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- ☐ C — Review & Comment

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Name of Contact Person	Mail Code	Office	Telephone Code
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RE

JAN 25 1988

MEMORANDUM

SUBJECT: Enforcement Actions Under RCRA and CERCLA at Federal Facilities

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Regional Administrators
Regions I-X

BACKGROUND

Statutory language makes it clear that Federal facilities must comply both procedurally and substantively with RCRA and CERCLA in the same manner as any non-Federal entity. The purpose of this memo is to lay out the statutory authorities under RCRA and CERCLA that EPA may use at Federal facilities to achieve compliance and expeditious cleanup.

Over the past year, a great deal of effort has been spent identifying those enforcement tools that are available to EPA in the hazardous waste programs to achieve a higher level of compliance at Federal facilities. Specifically, the successful negotiation of individual agreements such as the corrective action order with the Department of Energy (DOE) at the Idaho National Engineering Lab and the Interagency agreement with the Department of Army (DOA) at the Twin Cities Army Ammunition Plant demonstrated significant progress in efforts to achieve compliance and cleanup at Federal facilities. Further clarification of EPA's enforcement capabilities at Federal facilities has come from the Department of Justice in Congressional testimony.

To continue the above progress in resolving compliance and cleanup issues at Federal facilities, I am outlining the enforcement and permitting response actions that EPA can currently implement to formalize compliance and cleanup actions

at Federal facilities. A description of the available enforcement and permitting response actions is given for each of the following scenarios.

1) A Federal facility with RCRA compliance issues.

2) A Federal facility with RCRA corrective action issues.

3) A Federal facility with CERCLA issues.

4) A Federal facility with RCRA and CERCLA issues.

I. A FEDERAL FACILITY WITH RCRA COMPLIANCE ISSUES

At a Congressional hearing on April 28, 1987 before the House Oversight and Investigation Sub-Committee, of the Committee on Energy and Commerce, the U.S. Department of Justice testified that EPA may not issue Administrative Orders at Federal facilities under Section 3008(a) of RCRA to address compliance violations of regulatory requirements. (See Attachment 1 for a copy of DOJ's Congressional testimony). When addressing RCRA compliance violations, EPA will issue the Federal facility a Notice of Noncompliance (NON). EPA will then negotiate a Federal Facility Compliance Agreement (FFCA) to resolve the compliance issues outlined in the NON. Detailed below is a description of the components of a NON and a FFCA.

A. Federal Facility Notice of Noncompliance

EPA will issue a Notice of Noncompliance (NON) as the initial enforcement action at a Federal facility with RCRA compliance violations. The notice should be sent to the responsible Federal official at the facility, or their delegate. The issuance of a NON at a Federal facility is parallel to the issuance of a RCRA Section 3008(a) administrative complaint to a private facility and, therefore, must conform with a RCRA Section 3008(a) complaint in content and format. As outlined in the model language (Attachment 2), the NON should contain the following components:

1) A general reference to the Resource Conservation and Recovery Act as amended.

2) The factual basis for the issuance of the NON (e.g., acts, omissions and conditions identified during an inspection).

3) A reference to the waiver of sovereign immunity under Section 6001 of RCRA.

4) A reference to the citizen suit provisions of Section 7002 of RCRA.

5) A reference to administrative, civil, and/or criminal sanctions under Section 3008 of RCRA that may be applied to an individual who is in charge of hazardous waste management activities at a facility.

6) A detailed allegation of all RCRA violations with citations to authorized state or EPA regulations.

7) A detailed compliance schedule (both actions and timeframes) for the correction of violations.

8) The alternatives to the actions provided for in the NON (e.g., Presidential exemption or specific legislative relief from Congress).

9) A specific date or timeframe by which the Federal facility must provide a written response to EPA regarding their plans for addressing the violations outlined in the document and/or a specific date for a conference.

It is essential that the NON specify the violations, remedy, and timeframes for implementing the remedy in the same manner that a strong administrative or civil complaint would be drafted.

B. Federal Facility Compliance Agreement

After the NON has been issued, the final negotiated document resolving compliance violations between the Federal facility and EPA will continue to be called a Federal Facility Compliance Agreement (FFCA). A very important section in any new FFCA is the enforceability clause. Model enforceability language is attached (Attachment 3) for your inclusion in any new FFCA. Where appropriate, and when you can obtain expeditious agreement from the affected Federal facility, you should add the enforeability clause to existing Federal Facility Compliance Agreements as well. This language reflects EPA's view that a "requirement" in Section 7002 includes statutory and regulatory requirements and other items which are mandated by these requirements (e.g., schedules of compliance, various plans, recordkeeping and reporting) and that this final negotiated document is enforceable under Section 7002. This language also recognizes that under RCRA Section 6001, Federal agencies are required to comply with the agreement, subject to available appropriations.

All FFCAs should contain the model dispute resolution clause found at Attachment 4. This dispute resolution language emphasizes resolution of disputes at a lower level. In cases where disputes are escalated to higher levels, the EPA Administrator is the final decision maker.

C. Issuance of RCRA Section 3008(a) Order to a Government-Owned Contractor Operated Facility (GOCO)

When addressing RCRA compliance issues at a Federal facility, EPA also has the option of issuing an enforcement action against the non-Federal operator of a facility. In many cases, contractors have the operational responsibility for waste generation and management operations at a Federal facility.

At the aforementioned Congressional hearing on this topic, DOJ stated that they saw no constitutional or statutory problems to asserting Section 3008 authority (or any other authority) against contract operators of government-owned facilities (GOCOs)(see Attachment I, DOJ Testimony). This means that EPA and the states have the full range of enforcement authorities under RCRA and CERCLA at GOCOs that are available for private facilities.

Actions against GOCOs can be valuable enforcement tools, especially at facilities where the contractor does the majority of the waste management work (i.e., DOE facilities). On a factual basis EPA has not experienced trouble establishing the contractor as the operator. The Mixed Energy Waste (MEWS) task force found that at most of the major DOE facilities the contractor(s) were responsible for the day-to-day operations and long term management, or oversight of hazardous waste at the facility. In some instances, both the Federal agency and the contractor(s) are the operators. A memo labeled Attachment 5 in this package gives some criteria for determining the operator at a Federal facility.

GOCOs are not shielded from enforcement actions for non-compliance with environmental laws. Therefore, I strongly encourage you to determine who is the operator of hazardous waste management activities at a Federal facility when developing an enforcement strategy at the facility. You should then examine the factual association of the contractor at the facility. When the primary operator at a Federal facility is clearly the contractor(s), and the factual basis for the enforcement action is clearly defined, you should consider the use of all RCRA and CERCLA authorities available for non-Federal facility actions. The Federal Facilities Compliance Task Force in the Office of Waste Programs Enforcement and the Office of Enforcement and

Compliance Monitoring will be working with your staff to identify those cases which may be good candidates for a GOCO enforcement action.

II. A FEDERAL FACILITY WITH RCRA CORRECTIVE ACTION ISSUES

A. Corrective Action Orders (3008(h)) at Federal Facilities

With regard to corrective action and the applicability of administrative orders under RCRA Section 3008(h) at Federal facilities, DOJ has taken the view that corrective action orders are integral to the permitting process. Since Section 6001 of RCRA expressly requires Federal facilities to comply with hazardous waste permits, DOJ has concluded that administrative orders under Section 3008(h) can be issued to Federal facilities.

Based on this DOJ determination, Section 3008(h) administrative orders should be issued whenever possible and appropriate (e.g., an interim status facility which is not seeking a RCRA permit or the issuance of the permit is not expected in the near future). The existing administrative procedures for issuing RCRA 3008(h) orders, as set forth in the February 19, 1987 memorandum to the regional offices, will be applied to Federal agencies. However, Federal agencies will have the opportunity to elevate disputes to the Administrator for a final decision in the event a dispute cannot be resolved at the Regional Administrator level. Consistent with these procedures, EPA will issue orders as necessary, and provide a reasonable opportunity for Federal agencies to discuss the order with EPA. If the Federal agency chooses not to invoke these procedures, the order becomes final and effective.

As in the NON and FFCA, a Section 3008(h) order being issued to a Federal facility should state the waiver of sovereign immunity found in Section 6001 of RCRA. It should also contain the model dispute resolution language found in Attachment 4. The the model enforceability language found in Attachment 3 is not necessary since the order will explicitly cite the statutory authority in Section 3008(h), and is, therefore, enforceable under Section 7002 of RCRA. There should be no difference in the factual basis for the issuance of a corrective action order between a private facility and a Federal facility. The initial order should be sent to the responsible Federal official at the facility, or their delegate.

B. Issuance of a 3008(h) Order to a Government-Owned Contractor-Operated Facility (GOCO)

As described in Part III, RCRA Compliance, Section C, DOJ has determined that EPA has the authority to exercise all of its Section 3008 enforcement options at GOCOs. This authority is not limited to RCRA compliance issues under Section 3008(a). It includes corrective action authorities under Section 3008(h) and Section 3013 of RCRA. All CERCLA enforcement authorities apply to GOCOs as well.

III. A FEDERAL FACILITY WITH CERCLA COMPLIANCE ISSUES

A. Section 120 Interagency Agreements

Under Section 120 of the Comprehensive Environmental Response Compensation and Liability Act as amended by the Superfund Amendments and Reauthorization Act (hereinafter referred to as CERCLA), Federal agencies must enter into an "interagency" agreement (IAG) for all necessary remedial actions at Federal facilities on the NPL.

The Agency is viewing the Section 120 Interagency agreement as a comprehensive document to address hazardous substance response activities at a Federal facility from the remedial investigation/ feasibility study (RI/FS) through the implementation of the remedial action. All such interagency agreements must comply with the public participation requirements of Section 117. The timetables and deadlines associated with the RI/FS and all terms and conditions associated with the remedial actions (including operable units or interim actions) are enforceable by citizens and the States through the citizen suit provisions of Section 310 of CERCLA. In addition, Section 122(l) of CERCLA authorizes the imposition of civil penalties against Federal agencies for failure to comply with interagency agreements under Section 120. Procedures for imposing these penalties are provided for in Section 109 of CERCLA.

B. Other CERCLA Authorities Available at Federal Facilities

EPA has the authority to issue administrative orders to Federal agencies under Section 104 and Section 106 of CERCLA. Section 106 orders should be used where needed to assure compliance with Federal facility requirements for response action. Orders under Section 104(e)(5)(A) of CERCLA can be used to collect information and obtain access to Federal agency sites where needed.

Executive Order 12580 clarifies that EPA is authorized to issue Section 104 and Section 106 administrative orders to other Federal agencies, with the concurrence of the Department of Justice. Section 4(e) of the Executive Order provides that:

> Notwithstanding any other provision of this Order, the authority under Section 104(e)(5)(A) and Section 106(a) of the Act to seek information, entry, inspection, samples or response action from Executive Departments and agencies may be exercised only with the concurrence of the Attorney General.

CERCLA enforcement authorities under Section 106, both administrative and judicial, can be used against government contractors at Federal facilities. Administrative orders against contractors do not require concurrence of the Department of Justice. In addition, Section 120(e)(6) provides that, if the Administrator determines that the response actions can be done properly at the Federal facility by another responsible party, then the Administrator may enter into an agreement with such party under the settlement provisions of Section 122 of the statute. Following the approval by the Attorney General of any such agreement relating to a remedial action, the agreement will be entered in the appropriate United States district court as a consent decree under Section 106 of CERCLA.

States also have a variety of enforcement authorities under CERCLA, so the exercise of EPA's enforcement authorities should be closely coordinated with the States. First, Section 121(e)(2) of CERCLA authorizes States to enforce any Federal or state standard, requirement, criteria or limitation to which the remedial action must conform under CERCLA. Second, Section 310 authorizes citizen suits to require Federal agencies to comply with the standards, regulations, conditions, requirements, or orders which have become effective pursuant to CERCLA including IAGs under Section 120 of the Act. Third, Section 120(a)(4) clarifies that State laws concerning removal and remedial action, including State laws regarding enforcement, are applicable at Federal facilities not included on the NPL. In addition, Section 120(i) states that nothing in CERCLA Section 120 shall affect or impair the obligation of the Federal agency to comply with the requirements of RCRA, including corrective action requirements (see section IV.C., "Importance of the States as a Party to the IAG"). EPA enforcement actions against Federal agencies should therefore be carefully coordinated with States, to avoid potentially duplicative or conflicting exercises of authority.

IV. A FEDERAL FACILITY WITH CERCLA AND RCRA ISSUES

In many cases, facilities subject to an IAG will also have RCRA liabilities. The most common example of the RCRA/CERCLA overlap is where a unit(s) at the facility has interim status or a permit under RCRA and a portion of the facility is undergoing a CERCLA remedial investigation.

A. Enforcement Options

When developing a comprehensive strategy for addressing both RCRA and CERCLA issues at a Federal facility, EPA and the states should consider the following options, alone or in combination, as possible mechanisms for getting enforceable requirements in place:

1. A RCRA permit

All RCRA Subtitle C permits issued after November 8, 1984, will contain provisions for implementing the corrective action requirements of 40 CFR Part 264 Subpart F (or authorized state requirements), and Section 3004(u) and (v) of RCRA. For facilities that have or are seeking a RCRA permit, the requirements for a "CERCLA" remedial investigation and cleanup could be met by implementing these requirements through RCRA corrective action. It is important to keep in mind, however, that the extent of coverage of the RCRA permit is generally limited to hazardous wastes/constituents (e.g., some CERCLA hazardous substances such as radionuclides are not RCRA hazardous constituents and, therefore, the permit may not be able to address all of the releases at a facility).

2. A RCRA Corrective Action Order

The corrective action authority under Section 3008(h) of RCRA can be used at RCRA interim status facilities to address releases from RCRA regulated units and other solid waste management units. At a Federal facility that has interim status, a RCRA corrective action order could address the investigation and clean-up of releases in lieu of a "CERCLA" response action or as an interim measure. (Again, the extent of coverage in the RCRA corrective action order is limited to RCRA hazardous wastes/constituents.)

3. Imminent and Substantial Endangerment Orders

CERCLA Section 106 can be used to address releases from RCRA units or CERCLA sites when an "imminent and substantial endangerment" is shown.

4. An Interagency Agreement under Section 120 of CERCLA

A Section 120 IAG could be drafted to incorporate all RCRA corrective action requirements and CERCLA statutory requirements. Where some or all of a Federal installation has been listed on the NPL, the CERCLA Section 120 IAG is required for remedial action by statute.

The first agreement under Section 120 of CERCLA (IAG) was finalized on August 12, 1987. The IAG at Twin Cities Army Ammunition Plant (TCAAP) is a three party agreement between EPA, the State of Minnesota, and the U.S. Department of the Army. Several notable provisions that should be incorporated in every CERCLA Section 120 IAG include a dispute resolution process that denotes the EPA Administrator as the final decision maker, an enforceability clause which states that provisions of the agreement are enforceable by citizens and the State through the citizen suit provision of Section 310 of CERCLA, and a means for resolving both the RCRA and CERCLA requirements when both statutes apply. Further guidance on CERCLA Section 120 agreements is being developed and will be made available to the Regions as soon as possible. In the interim, the Regions should consult with Headquarters on any IAG issues they encounter.

B. Strategy for Action at RCRA/CERCLA Sites

The decision on which of the above mechanisms to employ at a Federal facility will be made on a facility specific basis. However, if the Federal facility is on the NPL or is likely to be placed on the NPL, I encourage the use of a Section 120 IAG to incorporate both RCRA and CERCLA activities under one enforceable agreement and to serve as a comprehensive plan for investigatory and remedial activities at the facility, whether RCRA or CERCLA. EPA, the State, and the Federal facility would agree on a facility wide strategy, setting priorities and schedules for action. If properly framed, the agreement would satisfy the facility's RCRA corrective action requirements,as well as the public participation requirements of Section 117 of CERCLA and Part 124 of RCRA. At a later date, if appropriate, corrective/ remedial action requirements found in the IAG could be incorporated into the RCRA permit for those facilities seeking an operating or post-closure permit, in satisfaction of RCRA Section 3004(u) and (v) requirements. An Interagency agreement under Section 120 of CERCLA does not serve as the replacement for a RCRA permit at a unit seeking an operating permit.

C. Importance of the State as a Party to the IAG

CERCLA Section 120(i) states that nothing in CERCLA Section 120 shall affect or impair the obligation of the Federal agency to comply with the requirements of RCRA, "including the corrective action requirements." One interpretation of CERCLA

Section 120(i) is that the provision allows "re-cleanup" of a release using RCRA corrective action authorities during or after a cleanup of that release under CERCLA; this could be a problem if a State, authorized to implement the RCRA program, contested the technical standards of an IAG. In order to avoid arguments over the interpretation of Section 120(i), as well as to avoid potentially duplicative exercises of authority, I encourage the inclusion of the State as a full signatory party for IAG's at RCRA facilities.

A three party agreement will ensure the following state roles in the agreement:

- O appropriate application of state clean-up standards
- O public participation requirements
- O enforceability
- O involvement in setting priorities
- O dispute resolution
- O review and comment on technical documents

This type of agreement would resolve differences between EPA and state requirements up front.

CONCLUSION

This memo is the first step in developing an integrated RCRA/CERCLA Federal facility compliance and cleanup strategy. The fundamental principle of the strategy is that there is no difference between environmental standards for Federal facilities and private facilities. EPA holds Federal facilities accountable for environmental cleanup and will proceed with enforcement actions at Federal facilities in the same way that we would proceed at private facilities. Although the limitations of enforcement authorities at Federal facilities have frustrated EPA's enforcement capabilities in the past, the RCRA corrective action requirements in combination with CERCLA authorities under Section 106 and Section 120 provide many options for achieving cleanup at Federal facilities.

I have recently established a Federal Facilities Compliance Task Force within OWPE which is dedicated to achieving compliance and cleanup at Federal facilities. The Task Force will be working closely with the CERCLA Enforcement Division and RCRA Enforcement Division of OWPE, other offices within Headquarters, and the Regions to develop guidance and policy regarding Federal facilities, to resolve difficult issues that arise from EPA's negotiations with Federal facilities, to track ongoing negotiations between EPA and Federal agencies, to pinpoint areas

for potential enforcement response, and to relay the Agency's efforts at resolving compliance, corrective action and permitting issues at Federal facilities.

I am requesting that you forward any Federal Facility Compliance Agreements, Interagency Agreements, etc., that you are negotiating with Federal facilities in your Region to Gene A. Lucero, Director of the Office of Waste Programs Enforcement (Mail Code: WH-527).

As I mentioned earlier, the Task Force will be working with the Regions to pinpoint areas for possible enforcement action. As DOJ has encouraged EPA to take appropriate enforcement actions at GOCOs, the Task Force is interested in GOCO candidates for an enforcement action under RCRA or CERCLA. I am polling the Regions for suggestions of Federal facilities where the need for an enforcement action is imminent and there is a clear means of establishing the contractor as the operator. We will provide Headquarter's support for the development of the order and throughout the negotiation process.

If you have any questions regarding this memorandum or recommendations of candidates for potential enforcement actions, please contact Christopher Grundler, Director of the Federal Facilities Compliance Task Force at FTS 475-9801. Questions can also be directed to Jacqueline Thiell of the the Task Force at FTS 475-8727.

Attachments

cc:

Gene Lucero, OWPE
Roger Marzulla, DOJ
Henry Longest, OERR
Tom Adams, OECM
Marcia Williams, OSW
Frank Blake, OGC
Richard Sanderson, OFA
Hazardous Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X
CERCLA Branch Chiefs, Regions I-X
RCRA Branch Chiefs, Regions I-X
Federal Facility Coordinators

9992.(

ATTACHMENT 1

STATEMENT

OF

F. HENRY HABICHT II
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION

BEFORE

THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

CONCERNING

FEDERAL FACILITY COMPLIANCE WITH ENVIRONMENTAL LAWS

ON

APRIL 28, 1987

Mr. Chairman and Members of the Subcommittee:

On behalf of the Department of Justice, I am pleased to have this opportunity to present our views on issues related to federal facility compliance with the environmental laws and regulations. I am committed to helping the Congress work through these most important issues and to achieving the desired compliance in the most effective possible way.

In today's testimony, I will discuss the Justice Department's views on environmental compliance and enforcement, both generally and as they address federal facilities. In order to be most helpful to the Subcommittee, I will attempt to lay a foundation for the Subcommittee's questions by addressing specific institutional characteristics of federal agencies -- their political accountability and the unique role of Congress in setting, with the Executive, their missions and budget. To complete this foundation, my testimony will then turn to the commitment and work of the Lands Division to ensure environmental compliance by the entire regulated community, with particular attention on our efforts to promote compliance by federal agencies. In this regard, I will outline the numerous ways in which federal agencies are accountable to the public and the Congress, including what enforcement tools are available to the States, citizens and EPA to secure compliance by federal facilities. I will then proceed to respond to the Subcommittee's

specific factual and legal questions. It is my earnest hope that through this testimony and in response to your questions today, we can develop a common understanding of the significant issues in this area, so we can work together -- as we must -- to achieve the best possible compliance results in the most efficient and effective manner. I hope that you find this testimony helpful.

Because this hearing concerns environmental compliance and enforcement generally, I think it is important to share with the Subcommittee my perspective on environmental compliance and enforcement across the board, with particular emphasis on our commitment to ensure that federal facilities set an example of compliance. As a matter of first principles, this Administration, and the Lands Division in particular, is strongly committed to full compliance with the environmental laws by both private parties and government entities. In the last six years we have successfully prosecuted more people and corporations for criminal violations of the environmental laws than ever before, obtaining over 257 guilty pleas and convictions since 1981 that resulted in over $3 million in fines and almost 150 years in jail sentences. We have also filed more civil environmental enforcement suits than ever before -- over 1000 since 1981. Through the Chairman's lead role in the Superfund reauthorization process you are aware of our strong stance on Superfund enforcement issues, and in our hazardous waste cases alone, we have obtained court-ordered cleanups valued at over $400 million. Federal entities must abide by the same laws. Not only do the statutes require it, but

good public policy dictates that the federal government set an example for the private sector in proper hazardous waste management.

For federal facilities, strict compliance with all substantive requirements is our goal, just as it is for private facilities. However, important constitutional, statutory, and public policy considerations all dictate that the means employed to achieve this goal will in certain respects be different from the procedures used in securing private compliance -- although they are clearly comparable. This is because federal facilities are not the same as private facilities; they are distinct for several reasons which I will outline briefly. Nonetheless, the end result, and the commitment to reach that result, must be -- and is -- the same.

When Congress creates a federal agency, it takes a very significant step reflecting the judgment that the underlying mission is a special one which cannot be entrusted to the private sector. Typically, federal agencies have been established by Congress to fulfill a certain mission: the Defense Department to protect the national security, the Environmental Protection Agency to protect against environmental degradation, the Department of Energy to promote the production of and the regulation of energy sources and supply. In contrast, the mission of General Motors, for instance, is to make cars. But GM is not the only automaker and if it stopped production tomorrow, Americans would not stop driving. If the Defense Department stopped defending

the United States tomorrow, we would all agree, I believe, that the nation would be notably less secure. No substitute enterprise could rise to fulfill the mission.

There are other differences. Federal agencies are created by Congress and are supported solely by Congressional appropriations. They cannot, when faced with a demand for millions or even billions of dollars for hazardous waste cleanup simply raise the prices on their products, dip into last year's profits or stockholders equity to cover the tab, or ultimately declare bankruptcy. The only funds they have available for environmental compliance are those appropriated by Congress. Thus, Congress plays an important role in assuring that environmental compliance occurs by working with the Executive Branch to appropriate sufficient funds to assure these desired results. For example, the Department of Defense has received in FY87 $377 million for the DOD installation environmental restoration program. This money helps ensure that DOD facilities achieve compliance with the relevant statutory requirements of RCRA and CERCLA. In addition, the recently enacted Superfund amendments created a "Defense Environmental Restoration Program" which requires DOD, in consultation with EPA, to undertake an environmental restoration program at all DOD facilities and to perform appropriate response actions to releases of hazardous substances. The law also established a DOD research, development, and demonstration program for hazardous substances. Finally, it created a special account within DOD to finance the environmental restoration

effort. Similarly, the DOE has presented testimony here today on its environmental compliance programs.

Thus, Congress, by outlining the specific public interest mission of the federal agency and by appropriating the requisite funds, is an integral partner in bringing about compliance at federal facilities. While in some ways it is more cumbersome for a federal agency to find the money necessary to comply with environmental laws than it is for a private company, federal agencies have an added incentive to comply: they must be accountable to Congress, to the President, and above all to the American people for any failure to comply. While litigation, or the threat of some coercive enforcement action, may be the best means to pressure private companies to comply, we should recognize the unique political accountability of federal facilities. This ability of Congress and the people to call government agencies to account for their actions or neglects provides a compelling enforcement tool. At the same time, this unique accountability reaffirms the importance of Congress acting as a partner with the agencies in seeing that established environmental priorities are being met.

Most importantly, federal agencies report to the President, who is accountable under the Constitution for their missions and actions. At times, agency missions, which Congress set forth by statute, can conflict and the resolution of those conflicts by the President is one way in which these agencies differ from private facilities. In light of this, as demonstrated further

below, appeal to higher Executive authority, and ultimately to the President, is an additional mechanism to ensure federal facility compliance -- an enforcement tool not reasonably available against private parties. Often, this intra-Executive Branch approach will be the most effective and efficient means of ensuring federal facility compliance. Moreover, as I will discuss later in this testimony, this process obviates the necessity to delay compliance in order to resolve complex legal issues or interagency differences in a costly adversarial process.

Another difference between public agencies and private parties is that the sovereign is immune from suit. This legal doctrine, going back to the foundation of the Republic, applies to all public agencies, except to the extent that sovereign immunity has been specifically waived by Congress. Thus, in each statute we must carefully analyze the degree to which Congress exposed federal agencies to liability. Congress has made clear that agencies must comply with the laws, but what differentiates federal agencies from private parties is the very long-standing and established rule of statutory construction that courts must interpret any waivers of sovereign immunity strictly and narrowly. See, e.g., Hancock v. Train, 426 U.S. 167 (1976). This rule reflects the proper role of the judiciary in our federal government and a reluctance on the part of the courts to infringe on Congress' constitutional authority to decide, for example, how government funds may be spent. Unless Congress has made a clear decision that it intends funds to be spent in a

specific manner, the courts are loathe to make that decision for Congress. This protects congressional prerogatives by retaining for Congress, and only for Congress, the ability to control the federal treasury. U.S. Const., Art. I, Sect. 9.[1]

Although practical realities require that we recognize these inherent distinctions between private entities and federal agencies, they do not interfere with the Justice Department's strong commitment to fostering environmental compliance. The Attorney General is the chief legal officer of the United States, and, as such we in the Justice Department have a paramount responsibility to see that the laws of the United States are faithfully executed. It is the law enforcement elements of this responsibility that I view as the Lands Division's largest singl

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[1] Some have criticized the Department for utilizing the well-settled law of sovereign immunity to protect the public fisc against civil penalties. To prevent this purely legal issue from interfering with expeditious compliance, we have proceeded directly to take steps to conform with the substantive requirements of the law, while at the same time testing in litigation the narrow issue of whether certain of the federal environmental statutes have waived sovereign immunity for the payment of civil penalties. I note that courts have consistently shared our view of the law and concluded that such immunity has not been waived under the Clean Water Act or RCRA. See, M.E.S.S. v. Navy, 25 E.R.C. 1480 (E.D. Cal. 1986); Meyers v. Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986).

I must emphasize, as I have in my communications to State Attorneys General and others, that our position regarding civil penalties is not intended to shield federal agencies from effective compliance with environmental laws. By severing this issue, through pretrial motions, I am committed to meeting all of my obligations faithfully to uphold the law. We can litigate the narrow penalty issue without delaying the development of a necessary environmental remedial plan to ensure compliance with the law.

task. Indeed, this can be seen in the resource allocation within the Division: civil and criminal enforcement activities have the lion's share of the Division's resources.

Although the Land and Natural Resources Division represents many agencies in a broad spectrum of cases ranging from public lands and natural resource questions to Indian claims issues, the client to which we devote most litigation and management attention is the Environmental Protection Agency (EPA). We not only represent EPA in enforcement litigation under the environmental laws, but also defend the regulations, programs, policies, and decisions of the EPA.

Commensurate with its enforcement duty, the Lands Division -- in close and effective partnership with EPA -- has regularly argued in the Federal courts for the broadest interpretation of the environmental statutes consistent with the apparent intent of Congress. In this respect, the Division has been singularly successful in its litigation. I point with pride to very favorable decisions regarding the liability standard under Superfund, and a consistent string of victories in Clean Air Act, Clean Water Act and RCRA cases.

My staff vigorously defends EPA's substantive standards, embodied in rulemakings. We have successfully defended challenges to the National Contingency Plan, the National Priorities List, regulations under RCRA, the Clean Air Act, the Clean Water Act, all of which establish the substantive standards to be followed by all parties -- federal and private. In prosecuting

cases, or defending EPA's authority to impose requirements on private parties under RCRA, CERCLA, and other laws, we have firmly established the substantive standards of environmental law. I look with pride to the cases, culminating in the Supreme Court's denying certiorari, which protected EPA's authority under Section 106 of CERCLA from preemptive challenges by responsible parties. See, e.g., Lone Pine Steering Committee v. EPA, 600 F. Supp. 1487 (D.N.J.), aff'd, 777 F.2d 882 (3rd Cir. 1985), cert. denied, 106 S.Ct. 1970 (1986). Through these victories, the Division has sent a signal to the regulated community -- both private and federal -- that the Department takes environmental enforcement very seriously. It has also ended uncertainty over the contours of liability under the environmental laws, thus promoting swift compliance as all parties understand what the law demands of them.

At this juncture it bears emphasis that these same laws, and the court rulings secured under them, apply to federal agencies. Our responsibility to defend Federal facilities has not led the Division to temper its enthusiasm for a legal regime that demands strict environmental compliance. To the contrary, and allow me to be very clear on this point, the Justice Department does not support one meaning of a statute in one action and another in different lawsuit. The United States government has an obligation to the public it serves to decide on a view of the law and adhere to that view in all its dealings with the courts and the public.

Indeed, avoiding harmful inconsistency in this area is a crucial reason for centralizing litigation authority in one Department. The benefits that this provides the federal government are legion. The United States enjoys an enhanced credibility in litigation because it speaks with a single voice in the courts. This promotes a uniform understanding of the law, developed with a government-wide perspective by experienced, full-time trial attorneys. There can be little question that the impressive string of victories that have established the enforcement rules under Superfund and other environmental laws were secured by exploiting these advantages, in critical partnership with the expert professionals at EPA.

The Lands Division is also responsible for providing legal advice to our clients, representing the federal agencies in environmental matters, and advising them on compliance with the law. The defense of federal agencies consumes considerably less of the Division's resources and time than does environmental enforcement efforts.

Cases involving the government's compliance with environmental laws may arise in a number of ways. In each instance, however, it is my objective to assure that the same exacting substantive requirements which are met by private parties apply to the federal government. We do not argue conflicting positions on the appropriate standards to be met for federal agencies as compared to private parties. That being said, let me describe

the kinds of cases which are handled in my office and give some illustrations of how they are handled.

Currently pending are approximately 80 cases or matters involving federal facility environmental compliance. I note that this is but a small percentage of the total workload of the Environmental Defense Section, which has approximately 1300 cases pending annually. Approximately 20 of those matters involve situations either where a federal agency has received a notice of intent to sue pursuant to a citizen suit provision, or where a federal agency has simply requested our advice independent of any filed litigation. In those latter instances, my offices may provide advice to the agency regarding the law relevant to the particular problem. Yet, because there is no lawsuit pending, our role is purely advisory and is not central to resolution of the issue. We commonly employ this opportunity to ensure that the agency takes the notice letter seriously and commences the steps necessary to achieve compliance with the law or otherwise resolve the dispute. Because we are closest to the rapidly developing substantive law under these statutes, we can alert the agencies to the most recent cases, regulations, or EPA policy documents addressing their problem. Additionally, we can advance compliance by placing federal agencies in contact with the appropriate staff at EPA. The Division uniformly advises agencies that they cannot avoid compliance with the law and should be aware that, in the event a lawsuit is filed, the Department will refuse to assert frivolous defenses or make legal arguments that

conflict with positions that we take in EPA enforcement cases. This generally has the salutary effect of helping the agency to make a realistic assessment of the problem and often results in discussions between the parties which avoids litigation and concludes in a more effective, more expeditious resolution of the problem. In part as a result of our efforts, I note that most notices of intent to sue do not ripen into lawsuits.

There are also approximately 30 cases in which the United States has filed an action against private parties responsible for a hazardous waste problem, and these parties, in turn, have brought federal agencies into the suit as either third party defendants or by way of counterclaims against the United States. In these cases there is rarely an issue of liability -- if the federal agency is a generator, it will pay its appropriate share. As a result, federal generators have contributed to settlements at major sites like the Conservation Chemical Corporation site in Kansas City, the Chem Dyne site in Ohio, and many others. Federal generators have for the most part been relatively small contributors to a number of our enforcement sites. Occasionally, however, the federal activity generated a larger amount of the waste. It appears that the Hardage site is such a situation, where the federal contribution may be approximately 3%. At a site like Stringfellow, for example, Air Force generated wastes represent approximately 3.9%. The Air Force already committed over $4 million toward its contribution for clean up. Even without litigation, at a site like the Bio-

Ecology site in Texas, Air Force, which may have contributed as much as 38% of the waste by volume, has agreed with EPA to pay its share of the RI/FS costs. In these instances, the federal agencies will try to meet their obligations through appropriate funding of remedial activity.

As these examples illustrate, neither I, nor any of my colleagues here today, will tell you that in the past federal agencies have always attained the standards of environmental protection to which they must be held. But as problems and issues have become apparent we have sought and found ways to get results. Over the last five years, using non-litigative strategies, federal agencies have made great strides in developing responsible compliance programs. For example, the Department of Defense under Superfund has initiated 3,500 preliminary investigations, 3,100 remedial investigations and feasibility studies, 407 remedial actions, and completed 99% of those remedial actions. The Department of Energy has also taken impressive steps toward hazardous waste compliance and they are here today to explain those efforts to you.

In addition to the governmental PRP's, the cases described above often involve private parties with government contracts, who perform substantial amounts of work at federal facilities. Let me assure the Congress that while we have identified inescapable legal and institutional distinctions between federal agencies and private parties, those distinctions do not apply to government contractors, and the Justice Department does <u>not</u> treat

the government contractor fundamentally different than any other private party for purpqses of law enforcement. In connection with federal contractors, the Subcommittee has requested that an outline of the general procedures for enforcement litigation referrals from EPA, which we have set forth in detail in Appendix "A" to this testimony. As you will note, the very same procedures apply to all actions against private parties, including government contractors (GOCOs).

Of the 80 matters mentioned previously involving federal facility compliance, we have approximately 20 active cases pending which deal with problems arising on federally owned and/or operated facilities. These include sites like Rocky Mountain Arsenal, Twin Cities Army Ammunition Depot, the Department of Energy facilities at Fernald, Ohio and Savannah River Plant in South Carolina, as well as other government property held and managed by various federal agencies. Once again, in these cases our objective is to obtain effective compliance with the law in an orderly way, consistent with the substantive requirements of the relevant statutes. We do this through fully assessing the cases, encouraging the agencies to work with their experts and with EPA to determine how a problem can best be addressed, and by discussing and negotiating with opposing parties on what steps to take toward compliance. At the same time, we seek to carve out those extraneous issues that do not address questions of substantive compliance and on which we do not agree -- such as liability for civil penalties -- through

early, focused motions to dismiss or for partial summary judgment. This approach enables us to separate the areas of disagreement from those areas where we can agree. In most cases this approach has led rapidly to either consent decrees or ongoing negotiations in which the parties reach agreement on the technical requirements necessary to resolve a problem.

Let me give but a few examples.

We take very seriously the lawsuits brought and the concerns expressed by the Congress and the public regarding the Energy Department's facilities at Fernald, Ohio and at the Savannah River Plant in South Carolina. We have worked closely with the Energy Department at each facility to assure that they have embarked on schedules for investigating and remedying any environmental problems or non-compliance identified in those suits. For example, the state of Ohio filed its lawsuit in March 1986. By June 1986, the Energy Department and EPA Region 5 had entered into a federal facilities compliance agreement to govern problems under RCRA, CERCLA and the Clean Air Act. We offered Ohio the opportunity to enter into this agreement, and since June 1986, we have also offered to the State at least three draft consent judgments in this matter. For the most part, the parties have agreed on the technical steps necessary to achieve compliance, the remaining stumbling blocks are primarily specific legal questions -- such as penalties -- which I firmly believe should not impede swift compliance with the law. Accordingly, in the meantime, while there are pending motions on the penalties

and other issues, the Energy Department, with our encouragement, is complying with the technical aspects of the agreement that it has negotiated with EPA and with the promises that it has made to the State.

Similarly, with regard to the Savannah River Plant, we have been negotiating with the plaintiffs, Natural Resources Defense Council and the State of South Carolina, to achieve a consensual resolution. Without disclosing settlement discussions, I can express that there appears to be technical agreement in that case as well and I am hopeful that resolution will be achieved.

In fact, we either have entered into consent decrees or are in the process of both negotiating such decrees and embarking on steps toward compliance in each of our federally owned facility lawsuits. You may ask why there are not resolutions in every instance. Candidly, at large facilities, particularly those which have been in operation for many years, all environmental problems are not solved instantaneously. We face exactly this difficulty in our private litigation, as well as with federal facilities. While we surely desire immediate compliance, to do the job right everyone needs to know the full extent of a problem before commencing a remedy. Thus in lawsuits, as is true in the absence of litigation, the government first fully assesses the extent of any environmental problem, and then expeditiously moves to remedy it.

Moreover, as a litigator, I fully recognize that parties to a lawsuit will not enter into consent decrees if they are

uninformed or less than fully informed. My point in emphasizing negotiated resolution of federal facility compliance suits is not to bulldoze parties precipitously into agreements. Rather I want to be clear that we are ready to enter into consent decrees that apply the same substantive standards to government compliance as exist for private parties.

Trial of any environmental compliance lawsuit is time-consuming and costly to all parties, including the courts. Our objective where federal agencies are sued because of alleged non-compliance with environmental laws is to utilize all available tools -- including agreements with EPA, consent decrees, negotiations among interested parties, pre-trial motions -- to avoid protracted litigation that might delay effective compliance, or waste precious resources. We are interested in seeing the agency quickly address the problem so that neither the parties, the community nor the courts need to expend resources on such cases.

You have asked what role the Lands Division played in the agreement reached between the Department of Energy, the EPA and the State of Colorado concerning the Rocky Flats facility. Where there is no pending litigation, my staff is not generally involved in either administrative or intergovernmental discussions between federal agencies and either EPA or state agencies. From time to time, however, we receive requests for informal advice from agencies regarding environmental issues. We routinely advise such agencies that they must meet the substantive requirements of applicable environmental laws.

In the Rocky Flats circumstance, it is my understanding that all parties had reached agreement regarding the technical steps that were necessary, but consummation of that agreement was being delayed, in part, because of the label to be placed on the instrument. There were questions raised near the end of negotiations as to whether there was authority under RCRA for EPA to issue "orders" to another federal agency, and what the precise legal consequences would be of issuance of orders to federal agencies. Rather than have such a dispute delay prompt consummation of an agreement which all parties seemed to desire, we recommended that it be signed as an "agreement", rather than an "order".

We were also consulted with regard to provisions in the Rocky Flats agreement concerning citizen enforceability. There we recommended that the agreement include language parallel to that found in the citizen suit provision of RCRA, providing that requirements of RCRA embodied in such agreements are subject to citizen enforcement. We fully support the concept that federal agencies must be accountable to the public for their compliance with the law, and recognize that citizen enforcement is an important tool to achieve this accountability.

It is my understanding that the parties to the Rocky Flats agreement are pleased with its terms and its implementation. The agreement enabled the federal government to avoid unnecessary litigation with the State of Colorado, and established an

enforceable instrument to govern Energy's compliance. These are the objectives we seek to achieve in all such cases.

Moving from specific matters to our broad approach to achieving federal facility compliance, I firmly believe -- and this is also reflected in the Division's successful strategy in obtaining environmental compliance for private facilities -- that litigation, or other types of coercive enforcement, should always be the last resort, rather than the first resort. For federal facilities, this is especially apparent -- a process involving consensual agreements, subject to public accountability and the discipline of citizen enforcement, is far more likely to produce quick and efficient compliance than a contested proceeding.

I believe that agreements reached through the process provided for in the proposed memorandum of understanding (MOU) worked out among interested agencies will assist in bringing federal facilities into environmental compliance in the most expeditious and efficient manner. To be sure, this process evolved in part from legal concerns (both constitutional and statutory) about the use within the Executive Branch of certain enforcement tools in a manner oblivious to the differences between federal agencies and private parties outlined above. However, it became clear that an MOU process was -- independent of the legal concerns -- a better and quicker way to secure compliance than an administrative hearing and judicial review process which would unnecessarily drain resources. To ensure that the President has the opportunity to resolve disputes within

the Executive Branch, it is important to establish a process which can both track the steps applied to private parties, yet account for this significant constitutional dimension. Thus, under the MOU which we have been developing with EPA and other federal agencies, EPA would be able to send notices to agencies identifying possible violations or deficiencies. If the response was not sufficient to satisfy EPA, that agency could propose findings of violation and propose remedies, just as it can for private parties. At each stage, a set amount of time would be permitted for negotiation of compliance agreements. If significant policy issues were involved, there would be an opportunity for elevation of the dispute as provided in Executive Order 12088. I am confident that very few issues of environmental compliance would require this level of review, but prudent, constitutionally valid management of the government requires that such an opportunity be provided. I note that under this process the resolution of environmental matters would be subject to public review and the terms of the resulting compliance documents can be invoked in citizen suits to enforce the statutory requirements of RCRA.

The MOU process outlined above, however, has more to recommend it than the practical realities of more timely compliance. It also avoids substantial statutory and constitutional problems associated with intra-Executive Branch orders. Indeed, an answer to your first question -- requesting the Department's legal opinion as to the authority of the

Environmental Protection Agency ("EPA") to issue administrative orders to other federal agencies under section 3008 of the Resource Conservation and Recovery Act ("RCRA") and section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") -- highlights some of these difficult legal problems. The answer to this question is complex, requiring interpretation of often ambiguous provisions of complicated statutes in light of certain well-established and important constitutional principles. Allow me to begin, however, by outlining some relevant authorities that the EPA clearly can exercise consistent with the statutes and the Constitution.

First, EPA's authority to issue administrative orders to other federal agencies under CERCLA section 106 is straightforward. Section 106 of CERCLA provides, in pertinent part, as follows:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility he may [take] action under this section including, but not limited to, issuing such orders as may be necessary to protect the public health and welfare and the environment.

42 U.S.C. 9609(a). The statutory term "facility" is very broadly defined and encompasses federal facilities. 42 U.S.C. 9601. All section 106 authority is, of course, vested in the President. In Executive Order 12580, however, the President has delegated his power under CERCLA section 106(a) to "the Coast Guard with respect to any release or threatened release involving the

coastal zone, Great Lakes waters, ports, and harbors," and to the Administrator of the EPA otherwise. Consistent with EO 12146, the President's delegation recognizes a role for the Attorney General when orders are to be issued to other executive agencies.

Second, there can be no doubt that RCRA 6001 has waived the United States' sovereign immunity as to the statutory requirement of EPA-issued permits. Insofar as EPA, or the States, in their permitting process establish or modify permit conditions, or provide for variances from permit standards, those documents can be statutorily issued to federal agencies without running afoul of the government's sovereign immunity. For example, federal facilities can be subject to "corrective action orders" under §3004 (u) and (v), as part of the permit process.

EPA can also enter into compliance agreements with other federal agencies under the MOU process outlined above. RCRA section 6003, entitled "Cooperation with Environmental Protection Agency," contemplated federal agency cooperation with EPA in ensuring RCRA compliance. 42 U.S.C. 6963(a). Certainly, the MOU and the resulting agreements concerning compliance with RCRA constitute the kind of cooperation between EPA and federal agencies envisioned by section 6003. Indeed, even absent statutory authorization, this process would be constitutionally appropriate. Where EPA and the other federal agency have reached a determination as to the steps that a federal facility must take to achieve compliance, they can agree -- where appropriate -- that those steps are "requirements" under the statute. Moreover,

the compliance document can reflect an Executive determination the "requirements" of the statute and, as such can be invoked by private citizens in lawsuits brought under section 7002 to vindicate their statutory rights. Under their statutory and constitutional authority, Executive Branch agencies are free to denominate the document that results from the MOU process as an "Executive Compliance Order" or "Executive Compliance Agreement."

Having outlined important elements of the "order" authority that EPA does have under these statutes, I must also emphasize that Justice Department analysis of RCRA, in response to your request, indicates that §6001 has not effectuated a complete waiver of sovereign immunity that extends to all manner of "compliance" orders. For example, as noted earlier, documents under various labels set forth the requirements that all must meet under RCRA. These documents include regulations, permits and related elements of the permit process that establish requirements for a particular facility. A very important type of RCRA orders -- corrective action orders -- delineate requirements to which facilities are subject and as such clearly seem to be within the waiver of sovereign immunity. The "orders" described in §3008(a), in contrast, primarily concern the imposition of enforcement sanctions -- usually penalties -- for "persons" who are "in violation of a requirement." Indeed, this is clear from the language of §3008(a), "the Administrator may issue an order assessing a civil penalty for any past or current violation." (emphasis added). As we have noted, however, several courts have

found that penalties are not within the scope of RCRA's waiver of sovereign immunity, reasoning in part that sanctions to enforce requirements are distinct from the "requirements" themselves. See, e.g., California v. Walters, 751 F.2d 977 (9th Cir. 1984) ("Criminal sanctions * * * are not a "requirement" * * * within the meaning of [section 6001], but rather the means by which the standards, permits, and reporting duties are enforced"); Meyer v. Coast Guard, 24 E.R.C. 2013, 2014 (E.D. N.C. 1986); Florida Department of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985). See generally Appendix B.

While a formal legal opinion on such a complex question of statutory interpretation would require additional time, I believe it important to set forth for the Subcommittee our analysis, undertaken consistent with the settled rules of construction for any statutory waiver of sovereign immunity. I have done so in Appendix "B" of this testimony. I believe, however, that whether EPA can issue all types of compliance orders to federal agencies under §3008 is not the real issue. Instead, the true concern is ensuring that there is an adequate mechanism to get results: to guarantee that federal facilities meet the underlying statutory requirements. Unquestionably, the federal agencies must comply with the statute, EPA regulatory requirements, conditions contained in permits, and corrective action requirements. Thus, even absent application of every type of §3008 compliance order to federal facilities, the above discussion of EPA's authorities

demonstrates that ample tools and means exist to secure swift compliance and accountability.

I hasten to add that the Constitution requires a process that protects the President's ability to take care that all laws are faithfully executed, and hence, to manage the Executive Branch. The Justice Department has examined this matter, in response to your request for a legal opinion, and it is our conclusion that even where statutory order authority exists, the exercise by EPA of unilateral order authority would be clearly inconsistent with existing Executive Branch dispute resolution mechanisms, and would raise substantial constitutional questions. This Department has consistently taken the position that under our constitutional scheme, disputes of a legal nature between two or more Executive Branch agencies whose heads serve at the pleasure of the President are properly resolved by the President or by someone with authority delegated from the President. [2]

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[2] Executive Orders 12146 and 12088 provide a mechanism whereby agencies may submit their disputes concerning compliance with the environmental laws to the Attorney General or the Director of the Office of Management and Budget, respectively.

Executive Order No. 12146 provides that:

> 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
>
> 1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of

(continued...)

The President's authority to require Executive Branch agencies to submit their legal disputes to him or his delegate for resolution derives from his Article II duty to "take Care that the Laws [are] faithfully executed," as does his responsibility to supervise the affairs of the Executive Branch. This obligation necessarily recognizes the President's authority to exert "general administrative control over those executing the law." Myers v. United States, 272 U.S. 52, 161-164 (1926). The President, as head of the Executive Branch, must "supervise and

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[2](...continued)
the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

44 Fed. Reg. 42652, reprinted in 28 U.S.C. 509 note.

Executive Order No. 12088 provides that

> 1-502. The Administrator [of EPA] shall make every effort to resolve conflicts regarding such violation [of an applicable pollution control standard] between Executive agencies . . . If the Administrator cannot resolve a conflict the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.
>
> 1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

43 Fed. Reg. 47707. We acknowledge that the conflict resolution procedures set forth in Exec. Order No. 12088 "are in addition to, not in lieu of other procedures, including sanctions, for the enforcement of applicable pollution control standards."

guide" executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Id. at 135.[3]

The President's use of his Article II supervisory powers to resolve disputes among his subordinates also follows from the Framers' intent that the executive power of the United States be exercised in a "unitary and uniform" way. Myers, 272 U.S. at 135. The basic principle underlying Article II of the Constitution, is that the Executive power is vested in a single person, the President, or as James Madison stated during the Great Debate of 1798, "the great principle of unity and responsibility in the Executive department." 1 Ann. Cong. 499 (1798). Simply put, the executive power under our Constitution is based on this principle of the unitary executive. The Framers deliberately chose this principle and deliberately rejected the cabinet (or privy council) alternative, with which they were quite familiar from British practice and from the constitutions of most of the original states.

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[3] The supervisory authority recognized in Myers is based on the distinctive constitutional role of the President. The "take Care" clause charges the President with the function of coordinating the execution of many statutes simultaneously: "Unlike an administrative commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

One of the main reasons the Framers chose to create a unitary executive was that they believed that unity in the executive would promote what today we call "accountability." As Alexander Hamilton pointed out, the more that the executive power is watered down and distributed among various persons, the easier it is for everyone concerned to avoid blame for failure to comply with the rule of law. The Federalist No. 70, at 427-428 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton stated that "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility." Id. at 427. To ensure accountability to the President, the Constitution, as interpreted by the courts, vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy.

In our view, if the intentions of the Framers are to be fulfilled, the President must have an unfettered opportunity to take action in the event of disagreements or disputes within the Executive Branch. The President has the responsibility of making certain that that Branch speaks with one voice. He can do that by settling the controversy himself, or by establishing procedures, as he has done by Executive Order, for the resolution of controversies by one of his principal officers. In this way, conflicts within the Executive Branch are resolved internally, under the supervision of the President or his delegate, and not in the courts.

The President is accountable to the American people for the activities of all Executive agencies. Thus, the President has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibility under Article II, even though Executive Branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order without the prior opportunity to contest the order within the Executive Branch. Thus, coercive unilateral order authority is inconsistent with the constitutional principles of unity and unitary responsibility within the Executive Branch.

Indeed, the question of the constitutionality of administrative order authority is a variation on the question of the constitutionality of EPA's authority to bring an enforcement action against a federal agency in court. Unilateral administrative orders, like lawsuits, are enforcement tools that interfere with the management of the Executive Branch by the President. We have previously advised you, in the context of EPA judicial enforcement of environmental legislation against federal facilities, that

> If a decision or action by one of [the President's] subordinates is presented to him for review, it seems to us that if Article II means anything at all, it means that the President has a duty to consider the legality of the decision or action and to request the subordinate to revise the decision or action if it does not accord with law.

Memorandum for the Associate Attorney General, "EPA Litigation Against Government Agencies" at 2-3 (June 23, 1978). We think that this analysis applies with equal force to coercive EPA administrative orders.

This is not to suggest that the Constitution shields federal facilities from compliance with the environmental laws. The constitutional infirmity in unilateral orders is their interference with the President's power to manage the Executive Branch. Insofar as RCRA allows citizens to sue to enforce unilaterally-issued, contested administrative orders as soon as they are violated, such a regime would lead to the judiciary resolving an intra-Executive Branch dispute before the President had a full opportunity to exercise his constitutional authority. In light of this, the challenge to those of us in the Executive Branch charged with the responsibility of ensuring federal facility compliance with the environmental laws became to fashion a system that could pass constitutional muster and still provide an effective enforcement sanction against federal agency non-compliance. For the reasons explained above, I believe that the proposed MOU process that the EPA, Department of Justice and other federal agencies have developed meets this difficult challenge. Under this procedure, the Executive Branch speaks with a single voice. At the time of the consummation of the agreement, the Executive has one view of the requirements of the law. During the negotiation process, if the agencies disagree, they are free to appeal to the President to settle the dispute.

In this manner, the President's constitutional prerogatives are protected, but at the same time, there exists an adequate enforcement mechanism. In a practical sense, these agreements constitute determinations by the executive branch as to the precise meaning of the statutory requirements. Within the Executive Branch, the President would have ultimate enforcement responsibility. At the same time, the agreements may be viewed as tantamount to an admission or a determination by the Executive as to the requirements of the statute and as such will often be virtually dispositive of a claim in a citizen judicial enforcement action that deviation from the statement constitutes a statutory violation. So long as the statutory requirements have been properly articulated within the Executive Branch process and remain effective, the citizen may sue and may invoke the "Executive Compliance Agreement" or "Executive Compliance Order" to enforce compliance with the statute. While it is well established in constitutional jurisprudence that executive agreements are not in and of themselves enforceable,[4] this is not a

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[4] See In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1357 (D.C. Cir. 1980); Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 n.21 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976); Weise v. Syracuse University, 522 F.2d 397, 411 n.23 (2d Cir. 1975); Acevedo v. Nassau County, 500 F.2d 1078, 1084 & n.7 (2d Cir. 1974); Stevens v. Carey, 483 F.2d 188, 190 (7th Cir. 1983); Kuhl v. Hampton, 451 F.2d 340, 342 (8th Cir. 1971); Place v. Weinberger, 497 F.2d 412, 415 (6th Cir. 1974); Gnotta v. United States, 415 F.2d 1271, 1275 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970); Manhattan-Bronx Postal Union v. Gronowski, 350 F.2d 451, 456 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966); Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632-33 (5th Cir.), cert. denied, 389 U.S. 977 (1967); Farmer v. Philadelphia Electric Co., 329 F.2d 3, 8-10 (3rd Cir. 1964).

practical problem here, however, as the citizen is suing to enforce the requirements of the statute and not the executive agreement per se -- the ultimate enforcement of which constitutionally resides with the President. For these reasons, the Department of Justice believes that the process established by this Memorandum of Understanding is fully consistent with both RCRA and the constitutional principles just discussed, yet produces a document that demonstrates Executive accountability.

Let me assure you that this resolution of the constitutional difficulties presented by unilateral order authority in no way limits the effect of the statute's requirements on federal agencies. Those agencies are required by the statute to comply with stringent requirements and standards. The heads of the agencies, as well as the President, are obligated to see that such agencies faithfully comply with the requirements. But when there is legitimate dispute as to the meaning or application of such requirements, the ultimate responsibility for resolution lies with the President.

You have also asked specifically about the role of the Justice Department in the development of Executive Order 12580, implementing the Superfund Amendments and Reauthorization Act. In particular, you asked about section 4(e) of that Executive Order. The Executive Order was developed through the efforts of all interested units in the Executive Branch, under the coordination of the President's OMB. Accordingly, the Justice Depart-

ment participated in that effort, including commenting on various drafts of, and attending meetings about, the Executive Order.

SARA creates new remedies, including citizen suits. In order to assure that the President can manage the government and resolve disputes within the Executive Branch before such conflicts might be presented to the judiciary for resolution, Section 4(e) of the Executive Order provides for consultation with the Justice Department in the event EPA believes an "order" should be issued to a federal facility. This provision of the Executive Order is certainly not designed to obstruct federal facility compliance with CERCLA, but rather to assist it. It has been our experience that in most instances, differences between federal agencies regarding environmental compliance have not been over the technical steps necessary to remedy a problem. Rather, disagreements usually involve legal or policy matters, which are appropriately resolved at a policy level within the government. By providing for consultation with the Justice Department, the President's Executive Order is intended to facilitate rapid isolation and resolution of such issues, so that they do not result in delayed compliance by the federal government. Let me emphasize this point again: The Justice Department will <u>not</u> delay the necessary clean up action because of some policy or legal disagreement that is not central to the action -- whether it is §3008(a) order authority or the availability of civil penalties under §6001.

Your letter expressed concern that this was an unwarranted change from Executive Order 12316, implementing CERCLA. It is our understanding that in the past EPA has routinely sent PRP letters and other notices to federal agencies, but has never sent orders under Section 106 of CERCLA. Where federal agencies have received notices from EPA, they have often, on an ad hoc basis, consulted with this Department or other units of the Executive Branch to ascertain how certain legal or policy matters are handled. Section 4(e) of Executive Order 12580 simply makes clear that such consultation should be a normal part of this process, rather than haphazard.

Finally, you also asked specifically about the Department of Energy and Department of Defense contractual provisions concerning indemnity of contractors at government owned facilities. Let me say frankly that these aspects of government practice are not of direct concern to my priorities in enforcing the environmental laws. As I stated, we have filed several actions against government contractors. When a federal agency is sued, or the contractor of any agency is sued, the contractual and/or indemnity relationship is not a major factor in assessing the environmental case. The prime concern is whether there is a violation and how it can be remedied. For this reason, I have not had the occasion to consider in detail government contracting practices, including how such practices generally might be related to indemnity for noncompliance with environmental laws.

In conclusion, federal agencies have gone a long way toward achieving compliance with environmental requirements -- we still have a distance to go to achieve full compliance and there exist many vehicles for ensuring results. We are now in a position to move forward with EPA regulations, permits and compliance agreements. Moreover, as we informed the Subcommittee in our October 11, 1983 letter, the Justice Department stands ready to utilize the full panoply of its judicial enforcement tools against GOCO-violators that are operating on federal facilities. At the same time, I fully expect that State and citizen enforcement will continue to be active in this area. Finally, the proposed MOU will provide an open process that enhances agency accountability to the public and to the Congress. As I noted earlier, Congress has also set in motion, through the amendments to CERCLA, and through the appropriation of funds, a process to ensure that cleanup activities continue. A continued working relationship with members of Congress and a common understanding of mission and budget issues is essential, for without it, the agencies will be unable to achieve results.

We all share the same goals -- quick and effective federal facility compliance -- the only question is the best means to reach them. Many federal agencies that are subject to RCRA or CERCLA are already coordinating their compliance with EPA to avoid the need for administrative orders. To this end, EPA has been negotiating compliance agreements with other federal agencies covering response actions at federal facilities. I

firmly believe the new MOU that this Department has developed, in coordination with EPA, will further facilitate the process of dispute resolution between EPA and other executive agencies under RCRA, without doing violence to our constitutional structure. The proposed MOU would establish procedures quickly to resolve disputes at the agency level and that would include a generous opportunity for public comment. The key goal is to achieve results, and if these negotiated compliance commitments can go forward at each major facility, those results will surely come.

The Department of Justice looks forward to working closely with Members of this Subcommittee and the various federal agencies in this most important area. I would be pleased to answer any questions you might have.

APPENDIX "A" -- Answer to Question 4.

Civil judicial EPA enforcement cases are referred to the Lands Division with litigation reports prepared by the EPA Regional Office. Incoming referrals are received in the Environmental Enforcement Section (EES) and routed to an Assistant Section Chief who, in turn, assigns the matter to a trial attorney to handle.

The trial attorney performs the basic case evaluation to analyze factual and legal issues. (In some cases, an Assistant U.S. Attorney may be the lead DOJ lawyer, so the Lands trial attorney will work jointly with the Assistant U.S. Attorney to conduct the case evaluation.) If additional information is needed to determine whether to file the case, the trial attorney, with the approval of an Assistant Chief or Senior Lawyer, makes a supplementary request to the EPA attorney assigned to the case. If supplemental information is not timely provided by EPA to the Division, then the case may be returned to EPA until further necessary information is available. Referrals returned for this reason must be approved in writing, by the Chief of the Section.

When sufficient information has been obtained to evaluate the EPA referral on the merits, a decision is made whether or not to file the case, unless EPA has decided to withdraw the matter. If EES staff recommend filing the case, then the EES trial attorney prepares a draft complaint which is reviewed by EPA

staff. The draft complaint is directed to me, as the Assistant Attorney General, under cover of a memorandum analyzing the case. This package is reviewed by the trial attorney's Assistant Chief, the EES Section Chief or Deputy Chief, and the Deputy Assistant Attorney General before it reaches my desk. The Assistant Attorney General signs both the cover memorandum and the complaint. The complaint is then forwarded to the U.S. Attorney's Office, where it is signed by an Assistant United States Attorney prior to filing.

If EES staff believes the case should not be brought, the Chief of the Enforcement Section, writes to the Senior Enforcement Counsel, OECM, (EPA) and the relevant EPA Regional Counsel explaining, in detail, the reasons supporting this decision. This letter is reviewed by the Deputy Assistant Attorney General before it is sent. If EPA staff disagree with the EES declination, they may request that the matter be reviewed by me or the Deputy Assistant Attorney General, Lands Division. Over the last 5 years the Division has declined to file fewer than 3% of the cases referred by EPA, in part because of effective communication throughout the process.

Where the EPA litigation report or the evaluation by the Division suggests that a potential counterclaim may be filed by the proposed defendant(s) against the United States, including those by a government contractor against the United States, the EES may request assistance in analyzing the risks posed by such potential counterclaims from the Environmental Defense Section

(EDS). Requests for such assistance by EES to EDS are made through a supervisor in EES (Chief/Deputy Chief or Assistant Chief) to the Chief or Assistant Chief, EDS. Environmental Defense Section lawyers are responsible for defending the United States on counterclaims brought by defendants in civil enforcement cases and report to a different Deputy Assistant Attorney General from the one who supervises enforcement. Accordingly, these assistance requests allow EDS staff to obtain factual information from non-EPA client agencies regarding the potential counterclaim, to advise EES staff on the merits of the potential counterclaim, and to prepare responses to counterclaims where necessary. EDS staff ordinarily will obtain necessary factual information from the relevant client agency and communicate that to the EES staff, who in turn, arranges for review of this information by EPA staff working on the case. Assessing counterclaims is an essential part of evaluating the overall merits and exposure of the United States' affirmative claims. However, let me emphasize that the risk, or presence, of a counterclaim generally does not affect filing of an enforcement case.

If there are concerns between EES and EDS staff involving a case where there is a counterclaim risk, the Chiefs of the respective sections attempt to resolve the matter informally. Continued concerns are elevated to the Deputy Assistant Attorneys General who supervise the two sections, and then to me, if necessary.

The EES trial attorney (or an Assistant United States Attorney under EES supervision in some cases) prosecutes the complaint after filing to final resolution by settlement or final judgment. If the defendant files a claim back against the United States, by way of answer or other responsive pleading, the EES will forward those matters to the EDS for primary handling. If the claims are based on matters within the jurisdiction of other sections in the Lands Division or other Divisions of DOJ, EDS will refer the matters to the relevant offices for assistance. EPA is advised by the EES or EDS staff of any such referral.

APPENDIX B, in partial answer to Question 1.

The Department has approached the Subcommittee's quesiton conerning RCRA compliance order authority against federal facilities by utilizing the same analysis applied to any questior concerning the scope of a statutory waiver of sovereign immunity. This analysis must begin with Section 3008(a). That section provides, in pertinent part, as follows:

> [W]henever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, ...

42 U.S.C. 6928(a)(1) (emphasis added). By its terms, section 3008(a) applies only to "persons" found to have violated a requirement. In turn, section 1004 of RCRA contains definitions applicable throughout the chapter, and provides that

> The term "person" means any individual, trust, firm, joint stock company, corporation (including a government corporation), a partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. 6903(15). Federal agencies are not included in this definition. This very strongly suggests that federal agencies are not "persons" under RCRA. Further support for this interpretation is found in the fact that not only does the definition of "person" make no mention of federal agencies, but also section 1004(4) contains a distinct definition of "federal

agency," as that term is used in the chapter. That section 1004 contains independent definitions of both "person" and "federal agency" indicates clearly that the omission of the latter from the former was not inadvertent.

Given that federal agencies and departments are not defined as "persons" for purposes of RCRA, it would be reasonable to inquire as to the source of the obligation of federal facilities to comply with RCRA's requirements, including the requirement to obtain permits. That obligation is derived exclusively from RCRA section 6001. That section, entitled "Application of Federal, State, and local law to Federal Facilities," provides as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid wastes or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

42 U.S.C. 6961. It is noteworthy that section 6001, on its face, draws a very explicit distinction between "federal agencies" and "persons," stating that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local

requirements, both substantive and procedural . . . in the same manner, and to the same extent, as any person." Id. (emphasis added).

In light of the language of section 6001, the question of EPA's statutory authority to issue a specific compliance orde to other federal agencies, then, turns not on whether a federal agency is a person under section 3008 -- because clearly, it is not -- but rather on whether section 6001 subjects federal agencies to the compliance order authority of the EPA in the particular circumstance in question. The answer to this question, in turn, depends on whether the compliance order under consideration constitutes a substantive or procedural requirement within the meaning of section 6001. There is much in the legislative history and the relevant case law that suggests that 3008(a) compliance orders themselves are not "requirements" of RCRA.

In June 1976, the Supreme Court held that section 313 of the Federal Water Pollution Control Act Amendments of 1972 ("Water Pollution Amendments") did not obligate federal agencies to obtain state permits, but required only that "federal installations . . . comply with applicable state requirements." EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 212 (1976). Section 313 then provided as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local

> requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

86 Stat. 875, 33 U.S.C. 1323 (1970 ed. Supp. IV). You will note that, with the omission of one clause, this language is identical to that found in RCRA section 6001. Thus, in the context of the waiver of sovereign immunity found in an environmental statute, the Supreme Court drew a distinction between permits and the underlying statutory "requirements." The Court ended its opinion by stating that if Congress desires federal installations to be subject to state permit requirements, "it may legislate to make that intention manifest." 42 U.S. at 227-28.

Within a month of this decision, the Senate Committee on Public Works reported its version of the bill that was enacted ultimately as RCRA. S. 3622, 94th Cong., 2d Sess. (1976). The section of the bill that became section 6001 of RCRA was patterned after section 313 of the Water Pollution Amendments, with one significant addition. Whereas section 313 merely obligated federal installations to comply with "Federal, State, interstate, and local requirements," the bill then under consideration would have subjected such installations to "all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits and reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)." While the committee report did not reference the Supreme Court's recent decision pertaining to the Water Pollution Amendments, it seems plain that

the change was an attempt by Congress to make "manifest" its intent to subject federal agencies to requirements, such as thos for permits, that the Supreme Court had so recently held inapplicable under the parallel provision of the Water Pollution Amendments. The Senate bill, however, was silent as to the availability of enforcement measures such as compliance orders and civil penalties.

Meanwhile, in the House, the Committee on Interstate and Foreign Commerce drafted a bill that would have expressly subjected federal agencies to administrative enforcement mechanisms and civil penalties. H.R. 14496, 94th Cong., 2d Sess. (1976). Section 601(b) of the House bill provided that federal agencies were subject to "all Federal Requirements under title III and for purposes of such title (including actions taken by the Administrator under sections 307 and 308) the term 'person' includes any department, agency, or instrumentality of the United States." Section 308 of the House bill -- authorizing EPA to issue compliance orders to any "person" in violation of hazardous waste requirements, to impose civil penalties, and to commence civil actions in court against such persons -- was virtually identical to the provision enacted as RCRA section 3008(a).

Desiring to avoid the necessity of a conference to resolve differences between the House and Senate bills, the House, by a voice vote, agreed to strike the entire text of its bill and substitute a compromise closer to the bill passed by the Senate. 122 Cong. Rec. 32832 (1976). The House substitute, it

should be noted, now contained RCRA section 6001 as finally enacted, thus including no provision purporting to subject federal agencies to EPA compliance order authority or civil penalties. Three days later, the Senate, by a voice vote, passed the House substitute without amendment. 122 Cong. Rec. 33818 (1976). That Congress considered, but failed to enact, a bill that expressly would have granted EPA the precise authority now contended for under RCRA supports the conclusion that EPA lacks statutory authority to issue compliance orders generally to other federal agencies.

Judicial decisions under RCRA section 6001 provide additional support for this construction of the statute. In California v. Walters, 751 F.2d 977 (9th Cir. 1984), California sought to recover criminal penalties against the Veterans Administration for disposing of hazardous waste in violation of state requirements. The only question presented was whether the VA was subject to such penalties under RCRA section 6001. California contended that its criminal penalties for violation of state disposal requirements constitute a substantive or procedural requirement with which the VA must comply under section 6001. The United States Court of Appeals for the Ninth Circuit, the only Circuit which has considered the meaning of RCRA section 6001, squarely rejected this claim. According to the court:

> State waste disposal standards, permits, and reporting duties clearly are "requirements" for the purpose of [section 6001]. Criminal sanctions, however, are not a "requirement"

> of the state law within the meaning of [section 6001], but rather the means by which the standards, permits, and reporting duties are enforced. Section [6001] plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.

Id. at 978; accord Meyer v. Coast Guard, 24 E.R.C. 2013, 2014 (E.D. N.C. 1986) (RCRA section 6001 does not subject Coast Guard to civil penalties recoverable by the state for violations of state requirements because such penalties "appear to be a means by which requirements are enforced and not requirements themselves"); Florida Department of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985) (state statute imposing strict liability for negligent release of hazardous waste material does not constitute a "requirement" under RCRA section 6001). The reasoning of the Walters opinion is instructive. Like state criminal penalties, a compliance order can be more readily viewed as a "means by which . . . standards, permits, and reporting duties are enforced," rather than an independent, substantive requirement.

One additional district court decision under RCRA section 6001 is directly relevant to the discussion. In McClellan Ecological Seepage Situation v. Weinberger, 25 E.R.C. 1480 (E.D. Calif. 1986), a citizens group brought suit against the Defense Department for alleged violations of RCRA, seeking injunctive and declaratory relief as well as civil penalties under RCRA section 7002, the citizen suit provision. We moved to dismiss the claim for civil penalties on the ground that the

statute did not subject the United States to such penalties. Section 7002 permits citizens to commence civil actions against "any person (including . . . the United States . . .)" and authorizes the district court to order appropriate injunctive relief "and to apply any appropriate civil penalties under [RCRA section 3008(a) and (g)]." The court first concluded that section 3008 applies only to "persons," and that "person," as defined by RCRA section 1004(15), does not include the United States. The Court thus looked to RCRA section 6001 to determine whether the United States had been subjected to section 3008's civil penalty provisions. As stated by the court:

> The plain face, common-sense reading of [section 6001] convinces this Court that there has not been a waiver of sovereign immunity regarding the imposition of civil penalties against federal facilities under RCRA. The plain face reading of this legislation demonstrates that Congress intended to waive sovereign immunity on behalf of the United States, insofar as process or sanctions is concerned, only as required for enforcement of injunctive relief.

Id. at 1481. Accordingly, the court granted the motion to dismiss.

Taken together, these decisions illustrate the courts' continued application of the time-honored rule that waivers of sovereign immunity must be narrowly construed. See, e.g., California v. Walters, 751 F.2d 977, 978 (1984) (citing United States v. Mitchell, 445 U.S. 535, 538 (1980)); Hancock v. Train, 426 U.S. 167, 179 (1976). In the specific context of section 6001, this rule of construction suggests that the obligation of

all federal agencies is to comply with all federal, state, and local hazardous and solid waste disposal requirements, including permit and reporting requirements, but that the means of enforcing compliance with such requirements is through state, local, or citizen-initiated actions for injunctive relief. Under this interpretation, administrative compliance orders -- like criminal and civil penalties -- are not "requirements" and hence, are not within the waiver of sovereign immunity. This argument draws its strength from the self-evident proposition that compliance orders issued by the EPA under Section 3008(a) are most appropriately considered a means of enforcing RCRA requirements, rather than as "requirements" themselves under section 6001. This is especially clear when it is recalled that section 3008(a) not only authorizes compliance orders to assess civil penalties, but also subjects the person to whom they are issued to independent civil penalties upon failure to comply with such orders. As discussed, several courts have determined that Congress did not intend the United States to be liable for civil penalties under the statute. Moreover, while section 3008 provides that compliance orders may include a "revocation of any permit," such revocation is independently authorized by RCRA section 3005(d), and certainly falls within section 6001's command that federal agencies comply with "requirements for permits."

Although we realize that RCRA section 6001 is not without ambiguity, the Department believes that the construction of the statute outlined above is compelled from the statutory language,

legislative history, and relevant judicial decisions. Of course, in the event that RCRA were amended to remove any ambiguity concerning EPA order authority generally vis-a-vis other federal agencies, the Constitution would continue to restrain EPA's unilateral use of "orders" that might trigger citizen suit enforcement. Accordingly, these "orders" would still have to be the result of an Executive Branch process that preserved the President's constitutional prerogatives.

ATTACHMENT 2

NOTICE OF NONCOMPLIANCE

FOR FEDERAL FACILITIES

This NOTICE OF NONCOMPLIANCE, COMPLIANCE SCHEDULE and NOTICE OF NECESSITY FOR CONFERENCE (Notice), is issued under the Resource Conservation and Recovery Act, (RCRA) and further amended by the Hazardous and Solid Waste Amendments. This Notice is issued consistent with Executive Order 12088, Federal Compliance With Pollution Control Standards. The authority to issue this Notice has been delegated by the Administrator of the U.S. Environmental Protection Agency to the Regional Administrator of EPA Region __ and further delegated to the Director, Waste Management Division, EPA Region __ (Complainant).

Complainant is issuing this Notice to the U.S. _____ _____ (Respondent) as a result of (an inspection on (date)/the review of relevant documents or other information/a referral for action from the State of _____) which provides evidence that Respondent has violated or is in violation of one or more requirements of Subtitle C of RCRA and the regulations promulgated thereunder concerning the management of hazardous waste.

Pursuant to Section 6001 of RCRA, the Respondent as a (department/agency) of the executive branch of the Federal government and (generator of hazardous waste/owner or operator of a hazardous waste management facility) is subject to and must comply with both Federal and the State of _____'s requirements, including regulations and permit conditions pertaining to the management of hazardous waste in the same manner and to the same extent as any person (as defined in Section 1004(15) of RCRA) is subject to such requirements.

Section 7002 of RCRA provides for citizens suits against any person (including the United States) who is alleged to be in violation of any permit, standard, regulations, condition, requirements, prohibition or final order of RCRA. In addition, any person as defined in Section §1004(15) of RCRA, including any individual that may be responsible for the hazardous waste management activities at the facility, who has violated or is violating any requirement of Subtitle C of RCRA or who knowingly violates any material condition or requirement of a RCRA permit or interim status regulations or standards maybe subject to administrative, civil and/or criminal sanctions under Section 3008.

In order to return to compliance, Respondent must implement the actions prescribed in Section _____ (Title of Section) of this Notice within the timeframes stipulated (subject of negotiation). Two possible alternatives to implementing the prescribed actions are (1) the seeking of a Presidental exemption pursuant to Section 6001 of RCRA or (2) the petitioning of Congress for specific legislative relief. [Note: Noncompliance with certain statutory or regulatory requirements of RCRA (e.g., Section 3005(e)(2)/40 C.F.R. 270.73(c) may require that the Respondent immediately cease the addition of hazardous waste to or the management of hazardous waste in the affected unit(s) or at the entire facility and that there is no action which the facility can take to return to compliance].

Within 15 days of the receipt of this Notice of Noncompliance/ Violation, the Respondent must submit to EPA a written response describing the Respondent's efforts to comply with the violations outlined in this Notice. The Respondent must also identify a date for a settlement conference between the Respondent and the U.S. EPA. This response should be sent to _____ (identify person to receive response).

ATTACHMENT 3

MODEL ENFORCEABILITY CLAUSE
FOR FEDERAL FACILITY COMPLIANCE AGREEMENTS

The [Department/Agency] recognizes its obligations to comply with RCRA as set forth in Section 6001 of RCRA.

The provisions of this Agreement including those related to statutory requirements, regulations, permits, closure plans, or corrective action, including recordkeeping, reporting and schedules of compliance, shall be enforceable under citizen suits pursuant to 42 U.S.C. 6972(a)(1)(A), including actions or suits by the State and its agencies. The [Department/Agency] agrees that the State and its agencies are a "person" within the meaning of Section 7002(a) of RCRA.

In the event of any action filed under Section 7002(a) of RCRA alleging any violation of any such requirement of this Agreement, it shall be presumed that the provisions of this Agreement including those provisions which address recordkeeping, reporting, and schedules of compliance are related to statutory requirements, regulations, permits, closure plans, or corrective action, and are thus enforceable under Section 7002(a) of RCRA.

ATTACHMENT 4

MODEL LANGUAGE FOR

DISPUTE RESOLUTION

Except as specifically set forth elsewhere in this Agreement, if a dispute arises under this Agreement the procedures of this Part shall apply. In addition, during the pendency of any dispute, the [Department/Agency] agrees that it shall continue to implement those portions of this Agreement which are not in dispute and which U.S. EPA and [State] determine can be reasonably implemented pending final resolution of the issue(s) in dispute. If U.S. EPA and [State] determine that all or part of those portions of work which are affected by the dispute should stop during the pendency of the dispute, the [Department/Agency] shall discontinue implementing those portions of the work.

All Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Manager or immediate supervisor level. If resolution cannot be achieved informally, the procedures of this Part shall be implemented to resolve a dispute.

A. Within thirty (30) days of the date of any action by U.S. EPA or [State] which leads to or generates a dispute, the [Department/Agency] shall submit to U.S. EPA and [State] a written statement of dispute setting forth the nature of the dispute, the [Department/Agency's] position with respect to the dispute and the information the [Department/Agency] is relying upon to support its position. If the [Department/Agency] does

not provide such written statement to U.S. EPA and [State] within this thirty (30) day period, the [Department/Agency] shall be deemed to have agreed with the action taken by U.S. EPA or [State] which led to or generated the dispute.

B. Where U.S. EPA or [State] issue a Written Notice of Position, any other Party which disagrees with the Written Notice of Position may provide the issuing Party with a written statement of dispute setting forth the nature of the dispute, its position with respect to the dispute and the information it is relying upon to support its position. If no other Party provides such a written statement of dispute within thirty (30) days of receipt of the Written Notice of Position, the Parties shall be deemed to have agreed with the Written Notice of Position.

C. Upon receipt of the written statement of dispute, the Parties shall engage in dispute resolution among the Project Managers and/or their immediate supervisors. The Parties shall have fourteen (14) days from the receipt by the U.S. EPA and [State] of the written statement of dispute to resolve the dispute. During this period the Project Managers shall meet as many times as are necessary to discuss and attempt resolution of the dispute. If agreement cannot be reached on any issue within this fourteen (14) day period any Party may, within ten (10) days of the conclusion of the fourteen (14) day dispute resolution period, submit a written notice to the Parties escalating the dispute to the Dispute Resolution Committee (DRC) for resolution. If no Party elevates the dispute to the DRC within this ten (10)

day escalation period, the Parties shall be deemed to have agreed with U.S. EPA's position with respect to the dispute.

D. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to Subparts A, B or C of this Part. The Parties shall each designate one individual and an alternate to serve on the DRC. The individuals designated to serve on the DRC shall be employed at the policy level (SES or equivalent) or be delegated the authority to participate on the DRC for the purposes of dispute resolution under this Agreement. Following escalation of a dispute to the DRC as set forth in Subpart C, the DRC shall have thirty (30) days to unanimously resolve the dispute. If the DRC is unable to unanimously resolve the dispute within this thirty (30) day period any Party may, within ten (10) days of the conclusion of the thirty (30) day dispute resolution period, submit a written notice of dispute to the Administrator of U.S. EPA for final resolution of the dispute. In the event that the dispute is not escalated to the Administrator of U.S. EPA within the designated ten (10) day escalation period, the Parties shall be deemed to have agreed with the U.S. EPA DRC representative's position with respect to the dispute.

E. Upon escalation of a dispute to the Administrator of U.S. EPA pursuant to Subpart D, the Administrator will review and resolve such dispute as expeditiously as possible. Upon resolution, the Administrator shall provide the [Department/Agency] and [State] with a written final decision setting forth resolution of the dispute.

F. The U.S. EPA representative on the DRC is the Waste Management Division Director of U.S. EPA's Region ___. [State's] designated member is the [State's equivalent position]. The [Department/Agency's] designated member is the [Department/Agency's equivalent position]. Notice of any delegation of authority from a Party's designated representative on the DRC shall be provided to all other Parties pursuant to the procedures of Part XX.

G. The pendency of any dispute under this Part shall not affect the [Department/Agency's] responsibility for timely performance of the work required by this Agreement, except that the time period for completion of work affected by such dispute shall be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein. All elements of the work required by this Agreement which are not affected by the dispute shall continue and be completed in accordance with the applicable schedule. The determination of elements of work, Submittals or actions affected by the dispute shall be determined by U.S. EPA and shall not subject to dispute under this Part.

H. Within fourteen (14) days of resolution of a dispute pursuant to the procedures specified in this Part, the [Department/Agency] shall incorporate the resolution and final determination into the appropriate plan, schedule or procedures and proceed to implement this Agreement according to the amended plan, schedule or procedures.

I. Resolution of a dispute pursuant to this Part of the Agreement constitutes a final resolution of any dispute arising under this Agreement. The [Department/Agency] shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Part of this Agreement.

ATTACHMENT 5

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

JUN 24 1987

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Determination of Operator at Government-Owned Contractor-Operated (GOCO) Facilities

FROM: Gene A. Lucero, Director
Office of Waste Programs Enforcement

Marcia E. Williams, Director
Office of Solid Waste

TO: Waste Management Division Directors
Regions I - X

The purpose of this memorandum is to clarify who should sign as the operator on permit applications for Government-Owned Contractor-Operated (GOCO) facilities. Earlier guidance (see attached memo) had recommended that the Regional office consider the role of the contractor in the operation of the facility before determining who should sign the permit application. We also noted that in some cases where the contractor's role is less precisely defined the Region should exercise judgment given the factual situation.

It appears that there is still some confusion regarding signatories for permit applications. Whenever a contractor or contractors at a government-owned facility, are responsible or partially responsible for the operation, management or oversight of hazardous waste activities at the facility; they should sign the permit as the operator(s). In some instances both the Federal agency and the contractor(s) are the operators and multiple signatures to that effect would be appropriate. A review of the facility's operating records, contingency plans, personnel training records, and other documents relating to waste management should indicate who the operator(s) are. As a general rule, contractors will meet this test and therefore in most situations should be required to sign the permit application.

If you have any questions please contact Jim Michael, Office of Solid Waste at FTS 382-2231 or Anna Duncan, Office of Waste Programs Enforcement at FTS 382-4829.

Attachment

cc: Bruce Weddle, OSW
Elaine Stanley, OWPE
Chris Grundler, OSWER
Matt Hale, PSPD
Federal Facility Coordinators, Region I-X