmarks: SNL drafted; CD drafted.
 - b. Day 150 from ROD - SNL Status Conference 2: If SNL has not been issued at Day 150 from ROD, there will be a Conference with Regional Counsel Branch Chief, Superfund Program Branch Chief, Director/RSD/OSRE, and Assistant Section Chief or Senior Attorney/DOJ (if PRN has been submitted and a case attorney has been assigned) who will evaluate status, identify barriers, and elevate issues if appropriate.
 - i. Negotiation Plan will be revised with concrete dates for every step.
 - ii. Benchmarks: Documentation of what was discussed at the Regional SNL Status Conference; progress on Negotiation Plan.
 - iii. Status Memo: the EPA negotiation team will submit a short status memo to the Regional Counsel, Superfund Division Director, Director/OSRE, and Assistant Section Chief or Senior Attorney/DOJ (if PRN has been submitted and a case attorney has been assigned) summarizing the Status Conference and the plan for issuing SNL.
 - c. These Conferences would continue to be scheduled every 30 days until SNL is issued.
 - i. Status Memo Update: After 60 additional days (i.e. day 210), the negotiation team will submit a memo to the Regional Counsel, Superfund Division Director, Director/OSRE, Director/Office of Superfund Remediation and Technology Innovation (OSRTI), and Assistant Section Chief or Senior Attorney/DOJ (if PRN has been submitted and a case attorney has been assigned) recommending a specific and prompt timetable to issue SNL.
2. **Site-Specific Exception Plans:** In rare cases, there may be negotiation situations that the Region believes warrant an exception to the standard negotiation timeline. In those cases, the Regions will use the process below to request an exception:
 - a. Day 90 From ROD: The negotiation team will develop a proposal for a site-specific alternative schedule, including a detailed justification memo, and submit the proposal to the Director/RSD within 90 days of issuing the ROD. Once the proposal is discussed and the alternative timeline agreed upon by OSRE and the negotiation team, that site-specific schedule will

- govern activities and expectations for the negotiations, including the timing of any necessary Negotiation Status Conferences.
- b. If a Region issues, or plans to issue, an AOC for RD before the SNL is due (90 days after the ROD), the Region will follow the Site-Specific Exception Plan process.
3. **Waiver of 122(a):** In rare situations the negotiation team may, under Section 122(a), decide to waive Special Notice procedures but still plan to pursue RD/RA negotiations. In those cases, the timing of Status Conferences will follow the same schedule as the standard negotiation timeline, but will factor in the 90 days normally provided for issuing SNL.
- a. Day 90 From ROD: The negotiation team will notify the Regional Liaison that they have decided not to issue SNL in this case.
 - b. Day 210 From ROD – Negotiation Status Conference 1 (see II.A.1.a.)
 - c. Day 330 From ROD – Negotiation Status Conference 2 (see II.A.1.b.)
 - d. Day 390 From ROD – Negotiation Status Conference 3 (see II.A.1.c.)

III. Distinguishing Negotiation Moratorium and Negotiation Timelines

CERCLA Section 122(e)(2) provides a moratorium on any enforcement actions under Section 106. Under Section 122(e)(2)(B), PRPs have 60 days from the date of receipt of SNL to submit a good faith offer to EPA. If EPA receives a good faith offer, the PRPs have another 60 days during which negotiations can continue without EPA commencing a Section 106 enforcement action or funding a remedial action. Current policy on negotiation extension requests cites the statutory negotiation moratorium as a “benchmark for measuring the timeliness of RD/RA negotiations.”¹³ There is no EPA policy or statutory requirement for continuing the moratorium beyond 120 days, and the former OSRE extension request and approval system related only to continuing negotiations, not to extending the statutory moratorium on taking an enforcement action.¹⁴ Similarly, the Interim Policy will continue to use the 120-day moratorium as a “benchmark” for when we believe negotiations should be complete, but it will also not involve any extension of the moratorium. When we amend the Roles Memo to implement the revised system, this distinction between the statutorily imposed moratorium and the EPA policy of permitting negotiations to continue will be clarified.

IV. Interim Policy and Evaluation Period

Eighteen months after implementation, OSRE will evaluate the effectiveness of the Interim Policy during that time period. The evaluation will include an analysis of certain measures combined with a survey that will be distributed to Legal, Program, and DOJ staff. CERCLIS and the SPIM Manual will be updated and modified in FY 2010 to capture the relevant data. Prior to those modifications, the HQ Regional Liaisons will track the data. Key measures will include timing of PRN submittal and SNL issuance, the number of status conferences held, the number of site-specific exception requests, and the duration of negotiations. Based on the evaluation, OSRE will examine ways to improve or modify the RD/RA negotiations policy.

¹³ Negotiation Strategies, June 17, 1999, p. 2.

¹⁴ See *id.*, p. 3 at note 4.

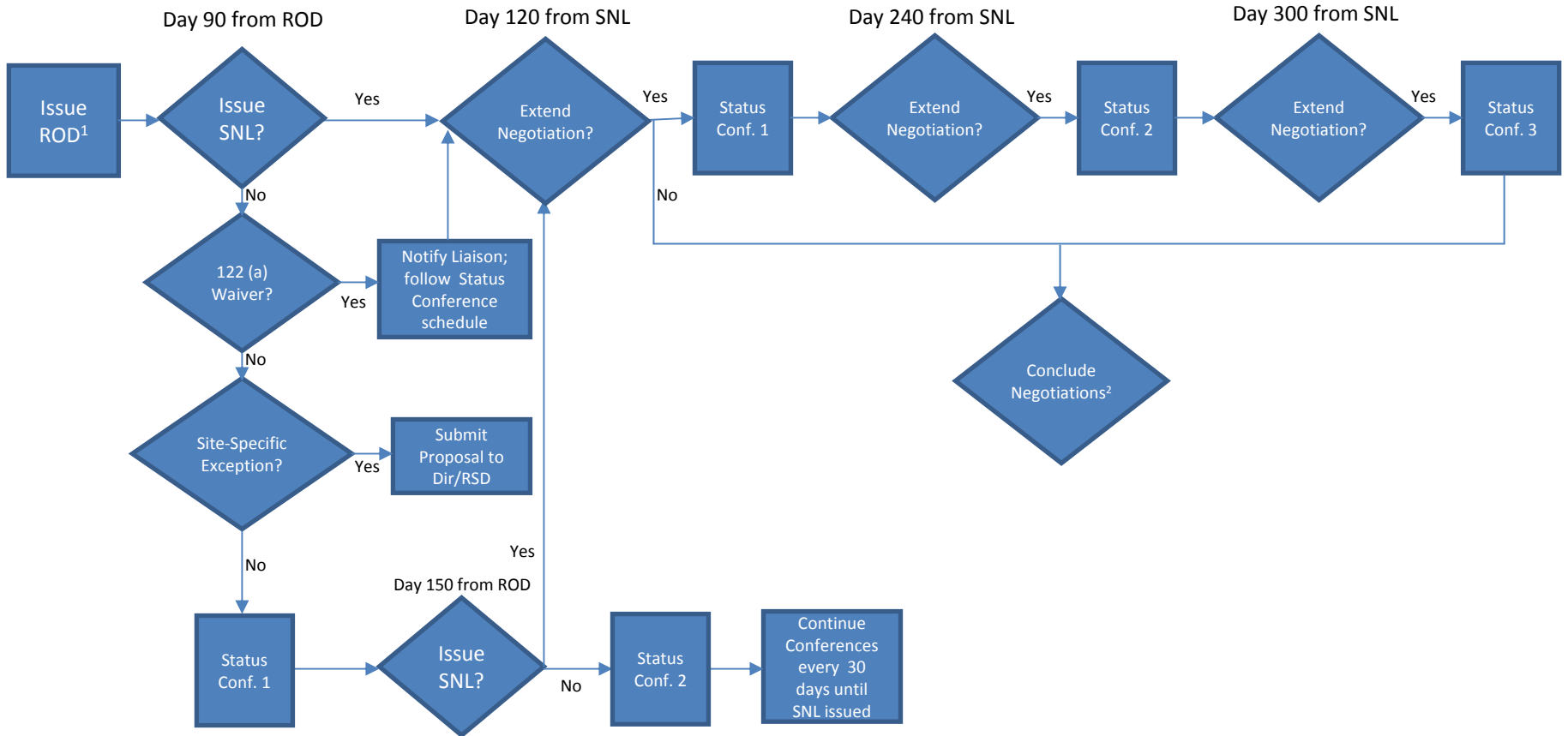
V. Disclaimer

This memorandum is intended solely for the guidance of employees of EPA. It is not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States of America. EPA reserves the right to act at variance with this document and to change it at any time without public notice.

Attachment

cc: Superfund Legal Branch Chiefs, Regions I-X
Bruce Gelber, DOJ
Karen Dworkin, DOJ
James Woolford, OSRTI
Sandra Connors, OSRE
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RD/RA Negotiation Flowchart



¹This timeline assumes the PRN was submitted within 30 days after the ROD is issued.

²As per the 1990 Pre-referral Negotiation Guidance, once the final settlement package has been submitted, DOJ will lodge the CD within 30 days and will move for entry within 45 days after lodging (assuming no significant comments).