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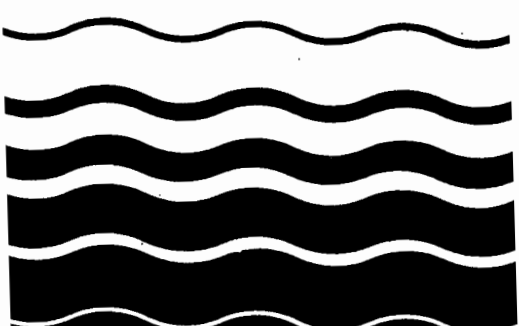
CLEAN WATER ACT

Compliance/Enforcement Compendium

Volume III



VI. SPECIALIZED ENFORCEMENT TOPICS

B. PRETREATMENT

"Coordination Between Regional Enforcement and Water Programs Personnel in Implementing the National Pretreatment Program", dated November 29, 1978.

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

NOV 2 9 1978

MEMORANDUM

TO: Regional Administrators w/o attachments
Regional Water Division Directors
Regional Enforcement Division Directors

FROM: Deputy Assistant Administrator for Water Programs Operations (WH-546)

Deputy Assistant Administrator for Water Enforcement (EN-335)

SUBJECT: Coordination Between Regional Enforcement and Water Programs Personnel in Implementing the National Pretreatment Program

The general pretreatment regulation (40 CFR Part 403) promulgated on June 26, 1978, requires that certain publicly owned treatment works (POTWs) develop pretreatment programs to control the introduction of industrial wastes into POTWs. The successful implementation of these pretreatment programs requires a careful integration of Regional Enforcement Division efforts in overviewing the creation of such programs and Construction Grants efforts in providing funding for the development of these programs. The purpose of this memorandum is to outline the respective roles of these two groups with regard to the initial stages of POTW pretreatment program development. The recommendations in this memorandum reflect the proposals for coordinating Enforcement and Construction Grants activities found in the Interim National Municipal Policy and Strategy, October, 1978, and the latter document should be read in concert with this memorandum.

Identification of POTWs Required to Develop a Program

The pretreatment regulation specifies that two groups of POTWs should be required to develop a pretreatment program (see section 403.8). First, all POTWs with an average design flow greater than 5 million gallons per day (mgd) and receiving industrial wastes which 1) pass through the POTW untreated, 2) interfere with the operation of the POTW or, 3) are otherwise subject to pretreatment standards developed under section 307 of the Clean Water Act are required to develop a program. In addition, the Regional Administrator or Director of the State NPDES program may require that POTWs with an average design flow of 5 mgd or less develop a pretreatment program if their industrial influent meets any of the three criteria listed above.

A computer print-out of all POTWs in each Region broken down by majors and minors is attached to this memorandum. The Regional Enforcement Division should take the lead in developing from the attached computer print-out: 1) a list of those POTWs (both above and below 5 mgd) in non-NPDES States which should develop a pretreatment program and, 2) a list of those POTWs above 5 mgd in NPDES States which must be required to develop a program. The Regional Water Division must assist in this effort and provide such necessary information as is available in the Water Division files. Attachment A suggests means by which the Regional office can identify these POTWs.

In compiling the non-NPDES State list, the Regional office should check the appropriate boxes next to the POTW name on the computer print-out. Copies of this print-out should then be forwarded to the Permits and Municipal Construction Divisions at Headquarters. A copy of this print-out should also be maintained by both the Enforcement and Water Divisions in the Regional office and both Divisions should be consulted on any changes to the list.

The NPDES State list should be sent to NPDES States to assist them in identifying appropriate POTWs. NPDES States will be responsible for adding to the Regional list those POTWs with flows of 5 mgd and less which will be subject to the program development requirement. Once the NPDES State has developed a list of all POTWs within its jurisdiction which will be required to implement pretreatment programs, it should forward this list to the Grants and Enforcement personnel in the Regional office who will, in turn, send this information on to Headquarters.

Lists of those POTWs in both NPDES and non-NPDES States which will be required to develop a program should be sent to the Headquarters Permits and Municipal Construction Divisions no later than January 15, 1979. The cover memorandum transmitting the completed lists should be signed jointly by the Directors of the Regional Water and Enforcement Divisions. These lists will eventually be incorporated into the Permit Compliance System (PCS) which will provide a convenient mechanism for tracking and updating progress in developing POTW pretreatment programs.

Application for Construction Grants Amendment

Once the lists of POTWs required to develop a pretreatment program have been compiled, the Construction Grants staff should notify the appropriate POTWs in NPDES and non-NPDES States of the need to apply for an amendment to their existing Step 1, 2 or 3 grant in order to acquire funding for the development of a pretreatment program (see Construction Grants regulation 40 CFR 35.907). Concurrent notice of POTWs which should apply for grant amendments should be sent to Grant personnel in NPDES and non-NPDES States so that the States may plan future funding requirements. Existing construction grants should be amended no later than June 30, 1979, to provide pretreatment program funding.

As individual POTWs apply for and are awarded an amendment to their construction grant for pretreatment program implementation, this information should be conveyed to Regional Enforcement personnel. As will be seen in the subsequent discussion, timing of the construction grants award can have an impact on the development of the pretreatment compliance schedule incorporated into the POTW's NPDES permit.

Reissuance of Permits to Include Pretreatment Requirements

The pretreatment regulation requires that NPDES permits for POTWs which are required to develop a POTW pretreatment program incorporate a compliance schedule for the development of such a program [see 40 CFR 403.8(d)]. This compliance schedule should be incorporated into the POTW's permit upon reissuance at the end of the existing permit term or at the time the permit is modified or reissued to grant a section 301(i)(1) time extension or a section 301(h) modification of secondary treatment requirements. In addition, a POTW's NPDES permit may be modified in mid-term to incorporate a schedule for the development of a POTW pretreatment program where the operation of a POTW without a pretreatment program poses significant public health, environmental or related concerns, or where a pretreatment program compliance schedule must be developed to coordinate with construction grant awards. A detailed explanation of the development and application of pretreatment compliance schedules will be found in Attachment B along with a model compliance schedule.

The pretreatment strategy envisions the type of close coordination between Enforcement and Construction Grants staffs outlined in the Interim National Municipal Policy and Strategy for developing these compliance schedules. Both the Construction Grants regulation (40 CFR 35.907, 35.920-3) and the pretreatment regulation (40 CFR 403.8) impose time limitations on the various activities to be undertaken in the pretreatment compliance schedule. The pretreatment compliance schedule incorporated into a POTW's NPDES permit should contain milestones derived from the grants process. As the discussion in Attachment B indicates, in order to develop a compliance schedule which meets both the pretreatment and Construction Grants regulatory requirements, the Enforcement staff must coordinate with Construction Grants staff in determining the current grant status of the permittee and the schedule for receipt of future grant funding.

Enforcement of POTW Pretreatment Programs

The preceding discussion of coordination between Construction Grants and Enforcement in developing POTW pretreatment programs should not be understood to imply that availablity of funding is a prerequisite to the development of a pretreatment program. The requirement to develop a pretreatment program should be enforced and not dependent on

Federal funds. The development of pretreatment programs is critical; it is the main tool to address toxic discharges from POTW's. The costs of developing such programs are not capital costs and they can be recovered from users of the municipal system in most cases. In balancing these considerations, the Agency's policy is to enforce requirements for municipalities to develop pretreatment programs without dependence on Federal funding.

This policy applies equally to funding the operation of municipal pretreatment programs once they are developed and running. They are expected to be self-supporting. A user charge system may be used for this purpose.

If you have any questions on the implementation of this coordination effort or its relation to the Interim National Municipal Policy and Strategy, please feel free to contact Nancy Hutzel or Shanna Halpern (8-755-0750) in the Permits Division or Ron DeCesare (8-426-8945) in the Municipal Construction Division.

John T. Rhett

Jeffrey G. Miller

Attachments

cc: Regional S&A Division Directors
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ATTACHMENT A

Procedures to Identify POTWs Which Will be Required to Develop POTW Pretreatment Programs

The permit-issuance authority (Regional office or NPDES State) must have the ability to determine which of its municipal permittees will be required to develop a POTW pretreatment program. As section 403.8(a) of the pretreatment regulation explains, POTWs required to develop a program will include those POTWs with a design flow over 5 mgd receiving from industrial users wastes which:

- o pass through the POTW untreated
- o interfere with the operation of the treatment works
- o are subject to pretreatment standards developed under the authority of section 307(b) or (c) of the CWA.

In determining which POTWs are above 5 mgd, the permit-issuance authority should look at average design flow. In addition, if one permittee controls several treatment works, the cumulative flow of the treatment works should be considered in calculating average design flow. For example, one Regional Authority controlling 3 treatment works with average design flows of 3, 2 and 1.5 mgd respectively would be viewed, for the purposes of the pretreatment regulation, as a single operation with an average design flow greater than 5 mgd.

A recommended first step in determining which POTWs over 5 mgd fall within the 3 categories listed above would be to determine which POTWs receive wastes from one or more industries within the 21 industrial categories listed in the NRDC Consent Decree (for reprinting of Consent Decree see The Environmental Reporter-Cases, 8 ERC 2120). EPA anticipates that categorical pretreatment standards under section 307(b) and (c) will be developed for almost all industrial subcategories within the 21 industrial categories listed in the NRDC Consent Decree. A possible approach to detecting these sources would be to examine industrial inventories such as the Dun and Bradstreet Market Identifiers, the Directory of Chemical Producers, published by the Stanford Research Institute, and the State industrial directories to determine which of the listed sources are within the State or Region and discharging into POTWs.

A second step in identifying POTWs required to develop a POTW pretreatment program might be to look at those POTWs which are not meeting their NPDES permit conditions. Such permittees would be likely candidates for a pretreatment program aimed at controlling pollutants which interfere with the operation of or pass-through the POTW.

Section 403.8(a) of the pretreatment regulation also gives the permit-issuance authority the ability to require the development of a pretreatment program by POTWs with average design flows of 5 mgd or less. It is recommended that the permit-issuance authority require the development of a program wherever the POTW meets one of the 3 criteria outlined earlier. The permit-issuance authority is strongly urged to exercise its option to extend the requirement to develop a pretreatment program as broadly as possible.

The burden of proof for demonstrating that a program is not needed should rest on the POTW. Where there is some doubt that a certain POTW has industrial influent subject to pretreatment requirements, the POTW can be allowed to show that it need not develop a program. In such cases, a clause should be inserted in the municipal permit along with the compliance schedule for the development of a pretreatment program. This clause would state that if the industrial waste inventory required by the compliance schedule demonstrates that the POTW has no contribution of industrial wastes which would be subject to pretreatment requirements, the POTW would not be required to continue development of the program.

ATTACHMENT B

GUIDANCE ON PREPARING COMPLIANCE SCHEDULES FOR

DEVELOPING POTW PRETREATMENT PROGRAMS

GENERAL COMMENTS:

Section 403.8(d) of the general pretreatment regulation (40 CFR part 403) requires that NPDES permits for POTWs which are required to develop a POTW pretreatment program incorporate a compliance schedule for the development of such a program. In some cases, this compliance schedule will be incorporated into affected POTW permit upon reissuance at the end of its existing term.

In many cases, however, the compliance schedule will be incorporated into the POTW permit in mid-term through a permit modification. It is anticipated that in many instances this pretreatment compliance schedule will be inserted into the NPDES permit for applicable POTWs when the permit is modified or reissued in mid-term in connection with a 301(i)(1) determination (i.e., the determination as to whether or not the schedule for development of secondary treatment should be extended under the provisions of section 301(i)(1) of the Act, see 40 CFR 124.104). Similarly, a POTW which is required to develop a pretreatment program will have a pretreatment compliance schedule inserted in its NPDES permit if that permit is modified or reissued in order to grant a waiver of secondary treatment requirements under the provisions of section 301(h) of the Act. (See proposed 40 CFR Part 233.) In addition, a POTW permit will be modified in mid-term to incorporate a schedule for the development of a POTW pretreatment program, where the operation of a POTW without a pretreatment program poses significant public health, environmental or related concerns, or where a pretreatment program compliance schedule must be developed to coordinate with construction grant awards.

The compliance schedule will require that the permittee develop the authorities, procedures and resources, as defined by 40 CFR 403.8 and 403.12, which comprise an approvable POTW pretreatment program. The activities listed in the attached model compliance schedule summarize the more detailed requirements found in sections 403.8 and 403.12 of the pretreatment regulation. It is recommended that the permit-issuance authority review the more detailed requirements set forth in the regulation before developing the pretreatment compliance schedule, and insert additional schedule activities where appropriate.

There are several time limitations imposed by the pretreatment regulation and the construction grant regulation (40 CFR part 35) which should be considered in establishing compliance schedule dates. The pretreatment regulation provides that the compliance schedule will require the development and approval of a POTW pretreatment program as soon as reasonable and within 3 years after the schedule is incorporated

into a POTW's permit but in no case later than July 1, 1983 (see §403.8). Since up to 6 months must be allowed for the program approval process according to section 403.11 of the pretreatment regulation, the compliance schedule date for submission of a pretreatment program for approval (activity 8 of the compliance schedule) should be 2-1/2 years from the incorporation of a compliance schedule or January 1, 1983, whichever is sooner.

Provisions of the construction grants regulations impose what may be in some cases stricter time constraints on the development of an approvable program. For example, section 35.920-3 of the construction grants regulation provides that no grantee may receive a Step 3 grant after December 31, 1980, until it has developed an approvable pretreatment program. Thus, a permittee which is scheduled to receive a Step 3 construction grant in January 1981 will be required to develop an approvable program at the outside by January 1981. However, if that same permittee received a compliance schedule for the development of a pretreatment program in December 1978 it would be allowed, by the pretreatment regulation, an outside date of June 1981 (i.e., 2-1/2 years from the incorporation of the compliance schedule) to develop an approvable program. In this case, the more stringent time limitation, i.e., that posed by the construction grant regulation, would apply.

As the example above indicates, in developing the schedule date for the submission of an approvable pretreatment program, the permit-issuance authority must use that date prescribed by either the pretreatment regulation or the construction grants regulation which provides the shortest time for the development of the program. In addition, the permit-issuance authority may impose reasonable time limitations which are more restrictive.

DEVELOPMENT OF THE PRETREATMENT COMPLIANCE SCHEDULE

It is apparent from the general discussion above that several different regulatory provisions influence the development of the schedule date for submitting a POTW pretreatment program for approval (compliance schedule activity 8). Regulatory limitations on the time frame for developing a program can be summarized as follows:

- approval within 3 years from the incorporation of a pretreatment compliance schedule in the municipal permit (application for approval within 2-1/2 years). See 40 CFR 403.8.

- approval by July 1, 1983 (application for approval by January 1, 1983). See 40 CFR 403.8.

- o approval prior to payment of grants beyond 90% of the Step 3 funding (application for approval 6 months before this date). See 40 CFR 35.935-19.

- o development of an approvable pretreatment program by the end of the Step 2 grant for certain permittees. See 40 CFR 35.920-3.

- o approval by whatever more stringent time limit is imposed by the permit-issuance authority.

In addition, the construction grant regulation imposes an interim time limitation on the development of compliance schedule activities 1-3. According to this regulation, grantees with amended Step 1 grants must have completed activities 1-3 by the time of application for the Step 2 grant if the Step 2 is to be awarded after June 30, 1980.

Facilities required to develop a POTW pretreatment program can generally be divided into 4 groups depending upon the applicablity of the time limitations discussed above. See attached Chart A.

GROUP 1 Facilities which will have received Step 1 and 2 construction grants or amendments before June 30, 1980, and a Step 3 construction grant before December 31, 1980.

If a grantee is scheduled to receive its Step 2 and 3 construction grants before June 30, 1980 and December 31, 1980, respectively, the construction grant regulation (40 CFR 35.935-19) requires that, in most cases, the grantee have an approved POTW pretreatment program before it receives the last 10% of its Step 3 grant funding. This means that the grantee would be required to apply for POTW pretreatment program approval at least 6 months before it is scheduled to receive payment beyond 90% of its Step 3 funding.*

The pretreatment regulation (40 CFR 403.8(d)) provides that such a grantee should request approval of the POTW pretreatment program within 2-1/2 years from the incorporation of a pretreatment compliance schedule into its NPDES permit or by January 1, 1983, whichever is sooner.

In developing the compliance schedule for permittees in this group, the permit-issuance authority should determine which of the above dates provides for the earliest development of a POTW pretreatment program. This date should then be used as the pretreatment compliance schedule deadline for activity 8.

*As a 6 months period is needed to approve a POTW pretreatment program, in order to receive approval of a program by the date upon which the grantee is scheduled to receive payment beyond 90% of its Step 3 funding, the application for approval must be submitted 6 months earlier.

Dates for the remaining compliance schedule activities are negotiable with the permittee. Generally, however, the deadlines for completing activities 1-3 should not exceed 15 months from the initiation of the compliance schedule.

Facilities receiving their Step 3 grant before June 30, 1980, shall be subject to the same time limitations described above.

GROUP 2 Facilities which will have received Step 1 and 2 construction grants before June 30, 1980, and a Step 3 construction grant after December 31, 1980.

The construction grant regulation provides that a grantee which is scheduled to receive a Step 3 grant after December 31, 1980, must have completed compliance schedule activities 1-7 before it can receive its Step 3 funding. Therefore, in developing the compliance schedule, the permit-issuance authority should use as an outside compliance date for activities 1-7 the date for completion of the Step 2 grant as determined by the construction grants compliance schedule as long as this date would not be later than 2-1/2 years from the initiation of the pretreatment compliance schedule or Janurary 1, 1983, whichever is sooner.

The compliance date for pretreatment compliance schedule activity 8 (request for program approval) should not exceed 2-1/2 years from the initiation of the compliance schedule, January 1, 1983, or 6 months before the permittee is scheduled to receive payment beyond 90% of its Step 3 funding, whichever is sooner.

Again, the interim pretreatment compliance schedule dates are negotiable. It is recommended that the completion date for activities 1-3 not exceed 15 months from the initiation of the compliance schedule.

GROUP 3 Facilities which will receive a Step 2 construction grant after June 30, 1980, and a Step 3 construction grant before December 31, 1980.

Under to the construction grant regulation, in order to receive a Step 2 grant after June 30, 1980, a grantee must first have completed activities 1-3 of the pretreatment compliance schedule. The permit-issuance authority should therefore ensure that the compliance schedule dates for the completion of activities 1-3 do not exceed the scheduled date for the completion of the Step 1 grant activities. The permit-issuance authority may at its discretion impose a more stringent time limitation for the completion of these activities. It is recommended that the completion date for activities 1-3 not exceed 15 months from the initiation of the compliance schedule.

The construction grant regulation provides that grantees which will receive a Step 3 grant before December 31, 1980, must have an approved pretreatment program in order to receive the final 10% of the Step 3 grant funds. The final compliance date for activity 8 of the pretreatment compliance schedule therefore should be no later than 6 months* before the date upon which the grantee is scheduled to receive payment beyond 90% of the Step 3 grant funding unless this date exceeds 2-1/2 years from the initiation of the compliance schedule, or January 1, 1983, in which case the final date for activity 8 should be no later than January 1, 1983, or 2-1/2 years from the initiation of the compliance schedule, whichever is sooner.

The interim dates for activities 4-7 are negotiable with the permittee.

GROUP 4 Facilities which will receive a Step 2 construction grant after June 30, 1980, and a Step 3 construction grant after December 31, 1980.

The construction grant regulation provides that in order to receive a Step 2 grant after June 30, 1980, a grantee must first have completed activities 1-3 of the pretreatment compliance schedule. The permit issuance authority should therefore ensure that the compliance schedule dates for the completion of activities 1-3 do not exceed the schedule date for the Step 2 grant application. The permit-issuance authority may impose a more stringent time limitation for the completion of these activities. It is recommended that the completion date for activities 1-3 not exceed 15 months from the initiation of the compliance schedule.

In order to receive a Step 3 grant after December 31, 1980, a facility in this category must also have completed compliance schedule activities 4-7. The final compliance dates for activities 4-7 should therefore be no later than the completion date for the facilities Step 2 grant as determined by the construction grants schedule. If the scheduled completion date for the Step 2 construction grant activities is later than 2-1/2 years from the initation of the compliance schedule or January 1, 1983, then the final compliance date for activities 4-7 should not exceed January 1, 1983, or 2-1/2 years from the initiation of the compliance schedule, whichever is sooner.

In establishing the pretreatment compliance schedule dates for activities 4-7, sufficient time must be allowed for the grantee to accomplish activity 8 (application for program approval) by January 1, 1983, 2-1/2 years from the initiation of the pretreatment compliance schedule, or 6 months before the permittee is scheduled to receive payment beyond 90% of its Step 3 funding*, whichever is sooner.

* See footnote, page 3

MODEL PRETREATMENT COMPLIANCE SCHEDULE LANGUAGE

Under the authority of section 307(b) and 402(b)(8) of the Clean Water Act, and implementing regulations (40 CFR 403), the permittee is required to develop a pretreatment program. This program shall enable the permittee to detect and enforce against violations of categorical pretreatment standards promulgated under section 307(b) and (c) of the Clean Water Act and prohibitive discharge standards as set forth in 40 CFR 403.5.

The schedule of compliance for the development of this pretreatment program is as follows. The permittee shall:

ACTIVITY NO.	ACTIVITY	DATE
1	Submit the results of an industrial user survey as required by 40 CFR 403.8(f)(2)(i-iii), including identification of industrial users and the character and volume of pollutants contributed to the POTW by the industrial users.	_____
2	Submit an evaluation of the legal authorities to be used by the permittee to apply and enforce the requirements of sections 307(b) and (c) and 402(b)(8) of the Clean Water Act, including those requirements outlined in 40 CFR 403.8(f)(1).	_____
3	Submit a determination of technical information (including specific requirements to specify violations of the discharge prohibitions in 403.5) necessary to develop an industrial waste ordinance or other means of enforcing pretreatment standards.	_____
4	Submit an evaluation of the financial programs and revenue sources, as required by 40 CFR 403.8(f)(3), which will be employed to implement the pretreatment program.	_____
5	Submit design of a monitoring program which will implement the requirements of 40 CFR 403.8 and 403.12, and in particular those requirements referenced in 40 CFR 403.8(f)(1)(iv-v), 403.8(f)(2)(iv-vi) and 403.12(h-j),(l-n).	_____

6	Submit list of monitoring equipment required by the POTW to implement the pretreatment program and a description of municipal facilities to be constructed for monitoring or analysis of industrial wastes.	_____
7	Submit specific POTW effluent limitations for prohibited pollutants (as defined by 40 CFR 403.5) contributed to the POTW by industrial users.	_____
8	Submit a request for pretreatment program approval (and removal credit approval, if desired) as required by 40 CFR 403.9.	_____

The terms and conditions of the POTW pretreatment program, when approved, shall be enforceable automatically through the permittee's NPDES permit.

Quarterly Reporting

The permittee shall report to the permit-issuance authority on a quarterly basis the status of work completed on the POTW pretreatment program. Reporting periods shall end on the last day of the months of March, June, September and December. The report shall be submitted to the permit-issuance authority no later than the 28th day of the month following each reporting period.

Removal Allowances

Any application for authority to revise categorical pretreatment standards to reflect POTW removal of pollutants in accordance with the requirements of 40 CFR 403.7 must be submitted to the permit-issuance authority at the time of application for POTW pretreatment program approval or at the time of permit expiration and reissuance thereafter.

CHART

OUTSIDE PRETREATMENT COMPLIANCE DATES BASED ON CONSTRUCTION GRANT AWARDS AND PRETREATMENT REQUIREMENTS*

Group	JUNE 30, 1980	DECEMBER 31, 1980	2-1/2 YEARS FROM INITIATION OF COMPLIANCE SCHEDULE, JANUARY 31, 1983, OR 6 MONTHS BEFORE THE FINAL 10% OF STEP 3 GRANT WHICHEVER IS SOONER
1	Step 1 Awarded; Step 2 Awarded	Step 3 Awarded	Activities 1-8 Due
2	Step 1 Awarded; Step 2 Awarded	Step 3 Awarded (Activities 1-7 due by application for Step 3)	Activity 8 Due
3	Step 1 Awarded	Step 2 Awarded (Activities 1-3 due by application for Step 2); Step 3 Awarded	Activities 4-8 Due
4	Step 1 Awarded	Step 2 Awarded (Activities 1-3 due by application for Step 2); Step 3 Awarded (Activities 4-7 due by application for Step 3)	Activity 8 Due

*Interim dates are negotiable and are established by the permit-issuance authority

DOCUMENT C

Explanation of Procedural/Funding Requirements
for State Pretreatment Programs

1. Procedures/Funding to Identify POTWs Which Will be Required to Develop POTW Pretreatment Programs

The State must have the ability to determine which of its municipal permittees will be required to develop a POTW pretreatment program. As section 403.8(a) of the pretreatment regulation explains, POTWs required to develop a program will include those POTWs with a design flow over 5 mgd receiving from industrial users wastes which:

- o pass through the POTW untreated
- o interfere with the operation of the treatment works
- o are subject to pretreatment standards developed under the authority of section 307(b) or (c) of the CWA.

In determining which POTWs are above 5 mgd, the State should look at average design flow. In addition, if one permittee controls several treatment works, the cumulative flow of the treatment works should be considered in calculating average design flow. For example, one Regional Authority controlling 3 treatment works with average design flows of 3, 2 and 2 mgd respectively would be viewed, for the purposes of the pretreatment regulation, as a single operation with an average design flow greater than 5 mgd.

A recommended first step in determining which POTWs over 5 mgd should be required to develop a pretreatment program would be to determine which POTWs receive wastes from one or more industries within the 21 industrial categories listed in the NRDC Consent Decree (for reprinting of Consent Decree see The Environmental Reporter-Cases, 8 ERC 2120). EPA anticipates that categorical pretreatment standards under section 307(b) and (c) will be developed for almost all industrial subcategories within the 21 industrial categories listed in the NRDC Consent Decree. A possible approach to detecting these sources would be to examine industrial inventories such as the Dunn and Bradstreet Market Indicator and the Directory of Chemical Producers, published by the Stanford Research Institute, to determine which of the listed sources are within the State and discharging into POTWs.

A second step in identifying POTWs required to develop a POTW pretreatment program might be to look at those POTWs which are not meeting their permit conditions. Such permittees would be likely candidates for a pretreatment program aimed at controlling pollutants which interfere with the operation of the POTW.

Section 403.8(a) of the pretreatment regulations also gives the State authority to require the development of a pretreatment program by POTWs with average design flows of 5 mgd or less. It is recommended that the State require the development of a program wherever the POTW receives industrial wastes from sources in one or more of the 21 industrial categories listed in the NRDC Consent Decree, is not meeting its permit conditions or where municipal sludge is not meeting applicable requirements. The State is strongly urged to exercise its option to extend the requirement to develop pretreatment program as broadly as possible. The burden of proof for demonstrating that a program is not needed should rest on the POTW. Where there is some doubt that a certain POTW has industrial influent subject to pretreatment requirements, the POTW can be allowed to show that it need not develop a program. In such cases, a clause can be inserted in the municipal permit along with the compliance schedule for the development of a pretreatment program. This clause would state that if the industrial waste inventory required by the compliance schedule demonstrates that the POTW has no significant contribution of industrial wastes which would be subject to pretreatment requirements, the POTW would not be required to continue development of the program.

In brief narrative form, the State should explain those procedures it has currently developed for identifying POTWs above and below 5 mgd required to develop a pretreatment program. The narrative should be accompanied by a statement of the resources currently devoted to this undertaking. If a program to identify appropriate POTWs is planned for the future, the State should indicate what approaches to identifying POTWS will be used and what criteria will be applied in identifying the pollutants and industries subject to pretreatment requirements. The State should also describe briefly its planned procedures for providing technical and legal assistance to POTWs where help is needed in developing a POTW pretreatment program.

2. Procedures/Funding to Notify POTWs of Pretreatment Requirements

The State should indicate those procedures it has developed to notify POTWs of applicable pretreatment requirements as set forth in 40 CFR 403.8(2)(iii). This may consist of a mailing system for distributing information such as copies of the pretreatment regulation and any guidance on developing a POTW pretreatment program prepared by the State or EPA. Any such distribution system should be coordinated with similar information networks employed by State personnel in charge of EPA construction grants.

3. Procedures/Funding to Incorporate Pretreatment Requirements in Municipal Permits

Where States currently have the authority to revoke and reissue or modify municipal permits to incorporate an approved pretreatment program or a compliance schedule for developing such a program, (see Attorney General's Pretreatment statement section 2) they will be required to exercise this authority. Otherwise, a State must include a modification clause in appropriate POTW permits which calls for the incorporation of pretreatment requirements at a later date. The State should indicate to EPA the priorities it will use for incorporating pretreatment requirements into POTW permits and an estimate of the additional resources, if any, which will be required to carry out this task. For example, the State should indicate to the best of its ability:

- the number of municipal permits which will incorporate pretreatment requirements at the same time as they are revoked and reissued or modified for the purpose of meeting the provisions of 301(i) or 301(h) of the Clean Water Act;

- the number of expiring municipal permits not receiving 301(i) or 301(h) modifications which will incorporate pretreatment conditions upon reissuance

- the number of municipal permits to be revoked and reissued or modified to include an approved pretreatment program or a compliance schedule for developing such a program

4. Procedures/Funding to Make Determinations on Requests for POTW Pretreatment Program Approval and Removal Allowances

The State must have the procedures and funding to receive and make determinations on requests for POTW pretreatment program and removal allowance approval. In general this responsibility will require that the State have procedures and funding to:

- comply with the public notice provisions of section 403.11(b)(1) of the regulation which requires the State to:

  1. mail notices of the request for approval to adjoining States whose waters may be affected;

  2. mail notices of the request to appropriate area-wide planning agencies (Section 208 of the CWA) and other persons or organizations with an interest in the request for program approval or removal allowance;

3. publish a notice of the request in the largest daily newspapers of the municipality in which the POTW requesting program or removal allowance approval is located. These notices shall indicate that a comment period will be provided for interested parties to express their views on the request for program approval or removal allowance.

- o Provide a public hearing if requested by any affected or interested party as provided for in section 403.11(b)(2). Notice of such a hearing will be published in the same newspapers where the original notice of request for program or removal credit approval appeared.

- o Make a final determination on the request if EPA has not objected in writing to the approval of the request during the comment period. In making the final determination, the State should take into consideration views expressed by interested parties during the comment period and hearing, if held.

- o Issue a public notice of the final determination on the request. This notice shall be sent to all persons who submitted comments and/or participated in the public hearing. In addition, the notice will be published in the same newspapers as the original notice of request for approval was published.

The State should indicate to EPA by October 10, its current ability to carry out these responsibilities, focusing primarily on staffing and funding availability. This assessment should be based on an estimate of the number of POTWs which will be scheduled to receive POTW pretreatment program and removal allowance approval during the remainder of the State's budget year. The State should then indicate the projected resource levels for POTW pretreatment program and removal allowance approval in each of the budget years 1979-1983 based on the estimated number of POTWs requesting program and removal allowance approval during each of these years. Finally, the State should explain how it can insure, to the best of its ability, that the funding required to carry out this activity will be available each year.

5. Procedures/Funding for Identifying and Notifying Industrial Users Subject to Pretreatment Requirements

The pretreatment regulations provide that where a POTW is not required to develop a POTW pretreatment program, the State will assume responsibility for identifying industrial users of the POTW which might be subject to pretreatment standards. The State may

devise its own methods for obtaining this information, including requiring the POTW to identify the industrial users in question. Reference to the Dunn and Bradstreet and Directory of Chemical Producers listings, as mentioned earlier, may provide a convenient first step. In many cases this information may already have been provided by the POTW through part 4 of the municipal permit application form. Through whatever means it chooses, the State should insure that all industrial users which fall within one or more of the 21 industrial categories listed in the NRDC Consent Decree are identified. In addition, the State should identify as subject to pretreatment standards all industrial users which contribute pollutants which interfere with the operation of the treatment works or pass through the POTW untreated.

Once the appropriate industrial users have been identified, the State must ensure that they are notified of all applicable existing pretreatment standards and of applicable pretreatment standards which might be forthcoming. Acceptable procedures would include a mailing list for industrial users or an arrangement with the POTW requiring it to provide the requisite notice.

The State should indicate by October 10, whether it has presently in operation effective procedures for identifying and notifying industrial users currently or potentially subject to pretreatment standards. If such procedures are not currently on line, if for example, information supplied by part 4 of the municipal application form is not sufficiently detailed to provide the required information, the State should indicate how it plans to develop the ability to identify and notify appropriate industrial users. The description of these procedures should be accompanied by an assessment of resources needed to implement them, the current availability of resources to meet this need and plans for obtaining additional resources if required.

6. Procedures/Funding for Identifying the Character and Volume of Pollutants Contributed by Industrial Users to POTWs

Section 403.10(f)(2)(i) of the pretreatment regulation provides that where a POTW is not required to develop a POTW pretreatment program, the State will be required to carry out those procedures which would otherwise have been the responsiblity of the POTW. One of these responsiblities is the identification of the character and volume of pollutants being contributed to the POTW by sources subject to pretreatment requirements (see 403.8(f)(2)(ii)). Industrial users subject to pretreatment requirements include those which are subject to pretreatment standards promulgated under section 307(b) and (c) and/or, contribute pollutants which interfere with the operation of the POTW or which pass through the POTW untreated. This responsibility is complicated by the fact that

analytical and monitoring techniques are not yet available to provide a quantitative analysis of the presence of many of the pollutants in question. In recognition of this problem, EPA recommends that States follow the procedures outlined below in developing their inventory of industrial waste contribution.

- The first step in the waste inventory should be a qualitative analysis of pollutants being contributed by all industrial sources within the system. The individual industrial users should be asked to provide information on the type and approximate quantity of pollutants discharged by the facility. This information should be derived entirely from knowledge of the facility's process and should not require any sampling at the source.

- Second, the State should review this qualitative information on the pollutants being discharged into the system and remove from further consideration those pollutants which are not within the 129 pollutants to be regulated with national pretreatment standards and/or which are known not to interfere with the operation of the POTW or pass through the POTW untreated.

- Third, the State (or POTW if the State so directs) will then sample the influent to the POTW to determine which of the pollutants remaining after step two appear in significant concentrations in the influent to the POTW. In carrying out this sampling, the State should use those sampling and analytical techniques set forth in 40 CFR part 136. If a pollutant appears at such a low concentration that it is highly unlikely that it would have an adverse effect on the operation of the POTW, pass through untreated, or if the pollutant does not appear at all in the influent to the POTW, it should be excluded from further consideration.

- Fourth, the analysis in preceeding steps has resulted in a list of those pollutants contributed to the system which may affect the operation of the POTW or pass through the POTW untreated. The next step is to determine which industrial users have such pollutants in their effluent.

- Fifth, those industrial users identified in step four will be required to do sampling and analysis to quantify the amounts of those pollutants being discharged by that source into the POTW. If necessary, the State may then impose upon that industrial user an effluent limitation which will ensure that such pollutants are discharged at levels which will not interfere with the operation of the treatment works or pass through in unacceptable amounts.

- Finally, as Federal pretreatment standards for industrial subcategories are promulgated, the State will require that industrial users belonging to those subcategories sample and analyze their effluent to quantify the amount of pollutants regulated by the standard being discharged by that industrial user.

The above procedures can be characterized as a 2-part program. Initially, prior to the development of sampling and analytical techniques for many of the complex pollutants regulated within the 21 industrial categories (and approximately 400 industrial subcategories) set forth in the NRDC Consent Decree, the State will focus on identifying and quantifying only those pollutants which interfere with the operation of the treatment works. Then, as Federal pretreatment standards for the 129 pollutants in the 21 industrial categories emerge, along with recommended sampling and analytical techniques for such pollutants, the State will be required to elicit specific quantitative information on the character and volume of pollutants discharged by indstrial users regulated by Federal standards.

POTWs which are required to develop a POTW pretreatment program are responsible for carrying out the industrial waste inventory in lieu of the State (see 403.8(f)(ii) and step 2 of the municipal pretreatment compliance schedule). The State should recommend that this 2-step program be used by such POTWs.

The State should indicate to EPA by October 10 its current ability to carry out the industrial waste characterization program described above. Particular attention should be paid to the availability of resources to implement this survey, the technical ability of the State to sample influent to POTWs as required by step 3 above, and the State's technical ability to develop effluent limitations for industrial users where necessary to control the introduction of pollutants which interfere with the operation of the POTW. The State should discuss those resources and technical abilities which it will need to acquire to fully implement the components of the industrial waste inventory described above.

7. Procedures/Funding to Make Determinations on Requests for Fundamentally Different Factor Variances

Section 403.13 of the pretreatment regulation provides that States will be responsible for considering requests for fundamentally different factors variances. Any interested person believing that factors relating to an industrial user are fundamentally different from the factors considered during the development of a categorial pretreatment standard applicable to that user may apply for a fundamentally different factors variance allowing a modification of the discharge limit specified in that standard.

The State must have procedures to review such requests, and make a determination to deny the request or recommend to EPA that the request be approved. In making this determination, the State must consider the factors outlined in 403.13(c) and (d). The State should submit to EPA by October 10, 1978, a discussion of its current ability to consider requests for fundamentally different factor variances. Emphasis should be placed on current funding availability and projected funding needs. In addition, the State should identify the existing or required technical expertise it will need to evaluate the various factors listed in 403.13(c) and (d).

8. Procedures/Funding to Ensure Compliance with Pretreatment Standards and Permit Conditions

Where a POTW is not required to develop a POTW pretreatment program, the State will be required to ensure that industrial users of that POTW subject to pretreatment standards comply with those standards. In order to do so, the State must develop procedures which include the following:

- Where State law provides adequate authority, the State should have the technical ability to review the technology which the industry proposes to install in order to meet State or Federally imposed pretreatment standards.

- Once the compliance date for a pretreatment standard has passed, the State must have procedures to receive and analyze the report submitted by the industry, in compliance with the requirements of 403.12(d), indicating whether or not the industry has complied with applicable effluent limitations.

- The State must develop the administrative and technical ability to receive and analyze the periodic reports submitted by industrial users indicating continued compliance with pretreatment standards (see 403.12(e)).

- The State must ensure that it has adequate resources and technical expertise to determine, independent of reports submitted by the industrial user, that the user is in compliance with applicable pretreatment standards. For example, the State should have procedures for scheduling periodic checks on industrial users to spot-check compliance, sampling the effluent at the industrial sources and analyzing this effluent to ensure compliance with applicable limitations.

Where a POTW pretreatment program has been developed and the POTW has been granted a removal allowance for certain pollutants, the State must have procedures to:

- receive and analyze periodic reports from the POTW indicating continued removal at the rate allowed by the POTW's permit and continued compliance with sludge requirements;

- sample and analyze the influent to and effluent from the POTW to determine, independent of reports submitted by the POTW, that the POTW is maintaining the approved level of removal and is in compliance with all applicable sludge requirements.

It is recognized that the sampling and analytical requirements explained in this section may impose a substantial resource burden on the State. While it is preferred that the State develop its own technical expertise, an acceptable alternative would be for the State to contract with private consultants, universities or other groups with sufficient technical expertise to carry out the sampling and analytical requirements described in this section.

"Incorporation of Pretreatment Program Development Compliance Schedules into POTW NPDES Permits", dated January 28, 1980.

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

JAN 28 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

n-80-3

TO: Regional Enforcement Division Directors
Regional Permits Branch Chiefs

FROM: Acting Deputy Assistant Administrator
for Water Enforcement (EN-335)

SUBJECT: Incorporation of Pretreatment Program Development Compliance Schedules Into POTW NPDES Permits

The General Pretreatment Regulation (40 CFR Part 403) requires that certain publicly owned treatment works (POTWs) develop programs to ensure compliance with pretreatment discharge standards by nondomestic sources discharging into the POTW. A necessary first step in developing these programs is the insertion of a compliance schedule for program development in the POTW's NPDES permit. The purpose of this memorandum is to re-emphasize the importance of incorporating pretreatment compliance schedules into all appropriate permits at the earliest possible time.

BACKGROUND

It is the intention of the Clean Water Act and the National Pretreatment Strategy that the primary responsibility for enforcing pretreatment standards be delegated to local POTWs. This is to be accomplished by EPA and NPDES States overseeing the development of POTW pretreatment programs meeting the requirements of the General Pretreatment Regulation. Section 403.8(d) of that regulation requires that,

> If the POTW* does not have an approved Pretreatment Program at the time the POTWs' existing Permit is reissued or modified, the reissued or modified Permit will contain the shortest reasonable compliance schedule, not to exceed three years or July 1, 1983, whichever is sooner, for the development of the legal authority, procedures and funding required by paragraph (f) of this section. Where the POTW is located in an NPDES State currently without authority to require a POTW Pretreatment Program, the Permit shall incorporate a modification or termination clause as provided for in section 403.10(d) and the compliance schedule shall be incorporated when the Permit is modified or reissued pursuant to such clause.

* As defined by section 403.8(a)

The insertion of these compliance schedules is a critical element in launching the development of many POTW pretreatment programs. Compliance schedules also serve as a means for EPA and NPDES States to track program development.

Those POTWs required to develop a pretreatment program have been identified by States and Regional offices. Preliminary information on these POTWs was forwarded to Headquarters at the start of 1979. Since that time, the Regions and States should have developed a firmer list of exactly which POTWs will need pretreatment programs. For those POTWs so identified, the task of incorporating compliance schedules should be well underway.

CURRENT STATUS AND NECESSARY ACTIONS

Despite the importance of compliance schedules to program development and the need for their swift incorporation if regulatory deadlines are to be met, there have been indications that schedules have not been inserted in all appropriate permits. While some Regions and States have moved forward strongly in this area, others have not. If the pretreatment program is to be successful and the momentum for local program development that has been generated is to be maintained, it is essential that this activity is given appropriate priority.

In order to meet both the July 1, 1983 program approval deadline and allow POTWs adequate time for program development, compliance schedules should be established as soon as possible. By inserting schedules in permits as they expire or are modified, the disruption and waste of resources created by reopening permits solely to incorporate pretreatment compliance schedules will be avoided. Although it is desirable to avoid opening permits just to insert pretreatment schedules, this step may become necessary as the 1983 deadline approaches. As first round permits expire in FY 80, the insertion of compliance schedules will be a priority activity in this fiscal year. Less than complete attention to this activity will create a backlog with potentially disastrous program consequences.

I understand that the timely insertion of compliance schedules has been made more difficult by the delay in approval of State pretreatment programs. However, in many cases, this delay need not affect the development of POTW compliance schedules. The General Pretreatment Regulation and the National Pretreatment Strategy make it clear that those States which currently have the authority to reissue, modify or reopen POTW permits to incorporate pretreatment requirements should exercise that authority and put compliance schedules into expiring permits or those being modified for some other reason. This should be the case with the majority of NPDES States. Those few States which at this time lack the necessary authority to incorporate compliance schedules

should continue to put modification clauses in permits. These modification clauses should require that such permits be promptly reissued or modified after State pretreatment program approval to incorporate an approved POTW program or a compliance schedule for the development of a pretreatment program. To alleviate future delays, all States should move quickly to receive State program approval.

The incorporation of compliance schedules into permits should not be a major resource burden on either Regional offices or States. Individual schedules should not vary a great deal from the model provided in guidance material. A model compliance schedule accompanied by a detailed explanation of how to develop such a schedule was included in the November 29, 1978 memorandum from the Deputy Assistant Administrator for Water Enforcement and the Deputy Assistant Administrator for Water Programs Operations which is attached for your assistance. This information was expanded upon in the Pretreatment Guidance Document for NPDES States that was distributed in February, 1979. Additional copies of this Document are available from Headquarters Permits Division. If these models are followed, it should require a minimal amount of resources to carry out this critical function. The investment of resources in this effort now will yield a long term resource saving for EPA and States. Pretreatment programs developed as a result of these compliance schedules will shift most program responsibilities to POTWs.

CONCLUSION

To allow us to evaluate the progress of this program, and to help us plan where we can best utilize our contract dollars, we ask that you provide us with the following information on compliance schedule activities:

- Your current count of the number of POTWs or POTW Authorities which are required to develop pretreatment programs.
- Of those POTWs or POTW Authorities required to develop programs, how many have pretreatment compliance schedules? How many have modification clauses?
- How many POTWs or POTW Authorities, required to develop pretreatment programs, do not yet have either a compliance schedule or a modification clause?
- How do you plan to deal with those POTWs or POTW Authorities with neither a compliance schedule nor a modification clause, in a manner that will allow them sufficient time to develop a program prior to the July 1, 1983 deadline?

For purposes of answering the first three questions, we have attached a form that can be filled in for each State in your Region. Because of the need to finalize our contract planning process, we need this information as soon as possible and would like to have it within four weeks of your receipt of this memorandum. Please send the completed forms to Michael Kerner, Permits Division, (EN-336), US EPA, 401 M Street SW, Washington, D.C. 20460. If you have any questions on this or any other aspect of the National Pretreatment Program you can call Michael Kerner at (202) 755-0750 (FTS).

By diligently pursuing this compliance schedule activity, we should be able to prevent any further program slippage and encourage the rapid and successful development of this important pollution control program.

Leonard A. Miller

Attachments

"Statutory Deadlines for Compliance by Publicly Owned Treatment Works Under the CWA", dated March 4, 1983.

1670

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

4 MAR 1983

MEMORANDUM

SUBJECT: Statutory Deadlines for Compliance by Publicly Owned Treatment Works under the Clean Water Act

FROM: Robert M. Perry
Associate Administrator
and General Counsel

TO: Frederic A. Eidsness, Jr.
Assistant Administrator for Water

ISSUE

Section 21 of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, amended §301(i) of the Clean Water Act by substituting "July 1, 1988," for "July 1, 1983." What effect, if any, does this amendment have on the statutory compliance deadlines for publicly owned treatment works contained in §301(b)(1)(B) and §301(b)(1)(C), and on the authority of EPA and States to establish compliance schedules by the exercise of enforcement discretion?

ANSWER

Section 21 of the 1981 Amendments does not amend the July 1, 1977, compliance deadlines for POTWs contained in §301(b)(1)(B) and §301(b)(1)(C). However, under §301(i) as amended, EPA and States with approved NPDES programs may extend this deadline in NPDES permits up to, but not beyond, July 1, 1988, for POTWs which satisfy the criteria in §301(i) and implementing regulations. Although permits for POTWs which do not qualify for §301(i) extensions must require immediate compliance, EPA and States may use their enforcement discretion to establish compliance schedules in the context of enforcement actions, such as administrative orders and judicial decrees.

DISCUSSION

In 1972, Congress established July 1, 1977, as a statutory deadline by which publicly owned treatment works (POTWs) were required to comply with effluent limitations based on secondary treatment (§301(b)(1)(B)) and any more stringent limitations, including those necessary to meet water quality standards (§301(b)(1)(C)). Numerous administrative and judicial decisions held that the Agency lacked authority to extend the date for compliance in NPDES permits beyond the statutory deadline.

schedule did not extend beyond the statutory deadline, there would probably not be a need to resort to an enforcement action.) The quotation from the State Water Control Board case cited above supports this position. Moreover, the recent Supreme Court decision in Weinberger v. Romero-Barcello, 50 L.W. 4434 (April 27, 1982) provides strong confirmation of this view.

It is important to emphasize the limited purpose and effect of an administrative order, or a judicial decree, that establishes a compliance schedule extending beyond a statutory deadline. Such an order or decree does not "extend the deadline," in a legal sense, for neither the Agency nor the judiciary has authority to amend or disregard a statute.[2] Rather, such orders and decrees are a means of enforcing the statute, and achieving compliance. Neither administrative orders nor judicial decrees "allow" or "permit" continued violations of the law, but rather require compliance with it, as expeditiously as possible.

In summary, the 1977 deadlines in §§301(b)(1)(B) and 301(b)(1)(C) remain in effect for any POTW which does not qualify for an extension under §301(i). However, both judicial interpretation and Congressional acquiesence support EPA's view that the Agency may, and should, use enforcement discretion in a responsible manner to establish expeditious but realistic compliance schedules for POTWs. Use of judicial enforcement and §309(a)(5)(A) orders for this purpose, in appropriate cases, are responsible methods by which to exercise that discretion.

[2] Therefore, courts have held that issuance of an administrative order - even if the discharger complies with it - does not absolve the discharger from liability for the violation, or preclude the Agency from commencing a judicial enforcement action based on the same violation. United States v. Earth Sciences, Inc., 599 F. 2d 368 (10th Cir. 1979). United States v. Outboard Marine Corp., 12 ERC 1346 (N.D. Ill. 1978). United States v. Detrex Chemical Industries, Inc., 393 F. Supp 735 (N.D. Ohio 1975) Nor does issuance of an administrative order preclude citizens' suits against the discharger under §505 of the Act.

Bethlehem Steel Corp. v. Train, 544 F.2d 657 (3d Cir. 1976); United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977); Republic Steel Corp. v. Costle, 581 F.2d 1228 (6th Cir. 1978).

With respect to POTWs in particular, the Fourth Circuit held that EPA lacked authority to extend the 1977 deadline in an NPDES permit issued to a POTW, notwithstanding that the Federal Government had illegally impounded Federal construction grant money. State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977). However, the court also noted that the Agency had discretion in enforcing the deadline, and that it expected the Agency to exercise its discretion in a responsible manner:

> Our holding in this case does not mean that, absent Congressional action, severe sanctions will inevitably be imposed on municipalities who, despite good faith efforts, are economically or physically unable to comply with the 1977 deadline. We fully expect that, in the exercise of its prosecutorial discretion, EPA will decline to bring enforcement proceedings against such municipalities. Furthermore, in cases where enforcement proceedings are brought, whether by EPA or by private citizens, the courts retain equitable discretion to determine whether and to what extent fines and injunctive sanctions should be imposed for violations brought about by good faith inability to comply with the deadline. In exercising such discretion, EPA and the district courts should, of course, consider the extent to which a community's inability to comply results from municipal profligacy. 559 F.2d at 927-28.

Realizing that many dischargers would fail to meet the 1977 deadline despite good faith efforts, EPA formalized a system by which to establish realistic compliance schedules through the exercise of enforcement discretion. Under this policy, EPA and NPDES States issued "enforcement compliance schedule letters" (ECSLs) to POTWs and industrial dischargers which were unable to meet the July 1, 1977, deadline despite all good faith efforts. An ECSL contained: 1) an expeditious but realistic compliance schedule; 2) the discharger's commitment to abide by the schedule and acknowledgement that the schedule was achievable; and 3) the Agency's commitment not to take further enforcement action if the discharger complied with the schedule.

The Clean Water Act Amendments of 1977 addressed the issue of noncompliance with the 1977 deadline in different ways for municipal dischargers and industrial dischargers. For direct industrial dischargers, Congress chose not to allow any extensions of the 1977 deadline to be contained in NPDES permits. Rather, Congress directed the Agency to use its enforcement discretion in such cases, and authorized EPA to issue "extension orders" under the authority of §309(a)(5)(B). Thus, for industrial dischargers, Congress clearly defined the terms upon which it authorized the

Agency to use its enforcement authority to address noncompliance with the 1977 deadline.

Congress took a different approach for POTWs. Section 301(i)(1) authorized EPA and NPDES States to extend, in NPDES permits, the July 1, 1977, deadline up to July 1, 1983, for POTWs which met certain criteria. EPA was able to establish compliance schedules for most POTWs in §301(i) permits, and stopped issuing ECSLs. As 1983 approached, it became clear that many POTWs could not comply by July 1, 1983, and EPA again needed a device to establish realistic compliance schedules. Rather than resurrect the ECSL policy, EPA decided to use its enforcement authority under §309(a)(5)(A). This subsection, added by the 1977 CWA Amendments, authorizes EPA to issue administrative orders which "specify a time for compliance . . . not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." The October 1979 National Municipal Policy and Strategy directed EPA Regions to issue §309(a)(5)(A) orders to POTWs, establishing compliance schedules which could exceed the 1977 deadline, for secondary treatment, but which were not to exceed the 1983 deadline for the more stringent "best practicable waste treatment technology over the life of the works" ("BPWTT") required by §301(b)(2)(B).

In the 1981 CWA Amendments, Congress chose not to supercede the Agency's practice of using §309(a)(5)(A) orders as a means of establishing compliance schedules for POTWs through the use of enforcement discretion. However, Congress repealed §301(b)(2)(B), thereby eliminating the major reason for requiring that such orders not extend beyond July 1, 1983. Congress also amended §301(i) by substituting "July 1, 1988" for "July 1, 1983," wherever the latter appeared, thus allowing NPDES permits for qualifying POTW's to contain compliance schedules up to July 1, 1988.

However, Congress did not modify the 1977 statutory deadline contained in Section 301(b). In fact, §21(a) of the 1981 amendments explicitly states that the Amendments are not intended to extend schedules of compliance then in effect, except where reductions in financial assistance or changed conditions affecting construction beyond the control of the operator made it impossible to complete construction by July 1, 1983.

There is even stronger support for the authority of the Agency (acting through the Department of Justice) and the district courts to establish compliance schedules in judgments entered in civil enforcement actions, including compliance schedules that extend beyond a statutory deadline.[1] (Indeed, if the compliance

[1] As you are aware, the Administrator has issued a policy on enforcement of the December 31, 1982 deadline for attainment of primary ambient standards under the Clean Air Act. This policy assumes that equitable relief may be obtained in judicial enforcement proceedings.

"Example Language for Modifying NPDES Permits for Pretreatment Program Approval", dated September 22, 1983.

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

OFFICE OF
WATER

SEP 22 1983

MEMORANDUM

SUBJECT: Example Language for Modifying NPDES Permits for Pretreatment Program Approval

FROM: Martha G. Prothro, Director
Permits Division (EN-336) MGP

TO: Water Management Division Directors

There are over 1700 POTWs that must develop local pretreatment programs. To date, over 100 POTW programs have been approved and many of the remaining POTWs have submitted or are very close to submitting a final program. Therefore, many programs will be approved in the next several months.

After an industrial pretreatment program is approved, the POTW's discharge permit must be modified or reissued to incorporate the program as an enforceable component as required in 40 CFR §403.8(c). The modification of permits is authorized under 40 CFR §122.62(a)(7) where reopener conditions have been used in the permits. In 40 CFR §122.44(j)(2), permits must include conditions such that, ". . . The local program shall be incorporated into the permit as described in 40 CFR Part 403. The program shall require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR Part 403." Reporting requirements for the POTW that are inserted in the modified permit are covered under 40 CFR §122.48(c) which references §122.44.

There have been several requests from Regional and State agency personnel for help with appropriate permit language. We have reviewed example language for modifying permits from several Regions and States (attached) and have developed example language ourselves. While there are a number of differences among the examples, you will notice that a common element among the examples is the requirement that the POTW submit an annual report on pretreatment activities. Such reports usually require information on the POTW pretreatment activities during the past year, a summary of its effectiveness and proposed program modifications.

The reports summarize industrial user monitoring, compliance and enforcement activities conducted over the past year. Regardless of which example modification language your staff chooses to adopt or modify, we strongly recommend and advise you to include an annual reporting element in the modified permit.

I request that you and your pretreatment staff review the attached draft permit modification materials and submit comments to Dr. Gallup of my staff by October 14. Please call me or Jim Gallup at FTS 755-0750 if you have any questions.

Attachments

cc: Pretreatment Coordinators

STANDARDIZED LANGUAGE FOR MODIFYING NPDES PERMITS FOR PRETREATMENT PROGRAM APPROVAL

The goals of the National Pretreatment Program are to improve opportunities to recycle and reclaim wastewaters and sludges, to prevent pass through of pollutants into receiving waters, and to prevent interference with the operation of the publicly owned treatment works (POTWs) when hazardous or toxic industrial wastes are discharged into the sewage system. The primary responsibility for developing pretreatment programs and for enforcing national pretreatment standards for industries rests with the local POTW authorities. EPA estimates that more than 1,700 POTW Authorities must develop programs which will protect over 2,000 permitted municipal treatment facilities.

EPA and State regulatory agencies participate in the pretreatment program by overseeing the development, implementation, and continued effectiveness of local pretreatment programs. In non-NPDES States, EPA issues or modifies permits and retains authority for the pretreatment program, although the States may participate in some activities. In NPDES States without pretreatment authority, EPA reviews and approves POTW submissions, but the State is responsible for permit modification and permit compliance. In these cases, it is important for EPA to develop an agreement with the State to ensure that permits are modified to reflect pretreatment program approval. Program approval and permit modifications are equally important in NPDES States with Pretreatment authority. EPA can obtain some consistency and ease the States' workload by providing standard permit modification language to them.

POTWs have been notified by EPA and State agencies of the requirement to develop a local program. Program development compliance schedules have been inserted into the POTWs' NPDES, or State-issued permits, making development and submission of local pretreatment programs an integral and enforceable component of the permits. Compliance schedules usually require POTWs to develop and document the authorities, information, and procedures necessary to implement the General Pretreatment Regulations. Municipalities develop the local program with technical and financial assistance from EPA and the States.

Generally, a POTW prepares a plan describing how it will implement the pretreatment program in its service area and submits the plan to the EPA or the delegated State regulatory agency for review and approval. EPA or the delegated State must then review the submission to ensure that:

- All necessary legal authorities are in place.
- The technical information presented demonstrates the POTW's understanding of the industrial community that will be controlled (type, size, pollutants, necessary pollutants limits, problems to be addressed, etc.).
- Administrative, technical and legal procedures for implementing the program are consistent with the complexity of the industrial community served.
- The estimated cost of implementing the program (including manpower and equipment), based on the procedures established, is reasonable and revenue sources are available to ensure continued, adequate funding.
- The objectives and requirements of the General Pretreatment Regulations are fulfilled by the planned program.

It should be reiterated that the POTW's submission at this point represents only a plan for operating a program to comply with the regulatory requirements. To date, more than 100 POTW pretreatment programs have been approved nationwide. Most of the remaining POTWs have already submitted portions of their programs for interim comment or review. Accordingly, a large number of programs should soon be ready for approval without substantial additional effort.

After approval, the POTW begins implementing the pretreatment program plan subject to oversight by EPA or the State regulatory agency. At this time, the Approval Authority turns from considering program development problems to considering implementation, verification and compliance issues, such as:

- Documentation of POTWs' Compliance with Approved Programs.

  For the individual case this means that each POTW must demonstrate, through reporting requirements, that the elements of its pretreatment program are actually being carried out. In the general case, the Approval Authority will have to plan oversight and surveillance activities that regularly cover all POTWs within its jurisdiction.

- Documentation of the Effectiveness of POTW Programs.

  A POTW complying with provisions of its approved pretreatment program may still not be adequately protecting site-specific receiving water quality and sludge disposal options, especially as new requirements are developed. Appropriate measures must be developed to ensure that local environmental goals are being met by the POTW and that improvements can be evaluated.

In addition to considering these issues, Section 403.8(c) of the General Pretreatment Regulations specifies that the NPDES permit must be modified or reissued to incorporate the conditions of the approved program as an enforceable component. The language placed in the permit must take into account the issues mentioned above and must ensure that:

- The general requirements of the National Pretreatment Program and the specific requirements of the local program will be implemented in a manner that achieves the objectives of preventing pass through, interference and sludge contamination.
- The Approval Authority will be able to bring about POTW compliance with the responsibilities established in the regulations and the approved local program submission.
- The POTW understands its obligations and the standards and benchmarks against which its performance will be judged.

Permit modification, then, is a very important part of the overall process of implementing the National Pretreatment Program. Because there are so many important issues to be addressed in local programs, and because so many agencies will be responsible for permit modification and oversight activities, we have developed the attached model permit language that can be adapted to most POTWs across the country. The attachment includes standard permit modification language (adapted from actual permit language from ___ Regions and ___ States) that can be used to incorporate into the permit a POTW's approved pretreatment program and other conditions and requirements with which the POTW must comply.

This package also includes examples of special condition clauses. In certain circumstances, additional substantive or notification permit requirements may be appropriate for a particular POTW. Some examples of situations that might indicate the need for special pretreatment permit conditions are listed below.

- Where the industrial flow represents a very large percentage of the total flow of the POTW.
- Where only one or two major industrial user(s) discharge to the POTW.
- Where industrial users have the potential to discharge highly toxic, hazardous, or unusual wastes.
- Where there are a large number or variety or industrial users.
- Where a POTW has a history of NPDES permit violations.
- Where the receiving waters have unusual water quality needs because of sensitive species or intolerance to high or varying pollutants loads.
- Where a POTW's wastewater or sludge is reused on agricultural or recreational land or where treated sludge is sold commercially.
- Where a POTW receives wastes from septage haulers, or other waste haulers that could be handling hazardous wastes that have a potential for adverse impacts on the treatment plant.
- Where the POTW service area is large or made up of numerous political jurisdictions requiring cooperation and coordination between several local agencies.

For these more difficult situations, we have developed five special conditions as part of the following standard permit language. These may be useful when tailored to a POTW with special problems or circumstances that cannot be covered by the more general, standardized language.

SUGGESTED PRETREATMENT LANGUAGE
FOR NPDES PERMITS

The following language should be inserted into the "Other Requirements" section of the POTW's NPDES permit after the local pretreatment program is approved.

Industrial Pretreatment Program

1. The permittee is responsible for enforcing any National Pretreatment Standards [40 CFR 403.5] (e.g., prohibited discharges, Categorical Standards, locally developed effluent limits) in accordance with Section 307(b) and (c) of the Act. The permittee shall establish and enforce specific limits to implement the provisions of 40 CFR 403.5(a) and (b) as required by 40 CFR 403.5(c). These locally established effluent limitations shall be defined as National Pretreatment Standards.

2. The permittee shall implement the Industrial Pretreatment Program in accordance with the legal authorities, policies, procedures, and financial provisions described in the permittee's Pretreatment Program submission (and related documents) entitled, _____ and dated, _____, and the General Pretreatment Regulations (40 CFR 403). The permittee shall also maintain adequate funding levels to accomplish the objectives of the pretreatment program.

3. The permittee shall provide the EPA or State with an annual report that briefly describes the permittee's program activities over the previous twelve months. The permittee must also report on the pretreatment program activities of all participating agencies [name them], if more than one jurisdiction is involved in the local program. This report shall be submitted no later than _____ of each year and shall include:

   (a) An updated list of the permittee's industrial users, or a list of deletions and additions keyed to a previously submitted list. A summary of the number of industrial user permits (or equivalent) issued this past year and the total (cumulative) issued;

   (b) A summary of the compliance/enforcement activities during the past year including total number of enforcement actions any discharge restrictions or denials against industrial users and the amount of any penalties collected. In addition the summary shall contain the number & percent of industrial users in compliance with:
      (1) Baseline Monitoring Report requirements;
      (2) Categorical Standards; or
      (3) Local limits

   (c) A summary of the monitoring activities conducted during the past year to gather data about the industrial users, including inspections to verify baseline monitoring reports;

   (d) A narrative description of program activities during the past year including a general summary of the effectiveness of the program in controlling industrial waste. A description and explanation of all proposed substantive changes to the permittee's pretreatment program. Substantive changes include, but are not limited to, any major modification in the program's administrative structure or legal authority, a significant alteration of the scope of the monitoring program, or a change in the level of funding for the program, a major change in the staffing or equipment used to administer the program, change in the sewer use ordinance, regulations, or rules, a proposed change or addition to locally established effluent limits (pursuant to 40 CFR 403.5(c));

(e) A summary of analytical results from flow proportioned, composite sampling for [list priority pollutants] at the POTW influent, effluent, and sludge for the same [number of days] period and bioassay data for (list pollutants) for a (number of days) period; and

(f) For Baseline Monitoring Reports (where applicable), a summary of the industrial users notified during the past year, the total cumulative notifications, the number of reports received/approved during the year and total cumulative.

(g) If EPA (or State) does not object to any proposed modifications described in the annual report within 90 days, the changes shall be considered approved.

4. The EPA (or State) has the right to inspect or copy records or to initiate enforcement actions against an industrial user or the permittee as provided in Sections 308 and 309 of the Act.

5. EPA (or State) retains the right to require the POTW to institute changes to its local pretreatment program:

(a) If the program is not implemented in a way that satisfies the requirements of 40 CFR 403;

(b) If problems such as interference, pass through, or sludge contamination develop or continue;

(c) If other Federal, State, or local requirements (e.g., water quality standards) change.

Special Conditions (Case-by-Case)

The following types of requirements should be inserted into a POTW's NPDES permit when special circumstances, such as continuing noncompliance or significant or unusual industrial discharges, which could cause interference, pass through, or sludge contamination, are encountered.

1. The permittee shall notify EPA (or State) 60 days prior to any major proposed change in sludge disposal method. EPA (or State) may require additional pretreatment measures or controls to prevent or abate an interference incident relating to sludge use or disposal.

2. The permittee shall establish and enforce regulations to control the introduction of septage waste from commercial septage haulers into the POTW. These local regulations shall be subject to approval by EPA (or State).

3. The permittee shall monitor the following major industrial users for the pollutants of concern on a [frequency, e.g., monthly, quarterly] basis and forward a copy of the results to EPA (or State).

List Industrial Users	List Pollutants of Concern
a.	i.
b.	ii.
c.	iii.

4. The permittee shall sample and analyze its influent, effluent, and sludge for [list toxic pollutants] on a [frequency] basis and forward a copy of the results to EPA (or State).

5. The permittee shall monitor the receiving waters for [list toxic pollutants] on a [frequency] at [describe monitoring site location] and forward a copy of the results to EPA (or State).

Implementation of G-J Town Pretreatment Program

After the POTW pretreatment program meets all requirements under §403.9(b) and is approved by the Approval Authority, the G-J town Joint Sewer Board's NPDES permits must be modified to include permit conditions for Industrial pretreatment program implementation.

A set of the special permit requirements has been drafted as follows:

a. The permittee has been delegated primary responsibility for enforcing against discharges prohibited by 40 CFR 403.56 and applying and enforcing any National Pretreatment Standards established by the United States Environmental Protection Agency in accordance with section 307(b) and (c) of the Act.

b. The permittee shall implement the G-J town Industrial Pretreatment Program in accordance with the legal authorities, policies, and procedures described in the permittee's Pretreatment Program document entitled, "Industrial Pretreatment Program, G-J town" (Date to be inserted).

c. The permittee shall provide the State of Department of Environmental Conservation and EPA with a semi-annual report describing the permittee's pretreatment program activities over the previous calendar months in accordance with 40 CFR 403.12.

d. Pretreatment standards (40 CFR 403.5) prohibit the introduction of the following pollutants into the waste treatment system:

- o Pollutants which create a fire or explosion hazard in the POTW,
- o Pollutants which will cause corrosive structural damage to the POTW, but in no case, discharge with a pH lower than 5.0,
- o Solid or viscous pollutants in amounts which will cause destruction to the flow in sewers, or other interference with operation of the POTWs.
- o Any pollutant, including oxygen demanding pollutants (BOD_5, etc.), released in a discharge at such a volume or strength as to cause interference in the POTW, and,
- o Heat in amounts which will inhibit biological activity in the POTW, but in no case, heat in such quantities that the influent to the sewage treatment works exceeds 104°F (40°C).

e. In addition to the general limitations expressed in paragraph d above, applicable National Categorical Pretreatment Standards must be met by all industrial users of the POTW.

f. USEPA and the permit issuing authority (DEC) retains the right to take legal action against the industrial user and/or the permittee for those cases where a permit violation has occurred because of the failure of an industrial user to meet an applicable pretreatment standard.

NATIONAL PRETREATMENT PROGRAM
MEMORANDUM OF AGREEMENT
BETWEEN THE
CITY OF WESTMINSTER, COLORADO
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION VIII

The United States Environmental Protection Agency, Region VIII (hereinafter, the "EPA") hereby approves the City of Westminster's (hereinafter, the "City") Pretreatment Program described in the City's November 15, 1982 submittal document entitled "Industrial Pretreatment Program", as meeting the requirements of Section 307(b) and (c) of the Clean Water Act (hereinafter, the "Act") and regulations promulgated thereunder. Further, to define the responsibilities for the establishment and enforcement of National Pretreatment Standards for existing and new sources under Section 307 (b) and (c) of the Act, the City and EPA hereby enter into the following agreement:

1. The City has primary responsibility for enforcing against discharges prohibited by 40 CFR 403.5, and applying and enforcing any National Pretreatment Standards established by the United States Environmental Protection Agency in accordance with Section 307(b) and (c) of the Act.

2. The City shall implement the Industrial Pretreatment Program in accordance with the legal authorities, policies, and procedures described in the permittee's Pretreatment Program document entitled, "Industrial Pretreatment Program", November 1982. Such program commits the City to do the following:

   a. Carry out inspection, surveillance, and monitoring procedures that will determine, independent of information supplied by the industrial user, whether the industrial user is in compliance with the pretreatment standards;

   b. Require development, as necessary, of compliance schedules by each industrial user for the installation of control technologies to meet applicable pretreatment standards;

   c. Maintain and update, as necessary, records identifying the nature and character of industrial user inputs;

   d. Obtain appropriate remedies for noncompliance by any industrial user with any pretreatment standard and/or requirement; and,

   e. Maintain an adequate revenue structure for continued implementation of the pretreatment program.

3. The City shall provide the United States Environmental Protection Agency and the State of Colorado with an annual report briefly describing the City's pretreatment program activities over the previous calendar year. Such report shall be submitted no later than March 28th of each year and shall include:

a. An updated listing of the City's industrial users.

b. A descriptive summary of the compliance activities including number of major enforcement actions, (i.e., administrative orders, penalties, civil actions, etc.).

c. An assessment of the compliance status of the City's industrial users and the effectiveness of the City's pretreatment program in meeting its needs and objectives.

d. A description of all substantive changes made to the permittee's pretreatment program description referenced in paragraph 2. Substantive changes include, but are not limited to, any change in any ordinance, major modification in the program's administrative structure or operating agreement(s), a significant reduction in monitoring, or a change in the method of funding the program.

4. Pretreatment standards (40 CFR 403.5) prohibit the introduction of the following pollutants into the waste treatment system from <u>any</u> source of nondomestic discharge:

a. Pollutants which create a fire or explosion hazard in the publicly owned treatment works (POTW);

b. Pollutants which will cause corrosive structural damage to the POTW, but in no case, discharges with a pH lower than 5.0;

c. Solid or viscous pollutants in amounts which will cause destruction to the flow in sewers, or other interference with operation of the POTW;

d. Any pollutant, including oxygen demanding pollutants (BOD_5, etc.), released in a discharge at such a volume or strength as to cause interference in the POTW; and,

e. Heat in amounts which will inhibit biological activity in the POTW, but in no case, heat in such quantities that the influent to the sewage treatment works exceeds 104° F (40° C).

5. In addition to the general limitations expressed in paragraph 4. above, applicable National Categorical Pretreatment Standards must be met by all industrial users of the POTW. These standards are published in the Federal Regulations at 40 CFR 405 et. seq.

6. The Agreement contained herein shall be incorporated, as soon as possible, in the City's NPDES permit. Noncompliance with any of these requirements shall be subject to the same enforcement procedures as any permit violation.

Nothing in this Agreement is intended to affect any Pretreatment requirement including any standards or prohibitions, established by state or local law as long as the state and local requirements are not less stringent than any set forth in the National Pretreatment Program Standards, or other requirements or prohibitions established under the Act or regulations promulgated thereunder.

Nothing in this Agreement shall be construed to limit the authority of the U. S. EPA to take action pursuant to Sections 204, 208, 301,304, 306, 307, 308, 309, 311, 402, 404, 405, 501, or other Sections of the Clean Water Act of 1977 (33 USC 1251 et seq).

This Agreement will become effective upon the final date of signature.

City of Westminster, Colorado

By_____

Date_____

U.S. Environmental Protection Agency
Region VIII

By_____

Date_____

State of Colorado Department of Health
Water Quality Control Division

By_____

Date_____

DRAFT COPY
SUBJECT TO REVISION

ATTACHMENT 3

OTHER REQUIREMENTS

APPROVED PRETREATMENT PROGRAM CONDITIONS

Under the authority of (Section 307(b) and (c) and 402(b)(8) of the Clean Water Act or applicable State law) and implementing regulations (40 CFR Part 403), the permittee's final pretreatment program application as submitted on _____ is hereby approved. The permittee, hereinafter referred to as the "Control Authority", shall apply and enforce against violations of categorical pretreatment standards promulgated under Section 307(b) and (c) of the Act and prohibitive discharge standards as set forth in 40 CFR Part 403.5. The Control Authority shall implement the conditions of the Approved Pretreatment Program in the following order:

A. APPROVED PRETREATMENT PROGRAM CONDITIONS

1. Apply and enforce the legal authorities and procedures as approved on _____ which shall include, but not be limited to, those specific local effluent limitations established pursuant to 40 CFR 403.5(c) and enforceable on industrial users of the system for the parameters listed in Part III, Section D of this prmit in accordance with the approved program plan industrial allocation scheme.

2. Maintain and update, as necessary, records indentifying the nature, character, and volume of pollutants contributed by industrial users to the publicly owned treatment works (POTW).

3. Enforce and obtain appropriate remedies for non-compliance by any industrial user with any applicable pretreatment standard and requirement as defined by Section 307(b) and (c) of the Act, Section 403.5, and any State or local requirement, whichever is more stringent.

4. Issue (wastewater discharge permits, orders, contracts, agreements, etc.) to all affected industrial users in accordance with the approved pretreatment program procedures and require the development of compliance schedules, as necessary, by each industrial user for the installation of control technologies to meet applicable pretreatment standards and requirements as required by Section _____ of Sewer Use Ordinance _____.

5. Carry out inspection, surveillance, and monitoring requirements which will determine, independent of information supplied by the industrial user, whether the industrial user is in compliance with the applicable pretreatment standards.

6. Comply with all confidentiality requirements set forth in 40 CFR Part 403.14 as well as the procedures established in the approved pretreatment program.

7. Maintain and adjust, as necessary, revenue sources to ensure adequate equitable and continued pretreatment program implementation costs.

B. REPORTING REQUIREMENTS

The Control Authority shall prepare and submit to the (USEPA, Region V, Permits Section or the State) a report on the _____th of _____ and the _____th of _____ which describes the pretreatment program activities for the (previous calendar year or 6-month period or more frequently as required by the Approval Authority). Such report(s) shall include:

1. An updated listing of the Control Authority's industrial users which identifies additions and deletions of any industrial users from the _____ 19 industrial waste inventory. Reasons shall be provided for the aforementioned additions and removals.

2. A descriptive summary of the compliance activities initiated, ongoing and completed against industrial users which shall include the number of major enforcement actions (i.e. administrative orders, show cause hearings, penalties, civil actions, fines, etc.) for the reporting period.

3. A description of all substantive changes proposed for the Control Authority's program as described in Part III, Section A of this permit. All substantive changes must first be approved by (Agency Name) before formal adoption by the Control Authority. Hereinafter, substantive changes shall include, but not be limited to, any change in the enabling legal authority to administer and enforce pretreatment program conditions and requirements, major modification in the program's administrative procedures or operating agreements(s), a significant reduction in monitoring procedures, a significant change in the financial/revenue system, or a significant change in the local limitations for toxicants enforced and applied to all affected industrial users of the sewage treatment works.

4. A listing of the industrial users who significantly violated applicable pretreatment standards and requirements, as defined by section 403.8(f)(2)(vii) of the General Pretreatment Regulations, for the reporting period.

5. The sampling and analytical results for the specified parameters as contained in Part III, Section C of this permit.

6. (optional) The Control Authority shall submit to the (USEPA, Region V, Permits Section and/or State) by December 31 of each year, the names and address of the tanneries receiving the sulfide waiver pursuant to the procedures and conditions established by 40 CFR 425.04(b) and (c). This report must identify any problems resulting from granting the sulfide waiver as well as any new tanneries tributary to the sewerage system for which the sulfide standards may apply or any tannery receiving the sulfide waiver which no longer is applicable.

7. (optional) The Control Authority shall submit to the (USEPA, Region V, Permits Section or State Permit Section) by December 31 of each year, the name and address of each industrial user that has received a revised discharge limit in accordance with Section 403.7 (Removal Allowance Authority). This report must comply with the signatory and certification requirements of Section 403.12 (l) and (m).

C. SAMPLING AND MONITORING REQUIREMENTS

1. The Control Authority shall sample, analyze and monitor its influent, effluent and sludge in accordance with the techniques prescribed in 40 CFR Part 136 and amendments thereto, in accordance with the specified monitoring frequency and schedule for the following parameters:

(1) Parameters	Units	Frequency	Sample Type	(2) Permittee's
Total Arsenic (As)				
Total Cadmium (Cd)				
Total Chromium (Cr,)				
Total Chromium (Cr)				
Total Copper (Cu)				
Total Cyanide (CN)				
Total Iron (Fe)				
Total Lead (Pb)				
Total Mercury (Hg)				
Total Nickel (Ni)				

(1) Parameters	Units	Frequency	Sample Type	(2) Permittee's
Total Phenols				
Total Silver (Ag)				
Total Zinc (Zn)				
Total Kjeldahl Nitrogen (TKN)				

(1) Approval Authority should include other parameters as needed.
(2) Note whether sampling apply to permitte's influent, effluent and sludge.

D. SPECIAL CONDITIONS

1. At no time shall the following daily influent values be exceeded by the Control Authority for the specified parameters:

Parameters	Mg/l	Pounds / Day
Total Cyanide (Cn)		
Total Cadmium (Cd)		
Total Chromium (Cr, T)		
Total Copper (Cu)		
Total Iron (Fe)		
Total Lead (Pb)		
Total Mercury (Hg)		
Total Nickel (Ni)		
Total Silver (Ag)		
Total Zinc (Zn)		
(Others)		

2. If the sampling data results from Part III, Section C of this permit meet the criteria of 40 CFR 403.5(c), then this permit will be modified to include influent values for these parameters.

3. (optional) The Control Authority shall notify (USEPA, Region V, Permits Section or the State) 60 days prior to any major proposed change in existing sludge disposal practices.

4. (optional) The Control Authority shall monitor the following industrial users discharge for the specified parameters in accordance with the following frequency and schedule and submit the results to (Region V or the State) on the _____th of _____ and the _____the of _____.

List Users	Parameter	Units	Frequency	Sample Type	Notes
a.					
b.					
c.					
(Others)					

E. RETAINER

The USEPA, Region V and the State retains the right to take legal action against the industrial user and/or the Control Authority for those cases where a permit violation has occurred because of the failure of an industrial user's compliance with applicable pretreatment standards and requirements.

PART III

Page 14

A. OTHER REQUIREMENTS

1. Contributing Industries and Pretreatment Requirements

a. The permittee shall operate an industrial pretreatment program in accordance with section 402(b)(8) of the Clean Water Act and the General Pretreatment Regulations (40 CFR Part 403). The program shall also be implemented in accordance with the approved POTW pretreatment program submitted by the permittee which is hereby incorporated by reference.

b. The permittee shall establish and enforce specific limits to implement the provisions of 40 CFR §403.5(a) and (b), as required by 40 CFR §403.5(c). All specific prohibitions or limits developed under this requirement are deemed to be conditions of this permit. The specific prohibitions set out in 40 CFR §403.5(b) shall be enforced by the permittee unless modified under this provision.

c. The permittee shall, prepare annually a list of Industrial Users which, during the past twelve months, have significantly violated pretreatment requirements. This list is to be published annually, in the largest newspaper in the municipality, during the month of _____, with the first publication due _____.

d. In addition, at least 14 days prior to publication, the following information is to be submitted to the EPA and the State for each significantly violating Industrial User:

1. Condition(s) violated and reason(s) for violations(s),

2. Compliance action taken by the City, and

3. Current compliance status.

STATE OF GEORGIA
DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION

A. APPROVED INDUSTRIAL PRETREATMENT PROGRAM FOR PUBLICLY OWNED TREATMENT WORKS (POTW)

1. The terms and conditions of the permittee's approved pretreatment program, approved by the Environmental Protection Division (EPD) on April 8, 1983, (as provided for in Chapter 391-3-6-.09(6b) of the Rules and Regulations for Water Quality Control), shall be enforceable through this permit.

2. Based on the information regarding industrial inputs reported by the permittee pursuant to Part III paragraph B(2), the permittee will be notified by EPD of the availability of industrial effluent guidelines on which to calculate allowable inputs of incompatible pollutants based on best practicable technology for each industry group. Copies of guidelines will be provided as appropriate. Not later than 120 days following receipt of this information, the permittee shall submit to the EPD calculations reflecting allowable inputs from each major contributing industry. The permittee shall also require all such major contributing industries to implement necessary pretreatment requirements, providing EPD with notification of specific actions taken in this regard. At that time, the permit may be amended to reflect the municipal facility's effluent limitations for incompatible pollutants.

3. Starting on April 15, 1984 the permittee shall submit annually to EPD a report to include the following information:

   a. A narrative summary of actions taken by the permittee to insure that all major contributing industries comply with the requirements of the approved pretreatment program.

   b. A list of major contributing industries using the treatment works, divided into SIC categories, which have been issued permits, orders, contracts, or other enforceable documents, and a status of compliance for each Industrial User.

   c. The name and address of each Industrial User that has received a conditionally or provisionally revised discharge limit.

4. The permittee to which reports are submitted by an Industrial User shall retain such reports for a minimum of 3 years and shall make such reports available for inspection and copying by the EPD. This period of retention shall be extended during the course of any unresolved litigation regarding the discharge of pollutants by the Industrial User or the operation of the approved pretreatment program or when requested by the Director.

B. INDUSTRIAL PRETREATMENT STANDARDS

1. The permittee shall require all industrial dischargers into the permitted system to meet State and Federal Pretreatment Regulations promulgated in response to Section 307(b) of the Federal Act. Other information may be needed regarding new industrial discharges and will be requested from the permittee after EPD has received notice of the new industrial discharge.

2. A major contributing industry is one that: (1) has a flow of 50,000 gallons or more per average work day; (2) has a flow greater than five percent of the flow carried by the municipal system receiving the waste; (3) has in its waste a toxic pollutant in toxic amounts as defined in standards issued under Section 307(a) of the Federal Act; or (4) has significant impact, either singly or in combination with other contributing industries, on the treatment works or the quality of its effluent, or interferes with disposal of its sewage sludge.

3. Any change in the definition of a major contributing industry as a result of promulgations in response to Section 307 of the Federal Act shall become a part of this permit.

C. REQUIREMENTS FOR EFFLUENT LIMITATIONS ON POLLUTANTS ATTRIBUTABLE TO INDUSTRIAL USERS

1. Effluent limitations for the permittee's discharge are listed in Part I of this permit. Other pollutants attributable to inputs from major contributing industries using the municipal system may also be present in the permittee's discharge. At such time as sufficient information becomes available to establish limitations for such pollutants, this permit may be revised to specify effluent limitations for any or all of such other pollutants in accordance with best practicable technology or water quality standards. Once the specific nature of industrial contributions has been identified, data collection and reporting requirements may be levied for other parameters in addition to those specified in Part I of this permit.

2. With regard to the effluent requirements listed in Part I of this permit, it may be necessary for the permittee to supplement the requirements of the State and Federal Pretreatment Regulations to ensure compliance by the permittee with all applicable effluent limitations. Such actions by the permittee may be necessary regarding some or all of the major contributing industries discharging to the municipal system.

"Procedure Manual for Reviewing a POTW Pretreatment Program Submission," dated October 1983. Table of Contents only.

11r58

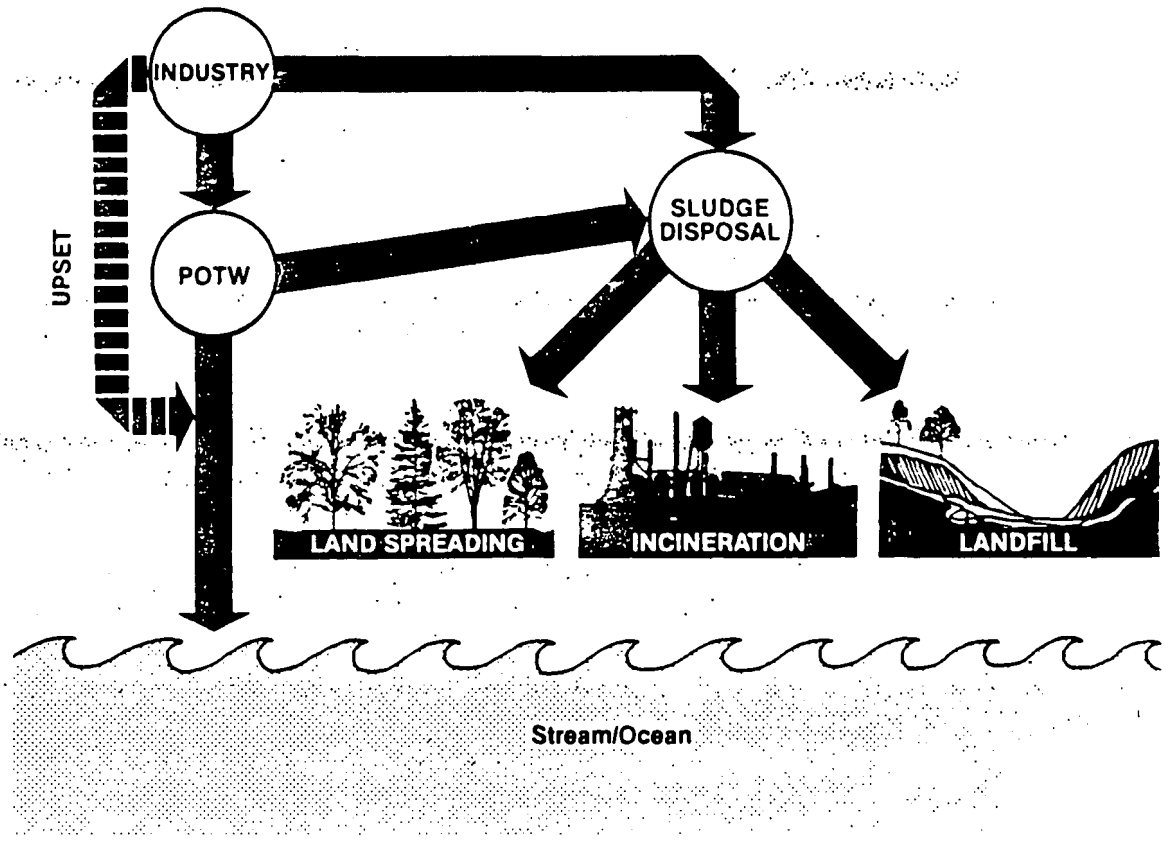
United States
Environmental Protection
Agency

Office of
Water Enforcement
and Permits

October 1983

EPA

Procedures Manual for Reviewing a POTW Pretreatment Program Submission



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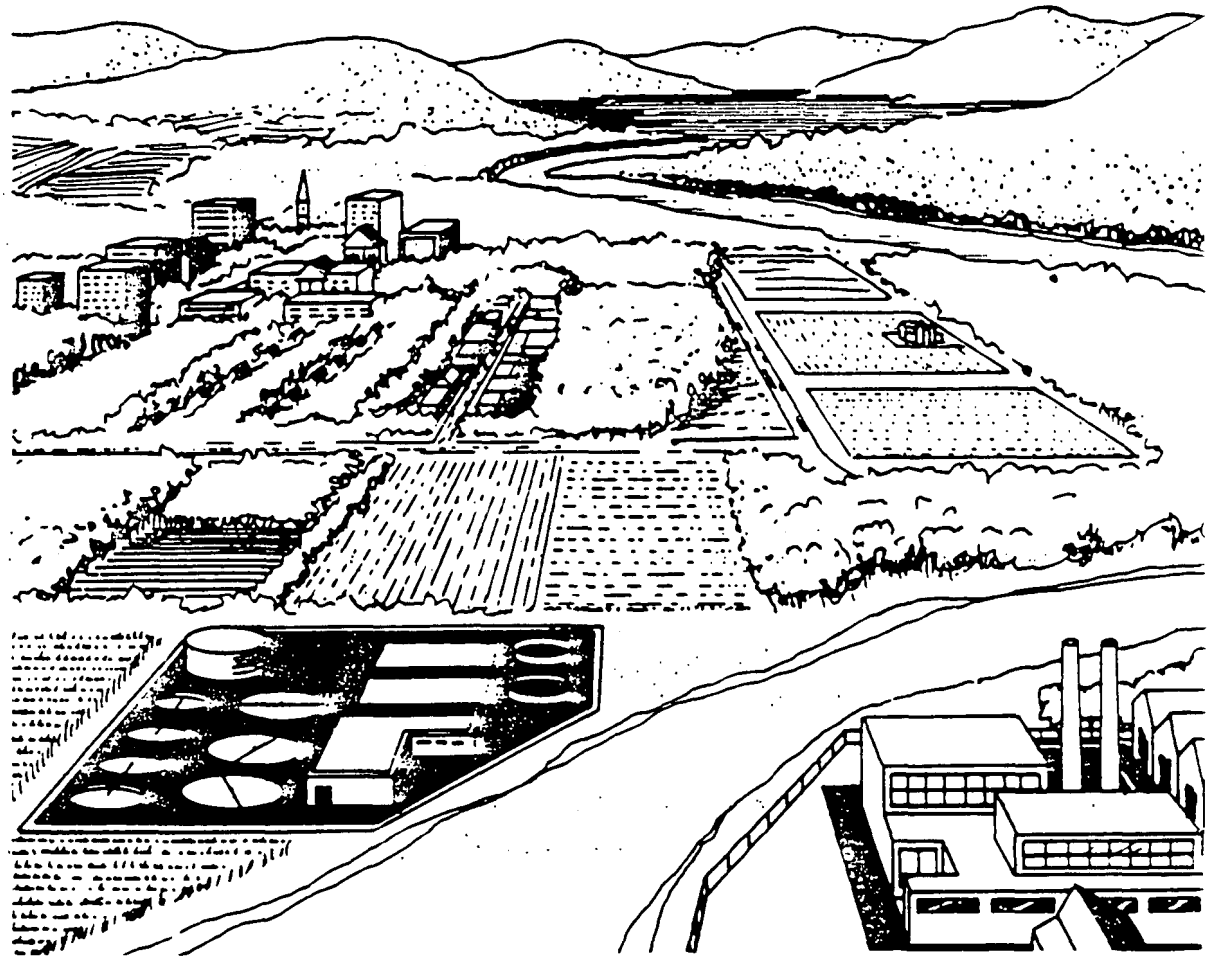
United States
Environmental Protection
Agency

Office of
Water Enforcement
and Permits

October 1983

EPA

Guidance Manual for POTW Pretreatment Program Development



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United States
Environmental Protection
Agency

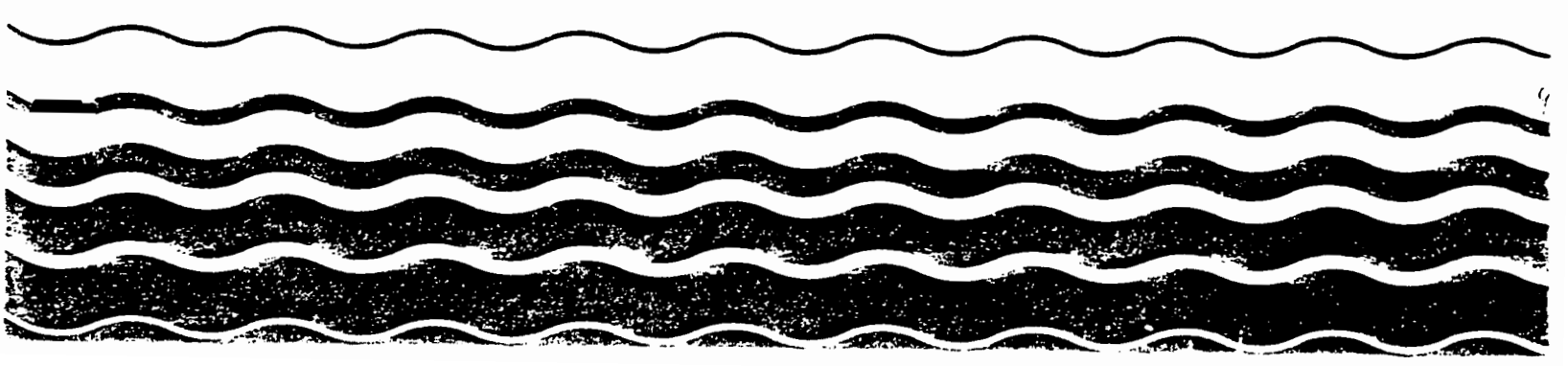
Effluent Guidelines Division
and Permits Division
Washington, DC 20460

February 1984

Water

EPA

Guidance Manual for Electroplating and Metal Finishing Pretreatment Standards



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"Implementation of Pretreatment Standards While Litigation Continues", dated May 2, 1984.

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

MAY 2 1984

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Implementation of Pretreatment Standards While Litigation Continues

FROM: James D. Gallup, Chief
NPDES Programs Branch (EN-336)

TO: Regional Pretreatment Coordinators
Regions I - X

Individual indirect dischargers have requested stays of certain categorical pretreatment standards. To date, none of these stays have been granted either by a U.S. Circuit Court or by the Agency. Until such time as a stay is granted, all promulgated categorical pretreatment standards and all reporting requirements under the General Pretreatment Regulations are in effect.

I have attached a copy of memorandum from the Office of General Counsel to the Director, Office of Water Enforcement and Permits which affirms this position. If you have any questions, please contact me at (FTS)755-0750.

Attachment

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

APR 25

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Implementation of Pretreatment Standards While Litigation Continues

FROM: Susan Lepow
Assistant General Counsel
Water Division (LE-132W)

TO: Rebecca Hanmer
Director
Office of Water Enforcement and Permits (EN-335)

As the attached letters indicate, at least one indirect discharger has refused to provide a baseline monitoring report on the grounds that the underlying pretreatment standard is the subject of litigation. That refusal, in the absence of a judicial or administrative stay of the regulations is not justified.

We have responded to the specific inquiry we received, and have notified the Fourth Circuit of this particular matter. However, it is possible that this problem is occurring in other cases as well. You may wish to provide guidance to the States and Regions making clear that although there has been substantial litigation on the recently promulgated effluent limitations guidelines and standards, */ no judicial or administrative stay have been granted.

As is clear from the attachments, a motion for a judicial stay of the metal finishing standards is pending in the Fourth Circuit. In addition, Cerro Copper Products

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*/ The Agency has reached settlement agreements on the effluent limitations guidelines and standards for the following industries: iron and steel; porcelain enameling; coal mining; petroleum refining; and steam electric. In addition, litigation is pending on the regulations for the following industries: leather tanning and finishing; aluminium forming; copper forming; nonferrous metals manufacturing (phase I); metal finishing; electronics (phase II); can making. Not all of these settlement agreements and lawsuits concern the categorical pretreatment standards.

and the Village of Sauget have requested the Agency to stay the copper forming pretreatment standards as they apply to them. Until any of these stays are granted, the promulgated regulations, including the pretreatment requirements and the requirement to submit baseline monitoring reports, are in effect.

Attachments

cc: Martha Prothro
Bob Zeller
Louise Jacobs
Steve Schatzow

CATERPILLAR TRACTOR CO.

150 W. Holt Ave
P.O. Box 728
Milwaukee, Wisconsin 53201
Telephone 414 744-3333

March 28, 1984

Mr. John L. Schultz
Milwaukee Metropolitan Sewerage District
Industrial Waste Section
735 North Water Street
Milwaukee, WI 53202

Dear Mr. Schultz:

We have received your letter of March 6, 1984, concerning EPA categorical pretreatment standards for the electroplating and metal finishing point source categories. We have also reviewed the materials previously sent to us on January 9, 1984, concerning the applicability of these regulations to the operations of the Milwaukee Plant.

In a telephone conversation with Mr. Terry Yakich of your agency on March 21, 1984, we explained that the reason we did not respond to your request for baseline monitoring reports is that Caterpillar Tractor Co. filed a petition for review of these regulations in the U. S. Court of Appeals for the Seventh Circuit on October 26, 1983. The case was then transferred to the U. S. Court of Appeals for the Fourth Circuit and consolidated with certain other cases challenging the same regulations. On February 28, 1984, Caterpillar filed a motion to stay the application of the regulations to its various facilities, and this motion is presently under consideration by the Court.

Since application of the electroplating and metal finishing regulations to Caterpillar's facilities is in litigation and the subject of pending motions, we believe it is not appropriate to respond to your request for baseline monitoring reports at this time. We trust that this is fully responsive to your inquiry.

Sincerely,

R.P. Gallagher

Plant Manager

RPGallagher
Telephone: (414) 747-4201
dk

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

APR 19 1984

OFFICE OF
GENERAL COUNSEL

Mr. William K. Slate, II
Clerk, United States Court
of Appeals for the Fourth Circuit
U.S. Courthouse
10th & Main Streets
Richmond, VA 23219

Re: Caterpillar Tractor Co. v. EPA and Related Cases
Nos. 83-1930(L), Nos. 83-1981, 83-2162(L), 83-2127,
83,4197, Consolidated sub nom, IIPEC v. EPA.

Dear Mr. Slate:

We would appreciate your bringing the enclosed letter to the attention of the panel considering EPA's pending motion for transfer of these cases, and Caterpillar Tractor Company's pending motion to stay the underlying pollution control regulations. The letter, dated March 28, 1984, is from petitioner Caterpillar Tractor to the Industrial Waste Section of Milwaukee's Metropolitan Sewerage District. EPA received a copy of the letter on April 17, 1984, courtesy of the Wisconsin Department of Natural Resources.

In the letter Caterpillar tells the sewerage authority that it refuses to provide it with a baseline monitoring report describing the toxic pollutants present in its industrial wastewater. Caterpillar justifies its refusal by reference to this litigation and to its pending motion for a stay. In essence, however, Caterpillar is acting as though its petition for a stay had already been granted by this Court. It has informed neither this Court, nor the parties to this litigation, of its action.

Caterpillar's unilateral action demonstrates the need for a prompt resolution of the stay questions; EPA's memorandum of March 14, 1984 In Opposition to Caterpillar's Motion for a Stay illustrates why Caterpillar's motion should be denied.

Caterpillar's letter also asserts that the "application of the electroplating ... regulations to Caterpillar's facilities is in litigation... ." Enclosed letter at Para. 3. This assertion flatly ignores the Third Circuit's recent ruling specifically upholding the 40 C.F.R. Part 413 pretreatment standards for the electroplating industry. NAMF et al. v. EPA, 719 F.2d 624 (3d Cir. 1983). However, Caterpillar's

"Guidance Manual for Pulp, Paper, and Paperboard and Builder's Paper and Board Mills Pretreatment Standards", dated July 1984. Table of Contents only.

United States
Environmental Protection
Agency

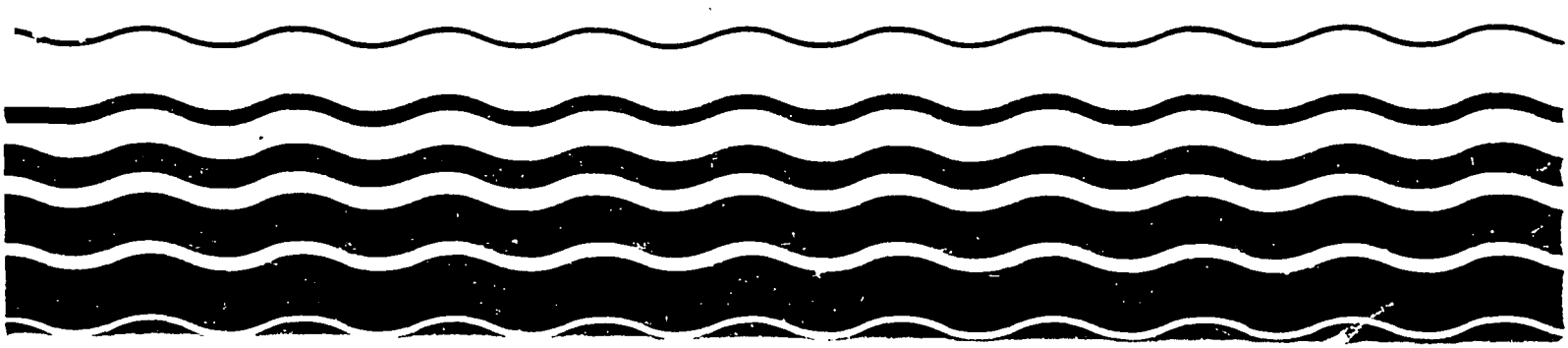
Effluent Guidelines Division
WH-552
Washington DC 20460

July 1984

Water

EPA

Guidance Manual for Pulp, Paper, and Paperboard and Builders' Paper and Board Mills Pretreatment Standards



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"Guidance to POTWs for Enforcement of Categorical Standards", dated November 5, 1984.

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

NOV 5 1984

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Guidance to POTWs for Enforcement of Categorical Standards

FROM: Rebecca W. Hanmer, Director
Office of Water Enforcement and Permits (EN-335)

Glenn Unterberger, Acting
Associate Enforcement Counsel for Water (LE-134W)

TO: Regional Water Management Division Directors
Regions I-X
State Program Directors

Attached is a copy of the Pretreatment Program Guidance to POTWs for Enforcement of Industrial Categorical Standards. The Guidance is now final. It is important to provide enforcement guidance to managers of POTWs because the compliance deadlines for electroplaters have recently passed.

The purpose of this guidance is to advise POTWs with approved pretreatment programs of their authorities and responsibilities for enforcing categorical pretreatment standards. Specifically, it sets forth what EPA considers as appropriate responses to industrial users who fail to comply with categorical standards by the required deadlines. On that basis, it also serves as guidance for the EPA enforcement activities relating to categorical standard violations.

This guidance was developed with the assistance of the Regional Offices, several State representatives, PIRT task force members and POTWs as well as the Office of General Counsel (OGC).

As part of each POTW's responsibility to enforce categorical standards, there is a regulatory requirement to obtain 90 Day Compliance Reports. To assist POTWs in obtaining this information, we have enclosed a model letter to be sent by POTWs to each industrial user.

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

November 1, 1984

OFFICE OF
WATER

Pretreatment Program Guidance to POTWs for Enforcement of Industrial Categorical Standards

Purpose

The purpose of this document is to provide guidance to publicly owned treatment works (POTWs) on the enforcement of industrial categorical pretreatment standards. Under the Clean Water Act and the National Pretreatment Program Regulations, 40 CFR 403, POTWs with approved local pretreatment programs are typically the primary enforcement authorities for industrial categorical standards[1/].

Application

Section 307(b) of the Clean Water Act requires the Environmental Protection Agency to promulgate pretreatment standards to prevent the introduction of pollutants into POTWs which are determined not to be susceptible to treatment by such POTWs, which would interfere with the operation of such POTWs, or would limit opportunities to recycle and reclaim municipal sludges. EPA has been under court order to establish pretreatment standards for 26 specific industrial categories determined to be the most significant sources of toxic pollutants. These categorical standards contain numerical limits for pollutants commonly introduced into POTWs by the covered industries. Attached is the list of categorical standards which have been promulgated since 1981 and those which were recently proposed to be promulgated (see Attachment 1).

Notification and Industrial Reporting

Based on its industrial waste survey, each approved POTW should have a list of all industrial users which discharge into the POTW and the industrial categories to which they belong. POTWs are required to notify categorical industries about their responsibility to comply with appropriate categorical standards. Each industrial user is required to submit a baseline monitoring report

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1/ In some instances States have chosen to administer the pretreatment program directly with limited or no assistance from local POTWs.

(BMR) by a specified deadline (see Attachment 1) which indicates whether it meets the categorical standard(s) at the time of submission. Although POTWs are encouraged to notify industrial users of the baseline monitoring requirement, industrial users must comply with this requirement even if they do not receive a POTW notification. Where an industrial user's baseline monitoring report indicates noncompliance with the standards, it must establish in its baseline monitoring report a schedule of activities that will result in compliance with the standard by the compliance deadline. Categorical industrial users are required to submit additional reports within regulatory timeframes. (See Attachment 2 for specific regulatory reporting requirements.) Industrial users which fail to submit required reports or who submit inadequate reports are subject to enforcement action by EPA, the State (if approved), or the POTW (if approved).

Compliance Deadlines

For each categorical pretreatment standard, the Clean Water Act requires EPA to set a deadline for compliance no later than three years after the effective date of the standard. In most cases, EPA provides industry with three years to comply. (See Attachment 1 for the compliance dates established in the categorical pretreatment standards.) An industrial user which fails to meet the categorical pretreatment standard by the deadline is in violation of the Clean Water Act. Each approved POTW has the primary responsibility for enforcing the standards and bringing each violator of the regulatory deadline in the POTW's service area into compliance as rapidly as possible. The following guidance is intended to address instances of noncompliance with regulatory deadlines of categorical standards.

Enforcement

Timely compliance with categorical pretreatment standards is an essential requirement of the Clean Water Act. Therefore, where an industrial user has failed to comply with the deadline specified in an applicable categorical pretreatment standard, the POTW should take an enforcement action to obtain compliance, to deter future violations of the law by the violator, and to promote fairness among members of the regulated community. The enforcement action may take the form of a judicial action or, in appropriate circumstances, an alternative procedure as discussed below. Following are three recommended procedures for different instances of industrial user noncompliance:

1. If the industrial user in violation has not demonstrated good faith and could have met the regulatory deadline by a prompt and conscientious effort, the POTW should file a judicial action and seek (by court decision or consent decree) an expeditious compliance schedule and an appropriate penalty.[2/] The penalty should be sufficient to deprive the industrial user of any economic benefit or competitive advantage derived from delayed compliance. The amount should also reflect the seriousness of the violation, the lack of diligence demonstrated by the violator, and any other relevant circumstances. POTWs that have the authority to administratively assess penalties and mandate compliance schedules may do so in lieu of judicial action.

2. If the industrial user has made a good faith effort to comply with the standard, but will miss the deadline by more than 90 days, the POTW should bring the industrial user into compliance through judicial or administrative enforcement procedures. Regardless of the procedure used, this action should include a written document issued to the industrial user which contains an enforceable schedule for achieving compliance. Violators should be allowed no more time than is absolutely necessary to achieve compliance. Also, the enforcement action should seek monetary penalties for failure to comply. If the POTW does not have the authority to impose penalties administratively, it should seek penalties through judicial enforcement action.

3. If the industrial user has made a good faith effort to comply with the standard by the legal deadline and failed by a period of 90 days or less, the POTW should either take enforcement action or closely monitor the progress of the industrial user towards achieving compliance.

Good faith is to be narrowly construed. The legislative history of the Clean Water Act Amendments of 1977 described "good faith" as follows:

2/ A POTW is required to have authority to file a judicial action and seek penalties as a condition for program approval. A POTW may also have authority to: issue an administrative compliance order (with or without the consent of the industrial user); impose administrative penalties (authorized by ordinance, contract, permit, or compliance order); or revoke an industrial user's right to discharge into the sewer. A POTW should consult its attorney to determine existing administrative authorities.

> The Act requires industry to take extraordinary efforts if the vital and ambitious goals of the Congress are to be met. This means that business-as-usual is not enough. Prompt, vigorous, and in many cases expensive pollution control measures must be initiated and completed as promptly as possible. In assessing the good faith of a discharger, the discharger is to be judged against these criteria. Moreover, it is an established principle, which applies to this act, that administrative and judicial review are sought on a discharger's own time. Legislative History of the Clean Water Act No. 95-14, Vol. 3 at 463.

For information on how this good faith test applies specifically to electroplating facilities, please see Attachment 3.

Footnotes:

(1) No numerical pretreatment limits have been established for the Textile Mills industrial category, and there is no final compliance date for categorical pretreatment standards. Firms in this industry are required to comply only with the General Pretreatment Regulations in 40 CFR 403. Local authorities should specify case-by-case reporting for these industrial users.

(2) Industries regulated by the Metal Finshing categorical pretreatment standards are included in the 10,500 indirect dischargers estimated for the Electroplating category.

(3) Existing sources that are subject to the Metal Finshing standards in 40 CFR Part 433 must comply only with the interim limit for Total Toxic Organics (TTO) by June 30, 1984. Plants also covered by 40 CFR Part 420 must comply with the interim TTO limit by July 10, 1985. The compliance date for Metals, Cyanide, and final TTO is February 15, 1986 for all sources.

(4) The compliance date for existing Phase I Electrical and Electronic Components manufacturers for TTO is July 1, 1984. The compliance date for arsenic is November 8, 1985.

(5) Industries regulated under the Phase II Electrical and Electronic Components categorical pretreatment standards are included in the 240 indirect dischargers estimated for Phase I.

(6) Industries regulated under the Canmaking subcategory of the Coil Coating Categorical standards are included in the 32 indirect dischargers estimated for the Coil Coating Category.

(7) Industries regulated under the Phase II Inorganic Chemicals categorical standards are included in the 44 Indirect dischargers estimated for Phase I.

(8) Industries regulated under the Phase II Nonferrous Metals Categorical standards are included in the indirect dischargers estimated Phase I.

(9) Subpart B only

(10) Subpart C only

(11) These regulations reaffirmed the pretreatment standards that were previously promulgated and become effective in the mid 1970's.

[This table is intended to provide POTWs with general information concerning each major industrial category. A more detailed account of each category can be obtained through the Code of Federal Regulations.]

Revised 8/08/84

SUMMARY STATUS OF NATIONAL CATEGORICAL PRETREATMENT STANDARDS: MILESTONE DATES

Industry Category	Estimated Number Of Indirect Dischargers	Promulgation Date	Effective Date	BMR Due Date	PSES* Compliance Date
Timber Products	47	1-26-81 —11	3-11-81		
Electroplating	10,500	1-28-81	3-30-81	9-26-81 (Non-integ.) 6-25-83 (Integrated)	4-27-84(Non-Integ.) 6-30-84(Integrated)
Textile Mills	930 —2	9-02-82	10-18-82		—1
Metal Finishing		7-15-83	8-29-82	2-25-83	—3 6-30-84(Part 433, TTO) 7-10-85 (Part 420, TTO) 2-15-86 (Final) —3
Pulp, Paper, Paperboard	261	11-18-82	1-3-83	7-2-83	7-1-84
Steam Electric	85	11-19-82	1-2-83	7-1-83	7-1-84
Electrical Components I	242	4-08-83	5-19-83	11-15-83	7-1-84 (TTO)--4 11-8-85 (As)—9
Iron and Steel	162	5-27-82	7-10-82	1-6-83	7-10-85
Inorganic Chemicals I	21	6-29-82	8-12-82	2-9-83	8-12-85
Leather Tanning	140	11-23-82	1-06-83	7-5-83	11-25-85
Porcelain Enameling	88	11-24-82	1-07-83	7-6-85	11-25-85
Petroleum Refining	53	10-18-82 —11	12-01-82		3-23-80
Coil Coating I	39	12-1-82	1-17-83	7-16-83	12-1-85
Electrical Components II	23 —5	12-14-83	1-27-84	7-25-84	7-14-86 —10
Copper Forming	60	8-15-83	9-26-83	3-25-84	8-15-86
Aluminum Forming	72	10-24-83	12-7-83	6-4-84	10-24-86
Pharmaceuticals	277	10-27-83	12-12-83	6-9-84	10-27-86
Coil Coating (canmaking)	81 —6	11-17-83	1-2-84	7-1-84	11-17-86
Battery Manufacturing	131	3/9/84	4/18/84	9/5/84	3/9/87
Nonferrous Metals I	85	3/8/84	4/23/84	9/4/84	3/9/87
Organic Chemicals	468	(2/85)	(4/85)	(10/85)	(2/88)
Pesticides	38	(11/84)	(2/84)	(8/84)	(2/87)
Metal Molding and Casting (Foundries)	327 —7	(12/84)	(2/85)	(6/85)	(12/87)
Inorganic Chemicals II	23	7/26/84	(9/84)	(3/85)	(8/87)
Nonferrous Metals Forming	107	(10/84)	(12/84)	(5/85)	(10/87)
Nonferrous Metals II	37 —8	(11/84)	(1/85)	(2/85)	(1/88)

Parentheses Indicate expected milestone dates for categories that do not yet have final standards

Pretreatment Standards for Existing Sources

CATEGORICAL PRETREATMENT STANDARDS:

REPORTING REQUIREMENTS AND DUE DATES

Item Due	Report Due Date	Description of Report
1. Baseline Monitoring Reports (BMR)	Due 180 days after the categorical standard effective date. * Nonintegrated 9/12/81 Integrated 6/25/83	Initial process description and a statement certifying compliance or non-compliance with the standards. A compliance schedule required from noncomplying facilities. See 40 CFR 403. 12 (b).
2. Periodic Progress Report	Within 14 days of each milestone date in the compliance schedule submitted with the BMR.	Noncomplying facilities are required to submit a compliance schedule for achieving compliance by the final compliance date. Progress reports indicate whether or not action items were completed on time, and if not, steps taken to come back into compliance.
3. 90-Day Compliance Status Report	Within 90 days following the date for final compliance with the applicable Pretreatment Standard(s). *Nonintegrated 7-27-84 Integrated 9-30-84	All facilities, regardless of compliance status, must file this report certifying whether compliance with the standards was achieved and, if not, steps being taken to come into compliance. See 40 CFR 403.12(d).
4. Self-Monitoring (Semi-Annual) Reports	June and December of each year, or more frequently	This report indicates the continued compliance of the facility with the standards. It must be submitted biannually but more frequent reports can be specified by Control Authority. See 40 CFR 403.12(e).

*Electroplating Categorical Industry Only

Attachment 2

ATTACHMENT 3

Enforcement of Electroplating Pretreatment Standards

The deadline for non-integrated electroplating facilities to comply with the electroplating pretreatment standards was April 27, 1984. The deadline for integrated facilities was June 30, 1984. Facilities that have acted expeditiously in good faith to achieve compliance should generally have been able to comply with the standards by the applicable deadlines.

The electroplating pretreatment standards (40 CFR Part 413) were promulgated on January 28, 1981 (46 Fed. Reg. 9467). These standards (with the exception of those applicable to integrated facilities, discussed below) have remained in effect since promulgation, and facilities have thus had three years and three months from the date of promulgation to achieve compliance. As discussed in the main section of this guidance, compliance with these standards is essential, and appropriate enforcement action should be taken against violators.

Some industry members challenged the electroplating pretreatment standards soon after their promulgation. The court upheld these standards in their entirety on September 20, 1983. National Association of Metal Finishers v. EPA, 719 F.2d 624 (3rd Cir. 1983). It is clear from the legislative history of the Clean Water Act and other sources that companies must litigate on their own time and are not entitled to delay compliance pending the outcome of litigation. See, e.g., Train v. Natural Resources Defense Council, 421 U.S. 60, 92 (1975). Therefore, electroplating facilities who have delayed compliance activities while awaiting the outcome of the NAMF litigation should not be considered as having acted in good faith.

Another factor that does not justify delayed compliance is EPA's ongoing review of the pretreatment program. In the past, EPA has considered the possibility of amending some aspects of the general pretreatment regulations. EPA is continuing to examine the pretreatment program and may at various times amend the regulations. This is a normal occurrence in the evolution of any regulatory program. However, the basic program has been unchanged since June 26, 1978, and no changes are currently contemplated that will affect the status of the compliance requirements of the electroplating pretreatment standards.

Similarly, the existence of pending legislative proposals relating to the pretreatment program does not constitute an appropriate grounds for delaying compliance with pretreatment standards. Existing statutory and regulatory requirements are valid and enforceable unless and until they are modified.

Some special considerations pertain to the June 30, 1984 categorical standard compliance deadline for integrated electroplating facilities. (These considerations do not pertain to non-integrated electroplaters.) In early 1981, EPA established and then suspended a March 30, 1984 compliance deadline for these facilities. On July 8, 1982, the U.S. Court of Appeals for the Third Circuit held that the suspension was illegal and reinstated the March 30, 1984 compliance deadline, (NRDC v. EPA, 583 F.2d 752 3rd Cir. 1982). The Third Circuit later extended the deadline by three months to June 30, 1984.

Subsequently, some owners and operators of integrated facilities petitioned EPA to extend the deadline. EPA determined that an integrated facility acting in good faith could comply with the electroplating pretreatment standards by June 30, 1984. Therefore, EPA denied their request on June 3, 1983 (48 Federal Register 24933). This denial was upheld in General Motors v. EPA (Nos. 83-3418 and 83-3432, June 26, 1984).

In general, an integrated manufacturer that began its compliance program promptly after the July 8, 1982 NRDC decision and pursued it diligently since then should have been able to meet the June 30, 1984 deadline. However, a few integrated plants may be able to demonstrate that despite good-faith efforts since July 8, 1982, they could not comply by June 30, 1984. In such cases, these good-faith efforts should be taken into account, and the POTW should exercise its enforcement authority in a manner consistent with this enforcement policy.

MODEL TRANSMITTAL LETTER

(FROM THE REGION OR STATE TO THE CONTROL AUTHORITY)

INSIDE ADDRESS

Dear _____:

With approval of your municipal pretreatment program has come new responsibilities, including enforcement of national pretreatment standards for certain industries which discharge into your municipal sewerage system. These industries of concern are known as "categorical industries". The Federal categorical standards for each affected industry can be found at 40 CFR 405 to 40 CFR 471.

In a continuing effort to assist municipal managers such as yourself who are implementing pretreatment programs, the Environmental Protection Agency has developed guidance, pretreatment training workshops, and seminars. As part of this effort, enclosed is the Pretreatment Program Guidance to POTWs for Enforcement of Industrial Categorical Standards.

This guidance explicitly offers you information concerning your authority and responsibilities to conduct certain activities as a part of implementing your program. It sets forth what EPA considers as appropriate responses to industrial users who fail to comply with categorical standards by the regulatory deadlines.

As part of each POTW's responsibility to enforce categorical standards, there is a requirement to obtain 90 Day Compliance Reports. By regulation 40 CFR 412, each industrial user affected by a categorical standard must submit a compliance report to the Control Authority within 90 days after the compliance deadline of the categorical standard.

To assist POTWs in obtaining this information, we have enclosed a model letter to be sent by POTWs to each industrial user which may be required to submit a compliance report. (Note: The model letter enclosed pertains to electroplating industrial users. Most other categorical industry letters would be less

complex, and would have alternate compliance reporting dates.) A summary of the compliance report response should be maintained with the POTW's enforcement records.

This guidance is of a general nature. Should you have any specific questions please contact (Regional or State contact).

Sincerely,

(Appropriate EPA or State Official)

Enclosure

MODEL LETTER

(FROM THE CONTROL AUTHORITY TO CATEGORICAL IU)

Subject: Electroplating Industry Compliance

Dear Sir:

The National Pretreatment Program, established under the authority of the Clean Water Act of 1977, requires that certain industry groups, including electroplators, meet pollutant limitations before discharging such pollutants into local-publicly owned treatment works (POTW).

The Electroplating pretreatment standards are published in the Code of Federal Regulations at 40 CFR 413. There are two distinct deadlines which apply to this industry based on plant operations. "Integrated" plants are those which, prior to on-site treatment, combine electroplating waste streams with significant process waste streams not covered by the electroplating category. "Non-integrated" facilites are those which have significant wastewater discharges only from operations addressed by the electroplating category. According to our records, your facility is subject to the Electroplating Categorical Standard (40 CFR 413). If you believe that you are not subject to either of these rules, please notify us immediately by submitting a request for a categorical determination as provided by regulation, 40 CFR 403.6.

If your facility is a non-integrated electroplating facility, you were to comply with the appropriate pretreatment standards for metals and cyanide by April 27, 1984. In addition, you were to submit a Compliance Report advising us as to whether you met the April 27 deadline by July 27, 1984. If you did not meet the compliance deadline, then your Compliance Report must include a Compliance Schedule describing the actions you are undertaking to meet the pretreatment standards and the earliest date by which you can and will comply.

If your facility is an integrated electroplating facility, the deadline for compliance with pretreament standards was June 30, 1984. Your Compliance Report was due by September 28, 1984, and must include, if applicable, your Compliance Schedule.

The content of the compliance report must comply with regulation 40 CFR 403.12(d):

> "Within 90 days following the date for final compliance with applicable categorical Pretreatment Standards . . . any industrial user subject to pretreatment standards and requirements shall submit to the Control Authority a report indicating the nature and concentration of all pollutants in the discharge from the regulated process which are limited by pretreatment standards and requirement standards and the average and maximum daily flow for these process units in the Industrial User which are limited by such pretreatment standards and requirements. The report shall state whether the applicable pretreatment standards or requirements are being met on a consistent basis and, if not,what additional O and M and/or pretreatment is necessary to bring the industrial user into compliance with the applicable pretreatment standards or requirements. This statement shall be signed by an authorized representative of the industrial user, (further defined in the regulation), and certified to be a qualified professional."

Please submit the required reports to:

(Address to be indicated for Regional Office, State, or POTW)

If you have any questions or if you require additional information, please contact _____.

Sincerely,

"POTW PRETREATMENT MULTI-CASE ENFORCEMENT INITIATIVE", dated December 31, 1984. Attachments A and B excluded.

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

DEC 31 1984

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: POTW Pretreatment Multi-Case Enforcement Initiative

FROM: Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

Jack E. Ravan
Assistant Administrator
for Water

TO: Regional Administrators, Regions I - X
Regional Counsels, Regions I - X
Water Management Division Directors, Regions I - X

The Office of Enforcement and Compliance Monitoring and the Office of Water are initiating a nationally coordinated effort leading to judicial enforcement against POTWs which have not met requirements to submit an approvable local pretreatment program. We are also requesting information and support from your office. Specifically, on or about April 1, 1985, EPA and the Department of Justice propose to simultaneously file 20 or more civil complaints nationwide against POTWs targeted as proper candidates for this enforcement initiative.

Compliance by POTWs with pretreatment requirements is the pretreatment program's top enforcement priority and is listed on the Agency Operating Guidance, FY 1985-1986, Priority List. Currently about 350 POTWs have failed to submit complete and approvable pretreatment programs to the Approval Authority. As you know, the Agency has established FY 1985 SPMS commitments to have all required programs approved or to have initiated judicial enforcement actions against violating POTWs by September 30, 1985.

To help the Agency achieve this commitment, the Office of Enforcement and Compliance Monitoring, the Office of Water, and the Department of Justice have agreed on a streamlined process for a judicial enforcement initiative early in calendar year 1985. This initiative will send a clear message to affected POTWs of the significance to EPA of this end-of-fiscal-year goal, thus encouraging them to submit approvable programs.

The POTW Pretreatment Multi-Case Enforcement Initiative

In order to meet the April 1, 1985 target for filing 20 or more POTW judicial actions, we have developed the schedule outlined in Attachment A for the Regions, Headquarters and the Department of Justice.

To expedite the referral process, those cases most likely to present the strongest legal position for the Government to prevail in judicial enforcement have been identified. We have grouped into four categories the POTWs which have neither submitted a complete and approvable pretreatment program nor are currently referred by EPA for legal enforcement action. Attachment B is the current list of the Category I and II POTWs. It is based on information received from the Regions at the end of FY84 and updated through staff contacts.

Category I: POTWs whose NPDES permits require pretreatment program submittal and are in violation of an EPA-issued Administrative Order (AO).

Category II: POTWs which have a pretreatment permit requirement but have not been issued an EPA AO.

Category III: POTWs which do not have a pretreatment permit requirement but are in violation of an EPA-issued AO.

Category IV: POTWs which have neither received an EPA AO nor had their NPDES permit modified to include a pretreatment permit requirement.

We request that by noon, Friday, January 18, 1985, your office submit (via overnight delivery service, if necessary) to the Office of Water Enforcement and Permits (OWEP) a completed version of Attachment C--the Pretreatment Program Submittal Information Sheet--for each Category I and II POTW in your Region. (In most instances, compilation of this information should be the responsibility of the Water Management Division Director.) This Information Sheet should also be submitted for any other POTW in your Region which has a modified permit specifying a deadline for obtaining approval of a local pretreatment program, but has not submitted a complete and approvable program. A copy of your transmittal should also be transmitted to the appropriate Assistant Section Chief in the Environmental Enforcement Section at the Department of Justice.

The following information should be included for each Category I and II POTW in your Region's January 18 submission:

(1) Status of each of the six required program elements (Industrial Waste Survey, Legal Authority, Technical Elements/Local Limits, Compliance Monitoring Program, Administrative Procedures, and Resources).

(2) The report should indicate a specific date when a complete program is expected to be submitted and whether or not the POTW should be referred for judicial action. An indication by the Region of a POTW's expectation to submit a complete and approvable program should be based on a high degree of certainty. Cases should not be targeted where a POTW has firmly committed to supplement an incomplete prior submission in a timely manner.

(3) Discussion of the obstacles that are currently preventing each Category I and II POTW from submitting a complete and approvable pretreatment program.

(4) A history of State and/or Regional enforcement action for each Category I and II POTW.

(5) To the extent possible at this time, the following areas should be included in your January 18 response for each Category I or II POTW: (a) the total flow (in MGD) and the percent of industrial flow (in %); (b) environmental concerns associated with the POTW's pretreatment program, for example, demonstrable environmental problems; (c) the existence of concurrent permit effluent limit violations and any other existing NPDES Administrative Order violations; (d) availability to the POTW of any equitable defenses; (e) current or planned State action that might be taken in conjunction with EPA's initiative; and (f) any other pertinent legal or technical matter which would affect an enforcement action against a Category I or II POTW. (Discussion of items (b)-(f) should be kept brief; failure to ascertain this information should not postpone your Region's January 18 submission.)

Meetings between Department of Justice legal staff, OECM legal staff, and OWEP technical staff will take place during the latter part of January in each affected Region to further refine the Region's January 18 submissions and to resolve the necessary legal and technical issues that will facilitate assembly of streamlined litigation reports by the Regions for submission to Headquarters by February 15, 1985--particularly those matters in number (5)(b)-(f) above.

The Office of Enforcement and Compliance Monitoring, the Office of Water, and the Department of Justice will give these referrals expedited, priority attention to facilitate national coordination and simultaneous filing on or about April 1, 1985. In all actions filed, the Government will seek program submission as soon as possible, typically no later than six months from entry of a decree, as well as appropriate civil penalties.

Additional Considerations

Several legal and technical issues have been identified and discussed by Department of Justice, OECM and OWEP staff to assist the Regions in identifying prospective POTW referral candidates among Category I and II POTWs. The following items derived from these discussions should be taken into consideration by your office in making determinations for POTW referral candidates:

(1) With respect to currently existing NPDES effluent limit violations, these claims should be addressed in the failure-to-submit case whenever feasible. These claims can be identified from Municipal Policy Inventories, DMR's and QNCR's. The Department of Justice is ready to commit the necessary resources to resolve the issues associated with these cases and to press forward with them once they are filed. Where a basic concept of the technical remedy necessary to address effluent violations cannot be identified in the initial POTW referral to Headquarters, the government position will be developed by Region/DOJ/HQ discussions prior to filing. Issues associated with POTW financial capability will be resolved in a similar manner prior to filing.

(2) With respect to multi-jurisdictional POTWs where failure to negotiate ordinances, legal authorities and other commitments from contributing jurisdictions is the primary impediment to program submission, the Department of Justice has indicated that this issue, though possibly complicating an enforcement action, will not preclude filing of an enforcement action; such action will be brought against the "parent POTW."

(3) To be successful, this pretreatment enforcement initiative will need to address a good mix of cases that tackles sizeable problems as well as simple ones; for example filing 20 or more cases against the smallest Category I and II POTWs will not achieve the desired result.

(4) This Initiative should be implemented consistent with the FY-85 State/EPA Enforcement Agreements and the soon-to-be-issued policy on "Nationally Managed or Coordinated Enforcement Actions" (draft, 11/15/84). The Regions should coordinate with State authorities to the extent called for in these agreements. In States with pretreatment authority the States should have received an opportunity to take timely judicial action. States should be invited to take complementary action and be involved as appropriate throughout this process. In NPDES States without pretreatment authority, the Regions should follow advance notification and consultation provisions contained in applicable enforcement agreements.

"EXAMPLE PERMIT LANGUAGE REQUIRING POTWS TO IMPLEMENT PRETREATMENT PROGRAMS", dated February 22, 1985.

EXAMPLES OF PERMIT LANGUAGE REQUIRING POTWs TO IMPLEMENT PRETREATMENT PROGRAMS

February 22, 1985

Prepared for:

U.S. Environmental Protection Agency
Permits Division
401 M Street, S.W.
Washington, D.C. 20460

Prepared by:

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EPA Contract No. 68-01-7043
JRB Project No. 2-834-07-167-00

REGION II

(State of New York)

PRETREATMENT PROGRAM IMPLEMENTATION REQUIREMENTS

A. The permittee shall implement the Industrial Pretreatment Program in accordance with the legal authorities, policies, procedures, and financial provisions described in the permittee's pretreatment program submission entitled, _____, dated _____, approved by EPA on _____, and the General Pretreatment Regulations (40 CFR 403). At a minimum, the following pretreatment implementation activities shall be undertaken by the permittee:

(1) Enforce categorical pretreatment standards promulgated pursuant to Section 307(b) and (c) of the Act, prohibitive discharge standards as set forth in 40 CFR 403.5, and local limitation specified in Section _____ of the (*) (**) whichever are more stringent or apply at the time of issuance or modification of an (***). Locally derived limitations shall be defined as pretreatment standards under Section 307(d) of the Act and shall not be limited to categorical industrial facilities.

(2) Issue (***) to all significant industrial users. (***) shall contain limitations, sampling protocols, compliance schedule if appropriate, reporting requirements, and appropriate standard conditions.

(3) Maintain and update, as necessary, records identifying the nature, character, and volume of pollutants contributed by significant industrial users. Records shall be maintained in accordance with Part II. 10.3.a.

(4) Carry out inspections, surveillance, and monitoring activities on significant industrial users to determine compliance with applicable pretreatment standards. Records shall be maintained in accordance with Part II. 10.3.a.

(5) Enforce and obtain remedies for non-compliance by any significant industrial users with applicable pretreatment standards and requirements.

* City, Village, County, Town, etc.
** Code, Local Law, Ordinance, etc.
*** Industrial discharge permit, Agreement, Contract, etc.

B. Pursuant to 40 CFR 403.5(e), whenever, on the basis of information provided to NYSDEC or the Water Division Director, U.S. Environmental Protection Agency, it has been determined that any source contributes pollutants in the permittee's treatment works in violation of Pretreatment Standards Existing Sources, New Source Pretreatment Standards or National Pretreatment Standards: prohibited discharges, subsections (b), (c) or (d) of Section 307 of the Clean Water Act, respectively, notification shall be provided to the permittee. Failure by the permittee to commence an appropriate investigation and subsequent enforcement action within 30 days of this notification may result in appropriate enforcement action against the source and permittee.

C. Sampling

Note: Effluent limitations and sampling and analyses requirements for POTW influent, effluent and sludge will be identified in Tables 1, 2 and 3 of Part I of the facility's SPDES Permit. These will be POTW specific and will be inserted at the same time as implementation language, if available. If not, a reopener clause would be utilized (see Special Condition 1).

D. Reporting

All pretreatment reporting requirements shall be submitted to the following offices:

Department of Environmental Conservation
Regional Water Engineer

Department of Environmental Conservation
Water Division
50 Wolf Road
Albany, NY 12233-0001

Dr. Richard Baker, Chief
Permits Administration Branch
Planning & Management Division
USEPA Region II
26 Federal Plaza
New York, NY 10278

(applicable only if checked)
County Health Department

E. The permittee shall notify NYSDEC 60 days prior to any major proposed change in sludge disposal method. NYSDEC may require additional pretreatment measures or controls to prevent or abate an interference incident relating to sludge use or disposal.

F. The permittee shall provide to NYSDEC a (***) report that briefly describes the permittee's program activities over the previous (****) months. The initial report shall cover the period from _____ to _____. The NYSDEC may modify, without formal notice, this reporting requirement to require less frequent reporting if it is determined that the data in the report does not substantially change from period to period (*****). This report shall be submitted to the above addresses within 28 days of the end of the reporting period and shall include:

(i) An updated industrial survey, as appropriate.

(ii) Results of wastewater sampling at the treatment plant as specified in Part I, Tables 1, 2, and 3.

(iii) Status of Program implementation to include:

(a) Any substantial modifications to the pretreatment program as originally approved by USEPA to include but not be limited to; local limitations, special agreements and staffing and funding updates.

(b) Any interference, upset or permit violations experienced at the POTW directly attributable to industrial users.

(c) Listing of significant industrial users issued (**).

(d) Listing of significant industrial users inspected and/or monitored during the previous reporting period and summary of results.

(e) Listing of significant industrial users planned for inspection and/or monitoring for the next reporting period along with inspection frequencies.

(f) Listing of significant industrial users notified of promulgated pretreatment standards, local standards and any applicable requirements under Section 405 of the Act and Subtitle C and D of the Resource Conservation and Recovery Act, as required in 40 CFR Part 403.8(f)(2)(iii).

(g) Listing of significant industrial users notified of promulgated pretreatment standards or applicable local standards who are on compliance schedules. The listing should include for each facility the final date of compliance.

** Industrial discharge permits, Agreements, Contracts, etc.
*** Specify frequency (semi-annual or annual)
**** Six or 12 months
***** The permittee shall also report on the pretreatment program activities of all contributing jurisdictions

(h) Planned changes in the implementation program.

(iv) Status of enforcement activities to include:

(a) Listing of categorical industrial users, who failed to submit baseline reports or any other reports as specified in 40 CFR 403.12(d) and in Chapter _____ Section _____ of the (*) (**).

(b) Listing significant industrial users nor complying with federal or local pretreatment standards as of the final compliance date.

(c) Summary of enforcement activities taken or planned against non-complying significant industrial users. The permittee shall provide public notice of significant violators as specified in 40 CFR Part 403.8(f)(2)(ii).

Special Conditions (case-by-case)

The following types of requirements should be inserted into a POTW's SPDES permit when special circumstances are encountered, such as continuing noncompliance or significant or unusual industrial discharges, which could cause interference, pass through, or sludge contamination.

(1) This permit shall be modified to incorporate appropriate effluent limits and sampling and analysis requirements for priority pollutants (substances of concern) based upon available sampling data.

(2) The permittee shall monitor the following major industrial users for the pollutants of concern on a [frequency, e.g., monthly, quarterly] basis and forward a copy of the results to NYSDEC.

List Industrial Users	List Pollutants of Concern (Detection limits)
a.	i.
b.	ii.
c.	iii.

* City, Village, County, Town, etc.
** Code, Local Law, Ordinance, etc.

(3) The permittee shall evaluate the impact and, if necessary, establish and enforce regulations to control the introduction of septage waste from commercial septage haulers into the POTW. These local regulations shall be subject to approval by NYSDEC.

(4) The permittee shall provide information as required by 40 CFR 403.12(i) and (j) regarding removal allowance.

(5) Upon request of NYSDEC considering information that receiving waterbody use may be impaired, the permittee shall evaluate priority pollutant discharge(es) to receiving waters through the following combined sewer overflows (CSO's)___. If NYSDEC determines that such discharge(s) are significant and receiving waterbody use is impaired, the permittee shall investigate the characteristics, nature and frequency of such discharge, and effects, and present a plan of action to reduce the discharge of priority pollutants.

PART I

C. Special Condition - Chlorine

This permit shall be modified or alternatively revoked and reissued to comply with or reflect the evaluations and/or recommendations of the disinfection task force and any resulting effluent standard or limitation.

D. Pretreatment Program

EPA by letter of November 10, 1983 approved the City of Danville's Pretreatment Program. By this approval, all provisions and regulations contained and referenced in the Program are an enforceable part of this NPDES Permit.

E. Toxic Montioring Program

1. The City of Danville shall submit for approval to the State Water Control Board within 180 days of the effective date of the permit a Toxics Monitoring Program.

2. The State Water Control Board shall review the submittal of the Toxics Monitoring Program within 90 days after receipt of the Program.

3. The City of Danville shall implement the Toxics Monitoring Program within 90 days after notification of the State Water Control Board approval and the provisions contained within the Program shall become an enforceable part of this NPDES Permit.

REGION IV

(State of Georgia)
(State of North Carolina)

State of Georgia

A. APPROVED INDUSTRIAL PRETREATMENT PROGRAM FOR PUBLICLY OWNED TREATMENT WORKS (POTW)

1. The terms and conditions of the permittee's approved pretreatment program, approved by the Environmental Protection Division (EPD) on April 8, 1983, (as provided for in Chapter 391-3-6-.09(6b) of the Rules and Regulations for Water Quality Control), shall be enforceable through this permit.

2. Based on the information regarding industrial inputs reported by the permittee pursuant to Part III paragraph B(2), the permittee will be notified by EPD of the availability of industrial effluent guidelines on which to calculate allowable inputs of incompatible pollutants based on best practicable technology for each industry group. Copies of guidelines will be provided as appropriate. Not later than 120 days following receipt of this information, the permittee shall submit to the EPD calculations reflecting allowable inputs from each major contributing industry. The permittee shall also require all such major contributing industries to implement necessary pretreatment requirements, providing EPD with notification of specific actions taken in this regard. At that time, the permit may be amended to reflect the municipal facility's effluent limitations for incompatible pollutants.

3. Starting on April 15, 1984 the permittee shall submit annually to EPD a report to include the following information:

   a. A narrative summary of actions taken by the permittee to insure that all major contributing industries comply with the requirements of the approved pretreatment program.

   b. A list of major contributing industries using the treatment works, divided into SIC categories, which have been issued permits, orders, contracts, or other enforceable documents, and a status of compliance for each Industrial User.

   c. The name and address of each Industrial User that has received a conditionally or provisionally revised discharge limit.

4. The permittee to which reports are submitted by an Industrial User shall retain such reports for a minimum of 3 years and shall make such reports available for inspection and copying by the EPD. This period of retention shall be extended during the course of any unresolved litigation regarding the discharge of pollutants by the Industrial User or the operation of the approved pretreatment program or when requested by the Director.

B. INDUSTRIAL PRETREATMENT STANDARDS

1. The permittee shall require all industrial dischargers into the permitted system to meet State and Federal Pretreatment Regulations promulgated in response to Section 307(b) of the Federal Act. Other information may be needed regarding new industrial discharges and will be requested from the permittee after EPD has received notice of the new industrial discharge.

2. A major contributing industry is one that: (1) has a flow of 50,000 gallons or more per average work day; (2) has a flow greater than five percent of the flow carried by the municipal system receiving the waste; (3) has in its waste a toxic pollutant in toxic amounts as defined in standards issued under Section 307(a) of the Federal Act; or (4) has significant impact, either singly or in combination with other contributing industries, on the treatment works or the quality of its effluent, or interferes with disposal of its sewage sludge.

3. Any change in the definition of a major contributing industry as a result of promulgations in response to Section 307 of the Federal Act shall become a part of this permit.

C. REQUIREMENTS FOR EFFLUENT LIMITATIONS ON POLLUTANTS ATTRIBUTABLE TO INDUSTRIAL USERS

1. Effluent limitations for the permittee's discharge are listed in Part I of this permit. Other pollutants attributable to inputs from major contributing industries using the municipal system may also be present in the permittee's discharge. At such time as sufficient information becomes available to establish limitations for such pollutants, this permit may be revised to specify effluent limitations for any or all of such other pollutants in accordance with best practicable technology or water quality standards. Once the specific nature of industrial contributions has been identified, data collection and reporting requirements may be levied for other parameters in addition to those specified in Part I of this permit.

2. With regard to the effluent requirements listed in Part I of this permit, it may be necessary for the permittee to supplement the requirements of the State and Federal Pretreatment Regulations to ensure compliance by the permittee with all applicable effluent limitations. Such actions by the permittee may be necessary regarding some or all of the major contributing industries discharging to the municipal system.

State of North Carolina

Pretreatment

The Permittee has submitted documentation to the Division of Environmental Management which complies with the required activities contained in the State and Federal Pretreatment Regulations 15 NCAC 2H .0900 and 40 CFR 403 respectively. The approved Local Pretreatment Program and Conditions of Approval are hereby incorporated as part of this permit by reference. The on-going industrial monitoring activities of the POTW's pretreatment program shall be governed by pretreatment regulation and the Conditions of Final Approval.

the Publicly Owned Treatment Works or POTW) to aid the State in the management of the Local Pretreatment Program established pursuant to the aforementioned regulations and statutory authority.

Section II. Responsibilities of POTW and DEM

1. The pretreatment program will be administered at the local level with state participation as described herein, after the POTW has taken certain enabling actions. These action consist of, but are not limited to, amending its sewer use ordinance to meet minimum requirements of state and federal pretreatment regulations, submitting and industrial user (IU) survey in an acceptable format, and reaching agreement on a pretreatment implementation schedule in the POTW's NPDES Permit.

2. The POTW will have assumed responsibility for performing the following activities:
   a. Conduct an Industrial User Survey including identification of industrial users and the character and volume of pollutants contributed to the POTW by the industrial users.
   b. Submit an evaluation of legal authorities to be used by the permittee to apply and enforce the requirements of sections 307(b) and 402(b) (s) of the Clean Water Act, including those requirements outlined in 40 CFR 403.8 (f) (1) and .0905.
   c. Submit a determination of technical information (including specific requirements of 40 CFR 403.8 and 0905 and .0908.)
   d. Submit specific POTW effluent limitations for prohibited pollutants contributed to the POTW by industrial users.
   e. Submit design of a monitoring program which will implement the requirements of the State and Federal regulations.
   f. Submit list of monitoring equipment required by the POTW to implement the pretreatment program and a description of municipal facilities to be constructed for monitoring or analysis of industrial wastes.

g. Submit an evaluation of financial programs and revenue sources as required by 40 CFR 403.8(f) (3), and .0905 (f) (3) which will be employed to implement the pretreatment program.

Submit a request for pretreatment program approval (and removal credit approval, if desired) as required by 40 CFR 403.9 and .0909.

3. The DEM will review removal credit request and will make an appropriate determination.

4. Fundamentally different factors variance request by a given category of industry may be commented upon by the POTW. DEM will make a preliminary finding and deny the request if fundamentally different factors do not exist. If such factors are found to exist, DEM will forward to EPA a recommendation that the request be approved.

Section III. Permit Review and Issuance

1. Applications by an IU for a POTW Indirect Discharger (PID) Permit will consist of an engineering report conforming to a prescribed format. This application should be submitted to the POTW for review and comment.

2. Pretreatment permits will be issued by the POTW staff. A draft of each proposed permit will be provided to the IU with a 30-day comment period.

3. The POTW will issue PID Permits to primary industries (as defined by 40 CFR 403) and significant industrial users. (For the purpose of this agreement, the term "significant industrial user" shall mean an IU which discharges greater than 0.025 MGD to a POTW, or greater than 5 percent of the hydraulic or organic design capacity of the receiving POTW, or an IU having a priority pollutent in its discharge.)

4. Determination of IU's pretreatment standard subcategory and PID Permit limits (if national pretreatment standards are unavailable) shall be

made by the POTW with concurrence by DEM. Minimum acceptable IU pretreatment standards will be those promulgated by EPA, and adopted by the EMC, although ordinance requirements may supersede national standards if more restrictive for purposes of protecting Water Quality.

5. Prohibitive pretreatment determinations will be made in accordance with the POTW ordinance. The POTW ordinance will be required to meet the minimum criteria expressed in 40 CFR 403.5(b).
6. Permits will be issued under POTW procedures and will require renewal at established intervals except that permits may be modified or revised upon the adoption of new standards or, at such time as IU process changes become a factor.

Section IV. Compliance Assurance

1. All permitted IU's shall be required to submit self-monitoring data at monthly intervals to the POTW (unless otherwise instructed). These monthly reports will be submitted on standardized forms and due at reasonable reporting intervals, established by the POTW.
2. The POTW will maintain a compliance evaluation system for permitted IU's with overview by DEM. Copies of violation notices concerning compliance evaluation by the POTW will be provided to DEM.
3. Primary and significant industrial users will receive at least one compliance evaluation inspection and one compliance sampling inspection by the POTW each fiscal year. The DEM will overview this activity. All compliance inspection by the POTW will be maintained as a written report for accountability purposes. All compliance records shall be maintained for a minimum of three (3) years.

Section V. Enforcement

1. The POTW must play the lead role in enforcement. Enforcement may be a joint effort with DEM overview. The POTW shall keep the DEM informed concerning all enforcement actions initiated.
2. The DEM has the authority to overview and if necessary to enforce against non-compliance by industrial users when the POTW has failed to act or has acted to seek relief but has sought a penalty which the director finds to be insufficient.
3. The enforcement of POTW pretreatment programs by DEM is conducted through the POTW's NPDES permit.

Section VI. Reporting and Transmittal of Information

1. The POTW will advise the DEM of all introductions of new pollutants into the POTW.
2. The POTW will transmit to the DEM a copy of all compliance inspections performed at IU facilities by the POTW.
3. The DEM will transmit to the POTW a copy of all compliance inspections performed at IU facilities by the DEM.
4. The DEM will notify the POTW of the applicability of pretreatment standards as final standards are promulgated to EPA and adopted by the EMC. The industrial user inventory provided by the POTW will be used as the basis fo notifications to appropriate IU's.

Section VII. Revisions to Agreement

This agreement may be reviewed annually during the fourth quarter of each fiscal year (beginning October 1 and ending September 30) with revisions agreeable to both parties made at that time.

REGION V

(State of Indiana)

(State of Wisconsin)

(Region V Model Language)

State of Indiana

Permit No. IN 0025755

INDIANA STREAM POLLUTION CONTROL BOARD

AMENDED AUTHORIZATION TO DISCHARGE UNDER THE

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended by PL 92-500 and PL 95-217, (33 U.S.C. 1251 et seq.; the "ACT"), and Public Law 100, Acts of 1972, as amended (IC 13-7 et seq.; the "Environmental Management Act"), the National Pollutant Discharge Elimination System (NPDES) discharge Permit No. IN 0025755, issued September 1, 1984, to the City of Goshen, located at Goshen, Indiana, is hereby amended by the revision of pages 8 and 9 of 11, and the deletion of page 10 by the addition of pages 2a, 8, and 9 of 11. The additional pages establish conditions for the operation of a local pretreatment program by the permittee.

All terms and conditions of the existing permit not modified by this document will remain in effect. Further, any existing term or condition which this modification will change will remain in effect until any legal restraint to the imposition of this modification has been resolved.

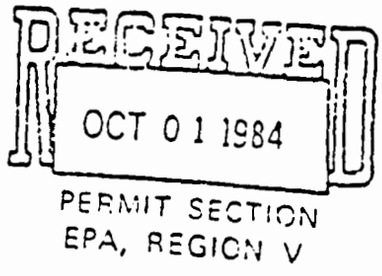
This amendment shall become effective on the date of the signature of the Technical Secretary.

This amendment shall expire at midnight, August 31, 1989.

Signed this _____ day of _____, 1984, for the Indiana Stream Pollution Control Board.

_____

Technical Secretary



PART III

Requirement to Operate
a Pretreatment Program

The permittee, hereinafter referred to as the "Control Authority," is required to operate an industrial pretreatment program as described in the program proposal approved by the Indiana Stream Pollution Control Board. To ensure the program is operated as approved, the following conditions and reporting requirements are hereby established:

The Control Authority (CA) shall:

1. Submit a schedule for implementation of its program within six (6) weeks after the issuance of this modification and report its progress in implementing the pretreatment program during each calendar month by the 28th day of the following month to the attention of the Pretreatment Group, Division of Water Pollution Control, Indiana State Board of Health. This reporting requirement may be terminated by written notification from the Indiana Stream Pollution Control Board without public notice.

2. Issue discharge permits to all affected Industrial Users (IUs) in accordance with the approved pretreatment program procedures within six (6) months after the issuance of this modification. The permits shall require the development of compliance schedules, as necessary, by each industrial user for the installation of control technologies to meet applicable industrial user discharger limits and other pretreatment requirements.

3. Enforce the industrial pretreatment requirements, including industrial user discharge limits, of the municipal sewer use ordinance and discharge permits issued pursuant to the ordinance. In addition, the CA is required to report IUs that are in violation of the ordinance in April, July, October, and January. The report shall include a description of corrective actions that have or will be taken by the CA to resolve the violations. Send all reports to the attention of the Compliance Section of the Division of Water Pollution Control, Indiana State Board of Health.

4. Carry out inspection, surveillance, and monitoring requirements as described in its approved program which will determine, independent of information supplied by IUs, whether IUs are in compliance with the industrial user discharge limits and other applicable pretreatment requirements.

State of Wisconsin

E. PRETREATMENT PROGRAM REQUIREMENTS

The permittee is required to operate an industrial pretreatment program as described in the program approved by the Department of Natural Resources and that complies with the requirements set forth in NR 214, Wis. Adm. Code. To ensure the program is operated in accordance with the approved program, the following conditions and requirements are hereby established:

1. Inventories

a. Character and Volume of Industrial Discharges

The permittee shall maintain a current inventory of the general character and volume of wastewater that industrial users discharge to the treatment works and shall update the industrial user survey annually and report any changes in the survey to the Wisconsin Department of Natural Resources by February 28th of each year.

b. Priority Pollutants and Additional Organic Compounds[1]

The permittee shall conduct an inventory of priority pollutants as defined by the U.S. EPA, and shall also identify and quantify additional organic compounds which occur in the influent, effluent and sludge. The inventory shall be completed by March 31, 1987 and shall consist of:

1) Sampling and analysis of the influent and effluent for the priority pollutants. The sampling shall be done during a day when industrial discharges are occurring at normal to maximum levels. The samples shall be 72-hour composites, except for volatile organics which shall be taken by grab sampling techniques. Analysis for the U.S. EPA Organic Priority Pollutants shall be performed using U.S. EPA methods #624 and #625 (July 1982 version or more recent version).

2) Sampling and analysis of a sludge sample for the priority pollutants. The sludge sample shall be a composite of weekly samples taken over a period of at least one month during the year. Analysis of sludge samples for U.S. EPA Organic Priority Pollutants shall also follow methods #624 and #625 cited in 1) above except for modifications to the samples preparation and extraction techniques appropriate to sludge analysis.

3) Sample collection, storage and analysis shall conform to the procedures recommended by the Department. Special sampling and/or preservation procedures will be required for those pollutants which deteriorate rapidly. The Department will provide additional guidance on sample collection, storage and analysis at the permittees request.

4) In addition to the priority pollutants, a reasonable attempt shall be made to identify and quantify the ten most abundant constituents of each extract (excluding priority pollutants and unsubstituted aliphatic compounds) shown to be present by peaks on the total ion plots (reconstructed gas chromatograms) more than ten times higher than the adjacent background noise. Identification shall be attempted through the use of the U.S. EPA/NIH computerized library of mass spectra, with visual confirmation by an experienced analyst. Quantification may be an order-of-magnitude estimate based upon comparison with an internal standard.

2. Control and Enforcement

a. Industrial User Compliance Schedules[2]

The permittee shall require the development of compliance schedules, as necessary, by each industrial user for the installation of control technologies to meet applicable industrial user discharge limits and other pretreatment requirements and shall issue discharge permits t industrial users in accordance with the approved pretreatment program procedures by September 30, 1984.

b. Industrial User Violation Report

The permittee shall enforce the industrial pretreatment requirements including industrial use discharge limits, of the Section 6.11 of the Code of Ordinances. In addition, the permittee is required to report quarterly industrial users that are in violation of the ordinance to t Department of Natural Resources by 30 days following the end of each quarter. The report shall include a description of corrective actions that have or will be taken by the permitte to resolve the violations. The first report shall be due September 30, 1984. If there are industrial users in violation during a quarter, the report should so state.

3. Annual Program Reviews

a. Program Effectiveness Analysis

The permittee shall by March 31, annually evaluate the effectiveness of the pretreatment program, and submit a report to the Department. The report shall include a brief summary of the work performed during the year including the numbers of permits issued and in eff numbers and kinds of industrial user reports reviewed, number of inspections and monitoring surveys conducted, budget and personnel assigned to the program, a general discussion of program progress in meeting the objectives of the LaCrosse Pretreatment Program together wit summary comments and recommendations.

b. Program Modifications

Any significant proposed program modification shall be submitted to the Department of Natura Resources for app val. Hereinafter, a significant program modification shall include, but not be limited to any change in enabling legal authority to administer and enforce pretreatment progr conditions and requirements, major modification in the program's administrative procedure or operating agreement(s), a significant reduction in monitoring procedures, a significant change in the financial/revenue system, and a significant change (including any relaxation) in the local limitations for toxicants enforced and applied to al affected industrial users of the sewage treatment works.

4. Special Conditions

a. Surveillance

The permittee shall require the submission of, receive and review self-monitoring reports or other notices from industrial users in accordance with the approved pretreatment program procedures. The permittee shall also carry out inspection, surveillance, and monitor requirements which will determine, independent of information supplied by he industr user whether the industrial users are in compliance with the industrial user discharge limits and other applicable pretreatment requirements.

b. Publication of Violations

The permittee shall publish a list of industrial users that have significantly violated the municipal sewer use ordinance during the calendar year, in the largest daily newspaper in the area by January 31 of the following year, pursuant to NR 211.31(1)(g).

c. Limitations for Industrial Users

The permittee shall complete an evaluation of the local limitations for cadmium, chromium, copper, lead, nickel, zinc and cyanide for industrial users, discharging these substances to the treatment plant and shall propose alternate or new limitations if justified. The permittee shall provide the evaluation of local limitations in a report to the Department due by June 30, 1985. Upon concurrence and acceptance of alternate or new limitations by the Department, the permittee shall adopt into its existing sewer use ordinance said limitations within six months.

0621c

Region V Model Language

DRAFT COPY
SUBJECT TO REVISION

ATTACHMENT 3

OTHER REQUIREMENTS

APPROVED PRETREATMENT PROGRAM CONDITIONS

Under the authority of (Section 307(b) and (c) and 402(b)(8) of the Clean Water Act or applicable State law) and implementing regulations (40 CFR Part 403), the permittee's final pretreatment program application as submitted on _____ is hereby approved. The permittee, hereinafter referred to as the "Control Authority", shall apply and enforce against violations of categorical pretreatment standards promulgated under Section 307(b) and (c) of the Act and prohibitive discharge standards as set forth in 40 CFR Part 403.5. The Control Authority shall implement the conditions of the Approved Pretreatment Program in the following order:

A. APPROVED PRETREATMENT PROGRAM CONDITIONS

1. Apply and enforce the legal authorities and procedures as approved on _____ which shall include, but not be limited to, those specific local effluent limitations established pursuant to 40 CFR 403.5(c) and enforceable on industrial users of the system for the parameters listed in Part III, Section D of this prmit in accordance with the approved program plan industrial allocation scheme.

2. Maintain and update, as necessary, records indentifying the nature, character, and volume of pollutants contributed by industrial users to the publicly owned treatment works (POTW).

3. Enforce and obtain appropriate remedies for non-compliance by any industrial user with any applicable pretreatment standard and requirement as defined by Section 307(b) and (c) of the Act, Section 403.5, and any State or local requirement, whichever is more stringent.

4. Issue (wastewater discharge permits, orders, contracts, agreements, etc.) to all affected industrial users in accordance with the approved pretreatment program procedures and require the development of compliance schedules, as necessary, by each industrial user for the installation of control technologies to meet applicable pretreatment standards and requirements as required by Section _____ of Sewer Use Ordinance _____.

5. Carry out inspection, surveillance, and monitoring requirements which will determine, independent of information supplied by the industrial user, whether the industrial user is in compliance with the applicable pretreatment standards.

6. Comply with all confidentiality requirements set forth in 40 CFR Part 403.14 as well as the procedures established in the approved pretreatment program.

7. Maintain and adjust, as necessary, revenue sources to ensure adequate equitable and continued pretreatment program implementation costs.

B. REPORTING REQUIREMENTS

The Control Authority shall prepare and submit to the (USEPA, Region V, Permits Section or the State) a report on the _____th of _____ and the _____th of _____ which describes the pretreatment program activities for the (previous calendar year or 6-month period or more frequently as required by the Approval Authority). Such report(s) shall include:

1. An updated listing of the Control Authority's industrial users which identifies additions and deletions of any industrial users from the _____ 19 industrial waste inventory. Reasons shall be provided for the aforementioned additions and removals.

2. A descriptive summary of the compliance activities initiated, ongoing and completed against industrial users which shall include the number of major enforcement actions (i.e. administrative orders, show cause hearings, penalties, civil actions, fines, etc.) for the reporting period.

3. A description of all substantive changes proposed for the Control Authority's program as described in Part III, Section A of this permit. All substantive changes must first be approved by (Agency Name) before formal adoption by the Control Authority. Hereinafter, substantive changes shall include, but not be limited to, any change in the enabling legal authority to administer and enforce pretreatment program conditions and requirements, major modification in the program's administrative procedures or operating agreements(s), a significant reduction in monitoring procedures, a significant change in the financial/revenue system, or a significant change in the local limitations for toxicants enforced and applied to all affected industrial users of the sewage treatment works.

4. A listing of the industrial users who significantly violated applicable pretreatment standards and requirements, as defined by section 403.3(f)(2)(vii) of the General Pretreatment Regulations, for the reporting period.

5. The sampling and analytical results for the specified parameters as contained in Part III, Section C of this permit.

6. (optional) The Control Authority shall submit to the (USEPA, Region V, Permits Section and/or State) by December 31 of each year, the names and address of the tanneries receiving the sulfide waiver pursuant to the procedures and conditions established by 40 CFR 425.04(b) and (c). This report must identify any problems resulting from granting the sulfide waiver as well as any new tanneries tributary to the sewerage system for which the sulfide standards may apply or any tannery receiving the sulfide waiver which no longer is applicable.

7. (optional) The Control Authority shall submit to the (USEPA, Region V, Permits Section or State Permit Section) by December 31 of each year, the name and address of each industrial user that has received a revised discharge limit in accordance with Section 403.7 (Removal Allowance Authority). This report must comply with the signatory and certification requirements of Section 403.12 (l) and (m).

C. SAMPLING AND MONITORING REQUIREMENTS

1. The Control Authority shall sample, analyze and monitor its influent, effluent and sludge in accordance with the techniques prescribed in 40 CFR Part 136 and amendments thereto, in accordance with the specified monitoring frequency and schedule for the following parameters:

(1) Parameters	Units	Frequency	Sample Type	(2) Permittee's
Total Arsenic (As)				
Total Cadmium (Cd)				
Total Chromium (Cr,)				
Total Chromium (Cr)				
Total Copper (Cu)				
Total Cyanide (CN)				
Total Iron (Fe)				
Total Lead (Pb)				
Total Mercury (Hg)				
Total Nickel (Ni)				

(1) Parameters	Units	Frequency	Sample Type	(2) Permittee's
Total Phenols				
Total Silver (Ag)				
Total Zinc (Zn)				
Total Kjeldahl Nitrogen (TKN)				

(1) Approval Authority should include other parameters as needed.
(2) Note whether sampling apply to permitte's influent, effluent and sludge.

D. SPECIAL CONDITIONS

1. At no time shall the following daily influent values be exceeded by the Control Authority for the specified parameters:

Parameters	Mg/ l	Pounds / Day
Total Cyanide (Cn)		
Total Cadmium (Cd)		
Total Chromium (Cr, T)		
Total Copper (Cu)		
Total Iron (Fe)		
Total Lead (Pb)		
Total Mercury (Hg)		
Total Nickel (Ni)		
Total Silver (Ag)		
Total Zinc (Zn)		
(Others)		

2. If the sampling data results from Part III, Section C of this permit meet the criteria of 40 CFR 403.5(c), then this permit will be modified to include influent values for these parameters.

3. (optional) The Control Authority shall notify (USEPA, Region V, Permits Section or the State) 60 days prior to any major proposed change in existing sludge disposal practices.

4. (optional) The Control Authority shall monitor the following industrial users discharge for the specified parameters in accordance with the following frequency and schedule and submit the results to (Region V or the State) on the _____th of _____ and the _____the of _____.

List Users	Parameter	Units	Frequency	Sample Type	Notes
a.					
b.					
c.					
(Others)					

E. RETAINER

The USEPA, Region V and the State retains the right to take legal action against the industrial user and/or the Control Authority for those cases where a permit violation has occurred because of the failure of an industrial user's compliance with applicable pretreatment standards and requirements.

REGION VI

(Region VI Model Language)

A. OTHER REQUIREMENTS

1. Contributing Industries and Pretreatment Requirements

a. The permittee shall operate an industrial pretreatment program in accordance with section 402(b)(8) of the Clean Water Act and the General Pretreatment Regulations (40 CFR Part 403). The program shall also be implemented in accordance with the approved POTW pretreatment program submitted by the permittee which is hereby incorporated by reference.

b. The permittee shall establish and enforce specific limits to implement the provisions of 40 CFR §403.5(a) and (b), as required by 40 CFR §403.5(c). All specific prohibitions or limits developed under this requirement are deemed to be conditions of this permit. The specific prohibitions set out in 40 CFR §403.5(b) shall be enforced by the permittee unless modified under this provision.

c. The permittee shall, prepare annually a list of Industrial Users which, during the past twelve months, have significantly violated pretreatment requirements. This list is to be published annually, in the largest newspaper in the municipality, during the month of _____, with the first publication due _____.

d. In addition, at least 14 days prior to publication, the following information is to be submitted to the EPA and the State for each significantly violating Industrial User:

1. Condition(s) violated and reason(s) for violations(s),

2. Compliance action taken by the City, and

3. Current compliance status.

REGION VIII

(Westminster, Colorado)
[language used by the EPA Regional Office]

(State of South Dakota)
[language used by the EPA Regional Office]

Westminster, Colorado

NATIONAL PRETREATMENT PROGRAM
MEMORANDUM OF AGREEMENT
BETWEEN THE
CITY OF WESTMINSTER, COLORADO
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION VIII

The United States Environmental Protection Agency, Region VIII (hereinafter, the "EPA") hereby approves the City of Westminster's (hereinafter, the "City") Pretreatment Program described in the City's November 15, 1982 submittal document entitled "Industrial Pretreatment Program", as meeting the requirements of Section 307(b) and (c) of the Clean Water Act (hereinafter, the "Act") and regulations promulgated thereunder. Further, to define the responsibilities for the establishment and enforcement of National Pretreatment Standards for existing and new sources under Section 307 (b) and (c) of the Act, the City and EPA hereby enter into the following agreement:

1. The City has primary responsibility for enforcing against discharges prohibited by 40 CFR 403.5, and applying and enforcing any National Pretreatment Standards established by the United States Environmental Protection Agency in accordance with Section 307(b) and (c) of the Act.

2. The City shall implement the Industrial Pretreatment Program in accordance with the legal authorities, policies, and procedures described in the permittee's Pretreatment Program document entitled, "Industrial Pretreatment Program", November 1982. Such program commits the City to do the following:

   a. Carry out inspection, surveillance, and monitoring procedures that will determine, independent of information supplied by the industrial user, whether the industrial user is in compliance with the pretreatment standards;

   b. Require development, as necessary, of compliance schedules by each industrial user for the installation of control technologies to meet applicable pretreatment standards;

   c. Maintain and update, as necessary, records identifying the nature and character of industrial user inputs;

   d. Obtain appropriate remedies for noncompliance by any industrial user with any pretreatment standard and/or requirement; and,

   e. Maintain an adequate revenue structure for continued implementation of the pretreatment program.

3. The City shall provide the United States Environmental Protection Agency and the State of Colorado with an annual report briefly describing the City's pretreatment program activities over the previous calendar year. Such report shall be submitted no later than March 28th of each year and shall include:

a. An updated listing of the City's industrial users.

b. A descriptive summary of the compliance activities including number of major enforcement actions, (i.e., administrative orders, penalties, civil actions, etc.).

c. An assessment of the compliance status of the City's industrial users and the effectiveness of the City's pretreatment program in meeting its needs and objectives.

d. A description of all substantive changes made to the permittee's pretreatment program description referenced in paragraph 2. Substantive changes include, but are not limited to, any change in any ordinance, major modification in the program's administrative structure or operating agreement(s), a significant reduction in monitoring, or a change in the method of funding the program.

4. Pretreatment standards (40 CFR 403.5) prohibit the introduction of the following pollutants into the waste treatment system from <u>any</u> source of nondomestic discharge:

a. Pollutants which create a fire or explosion hazard in the publicly owned treatment works (POTW);

b. Pollutants which will cause corrosive structural damage to the POTW, but in no case, discharges with a pH lower than 5.0;

c. Solid or viscous pollutants in amounts which will cause destruction to the flow in sewers, or other interference with operation of the POTW;

d. Any pollutant, including oxygen demanding pollutants (BOD_5, etc.), released in a discharge at such a volume or strength as to cause interference in the POTW; and,

e. Heat in amounts which will inhibit biological activity in the POTW, but in no case, heat in such quantities that the influent to the sewage treatment works exceeds 104° F (40° C).

5. In addition to the general limitations expressed in paragraph 4. above, applicable National Categorical Pretreatment Standards must be met by all industrial users of the POTW. These standards are published in the Federal Regulations at 40 CFR 405 et. seq.

6. The Agreement contained herein shall be incorporated, as soon as possible, in the City's NPDES permit. Noncompliance with any of these requirements shall be subject to the same enforcement procedures as any permit violation.

Nothing in this Agreement is intended to affect any Pretreatment requirement including any standards or prohibitions, established by state or local law as long as the state and local requirements are not less stringent than any set forth in the National Pretreatment Program Standards, or other requirements or prohibitions established under the Act or regulations promulgated thereunder.

Nothing in this Agreement shall be construed to limit the authority of the U. S. EPA to take action pursuant to Sections 204, 208, 301,304, 306, 307, 308, 309, 311, 402, 404, 405, 501, or other Sections of the Clean Water Act of 1977 (33 USC 1251 et seq).

This Agreement will become effective upon the final date of signature.

City of Westminster, Colorado

By_____

Date_____

U.S. Environmental Protection Agency
Region VIII

By_____

Date_____

State of Colorado Department of Health
Water Quality Control Division

By_____

Date_____

State of South Dakota

OTHER REQUIREMENTS

Industrial Pretreatment Program

1. The permittee has been delegated primary responsibility for enforcing against discharges prohibited by 40 CFR 403.5, and applying and enforcing any National Pretreatment Standards established by the United States Environmental Protection Agency in accordance with Section 307(b) and (c) of the Act.

2. The permittee shall implement the Industrial Pretreatment Program in accordance with the legal authorities, policies, and procedures described in the permittee's Pretreatment Program document entitled, Pretreatment Program, and submitted October 27, 1982. Such program commits the permittee to do the following:

   a. Carry out inspection, surveillance, and monitoring procedures which will determine, independent of information supplied by the industrial user, whether the industrial user is in compliance with the pretreatment standards;

   b. Require development, as necessary, of compliance schedules by each industrial user for the installation of control technologies to meet applicable pretreatment standards;

   c. Maintain and update, as necessary, records identifying the nature and character of industrial user inputs;

   d. Obtain appropriate remedies for noncompliance by any industrial user with any pretreatment standard and/or requirement; and,

   e. Maintain an adequate revenue structure for continued implementation of the pretreatment program.

3. The permittee shall provide the United States Environmental Protection Agency and the State of South Dakota with an annual report briefly describing the permittee's pretreatment program activities over the previous calendar year. Such report shall be submitted no later than March 28th of each year and shall include:

   a. An updated listing of the permittee's industrial users.

   b. A descriptive summary of the compliance activities including numbers of any major enforcement actions (i.e., administrative orders, penalties, civil actions, etc.).

   c. An assessment of the compliance status of the permittee's industrial users and the effectiveness of the permittee's pretreatment program in meeting its needs and objectives.

OTHER REQUIREMENTS (Continued)

Industrial Pretreatment Program (Continued)

d. A description of all substantive changes made to the permittee's pretreatment program description referenced in paragraph 1. Substantive changes include, but are not limited to, any change in any ordinance, major modification in the program's administrative structure or operating agreement(s), a significant reduction in monitoring, or a change in the method of funding the program.

4. Pretreatment standards (40 CFR 403.5) prohibit the introduction of the following pollutants into the waste treatment system from <u>any</u> source of nondomestic discharge:

a. Pollutants which create a fire or explosion hazard in the publicly owned treatment works (POTW);

b. Pollutants which will cause corrosive structural damage to the POTW, but in no case, discharges with a pH lower than 5.0;

c. Solid or viscous pollutants in amounts which will cause destruction to the flow in sewers, or other interference with operation of the POTW;

d. Any pollutant, including oxygen demanding pollutants (BOD_5, etc.), released in a discharge at such a volume or strength as to cause interference in the POTW; and,

e. Heat in amounts which will inhibit biological activity in the POTW, but in no case, heat in such quantities that the influent to the sewage treatment works exceeds 104°F (40°C).

5. In addition to the general limitations expressed in paragraph 4. above, applicable National Categorical Pretreatment Standards must be met by all industrial users of the POTW. These standards are published in the Federal Regulations at 40 CFR 405 et. seq.

6. The permit issuing authority retains the right to take legal action against the industrial user and/or the POTW for those cases where a permit violation has occurred because of the failure of an industrial user to meet an applicable pretreatment standard.

REGION IX

(Region IX Model Language)

Pretreatment of Industrial Wastewaters

a. The permittee shall be responsible for the performance of all pretreatment requirements contained in 40 CFR Part 403 and shall be subject to enforcement actions, penalties, fines and other remedies by the U.S. Environmental Protection Agency (EPA), or other appropriate parties, as provided in the Clean Water Act, as amended (33 USC 1351 et seq.) (hereafter "Act"). The permittee's Approved POTW Pretreatment Program is hereby made an enforceable condition of this permit. EPA may initiate enforcement action against an industrial user for noncompliance with applicable standards and requirements as provided in the Act.

b. The permittee shall enforce the requirements promulgated under sections 307(b), 307(c), 307(d) and 402(b) of the Act. The permittee shall cause industrial users subject to Federal Categorical Standards to achieve compliance no later than the date specified in those requirements or, in the case of a new industrial user, upon commencement of the discharge.

c. The permittee shall perform the pretreatment functions as required in 40 CFR Part 403 including, but not limited to:

(1) Implement the necessary legal authorities as provided in 40 CFR 403.8(f)(1);

(2) Enforce the pretreatment requirements under 40 CFR 403.5 and 403.6;

(3) Implement the programmatic functions as provided in 40 CFR 403.8(f)(2); and

(4) Provide the requisite funding and personnel to implement the pretreatment program as provided in 40 CFR 403.8(f)(3).

d. The permittee shall submit annually a report to EPA Region 9 and the State describing the permittee's pretreatment activities over the previous twelve months. In the event that the permittee is not in compliance with any conditions or requirements of this permit, then the permittee shall also include the reasons for non-compliance and state how and when the permittee shall comply with such conditions and requirements. This annual report is due on [DATE] of each year and shall contain, but not be limited to, the following information:

(1) A summary of analytical results from representative, flow-proportioned, 24-hour composite sampling of the POTW's influent and effluent for those priority pollutants known or suspected to be discharged by industrial users. Sludge shall be sampled during the same 24-hour period and analyzed for the same pollutants as the influent and effluent sampling and analysis. The sludge analyzed shall be a composite sample of a minimum of twelve discrete samples taken at equal time intervals over the 24-hour period. Wastewater and sludge sampling and analysis shall be performed a minimum of [FREQUENCY]. The permittee shall also provide any influent, effluent or sludge monitoring data for nonpriorit pollutants which the permittee believes may be causing or contributing to interference, pass through or adversely impacting sludge quality.

(2) A discussion of upset, interference, or pass through incidents, if any, at the POTW treatment plant which the permittee knows or suspects were caused by industrial users of the POTW system. The discussion shall include the reasons why the incidents occurred, the corrective actions taken and, if known, the

name of the industrial user(s) responsible. The discussion shall also include a review of the applicable pollutant limitations to determine whether any additional limitations, or changes to existing requirements, may be necessary to prevent pass through and violations of state water quality standards, interference with the operation of the POTW, or interference with disposal of sewage sludge.

(3) The cumulative number of industrial users that the permittee has notified regarding Baseline Monitoring Reports and the cumulative number of industrial user responses.

(4) An updated list of the permittee's industrial users, or a list of deletions and additions keyed to a previously submitted list. The permittee shall provide a brief explanation for each deletion. The list shall identify the users subject to Federal Categorical Standards by specifying which set of standards are applicable. The list shall indicate which categorical industries, or specific pollutants from each industry, are subject to local limitations that are more stringent than the Federal Categorical Standards. The permittee shall also list the noncategorical industrial users that are subject only to local discharge limitations. The permittee shall characterize the compliance status of each industrial user by employing the following descriptions:

(A) In compliance with Baseline Monitoring Report requirements (where applicable);

(B) Consistently achieving compliance;

(C) Inconsistently achieving compliance;

(D) Significantly violated applicable pretreatment requirements as defined by 40 CFR 403.8(f)(2)(vii);

(E) On a compliance schedule to achieve compliance (include the date final compliance is required);

(F) Not achieving compliance and not on a compliance schedule;

(G) The permittee does not know the industrial user's compliance status.

A report describing the compliance status of any industrial user characterized by the descriptions in items 4(C) through (G) above shall be submitted quarterly from the annual report date to EPA Region 9 and the State. The report shall identify the specific compliance status of each such industrial user.

(5) A summary of the inspection and sampling activities conducted by the permittee during the past year to gather information and data regarding industrial users. The summary shall include:

(A) The names of the industrial users subject to surveillance by the permittee and an explanation of whether they were inspected, sampled, or both and the frequency of these activities at each user; and

(B) The conclusions or results from the inspection or sampling of each industrial user.

(6) A summary of the compliance/enforcement activities during the past year. The summary shall include the names of the industrial users affected by the following actions:

(A) Warning letters or notices of violation regarding the industrial users' apparent noncompliance with Federal Categorical Standards or local discharge limitations. For each industrial user identify whether the apparent violation concerned the Federal Categorical Standards or local discharge

(B) Administrative Orders regarding the industrial users' noncompliance with Federal Categorical Standards or local discharge limitations. For each industrial user identify whether the violation concerned the Federal Categorical Standards or local discharge limitations;

(C) Civil actions regarding the industrial users' noncompliance with Federal Categorical Standards or local discharge limitations. For each industrial user identify whether the violation concerned the Federal Categorical Standards or local discharge limitations;

(D) Criminal actions regarding the industrial users' noncompliance with Federal Categorical Standards or local discharge limitations. For each industrial user identify whether the violation concerned the Federal Categorical Standards or local discharge limitations;

(E) Assessment of monetary penalties. For each industrial user identify the amount of the penalties;

(F) Restriction of flow to the POTW; or

(G) Disconnection from discharge to the POTW.

(7) A description of any significant changes in operating the pretreatment program which differ from the information in the permittee's Approved POTW Pretreatment Program including, but not limited to changes concerning: the program's administrative structure; local industrial discharge limitations; monitoring program or monitoring frequencies; legal authority or enforcement policy; funding mechanisms; resource requirements; or staffing levels.

(8) A summary of the annual pretreatment budget, including the cost of pretreatment program functions and equipment purchases.

(9) A summary of public participation activities to involve and inform the public.

(10) Other miscellaneous pretreatment developments, including treatment facilities changes, changes in sludge disposal methods, receiving water quality, data management and concerns not described elsewhere in the report.

Duplicate signed copies of these reports shall be submitted to the Regional Administrator and the State at the following addresses:

Regional Administrator
U.S. Environmental Protection Agency
Region 9 Attn: W-5-1
215 Fremont Street
San Francisco, California 94105

[STATE ADDRESS]

REGION X

(Region X Model Language)

(example pretreatment langua
for Region X POTW permits)

M. Pretreatment Program Requirements

1. The permittee shall implement the Industrial Pretreatment program in accordance with the legal authorities, policies, procedures, and financial provisions described in the permittee's pretreatment program submission entitled, and dated, , and the General Pretreatment Regulations (40CFR 403). At a minimum, the following pretreatment implementation activities shall be undertaken by the permittee:

a. Enforce categorical pretreatment standards promulgated pursuant to Section 307 (b) and (c) of the Act, prohibitive discharge standards as set forth in 40 CFR 403.5, or local limitation specified in Section _____ of the (City/District) code, whichever are more stringent or apply at the time of issuance or modification of an (industrial waste acceptance form/industrial discharge permit/contract). Locally derived limitations shall be defined as pretreatment standards under Section 307(d) of the act and shall not be limited to categorical industrial facilities.

b. Issue (industrial discharge permits, contracts, industrial waste acceptance form) to all affected industrial users. (Permits, contracts, industrial waste acceptance forms) shall contain limitations, sampling protocols, compliance schedule if appropriate, reporting requirements, and appropriate standard conditions.

c. Maintain and update, as necessary, records, identifying the nature, character, and volume of pollutants contributed by industrial users. Records shall be maintained in accordance with Part II.G.4.

d. Carry out inspections, surveillance, and monitoring activities on industrial users to determine compliance with applicable pretreatment standards. Frequency of monitoring of industrial user's wastewaters shall be commensurate with the character and volume of the wastes, but shall not be less than two(2) times per year.

e. Enforce and obtain remedies for non-compliance by any industrial users with applicable pretreatment standards and requirements.

2. The permittee shall develop and submit to EPA for approval within 6 months of the effective date of this permit, an accidental spill prevention program to reduce and prevent spills and slug discharges of pollutants from industrial users. The program, as approved by the Agency, will become an enforceable part of this permit.

3. Whenever, on the basis of information provided to the Water Division Director, U. S. Environmental Protection Agency, it has been determined that any source contributes pollutants in the permittee's treatment works in violation of subsection (b), (c) or (d) of Section 307 of the Clean Water Act, notification shall be provided to the permittee. Failure by the permittee to commence an appropriate enforcement action within 30 days of this notification may result in appropriate enforcement action against the source and permittee.

4. Pretreatment Program Sampling Requirements

The permittee shall sample, on a semi-annual basis, its influent, effluent, and sludge over three consecutive days (Monday thru Friday) for the following pollutants: arsenic, cadmium, hexavalent chromium, total chromium, copper, cyanide, lead, mercury, nickel, silver, and zinc. Results shall be reported as total except where noted otherwise.

Daily samples of each shall be 24 hour composited and shall be analyzed and reported seperately. Where composite sampling is not feasible for a particular pollutant, 3 grab samples over a 24 hour period are acceptable. Whenever possible, periods of sampling should be representative of a wet weather and dry weather period.

The sampling protocol may be modified without formal notice, if the results of the sampling data, as presented in the annual report, indicate levels pollutants are either insignificant or conversely significant as they relate to interference at the treatment plant, sludge contaminating or effects on water quality.

(Optional) The permittee shall perform chemical analyses of its influent, effluent, and sludge every (variable) from the effective date of this permit for all specific toxic pollutants listed in Tables II and III of Appendix D of 40 CFR 122..

(Optional) The permittee will be required to conduct a flow-through/static/embryo-larval bioassy to test (chronic/acute) exposure on ecologically important species in the area.

5. Pretreatment Report

1. The permittee shall provide to the U.S. EPA Region 10 Office an annual report that briefly describes the permittee's program activities over the previous twelve months. The Agency may modify, without formal notice, this reporting requirement to require less frequent reporting if it is determined that the data in the report does not substantially change from year to year. (The permittee must also report on the pretreatment program activities of all participating agencies (Name of agencies).) This report shall be submitted to the above address no later than _____ of each year and shall include:

(i) An updated industrial survey, as appropriate.

(ii) Results of wastewater sampling at the treatment plant as specified in Section I.B.2. In addition, the permittee shall calculate removal rates for each pollutant, and provide an analysis and discussion as to whether the existing local limitations specific in Chapter _____ Section _____ of the (City/District) code continue to be appropriate to prevent treatment plant interference, pass through of pollutants that could affect water quality, and sludge contamination.

(iii) Status of Program implementation to include:

a. Any substantial modifications to the pretreatment program as originally approved by the U.S. Environmental Protection Agency, to include staffing and funding updates.

b. Any interference, upset or permit violations experienced at the POTW directly attributable to industrial users.

c. Listing of industrial users inspected and/or monitored during the previous year and summary of results.

d. Listing of industrial users planned for inspection and/or monitoring for the next year along with inspection frequencies.

e. Listing of industrial users notified of promulgated pretreatment standards and/or local standards as required in 40 CFR Part 403.8(f)(2)(iii).

f. Listing of industrial users issued (industrial discharge permits, contracts, industrial waste acceptance forms).

g. Listing of industrial users notified of promulgated pretreatment standards or applicable local standards who are on compliance schedules. The listing should include for each facility the final date of compliance.

h. Planned changes in the implementation program.

(iv) Status of enforcement activities to include:

a. Listing of industrial users, who failed to submit baseline reports or any other reports as specified in 40 CFR 403.12(d) and in Chapter____ Section _____ of the (City/District) code.

b. Listing of industrial users not complying with federal or local pretreatment standards as of the final compliance date.

c. Summary of enforcement activities taken or planned against non-complying industrial users. The permittee shall provide public notice of significant violators as outline in 40 CFR Part 403.8(f)(2)(ii).

2. The permittee shall notify the EPA 60 days prior to any major proposed changes in its existing sludge disposal practices.

(Optional) The permittee shall provide information as required of 40 CFR Part 403.12 (i) and (j) regarding removal allowance.

"Guidance on Enforcement of Prohibitions Against Interference and Pass Through", dated May 3, 1985.

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

MAY 3 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Enforcement of Prohibitions Against Interference and Pass Through

FROM: Glenn L. Unterberger
Associate Enforcement Counsel for Water

Rebecca W. Hanmer, Director
Office of Water Enforcement and Permits

TO: Regional Counsels, Regions I - X
Water Management Division Directors, Regions I - X

Summary

EPA Regions, States with pretreatment approval authority and publicly owned wastewater treatment plants (POTWs) with approved pretreatment programs can and should continue to enforce the general prohibitions against interference and pass through, 40 CFR §§403.5(a), although the regulatory definitions of the terms "interference" and "pass through" have been remanded by the U.S. Court of Appeals For the Third Circuit, in National Association of Metal Finishers et al. v. EPA 719 F.2d 624 (3rd Cir. 1983) and the Agency has suspended them. 49 Fed. Reg. 5131 (Feb. 10, 1984).

Until EPA promulgates new definitions for the two terms, enforcement agencies should interpret them according to accepted principles of statutory construction. In each case, the enforcement agency should consider the general meanings of the two words, the legislative history of the provisions of the Clean Water Act in which they appear and other, related, provisions, judicial interpretations including NAMF v. EPA, supra, appropriate principles of general law, and the relationship of the facts of any particular case to policies which will best effectuate the intent of Congress with regard to pretreatment in the context of the Clean Water Act as a whole. EPA offers some suggestions on

interpretation below, but until a new definition is promulgated, determinations of whether a particular discharge constitutes interference or pass through should be made case by case.

Background

In the Clean Water Act, Congress directed the Administrator of EPA to promulgate regulations "to prevent the discharge of any pollutant through treatment works (as defined in section 212 of this Act) which are publicly owned, which pollutant interferes with, passes through, or is otherwise incompatible with such works." Section 307(b)(1). The Administrator carried out his mandate through two types of regulations: technology-based "categorical" standards which apply to particular categories of industries discharging into POTWs (these appear at 40 CFR Part 405 et. seq.) and general prohibitions which apply to all non-domestic indirect dischargers (these appear at 40 CFR §403.5). All these regulations are to be enforced by the POTW in question if it has an approved pretreatment program pursuant to 40 CFR §403.9, by the State in which the POTW is located, if the State has pretreatment approval authority pursuant to 40 CFR §403.10, and by EPA. (Pursuant to 40 C.F.R. §403.5(e), if, within 30 days after notice from EPA or the State, the POTW fails to commence appropriate enforcement action to correct an interference or pass through violation, EPA or the State may proceed.) The regulations also require each POTW that must institute a pretreatment program (and other POTWs under certain circumstances) to develop specific local limits for individual indirect dischargers where necessary to prevent interference and pass through. 40 CFR §403.5(c). Such facility-specific limits promulgated by POTWs are called local limits. They are enforceable independently of the general prohibitions.

The federal prohibitions against interference and pass through are part of the general prohibitions. The prohibition against interference was first promulgated on November 11, 1973, 40 C.F.R. Part 128, 38 Fed. Reg. 30983. A revised definition was promulgated as part of the June 26, 1978, General Pretreatment Regulations 43 Fed. Reg. 27736; EPA amended the definition on January 28, 1981, 46 Fed. Reg. 9404. As part of the latter action, EPA also promulgated, for the first time, a prohibition against pass through and a definition of that term. Both definitions were challenged in the NAMF case, supra. On September 28, 1983, the Third Circuit remanded both definitions to the Agency. It found the definition of "interference" invalid for failing to require a showing of causation, and it held that the definition of "pass through" had not been promulgated in accordance with the requirements of the Administrative Procedure Act. NAMF v. EPA, supra, at pp. 638-641. The Court expressly declined to rule on the substantive prohibitions. Id. at note 17. In accordance with the Court's opinion, the Agency administratively suspended both definitions on February 10, 1984. 49 Fed. Reg. 5131. EPA will shortly propose new definitions consistent with the Third Circuit's holding.

In February 1984, the Agency convened an advisory committee, the Pretreatment Implementation Review Task Force (PIRT), to assist the Agency in implementing the pretreatment program. The committee was composed of representatives of industry, State regulatory agencies, POTWs, environmental groups and EPA Regional offices. PIRT recommended in its Final Report to the Administrator on January 30, 1985, that in view of the NAMF decision, the Agency promptly issue guidance to all agencies responsible for pretreatment enforcement informing them that the substantive prohibitions against interference and pass through remain enforceable despite the suspension of the definitions. This guidance is intended to respond to PIRT's recommendation.

Interference

The prohibition against interference with the operation or performance of a POTW, which appears at 40 CFR §403.5(a), remains fully enforceable against any non-domestic industrial user by the POTW if it has a pretreatment program approved pursuant to 40 CFR §403.9, by a State if it has pretreatment approval authority pursuant to 40 CFR §403.10, and by EPA. Until EPA promulgates a regulatory definition, the question of whether a particular indirect discharge interferes with the POTW should be determined with reference to the facts of each case, using traditional aids to statutory construction such as the legislative history of relevant provisions of the Clean Water Act, judicial interpretations including NAMF v. EPA, supra, and principles of common law where appropriate. In addition, each POTW should continue to set local limits under 40 CFR 403.5(c) based on its interpretation of interference.

EPA believes that an agency responsible for enforcement should find an interference violation where it can show that discharges from an industrial user, either alone or in combination with discharges from other users, adversely affect the POTW in such a way as to cause it to violate its NPDES permit or adversely affect the way the POTW chooses to process, use or dispose of its sludge. Such adverse effects include those which increase the magnitude or the duration of an NPDES violation or prevent the POTW from using or disposing of its sludge in accordance with all legal requirements applicable to whatever disposal method it selects. The agency needs to first ensure that the problem was not caused entirely by inadequate operation and maintenance at the POTW, since, as the Third Circuit noted, Congress did not intend to require pretreatment for compatible waste as a substitute for adequate municipal waste treatment works. NAMF v. EPA, supra at 640-641. The industrial discharge to the POTW may consist of conventional, non-conventional or toxic pollutants: each type under some circumstances can affect a POTW or its operation. As indicated by the Third Circuit, the agency must demonstrate a causal link between the industrial discharge in question and the adverse effect - in particular, that the pollutant discharged caused, in whole or in part, the NPDES violation or sludge problem observed.

Nevertheless, it is important that nothing in the Act, the legislative history, or the NAMF opinion requires an enforcement authority to show that the industrial user charged with interference is the sole cause of the harm inflicted on the POTW. To the contrary, the majority opinion in that case states: "We conclude that given the language and purpose of the Act, an indirect discharge cannot be liable under the prohibited discharge standard unless it is a cause of the POTW's permit violation or sludge problem." Id. at 641. (Emphasis added). And see concurring opinion at 667. This is consistent with the general principle of tort law that a tortfeasor is not relieved of legal responsibility because another tortfeasor or an innocent party contributed to the harm caused by the tort, and it may not be possible to "apportion" the harm among the different causes. See Restatement (Second) of Torts, §§433(A), 881 (1979). (Indeed, examples of pollution are among the classic illustrations of indivisible harms sometimes brought about by a number of causes.)

The Third Circuit held in NAMF that introduction of a pollutant into a POTW in excess of that allowed by contract with the POTW or by federal, state or local law, or a discharge which differs in nature or constituents from the user's average discharge, cannot be held to be illegal interference without more, namely, a causal link between the discharge and the NPDES or sludge problem at the POTW.[1/] Nevertheless, such local, State or federal limits or known parameters of a user's average discharge may be probative evidence of the amount and characteristics of the pollution load a given POTW is capable of treating while operating properly and in compliance with all its NPDES and sludge requirements, and thus they may help to determine the causes of an interference incident. It is also possible, however, to find interference even where all industrial users are in compliance with applicable local limits where, for example, the local limits are concentration based and the industrial user though meeting the concentration based standards increases the mass of pollutants so significantly that it overloads the POTW. It is recommended, though not mandatory prior to litigation, that the POTW attempt to adjust local limits to allow the POTW to meet its NPDES permit.

Pass Through

Like the prohibition against interference, the prohibition at 40 CFR 403.5(a) against pollutants which pass through a POTW remains in effect and fully enforceable against any non-domestic industrial user by the POTW if it has an approved pretreatment program, by a State if it has obtained approval authority, or by

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1/Of course, this holding does not apply to violations of federal categorical standards: a violation of a categorical standard can be shown without a corresponding violation at the POTW.

EPA. Until EPA promulgates a new regulatory definition, the enforcement authority will have to determine each finding of pass through, like interference, with reference to the facts of each case, relying on accepted tools of statutory construction. As with interference, POTWs should continue to promulgate local limits based on the prohibition against pass through where appropriate under 40 CFR §403.5(c).

Many POTWs are designed principally to treat domestic sewage rather than the less common pollutants found in some industrial effluent. The latter pollutants may not affect POTWs and cause interference, but also may not respond to the POTW treatment processes. Congress directed the Administrator to devise regulations to prevent such pollutants from passing through a POTW into waters of the United States untreated or inadequately treated. Therefore, until a new regulatory definition is promulgated, it would be consistent with the statute for an enforcement agency to find a pass through violation where a pollutant from a non-domestic indirect discharger had passed through a POTW and either alone or in combination with discharges from other contributors caused the POTW to violate its NPDES permit.

Although the Third Circuit did not rule on the substance of the definition of pass through in the NAMF case, the logic of its opinion would appear to require a showing of causation to prove pass through - that is, the enforcement agency would need to demonstrate a causal connection between the defendant's discharge and the POTW's NPDES violation. Nevertheless, as with interference, to make out a case of pass through, the enforcement agency would not have to show that a plant's discharge was the sole cause of the POTW's toxic discharge, only that it was one cause.

A plaintiff could show pass through by demonstrating that a particular pollutant discharged by the industrial user also appeared in the effluent of the POTW and that the POTW violated its permit limit for that pollutant. Finally, as with interference, violation of local limits applicable to the indirect discharger or deviations from the discharger's average pollutant loading would not by themselves be sufficient to prove pass through. An enforcement agency would have to make in addition a demonstration of cause. Nevertheless, departures from local limits or average discharge constituents might be useful as evidence of the POTW's acknowledged capacity to treat different kinds of pollutants.

At this time, there may not be effluent limits for toxic parameters in the NPDES permits of many POTWs. EPA Regions, and States to whom the NPDES program has been delegated, should modify these permits when necessary. If a toxic pollutant from an industrial discharger passes through a POTW and causes imminent and substantial endangerment to health or livelihood, EPA may always seek immediate relief under Section 504 of the CWA, even if the POTW is not in violation of its permit. State and local agencies may have comparable authority under state laws.

"Obtaining Approval of Remaining Local Pretreatment Programs--Second Round Referrals of the Municipal Pretreatment Enforcement Initiative", dated June 12, 1985. (Categorization of POTWs within Regions excluded)

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

JUN 12 1985

MEMORANDUM

SUBJECT: Obtaining Approval of Remaining Local Pretreatment Programs -- Second Round Referrals of the Municipal Pretreatment Enforcement Initiative

FROM: Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

Henry L. Longest
Acting Assistant Administrator for Water

TO: Regional Counsels
Regions I-X

Water Management Directors
Regions I-X

This memorandum announces EPA's agenda for obtaining approved pretreatment programs for POTWs which have not yet received necessary program approval. The agenda includes a plan and schedule for a second national round of enforcement cases against POTWs which have failed to obtain approved pretreatment programs, and a directive to modify permits of POTWs where still necessary to require program approval and implementation.

With referrals from Regions V and VI, the Agency recently commenced the first round of the Municipal Pretreatment Enforcement Initiative. This nationally-coordinated enforcement effort resulted in judicial enforcement actions being filed against 8 POTWs which had not met the requirement to obtain an approved pretreatment program. The Department of Justice filed these cases in federal district courts on April 18. Significant progress has already been made toward satisfactory resolution of these cases.

The first round of the Municipal Pretreatment Enforcement Initiative has assisted the Agency to achieve its pretreatment goals of having all required pretreatment programs approved or referred for judicial enforcement by September 30, 1985. As of

March 31, 1985, there were still 461 POTWs which had not yet obtained an approved pretreatment program. As you know, the Agency has committed itself through the Strategic Planning and Management System (SPMS) to have all required pretreatment programs approved or referred for judicial enforcement by September 30, 1985. For this reason, we are undertaking a second round of the Municipal Pretreatment Enforcement Initiative to aid the Regions in meeting the FY-85 SPMS pretreatment target.

A list of those POTWs in your Region which do not yet have an approved pretreatment program is attached to this memorandum. Generally, POTWs with unapproved pretreatment programs have been in non-compliance with the regulation to obtain an approved pretreatment program for nearly 2 years --making "good progress" toward program approval is no longer satisfactory in such cases.

As we did in the first round of the Initiative, we should continue to focus our enforcement efforts on those POTWs with permits requiring the POTW to obtain pretreatment program approval (Categories I and II). We urge all Regions to review the attached list of noncomplying POTWs to identify for judicial enforcement those municipalities, particularly larger ones, that will not obtain an approved pretreatment program by the end of FY-85.

The attached list of municipalities with unapproved pretreatment programs also includes POTWs whose permits do not explicitly require them to obtain approved pretreatment programs (Categories III and IV). It should be noted that as a general rule it is EPA legal policy to not refer for judicial enforcement those POTWs in Categories III and IV. We therefore expect each Region to have the compliance status of these POTWs changed to Category I or II as soon as possible.

We request that you complete the attached "Pretreatment Program Approval Status" form for each Category I and II POTW in your Region. Additionally, for Category III and IV POTWs, provide a narrative description of the specific schedule and steps your Region is taking to obtain necessary permit modifications in delegated States, as well as in States where EPA directly administers the permit program. Please submit your completed materials to William Jordan, Director, Enforcement Division, Office of Water Enforcement and Permits (EN-338) at Headquarters by June 28. At that time you should also submit any corrections to the list of unapproved programs which accompanies this memorandum. We will be considering making public this updated list of POTWs with unapproved pretreatment programs.

Case referrals to meet the FY-85 SPMS pretreatment target should be submitted to OECM by August 1, 1985. It is unlikely that an enforcement action referred after that date against a POTW for failure to obtain an approved pretreatment program will be filed in the current fiscal year. Regions which have approved all (Region X) or nearly all (Regions VII and IX) required pretreatment programs should consider enforcement actions against those POTWs not properly implementing approved programs.

Direct enforcement action in delegated States should be taken consistent with the State/EPA Enforcement Agreement with each State. Each Region should work with the delegated States to get them to address their POTWs. In those cases where the State does not act or where EPA directly administers the program, each Region should be prepared to submit a referral for each POTW which is not on track to obtain program approval by the end of FY-85, or to explain the compelling circumstances which preclude such action.

After your Region has identified those POTWs that are likely referral targets for the second wave of the Initiative, both Headquarters and the Department of Justice will again be available for consultation and assistance in preparing litigation reports and for expediting referrals and filings. (OECM will make sample litigation reports available.) For several Regions, the Office of Water Mid-Year Reviews provide an excellent opportunity to discuss possible enforcement targets for the second round.

We must demonstrate that the Agency is committed to this goal on a national basis. We realize that an effort such as this requires expedited schedules and intensive use of staff resources. However, we believe this effort is both worthwhile and necessary if we are to realize this Agency SPMS pretreatment target. We are confident that teamwork by the Regions, Headquarters and the Department of Justice will allow us to file the second round of cases during the month of September.

Attachments

cc: Deputy Administrator
Regional Administrators, Regions I-X
Deputy Regional Administrators, Regions I-X
General Counsel
Director, Office of Water Enforcement and Permits
Associate Enforcement Counsel for Water
Chief, Environmental Enforcement Section, DOJ

AGENDA

Municipal Pretreatment Enforcement Initiative

Second Wave

Regions to submit completed "Pretreatment Program Approval Status" forms to HQ/OWEP for Category I and II POTWs	June 28
Regions to submit referrals to HQ against POTWs for failure-to-submit and/or failure-to-implement pretreatment programs	August 1
HQ/OECM to refer POTW enforcement actions to DOJ against non-complying POTWs	August 16
DOJ to file judicial enforcement actions against non-complying POTWs	September 16
Regions to have approved all POTW pretreatment programs or have referred all non-complying POTWs	September 30

PRETREATMENT PROGRAM APPROVAL STATUS

REGION _____ REGIONAL CONTACT _____

DATE FORM COMPLETED _____ FTS NUMBER _____

POTW NAME	DEFICIENT PROGRAM ELEMENTS* (check, describe below) 1 | 2 | 3 | 4 | 5 | 6	REFERRAL CANDIDATE AT THIS TIME	IF NOT REFERRING, DESCRIBE REASONS INCLUDE SCHEDULED SUBMITTAL DATE, APPROVAL DATE
		YES ____ NO ____	
		YES ____ NO ____	
		YES ____ NO ____	
		YES ____ NO ____	

*KEY:

1 = INDUSTRIAL WASTE SURVEY
2 = LEGAL AUTHORITY
3 = TECHNICAL ELEMENTS/LOCAL LIMITS
4 = COMPLIANCE MONITORING
5 = PROCEDURES
6 = RESOURCES

REGIONAL BREAKDOWN OF REMAINING POTWs WITH UNAPPROVED PRETREATMENT PROGRAMS

CATEGORIES	KEY
I	POTWs with 1) unapproved pretreatment programs, 2) a modified NPDES permit requiring pretreatment program submission, and 3) an EPA-issued administrative order requiring pretreatment program submission.
II	POTWs with 1) unapproved pretreatment programs, and 2) a modified NPDES permit requiring pretreatment program submission but without an EPA-issued administrative order requiring pretreatment program submission.
III	POTWs with 1) unapproved pretreatment programs, and 2) an EPA-issued administrative order requiring pretreatment program submission, but without a modified NPDES permit requiring pretreatment program submission.
IV	POTWs with unapproved pretreatment programs which do not have 1) a modified NPDES permit requiring pretreatment program submission, and 2) an EPA-issued administrative order requiring pretreatment program submission.

PROGRAM STATUS CODE	
N	Pretreatment program submission has been reviewed and is not approvable in its present form because portions of the program are incomplete or not submitted.
S	Pretreatment program has been submitted, but further review is required to determine whether the submittal is complete and approvable for public notice.
R	Complete pretreatment program submission has been reviewed and found acceptable for public notice.
P	Pretreatment program is on public notice.

REGIONAL SUMMARY OF POTWs WITH UNAPPROVED PRETREATMENT PROGRAMS
MAY 7, 1985

CATEGORY o PROGRAM STATUS CODES	REGION I	II	III	IV	V	VI	VII	VIII	IX	X	TOTALS
CATEGORY I	17	5	4	2	32	19	0	14	1	0	94
o N	8	4	4	0	23	12	0	0	0	0	51
o S	6	0	0	2	2	0	0	14	1	0	25
o R	0	1	0	0	3	3	0	0	0	0	7
o P	3	0	0	0	4	4	0	0	0	0	11
CATEGORY II	4	16	13	21	57	2	1	10	2	0	126
o N	3	11	8	12	19	1	0	0	0	0	54
o S	1	0	0	1	8	1	1	10	2	0	24
o R	0	0	0	0	2	0	0	0	0	0	2
o P	0	5	5	8	28	0	0	0	0	0	46
CATEGORY III	2	5	28	0	1	0	0	0	0	0	36
o N	2	5	26	0	0	0	0	0	0	0	33
o S	0	0	0	0	1	0	0	0	0	0	1
o R	0	0	0	0	0	0	0	0	0	0	0
o P	0	0	2	0	0	0	0	0	0	0	2
CATEGORY IV	7	2	15	7	35	0	1	3	2	0	72
o N	3	2	14	6	27	0	0	2	2	0	56
o S	3	0	0	1	1	0	1	1	0	0	7
o R	0	0	0	0	1	0	0	0	0	0	1
o P	1	0	1	0	6	0	0	0	0	0	8
CATEGORY UNKNOWN	0	0	3	0	122	0	0	8	0	0	133
o N	0	0	0	0	51	0	0	0	0	0	51
o S	0	0	0	0	8	0	0	0	0	0	8
o R	0	0	0	0	14	0	0	0	0	0	14
o P	0	0	3	0	49	0	0	8	0	0	60
TOTALS	30	28	63	30	247	21	2	35	5	0	461
o N	16	22	52	18	120	13	0	2	2	0	245
o S	10	0	0	4	20	1	2	25	3	0	65
o R	0	1	0	0	20	3	0	0	0	0	24
o P	4	5	11	8	87	4	0	8	0	0	127

"Applicability of Categorical Pretreatment Standards to Industrial Users of Non-Discharging POTWs", dated June 27, 1985.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JAN 27 1985

MEMORANDUM

SUBJECT: Applicability of Categorical Pretreatment Standards to Industrial Users of Non-Discharging POTWs

FROM: William R. Diamond, Chief
Program Development Branch

TO: Permit Branch Chiefs, Regions I-X

At the recent National Branch Chiefs Meeting, a question was raised regarding the applicability of categorical pretreatment standards promulgated by EPA pursuant to section 307(b) of the Clean Water Act ("CWA") to industrial facilities sending their wastewaters to POTWs that do not discharge to waters of the United States (hereafter referred to as "non-discharging POTWs"). Because there is no "discharge of pollutants" (as defined in section 502(12) of the CWA) from these POTWs, they are not required to obtain NPDES permits; nor are they subject to the requirement, in section 402(b)(8) of the CWA, to develop a local pretreatment program, since this requirement is tied to the existence of an NPDES permit. As explained below, however, industrial users discharging into these POTWs must nonetheless comply with applicable categorical pretreatment standards. This memorandum also discusses how these industrial users can be regulated in the absence of a federally required local pretreatment program.

Under the CWA, categorical pretreatment standards apply to industrial users of all POTWs, including those that do not discharge to waters of the United States. Section 307(b) of the Act directs EPA to promulgate pretreatment standards "to prevent the discharge of any pollutant through treatment works (as defined in section 212 of this Act) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works." The definition of "treatment works" in section 212 of the CWA is not limited to facilities that discharge into waters of the

United States and in fact makes explicit reference to land-based systems (see §212(2)(A)). Moreover, the statutory goal of preventing interference with the treatment works, which includes protection of the resulting sludge from contamination that would limit disposal alternatives, */ is applicable to all POTWs, regardless of whether there is any discharge to waters of the United States.

Because non-discharging POTWs are not NPDES permittees and therefore are not required to develop pretreatment programs, the primary responsibility for enforcing pretreatment requirements in these cases falls upon those States with approved pretreatment programs and EPA. Since these POTWs do not hold NPDES permits, EPA enforcement is limited to direct enforcement of categorical standards against the industrial users. **/ Of course, the fact that federal law does not require non-discharging POTWs to develop pretreatment programs does not prevent States from requiring these facilities to develop such programs under State law. ***/ Moreover, even where State law does not require them to do so, individual non-discharging POTWs may agree to develop pretreatment programs. In any of these cases, the developed programs may provide for enforcement of categorical standards by the POTW. ****/ However, it must be noted that because these POTWs are not NPDES permittees, EPA cannot enforce any requirements of their programs. Thus, if a non-discharging POTW whose pretreatment program involves enforcement of categorical standards does a poor job of enforcing these standards, EPA's only recourse is to take direct action against the violating industrial user(s).

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*/ See the discussion of sludge contamination as "interference" under the CWA in the preamble to the General Pretreatment Regulations at 46 Fed. Reg. 9408 (January 28, 1981).

**/ Although EPA may not issue permits to indirect dischargers, the Agency may require them to comply with additional reporting, monitoring, sampling, and other information requirements beyond those contained in the General Pretreatment Regulations, under section 308 of the CWA. See Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 130 (September 28, 1972), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, volume 1 at 313.

***/ For example, California has a regulatory provision that requires non-discharging POTWs with a design flow of 5 mgd or more to develop pretreatment programs. Facilities with a design flow of less than 5 mgd may be required to develop programs as deemed appropriate. 23 CAC §2233.

****/ In California, for instance, these programs are reviewed for consistency with §403.8(f) of the General Pretreatment Regulations, which includes a requirement regarding enforcement of categorical standards.

I hope this memorandum answers your questions on this subject. If you have any further questions or comments, please call me at (FTS) 426-4793 or have your staff contact Hans Bjornson at (FTS) 426-7035.

cc: Rebecca Hammer
Martha Prothro
Colburn Cherney

bcc: Jim Gallup
Geoff Grubbs
Program Development Branch

HBJORNSON/Disk 1/EN-336/67035
Document 36/lrm/06-26-85

"Guidance Manual for Preparation and Review of Removal Credit Applications", dated July 1985. Table of Contents only.

1826

United States
Environmental Protection
Agency

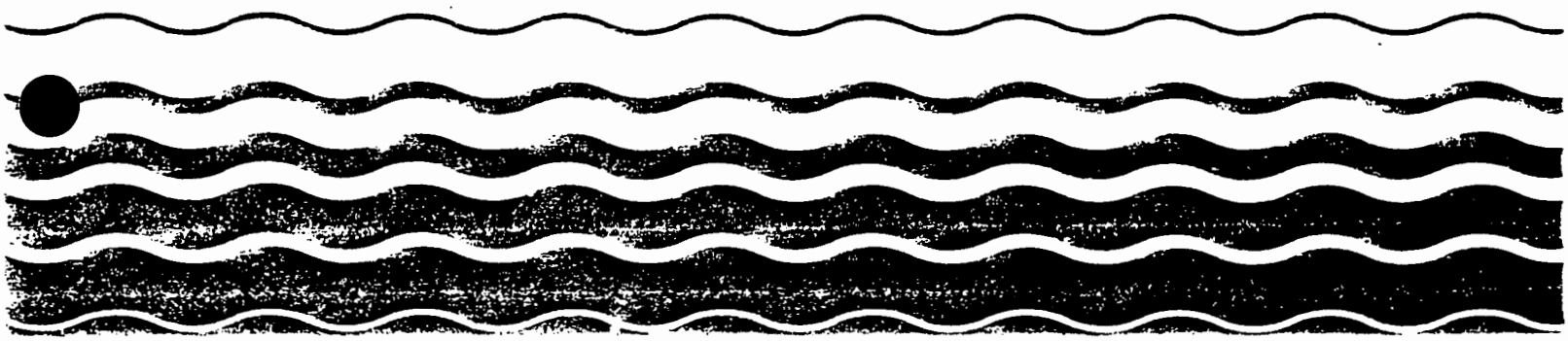
Permits Division EN-336
Washington, DC 20460

July 1985

Water

EPA

Guidance Manual for Preparation and Review of Removal Credit Applications



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"Local Limits Requirements for POTW Pretreatment Programs", dated August 5, 1985.

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

AUG 15 1985

OFFICE OF WATER

MEMORANDUM

SUBJECT: Local Limits Requirements for POTW Pretreatment Programs

FROM: Rebecca W. Hanmer, Director
Office of Water Enforcement and Permits (EN-335)

TO: Regional Water Management Division Directors
NPDES State Directors

I. Background

The Pretreatment Implementation Review Task Force (PIRT), in its Final Report of January 30, 1985, stated that some POTWs which are required to implement pretreatment programs "do not understand the relationship between categorical standards and local limits or even how to develop local limits." This memo reviews the Agency's minimum local limits requirements for POTWs which must develop and implement industrial pretreatment programs. More detailed technical guidance for developing local limits is available in the Guidance Manual for POTW Pretreatment Program Development. Comprehensive technical guidance on local limits is under development and will be published in FY 86.

Section 403.5(c) of the General Pretreatment Regulations provides that POTWs required to establish local pretreatment programs must develop and enforce specific limits to implement the general prohibitions against pass-through and interference [§403.5(a)] and the specific prohibitions listed in §403.5(b). This requirement is discussed in the preamble to the 1981 General Pretreatment Regulations:

> "These limits are developed initially as a prerequisite to POTW pretreatment program approval and are updated thereafter as necessary to reflect changing conditions at the POTW. The limits may be developed on a pollutant or industry basis and may be included in a municipal ordinance which is applied to the affected classes. In

addition, or alternatively, the POTW may develop specific limits for each individual facility and incorporate these limits in the facility's municipally-issued permit or contract. By translating the regulations' general prohibitions into specific limits for Industrial Users, the POTW will ensure that the users are given a clear standard to which they are to conform."

The categorical pretreatment standards, applicable to broad classes of industries, are technology-based minimum requirements which do not necessarily address all industrial discharge problems which might occur at a given POTW. To prevent these site-specific problems, each POTW must assess all of its industrial discharges and employ sound technical procedures to develop defensible local limits which will assure that the POTW, its personnel, and the environment are adequately protected. This memorandum clarifies EPA's minimum requirements for the development of local limits to control the discharges of industrial users and discusses the application of those requirements to POTWs in different stages of local pretreatment program development and implementation.

II. Minimum Requirements for Local Limits

The General Pretreatment Regulations require every POTW developing a pretreatment program to conduct an industrial waste survey to locate and identify all industrial users which might be subject to the POTW pretreatment program. This procedure is a prerequisite to pretreatment program approval. In addition, the POTW must determine the character and volume of pollutants contributed to the POTW by these industrial users. Based on the information obtained from the industrial waste survey and other sources, including influent, effluent and sludge sampling, the POTW must determine which of these pollutants (if any) have a reasonable potential for pass-through, interference or sludge contamination. For each of these pollutants of concern, the POTW must determine, using the best information available, the maximum loading which can be accepted by the treatment facility without the occurrence of pass-through, interference or sludge contamination. A procedure for performing this analysis is provided in the Guidance Manual for POTW Pretreatment Program Development. As a minimum, each POTW must conduct this technical evaluation to determine the maximum allowable treatment plant headworks (influent) loading for the following pollutants:

cadmium	lead
chromium	nickel
copper	zinc

These six toxic metals are listed because of their widespread occurrence in POTW influents and effluents in concentrations that warrant concern. Also, since they are usually associated with the suspended solids in the waste stream, their presence often

prohibits the beneficial reuse of municipal sewage sludge and reduces POTW options for safe sludge disposal. In addition, based on site-specific information, the POTW and/or the Approval Authority must identify other pollutants of concern which might reasonably be expected to be discharged to the POTW in quantities which could pass through or interfere with the POTW, contaminate the sludge, or jeopardize POTW worker health or safety. Once maximum allowable headworks loadings are determined for each of the pollutants of concern, the POTW must implement a system of local limits to assure that these loadings will not be exceeded. The POTW may choose to implement its local limits in any of a number of ways, such as uniform maximum allowable concentrations applied to all significant industrial dischargers, or maximum mass discharge limits on certain major dischargers. The method of control is the option of the POTW, so long as the method selected accomplishes the required objectives. There is no single method of setting local limits which is best in all situations. The Guidance Manual for POTW Pretreatment Program Development discusses several alternative methods which a POTW might use to allocate the acceptable pollutant load to industrial users. The manual also provides an example of the calculations a typical POTW would use to determine the maximum allowable headworks loadings for a pollutant and to allocate that load to significant industrial users. POTWs are strongly encouraged to apply a safety factor to the calculated maximum allowable loadings and to reserve some capacity for industrial expansion when setting local limits.

Some POTWs may find that loading levels of at least some of the pollutants of concern are far below the calculated maximum allowable headworks loadings. In these cases, the POTW should continue to monitor all industrial users discharging significant quantities of these pollutants. It may also be appropriate for the POTW to limit each significant industrial user to a maximum loading which cannot be exceeded without POTW approval. This process of limiting increases in discharges of pollutants of concern provides POTWs with a control mechanism without imposing unnecessarily stringent limits on industries which expand or change production processes. Industries approaching their limits could petition the POTW for an increased allowance. Upon receipt of such request, the POTW would update its headworks loading analysis to determine the effect of the proposed increase. The analysis would enable the POTW to make a sound technical decision on the request.

Because they are based on the specific requirements of the POTW, sound local limits can significantly enhance the enforceability of a POTW's local pretreatment program. A POTW that proposes to rely solely upon the application of the specific prohibitions listed in §403.5(b) and categorical pretreatment standards in lieu of numerical local limits should demonstrate in its program submission that (1) it has determined the

capability of the treatment facility to accept the industrial pollutants of concern, (2) it has adequate resources and procedures for monitoring and enforcing compliance with these requirements, and (3) full compliance with the applicable categorical standards will meet the objectives of the pretreatment program.

III. Application of the Minimum Local Limits Requirement

A. Unapproved Programs

All POTWs required to develop pretreatment programs must comply with the regulatory local limits requirements described above. However, EPA recognizes that there has been a need for clarification of these requirements and that some Approval Authorities have not applied this requirement in accordance with the principles in this memorandum when approving local pretreatment programs in the past. Some POTWs with local programs now under development or review were given direction by their Approval Authority that may have failed to reflect all of the requirements for local limits that are discussed herein. Withholding approval for these POTWs until they have adopted all necessary local limits would delay availability of the considerable local POTW resources needed to enforce categorical pretreatment standards and other pretreatment requirements. Therefore, where POTWs have not previously been advised of the need to complete the analysis described herein and to adopt local limits prior to program approval, and where imposing such a requirement would make approval by September 30, 1985 infeasible, POTW pretreatment program submissions meeting all other regulatory requirements may be approved. However, in any such case, the POTW permit must be modified to require that the POTW expeditiously determine the maximum allowable headworks loading for all pollutants of concern as described above and adopt those local limits required to prevent pass-through, interference, and sludge contamination. To ensure that this condition is enforceable, the Approval Authority must assure that this requirement is promptly incorporated into the POTW's NPDES permit and require that the appropriate local limits be adopted as soon as possible, but in no case later than one year after approval. Noncompliance with this permit requirement on the part of the POTW will be considered grounds for bringing an enforcement action for failure to implement a required pretreatment program.

B. Approved Programs

If any POTW program has already been approved without the analysis of the impact of the pollutants of concern and adoption of local limits, the Approval Authority should immediately require the POTW to initiate an analysis as described above and adopt appropriate local limits. This requirement should be incorporated in the POTW's NPDES permit as soon as feasible. Where a POTW has previously adopted local limits but has not demonstrated that those limits are based on sound technical analysis, the Approval

Authority should require the POTW to demonstrate that the local limits are sufficiently stringent to protect against pass-through, interference and sludge contamination. POTWs which cannot demonstrate that their limits provide adequate protection should be required to revise those limits within a specific time set forth in a permit modification.

IV. Local Limits to Control Additional Toxic Pollutants

To date, where POTWs have evaluated their industrial discharges and adopted local limits as needed based on that evaluation, the pollutants most often controlled are toxic metals, cyanide and phenol. Few POTWs now control the discharge of toxic organic compounds through local limits. Recent studies, including the Agency's Complex Effluent Toxicity Testing Program, indicate that these substances are often responsible for toxicity problems in receiving streams. Furthermore, many of the volatile organic compounds in POTW influents may be released to the atmosphere during conveyance or treatment, potentially causing health or safety hazards or aggravating air quality problems. Compounds causing these problems are not necessarily among those in the statutory list of 126 priority toxic pollutants and may not be addressed by existing or proposed categorical standards. If monitoring efforts are not sufficiently comprehensive, these adverse impacts may go undiscovered, or their root causes may not be identified.

After a POTW's pretreatment program has been approved, Approval Authorities should continue to evaluate each POTW to determine the need for additional measures to control toxic discharges from industrial users. This is in keeping with the Agency's policy on water quality-based permit limits for toxic pollutants (49 FR 9016, March 9, 1984). Utilizing the authority provided by Section 308 of the Clean Water Act (or comparable State authority), the Approval Authority should consider requiring both chemical-specific and biological testing of POTW influent, effluent and sludge to evaluate the need for additional local limits. Where test results indicate a need for greater industrial user control, POTWs should be required to determine the sources of the toxic discharges through additional testing and to adopt appropriate local limits which will prevent interference and pass-through.

Not every POTW required to have a local pretreatment program will need to perform this additional testing, but since toxic chemicals are utilized by many non-categorical industries, this requirement should not be limited to those POTWs with large contributions from categorical industries. For example, there is at least one documented instance of an FDA-approved food additive, discharged by a food processor to a POTW, causing receiving stream toxicity problems. OWEP has been working closely with EPA researchers and will provide whatever assistance we can to Approval Authorities faced with complex toxicity problems associated with POTW discharges.

V. Local Limits Requirements for POTWs covered by §403.10(e): State-run Pretreatment Programs

In accordance with §403.10(e) of the General Pretreatment Regulations, some States have assumed responsibility for implementing State-wide pretreatment programs in lieu of requiring POTWs to develop individual local programs. In these States, the NPDES permits of POTWs which otherwise would have been required to develop local pretreatment programs may need to be modified to require the local limits development procedures described above. Alternatively, the State can perform the required analyses and implement the appropriate local limits necessary to assure that the goals of the program are achieved. These limits would then be enforced in the same manner as other pretreatment requirements, in accordance with procedures included in the approved State-run program. Where States assume POTW responsibility for carrying out pretreatment program requirements, Regional Offices must monitor all aspects of the State-run pretreatment program, including local limits, to assure that the national program requirements are met.

VI. Control of Conventional Pollutants

Although the National Pretreatment Program is usually associated with the control of toxic industrial wastes, the discharge of excessive conventional pollutants has been the most commonly documented industry-related cause of POTW effluent limit violations. Generally, POTWs are required to construct, operate and maintain their own treatment facilities at efficiencies adequate to prevent pass-through and interference from conventional pollutants. However, where a POTW chooses instead to limit its influent or where limits on the influent concentrations are necessary to assure that unexpectedly high influent concentrations do not occur, the POTW pretreatment program submission should demonstrate that local limits adequately address conventional pollutant loadings from industry. Most POTWs have already determined the capacity of their treatment facilities to accommodate conventional pollutants. Where local limits for these pollutants are needed, the limit-setting process is rather straightforward. At a minimum, Approval Authorities should encourage all POTWs to consider setting appropriate local limits on conventional pollutants in order to prevent pass-through and interference where problems have occurred in the past or can be anticipated in the future due to local growth or increases in industry discharges.

VII. Deadline for Industrial User Compliance with Local Limits

POTWs adopting local limits should require industrial users to comply with those limits as soon as is reasonable, but in no case more than three years from the date of adoption. Where an industrial user is allowed more than one year to comply, the POTW

should evaluate the industrial user's operation and set interim limits to minimize discharge of the pollutants of concern prior to full compliance with the local limit. The POTW should also establish enforceable increments of progress for industrial users with compliance schedules longer than one year and require the users to submit incremental progress reports at least annually to assure proper tracking of actions needed to accomplish compliance.

Where an industrial discharge has been identified as a contributing factor in a POTW's violation of an NPDES permit limit, water quality standard, or other environmental requirement, the POTW must take immediate enforcement action, employing all means necessary to assure that the Industrial User is brought into compliance in the shortest possible time.

VIII. Conclusion

This memorandum has summarized the Agency's minimum requirements for the establishment of local limits by POTWs implementing pretreatment programs. Because local limits address site-specific needs, Approval Authorities should apply these requirements with sensitivity to local conditions, recognizing that the diversity among POTWs requires a case-by-case consideration of local limits. In many cases, there will be a clear need to aggressively attack toxicity or interference problems with extensive analysis and local regulation. In others, only a few local limits will be needed, if only to insure that present loadings do not increase. This flexibility, however, does not mean that local limits are optional under the National Pretreatment Program. All POTWs implementing pretreatment programs must evaluate the need for local limits. Where the evaluation so indicates, the POTW must promptly adopt and enforce local limits which will protect against interference, pass-through and sludge contamination.

As EPA and State permit writers establish more comprehensive water quality-based municipal permit limits (including toxics), POTWs will have more definitive information available as a basis for establishing the need for and the stringency of local limits to prevent pass-through. Similarly, the forthcoming sludge disposal and reuse regulations should enable States to establish more comprehensive sludge quality requirements, which will in turn provide a solid technical basis for local limits to prevent sludge contamination. The Office of Water Enforcement and Permits is also working with the Agency's Office of Research and Development to obtain better information on the impact of toxic substances on municipal treatment processes. These efforts are proceeding as fast as available resources permit and should produce results, in the form of guidance documents, in FY 86.

"Guidance Manual for Iron and Steel Manufacturing Pretreatment Standards," dated September 1985. Table of Contents only.

United States
Environmental Protection
Agency

Industrial Technology Division
WH-552
Washington, DC 20460

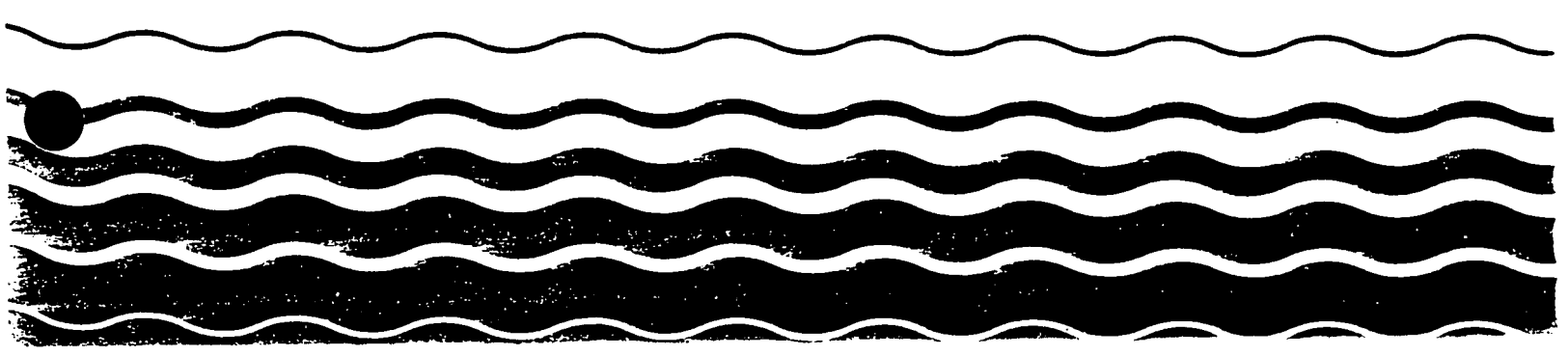
September 1985

Water

EPA

Guidance Manual for

Iron and Steel Manufacturing Pretreatment Standards



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"Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastestream Formula", dated September 1985. Table of Contents only.

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United States
Environmental Protection
Agency

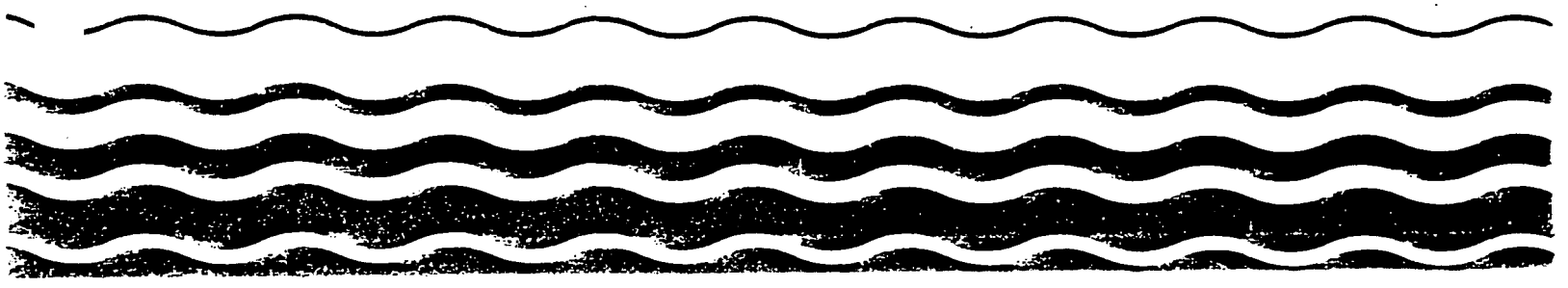
Permits Division and
Industrial Technology Division
Washington, DC 20460

September 1985

Water

EPA

Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastestream Formula



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United States
Environmental Protection
Agency

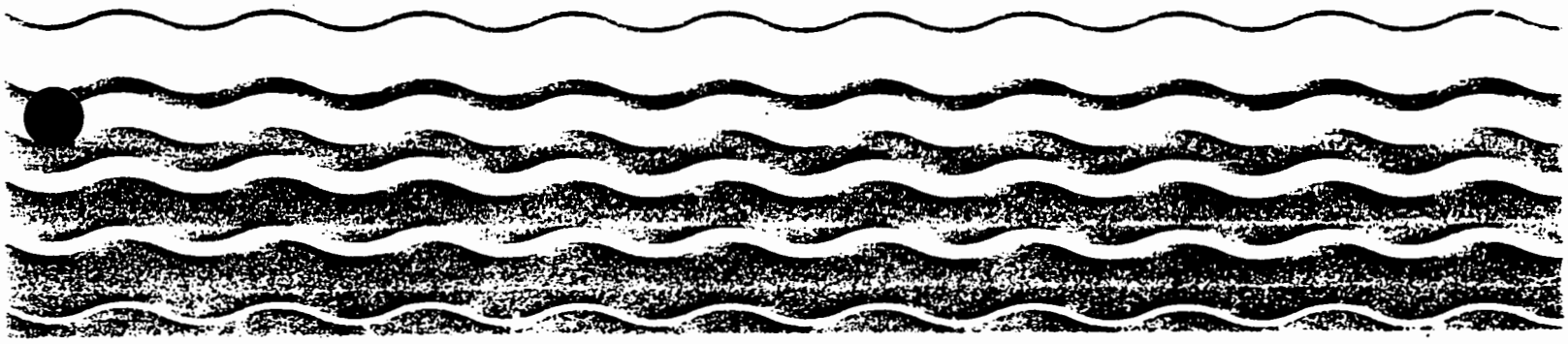
Permits Division EN-336
Washington, DC 20460

September 1985

Water

EPA

Guidance Manual for Implementing Total Toxic Organics (TTO) Pretreatment Standards



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"GUIDANCE ON OBTAINING SUBMITTAL AND IMPLEMENTATION OF APPROVABLE PRETREATMENT PROGRAMS", dated September 20, 1985.

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

SEP 20 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Guidance on Obtaining Submittal and Implementation of Approvable Pretreatment Programs

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water
Rebecca Hanmer, Director
Office of Water Enforcement and Permits

TO: Regional Counsels, Regions I - X
Water Management Division Directors
Regions I - X

Attached is a guidance memorandum on obtaining POTW pretreatment program submittal and implementation. The guidance confirms and elaborates on Agency enforcement and permitting policy positions which we already have discussed at our national meetings, and which we already are largely implementing in the context of meeting FY85 SPMS commitments and through EPA's POTW Pretreatment Program Enforcement Initiative. The major points which this guidance reaffirms are:

- that EPA is in the strongest position to bring an enforcement action against a POTW for failure to obtain or implement an approved pretreatment program when there is a requirement to do so in the POTW's permit;

- that POTW permits which do not contain these permit requirements should be modified or reissued as quickly as possible;

- that in a limited number of cases, EPA can consider the possibility of an enforcement action to require a POTW without a modified permit to obtain or implement an approved pretreatment program, and

- that in bringing a judicial enforcement action for failure to obtain or implement an approved pretreatment program, EPA typically should also file claims for any existing NPDES effluent limit violations.

Our objective still is to have all required POTW pretreatment programs approved or subject to a judicial referral by the end of FY85. Early in FY86, we would expect to address any remaining unapproved POTWs and to begin focusing increased attention on adequate pretreatment program implementation.

Attachments

cc: Coke Cherney
Bill Jordan
Martha Prothro
OECM Water Attorneys
David Buente

GUIDANCE ON OBTAINING SUBMITTAL AND IMPLEMENTATION OF APPROVABLE PRETREATMENT PROGRAMS

Summary

40 C.F.R. §403.8(b) establishes certain pretreatment requirements for any POTW with a design flow greater than 5 million gallons per day (mgd) and which accepts pollutants from Industrial Users which pass through or interfere with the operation of the POTW or are otherwise subject to pretreatment standards as well as for other POTWs as determined by the Approval Authority. Specifically, the regulation requires these POTWs to "...receive approval of a POTW Pretreatment Program no later than...July 1, 1983..." and that the approved pretreatment program "...be administered by the POTW to ensure compliance by Industrial Users with applicable pretreatment standards and requirements."

This guidance addresses POTW's previously identified as needing pretreatment programs. This Guidance should be utilized in selecting the most effective approach to ensure that non-approved POTW's requiring programs in your Region obtain pretreatment program approval as soon as possible and that POTWs with approved programs implement them properly and expeditiously.

The requirement to obtain approval of and to implement a pretreatment program should be incorporated in a POTW's NPDES permit. Where a POTW meets the criteria of 40 C.F.R. §403.8(a) and its permit does not contain the requirement to obtain approval of and implement a pretreatment program, the Region should expeditiously modify the POTW's permit --or request an approved State to do so--to incorporate such a requirement.

In general, to enable EPA to bring an enforcement action for failure by the POTW to either obtain an approved pretreatment program or implement its pretreatment program, a POTW's NPDES permit should either contain such a requirement or be modified or reissued with such a requirement. For a POTW that has failed to obtain or implement an approved pretreatment program--if EPA is the pretreatment Approval Authority--EPA should pursue a judicial enforcement action under Section 309(b) and (d) of the Clean Water Act to obtain compliance and civil penalties; where an approved State is the Approval Authority, EPA should urge the State to bring a comparable enforcement action and bring a federal enforcement action if the State fails to take timely and appropriate action. An alternative legal theory, available in a limited number of cases, to require a POTW without a modified permit to obtain or implement an approved pretreatment program, is discussed on pages 5 and 6.

Background

Section 307(b) of the Clean Water Act requires EPA to promulgate pretreatment standards to prevent Interference or Pass Through by toxic pollutants introduced into a POTW. Section 402(b)(8) of the Clean Water Act establishes a system whereby, NPDES permits would require POTWs to implement and enforce pretreatment standards. 40 C.F.R. §§403.8 and 403.9 outline the requirements for a pretreatment program to be developed, approved and incorporated in a POTW's NPDES permit by July 1, 1983.

When 40 C.F.R. §403.8(b) was promulgated, it was anticipated that the requirement to obtain approval and implement a pretreatment program would be promptly incorporated in applicable NPDES permits as provided in 40 C.F.R. §403.8(d) and (e), §403.10(d), §122.62(a)(7), and §122.62(a)(9). While most POTW permits have been modified, many remain that have not been modified to contain the requirement to obtain program approval and implement the approved program. Also, many POTWs with modified permits and POTWs with unmodified permits have not yet obtained program approval, even though the deadline prescribed by 40 C.F.R. §403.8(b) for obtaining program approval has passed. To successfully carry out the pretreatment provisions of the Clean Water Act, the Agency must ensure that every POTW which needs a pretreatment program submit an approvable pretreatment program and obtain program approval as soon as possible.

Enforcing a Permit Requirement to Develop a Pretreatment Program

Where a POTW's permit does contain a requirement to obtain and implement an approved pretreatment program and the POTW has failed to comply with the permit requirement and any Administrative Order issued by the Approval Authority requiring the POTW to obtain and implement its pretreatment program, the Approval Authority should initiate judicial enforcement. It should be noted that a judicial enforcement action can be initiated without prior issuance of an Administrative Order. Particularly, with regard to failure to obtain program approval by this time, the Approval Authority should judicially enforce a permit requirement to obtain program approval through a court action without first issuing an Administrative Order.

The decision to initiate an enforcement action for failure to obtain an approved pretreatment program or for failure by the POTW to implement an approved pretreatment program should be based on factors such as the severity of the POTW's noncompliance, such as: (1) degree of disregard by the POTW for pretreatment requirements; (2) evidence of water quality impacts, interference, pass-through, or sludge contamination resulting from failure to have an approved program in operation; (3) failure by the POTW even in the absence of an approved program to obtain

compliance by industrial users with applicable pretreatment standards and requirements; (4) existence of other NPDES permit violations. While these factors relate to ranking the severity of noncomplying POTW's, their absence does not preclude judicial enforcement.

An EPA enforcement action for failure to obtain program approval as required by a POTW's permit is taken under Section 309(b) for failure of the POTW to comply with requirements in its permit that were established under authority of Section 402(b)(8) and its implementing regulations for the purpose of implementing the pretreatment provisions of Section 307. All such cases should result in an expeditious compliance schedule for obtaining an approved program (see Attachment A), reporting requirements, significant civil penalties that consider economic benefit and address the gravity of the violation, and any provisions necessary to ensure program implementation.

An EPA judicial enforcement action for failure to implement an approved pretreatment program as required by a POTW's permit is based on the same statutory requirements. All "failure to implement" cases should result in specific implementation activities (e.g., permit issuance, inspections, enforcement response) by specified dates, progress reports, and significant civil penalties.

Requiring Development and Implementation of a Local Pretreatment Program Through Permit Modification or Reissuance

If a POTW that is required to administer an approved pretreatment program does not have or is not implementing one and is not currently required by its NPDES permit to do so, the Region should have the permit modified or revoked and reissued as quickly as possible to require the POTW to obtain approval of and implement a program according to an expeditious compliance schedule. While permit modification or reissuance is not the only legal option available to require a POTW to obtain or implement an approved pretreatment program in the absence of a permit requirement, it is generally the most legally sound approach, and typically the one the Agency should follow. Permit modification or reissuance will put EPA in the strongest legal position if an enforcement action against the POTW is necessary.

Permit modification or reissuance is always necessary when a POTW that has not previously been identified as needing a pretreatment program is required to develop and implement one. If an approved State attempts to reissue an NPDES permit without including pretreatment requirements, EPA should object formally, and, if necessary, veto the deficient permit.

If EPA is the permitting authority, the Region may either modify or revoke and reissue the permit pursuant to the procedures

at 40 C.F.R. Parts 122 and 124 to require the POTW to obtain approval of and implement a pretreatment program. The regulations specifically identify the incorporation of a requirement to develop an approved POTW pretreatment program as an appropriate "cause" for permit modification or reissuance. If the Region chooses to modify the permit, only the pretreatment requirement need be subject to comment ~~and~~ decision. If the Region chooses the reissuance procedure, the entire permit is reopened and subject to revision (40 C.F.R. §122.62).

If a State is the NPDES permitting authority for the POTW, the Region should request the State to modify or reissue the POTW's NPDES permit as quickly as possible pursuant to the State analogue of 40 C.F.R. §124.5.

In certain situations a POTW will obtain approval of a pretreatment program without a pre-existing permit requirement or with a permit requiring the POTW to obtain approval but not requiring implementation. Suitable provisions pertaining to the approved pretreatment program must still be incorporated into the POTW's NPDES permit as soon as practicable to ensure the Approval Authority's ability to enforce proper implementation.

A compliance schedule leading to pretreatment program approval can be imposed on the POTW in either one of two ways. First, the compliance schedule can be included in the modified or reissued permit. Second, the compliance schedule can be included in an Administrative Order issued contemporaneously with the modified or reissued permit. 1/ These two methods are illustrated by the two versions of suggested permit language in Attachment B. Both methods would be enforceable in a federal enforcement action against the POTW as long as the underlying requirement to obtain approval of the pretreatment program was contained in the POTW's modified or reissued permit.

1/ If a POTW was previously identified and notified that it needed a pretreatment program after the July 1, 1983 regulatory deadline contained in 40 C.F.R. §403.8, the POTW's NPDES permit can contain a compliance schedule leading to program approval requiring program submission after July 1, 1983. For those POTW's which were notified prior to July 1, 1983 that they needed a pretreatment program, inclusion of a compliance schedule in a modified or reissued permit requiring compliance after that date may be in violation of 40 C.F.R. §§403.8(d) and 122.4(a). In the latter instance, a compliance schedule would have to be contained in an Administrative Order issued contemporaneously with the modified or reissued permit.

The compliance schedule requiring program approval must be realistic. It should contain only enough time to accomplish the necessary activities culminating in the submittal of an approvable pretreatment program. Individual factors affecting pretreatment program development will determine the content of the compliance schedule and the date by which the program must be submitted. The compliance schedule must require submittal of an approvable pretreatment program as soon as reasonably possible; in most cases no more than 6 months. A six-month compliance period represents the usual maximum time period for obtaining an approved pretreatment program. If, for example, a POTW has already completed an Industrial User survey and a technical analysis, 60 days is generally a sufficient time period to complete the program application.

Once a POTW's NPDES permit has been amended by the Approval Authority to require the POTW to obtain and implement an approved pretreatment program, the Approval Authority should closely monitor the POTW's compliance and take enforcement action promptly if the POTW falls behind schedule.

Federal Enforcement in the Absence of a Permit Requirement

In limited circumstances, EPA might seek to require a POTW to obtain or implement an approved program in the absence of an NPDES permit requirement. This would be the case where the Agency can establish good evidence that the absence of an active pretreatment program is contributing to POTW effluent violations or the absence of a pretreatment program is causing demonstrable environmental problems and the permit amendment process described above will not address the problem in an expeditious manner. In these limited instances, the Government may sue the POTW for existing NPDES violations under Section 309(b) and (d) of the Clean Water Act and seek submission and implementation of a pretreatment program as an element of relief.

Alternatively, Section 309(f) of the Clean Water Act may be available to obtain or implement an approved program in the most serious cases in which EPA has identified industrial user(s) in violation of federal pretreatment standards. 2/ An enforcement action under Section 309(f) would require that the Agency claim that requiring the POTW to obtain approval of and implement a

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2/ The legal operation of Section 309(f) is explained in more detail in the Agency enforcement guidance "Choosing Between Clean Water Act §309(b) and §309(f) as a Cause of Action in Pretreatment Enforcement Cases" issued on the same date as this enforcement guidance.

pretreatment program was an element of "appropriate relief". Because use of Section 309(f) in this situation requires that obtaining or implementing a pretreatment program constitute "appropriate relief", a Region should consider carefully whether the situation would fit that criterion in deciding whether to bring an enforcement action under Section 309(f). For example, EPA will be in a stronger legal position to sustain this cause of action where the Agency can establish by good evidence that lack of a pretreatment program contributes to substantial industrial user noncompliance with Federal pretreatment standards.

Joining Other POTW Permit Violations In An Action For Failure To Obtain or Implement an Approved Pretreatment Program

In those instances where failure to obtain or implement an approved program coexists with NPDES effluent violations, the effluent violation claims should as a rule be joined to the pretreatment claim. There may be exceptions, notwithstanding the existence of effluent violations, where an enforcement action against a POTW only for failure to obtain or implement an approved pretreatment program is desirable. This situation might arise, for example, where absence of a pretreatment program is causing immediate environmental problems and unrelated effluent violations or appropriate remedies are particularly difficult to identify and substantiate; such instances are probably atypical. If they do occur the Government must take steps to limit the likelihood that either of the judicially recognized doctrines of collateral estoppel or res judicata will preclude a subsequent judicial enforcement action against a POTW for effluent violations. 3/

3/ Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). Res judicata makes conclusive a final valid judgment and if the judgment is on the merits, precludes further litigation of the same cause of action by the parties. Antonioli v. Lehigh Coal and Navigation Co., 451 F.2d 1171, 1196 (3d Cir. 1971), cert. denied, 406 U.S. 906 (1972). Under the doctrine of collateral estoppel, an actual and necessary determination of an issue by a court is conclusive in subsequent cases based on a different cause of action but involving either a party or a privy to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, (1979).

For the most part, failure to allege all known NPDES permit violations may later give rise to an argument by a POTW that res judicata should apply to bar these claims in the future. Alleging all such violations avoids this problem and also promotes efficient use of Government resources, increases environmental benefits from the enforcement action, and is the preferred approach.

Res judicata and collateral estoppel standards can reasonably be viewed as not precluding successive Government enforcement actions against a POTW for different causes of action based on different types of permit violations stemming from different causes. However, there is, of course, always the uncertainty as to whether any court will be amenable to successive suits against the same party for water pollution control violations. These uncertainties can be minimized by a careful litigation strategy and should not per se preclude successive enforcement actions. Nonetheless, if at all possible, an enforcement action should include all known NPDES violations, particularly if it can be demonstrated that effluent violations are in any-way attributable to the absence of a pretreatment program.

A lawsuit filed against a POTW only for failure to obtain or implement an approved pretreatment program as required by the POTW's NPDES permit should be pleaded solely as a failure to comply with the permit provision(s) requiring program approval or implementation. Failure to obtain or implement an approved program should not be pleaded as a violation of the NPDES permit in general. Specifically, the Government should ensure, to the extent possible, in such an enforcement action that the basis for the action is clearly articulated as a violation of the specific requirement for pretreatment program approval or implementation, so that questions regarding POTW compliance with permit effluent limits do not come into issue in the

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(footnote continued)

While there is no federal case law directly on point addressing the issue involved, several cases involving Federal environmental statutes and the doctrines of res judicata and collateral estoppel are instructive. See, for example, United States v. ITT Rayonier, Inc., 627 F.2d 996, 1002 (9th Cir. 1980), Western Oil and Gas Assoc. v. Environmental Protection Agency, 633 F.2d 803, 810 (9th Cir. 1980), and Earth First v. Block, 569 F. Supp 415 (D. Ore. 1983).

initial enforcement action. 4/ This practice should be followed whether or not a subsequent action based on effluent violations is contemplated.

When and if these issues arise, their resolution by a court will likely turn on the characterization of the Agency's initial and subsequent causes of actions against a POTW and the issues resolved during the initial litigation. Therefore, the Government should clearly and precisely articulate its cause of action and claim for relief in all actions for failure to obtain or implement an approved pretreatment program. This will provide an articulable basis for distinguishing a subsequent action for POTW effluent violations.

Collateral estoppel problems will concern issues that are necessary to the outcome of the initial pretreatment action that would also be determinative issues in the subsequent enforcement action for effluent violations. For example, in an action for failure to obtain an approved pretreatment program, a court may rule on whether a POTW's permit was properly issued in deciding whether the permit is enforceable as written. The ruling on permit enforceability would be controlling if the question arose again in a subsequent action addressing violations of the permit's effluent limits.

There is nothing inherent in such an atypical pretreatment enforcement action that necessarily will decide any or all issues in a subsequent effluent violation action against the same POTW. Indeed, in many cases, the circumstances relating to violations of a POTW's pretreatment program will have no bearing on the circumstances surrounding a POTW's failure to comply with effluent limits. A careful and articulate litigation strategy will minimize both res judicata and collateral estoppel problems against the Government in a subsequent action against the POTW for NPDES effluent violations.

4/ An enforcement action under Section 309(b) or Section 309(f) of the Act--in the absence of a corresponding permit requirement--seeking pretreatment program submission or implementation as "appropriate relief" should make clear to the extent possible that the need for a local pretreatment program is independent of the POTW's compliance with the effluent limits in its permit. In most cases, this argument may not be available if the Government needs to show that the lack of a pretreatment program is leading to POTW effluent limit violations in order to persuade the court that requiring program approval constitutes "appropriate relief".

This Guidance Memorandum is intended solely for the use of Agency enforcement personnel. This guidance creates no rights, is not binding on the Agency, and no outside party should rely on it.

Attachments

ATTACHMENT A

Compliance Schedule for POTW Pretreatment Program Approval

1. On or before (3 months or less from date the compliance schedule is effective), the permittee shall submit the following:

   (a) The results of an industrial waste survey as required by 40 C.F.R. §403.8(f)(2)(i-iii), including the identification of industrial users and the character and volume of pollutants contributed to the POTW by the industrial users;

   (b)(1) An evaluation by the City Attorney or a public official acting in a comparable capacity, of the legal authorities to be used by the permittee to apply and enforce the requirements of §§307(b) and (c) and 402(b)(8) of the Clean Water Act, including those requirements delineated in 40 C.F.R. §403.8(f)(1);

   (b)(2) A schedule under which the permittee shall obtain the legal authorities which the evaluation conducted under (b)(1) above identified as inadequate or missing. This legal schedule shall require that the permittee submit the necessary legal authority no later than _____;

   (c)(1) A plan and schedule for obtaining any additional technical information that will be needed by the permittee in order to develop specific requirements for determining violations of the discharge prohibitions in 40 C.F.R. §403.5 and to develop an industrial waste ordinance or other means of enforcing pretreatment standards.

   (c)(2) The plan must include influent, effluent and sludge sampling that will enable the POTW to perform a technical evaluation of the potential for pollutant pass through, interference, or sludge contamination, and to calculate, for each pollutant of concern, the maximum safe loading which can be accepted by the treatment facility.

2. On or before (3 months or less from submittal date in item 1., above), the permittee shall submit the following:

   (a) Proposed staffing and funding to implement the local pretreatment program. An estimate of personnel needed to (1) establish and track schedules of compliance, (2) receive and analyze self-monitoring reports, (3)

conduct independent monitoring and analysis as necessary, (4) investigate noncompliance, and (5) take enforcement actions, shall be included. The discussion of funding shall include both a description of the funding sources and estimated program costs;

(b) A detailed description of the POTW's pretreatment strategy for each Industrial User or class of Users identified in 1(a), above. The permittee shall identify the manner in which it will apply pretreatment standards to individual industrial users as required by 40 C.F.R. §403.8 (such as by Order, Permit, Contract, etc.). The discussion shall include provisions for notifying industrial users of: applicable local pretreatment requirements, applicable federal categorical standards as they are promulgated, and the industrial reporting requirements of 40 C.F.R. §403.12(b)-(e);

(c) A detailed description of a monitoring and enforcement program which will implement the requirements of 40 C.F.R. §403.8 and §403.12, particularly requirements referenced in 40 C.F.R. §403.8(f)(1)(iv-v), §403.8(f)(2)(iv-vi), and §403.12(h-j) and (l-n);

(d) A description of equipment and facilities the POTW will use to monitor and analyze industrial wastes;

(e) A draft sewer use ordinance or other legally enforceable mechanism containing specific effluent limitations for prohibited pollutants defined in 40 C.F.R. §403.5 discharged to the POTW by its Industrial Users. (The POTW should not enact the ordinance until it has been reviewed and approved by the Approval Authority.)

3. On or before (3 months or less* from submittal date in item 2., above), the permittee shall submit its complete pretreatment program for approval which satisfies the requirements of 40 C.F.R. §403.8. The approval request must be in accordance with the requirements of 40 C.F.R. §403.9.

* While a POTW could have up to 3 months for any individual program step, the entire submittal process should take no more than 6 months.

ATTACHMENT B

SUGGESTED NPDES PERMIT LANGUAGE

(for a POTW notified prior to July 1, 1983 that it needs a pretreatment program and for which a contemporaneous AO will be issued containing a compliance schedule)

Under the authority of Section 402(b)(8) of the Clean Water Act and the General Pretreatment Regulations (40 C.F.R. Part 403), which implement the pretreatment provisions of Section 307 of the Clean Water Act, the permittee is required to obtain approval in accordance with the provisions of 40 C.F.R. §§403.8 and 403.9, and thereafter implement, a pretreatment program.

(for a POTW previously identified and notified after July 1, 1983 that it needs a pretreatment program)

Under the authority of Section 402(b)(8) of the Clean Water Act and the General Pretreatment Regulations (40 C.F.R. Part 403), which implement the pretreatment provisions of Section 307 of the Clean Water Act, the permittee is required to obtain approval in accordance with the provisions of 40 C.F.R. §§403.8 and 403.9, and thereafter implement, a pretreatment program, in accordance with the following schedule:

"GUIDANCE ON OBTAINING SUBMITTAL AND IMPLEMENTATION OF APPROVABLE PRETREATMENT PROGRAMS", dated September 20, 1985.

1884

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

SEP 20 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Choosing Between Clean Water Act §309(b) and §309(f) as a Cause of Action in Pretreatment Enforcement Cases

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Regions I-X

Summary

Statutory and regulatory compliance dates for many pretreatment requirements are now in effect. EPA has referred and will continue to refer enforcement actions to the Department of Justice against POTWs and Industrial Users for violation of general and categorical pretreatment requirements. The purpose of this memorandum is to provide guidance on when to use either §309(b) or §309(f) of the Clean Water Act as the cause of action in a pretreatment enforcement case.

The following guidelines apply when choosing between §309(b) and §309(f) as a cause of action in a federal pretreatment enforcement action:

(1) In an enforcement action solely against an Industrial User for violation of pretreatment standards, the enforcement action should be based on §309(b), and not §309(f);

(2) Typically, where a POTW has not obtained or implemented an approved pretreatment program, the most legally sound and most strongly preferred method for ensuring pretreatment program adoption is to enforce an appropriate provision in the POTW's permit under §309(b), or modify the permit if such a requirement is not yet present. Thus, in an enforcement action solely against a POTW for failure to obtain or implement an approved pretreatment program--if the POTW's NPDES permit requires program approval or implementation--the enforcement action should be based on §309(b), and not §309(f);

(3) In an enforcement action solely against a POTW for failure to obtain an approved pretreatment program --if the POTW's NPDES permit does not require program approval--an enforcement action can be based on §309(b) if there are demonstrable NPDES permit violations, particularly ones which relate to the absence of a pretreatment program (program submission would be sought as "appropriate relief" under §309(b)); and

(4) In an enforcement action against a POTW and one or more Industrial Users covering the POTW's failure to obtain or implement an approved pretreatment program, the Government can base its enforcement action on §309(b), §309(f), or both. Note, however, that an action against the POTW is available under §309(b) only if the POTW's permit requires the POTW to obtain and implement an approved pretreatment program or if there are coexisting permit effluent violations, particularly ones which relate to failure to implement the pretreatment program. Moreover, if there is no enforceable permit provision, the Government will be in the best position to sustain its case if the POTW's failure to obtain program approval or program implementation has resulted in widespread Industrial User noncompliance with pretreatment standards or water quality problems.

It should be noted that both §309(b) and §309(f) do not include specific statutory authority to seek civil penalties; the statutory language in both subsections authorize the Administrator to "...commence a civil action for appropriate relief...." For this reason, an enforcement action based on §309(b) or §309(f) and seeking civil penalties should also include §309(d) in the cause of action.

Statutory Provisions Authorizing Pretreatment Enforcement Actions

Section 309(b) of the Clean Water Act is jurisdictional in nature; i.e., it authorizes the federal government to invoke the jurisdiction of a federal district court in an enforcement action for violation of specified sections of the Act, including the pretreatment provisions of the Act in §307.

> "(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdictio to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State." (emphasis added)

Section 309(d) of the Clean Water Act is the civil penalty provision of the Act; i.e., violators of specified sections of the Act are subject to a statutory civil penalty not to exceed $10,000 per day for each violation of those sections:

> "(d) Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation." (emphasis added)

Like §309(b), §309(f) of the Clean Water Act also confers authority on the Agency to invoke federal district court jurisdiction:

> "(f) Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 307, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter." (emphasis added)

Clearly, §309(f)--as does §309(b)--authorizes the Government to invoke a federal district court's civil jurisdiction in an enforcement action based on a violation of §307(d) of the Act. Thus, by the operation of both §309(b) and §309(f), the Government has the authority to invoke the jurisdiction of a federal district court to enforce pretreatment provisions of the Clean Water Act. In many cases, either subsection--(b) or (f)--or both, could be used in conjunction with subsection (d) as the Government's cause of action in a pretreatment enforcement action.

Legislative History of §309(f)

Section 309(f) was added to the Act as part of the 1977 amendments. 1/ It was added during the Conference Committee as a substitute for the original §309(f) contained in the Senate bill, S. 1952; §309(f) in the Senate bill bore no resemblance to the substitute §309(f) adopted at Conference. 2/ In the House bill, H.R. 3199, there were no pretreatment amendments. Therefore, there is no legislative history in the House or Senate committee hearings or in the House or Senate committee reports accompanying the 1977 amendments regarding this subsection of §309.

The Conference Report of the 1977 amendments states only that new subsection (f) was added to §309. 3/ The discussion of new subsection (f) in the Conference Report is limited strictly

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1/ It should be noted that §307(d) and §309(b) and (d) were added to the Clean Water Act as part of the 1972 Clean Water Act amendments. It is apparent from the legislative history of the 1972 amendments that §309(b) was contemplated as sufficient authority to enforce the pretreatment provisions of the Act. See, S. Rep. No. 92-1236, 92d Cong., 2d Sess. 131 (1972), reprinted in Rep. No. 93-1, Committee on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 314 (1973), and H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 114 (1972), id., at 801.

2/ See, S. Rep. No. 95-370, 95th Cong., 1st Sess. 46 (1977), reprinted in Rep. No. 95-14, Committee on Environment and Public Works, A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act, at 600 (1978).

3/ "Section 309 of the Federal Water Pollution Control Act is amended by adding at the end thereof the following new subsection: [quotes subsection (f) verbatim]." H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 28 (1977). Id., at 212. In addition, the Joint Explanatory Statement of the Committee of Conference only states "...section 309 of the Act is amended by adding a new subsection (f) to provide that [quotes subsection (f) verbatim]." Id., at 270-271.

to a restatement of the subsection. The Conference Report thus provides no information regarding why the Senate version of subsection (f) was not accepted or why the Conference Committee version of subsection (f) was adopted.

The Conference Report was debated and passed by both the House and the Senate on December 15, 1977. The addition of subsection (f) to §309 was not debated in either House. Subsection (f) was mentioned by both Floor managers of the legislation, Congressman Anderson (D-Cal.) and Senator Muskie (D-Maine), during their extensive remarks covering the entire 1977 amendment package. 4/

While the remarks of Congressman Anderson and Senator Muskie do not discuss why §309(f) was included as part of the 1977 legislation, Congressman Anderson did state that "The municipality has the primary responsibility to enforce [the pretreatment] standards against the industries. EPA is not to unilaterally enforce these standards against the industries." It is unclear what this statement actually means since the last sentence in §309(f) states that it does not "...limit or prohibit any other authority the Administrator may have...", and §309(b) was not amended in any way to prevent its use in pretreatment enforcement against industrial users.

Choosing Between §309(b) and §309(f) -- §309(b) as the Preferred Cause of Action, and When §309(f) May Be Preferred

Nothing in §309 itself precludes the use of subsection (b) rather than subsection (f) as the cause of action in a federal pretreatment enforcement action; nor is the legislative history of §309(f) conclusive in requiring use of subsection (f) to the exclusion of subsection (b).

Where either subsection is applicable, the Government thus has the discretion--in most cases--to choose either subsection or both as its cause of action in a pretreatment enforcement action. However, because §309(b) requires no advance notice to the State, no opportunity for appropriate local enforcement action preemptive of federal action and no joinder, it is easier to invoke procedurally than §309(f). It is therefore likely that §309(b) would almost always be the Agency's "cause of action of choice." However, even if §309(f) is considered less attractive than §309(b) for procedural reasons in a pretreatment enforcement action, its use as a cause of action where §309(b) is available is not necessarily precluded, particularly if the Government can obtain relief not otherwise available under §309(b).

4/ House Debate, December 15, 1977, id., at 404, and Senate Debate, December 15, 1977, id., at 461.

In a pretreatment enforcement action in which the Agency seeks relief only against Industrial Users, or only against a POTW for failure to obtain or implement an approved pretreatment program, the Agency should continue to base its enforcement actions on §309(b).

Section 309(b), for the reasons described above, also is typically the preferable cause of action against a violating Industrial User and a POTW that has failed to properly implement its pretreatment program--approved pursuant to 40 C.F.R. §403.8 and required by the terms of its NPDES permit. Nevertheless, the Government alternatively may initiate a pretreatment enforcement action using §309(f) after providing 30 days notice to the POTW to implement pretreatment requirements and the subsequent failure of the POTW to do so. Section 309(f) would be directly on point in this situation because the Agency would be seeking relief both against the POTW for failure to implement its pretreatment program and against violating sources which the POTW had failed to enforce against.

The option to use §309(b) in the above instance would be preferable if it was determined that providing a POTW 30 days formal notice of a violating Industrial User would lead either to no remedial action by the POTW or remedial action that would be deemed unsatisfactory by the Agency but claimed to be "appropriate enforcement action" by either the source or the POTW if subsequently challenged by the Agency.

Section 309(b) would also be the preferable cause of action against a POTW failing to implement a permit-required program where the Agency lacked either the information or was unable to identify and bring a combined action against both a POTW and violating Industrial Users.

Situations may arise where the Agency would not desire to have a POTW/municipality as a defendant in a pretreatment enforcement action; e.g., a POTW may request the Agency to initiate an enforcement action against an industrial user or the Agency may desire to have the POTW as a party plaintiff. In this type of situation, §309(b) would be the Government's preferable cause of action.

The notification and litigation provisions described in §309(f) are discretionary. The Agency can notify a POTW of pretreatment violations without being obligated to follow up that notification with litigation. Therefore, it is conceivable that §309(f) could be used for "action-forcing" purposes to provide notice to a POTW that is not implementing its approved program. Using a §309(f) letter to motivate a POTW to properly implement an approved program would make a §309(f) letter to an offending POTW a "quasi Administrative Order". This use of §309(f) should be considered.

The use of §309(f) "notice letters" would be most effective when a POTW has an approved pretreatment program; in the absence of an approved pretreatment program it is unlikely the POTW will be willing and able to assure a remedy of Industrial User violations in an expeditious manner.

It should be noted that in almost all instances an Agency enforcement action against a POTW is predicated upon the POTW having an approved pretreatment program incorporated in its NPDES permit pursuant to 40 C.F.R. §§403.8 and 403.9. This predicate is based on at least the following two reasons: First, §402(b)(8) of the Act--also added as part of the 1977 Clean Water Act amendments--requires that any POTW which receives pollutants subject to pretreatment standards under §307(b) have a "program to assure compliance" with those standards incorporated in its NPDES permit. Second, §402(k) of the Act may serve as a "shield" in prohibiting most enforcement actions against an NPDES permit holder that is not in violation of its permit.

A POTW without an NPDES permit requirement to obtain and implement a pretreatment program--and thus not susceptible to an enforcement action under §309(b)--could be subject to a §309(f) action. However, the Agency would have to bring a contemporaneous action against a violating Industrial User and seek relief against the POTW in the form of injunctive relief to obtain and/or implement a pretreatment program. The relief sought against the POTW would be pursuant to the "appropriate relief" clause of §309(f). At the same time the Agency should take steps to modify or revoke and reissue the POTW's permit to include a requirement to implement a pretreatment program. In order to bring such an enforcement action it should be thoroughly documented that significant, existing Industrial User violations would be alleviated by a properly implemented pretreatment program. Unless there are compelling reasons why permit modification cannot be accomplished expeditiously, Regional efforts should be directed at permit modification or reissuance.

This Guidance Memorandum is intended solely for the use of Agency enforcement personnel. This guidance creates no rights, is not binding on the Agency, and no outside party should rely on it.

cc: Office of Water Enforcement and Permits
Regional Water Management Directors, Regions I-X
OECM/Water attorneys
Environmental Enforcement Section, DOJ

"RCRA Information on Hazardous Wastes for Publicly Owned Treatment Works", dated September 1985. Table of Contents only.

United States
Environmental Protection
Agency

Office of
Water Enforcement Permits
Washington, DC 20460

September 1985

RCRA Information On Hazardous Wastes For Publicly Owned Treatment Works

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Environmental Protection
Agency

Office of Water
Programs Operations (WH-547)
Washington DC 20460

March 1984

EPA

Financial Capability Guidebook

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United States
Environmental Protection
Agency

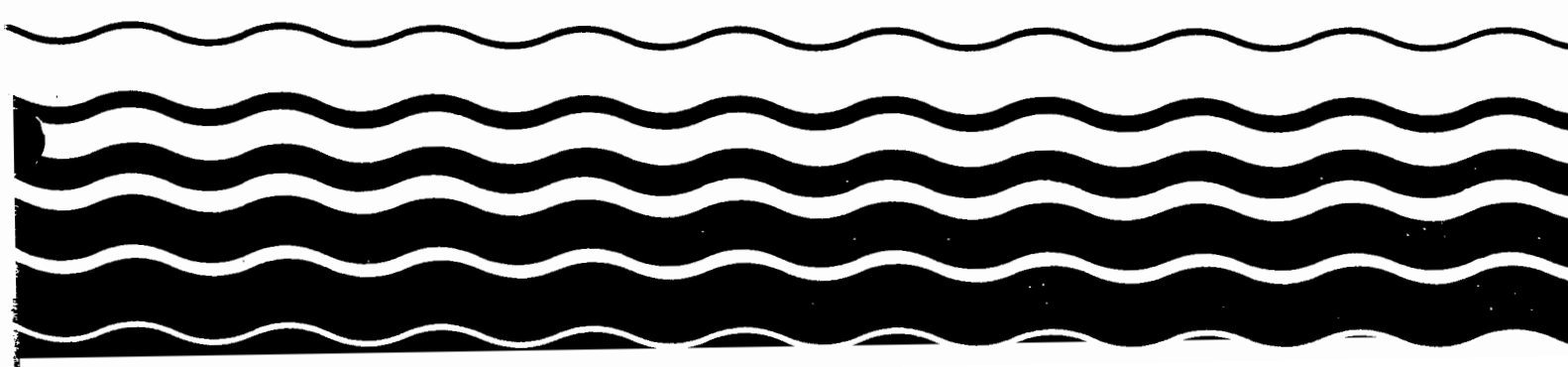
Office of Water
Enforcement and Permits
Washington, DC 20460

July 1986

Water

EPA

Pretreatment Compliance Inspection and Audit Manual for Approval Authorities



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PRETREATMENT COMPLIANCE MONITORING AND ENFORCEMENT GUIDANCE

OFFICE OF WATER ENFORCEMENT AND PERMITS

JULY 25, 1986

U.S. ENVIRONMENTAL PROTECTION AGENCY
401 M STREET, S.W.
WASHINGTON, D.C. 20460

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"Interim Guidance on Appropriate Implementation Requirements in Pretreatment Consent Decrees," dated December 5, 1986. Attachments excluded.

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

DEC 5 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Interim Guidance on Appropriate Implementation Requirements in Pretreatment Consent Decrees

FROM: Glenn L. Unterberger
Associate Enforcement Counsel for Water

J. William Jordan, Director
Enforcement Division, OWEP

TO: Regional Counsels
Water Management Division Directors
Regions I - X

This memorandum provides interim guidance for pretreatment program implementation provisions which should be included in all future municipal pretreatment consent decrees. This interim guidance should provide national consistency for court-ordered pretreatment implementation. This guidance may be expanded to include provisions developed by the Workgroup on Local Program Implementation.

Background

During the past two years, the Agency has launched the first and second wave pretreatment initiatives against POTWs that failed to develop local pretreatment programs, and has provided the Regions with a "Guidance on Obtaining Submittal and Implementation of Approvable Pretreatment Programs", September 20, 1985 and the "Pretreatment Compliance Monitoring and Enforcement Guidance" July 25, 1986, for POTWs with approved pretreatment programs. The latest Agency focus in the pretreatment area is on implementation of approved programs. Pretreatment cases against POTWs generally fall into two categories:[1]

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[1] An exception to these two categories are cases against POTWs under Section 309(f) for failure to take appropriate action against an industrial user that is discharging into the POTW in

1. Failure to develop and obtain approval of pretreatment programs. (The majority of these cases have already been brought; however, a number of consent decrees remain to be negotiated.)

2. Failure to properly implement approved programs.

For each type of case, a consent decree which concludes an individual case should contain provisions which require both implementation of the approved program and implementation status reports. The reporting requirements in the decree should provide sufficient information to allow EPA or a court to assess the adequacy of implementation activities. Stipulated penalties should attach to the failure to comply with definitive requirements such as the failure to report.

Implementation Requirements

At a minimum, the POTW should be required by the consent decree to do the following:

1. Implement the approved pretreatment program.

2. Inspect all significant IUs (defined as all categorical industrial users and any user which discharges over 25,000 gallons of process water or contributes 5% of the dry weather hydraulic or organic capacity of the plant or has a reasonable potential to adversely affect the POTW treatment plant) within six months of decree entry.

3. Submit semi-annual (or more frequent) implementation status reports beginning within six months of entry of the decree which supply, at a minimum, the following information:

   a) an updated list of significant industrial users and the limits that apply to each (whether based on local, categorical or prohibited limits); and

   b) an updated list of all waste discharge permits or equivalent instruments issued;

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[1] (Continued)
violation of Section 307(d) of the Clean Water Act. Such actions may be brought whether or not a POTW is otherwise required to have a pretreatment program. Although 309(f) provisions are not discussed in this guidance, some of the provisions contained herein may be appropriate in settling 309(f) cases as well.

c) an updated list of local pretreatment limits;

d) a list of all IUs inspected, monitored and sampled since the date of program approval, together with a copy of all inspection reports;

e) a brief statement describing whether each IU (including categorical IUs) has continuously complied with its pretreatment requirements during the reporting period. For categorical IUs, include the dates of receipt of Baseline Monitoring Reports, 90 day compliance reports and semi-annual reports. For each IU out of compliance, include a descriptive summary of the violation, the cause, duration and reason for noncompliance; and

f) a descriptive summary for each non-complying IU of any efforts made by the POTW to bring that IU into compliance, a justification for any lack of appropriate enforcement and a statement as to whether the IU is now in compliance.

The consent decree should also contain a provision for a sufficient period of court oversight, i.e., approximately one year when implementation is the only issue.

Enforcement Response Procedures

In addition to the above minimum requirements, we recommend that, whenever possible, the decree require the POTW to develop and submit written Enforcement Response Procedures (ERP) within a specific period of time for review and approval by EPA. These response procedures should establish a timeframe for determining what action is appropriate for each violation, describe a range of actions appropriate to different types of violations, and describe how the control authority will document its decisions. These procedures, once formulated and approved, should serve as the POTW's operating enforcement criteria. The violation of the criteria by an IU should then trigger specific enforcement responses. Through the July 25, 1986 guidance, the Agency has encouraged all POTWs with pretreatment programs to develop such response procedures. These procedures provide a basis to evaluate compliance with the requirements to enforce pretreatment standards. Where an ERP is required, the semi-annual report should indicate whether the POTW is following the procedures.

Permit Modification

Where the State is the permitting authority, you may also wish to include a provision in the consent decree that the State will move to modify the POTW's permit to include pretreatment implementation as quickly as possible.

Attached are examples of the kind of language that should be included in all pretreatment consent decrees. Part A includes language incorporating minimum requirements normally necessary for Headquarters consent decree approval. Part B includes additional recommended provisions.

If you have any questions regarding this guidance or would like copies of consent decrees including recommended provisions, please contact Elyse DiBiagio-Wood of OECM/Water at 475-8187. If you have questions regarding the POTW guidance or would like copies, please contact Ed Bender of OWEP at 475-8331.

Attachment

cc: Susan Lepow, OGC
David Buente, DOJ
Jim Elder
Martha Prothro
OECM/Water Attorneys

"Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", dated September, 1987. (This document is reproduced at II.C.11 of this compendium).

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"Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program", dated November 1987. Indices and Tables of Contents only.

United States
Environmental Protection
Agency

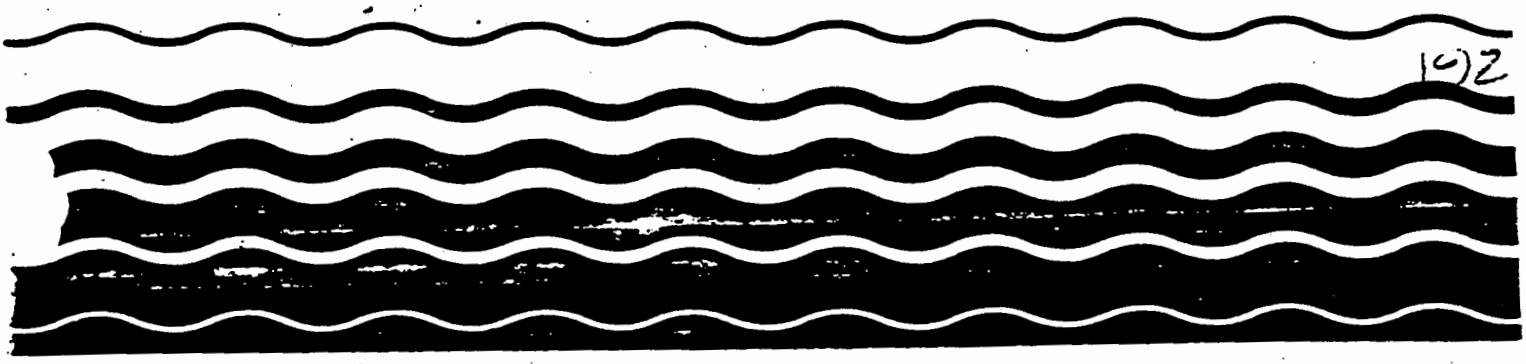
Office of Water Enforcement
and Permits
Washington, D.C. 20460

November 1987

Water

EPA

Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program



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"GUIDANCE ON BRINGING ENFORCEMENT ACTION AGAINST POTW'S FOR FAILURE TO IMPLEMENT APPROVED PRETREATMENT PROGRAMS", dated August 4, 1988.

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

AUG 4 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Bringing Enforcement Actions Against POTWs for Failure to Implement Pretreatment Programs

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

J. William Jordan
Enforcement Division Director,
Office of Water Enforcement and Permits

TO: Regional Counsels
Regional Water Management Division Directors
Susan Lepow, Associate General Counsel for Water
David Buente, Chief, Environmental Enforcement, DOJ

Attached is a final guidance document that explains the legal and policy considerations involved in deciding whether and how EPA shall pursue enforcement actions under the Clean Water Act against POTWs that have failed to adequately implement their pretreatment programs.[1] A model judicial complaint and model consent decree for failure to implement cases are included with this Guidance.[2] We will be preparing model administrative pleadings for these cases in the near future.

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[1] This guidance document was distributed in draft for comment on February 11, 1988 (the draft was marked "January 1988 Regional Comment Draft). We received comments from seven regions, two headquarters' offices, and the Department of Justice. The comments were generally favorable and the Guidance has been revised pursuant to those comments.

[2] Drafts of the model judicial complaint and consent decree were sent to several regions and the Department of Justice for review in May 1988. We received helpful comments and the enclosed models have been revised accordingly.

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Now that virtually all Federally required local pretreatment programs have been approved, EPA is placing a high priority on assuring that programs are fully implemented. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report, pursuant to the definition of Reportable Noncompliance for POTW pretreatment program implementation, those POTWs that have failed to adequately implement their pretreatment program requirements.[3]

Given finite resources, EPA enforcement actions will not be appropriate for all of the POTWs that are listed on the QNCR for Reportable Noncompliance with pretreatment implementation requirements. The enclosed guidance document is intended to help EPA Regions select the best cases for enforcement in this area.

Enforcement actions against POTWs for failure to implement will be a high priority in FY 1989. Consistent with the attached guidance, we encourage all Regions to focus resources on POTWs that have failed to adequately implement their pretreatment programs.

We encourage all Regions to discuss any potential enforcement actions in this area with us. Discussion of potential cases for failure to implement should be directed to David Hindin, OECM-Water, (LE-134W), FTS 475-8547, or Ed Bender, OWEP, (EN-338), FTS 475-8331.

Attachment

cc: Ed Reich
Jim Elder
Paul Thompson
Tom Gallagher
Cynthia Dougherty
ORC Water Branch Chiefs
Regional Water Management Compliance Branch Chiefs
Regional Pretreatment Coordinators
Assistant Chiefs, DOJ Environmental Enforcement
OECM Water Attorneys

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[3] See, U.S. EPA, Office of Water Enforcement and Permits, Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements, September 1987.

GUIDANCE ON BRINGING ENFORCEMENT ACTIONS AGAINST POTWS FOR FAILURE TO IMPLEMENT PRETREATMENT PROGRAMS
August 4, 1988

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I. EXECUTIVE SUMMARY

This guidance document explains the legal and policy considerations involved in deciding whether and how EPA shall pursue Federal enforcement responses under the Clean Water Act against POTWs that have been indentified on the Quarterly NonCompliance Report as having failed to adequately implement their pretreatment programs.

Municipal pretreatment programs must be fully implemented in order to effectively control industrial discharges of toxic, hazardous, and concentrated conventional wastes into public sewers and, ultimately, our rivers and lakes. Now that EPA has approved virtually all Federally required local pretreatment programs, EPA is placing a high priority on assuring local program implementation. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report those POTWs that have failed to adequately implement their pretreatment program requirements. EPA enforcement actions are necessary to ensure that POTWs fully implement their pretreatment programs. Indeed, this guidance document is intended to help EPA pursue enforcement actions in this area and establish a strong enforcement presence so as to assure proper program implementation on a broad scale from POTWs.

The decision to initiate an enforcement action against a POTW for its failure to adequately implement its pretreatment program requires a careful analysis of the underlying pretreatment program requirements, the legal basis for the violations and the seriousness of the violations. This is particularly true because of the differing implementation requirements which may apply to individual POTWs. In addition, the flexibility which many implementation requirements intentionally allow necessitates the use of considerable judgment in deciding whether to find a POTW in violation.

From a legal and equitable perspective, EPA is in the strongest position to enforce pretreatment program implementation requirements that are contained in a POTW's NPDES permit, either directly within the pages of a permit or indirectly through a permit condition that requires a POTW to implement its approved program and/or comply with the pretreatment regulations, 40 CFR 403.

The following approach should be useful in identifying potential pretreatment implementation violations for possible enforcement responses. First, examine the POTW's permit to identify all pretreatment activities the POTW is required to implement. Second, review all pretreatment program annual reports that the POTW has submitted since its program was

approved. All pretreatment audits and inspections should also be reviewed to identify potential violations.

Third, compile a list of all pretreatment implementation requirements applicable to the POTW which available information indicates the POTW may have violated. (See Tables 1 and 2 for possible examples, such as failure to issue industrial user (IU) control mechanisms, failure to establish necessary local limits, or failure to enforce IU pretreatment requirements adequately.) Fourth, in some cases, send a §308 letter to obtain more complete information necessary to support an enforcement case.

Once all potential violations have been identified, each violation must be evaluated to determine the strength of EPA's claim of violations in light of the facts and any imprecision in the way the underlying pretreatment implementation requirements define compliance.

Despite the flexibility a POTW may have in implementing some pretreatment requirements, the fundamental yardstick for measuring compliance is that a POTW must act reasonably by implementing its pretreatment requirements consistent with an effective pretreatment program: i.e., a program that will prevent interference and pass through, and improve opportunities to recycle municipal and industrial wastestreams and sludges (see 40 CFR 403.2). EPA should evaluate the reasonableness of the POTW's implementation activity in light of both the flexibility afforded by the applicable requirements and the impact or severity of the potential violations. Preparing a table similar to the one in Attachment A for evaluating program implementation violations should be helpful in making enforcement decisions in this area.

As a general rule, the strongest enforcement case against a POTW for failure to implement its pretreatment program will contain POTW effluent limit violations attributable to inadequate implementation and a number of related POTW pretreatment implementation violations. Such cases are compelling because they indicate that a POTW's implementation of its program has been so deficient that IU discharges have not been adequately controlled and these discharges have caused a POTW to exceed the effluent limits in its permit (or otherwise violate its permit). This type of case may very well be appropriate for civil judicial enforcement.

The lack of POTW permit effluent discharge violations (attributable to inadequate pretreatment implementation) does not mean that EPA should overlook or trivialize other types of implementation violations. Inadequate pretreatment implementation still could result, for example, in the POTW discharging increased loadings of pollutants (including

toxics) not yet controlled by its permit, or in increasing the risk of future effluent limit violations. Thus, for example, a POTW that has failed to issue control mechanisms to a number of its significant IUs in direct violation of a permit requirement to do so is committing a serious violation that may very well be subject to an enforcement response.

Other cases in which a POTW is running a sloppy pretreatment program, with clear implementation violations, but in which there is so far no evidence of interference or pass through problems, may be appropriately dealt with by issuance of a traditional compliance administrative order or by assessment of an administrative penalty, or by initiation of a civil judicial action. EPA's pursuit of a penalty in these circumstances should have great value in demonstrating to POTWs that they must fully implement their pretreatment programs now and not wait until after effluent violations occur.[1] Such enforcement actions should help EPA send the message that prevention is the goal of pretreatment programs, not damage control after POTW effluent limits violations or other unwarranted discharges have occurred.

If an IU has caused interference or pass through at the POTW, or has violated local limits, categorical standards or other pretreatment requirements, EPA may bring a joint action against both the IU and the POTW. The importance of joining an IU in an enforcement action is increased if an IU is a primary cause of a POTW's effluent limit violations, if an IU has obtained a significant economic benefit from its noncompliance, or if an IU needs to install pretreatment equipment at its facility, especially if a POTW is unwilling or unable to force an IU to install the necessary equipment.

A model judicial complaint and consent decree for pretreatment failure to implement cases are included as attachments to this guidance. Model administrative pleadings will be prepared shortly for Regional distribution.

Disclaimer

This guidance document is intended solely for the use of Agency enforcement personnel. This guidance creates no rights, is not binding on the Agency, and the Agency may change this guidance without notice.

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[1] Instructions on how to determine settlement penalties using the standard CWA Civil Penalty Policy criteria of economic benefit, gravity and appropriate adjustments are contained in EPA's draft Guidance, "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program," distributed for Regional comment on August 1, 1988.

II. INTRODUCTION: POTW Implementation as the Key to an Effective National Pretreatment Program

A. Purpose of this Guidance

This document provides guidance on how and under what circumstances EPA should pursue administrative and judicial enforcement actions against Publicly Owned Treatment Works (POTWs) for violations of their pretreatment program implementation obligations arising under the Clean Water Act.

Local pretreatment programs must be fully implemented in order to effectively control industrial discharges of toxic, hazardous, and concentrated conventional wastes into public sewers and, ultimately, our rivers and lakes. Now that EPA has approved virtually all Federally required local pretreatment programs, EPA is placing a high priority on assuring local program implementation. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report those POTWs that have failed to adequately implement their pretreatment program requirements. EPA enforcement actions are necessary to ensure that POTWs fully implement their pretreatment programs.

National guidance is needed for bringing enforcement actions against POTWs for their failure to adequately implement their pretreatment programs for four reasons. First, the determination of whether a POTW is violating its pretreatment program requirements, and whether such violations are serious, may involve careful, subtle judgments. Second, even though the failure to adequately implement may be clear, subtle legal issues may be involved in determining the best way to frame the Government's cause of action. Third, there is a need for national consistency to ensure that POTWs and their industrial users receive a consistent and strong message that pretreatment requirements must be complied with and that violations will not be tolerated. Fourth, pretreatment implementation cases are new and thus there are neither settled nor litigated precedents to follow in this area.

This guidance document builds upon the Office of Water Enforcement and Permits's (OWEP) definition of Reportable Noncompliance for POTW pretreatment program implementation.[2] EPA Regions and NPDES States use this definition of Reportable Noncompliance to identify and list on the Quarterly Noncompliance Report (QNCR) those POTWs that have failed to

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[2] U.S. EPA, OWEP. Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Requirements. September 1987.

adequately implement their pretreatment program requirements. Given finite resources, EPA enforcement actions will not be appropriate for all of the POTWs that are listed on the QNCR for Reportable Noncompliance with pretreatment implementation requirements. This guidance document is intended to help EPA Regions select the best cases for enforcement in this area and thus establish a strong enforcement presence in order to ensure full program implementation across the nation by local POTWs.

B. Related Pretreatment Guidance Documents

In addition to this guidance document, there are five other EPA documents that are particularly relevant to bringing enforcement actions against POTWs for failure to implement. As indicated above, on September 30 1987, EPA issued a guidance document that explains how POTW noncompliance with pretreatment implementation requirements should be evaluated and reported on the QNCR. In short, today's guidance document expands upon the September 1987 Reportable Noncompliance guidance by detailing the considerations involved in bringing an enforcement action against a POTW listed on the QNCR pursuant to the definition of Reportable Noncompliance.

Another important document is OWEP's July 25, 1986 guidance, entitled, "Pretreatment Compliance Monitoring and Enforcement Guidance" (published as an EPA document in September 1986). This document provides POTWs with information about their pretreatment implementation responsibilities and describes the procedures POTWs should implement in order to successfully operate their approved pretreatment programs. In short, the document recommends standards of performance for a good pretreatment program.

Two other guidance documents, both issued on September 20, 1985, are also relevant to bringing failure to implement cases.[3] One document, entitled "Guidance on Obtaining Submittal and Implementation of Approvable Pretreatment Program," discusses EPA enforcement and permitting policy on obtaining POTW pretreatment program submittal and implementation. The other document, entitled "Choosing Between Clean Water Act §309(b) and §309(f) as a Cause of Action in Pretreatment Enforcement Cases" describes the legal considerations involved in choosing a cause of action in a pretreatment case.

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[3] Copies of both documents are contained in the CWA Compliance/Enforcement Policy Compendium, Volume II, §VI.B. Copies of the Compendium are in OECM's new computer data base, the Enforcement Document Retrieval System.

Finally, on August 1, 1988, EPA distributed draft guidance, for Regional review, that explains how the CWA Civil Penalty Policy should be applied to cases in which a POTW has failed to adequately implement its pretreatment program. This document, entitled "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program" discusses the specific considerations involved in making penalty policy calculations for failure to implement violations.

C. Background on the National Pretreatment Program

The National Pretreatment Program is an integral part of the national goal to eliminate the discharge of pollutants into the nation's waters (§101 of CWA). The National Pretreatment Program's primary goal is to protect POTWs and the environment from the detrimental impact that may occur when toxic, hazardous or concentrated conventional wastes are discharged into a sewage system. With the retention of the Domestic Sewage Exclusion in RCRA, and as RCRA regulations for the disposal of hazardous waste in land fills become more restrictive, the amount of hazardous waste entering POTWs is expected to increase.[4] Thus, the role of pretreatment in controlling hazardous waste must also increase.

The role of pretreatment in controlling toxic pollutants must also increase as water quality-based toxics limits and monitoring requirements become a more common provision in the NPDES permits of POTWs. In order to comply with water quality-based toxics requirements, POTWs must fully implement their pretreatment programs in order to effectively control the discharge of toxic pollutants by industrial users.

The governmental entity that primarily implements pretreatment controls on industrial users (IUs) is usually the local municipality. The municipality, through its POTW, is called the Control Authority because it has the primary responsibility to control the industrial wastes that are

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[4] The domestic sewage exclusion in RCRA, §1004(27), allows wastes which otherwise would be considered hazardous and regulated under RCRA, to be exempted from RCRA regulations when mixed with domestic sewage and discharged to a POTW. Pursuant to RCRA §3018, EPA concluded that the Domestic Sewage exclusion should be retained because the CWA pretreatment program is the best way to control hazardous waste discharges to POTWs.

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entering its sewer system.[5] The Agency confirmed this responsibility that POTWs have in the preamble to its final 1978 General Pretreatment Regulations, 43 F.R. 27736, June 26, 1978. In that preamble the Agency stated:

> "Thus in the amendments to sections 309 and 402 of the Clean Water Act, Congress assigned the primary responsibilities for enforcing national pretreatment standards to the POTWs, while providing the EPA or the NPDES state with the responsibility to assure that local government fulfills this obligation." 43 F.R. at 27740.

U.S. EPA is performing four basic activities to ensure the success of the National Pretreatment Program. First, EPA has been developing national categorical pretreatment standards that contain effluent discharge limits for particular industrial processes.

Second, EPA has promulgated the General Pretreatment Regulations, 40 CFR 403. These regulations, inter alia, establish the criteria and procedures for the development, approval and implementation of local POTW pretreatment programs. Section 403.5 of these regulations prohibits the discharge of pollutants, by IUs, into a POTW that may cause interference or pass through at a POTW.

Third, EPA has issued guidance documents and conducted training seminars in order to help POTWs understand, develop and implement effective pretreatment programs.

Fourth, EPA must ensure that POTWs receive a strong message that full implementation of their pretreatment programs is required and will be legally enforced. With approximately 1500 approved local programs, the push to get POTWs to develop pretreatment programs is now largely complete. The next step is to make sure that these local pretreatment programs are fully implemented: Approved local programs must not be allowed to sit on the shelf and gather dust. Lifeless rivers, poisoned water supplies and crippled

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[5] States also play an important role in the National Pretreatment Program. Once a state has been authorized by EPA to operate the National Pretreatment Program in its territory, the state is then responsible for approving, monitoring and regulating the performance of all the local POTW pretreatment programs. To date, 24 States have received federal pretreatment authority. These states are called Approval Authorities. For those states without an approved pretreatment program, EPA is the Approval Authority.

sewage treatment plants are the possible consequences if POTWs do not fully implement their pretreatment programs.

In order to ensure that POTWs fully implement their pretreatment programs, EPA intends to focus much of its oversight and enforcement resources on proper and full implementation of local pretreatment programs. To this end, EPA Regions now identify those POTWs that have failed to adequately implement their pretreatment programs and report these POTWs on the QNCR pursuant to the definition of Reportable Noncompliance for pretreatment program implementation. EPA Regions should then initiate enforcement actions against POTWs with serious pretreatment implementation violations.[6] Such enforcement actions are necessary to force the violating POTW to comply and to deter other POTWs from neglecting their pretreatment obligations.

III. LEGAL BASIS FOR ENFORCING POTW PRETREATMENT PROGRAM IMPLEMENTATION: Look First to a POTW's Permit

A. Statutory Authority for Requiring POTW Pretreatment Programs

Section 301 of the Clean Water Act prohibits the discharge of any pollutant except in compliance with the effluent limits established in §301 and the requirements in sections 302, 306, 307, 308, 402 and 404. The most relevant sections for pretreatment are 307 and 402.

EPA's authority to establish pretreatment effluent standards is contained in §307 of the Act. Section 307(b)(1) requires EPA to promulgate regulations:

> "establishing pretreatment standards for [the] introduction of pollutants into treatments works ... which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operations of such treatment works. ... Pretreatment standards under this subsection ... shall be established to prevent the discharge of any pollutant through treatment works ... which are publicly owned, which pollutant

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[6] Of course, EPA Regions should initiate these enforcement cases consistent with the role of a state that has an approved state pretreatment program. EPA Regions should encourage states with approved programs to initiate state enforcement actions against violating POTWs.

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interferes with, passes through, or otherwise is incompatible with such works."

In 1977, Congress amended §402(b)(8) to require a state that wishes to receive EPA approval to operate the NPDES program in its territory to have adequate authority:[7]

> "[t]o insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source ..."

Section 402(b)(8) further mandates that a state program have adequate authority to require POTWs to inform the state permitting agency of (1) the introduction of pollutants into the POTW from a new source, (2) a substantial change in the volume or character of pollutants coming into the POTW from an existing source and (3) any anticipated impact of such changes on the POTW's effluent discharge. In short, any state desiring to administer its own NPDES permit program must issue permits that require POTWs to have programs that will assure compliance with pretreatment standards.

The language of §402 indicates that POTWs are obligated to have programs to assure compliance with pretreatment requirements and gives EPA and approved states the authority and obligation to require POTWs to develop and implement effective pretreatment programs.

B. Civil Judicial Enforcement Authority

EPA's civil authority to obtain injunctive relief to enforce the obligation that POTWs adequately implement their pretreatment programs is contained in §309(a)(3) of the Act, which reads, in pertinent part:

> "Whenever ... the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit

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[7] The requirements that govern a state NPDES program under §402(b) of the Act also apply to U.S. EPA where EPA is administering the NPDES program. §402(a)(3).

> issued under section 402 of this Act by him or a State ..., he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section."

Section 309(b) of the Act authorizes EPA, in pertinent part,:

> ... to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he [EPA Administrator] is authorized to issue a compliance order under subsection(a) of this section. ...

Civil penalty liability is established in §309(d) of the Act, which reads, in pertinent part:

> "Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State ..., or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act, and any person who violates an order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 for each violation."

Thus, §309(b) and (d) of the Act give EPA plenary authority to bring a civil action for injunctive relief and penalties against a municipality that has violated the pretreatment implementation requirements contained in its NPDES permit and any requirements contained in an approved pretreatment program incorporated by reference into the permit. EPA also can enforce the pretreatment regulations, 40 CFR 403, if the permit (or approved program incorporated by reference into the permit) appropriately references the regulations. Specifically, EPA's cause of action under §309(b) and (d), in those circumstances, is that the POTW has violated a permit condition authorized by the statute for the purpose of implementing §307 of the Act.

In some circumstances, EPA may seek to require a POTW to implement an approved program or regulatory requirement in the absence of an NPDES permit condition requiring program implementation or compliance with the regulations where, for example, EPA can establish that the absence of an active pretreatment program is contributing to POTW effluent violations or the absence of a pretreatment program is causing apparent environmental problems. In this situation,

EPA could sue the POTW for NPDES permit violations other than inadequate implementation under § 309(b) and (d) of the Act and seek pretreatment implementation as "appropriate relief" under §309(b).

Also in some circumstances, EPA may seek injunctive relief under §309(f) of the Act to require a POTW to implement a pretreatment program (in the absence of a permit condition requiring implementation) if one or more IUs are violating federal pretreatment standards. Under §309(f) of the Act, EPA would have to establish that requiring a POTW to implement a pretreatment program is an element of "appropriate relief" and that such appropriate injunctive relief would remedy the IU noncompliance with federal pretreatment standards.[8]

As a general rule, EPA will be in the strongest position, from a legal and equitable perspective, to bring an enforcement action against a POTW for pretreatment program implementation violations when the case is based on violations of the POTW's NPDES permit related to pretreatment implementation. Permit requirements vary across POTWs and thus each permit must be reviewed to identify the specific implementation requirements. The ideal NPDES permit for a POTW with a pretreatment program should establish three types of implementation requirements as conditions of the permit:[9]

> (1) The permit should incorporate by reference the approved pretreatment program and require the POTW to comply with and implement the program.
> (2) The permit should require the POTW to comply with the federal pretreatment regulations at 40 CFR 403 and to implement its approved pretreatment program consistent with the federal pretreatment regulations. The permit also should require the POTW to comply, within 30 days after receiving notice from its Approval Authority, with all revisions to the pretreatment regulations subsequently promulgated.
> (3) The permit should, as needed, set out more specific requirements relating to important implementation procedures of the pretreatment program, and require the POTW to comply with these requirements by specific dates. For example, the permit could require the POTW

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[8] Further details on bringing cases in these limited circumstances are contained in the two September 20, 1985, documents discussed earlier, at page 5.

[9] Permits that lack all three of these provisions should be modified as soon as possible, but no later than when the permit is next re-issued.

to inspect and sample IUs on an enumerated schedule (perhaps a specific number each quarter), beyond just simply requiring an inspection and sampling program.

The strongest enforcement cases consequently are likely to contain allegations that the POTW has violated its permit by failing to, for example,:

(1) perform a specific pretreatment activity directly required by its permit;
(2) fully implement its approved pretreatment program as explicitly required by its permit; and/or
(3) comply with the 40 CFR 403 regulations (especially, §§403.5 and 403.8(f)) as directly required by its permit.

C. Administrative Enforcement Authority

Under §309(a)(3) of the Act, EPA can administratively order a POTW to comply with the pretreatment program requirements contained in its permit and its approved pretreatment program incorporated by reference into the permit. EPA Regions also can issue an administrative order (AO) requiring a POTW to comply with the pretreatment regulations if the permit (or approved program incorporated into the permit by reference) requires compliance with the regulations. As stated previously, EPA is in the strongest position to enforce a pretreatment implementation requirement, either administratively or judicially, if the POTW's permit (or approved program or regulations, incorporated into the permit) imposes that requirement on the POTW.

If neither the permit nor the incorporated program requires a POTW to comply with the regulations, and a POTW is otherwise in compliance with its permit and approved program, but not with requirements in the regulations, then the recommended course of action is for the Region (or authorized state) to expeditiously modify a POTW's permit to incorporate all applicable pretreatment regulatory requirements into the permit explicitly or by reference.[10] An AO may, nevertheless, be an appropriate tool for enforcing pretreatment program implementation not otherwise required in the POTW's permit, where, for example, the POTW is violating effluent limits in its permit which violations are related to the POTW's failure to implement its local pretreatment program.

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[10] Applicable regulatory procedures to modify permits must, naturally, be followed.

The Water Quality Act of 1987 authorized EPA to assess penalties administratively for violations of the Clean Water Act. Under §309(g), EPA may impose penalties for virtually the entire range of violations that are subject to civil penalties under §309(d). Administrative penalties may be assessed up to a maximum of $25,000 following Class 1 informal procedures and a maximum of $125,000 under Class 2 formal APA procedures. Administrative penalties cannot be imposed for violations of §309(a) administrative compliance orders, but, of course, may be imposed for underlying violations.[11] Administrative penalty authority, by itself, does not include the power to directly order a violator to stop continuing violations or take alternative activities to achieve compliance.

Subject to these qualifications, EPA now has administrative authority to assess penalties against a POTW that violates (1) the pretreatment implementation requirements contained in its permit, (2) an approved program incorporated into its permit, or (3) the pretreatment regulations if the permit or approved program appropriately references the regulations. Regions should review EPA's "Guidance Documents for Implementation of Administrative Penalty Authorities," August 1987, for the details on how to initiate these enforcement actions.[12]

D. Criminal Penalty Authority

Under §309(c), EPA has the authority to assess criminal penalties for negligent or knowing violations of the Act, for violations that knowingly put another person in imminent danger of death or serious bodily injury, or for making false statements under the Act. Criminal penalties can be assessed for the entire range of violations that are covered by EPA's civil and administrative authorities in §309(a), (b) and (d). For example, a POTW that falsely reports to its Approval Authority that it is complying with a pretreatment implementation requirement is a potential candidate for criminal enforcement.

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[11] Civil penalties can be imposed judicially under §309(d) of the Act for violations of administrative (compliance) orders issued pursuant to §309(a) of the Act.

[12] EPA Regions should, naturally, include a copy of the POTW's permit in any proposed administrative penalty action sent to Headquarters for review.

IV. IDENTIFYING POTW PRETREATMENT IMPLEMENTATION VIOLATIONS LIKELY TO MERIT AN ENFORCEMENT RESPONSE:

Evaluating a POTW's Actions In Light of Allowed Flexibility and Impact of the Violation

A. Identifying Potential Violations

Once a POTW is listed on the QNCR for Reportable Noncompliance with pretreatment program implementation requirements (or the noncompliance otherwise comes to the Region's attention), the Region should evaluate whether to initiate an enforcement action.[13] In order to perform this evaluation, the Region should identify all potential pretreatment violations. Once the Region has identified all potential violations, it must examine the extent, scope, and impact of these potential violations to determine whether and what kind of an enforcement response is warranted.

This evaluation is necessary because some pretreatment requirements intentionally allow a POTW considerable flexibility in implementation. This flexibility may result in a pretreatment requirement lacking a completely precise definition of noncompliance, thereby calling for some exercise of judgment in determining whether a POTW violated the pretreatment requirement.

As an example, consider a POTW with a permit condition that requires the POTW to "analyze self-monitoring reports submitted by its IUs and then respond to those reports that indicate violations or other problems." Assume the facts reveal that this POTW reads each self-monitoring report and usually, but not always, writes a letter to those IUs that are violating their local limits. By themselves these facts may not be sufficient to demonstrate that this POTW has failed to implement this requirement in a reasonable fashion and thus has violated this pretreatment requirement. In contrast, if the facts revealed that the POTW rarely read the self-monitoring reports and that most were sitting in a pile unopened, this would almost certainly be a violation of the pretreatment implementation requirement.

The following approach should prove helpful in identifying all potential violations. First, the region should

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[13] Before a POTW appears on the QNCR for Reportable Noncompliance, a region or state Approval Authority is likely to have already initiated informal enforcement actions against the POTW (e.g., NOVs or compliance meetings) in an attempt to correct the violations and bring the POTW back into compliance.

examine the POTW's permit (and approved program and Federal regulations where the permit incorporates these requirements by reference) to identify all pretreatment activities the POTW is required to implement. The Region must perform this step carefully, since the specific enforceable requirements set out in POTW permits (or approved programs appropriately incorporated in a POTW permit) can vary significantly across the 1500 or so POTWs with approved pretreatment programs. EPA's Pretreatment Compliance Monitoring and Enforcement Guidance serves as a good reference point for the kinds of requirements that are likely to be applicable in a strongly crafted permit to obtain effective program implementation. In addition, 40 CFR 403.5 and 403.8 detail elements of an acceptable local pretreatment program. Indeed, the permit may very well require the POTW to implement its local program consistent with the Part 403 regulations.[14]

Second, the region should compare all available compliance information to the identified, applicable pretreatment program requirements. At a minimum, the Region should review all pretreatment program annual reports that the POTW has submitted since its program was approved. The annual reports should be checked to make certain that they are complete and supply all the information required by the permit or approved program.[15] Naturally, all pretreatment program audits and inspections that have been performed by the Region or the state should also be reviewed to identify potential violations.

Third, the region should compile a list of all pretreatment implementation requirements applicable to the POTW which available information indicates the POTW may have violated. Fourth, in some circumstances, the region may wish to obtain more additional information by issuing a §308 letter to a POTW to fill in gaps in compliance information.

As a rough check that all potential violations have been identified, the Region should review the definition of Reportable Noncompliance contained in Table 1 and the examples of possible pretreatment implementation violations

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[14] Table 2 provides a listing of some potential violations that might arise from a POTW's failure to comply, as instructed to by its permit, with the federal pretreatment regulations.

[15] Pursuant to the PIRT June 1986 proposed rule, EPA will be promulgating shortly a final regulation, 40 CFR 403.12(i), requiring POTWs with approved pretreatment programs to submit annual reports describing the POTW's pretreatment activities.

TABLE 1*

DEFINITION OF REPORTABLE NONCOMPLIANCE

A POTW should be reported on the QNCR if the violation of its approved pretreatment program, its NPDES permit or an enforcement order[3] meets one or more of the following lettered criteria for implementation of its approved pretreatment program:

I. Issuance of IU Control Mechanisms

A) Failed to issue, reissue, or ratify industrial user permits, contracts, or other control mechanisms, where required, for "significant industrial users", within six months after program approval. Thereafter, each "significant industrial user" control mechanism should be reissued within 90 days of the date required in the approved program, NPDES permit, or an enforcement order.

II. POTW Compliance Monitoring and Inspections

B) Failed to conduct at least eighty percent of the inspections and samplings of "significant industrial users" required by the permit, the approved program, or an enforcement order.

C) Failed to establish and enforce self-monitoring requirements that are necessary to monitor SIU compliance as required by the approved program, the NPDES permit, or an enforcement order.

III. POTW Enforcement

D) Failed to develop, implement, and enforce pretreatment standards (including categ standards and local limits) in an effective and timely manner or as required by the ap program, NPDES permit, or an enforcement order.

E) Failed to undertake effective enforcement against the industrial user(s) for instances of pass-through and interference as defined in 40 CFR Section 403.3 and required by Section 403.5 and defined in the approved program.

IV. POTW Reporting to the Approval Authority

F) Failed to submit a pretreatment report (e.g., annual report or public...: of significant violators) to the Approval Authority within 30 days of the due date specified in the NPDES permit, enforcement order, or approved program.[4]

V. Other POTW Implementation Violations

G) Failed to complete a pretreatment implementation compliance schedule milestone within 90 days of the due date specified in the NPDES permit, enforcement order, or approved program.[4]

H) Any other violation or group of violations of local program implementation requirements based on the NPDES permit, approved program or 40 CFR Part 403 which the Director or Regional Administrator considers to be of substantial concern.[4]

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[3] The term enforcement order means an administrative order, judicial order or consent decree. (See Section 123.45)

[4] Existing QNCR criterion (40 CFR Part 123.45); the violation must be reported.

Reprinted from: U.S. EPA, OWEP, "Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", September 30, 1987.

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listed in Table 2. Table 2 contains a listing of possible violations based on a reasonable interpretation of the pretreatment implementation regulations (40 CFR 403) when such regulations are incorporated by reference into the permit. While the list in Table 2 is not exhaustive, it is illustrative of those violations that may justify an enforcement response by EPA for failure to implement.

Once all potential violations have been identified, each potential violation must be evaluated to determine the strength of EPA's claim of violation in light of the facts and any imprecision in the way the underlying pretreatment implementation requirement defines compliance.[16] Each potential violation should be evaluated in this manner to determine the strength of a possible EPA claim of a violation of an underlying pretreatment requirement. After these evaluations are completed the Region should produce a table of violations which the Region concludes are strong enough to pursue. Such a table should describe each violation and identify the specific underlying legal requirement that was violated. In addition, such a table should indicate the duration of the violation and indicate how strong the evidence is supporting the violation. A model form for this process is included here as attachment A.

B. Determining the Extent To Which Identified Violations Warrant an Enforcement Response: How Strong Are EPA's Claims?

The strength of EPA's claims naturally will affect EPA's decision regarding whether to pursue an enforcement action against a POTW for failing to implement a local pretreatment program. In turn, the strength of EPA's enforcement claims depends to a large degree on the extent to which identified violations demonstrate that a POTW has acted unreasonably in meeting pretreatment program implementation requirements, given (1) the flexibility afforded by many requirements and (2) the impact or severity of the violations. More specifically, the more flexible the implementation requirements, the more important the need to demonstrate the extensiveness or severity of the violation.

1. Evaluating Unreasonable POTW Action Under Flexible Implementation Requirements. Some pretreatment implementa-

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[16] Recall that EPA is in the strongest position to enforce a requirement if the requirement is expressly stated in the permit, in the approved program incorporated by reference into the permit, or in the regulations if the permit requires the POTW to comply with the regulations.

TABLE 2

EXAMPLES OF VIOLATIONS BASED ON A REASONABLE INTERPRETATION OF PRETREATMENT IMPLEMENTATION REGULATIONS WHEN INCORPORATED BY REFERENCE INTO THE PERMIT*

1. Failed to develop and/or implement procedures that reasonably identify all IUs, including new users. See 40 CFR 403.8(f)(2)(i).

2. Failed to develop and/or implement procedures that reasonably identify all incoming pollutants, including changes in the nature and volume of incoming pollutants. See 40 CFR 403.8(f)(2)(ii).

3. Lack of procedures to keep POTW itself informed of minimum legal requirements of pretreatment or keep its IUs informed. See 40 CFR 403.8(f)(2)(iii).

4. Failed to implement a system that allows the orderly receipt and informed analysis of self-monitoring reports. See 40 CFR 403.8(f)(2)(iv).

5. Failed to inspect and sample the effluent from IUs as often as is necessary to assure compliance with pretreatment standards and requirements. See 40 CFR 403.8(f)(2)(v).

6. Failed to investigate or respond adequately to instances of IU noncompliance. See 40 CFR 403.8(f)(2)(vi).

7. Failed to publish, at least annually, in the largest daily newspaper, a list of those IUs which, during the previous 12 months, were significantly violating applicable Pretreatment Standards and Requirements. See 40 CFR 403.8(f)(2)(vii).

8. Changes to POTW's legal authority such that the program no longer satisfies the minimum legal requirements of 40 CFR 403.8(f)(1).

9. Has never enforced its local limits beyond a telephone call or letter to the violating IU despite repeated violations by IUs. See 40 CFR 403.5(c)

10. Deficient POTW resources (supplies, equipment, personnel) which seriously hinder a POTW's ability to implement an effective pretreatment program pursuant to 40 CFR 403.8(f)(1) & (2). See 40 CFR 403.8(f)(3).

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* EPA's enforcement case is strongest where the violations are based on an implementation requirement contained in a POTW's permit, either explicitly or by reference.

tion requirements are quite specific and thus the determination of whether a POTW fully complied with such requirements will be straightforward. For example, if a permit requires a POTW to issue control mechanisms to all its significant IUs within one year of program approval, one year after program approval the facts should be clear whether or not a POTW complied with this requirement.

However, the pretreatment requirements contained in permits and approved programs, as well as the regulations, are often written in general terms that give a POTW considerable flexibility in implementing a given requirement. Indeed, virtually all regulatory implementation requirements allow some flexibility in implementation. While a POTW may have considerable flexibility in implementing some pretreatment requirements, a POTW must act reasonably by implementing its pretreatment requirements consistent with the objectives of the National Pretreatment Program. These objectives are presented in 40 CFR 403.2:

> (a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sewage;
> (b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works; and
> (c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

POTWs are on notice of these objectives and thus should implement a pretreatment program that "assure[s] compliance with pretreatment standards to the extent applicable under section 307(b)." 40 CFR 122.44(j)(2).[17] In short, a POTW's implementation of its pretreatment requirements must be reasonable: that is, consistent with the objectives of an effective pretreatment program.

In determining whether a POTW's implementation of a pretreatment requirement is reasonable or appropriate, the Regions again may wish to review OWEP's July 1986, "Pretreatment Compliance Monitoring and Enforcement Guidance". This document provides POTWs with information about their pretreatment implementation responsibilities and describes the

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[17] The last sentence of §403.8(b) and the first sentence of §403.8(f)(2) contain similar language requiring a POTW to implement its pretreatment program in order to ensure compliance with pretreatment standards. See also §402(b)(8) of the Act.

rationale behind the procedures POTWs should implement in order to successfully operate their approved programs.

For example, one such potentially flexible requirement is the important permit condition that a POTW enforce all pretreatment standards and requirements, including local limits and categorical pretreatment standards.[18] There will be situations in which a POTW's performance is so inadequate that there is no doubt that this requirement was violated. For example, there is no doubt that a POTW that generally ignores most violations of local limits by its IUs, has never enforced beyond issuing a letter of violation to an IU, and that consequently has violated its effluent limits due to interference or pass through problems has violated its requirement to enforce pretreatment standards and requirements.

In contrast, consider a POTW that regularly issues letters of violations, has collected penalties from some IUs that were violating local limits, but has allowed a few IUs to violate local limits and cause interference violations without escalating its enforcement response beyond the issuance of "lenient" compliance schedules for the IUs. Such facts may paint a much more complicated picture on which to base a finding that this POTW is not complying with its obligation to enforce pretreatment standards. In situations such as this, EPA Regions must evaluate all the facts to determine whether a POTW has taken reasonable actions consistent with its obligation to enforce its program. If the Region believes that a POTW has not taken reasonable actions to comply with its obligation here and specific deficiencies can be identified, then this POTW should be considered in violation of its permit.

2. Evaluating the Impact or Severity of Identified Violations.

a. Inadequate Program Implementation Causing POTW Effluent Limit Violations. The most significant pretreatment implementation violation is failing to prevent interference or

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[18] Much of the lack of precision in this requirement can be eliminated if a POTW is required to develop and implement an enforcement response plan that details how a POTW will respond to different kinds of violations by its IUs. See Enforcement Response Guide, §3.3 and Table 3-2, in OWEP's July 1986 "Pretreatment Compliance Monitoring and Enforcement Guidance."

pass through.[19] By regulatory definition, interference or pass through basically exists when an IU discharge is a cause of POTW effluent limit violation or inability to use or dispose of sewage sludge properly. Thus, a POTW which is violating its permit limits because of the IU discharges it is accepting has failed to implement a successful pretreatment program as defined by the Act.

A POTW that has experienced repeated interference or pass through problems but has taken no definite action to remedy the situation (i.e., to control the discharges of its IUs) generally should be an ideal candidate for an enforcement action. The fact that effluent violations have occurred at the POTW strongly suggests that the POTW is not effectively implementing its pretreatment program.

b. Inadequate Implementation Not Causing Effluent Violations. The lack of an interference or pass through violation, or any permit effluent discharge violation, does not mean that EPA should overlook or trivialize other types of implementation violations.

Beyond undermining the integrity of the national pretreatment program, a POTW's failure to implement a pretreatment program which does not lead to effluent limits violations can result in the discharge to waters of the United States or in a POTW's sludge of higher levels of pollutants, particularly toxics, which may not yet be controlled under the POTW's permit. In addition, an improperly implemented pretreatment program may allow slug loadings from IUs which might go undetected if the POTW is not sampling its effluent at appropriate times.

Moreover, inadequate implementation by one POTW may give its IUs an unfair advantage relative to industries discharging into another POTW and thereby may induce the second POTW to forego adequate pretreatment program implementation. Finally, inadequate local program implementation generally jeopardizes the ability of the National Pretreatment Program to effectively control industrial discharges of toxic and hazardous pollutants.

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[19] Recall that §402(8) of the Act requires pretreatment programs to assure compliance with pretreatment standards and that such standards, pursuant to §307(b) of the Act, are "established to prevent the discharge of any pollutant through [publicly owned] treatment works ... which pollutant interferes with, passes through, or otherwise is incompatible with such works. [emphasis added]" See also 40 CFR 403.5(a) and (c).

Thus, a Region should evaluate each violation to determine its severity or seriousness. Violations that are truly minor, with no impact on the ability of a POTW to conduct an effective pretreatment program, should be so identified. Each violation should be evaluated with respect to the general guidelines listed in Table 3.

A Region may find it helpful to assign a numerical ranking to each identified violation reflective of its severity. The model form for creating a list of violations in Attachment A contains a numerical scale ranging from 1 (minor violation) to 5 (violation creating injury or risk of injury to human health or the environment) which may be used to rate the severity of each identified violation.

Of course, a violation which may not be severe and may not present EPA with a strong enforcement claim individually may very well warrant enforcement action by EPA if the POTW is committing a number of such violations simultaneously, even if the enforceable requirements afford a considerable amount of flexibility. Such a broad pattern of minor failures can add up to inadequate program implementation when viewed as a whole. Naturally, the more such violations are present, the stronger EPA's enforcement case.

V. ENFORCEMENT OPTIONS FOR FAILURE TO IMPLEMENT

A. General Considerations for Choosing an Appropriate Enforcement Response

Once a POTW has been identified as having pretreatment implementation violations meriting a formal enforcement response, the Region has several options to choose from in selecting an appropriate enforcement response. The available statutory enforcement responses are:

1. Administrative (compliance) Order -- §309(a)
2. Administrative penalty assessment -- §309(g)
3. Civil Judicial Action -- §309(b) & (d), 309(f)[20]
4. Criminal Judicial Action Referral -- §309(c).

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[20] If there is not enforceable permit language requiring pretreatment program implementation but an IU is violating federal pretreatment standards, EPA can use §309(f) to initiate a judicial action seeking appropriate injunctive relief against both the IU and the POTW. [see page 10]. Section 402(h) also may provide a useful cause of action in some circumstances where a sewer hook-up ban may be appropriate relief to pursue.

TABLE 3

GENERAL GUIDELINES FOR EVALUATING THE SEVERITY OF PRETREATMENT IMPLEMENTATION VIOLATIONS*

For each potential violation, consider:

A. Importance of activity at issue to environmental success of the POTW's pretreatment program.

B. Any identifiable environmental/public health harm or risk created by the alleged violation?

C. Is the quantity of pollutants being discharged into the receiving stream higher than it would otherwise be if the POTW was complying with the requirement at issue? By how much?

D. Did the POTW benefit economically from the alleged violation?

E. Are IUs benefiting economically (avoiding the costs of compliance) by the POTW's failure to implement this program requirement?

F. Has the violation persisted after the POTW was informed of this violation? And then ordered to remedy the situation?

G. How long has this violation persisted over time or is it more like a single, isolated incident of noncompliance?

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* In general, this evaluation should be performed after a POTW has been listed on the QNCR for Reportable Noncompliance with pretreatment program implementation requirements.

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In selecting an appropriate enforcement response, the Region should consider the overall severity of the violations, the compliance history and commitment of the POTW in question, whether injunctive relief is needed, whether a penalty is appropriate and if so, how large a penalty, and what kind of message needs to be sent to other POTWs (i.e., general deterrence).

The Regions should carefully consider using EPA's new administrative penalty authority in appropriate circumstances. The Regions should review the Agency guidance documents issued by the Office of Water and the Office of Enforcement and Compliance Monitoring (August 1987) for implementation of the new administrative penalty authorities. The document entitled "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies" should be particularly helpful in laying out the considerations involved in choosing between administrative and judicial enforcement actions.

As a general rule, the strongest enforcement case against a POTW for failure to implement its pretreatment program will generally involve POTW effluent violations and a number of related pretreatment implementation violations. In other words, the POTW's implementation of its pretreatment program has been so deficient that IU discharges have not been adequately controlled and these discharges have caused a POTW to exceed the effluent limits in its permit (or otherwise violate its permit). This type of case which calls for both injunctive relief and a substantial civil penalty is likely to be appropriate for civil judicial enforcement.

A case in which a POTW is running a sloppy or inadequate pretreatment program, with identifiable implementation violations, but in which there is so far no evidence of POTW effluent limit violations, may be appropriately dealt with by issuance of a traditional compliance administrative order or by assessment of an administrative penalty, or by initiation of a civil judicial action. EPA's pursuit of a penalty in these situations could have great value in demonstrating to POTWs that they must fully implement their pretreatment programs now and not wait until serious effluent violations occur. Enforcement actions initiated against POTWs for failure to implement in the absence of effluent limit violations (related to inadequate implementation) should help EPA send the message that prevention is the goal of pretreatment programs, not damage control after effluent limit violations have occurred.

There may be cases in which the POTW is complying with its permit and approved program, but nevertheless the Region believes that the POTW's pretreatment performance is inade-

quate. This situation is likely when the approved program does not specify all the necessary actions that the POTW should perform. In such a situation, if there are indeed no clear violations of the permit or approved program, the best course of action may be for the Region or approved state to expeditiously modify the POTW's permit and/or approved program to establish specific program implementation requirements to remedy the situation.[21]

In summary, civil judicial enforcement cases are most likely to be appropriate when the violations are severe, injunctive relief is necessary, and/or a penalty should be assessed in excess of EPA's new administrative penalty authority.

B. Penalty Assessments

Naturally, in determining an appropriate settlement penalty, the CWA Civil Penalty Policy must be followed. Earlier this month, EPA distributed draft guidance -- "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program" -- that explains the specific considerations involved in making penalty policy calculations for failure to implement violations. In short, EPA should collect a penalty that recovers a POTW's full economic benefit stemming from the pretreatment implementation noncompliance plus an additional gravity amount based on the type and pattern of the violations. The POTW's economic benefit may accrue from costs avoided by not hiring program personnel, not issuing IU wastewater discharge permits, not conducting inspections or wastewater testing, failing to maintain records or submit reports, or failing to install or operate necessary equipment.

In applying the Penalty Policy adjustment factor for ability to pay to these cases, it should be stressed that since pretreatment programs are designed to control industrial discharges, the costs of the programs should be paid by IUs through appropriate user charges levied by a POTW. In assessing ability to pay, a POTW's ability to recover penalty amounts from its IUs is relevant. A per capita approach based simply on the residential service population of a POTW is not appropriate as the basis for establishing a settlement penalty for a POTW failure to implement case.

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[21] Recall that EPA is in the strongest position to enforce a pretreatment requirement if the requirement is expressly stated in the permit, in the approved program incorporated by reference into the permit, or in the regulations if the permit requires the POTW to comply with the regulations.

19-1.

C. Joining Industrial Users (IUs) and States

If an IU has caused interference or pass through at the POTW, or has violated local limits, categorical standards or other pretreatment requirements, EPA may include such an IU in a civil enforcement action. The importance of joining an IU in an enforcement action is increased if an IU is a primary cause of a POTW's effluent limit violations or if the IU needs to install pretreatment equipment at its facility, especially if a POTW is unwilling or unable to force an IU to install the necessary equipment. In general, if an IU has obtained an economic benefit from its noncompliance with pretreatment standards and requirements and its noncompliance is contributing to a POTW's problems, then in order to obtain a complete remedy and an appropriate penalty consistent with the Agency's Penalty Policy, EPA may very well want to include such an IU in any judicial action brought against a POTW for failure to implement. Similarly, if a Region contemplates an enforcement action against an IU for pretreatment violations, which violations have caused problems at the POTW and the POTW has failed to adequately respond to the IU's violations, claims against the IU and the POTW should generally be joined in a single civil action.

Pursuant to §309(e) of the Act, whenever EPA brings a judicial enforcement action against a POTW, the state in which a POTW is located must be joined as a party. If state law prevents a POTW from raising revenues needed to comply with any judgment entered against it, the Act makes a state liable for payment of such expenses. States may be joined in judicial enforcement actions against POTWs for failure to implement as either defendants or plaintiffs, as appropriate. Further details on how to join states under §309(e) is found in EPA's February 4, 1987, "Interim Guidance on Joining States as Plaintiffs."

"GUIDANCE ON PENALTY CALCULATIONS FOR POTW FAILURE TO IMPLEMENT APPROVED PRETREATMENT PROGRAMS", dated December 22, 1988.

VLG

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

DEC 22 1988

OFFICE OF WATER

MEMORANDUM

SUBJECT: Guidance on Penalty Calculations for POTW Failure to Implement an Approved Pretreatment Program

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

John Lyon, Acting Associate
Enforcement Counsel for Water (LE-134W)
Office of Enforcement and Compliance Monitoring

TO: Regional Water Management Division Directors
Regional Counsels

The attached Guidance is provided to assist you and your staff in applying the Clean Water Act (CWA) Civil Penalty Policy in cases where a POTW has failed to adequately implement its approved pretreatment program. The Guidance is based on the existing CWA Penalty Policy, as well as the August 28, 1987 amendment to the Civil Penalty Policy and the Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements. As a result, both administrative and judicial civil penalties for settlement should be calculated using this Guidance.

A draft version of this Guidance was provided to the Regions for comment on August 1, 1988. We wish to thank you for your timely and helpful comments and your overall support for this Guidance. The most significant comments on the previous draft were received on the "Ability to Pay" discussion which encouraged the recovery of penalties from industrial users. Based on comments received, that discussion has been revised, and the Guidance is now flexible as to the method which a municipality should use to pay penalties.

Several Regions requested additional guidance on estimating the economic benefit of failure to implement, especially for failure to enforce pretreatment standards. We have added Table 2 to the Guidance which provides resource estimates for enforcement responses to instances of noncompliance. The basic assumptions are drawn from earlier guidance and from resource estimates used by the Agency. At this time, we do not have additional data on program implementation costs to update Table 1. We do plan to develop such data during the coming year.

The major components of this Guidance will be incorporated into the Civil Penalty Policy later this fiscal year. However, this Guidance is effective immediately as a more detailed explanation of how to calculate penalties in pretreatment implementation cases.

If you have any further questions on the use of this Guidance, please feel free to contact one of us (Jim Elder at 475-8488 or John Lyon at 475-8180) or your staff may contact Ed Bender at 475-8331.

Attachment

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PENALTY CALCULATIONS FOR A POTW'S FAILURE TO IMPLEMENT ITS APPROVED PRETREATMENT PROGRAM GUIDANCE

I. INTRODUCTION

The Clean Water Act Civil Penalty Policy (Feb. 11, 1986) establishes a systematic approach for obtaining appropriate settlement penalties for violations of the Act. The Policy and Methodology were amended August 28, 1987 to include a methodology for the calculation of administrative penalties. One of the changes in the amendment was the addition of a gravity factor to address the significance of non-effluent violations. This Guidance applies the Civil Penalty Policy with amendment to implementation cases.*

In September 1987, OWEP issued "Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements" (RNC Guidance). That document provides a definition of reportable noncompliance (RNC) that is used to evaluate POTW implementation violations of approved pretreatment programs. The definition consists of eight criteria for determining when violations of an approved pretreatment program, of related NPDES permit requirements, or of regulatory requirements for implementation are of sufficient magnitude and degree to require that a POTW be reported on the QNCR for failure to implement an approved pretreatment program. The criteria are as follows:

1. POTW failure to issue control mechanisms to Significant Industrial Users in a timely fashion.

2. POTW failure to inspect Significant Industrial Users.

3. POTW failure to establish and enforce industrial user self-monitoring where required by the approved program.

4. POTW failure to implement and enforce pretreatment standards (including local limits).

5. POTW failure to undertake effective enforcement against the industrial user for instances of interference and pass/through.

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* This Guidance, should be applied to calculate settlement penalties for both administrative and judicial cases against POTWs that fail to implement approved pretreatment programs.

6. POTW failure to submit pretreatment reports.

7. POTW failure to complete pretreatment compliance schedule milestones on a timely basis.

8. POTW failure to comply with other pretreatment program requirements which are of substantial concern.

The purpose of this Guidance is to provide Regions with a methodology to apply the CWA Penalty Policy, as amended, to calculate administrative and civil judicial penalties for failure to implement cases, using the criteria outlined in the RNC Guidance.

As in the CWA Penalty Policy, this calculated penalty should represent a reasonable and defensible penalty which the Agency believes it can and should obtain in settlement. In general, the settlement penalty should recover a) full economic benefit (avoided costs--salaries, financing, operating costs, and capital expenditures), and b) some gravity related to the type and pattern of the violation(s), even after adjustments.

Note: This guidance discusses the additional considerations that should be used in the penalty calculation for failure to implement. Penalty amounts for effluent violations should be included and calculated according to the existing CWA Penalty Policy and Methodology. However, Section III of this document, "Example of Penalty Calculation", does include penalties for both effluent and pretreatment implementation violations.

II. PENALTY CALCULATION METHODOLOGY - Pretreatment Implementation

The basic methodology of the CWA Civil Penalty Policy should be used to calculate settlement penalties in POTW pretreatment implementation cases. The three components of a settlement penalty (Economic Benefit, Gravity, and adjustments) are discussed below.

A) Economic Benefit

The following steps summarize the process to calculate economic benefit for pretreatment program activities:

- Obtain estimates of the costs to the POTW to implement its pretreatment program from the approved program submission.
- Update that information based on more current data from a pretreatment compliance inspection, a pretreatment audit, an annual report, or a 308 letter, if available.
- The economic benefit component of the civil penalty policy should be calculated using the EPA computer program "BEN".

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- For purposes of the "BEN" calculation, the value of delayed implementation includes delayed capital investment, delayed cost in developing or updating local limits, and annual pretreatment program operating and maintenance (O&M) costs that were avoided. Use separate BEN runs if changes in operating costs have occurred.

1) Estimating Avoided or Delayed Costs for Implementation

The approved pretreatment program will probably include a budget for program implementation. There may also be discussion of implementation activities and costs in the approved program elements covering the compliance monitoring and administrative procedures. Such data in the approved program submission provides a basis for developing the economic benefit derived by a POTW by not implementing its approved program. In particular, where a POTW has not complied with that budget, economic benefit may be represented in part by the amount of the budget the POTW has failed to expend. The Region should use data developed through audits, inspections, annual reports or 308 letters to develop these cost estimates.

In many cases, the POTW will have complied with the resource commitments in the approved program but still fail to adequately implement the required program. This may be the result of unrealistic estimates initially, the failure to update resource needs, changes in pretreatment program requirements or a failure to carry out required activities with existing resources. In such cases, economic benefit may be developed by estimating the specific costs that were avoided for required implementation activities.

Where specific costs estimates for non-implementation are not available, the costs avoided by the POTW for failure to implement can be expressed as a percent of the total implementation cost or as an estimated cost for each required activity that was not implemented. Pretreatment implementation costs for POTWs were evaluated as part of an earlier study (JRB Associates, 1982 "Funding Manual for Local Pretreatment Programs" EPA Contract No. 68-01-5052). This assumes that the POTW budget includes all costs associated with implementation. Based on a review of several programs, a table (Table 1) was developed for small, medium, and large programs to show the percent of total costs which each implementation activity represented. The small POTW pretreatment programs were all under 5 MGD flow and covered ten or fewer significant industrial users (SIU) with a total implementation cost ranging from $10,000-$50,000.00 annually. The medium sized POTW pretreatment programs had total flows from 5-15 MGD and up to 50 SIUs with an annual cost from $25,000-$200,000.00. The large POTW programs had flows over 15 MGD with 20 or more SIUs with annual implementation costs ranging from $100,000 to more than $350,000.00.

Table 1. Typical Program Costs for Implementation Activities by Program Size (as % of Total Cost)

Activity	Small	Medium	Large
1. Sampling and Industrial Review (*Criteria B, C,)	22%	19%	18%
2. Laboratory Analysis (*Criteria B, C, D)	34%	34%	39%
3. Technical Assistance (*Criteria A, D and E)	17%	26%	20%
4. Legal Assistance (*Criteria A, D, E)	13%	10%	13%
5. Program Administration (*all Criteria)	14	11	10
	100%	100%	100%

This Table can be used to assist in developing costs for a specific program activity where costs are unavailable or determined to be inadequate. For example, if a medium-sized POTW had costs for implementation of $100,000, but this POTW had failed to perform any compliance inspections of its IUs, the percentage from Table 1, activity 1 for a medium-sized program could be applied to total costs. The inspection costs in this case could be estimated to be $19,000.00. The costs of "avoided implementation" may differ from year to year depending on whether the activities are one-time or periodic (such as permit issuance or updating local limits) or continuing tasks (such as inspections). The costs of issuing permits may be 20% of an annual implementation budget of $120,000 or $24,000 for a particular year. If this POTW failed to issue four of the eight required permits, $12,000.00 in expenses would be avoided for that year.

Another approach to development of avoided costs is to estimate the labor and overhead costs for particular activities. This approach may also be used in combination with Table 1, where the budget does not cover costs for specific implementation requirements (e.g., IU permitting or enforcement). For example, if each permit required one month of engineering labor and analysis at $36,000.00/year, each permit would cost $3,000.00. The total avoided cost of four permits would also be $12,000.00. The cost of permit re-issuance could be lower than the initial issuance cost. This value would be entered under the variable for annual operating and maintenance expenses for

* Criteria from RNC Guidance that are likely to be associated with a listed activity.

a particular year. If the permits were issued late, as opposed to not issued at all, avoided costs (economic benefit) could be calculated for the period of delay.

If a POTW has failed to enforce against IUs or delayed enforcement against IUs, the POTW has received economic benefit by avoiding or delaying that action. Even when specific program costs for enforcement can be identified, it may be difficult to quantify the avoided or delayed costs. Where necessary, one approach to calculating the avoided costs by the POTW for inadequate enforcement is to assume that each IU violation would require a POTW enforcement response (see discussion in Pretreatment Compliance Monitoring and Enforcement Guidance (PCME), September 1986). The expected response against the IU would escalate with the duration and magnitude of the violation, either based on the POTW's own enforcement procedures or the Enforcement Response Guide in the PCME. As a guide for the cost to the POTW of each type of enforcement response and the delay that may have occurred, you may wish to use the table below. It is based on EPA's pricing factors and the enforcement response timeframes discussed in the RNC guidance.

Table 2. Resource Cost and Response Time for POTW Enforcement Actions

Initial Response to Violations	POTW Time to Respond*	Cost of Action in Workdays
Telephone calls	5 days	0.05-0.2
Warning Letters	10 days	0.2
Meeting	30 days	0.5
Demand Inspections	30 days	0.5-2.0
Follow-up for Continued Noncompliance		
On-site evaluation	15 days	0.5-2.0
Meeting	30 days	0.5
Formal Enforcement		
Administrative	60 days	10-50
Judicial	60 days	30-100
Penalty assessment and Collection	60 days	2-50

* Response time reflects EPA's expectation as to the amount of time in which the POTW should take enforcement action after notification of an IU violation. For example, the POTW initial response to notification noncompliance should occur within 5 days when it is a telephone call and within 30 days when it is a Demand Inspection.

The time required to complete a specific enforcement response should be evaluated based on the enforcement procedures developed by the POTW and the size and complexity of the IU. SIUs with significant noncompliance would be expected to require more POTW effort to resolve the noncompliance. The level of response should be escalated in relation to the magnitude and duration of noncompliance. The avoided enforcement costs would increase based on the number of IUs that were in noncompliance and not addressed by POTW enforcement. The actual cost can be estimated from salaries. EPA assumes each work year consists of 220 workdays after leave and holidays are subtracted. Typical EPA annual salaries and benefits (assuming 15% of salary) are as follows: inspectors $32,000, permit engineers $40,000, staff attorneys and chemists $37,000. However, it would be appropriate to use the salary scale of the affected POTW, if available.

The next three sections discuss the calculation of economic benefit, gravity, and adjustment to the penalty for pretreatment implementation violations. In some cases you may have effluent violations as well as implementation problems and additional penalty calculations will be required for these violations.

2) Using BEN

The BEN User's Manual provides basic instructions for entering variables and discusses the effect of changes in economic data and compliance dates on the estimate of economic benefit. The Manual describes the variables that are typically associated with construction and operation of wastewater treatment systems; however, there are a few special considerations for developing pretreatment implementation costs. If effluent violations are involved, a separate BEN run should be made to calculate the economic benefit of inadequate treatment, avoided operations and maintenance costs for the treatment system, or any other cause not related to implementation of a pretreatment program. The BEN estimates should be combined to develop the settlement penalty.

The capital investment for pretreatment is usually related to sampling and safety equipment, vehicles for inspections, and perhaps laboratory facilities. These typically have a shorter useful life (3 to 7 years)* than that which is assumed for pollution control equipment (15 years is the standard BEN value for tankage and pumps). The useful life is an optional input variable.

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* United States Tax Guide No. 17 categorizes real property, vehicles, and equipment according to its useful life for purposes of depreciation.

* Annual operating and maintenance costs related to pretreatment implementation include the costs to the POTW of: (a) IU permitting; (b) POTW monitoring, inspections, and analysis of IU compliance; (c) legal and technical assistance, (d) cost of taking enforcement actions, (e) updating local limits; and (f) program administration. The costs identified for operation and maintenance should include all salaries, supplies, maintenance, and support necessary to the operation of the pretreatment program. Most of the avoided costs of implementation will be the O&M expenses (see previous discussion). Since annual operating and maintenance costs and the level of implementation may vary each year, separate BEN runs may be needed to determine these costs, depending on the specific period of noncompliance.*

The Ben variable "one time, non-depreciable expenditures" is not likely to be appropriate for inclusion in the BEN penalty calculation for POTW implementation cases. All expenditures for pretreatment implementation are likely to be recurring at some frequency, so they are not truly one-time as, for example, the purchase of land. Even the development of local limits and the survey of industrial users are likely to require periodic updating. Most "set-up costs" were incurred as part of program development. In addition, a POTW does not pay income tax, so depreciation does not affect the POTW's economic benefit.

Economic benefit should be calculated from the initial date of noncompliance up to the time where the POTW was or is realistically expected to be in compliance.

B) Gravity Component

The gravity component of the existing Penalty Policy quantifies the penalty based primarily on the characteristics and consequences of effluent violations, although the amendment to the Penalty Policy adds a Factor E for non-effluent violations. The gravity of pretreatment implementation violations is evaluated primarily on the degree and pattern of failure to implement a required activity and the potential and actual impact of non-implementation. Thus, some modification or amplification of the gravity factors in the CWA Civil Penalty Policy is needed to reflect the characteristics of implementation violations.

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* BEN will adjust cost estimates to current year dollars. POTWs are considered "not for profit" entities.

Pursuant to the amended CWA Civil Penalty Policy, five factors (A-E) are used to evaluate gravity. This Guidance presents the relationship of each factor to pretreatment implementation. The methodology for calculation of the gravity component is the same as in the CWA Penalty Policy -- that is each factor is calculated on a monthly basis with each violation presumed to continue until corrected. The gravity amount equals the sum of factors A through E plus 1, multiplied by $1,000.00 for each month of violation.

Note: Where effluent violations also exist, they should be considered in the appropriate monthly gravity component. Effluent violations are considered specifically under factor A, and they may also increase the levels for factors B, C, and D. All non-effluent violations would be evaluated under factor E. The penalty for effluent violations should be added to penalties for pretreatment implementation violations.

The basis for evaluation of performance on implementation is identified in the RNC Guidance. The RNC criteria identify the basis for evaluating implementation activities to determine the number of and most significant implementation violations. Of course, where actual approved program requirements vary from the RNC criteria, the program requirements should be the basis for evaluating performance.

The "Guidance on Bringing Enforcement Action Against POTWs for Failure to Implement Pretreatment Programs", August 4, 1988, discus guidelines for evaluating the severity of pretreatment implementation violations (see Table 3 and discussion in that guidance).

The gravity factors as they are to be applied for pretreatment implementation cases are listed below:

Gravity Factor A. Significance of the Effluent Violation

This factor should be applied without change from current CWA Penalty Policy methodology to effluent violations where they occur. This factor is not applicable to failure to implement violations.

Gravity Factor B. Impact of the Violation

Failure to implement may result in POTW permit effluent limit violations, interference with the treatment works, pass through of pollutants from inadequately regulated IUs, and/or sludge contamination which may cause or contribute to harm to the environment or in extreme cases, a human health problem. Both effluent violations and all RNC criteria that are met by the POTW should be evaluated in selecting the value. The violation that gives the highest factor value should be used for each month. The value chosen should increase where the potential impact or evidence of an actual impact effects

more than one of the listed categories. Also, where a POTW is Federally funded and is potentially damaged, a higher value should be assigned:

(i)	Impact on Human Health; or	Range: 1Ø-Stat Max
(ii)	Impact on Aquatic Environment; or	Range: 1-1Ø
(iii)	Potential Impact of Inadequately Controlled IU Discharges on POTW	Range: Ø-1Ø

Gravity Factor C. Number of Violations Range: Ø-5

Each RNC criterion that is met is counted as a violation for the month. The more criteria that are met the higher the value chosen should be. In addition, this "number of violations" factor may be weighted more heavily to account for serious violations other than the most significant violation which was accounted for in factor "A" or "E". Effluent violations should also be included under this factor as part of normal Penalty Policy calculations.

Gravity Factor D. Duration of Noncompliance Range: Ø-5

This factor allows consideration of continuing long-term violations of a permit (including effluent limits, schedules, and reporting requirements) and should include evaluation of all RNC criteria. The value should be increased if the same criterion is met for 3 or more months. When the violation is corrected for that criterion, a value of Ø is appropriate for the monthly gravity component in the months following the correction.

Gravity Factor E. Significance of Non-effluent Violations

The significance of a violation of an implementation requirement is evaluated based on the percent of a requirement that the POTW has failed to implement. All of the criteria identified in the RNC Guidance should be evaluated to identify the required activity for that month in which performance has been most inadequate. That activity will be deemed the most significant pretreatment implementation violation, and gravity factor E should be determined for that violation. Higher values within the range could be used for violations by large POTW programs and for programs with high rates of IU noncompliance. Higher values may be appropriate in such cases because the failure to implement may result in a higher discharge of toxic compounds to the environment. Factor E can also be used to address other permit violations such as reporting or schedule milestone violations.

% of a Requirement that The POTW Failed to Implement	Value Range
80-100%	3-10
41-79	2-7
20-40	1-4
0-19	0-3

C) Adjustments

1) Recalcitrance (to increase penalty) Range: 0-150% of the preliminary penalty amount

In addition to the discussion in the CWA Penalty Policy, recalcitrance includes consideration of whether the POTW continued in noncompliance after notification of the violations. The existence of audits or PCIs and follow up letters identifying these violations to which the POTW has failed to respond, generally indicate that recalcitrance should be increased. If the POTW has failed to comply with an administratively-imposed compliance schedule, the recalcitrance adjustment should be increased. Recalcitrance is indicated because the POTW was reminded of the requirements and notified of its violation, and yet failed to remedy the situation.

2) Ability to Pay (to decrease penalty).

The ability to pay adjustment becomes an issue when the municipality is incapable of raising sufficient funds to pay the proposed penalty. Ability of the municipality (or sewerage authority to pay should rarely be a factor in pretreatment implementation cases since few involve large capitalization projects. Thus, the economic impact on the community from a penalty will be relatively small compared to the capital and O&M costs associated with the wastewater treatment system.

Funds to pay a penalty can come from a variety of sources within the municipality including unrestricted reserves, contingency funds, and any annual budget surpluses. The municipality could also make a one time assessment to the violating IUs or to all users of the system to cover the penalty amount. Where there is insufficient cash on hand to pay the entire penalty immediately, a payment plan can be developed which raises the needed funds over a specific time period (e.g., 6 - 12 months). This spreads the impact of the penalty over a longer period. Where a POTW chooses to assess all users to cover the penalty, the impact is likely to be small. Even a small municipality with 3,500 connections (service population about 10,000) with an

existing sewer charge of $10/month could raise rates by 10% ($1) for 12 months and generate sufficient cash to pay a penalty of almost $50,000, which equates to about $.35/capita/month.

In determining whether ability to pay will become an issue, the standard Financial Capability Guidebook procedures can be used. While a specific municipality's debt situation could become an issue, the procedures primarily look at the increase in user fees which would be needed to generate the penalty amount compared to the median household income (MHI) of the community. Where the total wastewater treatment burden divided by the MHI is less than the standard indicators (between 1.00 - 1.75% of the MHIis considered an affordable sewer rate), ability to pay is not usually considered to be a problem.

3. Litigation Considerations (to decrease penalty)

The legal basis and clarity of the implementation requirements of an approved program and an NPDES permit are important factors in assessing the strength of the case. Where requirements are ambiguous, the likelihood of proving a violation is reduced, and this may be a basis for adjusting the penalty amount.* Otherwise, assessment of this factor will depend largely upon the facts of the individual case.

III. EXAMPLE OF PENALTY CALCULATION

The RNC Guidance (See pages 12 and 13) includes two examples of POTWs that failed to implement their approved pretreatment programs. The "Hometown" example will be used as a basis for computing a penalty to illustrate this Guidance. As noted previously, this example does include a penalty calculation for effluent violations.

A) Revised Scenario:

Hometown's pretreatment program was approved in June 1985. The annual implementation costs identified in the approved program were $100,000.00, plus the cost for issuing each SIU permit. The NPDES permit required an annual report fifteen days after the end of the year, beginning January 15, 1986. The approved program required that all 15 permits be issued by June 30, 1986. An August, 1986, audit of the program revealed that the POTW had failed to issue ten required permits and had not inspected its IUs as of that date. In addition, the POTW failed to submit its 1986 annual report on time. The State issued an administrative order on March 31, 1987 that required submission of an annual report by April 30, 1987 and permit issuance by June 30, 1987 and sampling inspections of all SIUs by August 30, 1987. The annual report was submitted September 30, 1987

* See OECM/OWEP "Guidance on Bringing Enforcement Actions Against POTWs for Failure to Implement Pretreatment Programs". August 4, 1988, for further discussion on assessing the strength of a case.

but as of January 31, 1988 only eight permits were issued and half of the IUs were not inspected. This facility was on the Exceptions List for failure to implement its approved pretreatment program and for effluent violations. Thus, judicial action is appropriate. Full compliance was expected by April, 1988. Instances of noncompliance are tabulated below for both effluent violations and pretreatment implementation violations.

1. Effluent Violations

Monthly Average Effluent Limit Violations

Permit Limits: TSS 30mg/l; BOD 30mg/l; Cyanide 0.01mg/l; Copper 0.200 mg/l

Date	Value (all mg/l)
July, 1986	TSS 45 Cyanide 0.015 Copper 0.25
August, 1986	TSS 37 Cyanide 0.012 Copper 0.3
November, 1986	TSS 41 Cyanide 0.018 Copper 0.28 BOD 47
March, 1987	TSS 38 Cyanide 0.016 Copper 0.3 BOD 43
April, 1987	TSS 40 Cyanide 0.021 Copper 0.4
June, 1987	TSS 44 Cyanide 0.014 Copper 0.3
August, 1987	TSS 41 Cyanide 0.03 Copper 0.4
October, 1987	TSS 37 Cyanide 0.016 Copper 0.3
December, 1987	TSS 39

1984

2. Pretreatment Implementation Violations

Description of Violation Violations	Initial Date of Noncompliance*	Compliance Date
Failed to Issue permits (RNC criterion A)	6/30/86	60% Issued (1/31/88)
Failed to Inspect IUs (RNC criterion B)	8/30/86	50% Inspected (1/31/88)
Failed to Submit Annual Report (RNC criterion F)	1/15/87	(9/30/87)

* Under the same circumstances, this could be the date of program approval.

The minimum civil penalty for settlement can be determined as follows:

3. Estimates of Avoided Costs for Implementation Violations

The effluent violations are indicative of interference and pass-through caused by IU inputs of cyanide and metals that should be controlled by implementing pretreatment. The POTW has operated and maintained secondary treatment. Thus, the economic benefit is only calculated for pretreatment implementation violations. Since the approved program provided no information on the cost of issuing IU permits, an estimated cost has to be developed. The implementation costs are considered operation and maintenance costs (limited to certain time periods) for the BEN calculation of economic benefit. The BEN inputs and rationale are presented below for each violation.

1) Issue permits @ $3,000.00/permit

7/86 - 9/87, 10 unissued permits avoided cost-$30,000.00
10/87 - 1/88, 7 unissued permits avoided cost-$21,000.00

EPA uses a pricing factor of 40 days for issuing major, non-municipal, technology-based NPDES permits. SIU permits should be issued more quickly because there is less public notice. While the IU control mechanisms are likely to require similar types of evaluation and technical review as the comparable industries with NPDES permits, they are also likely to be smaller in size. Site and sampling data should already be available to the POTW, and there is no need for State certification as there is for EPA issued permits. Balancing the above facts with the limited POTW experience in issuing permits, thirty days was selected as an average time to issue a permit at a cost of $100.00 per day.

FR-5

2) Inspection costs

7/86 - 12/86, no inspections avoided cost-$19,000.00/yr
1/87 - 9/87, 60% uninspected avoided cost-$11,000.00/yr
10/87 - 1/88, 50% uninspected avoided cost-$ 9,500.00/yr

From Table 1, use the sampling and industrial review percentage (19% for a medium-size program), multiplied by the total annual program implementation costs ($100,000). Therefore, inspections are estimated to cost $19,000.00/year. The POTW began conducting inspections after the audit--40% of the SIUs were inspected by January, 1987, and 50% were inspected by October, 1987.

3) Annual report - $5,000.00

Annual report costs are presumed to be part of program administration. This portion was estimated to be 5% of the total program costs (See Table 1).

B. Economic Benefit Component

BEN Inputs for each variable each are shown below:

1. Case Name=Hometown
2. Initial Capital Investment= 0
3. One-time non-depreciable expenditures= 0

Four separate BEN runs were made for avoided costs from permitting, inspection, and reporting violations. The avoided cost changed as permits were issued and inspections were completed. The time periods correspond to information obtained from the POTW in the senario.

	BEN Run			
	1	2	3	4
4. Annual O&M costs (all 1985 dollars)				
a) permits ($3,000 each)	30000 (10 unissued)	30000 (10)	30000 (10)	21000 (7)
b) inspections (% inspected)		19000 (0%)	11000 (40%)	9500 (50%)
c) annual report			5000	
5. Initial Date Noncompliance	7/86	8/86	1/87	10/87

6. Compliance Date	7/86	12/86	9/87	4/88
7. Penalty paid	4/88	4/88	4/88	4/88

(Remaining variables use standard values)

Results from BEN

Run 1	3,150
Run 2	20,018
Run 3	36,659
Run 4	15,803
Total Economic Benefit	$75,630

D. Gravity Component

In developing the gravity amount, both effluent and pretreatment implementation violations should be included. A table showing the gravity calculation is provided below, along with a general description of the rationale for selection of values.

The values chosen for June-August 1986 reflect both the July and August effluent violations and the ten unissued permits which were to have been issued by June 30. The failure to issue permits was identified in the August audit and treated as the most significant violation and given a "3" under Factor E beginning in the month of July. (This factor could have been higher if the SIUs were major sources of toxics). September, 1986 represented the third month that the pretreatment implementation violation had continued, so Factor C was assessed at "1". Both effluent and implementation violations were counted under Factor D. The value assessed for Factor B, was related to the presumed IU impacts on NPDES permit violations. There was no evidence of any impact to the aquatic environment or human health from the effluent violations. For January, 1987, Factors C and D were increased to reflect the continuing effluent and implementation violations and the additional violations of the AO schedule. Factors were reduced in September, 1987 to reflec submission of the annual report, the issuance of some permits and the progress with inspections.

	Factors						
Month/Year	A	B	C	D	E	+1	Total
June, 1986	0	0	0	0	0	1	1000
July	3	1	0	0	3	1	8000
August	2	1	1	1	3	1	9000
Sept	0	0	1	1	3	1	6000
Oct.	3	0	1	1	3	1	9000
Nov.	4	1	1	1	3	1	11000
Dec., 1986	0	0	1	1	3	1	6000
Jan., 1987	0	0	2	2	3	1	8000
Feb.	0	0	2	2	3	1	8000
Mar.	4	1	2	2	3	1	13000
Apr.	5	2	2	2	3	1	15000
May	0	0	2	2	3	1	8000
June	3	2	2	2	3	1	13000
July	0	0	2	2	3	1	8000
Aug.	4	2	2	2	3	1	14000
Sept.	0	0	1	2	2	1	6000
Oct.	3	2	1	1	2	1	10000
Nov.	0	0	1	1	2	1	5000
Dec.	1	0	1	1	2	1	6000
Jan. 1988	2	0	1	1	2	1	7000
Feb.	0	0	1	1	2	1	5000
Mar.	0	0	1	0	1	1	3000
							179,000

1986

E. Adjustment Factors

1. Recalcitrance

A factor ranging from 0 percent (good compliance record, cooperation in remedying the violation) to 150 percent (extremely recalcitrant, despite repeated attempts to encourage compliance) of the total of the Economic Benefit and Gravity Components may be used to increase the penalty based upon the history of recalcitrance exhibited by the POTW. In this case, the POTW was advised of the implementation problems through an audit and an alternate schedule for compliance was established under an administrative order. Implementation was improved, but it was still inadequate. A factor of 20% was used because the POTW has failed to meet an administrative order schedule to fully implement its approved program.

Additional penalty .20 x ($75,630 + 179,000) = $ 50,800

Penalty Running total $ 304,800

2. Ability to Pay (Subtraction)

Several factors need to be considered in evaluating the defendant's ability to pay -- for example, domestic and industrial user fees, the cost of implementation relative to other municipalities, the size of the industrial users, the type of industrial base, and the financial condition of the city and its IUs. The combined bills for SIUs were 10% of all user charges, and IUs contributed 8% of the flow in 1986. The Hometown POTW is 10 MGD, with over 25,000 service connections and a $200 annual sewer rate. Assuming each connection represents a household with a MHI of $20,000, Hometown could afford a rate increase of about $12 annually per household. [EPA considers affordable sewer rates to range from 1.5 to 1.75 percent of the MHI (i.e., $250 to $275 per year)]. The POTW has an A Bond rating, strong financial condition, and has maintained the same user fees since 1984, prior to approval of the pretreatment program. There are no fees for permit issuance, discharger applications, or IU inspections. The results of the financial capability analysis indicate that if Howmetown used a general sewer rate increase to fund the penalty, it would be considered affordable. At this time, no adjustment for ability to pay seems appropriate.

Penalty Running Total $ 304,800

3. **Litigation Considerations (Subtraction)**

The federal case for Hometown is a strong one. The POTW has specific requirements for permitting and inspecting its industrial users. These are specified in the approved program and were incorporated into the NPDES permit in June 1985. The pretreatment audit identified specific violations, and the POTW began to address them. There is no evidence that the POTW was confused or that the requirements for implementation have changed. The failure to implement has contributed to permit limit exceedances for cyanide and copper, which are of concern. The large industrial community is an underused source of revenue for implementation and the current implementation violations may have provided them with some economic benefit. Therefore, there is no basis for adjustment for litigation considerations.

Final Penalty for Settlement $ 304,800

IV. Intent of Guidance

The guidance and procedures set out in this document are intended solely for the use of government personnel. They are not intended, and cannot be relied upon, to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these guidance and procedures and to change them at any time without public notice. In addition, any settlement penalty calculations under this Guidance, made in anticipation of litigation, are likely to be exempt from disclosure under the Freedom of Information Act. As a matter of public interest, the Agency may release this information in some cases.

"ENFORCEMENT INITIATIVE FOR FAILURE TO ADEQUATELY IMPLEMENT APPROVED LOCAL PRETREATMENT PROGRAMS", dated February 1, 1989.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FEB 1 1989

MEMORANDUM

SUBJECT: Enforcement Initiative for Failure to Adequately Implement Approved Local Pretreatment Programs

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

Edward E. Reich
Deputy Assistant Administrator
for Civil Enforcement (LE-133)

TO: Regional Water Management Division Directors
Regional Counsels

As part of our continuing policy to seek improvement in the pretreatment implementation efforts of approved local pretreatment programs on a national basis, we have decided to initiate a nationally-coordinated failure-to-implement pretreatment program enforcement initiative. This initiative will address inadequate implementation efforts of local pretreatment programs by taking formal enforcement actions against noncomplying POTWs in every Region within a specific timeframe.

Effective implementation of approved pretreatment programs by municipalities is critical to controlling the discharge of toxic pollutants to surface waters; protecting the substantial financial investment in POTWs; protecting POTW worker health and safety; and preventing the contamination of sludge. Yet, data from the most recent QNCR report indicates that over 250 POTWs were reported for various aspects of inadequate pretreatment program implementation. Preliminary data from the Pretreatment Permits and Enforcement Tracking System (PPETS) indicates that approximately 47% of POTWs with approved local pretreatment programs may be in violation of one or more of the three pretreatment reportable noncompliance (RNC) criteria related to issuance of control mechanisms, inspections, or adequacy of

enforcement against significant industrial users in significant noncompliance (SNC). Given the fact that 90% of the pretreatment programs have been approved for at least three years, we believe that these POTWs have had adequate time to fully implement their programs.

Thus, we believe a national enforcement initiative is both appropriate and necessary to ensure that approved local pretreatment programs are fully implemented across the country. We consider such an enforcement initiative as our top water quality enforcement priority for this year. On January 17 and 18, Bill Jordan and John Lyon held conference calls with your Compliance and Regional Counsel Branch Chiefs and there was general support from all the Regions for this enforcement initiative. In fact, several Regions already had designated pretreatment enforcement as their top priority.

The initiative will include both administrative penalty orders (APOs) and civil judicial actions, but we would like to see each Region contribute at least one civil judicial referral to the initiative. Regions which directly oversee larger numbers of approved local pretreatment programs should contribute additional referrals and administrative penalty orders. States which have received approval to administer pretreatment programs are invited to participate in this initiative, with State Attorneys General filing civil judicial cases in State courts. Where appropriate, Regions and States should include key industrial users which are violating pretreatment standards and requirements as part of a POTW civil referral or proposed APOs.

EPA Regions are requested to provide EPA Headquarters with a proposed list of POTW candidates (including those in States with approved pretreatment programs) for this enforcement initiative. Among the criteria which the Regions should consider in the selection of candidates are the following:

- The POTW has been listed on the QNCR for pretreatment violations for more than two quarters,
- The POTW has discharges which impact near-coastal waters and enforcement would support the Agency's Near Coastal Water Initiative,
- The POTW exceeded one or more of the pretreatment RNC criteria or other specific requirements in their permit or approved program (The magnitude of such exceedances should also be considered.), or

- The POTW has unresolved TRC or chronic effluent violations (including heavy metal effluent violations) which appear to be related to inadequate pretreatment implementation.

All candidates should have an NPDES permit which, at a minimum, requires implementation of the approved pretreatment program. Also, the approved program should provide an adequate statement of program requirements.

Upon review of the Regions' list of candidates, Headquarters may inquire about additional POTW enforcement candidates as appropriate. EPA Headquarters staff will be available for two-day Regional visits (as necessary) to provide a better opportunity for face-to-face discussion of POTW enforcement candidates and details of the initiative.

Key dates in the schedule for this initiative are shown below:

o	2/6-3/1/89	Review of QNCR, PPETS, etc. by Region
o	3/3/89	Submission of POTW candidates (designated as probable referrals or APOs) to EPA Headquarters by Regions
o	3/6-4/7/89	Dialogue, negotiation, and two-day visits (as necessary) to Regions to discuss and confirm candidates
o	3/20-5/31/89	Preparation of referral/APO packages by Regions
o	4/3-6/2/89	Submission of referrals and APOs (as appropriate) by Regions to EPA Headquarters

o 4/3-7/7/89	Headquarters review of referrals and APOs (as appropriate) and subsequent referral of civil cases to the Department of Justice
o 4/3-8/18/89	Civil judicial cases filed by the Department of Justice and proposed APOs issued
o 8/31/89	National press release regarding the initiative (will include similar cases filed and APOs issued since 1/1/89)

Regarding APOs, please note that Headquarters review of APOs will only be required for those Regions which have not yet fulfilled the concurrence requirements identified in the guidance on administrative penalties issued on August 27, 1987. Regarding referrals, neither Headquarters nor the Department of Justice will stockpile or hold cases expressly to fit the proposed filing window but will continue to move the cases through the system.

Documents such as the August 4, 1988 "Guidance on Bringing Enforcement Actions Against POTWs for Failure to Implement Pretreatment Programs" and the December 22, 1988 "Guidance on Penalty Calculations for POTW Failure to Implement an Approved Pretreatment Program" should be utilized in this initiative as well as in other formal enforcement actions for failure to implement.

In regard to past civil referrals and APOs for failure to implement, for the purpose of this initiative, Headquarters will credit the Regions with civil referrals which are still in the review pipeline but not yet filed.

In a related matter, a preliminary review of PPETS indicates that data is still missing for the following large cities: Boston, Buffalo, Detroit, St. Louis, Phoenix, Tucson, San Francisco, Honolulu, Seattle, and Portland. Regions should make every effort to provide such data as soon as possible, but no later than March 6, 1989.

Thank you for your cooperation in this effort. If you have any questions or concerns in regard to this enforcement initiative, please contact Jim Elder (FTS-475-8488) or Bill Jordan (FTS-475-8304) in OWEP or John Lyon (FTS-475-8177) in OECM. If your staff wishes to discuss specific details of the initiative, including the selection process, proposed Regional visits, merits of a potential case, etc., please contact either Andy Hudock (FTS-382-7745) or David Hindin (FTS-475-8547) of our respective staffs.

cc: Rebecca Hanmer, OW
David Buente, DOJ
Cynthia Dougherty, OWEP
Susan Lepow, OGC
Regional Counsel Water Branch Chiefs
Regional Compliance Branch Chiefs
Regional Pretreatment Coordinators/Liaisons

"Guidance For Developing Control Authority Enforcement Response Plans", dated September, 1989. Table of Contents only.

2000

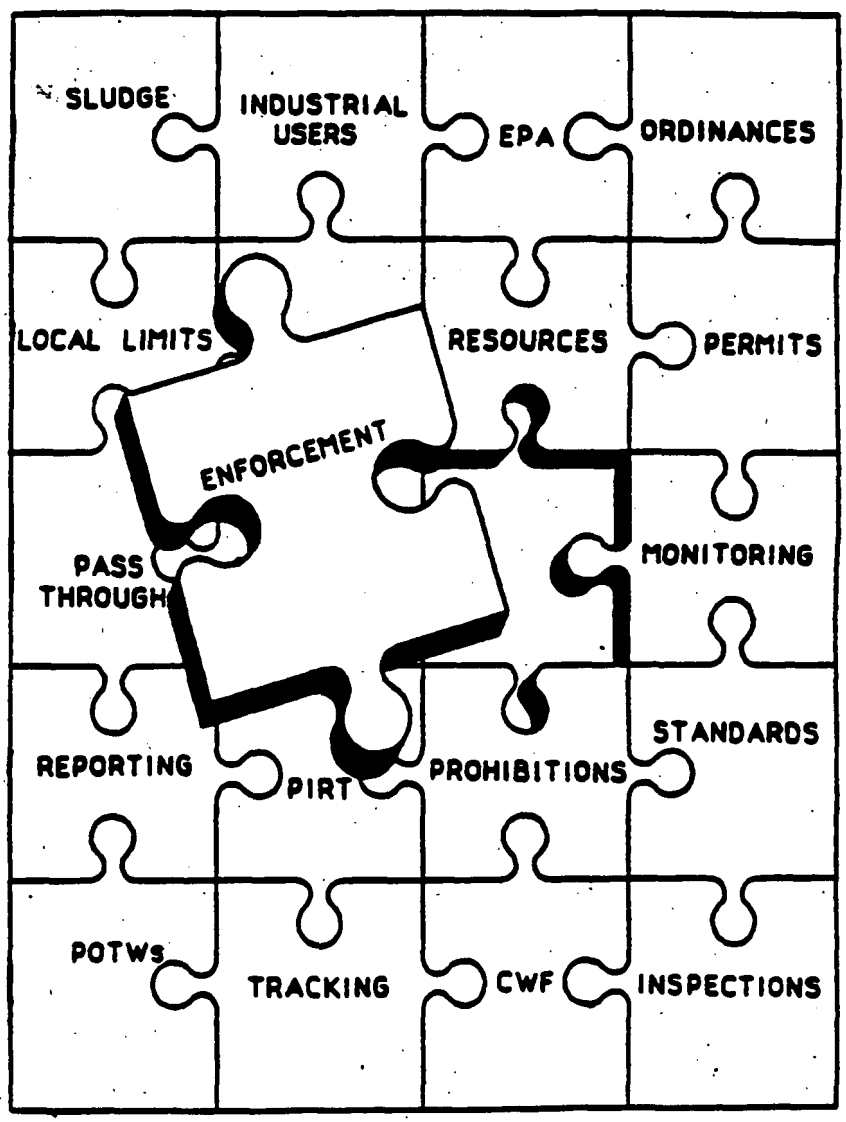
United States
Environmental Protection
Agency

Office of Water
(EN-338)

September 1989

EPA

Guidance For Developing Control Authority Enforcement Response Plans



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

DEC 4 1989

OFFICE OF WATER

To All Approved Pretreatment Programs:

One of the most important requirements of pretreatment program implementation for Publicly Owned Treatment Works (POTWs) is an effective enforcement program to deal with Industrial User (IU) noncompliance. EPA expects POTWs to identify all violations, to respond with appropriate action and to follow up those violations with escalated levels of enforcement, if needed to ensure compliance. In January 1990 EPA expects to promulgate amendments to the General Pretreatment Regulations requiring all POTWs with approved pretreatment programs to develop enforcement response plans describing how the POTW will investigate and respond to instances of noncompliance.

In response to this coming requirement, the Office of Water Enforcement and Permits has developed the attached "Guidance for Developing Control Authority Enforcement Response Plans". This Guidance is intended to provide municipal pretreatment personnel with recommendations for assessing enforcement authorities, determining appropriate enforcement roles for personnel and deciding upon enforcement remedies for specific violations. To assist Control Authorities in meeting the changes to the General Pretreatment Regulations, the manual includes a model enforcement response guide and a detailed analysis of each of the common enforcement remedies.

If you have any questions or comments concerning the development of your own Enforcement Response Plans, please contact your Approval Authority or the Pretreatment Coordinator in your USEPA Regional Office.

Sincerely,

James R. Elder, Director
Office of Water Enforcement
and Permits

GUIDANCE FOR DEVELOPING CONTROL AUTHORITY ENFORCEMENT RESPONSE PLANS

September 1989

Office of Water Enforcement and Permits
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

CONTENTS

CONTENTS (Continued)

TABLES

FIGURES

"FY 1990 Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", dated September 27, 1989.

2007

2008

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

SEP 27 1989

MEMORANDUM

SUBJECT: FY 1990 Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements

OFFICE OF WATER

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

TO: Regional Water Management Division Directors, Regions I-X
NPDES State Pretreatment Program Directors

Attached is the final "FY 1990 Guidance for Reporting and Evaluating Noncompliance with Pretreatment Implementation Requirements". This Guidance defines criteria for determining which POTWs should be reported on the Quarterly Noncompliance Report (QNCR) for failure to implement pretreatment requirements and criteria for determining which pretreatment violations by POTWs meet the level of significant noncompliance (SNC). It also establishes timely and appropriate criteria for responding to noncompliance for pretreatment implementation violations. The timely and appropriate definition adopted for the pretreatment program is the same as for the NPDES program.

The comments received from you on the August 9, 1989 draft were timely and thoughtful. Perhaps the most frequent comment was the recommendation that we drop the separate definition for reportable noncompliance (RNC). As indicated in the August 9 letter, a workgroup is evaluating possible changes to the Quarterly Noncompliance Report and RNC/SNC reporting system. The workgroup should complete its assessment and recommend changes in FY 1990. A final decision as to whether to continue the use of both an RNC and an SNC definition will await the recommendation of that group. For FY 1990, we will use both the RNC and SNC definitions.

Two commenters suggested that the criterion addressing issuance of control mechanisms established an excessively long timeframe (180 days) for permit issuance and reissuance. Suggestions were made to shorten the timeframe for IU permit issuance and reissuance to as little as 90 days. While we did not make this change, we have added to the SNC definition a provision that EPA Regions and States may designate a POTW as in significant noncompliance if any violation substantially interferes with the ability of the POTW to attain program objectives.

2009

The FY 1990 SPMS requirements include two measures for POTW pretreatment implementation: 1) WQ/E-5, the number and percent of approved programs in significant noncompliance with pretreatment implementation requirements; and 2) WQ/E-10, the number of POTWs that meet the criteria for reportable noncompliance. We will track performance on both these measures for FY 1990 as a means of evaluating the efficacy of the new SNC definition.

Regions and States are expected to initiate timely and appropriate actions to resolve instances of significant noncompliance, including POTW pretreatment implementation violations. POTWs which meet the definition of SNC for pretreatment implementation and are not addressed on a timely basis will be carried on the Exceptions List until they have been resolved or received a formal enforcement response. All POTWs with approved pretreatment programs should be tracked for both RNC and SNC.

If you have any questions regarding the use of this document, you may contact me (475-8488) or Richard Kozlowski, Director, Enforcement Division (475-8304). The staff contact is Anne Lassiter, Chief, Policy Development Branch (475-8307).

Attachment

7010

FY 1990 GUIDANCE FOR REPORTING AND EVALUATING POTW NONCOMPLIANCE WITH PRETREATMENT REQUIREMENTS

2011

TABLE OF CONTENTS

I. Executive Summary

The QNCR is an important tool to identify priority violations of permit conditions, to overview the effectiveness of State and EPA compliance and enforcement activities, to provide a framework to achieve a nationally consistent pretreatment program, and to compile national statistics on noncompliance for the NPDES program. The existing rule for noncompliance reporting requires EPA and the States to report instances where POTWs have failed to adequately implement and enforce their approved pretreatment program.

Nearly 1500 POTWs are now approved. Pretreatment will be the primary mechanism to control toxic and hazardous pollutants which may enter the POTW or its sludge. Therefore, it is vital that EPA and the approved States routinely evaluate POTW compliance with the requirements of their approved program and report POTWs that have failed to adequately implement their approved program.

This Guidance is intended to assist Regions and approved States to evaluate and report POTW noncompliance with pretreatment requirements and to take formal enforcement action where violations are of a significant nature. The Guidance explains the criteria that should be used to evaluate principal activities and functions necessary to implement the program. In some cases, approved States and Regions may need to modify the program and/or NPDES permit because the existing requirements are inadequate or because conditions have changed. In general, those POTWs that meet the definition of reportable noncompliance should be priorities for resolving the inadequacies in approved programs or permits. POTWs that meet any Level I criterion or two or more Level II criteria are considered to be in significant noncompliance. In addition, the Region/approved State may designate any failure to implement violation as SNC if it substantially impairs the ability of the POTW to achieve its program objectives. POTWs with violations which meet SNC criteria must resolve those violations before appearing on the 2nd QNCR or the Region or approved State is expected to take formal enforcement action. Where the violation is not resolved and formal enforcement action is not taken on a timely basis, the POTW should be listed on the Exceptions List until such time as the violation is corrected or the POTW has been put on a schedule for correction through formal enforcement.

II. INTRODUCTION

A. Background

EPA Regions and NPDES States must report certain permit violations on the Quarterly Noncompliance Report (QNCR) which meet criteria identified in the existing NPDES Regulations (40 CFR Part 123.45). One of the violations that must be reported is a POTW's failure to adequately implement its approved pretreatment program. Prior to September 1987, the interpretation of adequate implementation was left to the discretion of the Regions and approved States.

In September 1987, the Office of Water Enforcement and Permits issued "Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements" which provided a definition of reportable noncompliance (RNC) for POTW pretreatment program implementation. These criteria were to be used in determining when a POTW should be reported on the QNCR. This guidance established criteria which covered five basic areas of POTW program implementation: IU control mechanisms; IU inspections; POTW enforcement; POTW reporting to the Approval Authority; and other POTW implementation requirements.

Now, based on experience with the use of that definition in Fiscal Years 1988 and 1989, EPA has revised the RNC criteria and has developed a new definition of significant noncompliance (SNC) for POTW's that have failed to adequately implement their approved pretreatment programs. The new definition of RNC will be used to determine which POTWs should be reported on the QNCR for failure to implement approved pretreatment programs. The definition of SNC is used to identify the instances of noncompliance that are subject to formal enforcement action, if not resolved on a timely and appropriate basis.

The purpose of this Guidance is to explain the RNC/SNC criteria, with examples of how to apply the criteria; describe how to report noncompliance for POTW pretreatment program implementation on the QNCR and establish timely and appropriate criteria for response to significant noncompliance. This Guidance should be used as a basis for reporting POTW pretreatment noncompliance as required in the Agency Operating Guidance and included as a performance measure for EPA and approved State programs under the Strategic Planning and Management System (SPMS).

B. Existing Rule

The QNCR is the basic mechanism for reporting violations of NPDES permit requirements. Major[1] POTW permittees must be reported on the QNCR:

(1) if they are under an enforcement order for previous permit violations; or

(2) if their noncompliance meets specific criteria (Category I noncompliance); or

(3) if the regulatory agency believes the violation(s) causes problems or is otherwise of concern (Category II noncompliance).

The specific requirements of the existing rule which relate to pretreatment program implementation are as follows:

1. Enforcement Orders - All POTWs that are under existing enforcement orders (e.g., administrative orders, judicial orders, or consent decrees) for violations of pretreatment implementation requirements (except for orders addressing schedule and reporting violations) must be listed on the QNCR and the compliance status must be reported on each subsequent QNCR until the POTW returns to full compliance with the implementation requirements.

2. Category I pretreatment program noncompliance - A POTW must be reported on the QNCR:

   a) if it violates any requirement of an enforcement order (except schedule or reporting requirements as noted below), or

   b) if it has failed to submit a pretreatment report (e.g., to submit Annual Report or to publish a list of significant violators) within 30 days from the due date specified in the permit or enforcement order, or

   c) if it has failed to complete a pretreatment milestone within 90 days from the due date specified in the permit or enforcement order.

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[1] Major POTW permittees are those with a dry weather flow of at least 1 million gallons per day or a BOD/TSS loading equivalent to a population of at least 10,000 people. Any POTW (including a minor POTW) with an approved local pretreatment program should have its pretreatment violations reported on the QNCR.

3. Category II - A POTW must be reported on the QNCR if the instance of noncompliance is:

   a) a pass through of pollutants which causes or has the potential to cause a water quality problem or health problem,

   b) a <u>failure of an approved POTW to implement its approved program adequately</u> [emphasis added], including failure to enforce industrial pretreatment requirements on industrial users as required by the approved program,[2] or

   c) any other violation or group of violations which the Director or Regional Administrator considers to be of substantial concern.

C. Determination of Inadequate Program Implementation for QNCR Listing

OWEP has developed criteria to evaluate local program implementation that explain and clarify the existing regulations. As stated, these criteria highlight activities that control authorities must undertake to implement their programs. These activities include:

1) POTW establishment of IU control mechanisms,
2) POTW compliance monitoring and inspections
3) POTW enforcement of pretreatment standards and reporting requirements
4) POTW reporting to the Approval Authority, and
5) Other POTW implementation requirements.

Collectively, these criteria provide the framework for the definition of reportable noncompliance which should be used by EPA Regions and approved States to report POTW noncompliance with pretreatment requirements on the QNCR. These same criteria also provide the basis for a definition of significant noncompliance for pretreatment program implementation. POTWs with pretreatment violations which meet the level of SNC must either resolve these violations on a timely basis or the Region or approved State must take formal enforcement action on a timely basis. The attached table, Table 1, identifies the individual violations which constitute the criteria for reporting noncompliance on the QNCR, as well as the criteria for SNC.

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[2] The permit is the basis for enforcing requirements of the approved program or the Part 403 regulations. It should at least require compliance with 40 CFR part 403 and the approved program and ideally it should provide more specific implementation requirements when they are necessary to evaluate noncompliance.

TABLE 1

DEFINITIONS OF REPORTABLE AND SIGNIFICANT NONCOMPLIANCE

A POTW should be reported on the QNCR if the violation of its approved pretreatment program, its NPDES permit or the General Pretreatment Regulations (40 CFR Part 403) meets any of the following Level I or Level II criteria for inadequate implementation of its approved pretreatment program. A POTW should be considered to be in significant noncompliance if it meets any one of the following Level I criteria or two or more of the Level II criteria. The POTW may also be identified as in significant noncompliance if it meets any one of the Level II criteria if that violation substantially impairs the ability of the POTW to achieve program objectives.

A. Level I

1) Failed to take effective action against industrial users for instances of pass through and/or interference as defined in 40 CFR Part 403.3 and required in Section 403.5, and as specified in the approved program or the NPDES permit. Actions taken in response to discharges which result in pass through and/or interference that failed to eliminate the causal discharge within 90 days of identifying the responsible industry or failed to place the responsible industry on an enforceable schedule within 90 days of identification are not considered to be effective, unless otherwise defined in an approved enforcement response plan.

2) Failed to submit a pretreatment report (e.g., annual report or publication of significant violators) to the Approval Authority within 30 days of the due date specified in the NPDES permit, enforcement order, or approved program.[3]

3) Failed to complete a pretreatment implementation compliance schedule milestone within 90 days of the due date specified in the NPDES permit, enforcement order, or approved program.

[3] The term enforcement order means an administrative order, judicial order or consent decree. (See 40 CFR 123.45)

TABLE 1 (Continued)

B. Level II

1) Failed to issue, reissue, or ratify industrial user permits, or other enforceable control mechanisms, where required, for at least 90% of the "significant industrial users", within 180 days after program approval (or after permit expiration), or within 180 days of the date required in the approved program, NPDES permit, or enforcement order.

2) Failed to conduct a complete inspection or sampling of at least eighty percent of the "significant industrial users" as required by the permit, the approved program, or enforcement order.

3) Failed to enforce pretreatment standards or reporting requirements -- including self-monitoring requirements -- as required by the approved program, the NPDES permit, or the General Pretreatment Regulations. Failed to take appropriate action against a violation within thirty (30) days of being notified of such violation. Actions taken in response to incidents of significant noncompliance that failed to return the SIU to compliance (or in compliance with an enforceable compliance schedule) within 90 days of the receipt of information establishing significant noncompliance are not considered effective unless otherwise defined in an approved program enforcement response plan.

4) Any other violation or group of violations of local program implementation requirements based on the NPDES permit, approved program or 40 CFR Part 403 which the Director or Regional Administrator considers to be of substantial concern.[5]

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[4] See SNC definition for industrial users, section 3.4.1 of the PCME. EPA proposed to use that definition to identify significant noncompliers for the annual public notification requirement (section 403.8(f)(2)(vii)). Significant noncompliance (SNC) includes certain violations of pretreatment standards, reporting, schedules and enforcement orders by SIUs.

[5] Existing QNCR criterion (40 CFR Part 123.45); the violation must be reported.

III. Applying the Criteria

The criteria for reporting POTW noncompliance with pretreatment requirements are based on the General Pretreatment Regulations [particularly 403.8(f)(2)], approved pretreatment programs, and NPDES permit conditions (particularly Part III). Where specific conditions, deadlines, or procedures are specified in the Regulations or the approved program, and incorporated or referenced in the NPDES permit, POTW performance should be evaluated against those requirements. Any failure to meet those requirements is a violation. The criteria included in this Guidance establish a basis for determining when a violation or series of violations should be reported on the QNCR for failure to implement a pretreatment program. If the POTW is identified as meeting one or more of the criteria, the POTW should be reported on the QNCR. If the POTW's violations meet the criteria for significant noncompliance, the violation must be reported in the QNCR and it must be resolved or EPA or the approved State must take formal enforcement action to resolve the violation before the POTW appears on the second QNCR. This definition of "timely and appropriate" is the same as for the NPDES program.

POTW performance should be evaluated using the information routinely obtained from pretreatment compliance inspections, annual reports, pretreatment audits and Discharge Monitoring Reports (DMRs) as well as any special sources of information. All annual reports should include the compliance status of IUs, a summary of compliance and enforcement activities, and other information, as required by Section 403.12(i) of the General Pretreatment Regulations. This information should be useful to assess the effectiveness of pretreatment implementation. Pretreatment staff should review the approved program, the NPDES permit, and any correspondence with the POTW regarding its pretreatment program to identify any specific procedures, levels of performance, or milestones that may apply to implementation of the particular program.

A. LEVEL I CRITERIA (a POTW is considered to be RNC and SNC for any violation listed below)

1. Failure to Enforce Against Pass Through and Interference

Definitions of industrial user discharges that interfere with a POTW or pass through the treatment works were promulgated January 14, 1987 (52 FR 1586).

Protection against interference and pass through are fundamental objectives of implementing a local pretreatment program. Interference generally involves the discharge of a pollutant(s) which reduces the effectiveness of treatment such that a permit requirement is violated. (If the pollutant that causes the violation is the same as the permit pollutant limit that was exceeded, pass through has occurred.) The POTW is responsible for identifying and controlling the discharge of pollutants from IUs that may inhibit or disrupt the plant operations or the use and disposal of sludge. The POTW must monitor IU contributions and establish local limits to protect its sludge.

The POTW should have written procedures to investigate, control and eliminate interference and pass through. Whenever interference or pass through is identified, the POTW should apply such procedures to correct the problem. The effectiveness of POTW actions against IUs that cause interference and pass through is evaluated based on the timeliness of the POTW response, the degree to which the problem is abated, and the use of the maximum enforcement authority required to resolve the problem.

Whenever an industrial source has been identified as a cause of such violations, the control authority must respond in a rapid and aggressive manner to avoid continuing problems, consistent with the POTWs approved enforcement procedures. Where there are no approved procedures, a reasonable expectation would be that the interference/pass through would be corrected within 90 days after the industrial source has been identified as causing the interference or pass through or that an enforcement order setting an expeditions compliance schedule for corrective action would be issued within 90 days after the source is identified. Where the SIU does not comply with the schedule, the POTW would be expected to make use of full enforcement authorities to secure compliance.

Section 403.5 of the General Pretreatment Regulations requires that the POTW develop and enforce local limits to prevent interference and pass through from industrial contributors to the treatment works. If a POTW has permit limit violations that are attributable to industrial loadings to its plant, it may also be a violation of the requirement to enforce local limits. However, interference or pass through may reflect the fact that the approved program includes inadequate local limits. If such is the case the POTW should be required to modify its approved pretreatment program.

2. Failure to Submit Pretreatment Reports Within 30 days

This criterion already exists under Category I of 40 CFR Part 123.45(a). The term "pretreatment report" should be interpreted to include any report required by the Approval Authority from the POTW (including publication of significant violators/ noncompliers in the newspaper as required by Section 403.8(f)(2)(vii) of the General Pretreatment Regulations). Where specific dates are established for these or other reports from the POTW, they may be tracked in PCS. When deadlines are missed, the POTW should be notified immediately because these reports contain information which is essential to determine compliance status. When the due date is missed by 30 days or more, the POTW should be reported on the QNCR as in noncompliance. A POTW which meets this criterion would also be considered in significant noncompliance.

3. Failure to meet Compliance Schedule Milestones by 90 Days or more

This criterion is also included in Category I of 40 CFR Part 123.45(a). Compliance schedules are frequently used to require construction of additional treatment, corrective action to correct inadequacies in implementation, Spill Prevention Contingency and Countermeasure plans, additional monitoring that may be needed to attain compliance with the permit, and any other requirements, especially the development or revision of local limits. The schedules should divide the corrective action into major steps (milestones) that can be verified by inspection or review. Most schedules include progress reports. EPA recommends that the milestones be set at least every six months throughout the schedule. The schedules can be incorporated as part of the POTW's NPDES permit if final compliance will not exceed the regulatory compliance deadline. If the compliance schedule is to resolve a violation that has occurred after the regulatory compliance deadline, the schedule must be placed in an administrative order, judicial order, or a consent decree outside the NPDES permit.

The existing rule for QNCR reporting requires that all permittees be listed on the QNCR if they are under an enforcement order. If the permittee is in compliance with the order, the compliance status is "resolved pending". If the permittee has missed a compliance schedule date by 90 days or more, the permittee must be reported as noncompliant on the QNCR. For POTW pretreatment programs, a failure to begin corrective action, complete corrective action, or attain final compliance within 90 days of the compliance deadline in an enforcement order is considered SNC.

B. LEVEL II CRITERIA (a POTW is considered RNC for meeting any criterion and SNC for meeting two or more of the criteria listed, except that a POTW may be identified as meeting SNC if it meets any one of the criteria listed below if the violation substantially impairs the ability of the POTW to achieve program objections.)

1. Failure to Issue Control Mechanisms to Significant Industrial Users in a Timely Fashion

Control mechanisms establish enforceable limits, monitoring conditions, and reporting requirements for the industrial user. In some cases, an approved program may have a sewer use ordinance that defines the limits (including local limits) and an individual mechanism for establishing monitoring conditions at each facility. Technically, if a control mechanism expires, control of the SIU and enforcement of some pretreatment requirements may be suspended. Therefore, timely issuance and renewal of all control mechanisms is essential.

All Control Authorities must apply pretreatment standards to their industrial users. Where the approved program requires that individual control mechanisms be developed for significant industrial users, but does not include a timeframe for issuance, the POTW should be given a deadline to issue them through an enforcement order. Some States include schedules for issuing specific SIU permits in a POTW's NPDES permit. Where the POTW has missed one or more deadlines specified in a permit or enforcement order for issuing individual control mechanisms by 90 days or more, the violation must be reported on the QNCR as a schedule violation.

For failure to issue control mechanisms, where individual control mechanisms are required by the approved program or the NPDES permit, the POTW should issue or reissue control mechanisms to 90% of the SIUs within six months following the required date or, if there is no required date, within six months after the program is approved. Where initial issuance of individual control mechanisms has occurred, POTWs should be expected to reissue 90% of required control mechanisms within six months of expiration. POTWs that fail to meet these timeframes should be reported on the QNCR.

Some POTWs have stated that delay in submission of an application by the SIU or delay in review by a State agency causes unavoidable delays in issuance of control mechanisms. The POTW should establish a schedule for IU applications and any other required preliminary steps which allows for the timely review and issuance of a control mechanism prior to its expiration.

2. Failure to Inspect or Sample Significant Industrial Users

POTWs are required to carry out all inspections, surveillance, and monitoring procedures necessary to verify the compliance status of their industrial users independent of information provided by the industrial user [40 CFR 403.8 (f)(2)(iv)]. In the PCME Guidance, EPA recommended that the Control Authority conduct at least one inspection and/or sampling visit for each significant industrial user annually.

The approved program and/or the NPDES permit may establish other requirements for inspections or use a different definition of significant industrial user. In those cases where the permit or approved program identifies specific requirements for inspection or sampling, these requirements should be used as a basis to evaluate POTW compliance. If the POTW has failed to either inspect or sample at least 80% of the significant industrial users as required by the permit or the approved program, the POTW should be reported on the QNCR for its failure to inspect. POTW sampling of all IUs is essential to evaluate IU compliance where IUs do not submit self-monitoring information. In the absence of specific inspection coverage requirements in the approved program or permit, the Approval Authority should also report any POTW which has not either inspected or sampled at least 80% of all SIUs within a 12 month period.

3. Failure to Enforce Pretreatment Standards and Reporting Requirements

a. IU Reporting and Self-Monitoring Requirements

All categorical IUs are required to report at least twice a year (40 CFR 403.12). POTWs also have authority to require monitoring and reporting from non-categorical IUs. As a result, most POTWs have established self-monitoring requirements for SIUs as a means of securing adequate data to assess SIU compliance at less cost to the POTW than if all data were developed by the POTW through sampling. Where an approved program does not require SIU self-monitoring, the visits and inspections conducted by the POTW must be sufficient in scope or frequency to assure compliance.

In evaluating compliance with this criterion, EPA and approved States should examine the requirements of the NPDES permit and the approved pretreatment program and determine whether the Control Authority has established self-monitoring requirements as required. IU self-monitoring requirements should specify the location, frequency, and method of sampling the wastewater; the procedure for analysis and calculation of the result; the pollutant limits; and the reporting requirements. Under certain conditions, SIU violations may trigger additional self-monitoring (See 403.12(g)). For each violation the SIU detects, it must notify the POTW and resample and submit both sample results for review by the Control Authority. These self-monitoring requirements may be applied, in general, through an ordinance, through specific control mechanisms, or through a combination of general and specific mechanisms. Where self-monitoring is used, it should be required frequently enough so that in combination with POTW monitoring, compliance of the SIU can be accurately assessed.

Where appropriate requirements have been established, the Control Authority must ensure that SIUs comply with all aspects of the requirements and report in the manner required in the control mechanism. Where the Control Authority fails to establish appropriate requirements or to adequately enforce these requirements once established (i.e., POTW should respond in writing to all SNC violations for IU self-monitoring and reporting), the Control Authority should be considered in noncompliance and listed on the QNCR.

b. POTW Enforcement and IU Significant Noncompliance

The Control Authority must have the legal authority -- usually expressed through a sewer use ordinance -- to require the development of compliance schedules by IUs and to obtain remedies for noncompliance, including injunctive relief and civil or criminal penalties [40 CFR 403.8(f)(1)(iv) and (vi)]. In addition, the Control Authority must have an attorney's statement, which among other things, identifies how the Control Authority will ensure compliance with pretreatment standards and requirements and enforce them in the event of non-compliance by industrial users [403.9(b)(1)(iii)]. Further, procedures for enforcement may be contained in the approved program, sewer use ordinance, or NPDES permit.

The attorney's statement and compliance monitoring sections of the approved program, taken in combination with the NPDES permit, may provide a comprehensive set of enforcement procedures

which the POTW should follow to ensure the compliance of industrial users with pretreatment standards. Where such procedures are inadequate, EPA strongly recommends that POTWs develop written enforcement procedures which describe how, when, and by whom enforcement authorities are applied (See section 3.3 of the PCME). In fact, amendments to the General Pretreatment Regulations proposed on November 23, 1989 (40 CFR Parts 122 and 403) require POTWs to develop such procedures. These procedures must be approved by the Approval Authority. (After the NPDES permit is modified or reissued to incorporate these regulatory changes, these procedures become enforceable requirements of the pretreatment program.) These procedures serve to inform industrial users of the likely response to violations and assist the POTW in applying sanctions in an equitable manner.

The Approval Authority must periodically evaluate whether the POTW is effectively enforcing pretreatment requirements. In evaluating performance, the Approval Authority should examine both whether the POTW is following its enforcement procedures, where there are such approved procedures, and whether the program is effective in ensuring compliance with pretreatment standards. Regardless of whether there are procedures, one of the indicators the Approval Authority should use in evaluating effectiveness is the level of compliance of SIUs with pretreatment standards. Where the level of significant noncompliance (SNC) of SIUs is 15% or greater over a six month period without formal POTW actions or penalties where appropriate, there is a reasonable presumption that overall the Control Authority is not effectively enforcing its program. To overcome the presumption of ineffective enforcement, the POTW should be able to demonstrate maximum use of its enforcement authorities on a timeframe consistent with its enforcement procedures or, in the absence of written procedures, with the timeframes included in this document.

The Approval Authority should also review the nature and timeliness of the actions taken by the POTW to obtain compliance from individual SIUs. As a general rule, EPA recommends that a POTW respond initially to all violations with either formal or informal enforcement action within 30 days from the date the violation is reported or identified to the POTW. Frequently, the initial action will be informal (e.g., telephone call, warning letter, or meeting.) Where informal action does not bring compliance, the POTW should promptly escalate the level of enforcement response. As a general rule, escalation should occur within 90 days of the initial action, if compliance has not been achieved. Where an SIU continues to violate, so that the pattern of violations meets the criteria for significant noncompliance, the violation should be resolved within 90 days of the receipt of information which established the SIU to be in SNC or the POTW should issue an enforceable schedule for resolution of the noncompliance within that 90 days.

Under certain emergency situations -- to protect public welfare and property -- the initial response should be immediate and should include a formal enforcement action. The POTW should exercise any and all authority that is necessary to resolve instances of significant noncompliance or establish a schedule for resolving them.

The Control Authority should also use its authority to assess penalties against noncomplying industrial users to recapture the economic benefit of delaying compliance. Penalties would be expected as part of the response to violations of most compliance schedules and for violations which were related to interference and pass through at the POTW. EPA uses a computer model "BEN" to estimate the economic benefit. Economic benefit results from delaying capital expenditures, one-time costs for construction/acquisition of treatment facilities, and the avoided cost of operating and maintaining the treatment works. Control authorities should use procedures which consider economic benefit as part of their penalty assessment process.

The Approval Authority should review the Control Authority's overall actions carefully to determine whether it has routinely evaluated the violations and contacted the SIUs in a timely manner, escalating the response when compliance is not achieved. If this review reveals that the Control Authority has often not followed its own procedures or that the Control Authority has not appropriately used its full authorities to achieve compliance by its SIUs, the Control Authority should be judged to be in noncompliance.

Where the Control Authority is judged to have followed its procedures in almost all cases, but the level of significant noncompliance among SIUs is 15% or greater, the adequacy of Control Authority enforcement procedures should be reviewed. If the procedures are found to be inadequate, the procedures should be modified. The Approval Authority might require modification of the approved program, through the NPDES permit, or might issue an administrative order requiring the adoption of new procedures along the lines of those included in the PCME Guidance.

Even where the SIUs have a low level of significant non-compliance, the Approval Authority should review the performance of the Control Authority to ensure that it is, in fact, implementing its enforcement procedures and that the procedures are adequate to obtain remedies for noncompliance. For example, where a Control Authority fails to identify all violations or fails to respond to violations when they do occur, the POTW should normally be identified as in noncompliance on the QNCR.

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c. Local limits

A POTW that has violations of its NPDES permit limitations which are attributed to interference or pass-through from non-domestic contributions, should be reported on the QNCR (40 CFR 123.45 (a)). Likewise, a POTW which fails to enforce its approved local limits should be included on the QNCR. Just as for limits based on national categorical pretreatment standards, POTWs are expected to exercise the full range of enforcement mechanisms available to ensure the compliance of industrial users with approved local limits. In assessing the effectiveness of enforcement of local limits, the same criteria should be applied as for enforcement of national pretreatment standards.

4. Any Other Violation(s) of Concern to the Approval Authority

This criterion allows the Approval Authority to identify any POTW as in reportable noncompliance for a single violation or any combination of violations which are judged to be important even though they may not be covered by the specific criteria in the definition. These violations might include such violations as failure to update an industrial user inventory, failure to staff the pretreatment program consistent with the approved program or NPDES permit, issuance of control mechanisms of inadequate quality, or failure to develop or analyze local limits as required by an NPDES permit or enforcement order.

IV. Compliance Evaluation

EPA or the approved State should use annual (or more frequent) reports, pretreatment compliance inspections, audits, any follow-up reports, and DMRs to evaluate the compliance status of the permittee. At a minimum, data should be reviewed every six months to determine whether the POTW is in compliance. The Approval Authority should attempt to schedule audits and/or inspections and receipt of reports to support this six month review. Once the facility is shown on the QNCR, quarterly evaluations are needed to update the compliance status on each QNCR.

Compliance with permit effluent limits, compliance schedules, and reporting can be tracked in PCS, which is EPA's automated data system. The dates for submission and receipt of periodic reports and routine requirements should also be tracked in PCS. WENDB data elements already include the date of receipt of an annual report (or periodic report). This tracking would allow Regions and States to forecast when reports are expected and detect reporting violations, similar to the process for tracking discharge monitoring reports and other scheduled events.

The Pretreatment Permits and Enforcement Tracking System, (PPETS), has been developed, as a part of PCS, to track the overall performance of POTWs with their pretreatment requirements and the compliance rates of significant industrial users. Most of the data in PPETS will only be indicative of potential violations. The apparent violation should be verified as a continuing problem before the instance of noncompliance is reported on the QNCR. The data elements in PCS and PPETS that may apply to reportable noncompliance are summarized for each criterion in Table 2.

Once the POTW has been reported on the QNCR it should continue to be reported each quarter until the instance of noncompliance is reported as resolved. Compliance with an enforcement order (both judicial and administrative) should be tracked on the QNCR from the date the order is issued until it is met in full. EPA and/or the approved State should verify the compliance status of the POTW each quarter once it is listed on the QNCR through periodic reports from the POTW, compliance inspections, audits, meetings, or by a 308 letter to the POTW for compliance data and information on the status of the pretreatment implementation violation.

Table 2

REPORTABLE NONCOMPLIANCE CRITERIA AND RELATED PPETS DATA ELEMENTS

Criterion	Data Source	Data Element
Criterion II-1 -- Failure to Issue Control Mechanisms	PPETS -	o Number of SIUs without required mechanisms*
		o Control mechanism deficiencies
Criterion II-2	PPETS -	o SIUs not inspected or sampled
-- Failure to Inspect SIUs		o Number of SIUs*
		o SIUs in SNC but not inspected or sampled
		o SIUs not inspected at required frequency
		o Inadequacy of POTW inspections
Criteria II-2	PCS -	o Violation summary
-- Failure to Enforce Standards and Reporting Requirements		o Effluent data*
	PPETS -	o SIUs in SNC*
		o Adequacy of POTW monitoring
		o SIUs in SNC with self-monitoring*

Criterion	Data Source	Data Element
		o Number of enforcement actions*
		o Existing local limits
		o Headworks analysis
		o Deficiencies in POTW application of standards
Criterion I-1	PCS -	o Violation Summary
-- Failure to Enforce against Interference and Pass-through		o Effluent data*
	PPETS -	o SIUs in SNC*
		o Number of enforcement actions*
		o Number of IUs assessed penalties
		o Number of significant violators published in the newspaper*
		o Pass Through/ Interference incidents
		o Deficiencies in POTW sampling

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Criterion	Data Source	Data Element
		o Deficiencies in POTW application of standards
		o Enforcement response procedures
Criterion I-2		
-- Failure to Submit Annual Reports	PCS -	o Reporting schedule
		o Permit reporting*
Criterion I-3		
-- Failure to Meet Compliance Schedules	PCS -	o Compliance schedule events*

* Water Enforcement National Data Base (WENDB) data elements for which data entry is required, not optional.

V. Reporting on the QNCR

The Quarterly Noncompliance Report is prepared by NPDES States and EPA Regions each quarter. It lists violations of Federally designated major NPDES permittees that are of concern to the Agency. The format is described in Section 123.45(a) of the NPDES Regulations. For each instance of noncompliance, the report must show the date, basis and type of the violation, the date and type of action the agency has taken, and the current compliance status. The agency should also explain mitigating circumstances or remedial actions which the permittee may have planned. Detailed guidance for preparing the QNCR is available upon request to the Regions or OWEP. The following discussion summarizes the basic requirements for reporting POTW pretreatment violations.

The QNCR must be submitted to EPA Headquarters sixty days after the reporting quarter ends. The QNCR covers Federally designated majors. Generally, a POTW over 1 MGD is automatically designated as a major. This includes the vast majority of the POTW Control Authorities. All POTW pretreatment implementation violations should be reported on the QNCR, regardless of whether the control authority is classified as a major or a minor POTW.

A. Format

The general format for the QNCR is described in the Regulations. A list of abbreviations and codes used by the State Agency or EPA Region that prepares the report should be attached to each QNCR. If the Permit Compliance System (PCS) is used to generate the QNCR, standard abbreviations are automatically used and no special list of abbreviations or codes is needed for the submittal to Headquarters. (Note that a list of abbreviations may be needed for Freedom of Information Act requests.) The format is intended to provide the minimum information that is necessary to describe the violation, show how and when the agency responded, explain any mitigating circumstances or clarifying comments, and indicate the current compliance status of the permittee.

The description of the permittee should include the name of the permit holder, the name of the municipality, and the NPDES permit number. The permittee should be the Control Authority for the local pretreatment program. If other municipal permittees are subject to the Control Authority, they should be listed under the comments portion of the entry. The Control Authority is responsible for violations by other permittees covered by the Control Authority's pretreatment program. Similarly, industrial users that contribute to the violation should be listed under comments.

B. Description of the Noncompliance

Under the permittee's name and permit number, information on each instance of noncompliance must be reported. For pretreatment violations, the description should summarize the criteria that were violated and reference the QNCR Regulation subparagraph. The subparagraph of the August 1985 Regulations that apply would be as follows:

Type of violation	QNCR (section 123.45) Regulation Subparagraph
1) Failure to implement or enforce industrial pretreatment requirements (Criteria I-1 and II-1, -2, and -3)	(a)(iii)(B)
2) Pretreatment Report - 30 days overdue (Criterion I-2)	(a)(ii)(D)
3) Compliance schedule - 90 days overdue (Criterion I-3)	(a)(iii)(C)
4) Other violation or violations of concern (Criterion II-4)	(a)(iii)(G)

The criterion should be listed under the type of violation as the example (Section VI) shows.

Each violation should include the date. If the POTW has missed a deadline, the deadline is the date of the violation. The last day of the month is used as the violation date for violations of monthly averages. In some cases, the Agency may have discovered the violation through an audit or inspection of the POTW program. The inspection/audit date should be noted under comments. In the examples, all dates on the QNCR are written in six digit numbers representing the month, day, and year. The date, January 9, 1987 is entered as 010987 for the PCS generated QNCR.

The violation date of some implementation requirements may be the date the program was approved. Where the POTW has taken no action to implement a requirement since approval of the program, this beginning date would be appropriate. In other cases, the POTW may have been issued a specific deadline. These deadlines may be established through a permit or a compliance order. For example, some programs require annual inspections of

all SIUs as a condition of the NPDES permit but do not establish specific timeframes. In the absence of a particular compliance date, the specific deadline should be assumed to be one year after the effective date of the NPDES permit. Thus, the initial date of the violation is one year after the effective date of the permit.

The Region or approved State should contact the POTW promptly when a pretreatment implementation violation is detected. The Region/State should also indicate the action taken in response to the POTW's failure to implement an approved program on the QNCR. In determining the appropriate response, the Region/State should consider the impact of the violation, POTW compliance history, the number of SIUs, and the nature and/or duration of the violation. Initial violations may be resolved through training, conferences, or on-site reviews. The Regional/State response should be timely and escalate to formal enforcement (an administrative order or judicial referral) if the POTW fails or is unable to comply in a timely fashion. The date the action was taken should also be indicated. Planned actions by the POTW or its IUs and projected dates should be noted under comments.

C. Compliance Status

The QNCR also tracks the status of each instance of reportable noncompliance. Three status codes are usually reported: noncompliance (NC), resolved pending (RP), and resolved (RE). "Noncompliance" means the violation or pattern of violations is continuing. "Resolved pending" means the permittee is making acceptable progress according to an enforceable schedule (i.e., through an administrative or judicial order) to correct the violation. "Resolved" means the permittee no longer exceeds the QNCR criteria for which they are listed. For the "noncompliance" and "resolved pending" status, the status date is generally the last date of the report period. The status date for "resolved" is either the date the noncompliance requirement is fulfilled or the last day of the report period in which the permittee no longer meets the QNCR criteria.

The "comments" column can be used to describe the violation, explain permittee progress, indicate potential remedies, project dates of compliance, and explain agency responses. Other information can also be reported under comments, including the name of noncomplying SIUs; the level of performance or degree of failure by the POTW; the names of other permittees that are covered by the Control Authority; agency plans for training or technical assistance; and the manner in which the agency learned of the violation.

VI. Example of Reporting on the QNCR

The following example illustrates how violations and Agency responses are reported. This is a moderate-sized POTW that has refused to implement the program.

Scenario: Hometown's pretreatment program was approved in June 1985. The permit required an annual report, fifteen days after the end of each year, beginning January 15, 1986. The program required that permits be issued to 15 SIUs by June 30, 1986. The POTW was audited in August 1986 and had failed to permit and inspect its IUs and failed to submit an annual report. Hometown meets the criteria for SNC.

QNCR Listing

Hometown WWTP, Hometown, US 00007

INSTANCE OF NONCOMPLIANCE / STATUS	DATE	REG SUBPARA	ACTION (AGENCY/DATE)	
Issue permits (Criterion II-1) RP (033187)	063086	(iii)(B)	AO #123	(State/033187)
Inspect SIUs (Criterion II-2) RP (033187)	083086	(iii)(B)	AO #123	(State/033187)
Submit Annual Report RP (033187) (Criteria I-2)	011587	(ii)(C)	Phone call AO #123	(State/013087) (State/033187)
COMMENTS				

AO requires submission of annual report by 4/30/87, and permit issuance and sampling inspections of all SIUs by 6/30/87. EPA Audit 8/30/86 identified violations of permit inspection requirements Control Authority includes two other permittees: Suburb One, Permit No. US 00008 and Suburb Two, Permit No. US 00009 who must meet the schedule for inspections.

Discussion: The entry on the QNCR for Hometown shows the name and permit number of the facility. The Control Authority also covers two other permittees. Three reportable noncompliance criteria were exceeded (see sections I and II of this guidance).

The annual report was due January 15, 1987, according to the NPDES permit for Hometown. The approved program was the basis for the other reported violations. The "reg subpara" identifies the section of the existing QNCR which covers the violations. The State has called the city which promised to submit the annual report. After discussion with the city and its outlying jurisdictions, an administrative order was issued with a compliance schedule to resolve all three violations. Hometown is following an enforceable schedule that will lead to compliance, so its compliance status is shown as "resolved pending" "RP" for all three violations. The comments indicate the compliance deadlines.

VII. Response to POTW Significant Noncompliance for Failure to Implement Approved Pretreatment Programs

This Guidance establishes criteria for determining when a POTW's failure to implement pretreatment program requirements meets the level of significant noncompliance. In all instances where the violation is judged to be SNC, the violation must be addressed on a "timely and appropriate" basis. The definition for "timely and appropriate" for pretreatment implementation will be the same as for NPDES violations. That is, the violation must be resolved or EPA or the approved State must take formal enforcement action to resolve the violation before the POTW appears on the second QNCR. In the rare circumstances where formal enforcement is not taken and the violation not resolved, the administering agency must prepare a written record to justify why no action or the alternate action was more appropriate. Where "timely and appropriate" enforcement action is not taken, the POTW will be listed on the Exceptions List and will be tracked until such time as the violation is fully resolved. Each justification for the Exceptions List will be evaluated individually to determine whether the failure to take action was justified. The justification should make clear the reason for not taking action and discuss such factors as the nature of the implementation requirement schedule, the expected date of compliance, and the alternative process that will be used to resolve the violation.

*** "Application and Use of the Regulatory Definition of Significant Noncompliance for Industrial Users", dated September 9,1991.

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

SEP 9 1991

OFFICE OF WATER

MEMORANDUM

SUBJECT: Application and Use of the Regulatory Definition of Significant Noncompliance for Industrial Users

FROM: Michael B. Cook, Director
Office of Wastewater Enforcement and Compliance

TO: Water Management Division Directors, Regions I-X
Approved Pretreatment State Coordinators

Background:

On July 24, 1990, the Agency replaced the definition of "significant violation" with the definition of "significant noncompliance" (SNC) [see 40 CFR 403.8(f)(2)(vii) and 55 Fed. Reg. 30082]. This change eliminated the inconsistencies which arose in applying the significant violation criteria and established more parity in tracking violations committed by industrial users. The definition of SNC parallels the Pretreatment Compliance Monitoring and Enforcement Guidance (PCME) definition of SNC published in 1986.

This memorandum responds to several questions from States, publicly owned treatment works (POTWs), and industry regarding the application of the SNC definition. One frequently asked question is whether the time frame for determining SNC for technical review criteria effluent violations is a static six month period (i.e., a fixed six month calendar interval) or a rolling six month time frame (i.e., the current day minus six months). POTWs and industry have also inquired whether all data must be used to calculate SNC. The following discussion is provided to promote consistency in the application of this definition. Regions, States and POTWs should determine SNC in the manner prescribed below.

Pretreatment POTWs are required to notify the public of significant industrial users which meet the definition of SNC through publication in the newspaper. The POTW should also use the SNC criteria as the basis for reporting an industrial user's compliance status to the Approval Authority in its Pretreatment Performance Report. According to 40 CFR 403.12(i)(2), **the POTW must report on the compliance status of its industrial user universe at the frequency specified by the State or EPA National Pollution Discharge Elimination System (NPDES) permit, but in no case less than once per year.** Finally, the definition of SNC is used to determine whether a formal enforcement action against a user is warranted in accordance with the POTW's Enforcement Response Plan (ERP).

Applying the Definition: Use of the Six Month Time Frame:

There are seven criteria set forth in §403.8(f)(2)(vii). Two of these criteria concern violations evaluated over a six month time frame. The Agency intends for Control Authorities to evaluate these criteria on a rolling basis. The EPA's long established practice in the NPDES program is to evaluate SNC for direct dischargers each quarter using data from the previous six months. Similarly, Control Authorities should determine SNC for their universe of industrial users on the same rolling quarters basis using fixed quarters established by the Control Authority to correspond to its "pretreatment year" (e.g., March 31, June 30, September 30 and December 31).

At the end of each quarter, POTWs and States are to evaluate their industrial user's compliance status using the two criteria of the SNC definition which are evaluated on a six month time frame (i.e., the "A" and "B" criteria under the regulatory definition). Under this system, each industrial user is evaluated for SNC four times during the year, and the total evaluation period covers 15 months (i.e., beginning with the last quarter of the previous pretreatment year through the end of the current year). When the POTW is required to publish, it must list in the newspaper all industrial users which have been identified as SNC during the previous year (i.e., the SNC criteria were met during any of the previous four quarters).

If a facility has been determined to be in SNC based solely on violations which occurred in the first quarter of the 15 month evaluation period (i.e., the last quarter of the previous pretreatment year) and the facility has demonstrated consistent compliance in the subsequent four quarters, then the POTW is not required to republish the Industrial User (IU) in the newspaper if the IU was published in the previous year for the same violations.

Use of Industrial User and POTW Data in Determining SNC:

Several POTWs have inquired whether all data, including Control Authority sampling and industrial user self-monitoring, must be used in determining SNC. This question arises from the concern that an industrial user may choose to conduct its sampling efforts at times in which it knows that it is in compliance (e.g., during early morning start-up or during periods in which the industrial process is down). The concern is that use of these unrepresentative data will allow the industry to craft its compliance status such that it will never be in SNC.

The regulation defining SNC clearly requires that all measurements taken in the appropriate six month period must be used to determine a facility's SNC status. Therefore, any and all samples obtained through appropriate sampling techniques which have been analyzed in accordance with the procedures established in 40 CFR Part 136 must be used to determine whether the facility is in SNC.

The General Pretreatment Regulations further state that periodic compliance reports must be based on data obtained through appropriate sampling and analysis, and the data must be representative of conditions occurring during the reporting period [403.8(f)(1)(iv)

and 403.12(g)(3)]. The Control Authority must require that frequency and scope of industrial user self-monitoring necessary to assess and assure compliance by industrial users with applicable pretreatment standards and requirements.

The nature and scope of the sampling undertaken by an industrial user is under the control of the Control Authority through the issuance of an industrial user permit. These permits should specify the sampling locations and sample collection method necessary to ensure that representative samples are obtained for all regulated waste streams. By requiring industrial users to obtain representative samples, the Control Authority will ensure that industrial users do not evade noncompliance through selective sampling of their industrial processes.

Conclusion:

The Control Authority is required to screen all compliance data, whether generated through industrial user self-monitoring or by the Control Authority, to identify any violations of pretreatment requirements. Whenever there is a violation, the Control Authority must take appropriate enforcement action, as defined in its ERP. After this initial enforcement response, the Control Authority should closely track the industrial user's progress toward compliance by increasing the frequency of user self-monitoring, increasing the POTW's monitoring, or both.

When follow-up activity indicates that the violations persist or that satisfactory progress toward compliance is not being made, the Control Authority is required to escalate its enforcement response in accordance with the procedures established in its ERP. **At a minimum EPA expects POTWs to address SNC with an enforceable order that requires a return to compliance by a specific deadline.** When this enforceable order involves a compliance schedule, the industrial user remains in SNC during the period of the schedule (unless the facility returns to compliance prior to the end of the schedule). For example, if the duration of the schedule is two years, the facility should be published in both years. Of course, the POTW should explain in its publication that the violations have been addressed with a formal enforcement action (similar to a "resolved pending" listing on the Quarterly Noncompliance Report).

The definition of SNC provides a benchmark against which the compliance status of an industrial user and the enforcement activities of POTWs can be measured. The concept of significant noncompliance plays a pivotal role in the implementation and enforcement of the National Pretreatment Program. In order for the definition to succeed, it is critical that each Control Authority apply it on a consistent basis. If you have any further questions on this issue, please feel free to call me at (202) 260-5850. The staff person familiar with these issues is Lee Okster at (202) 260-8329.

cc: Cynthia Dougherty
Regional Water Compliance Branch Chiefs
Regional Pretreatment Coordinators
Lead Regional Pretreatment Attorneys

"Determining Industrial User Compliance Using Split Samples", January 21, 1992.

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

JAN 21 1992

OFFICE OF WATER

MEMORANDUM

SUBJECT: Determining Industrial User Compliance Using Split Samples

FROM: Richard G. Kozlowski, Director by George Kay
Enforcement Division

TO: Mary Jo M. Aiello, Acting Chief
Bureau of Pretreatment and Residuals

This memo is a response to your letter of September 30, 1991, where you requested written clarification regarding the use of split samples for determining industrial user (IU) compliance under the Pretreatment Program. Specifically, you requested guidance on how to use the data from split samples for determining IU compliance in situations where split samples yield different analytical results. The fundamental question posed by your inquiry is whether all analytical results must be used when evaluating the compliance status of IUs and how to use those results for determining compliance. In situations where split samples exist and both samples were properly preserved and analyzed, POTWs should evaluate compliance with applicable Pretreatment Standards in the manner described below.

When evaluating the compliance status of an industrial user, the POTW must use all samples which were obtained through appropriate sampling techniques and analyzed in accordance with the procedures established in 40 CFR Part 136[1]. The Environmental Protection Agency (EPA) has consistently encouraged Publicly Owned Treatment Works (POTWs) to periodically split samples with industrial users as a method of verifying the quality of the monitoring data. When a POTW splits a sample with an IU, the POTW must use the results from each of the split samples.

A legitimate question arises, however, when a properly collected, preserved and analyzed split sample produces two different analytical results (e.g., one which indicates compliance and the other shows noncompliance, or where both indicate either compliance or noncompliance but the magnitudes are substantially different). In these instances, questions arise regarding the compliance status of the IU, and what should be done to reconcile the results.

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1 See Memorandum, "Application and Use of the Regulatory Definition of Significant Noncompliance for Industrial Users," U.S. EPA, September 9, 1991.

There is inherent variation in all analytical measurements, and no two measurements of the same analyte (even when drawn from the same sample) will produce identical results. When a split sample is analyzed using appropriate methods, there is no technical basis for choosing one sample result over the other for determining the compliance status of a facility. Since this is the case for all split samples which have been properly analyzed, the POTW should average the results from the split and use the resulting average number when determining the compliance status of an IU. Using the average of the two sample results avoids the untenable situation of demonstrating compliance and noncompliance from the same sample.

If the split sample produces widely divergent results or results which are different over a long period of time, then the cause of the discrepancy between the analytical results should be reconciled. When this happens, the POTW should investigate Quality Assurance and Quality Control (QA/QC) procedures at each laboratory involved. For example, the POTW could submit a spiked sample (i.e., a sample of known concentration) to the laboratories involved (preferably blind) to determine which laboratory may be in error.

In situations where one or both of the analytical results is determined to be invalid, there are compliance and enforcement consequences. If one of the analytical results is determined to be invalid, the average value for that sample is also invalid. In this situation, the value for this sample should be the value of the sample which was not determined to be invalid (e.g., if the IU's results are determined to be invalid, the POTW should use its sample for assessing compliance, and vice versa). If both samples are determined to be invalid, the averaged result from that sample should be discarded and not used for compliance assessment purposes. In either case, the POTW must recalculate the compliance status of the IU using all remaining valid sample results.

In summary, whenever split samples are taken and both are properly preserved and analyzed, the POTW should average the results from each sample and use the averaged value for determining compliance and appropriate enforcement responses. Where the sample results are widely divergent, the POTW should instigate QA/QC measures at each of the analytical laboratories to determine the cause of the discrepancy. If one or both of the samples are invalid, the POTW must recalculate the compliance status of the IU using all valid results.

If you have any further questions regarding these questions, please feel free to call me at (202) 260-8304. The staff person familiar with these issues is Lee Okster. Lee can be reached at (202) 260-8329.

cc: Cynthia Dougherty
Regional Pretreatment Coordinators
Approved State Pretreatment Coordinators
Bill Telliard

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

APR 12 1993

OFFICE OF WATER

Mr. Harold R. Otis
Chairman, Split Sampling Task Force
Greater Fort Wayne Chamber of Commerce
826 Ewing Street
Fort Wayne, IN 46802-2182

Re: Using Split Samples to Determine Industrial User Compliance

Dear Mr. Otis:

In response to your letter of January 12, 1993, and your phone conversation of February 9, 1993, with Lee Okster, I am providing a further discussion of the issues surrounding the use of split samples to determine industrial user (IU) compliance with Pretreatment Standards. In your letter and your phone conversation, you requested clarification from the Environmental Protection Agency (EPA) on three issues. First, you requested a firm definition of what constitutes "widely divergent results" when comparing split sample results. Second, when a publicly owned treatment works (POTW) splits a sample with an IU, you inquired whether a POTW must use the industrial user's data to determine compliance with pretreatment standards. Finally, you requested written authorization from the EPA to incorporate the language from our existing guidance memorandum on split samples into the Rules and Regulations of the Water Control Utility for the City of Fort Wayne.

What are Widely Divergent Results?

As you are aware, the EPA issued a memorandum on January 21, 1992, entitled "Determining Industrial User Compliance Using Split Samples." The "widely divergent results" criterion established in this memo is to be used as an indication that a problem exists with the laboratory analysis. We did not include an indication of what constitutes "widely divergent" in our memorandum because the amount of "normal" analytical variability depends on the pollutant parameter being tested and the method being used to analyze the sample. With appropriate QA/QC, this "normal" analytical variability is small. In general, though, metals analyses have a smaller variation than organics analyses, but the magnitude of the variability depends on the pollutants being tested. Therefore, no hard and fast rules exist for determining what is widely divergent. This determination is left to the discretion of the local authority.

Must the POTW Use All Sample Results?

In the January, 1992, memorandum we state that "the POTW must use all samples which were obtained through appropriate sampling techniques and analyzed in accordance with the procedures established in 40 CFR Part 136." The memo further states "[w]hen a POTW splits a sample with an IU; the POTW must use the results from each of the split samples."

The POTW is required to sample the IU at least once per year to determine, independent of information supplied by the IU, the compliance status of that facility. If the POTW does not wish to be in a position of comparing its own data with the IU when it samples the IU's discharge, it is not required to split its samples with the IU. Furthermore, we do not recommend that the POTW use a split sample with the industry to satisfy its annual sampling requirement. The POTW should pull its own sample so that it has data which are truly independent of the IU's results.

The POTW also has the primary responsibility to ensure compliance by the IU with all applicable pretreatment standards and requirements. One way the POTW can satisfy its requirement to ensure compliance is to split a routine sample taken by the IU. If a POTW splits a routine sample taken by the IU, it must use the IU's data, in conjunction with its own, to determine the compliance status of the facility (assuming all of the data are sampled and analyzed appropriately). We encourage POTWs to split samples in this manner to verify the IU's data. In a similar fashion, if the POTW chooses to split its own sample with the IU, it must use all of the data to determine the compliance status of the facility (assuming all of the data are appropriately analyzed).

When the POTW splits a sample with an IU (whether it is a routine sample by the IU or an annual sample by the POTW) the POTW has the responsibility to determine whether the IU's results from the split sample are valid. Where an IU's results are different than the POTW's, the burden is on the IU to show that all preservation, chain-of-custody, and analytical and QA/QC methods were followed. If the IU cannot make this showing, then the analytical results from the IU should be discarded when determining the compliance status of the facility. If the IU establishes that it followed all appropriate procedures, then the POTW should review its own QA/QC program. If both the IU and POTW have followed appropriate procedures, and there is still a wide divergence, then follow-up sampling should be conducted. If follow-up sampling consistently shows IU noncompliance, or if the POTW is otherwise satisfied with the validity of its own results, it should proceed to follow its enforcement procedures.

Authorization From the EPA

In regard to your final request, the City of Fort Wayne has the authority to incorporate these procedures into its Rules and Regulations without any authorization from the EPA. As long as the City has the minimum legal authorities to implement its

approved program, it has satisfied its requirements under the Federal regulations. As always, the City is encouraged to adopt the EPA's Pretreatment Guidance whenever possible.

I hope this letter responds to your questions and concerns. If you have any further questions, please feel free to call me at (202) 260-8304 or you can call Lee at (202) 260-8329.

Sincerely yours,

Richard G. Kozlowski, Director
Water Enforcement Division
U.S. Environmental Protection Agency

cc: Cynthia Dougherty
Regional Pretreatment Coordinators
Approved State Pretreatment Coordinators

"The Use of Grab Samples to Detect Violations of Pretreatment Standards", October 1, 1992.

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

OCT 1 1992

MEMORANDUM

OFFICE OF WATER

SUBJECT: The Use of Grab Samples to Detect Violations of Pretreatment Standards

FROM: Michael B. Cook, Director
Office of Wastewater Enforcement & Compliance (WH-546)

Frederick F. Stiehl
Enforcement Counsel for Water (LE-134W)

TO: Water Management Division Directors, Regions I - X
Environmental Services
Division Directors, Regions I - X
Regional Counsels, Regions I - X

The primary purpose of this Memorandum is to provide guidance on the propriety of using single grab samples for periodic compliance monitoring to determine whether a violation of Pretreatment Standards has occurred. More specifically, the Memorandum identifies those circumstances when single grab results may be used by Control Authorities, including EPA, State or publicly owned treatment works (POTW) personnel, to determine or verify an industrial user's compliance with categorical standards and local limits. Please be aware that the concepts set out below are applicable when drafting self-monitoring requirements for industrial user permits.

REGULATORY BACKGROUND

The General Pretreatment Regulations require Control Authorities to sample all significant industrial users (SIUs) at least once per year [see 40 CFR 403.8(f)(2)(v)]. In addition, the Regulations, at 40 CFR 403.12(e), (g) and (h) require, at a minimum, that all SIUs self-monitor and report on their compliance status for each pollutant regulated by a Pretreatment Standard at least twice per year unless the Control Authority chooses to conduct all monitoring in lieu of self-monitoring by its industrial users.[1]

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[1] The POTW should conduct more frequent sampling and/or require more frequent self-monitoring by an industrial user if deemed necessary to assess the industry's compliance status (e.g., a daily, weekly, monthly or quarterly frequency as appropriate).

The Regulations, at 40 CFR 403.12(g) and (h), also specify that pollutant sampling and analysis be performed using the procedures set forth in 40 CFR Part 136. Part 136 identifies the proper laboratory procedures to be used in analyzing industrial wastewater (including the volume of wastewater necessary to perform the tests and proper techniques to preserve the sample's integrity). However, with certain exceptions, Part 136 does not specifically designate the method to be used in obtaining samples of the wastewater. Rather, section 403.12(g) and (h) require sampling to be "appropriate" to obtain "representative" data; that is, data which represent the nature and character of the discharge.

DISCUSSION OF BASIC SAMPLING TYPES

Sampling may be conducted in two basic ways. Both types of sampling provide valid, useful information about the processes and pollutants in the wastewater being sampled. The first is an "individual grab sample." An analysis of an individual grab sample provides a measurement of pollutant concentrations in the wastewater at a particular point in time. For example, a single grab sample might be used for a batch discharge which only occurs for a brief period (e.g., an hour or less). Such samples are typically collected manually but are sometimes obtained using a mechanical sampler.[2]

The second type of sample is a "composite sample." Composite samples are best conceptualized as a series of grab samples which, taken together, measure the quality of the wastewater over a specified period of time (e.g., an operating day). Monitoring data may be composited on either a flow or time basis. A flow-proportional composite is collected after the passage of a defined volume of the discharge (e.g., once every 2,000 gallons). Alternatively, a flow-proportional composite may be obtained by adjusting the size of the aliquots to correspond to the size of the flow. A time-proportional composite is collected after the passage of a defined period of time (e.g., once every two hours).

Generally, composite samples are collected using a mechanical sampler, but may also be obtained through a series of manual grab samples taken at intervals which correspond to the wastewater flow or time of the facility's operations. In some cases, composite data is obtained by combining grab samples prior

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[2] Mechanical samplers may not be used to sample for certain pollutants (e.g., those which could adhere to the sampler tubing, volatilize in the sampler, or pollutants with short holding times).

to transmittal to a laboratory. At other times, the samples remain discrete and are either combined by the laboratory prior to testing or are analyzed separately (and mathematically averaged to derive a daily maximum value).[3]

DETERMINING APPROPRIATE COMPLIANCE SAMPLING METHODS

EPA policy on appropriate compliance sampling types has been articulated in several pretreatment guidance manuals and regulatory preambles, and continues to be as follows:

A. Compliance With Categorical Standards

- Most effluent limits established by categorical standards are imposed on a maximum daily-average and a monthly-average bases. Generally, wastewater samples taken to determine compliance with these limits should be collected using composite methods.

- There are exceptions to the general rule. Composite samples are inappropriate for certain characteristic pollutants (i.e., pH and temperature) since the composite alters the characteristic being measured. Therefore, analysis of these pollutants should be based on individual grab samples. Alternatively, continuous monitoring devices may be used for measuring compliance with pH and temperature limits. Any exceedance recorded by a continuous monitoring device is a violation of the standard.

- Sampling wastewater from electroplating facilities regulated under 40 CFR Part 413 may be conducted using single grab samples [(assuming that the grab samples are representative of the daily discharge for a particular facility); see also preamble discussion at 44 Fed. Reg. 52609, September 7, 1979]

- A series of grab samples may be needed to obtain appropriate composite data for some parameters due to the nature of the pollutant being sampled. Examples of this situation include:

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[3] Daily maximum discharge limits are controls on the average wastewater strength over the course of the operating day. They are not intended to be instantaneous limits applied at any single point during that operating day.

- Sampling for parameters which may be altered in concentration by compositing or storage. These pollutants include pH-sensitive compounds (i.e., total phenols, ammonia, cyanides, sulfides)[4] and volatile organics such as purgeable halocarbons, purgeable aromatics, acrolein, and acrylonitrile.

- Sampling for pollutants with short holding times such as hexavalent chromium and residual chlorine; and

- Sampling for pollutants which may adhere to the sample container or tubing such as fats, oil and grease. Individual analysis for these parameters ensures that all the material in the sample is accounted for.

B. Compliance With Local Limits

• Local limits may be established on an instantaneous, daily, weekly or monthly-average basis. The sample type used to determine compliance with local limits should be linked to the duration of the pollutant limit being applied.

- Compliance with instantaneous limits should be established using individual grab samples. Exceedances identified by composite sampling are also violations.

- Compliance with daily, weekly or monthly average limits should be determined using composited sampling data, with the same exceptions noted in A, above.

- Measurements of wastewater strength for non-pretreatment purposes (e.g., surcharging) may be conducted in a manner prescribed by the POTW.

GRAB SAMPLING AS A SUBSTITUTE FOR COMPOSITE SAMPLING

EPA is aware that a number of Control Authorities currently rely on a single grab sample to determine compliance, particularly at small industrial users, as a way of holding down monitoring costs. It is EPA's experience that the process activities and wastewater treatment at many industrial facilities may not be sufficiently steady-state as to allow for routine use

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[4] Certain pH-sensitive compounds can be automatically composited without losses if the collected sample is only to be analyzed for a single parameter. Additionally, a series of grab samples may be manually composited if appropriate procedures are followed.

of single grab results as a substitute for composite results. Therefore, the Agency expects composited data to be used in most cases. However, there are several circumstances when a single grab sample may be properly substituted for a single composite sample. These situations are:

- Sampling a batch or other similar short term discharge, the duration of which only allows for a single grab sample to be taken;

- Sampling a facility where a statistical relationship can be established from previous grab and composite monitoring data obtained over the same long-term period of time;[5] and

- Where the industrial user, in its self-monitoring report, certifies that the individual grab sample is representative of its daily operation.

Except for these circumstances, Control Authorities should continue to use composite methods for their compliance sampling.

GRAB SAMPLES AS A COMPLIANCE SCREENING TOOL

Control Authorities may consider using grab samples as a compliance screening tool once a body of composite data (e.g., Control Authority and self-monitoring samples obtained over a year's time), shows consistent compliance. However, in the event single grab samples suggest noncompliance, the Control Authority

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[5] Grab sampling may provide results that are similar to composite sampling. See for example, a March 2, 1989, Office of Water Regulations and Standards (OWRS) Memorandum to Region IX describing the results of a statistical analysis of sampling data from a single industrial facility. These sampling data included both individual grab and flow-proportional, composite sampling obtained during different, non-overlapping time periods. After reviewing the data, OWRS concluded that the composite and grab sample data sets displayed similar patterns of violation for lead, copper, and total metals. In fact, the analyses did not find any statistically significant difference in the concentration values measured between the grab and composited data. Furthermore, additional statistical tests of the two data sets indicated that the means and variances for each pollutant were similar. The statistical conclusion was that the plant was judged to be out of compliance regardless of what data were analyzed.

and/or the industrial user should resample using composite techniques on the industrial users effluent until consistent compliance is again demonstrated.[6]

Control Authorities may also rely on single grab samples, or a series of grab samples for identifying and tracking slug loads/spills since these "single event" violations are not tied to a discharger's performance over time.

Any time an SIU's sample (either grab or composite) shows noncompliance, the General Pretreatment Regulations, at 40 CFR 403.12(g)(2), require that the SIU notify the Control Authority within twenty four (24) hours of becoming aware of the violation and resample within 30 days. Furthermore, EPA encourages Control Authorities to conduct or require more intensive sampling in order to thoroughly document the extent of the violation(s). Of course, the use of grab samples should be reconsidered in the event the SIU changes its process or treatment.[7]

SUMMARY

The collection and analysis of sampling data is the foundation of EPA's compliance and enforcement programs. In order for these programs to be successful, wastewater samples must be properly collected, preserved and analyzed. Although the Federal standards and self-monitoring requirements are independently enforceable, Control Authorities should specify, in individual control mechanisms for industrial users, the sampling collection techniques to be used by the industry. Generally, pretreatment sampling should be conducted using composite methods wherever possible, to determine compliance with daily, weekly or monthly average limits since this sampling technique most closely reflects the average quality of the wastewater as it is discharged to the publicly owned treatment works. Grab samples should be used to determine compliance with instantaneous limits. There are circumstances when discrete grab samples are also an appropriate, cost effective means of screening compliance with daily, weekly and monthly pretreatment standards.

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[6] Where grab samples are used as a screening tool only (i.e., consistent compliance has been demonstrated by composite data), the results should not be used in the POTW's calculation of significant noncompliance (SNC).

[7] When POTWs choose to allow the SIU to collect single grab samples, the POTW should draft the SIU's individual control mechanism to clearly indicate that grab samples are to be obtained thereby preventing any uncertainty at a later date.

In summary, there are limited situations in which single grab sample data may be used in lieu of composite data. Assuming adequate quality control measures are observed, analyses of these grab samples can indicate noncompliance with Federal, State and Local Pretreatment Standards and can form the basis of a successful enforcement action. Grab sampling can also be useful in quantifying batches, spills, and slug loads which may have an impact on the publicly owned treatment works, its receiving stream and sludge quality.

Should you have any further comments or questions regarding this matter, please have your staff contact Mark Charles of OWEC at (202) 260-8319, or David Hindin of OE at (202) 260-8547.

cc: Frank M. Covington, NEIC
Thomas O'Farrell, OST
Regional and State Pretreatment Coordinators
Lead Regional Pretreatment Attorneys, Regions I - X
Approved POTW Pretreatment Programs

VI. C.

VI. SPECIALIZED ENFORCEMENT TOPICS

C. SECTION 311

"Oil Spill Enforcement", dated January 8, 1974. **Outdated.**

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

JAN 8 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

TO: Regional Enforcement Directors
Surveillance and Analysis Directors
Regional Oil and Hazardous Materials Coordinators

FROM: Assistant Administrator for Enforcement and General Counsel

SUBJECT: Oil Spill Enforcement

Attached is a status report of EPA Oil and Hazardous Materials spill enforcement actions covering the period January 1 to October 1, 1973. It shows a great improvement over last year's record, although some Regions should apparently be more active. Some Regions with few actions reported may be relying on strong Coast Guard enforcement programs. All Regions should send me the Coast Guard records that would indicate the number of enforcement actions taken and the results to date. This may present a more complete picture of the status of spill enforcement activities.

I realize that lack of manpower and resources may result in the inability to follow up oil spill referrals, particularly in light of the present priority being rightly accorded to permit issuance and follow-up. What is needed, I believe, is a more efficient use of those Enforcement and Surveillance and Analysis personnel already working on oil spill problems. It is particularly important that Surveillance and Analysis personnel work closely with Enforcement staffs to maximize the number of investigations that can be completed and cases that can be prepared, in addition to the vital job of oil spill clean-up. Wherever reported spills cannot be investigated by the Environmental Protection Agency or the U. S. Coast Guard, a Section 308 information request should be sent to the discharger. Regional Administrators were delegated the authority to administer Section 308 in the Part 125--NPDES regulations, promulgated May 22, 1973 (38 Federal Register 13531). You should also encourage State agencies to provide EPA with evidence obtained from State investigations.

Some Regions have already been successfully using Section 308 letters in their oil enforcement programs. For those who have not, a suggested format is attached which should be helpful, which was prepared by Henry Stetina. Regional comments on this format should be forwarded to Rick Johnson, with a copy to Henry Stetina.

The following guidelines should apply when a Section 308 letter is sent to a discharger:

1. Section 308 letters should be used when a violator reports a spill which EPA is unable to investigate on scene.

2. Section 308 letters may also be used occasionally to supplement EPA or State investigations.

3. Section 308 information requests should not be utilized to investigate situations which may culminate in criminal prosecution.

4. Section 308 letters must be posted by "Registered Mail -- Return Receipt Requested."

5. Each Region must carefully maintain a log indicating for each letter the date mailed, the date received and the date a response is due.

6. When a Section 308 letter is used, the Enforcement Division should plan to exercise Section 309 sanctions if the violator fails to respond or if the response contains false statements -- the falsity of which can be established.

7. If the complete information submitted in response to the letter indicates that a violation did occur, that evidence should be referred to the Coast Guard as basis for a Section 311(b)(6) civil penalty.

A copy of the discharger's response should be automatically sent to the Emergency Response Branch in your Region.

To improve oil spill enforcement procedures within Regions, and to share successful Regional techniques among Regional staffs, we are planning a meeting for a representative of each Oil Enforcement staff and their counterpart in the Emergency Response Branch on February 20 and 21, 1973, in Atlanta, to be conducted in cooperation with the Oil and Hazardous Materials Division. Any suggestions for possible topics

to be included in the agenda should be sent to Patricia O'Connell, Headquarters. This will be a working level meeting which will focus on legal and investigative problems. Coast Guard and Justice Department participation is planned. We also plan to discuss the new EPA spill prevention regulations, and their implementation.

Alan G. Kirk II

Enclosures

cc: OGC Chron
Reading

Rick Johnson
Henry Stetina
Patricia O'Connell
Assistant Administrator for Air & Water Programs

RJohnson:dwk:12/28/73

Region	No. of Oil Spills Reported to Emergency Branch	No. of Oil Spills Also Reported to Enforcement	No. of Spills Enforcement Referred to Coast Guard	No. of Spills Enforcement Referred to U. S. Attorney (FWPCA)	No. of Spills Enforcement Referred to U. S. Attorney (Refuse Act)	Total Enforcement Actions
I	800	175	17	3	9	29
II	217	15	7		1	8
III	603	100	51	3	1	55
IV	192	61	52	19	- -	71
V	210	310	16	4	30	50
VI	499	17	8	1	3	12
VII	151	151	49	16	4	69
VIII	477	42	22	1	- -	23
IX	- -	24	9	1	- -	10
X	10	10	9	1	- -	10
Total.	3314	905	240	49	48	337

OIL AND HAZARDOUS MATERIALS SPILL ENFORCEMENT

JANUARY 1 [illegible] 1973

Draft letter for Regional Administrators signature

Gentlemen:

The Environmental Protection Agency has received a report that your company was involved in the discharge of a harmful quantity of oil, estimated to be gallons into waters of the United States, to-wit: (name of waterway) near (city), (state) on or about (time, date) from a (truck, pipeline or facility) which you own (or operate).

The 1972 Amendments to the Federal Water Pollution Control Act (hereinafter, the "Act") prohibits the discharge of oil or a hazardous substance into or upon the waters of the United States in harmful quantities [33 U.S.C. 1321(b)(3)]. Any owner or operator of a vessel or facility from which oil or a hazardous substance is discharged shall be assessed a civil penalty by the Coast Guard of not more than $5,000 [33 U.S.C. 1321(b)(6)]. The definition of harmful quantities of oil appears in Title 40, Code of Federal Regulations, Section 110.3.

In order for this Agency to carry out its responsibilities under the Act, you are required under authority of Section 308 of the Act (33 U.S.C. §1318) to submit a letter of explanation including the specific information listed in Attachment A.

The letter of explanation must be submitted to: (Enforcement Director, Region address) within fourteen (14) days of receipt of this letter. It must be signed by a duly authorized official of the corporation or company. The information submitted will be considered in evaluating whether the oil spill violated Section 311. (Please note that your reply in no way constitutes immediate notification of a spill to the appropriate federal agency, as required by Section 311(b)(5).) Section 309 of the Act (33 U.S.C. §1319) provides civil and criminal penalties for failure to submit information required under Section 308 and criminal penalties for knowingly making a false statement in any submission under Section 308.

If you have any questions please contact (name), Attorney Legal Branch, Enforcement Division, at (phone number).

Sincerely yours,

"Civil Penalties Collected for Violations of 40 C.F.R. Part 112" - Transmittal to USCG Districts of Deposit in Revolving Fund Account, dated December 24, 1974. **Outdated.**

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

DEC 24 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

To: Regional Enforcement Directors

From: Director, Enforcement Division

Subject: Civil Penalties Collected for Violations of 40 CFR Part 112 - Transmittal to USCG Districts for Deposit in Revolving Fund Account

Civil penalties collected for violations of the subsections of section 311 and regulations issued pursuant to section 311 of the FWPCA are being deposited in the revolving fund established by section 311(k) of the FWPCA which reads as follows:

> "(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

In compliance with the foregoing, civil penalties collected for violations of EPA's Oil Pollution Prevention Regulations, 40 CFR Part 112, are to be forwarded, by the EPA regional offices, to the main office of the U.S. Coast Guard District within which the violation occurred, for inclusion in the Coast Guard's revolving fund account established pursuant to section 311(k) of the FWPCA. The following procedures should be followed:

(1) Checks in payment of the civil penalty should be made payable to the "United States of America." Checks made payable to "EPA," "Treasurer of the U.S.," etc. are acceptable so long as the amount of the check is the same as the civil penalty. Do not endorse any such checks.

(2) The checks should be forwarded to the U.S. Coast Guard District with a cover letter setting out the following:

(a) Legal name and address of owner/operator charged with the violation.

(b) Date and nature of violation, including a citation of the relevant statutory and regulatory provisions. (i.e., failure to have SPCC Plan in violation of 40 CFR Part 112.3).

(c) EPA Regional Office Enforcement file number.

(d) Date of check, name of bank, amount of check.

(e) A statement that the check is being forwarded for deposit in the U.S. Coast Guard's revolving fund, and

(3) At times the EPA Part 112 violation will have as its genesis facts establishing other law violations. Where the Part 112 violation resulted from facts establishing another Federal law violation, including but not limited to the FWPCA's section 311 provisions relating to oil spills or failure to notify, identification data on the other Federal law violation, for the purpose of avoiding possible conflicts, should be included in the transmittal to the USCG.

(4) Where the violation, for which the check was submitted, is also the basis for a referral to a U.S. Attorney, the U.S. Attorney should be informed of the disposition of the EPA civil penalty proceeding.

J. Brian Molloy

Attachment A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Report of Oil or Hazardous Material Discharge

The following information is submitted concerning a discharge of oil or hazardous material:

1. Time and date of discharge.

2. Location of discharge, including:

   a. name of municipality and state;

   b. name and address of industry or commercial establishment at which the discharge occurred, if applicable;

   c. distance from receiving waterway.

3. Type of material discharged.

4. Quantity discharged.

5. Quantity of material which eventually reached the receiving waterway, and date and time it was discovered.

6. Type of vessel or facility (ship, barge, storage tank, tank truck, etc.) in which the oil was originally contained.

7. Describe in detail what actually caused the discharge.

8. Name and address of owner of facility causing the discharge.

9. Name and address of operator of facility causing the discharge.

10. Describe damage to the environment.

11. Describe steps the above named owner or operator took to clean up the spilled oil and dates and times steps were taken.

12. Actions by company to mitigate damage to the environment.

13. Measures taken by your company to prevent future spills.

14. List the federal and state agencies. if any, to which the owner or operator named in 8 and 9 above reported this discharge. Show the agency, its location, the date and time of the notification, and the official contacted.

15. List the names and addresses of persons you believe have knowledge of the facts surrounding this incident.

16. Name and address of person completing this report.

17. Your relationship, if any, to owner or operator.

18. List other information which you wish to bring to the attention of EPA. For example, number employed by the firm.

The above answers are true to the best of my knowledge and belief.

_____

Signature of person completing this report.

Date of Signature: _____

"Spill Prevention Control and Countermeasure (SPCC) Plan Program", dated April 23, 1975. **Outdated.**

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

APR 23 1975

MEMORANDUM

To: All Regional Administrators

From: Acting Deputy Assistant Administrator for Water Enforcement
Director for Oil and Hazardous Materials Control Division

Subject: Spill Prevention Control and Countermeasure (SPCC) Plan Program

This memorandum covers a number of SPCC program issues raised at the March 27-28 joint meeting of Environmental Emergency Branch and Enforcement Division representatives in San Francisco.

Warning Letters to Violators

Several Regions are considering the transmission of warning letters as a means of giving notice to violations of SPCC requirements and obtaining compliance without going through the civil penalty assessment procedures. The warning letter device was discussed vigorously at the San Francisco meeting with strong arguments made both for and against warning letters. After careful consideration we have decided that warning letters are unnecessary and should not be used. The preferred procedure, upon detection of a violation, is to issue a notice of violation with a proposed civil penalty. The notice of violation will get the attention and compliance response from the owner or operator faster than a warning letter. As appropriate, the penalty can be compromised down to a much smaller figure or waived altogether. The notice of violation, when used in this manner, has the advantages of a warning letter but provides more clout with no loss of time.

Nature and Conduct of Civil Penalty Hearings

It is important that everyone connected with the civil penalty hearings provided for in 40 C.F.R. Part 114 understand that these hearings are to be informal. They can be held in an office or conference room with the casualness of a routine meeting. No formal record is necessary. No undue attention need be given to the materiality or relevance of statements or evidence offered by participants. The rules of evidence employed in courtrooms and formal hearings are not appropriate for Part 114 civil penalty hearings. No cross examination is required. The time and resources of Regional attorneys involved with these hearings should be kept to a minimum.

It should be noted that the Presiding Officer at a civil penalty hearing can raise as well as lower a proposed civil penalty.

Selection of Hearing Officers

Section 114.6 of the civil penalty regulations provides that the Presiding Officer may be any attorney in EPA who has no prior connection with the case. To maintain an atmosphere of fairness and impartiality, Regional Administrators should not appoint Enforcement Division Directors or other Enforcement Division supervisory personnel. Similarly, it is desirable to avoid appointing water enforcement attorneys. Because of the informality of the hearing and the relatively simple responsibilities of the Presiding Officer, Agency Administrative Law Judges should not be asked to conduct these hearings. The most desirable candidates for Presiding Officers are attorneys in the Regional Counsel's Office. Also acceptable, although with some loss of the appearance of impartiality, are Enforcement Division attorneys working in non-water programs such as air and pesticides.

Criteria for Civil Penalty Levels

The desirability of establishing national criteria for uniform assessment of civil penalties was discussed at the San Francisco meeting, but no conclusion was reached. We have decided to form a Headquarters-Regional work group to determine whether such criteria would be desirable and, if so, to set up a matrix or some other system for uniform civil penalty assessment.

Jurisdiction Over Local, State, and Federal Facilities

Doubt as to whether federal, state, or local facilities are subject to SPCC requirements has been raised because the definition of "person" in section 311 does not explicitly include federal, state, and local entities. Our interpretation of section 311 and the SPCC regulations is that local, state, and federal entities are subject to SPCC plan preparation and implementation requirements. A General Counsel's legal memorandum to this effect will be distributed shortly.

Inclusion of Animal and Vegetable Oils in Section 311 Definition of "Oil"

Attached are four letters discussing the inclusion of animal and vegetable oils in the section 311 definition of "oil." EPA and the U.S. Coast Guard have always treated spills of non-petroleum based oils as subject to the civil penalty and cleanup provisions of section 311. However, the National Broiler Council and similar organizations have questioned this interpretation, and, as a result, many users of animal and vegetable oils are not in compliance with the SPCC regulations and have not submitted requests for extensions of time for compliance. In his January 9, 1975, letter Alan Kirk made clear EPA's position that non-petroleum oils are included in the section 311 definition of "oil" and that animal and vegetable oil users are subject to the SPCC plan preparation and implementation requirements of Part 112.

You will note in Mr. Kirk's January 9 letter and Rick Johnson's February 3 letter that, in view of the good faith efforts of the animal and vegetable oil users to determine whether their facilities are subject to the SPCC regulations, we will consider requests for extensions of time for compliance received from users of non-petroleum based oils. Such requests should be approved in cases where the requestor can demonstrate his reasonable belief that he was not subject to the SPCC program and his firm commitment to comply fully with SPCC requirements. Civil penalties for failure to request extensions of time, in accordance with the timetable set out in Part 112, should not be imposed in these situations. Part 112 will be amended to clarify that the Regional Administrators have the authority to grant such extensions for appropriate reasons in addition to those listed in §112.3(f). Any grant of additional time should provide for

"Penalty Assessment Procedures under Section 311(j)(2)", dated March 29, 1976. **Outdated.**

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

29 MAR 1976

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Penalty Assessment Procedures Under Section 311(j)(2)

FROM: Assistant Administrator for Enforcement

TO: Regional Enforcement Directors

On December 2, 1975, the Associate General Counsel for Water informed me of the case, United States v. Independent Bulk Transport, Inc., 394 F. Supp. 1319, 8 ERC 1202, (S.D.N.Y. May 29, 1975), in which Judge Frankel found that the requirement in section 311(b)(6) that penalties be assessed only after "notice and opportunity for a hearing" was violated because both in the hearing and in the appeal to the Commandant "matters not disclosed to defendant became part of the Agency's case record and basis for decision."

Similarly, penalty assessment procedures under section 311(j)(2) for violation of SPCC regulations (40 CFR Part 112) must also provide "notice and an opportunity for a hearing." Thus, the ruling in Independent Bulk Transport is applicable to section 311(j)(2) proceedings. In order to assure that this situation does not recur, the following procedures must be followed:

"1. Before the hearing, the defendant must be given copies of all materials which have been or will be submitted to the Presiding Officer. If the materials are too voluminous to make this practicable, the defendant or his attorney must be notified of an opportunity to review all such materials and make copies at their expense. The materials or the opportunity to review and copy them must be provided in sufficient time before the hearing to allow the defendant a reasonable opportunity to review and prepare to refute them.

"2. At no time may there be any ex parte communication concerning the case between the Presiding Officer and any EPA employee or agent engaged in the performance of investigation or prosecuting functions."

If you have any other suggestions to improve this procedure, please let me know. Thank you for your assistance and cooperation in this matter.

Stanley W. Legro

"Memorandum of Understanding Between the U.S. Coast Guard and the EPA", dated August 24, 1979. Outdated.

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

MAILING ADDRESS:
U.S. COAST GUARD (G-LMI/81)
WASHINGTON, D.C. 20590
PHONE: (202) 426-1527

16460
24 AUG 1979

Mr. Marvin B. Durning
Assistant Administrator for
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Durning:

I am signing the Memorandum of Understanding concerning the Assessment of Civil Penalties for Discharges of Oil and Hazardous Substances Under Section 311 of the Clean Water Act with the understanding that the Coast Guard and EPA have agreed that either agency may terminate this agreement 90 days after having given notice to the other agency of its intent to so terminate.

Sincerely,

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

a. any indication of misconduct or lack of reasonable care on the part of the owner, operator, or person in charge with respect to the discharge or with respect to the failure on the part of the owner, operator, or person in charge to adhere to the guidance of the OSC regarding clean-up or any policies, procedures, guidelines, or regulations applicable to clean-up;

b. any discharge incident other than a threat for which payments are made or to be made from the section 311(k) fund pursuant to 33 CFR section 153.407, except where no discharger has been identified;

c. any indication of prior violations by the discharger of any provision of the CWA, or violations of provisions of the CWA other than section 311(b)(6) CWA occurring at the time of the discharge, such as violations of a section 402 permit;

d. any discharge incident (other than a threat) as defined in 40 CFR section 1510.5 (1) which requires activation (by full or limited assembly, or by telephone) of the Regional Response Team as required by 40 CFR section 1510.34(d), as amended; and

e. any discharge involving human injury or evacuation, damage to plant or animal life, or contamination of water supply or underground aquifers.

Other referrals to the EPA may be made on a discretionary basis.

Assistant Administrator for Enforcement, United States Environmental Protection Agency — (date) 8/15/79

Acting Commandant, United States Coast Guard — (date) 8/14/79

SECTION I

GENERAL

The amendment of 2 November 1978 to section 311 CWA (Public Law 95-576) excluded certain discharges of hazardous substances from the application of section 311(b)(6) CWA. The discharges so excluded are: (a) discharges in compliance with a section 402 CWA permit, (b) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 CWA, and subject to a condition in such permit, and (c) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 CWA, which are caused by events occurring within the scope of relevant operating or treatment systems.

In addition, this amendment created two methods for penalizing discharges of hazardous substances. The first, which already existed as section 311(b)(6) CWA prior to the amendment, authorizes the USCG to assess a civil penalty not to exceed $5,000 for the discharge of oil or a designated hazardous substance (section 311(b)(6)(A)). The second method, created by the new amendment, provides that the EPA, through the Department of Justice, may initiate a civil action in Federal district court for penalties not to exceed $50,000 per spill of hazardous substance, unless such discharge is the result of willful negligence or willful misconduct, in which case the penalty shall not exceed $250,000 (section 311(b)(6)(B)).

The legislative history accompanying the amendment makes clear that Congress intended to create a dual option system for penalizing discharges of hazardous substances under section 311(b)(6) CWA. A discharger of a designated hazardous substance can be penalized under paragraph (A) or paragraph (B), but not both. The EPA and the USCG agree that paragraph (B) does not apply to oil discharges. The USCG will continue to assess oil discharge penalties administratively under paragraph (A).

SECTION II

COORDINATION

When a spill of a designated hazardous substance occurs, the On Scene Coordinator (OSC) will prepare a factual report of the incident. At the minimum, the report will address those criteria set forth in section III, of this memorandum.

The OSC will submit this report within 60 days of the spill incident. The OSC will submit the report to the District Commander when he is a USCG OSC, and to the Regional Administrator, when he is an EPA OSC.

When the District Commander reviews the USCG OSC's report and determines that one or more of the criteria set forth in section III, below is applicable to that case, the entire record of that case will be referred to the EPA Regional Administrator for review. In addition the District Commander will refer the entire record of:

(a) any other case involving a discharge of a designated hazardous substance from a point source subject to a section 402 permit or permit application, which, prior to or after the commencement of penalty action, the USCG determines is excluded from the application of section 311(b)(6) CWA; and

(b) any other case which, the District Commander considers appropriate for possible application of section 311(b)(6)(B) CWA.

When the Regional Administrator receives a case, either from an EPA OSC or upon referral from the District Commander, he will determine:

(a) whether the case is excluded from the application of section 311(b)(6) CWA, and, if not,

(b) whether a civil penalty action under section 311(b)(6)(B) CWA will be initiated.

The Regional Administrator will make these determinations within 90 days of his receipt of referral documents and will notify the District Commander promptly of the determinations in cases which have been referred. If the Regional Administrator determines that an action under section 311(b)(6)(B) CWA will be initiated, the case will be prepared in the EPA Regional Office and forwarded to the Department of Justice (DOJ) in accordance with established EPA case referral procedures.

If the Regional Administrator determines that the discharge is not excluded from the application of section 311(b)(6) CWA and that paragraph (B) action is inappropriate, or if EPA Headquarters declines to refer a Regional case, EPA will return the case to the USCG for appropriate action under paragraph (A).

Upon request, each Agency will make available to the other any or all cases, files, and records, including OSC reports and official determinations, regarding decisions concerning exclusions or the imposition of section 311(b)(6)(A) or (B) penalties. Where there is disagreement as to the disposition of a particular case, the District Commander and the Regional Administrator will consult to resolve the matter. If necessary, the matter will be submitted to the respective Agency Headquarters for final resolution.

SECTION III

CRITERIA

The USCG and the EPA agree that if one or more of the following criteria exists, the District Commander will refer the case to the Regional Administrator in accordance with section II of this memorandum:

MEMORANDUM OF UNDERSTANDING BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES COAST GUARD CONCERNING THE ASSESSMENT OF CIVIL PENALTIES FOR DISCHARGES OF OIL AND DESIGNATED HAZARDOUS SUBSTANCES UNDER SECTION 311 OF THE CLEAN WATER ACT (33 USC 1321)

The United States Environmental Protection Agency (EPA) and the United States Coast Guard (USCG) have determined that it is necessary to establish procedures pursuant to which decisions may be made:

(1) Whether a discharge of a designated hazardous substance is excluded from the application of the civil penalty procedures prescribed by section 311(b)(6) of the Clean Water Act (CWA); and

(2) Whether action will be taken under paragraph (A) or under paragraph (B) of section 311(b)(6) CWA to impose a penalty for the discharge of a designated hazardous substance not so excluded.

The EPA and the USCG agree that decisions as to whether a discharge of a designated hazardous substance is excluded from the application of section 311(b)(6) CWA will be made initially by the EPA in cases evidencing particular potential violation gravity, i.e., meeting criteria set out in section III of this memorandum. In all other cases the decision will be made initially by the agency providing the On Scene Coordinator to the discharge incident. When a decision is made that a discharge is excluded, penalty action under section 311(b)(6) CWA will be withheld.

The EPA and the USCG agree that decisions as to whether action will be initiated to impose civil penalties under paragraph (B) of section 311(b)(6) CWA, will be made by the EPA. Cases involving USCG responses, which evidence particular potential violation gravity, i.e., meeting criteria set out in section III of this memorandum, will be transmitted to the EPA for its consideration. In all cases where EPA determines that it is appropriate to initiate civil penalty action under paragraph (B) of section 311(b)(6) CWA, the USCG will withhold the initiation of civil penalty action under paragraph (A) of section 311(b)(6) CWA.

This memorandum establishes policies, procedures, and guidelines concerning the responsibilities of the EPA and the USCG in carrying out the foregoing agreement.

The respective responsibilities of each agency specified in this memorandum may be delegated to their respective subordinates consistent with established procedures.

The EPA and the USCG will review the implementation of this memorandum at least one year from the effective date of 40 CFR Part 117 or sooner if agreed to by both agencies, and will make any changes to the policy, procedures,and guidelines set forth herein which are agreed to by both agencies.

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

AUG 16 1979

OFFICE OF ENFORCEMENT

Admiral John B. Hayes
Commandant, United States Coast Guard
United States Coast Guard Headquarters Building
2100 2nd Street S.W.
Washington, D.C. 20590

Dear Admiral Hayes:

I am signing the Memorandum of Understanding concerning the Assessment of Civil Penalties for Discharges of Oil and Hazardous Substances Under Section 311 of the Clean Water Act with the understanding that the Coast Guard and EPA have agreed that either agency may terminate this agreement 90 days after having given notice to the other agency of its intent to so terminate.

Sincerely yours,

Marvin B. Durning

Marvin B. Durning

"Jurisdiction over Intermittent Streams under § 311 of the CWA", dated March 4, 1981.

MAR - 4 1981

MEMORANDUM

SUBJECT: Jurisdiction Over Intermittent Streams under §311 of the Clean Water Act

FROM: Edward A. Kurent
Director, Enforcement Division (EN-338)

TO: Louise D. Jacobs
Director, Enforcement Division, Region VII

The 2nd Coast Guard District, St. Louis, Missouri, has raised the issue of whether Clean Water Act jurisdiction may be asserted over a seasonal drainage course which, at the time of the spill, contained only intermittent pools of water but which at other times flows to a named year-round watercourse. It has been suggested that the recent 10th Circuit opinion in United States v. Texas Pipe Line Company provides authority for the proposition that unless a body of water is a "running" or "flowing" stream at the time of a spill, it cannot be subject to §311 Clean Water Act jurisdiction.

The Texas Pipe Line case involved an oil spill from a pipeline that was struck by a bulldozer. Before the flow could be shut off, approximately 600 barrels of oil escaped. The oil spilled into an unnamed tributary of a named creek, which discharged into another named creek, which was a tributary of a navigable river. The record at trial indicated that there was a small flow of water in the unnamed tributary, but there was no evidence that the other streams were or were not flowing. The Federal Court for the Eastern District of Oklahoma held that the Federal Water Pollution Control Act (FWPCA) applies to tributaries of navigable waters regardless of whether there is a continuous flow of water through the tributaries to the navigable water:

> . . . the Court is of the opinion that the FWPCA Amendments of 1972 are applicable to the tributaries of navigable waters and that this is so regardless of whether there is a continuous flow of water from the point of

J.Ruys/jti/EN-336/320/2-26-81

> an oil spill, through any intermediate tributaries and eventually into navigable waters at the specific time of an oil spill. Water was flowing in the unnamed tributary of the Red River, a navigable river, was clearly one of "the waters of the United States" within the meaning of §1362(7), and was therefore one of the "navigable waters of the United States" under §1321(b)(3) . . . U.S. v. Texas Pipe Line Company, No. 77-63-C.

Among the issues on appeal to the 10th Circuit was whether the discharge of oil involved was into "navigable waters" within the meaning of the FWPCA. The 10th Circuit affirmed the district court's jurisdictional finding:

> While there is nothing in this record to show the effect on interstate commerce of this unnamed tributary, without question it is within the intended coverage of the FWPCA. It was flowing a small amount of water at the time of the spill. Whether or not the flow continued into the Red River at that time, it obviously would during significant rainfall.

The language in the Texas Pipe Line decision, to the effect that the unnamed tributary into which the oil was spilled was flowing at the time of the spill, has recently been cited by some parties as authority for the proposition that unless a body of water is a "running" or "flowing" stream at the time of a spill, it cannot be subject to §311 Clean Water Act jurisdiction. However, this interpretation is by no means dictated by the language of the 10th Circuit decision. Although it is noted in the decision that the body into which oil was spilled was flowing at the time of the discharge, it is not at all necessary to construe this as the essential jurisdictional fact in the case. A persuasive argument can be made that the Court would have affirmed the federal government's jurisdictional determination in Texas Pipe Line even absent a showing that water was flowing at the time of the spill, particularly since it ruled that it makes no difference whether the receiving water body is or is not discharging water continuously into a connected water course at the time of a spill for purposes of Clean Water Act jurisdiction.

In light of the ambiguity of the Texas Pipe Line decision, please take note that it continues to be the position of the enforcement Division that intermittent water courses which are ponded and non-flowing at the time of a spill are subject to OPA jurisdiction. This position is supported by the legislative history of the Act 1/ and by case law. 2/ Any jurisdictional disputes with the U.S. Coast Guard concerning this matter should be directed to Jerry Huys of my staff.

1/ See discussion of legislative history in United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (1979), and United States v. Holland, 373 F. Supp. 665, 672-73 (M.D. Fla. 1974) for proposition that Congress intended "waters of the United States" to reach to the full extent permissible under the Constitution.

2/ See United States v. Phelps Dodge Corporation, 391 F.Supp. 1181 (D. Ariz. 1975) for the proposition that the FWPCA extends to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest.

cc: Regional Enforcement Division Directors

"EPA Authority to Seek Court Imposed Civil Penalties Under Section 311(b)(6) of the CWA", dated November 19, 1984. **Outdated.**

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

NOV 19 1984

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: EPA Authority to Seek Court Imposed Civil Penalties Under Section 311(b)(6)(B) of The Clean Water Act

FROM: Ephraim S. King
Attorney
Solid Waste and Emergency Response Division (LE-132S)

TO: Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency Response Division (LE-132S)

ISSUE PRESENTED

Region X has requested a legal opinion regarding whether Section 311(b)(6)(B) of the Clean Water Act (CWA) grants EPA the authority to seek court imposed civil penalties for oil discharges.

CONCLUSION

A literal reading of Section 311(b)(6)(B) suggests that the Agency may have such authority. A review of the legislative history of that provision, however, indicates that it was enacted by Congress to modify the Section 311 hazardous substance program only. Consistent with this indication of Congressional intent, EPA has taken the position in an August 29, 1979 Memorandum of Understanding (MOU) with the United States Coast Guard (USCG) that suoparagraph (B) "does not apply to oil discharges." 44 Fed. Reg. 50785 (August 29, 1979). The Agency has taken the same position in its hazardous substance regulations. 40 C.F.R. §117.22(b) (1983), 44 Fed. Reg. 50774 (August 29, 1979), 44 Fed. Reg. 10277 (February 16, 1979). On the basis of relevant legislative history, EPA's role in proposing and interpreting the 1978 amendments which added this subparagraph to Section 311 and a review of relevant case law, I believe that the better interpretation of Section 311(b)(6)(B) is that EPA does not have authority to seek court imposed civil penalties relating to discharges of oil.

DISCUSSION

A. Statutory Language

Subsections 311(b)(6)(A) and (B) of the CWA provide a two tier penalty system administered jointly by the United States Coast Guard and EPA. Under subparagraph (A), the Coast Guard has exclusive authority to impose administrative penalties for discharges of oil and hazardous substances up to $5,000. Under subparagraph (B), EPA has exclusive authority to commence civil actions for penalties up to $50,000, and in those situations involving "willful negligence" or "willful misconduct" up to $250,000.

Subparagraph (A) of section 311(b)(6) provides that any owner, operator, or person in charge of a facility or a vessel "from which oil or a hazardous substance is discharged ... shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense." (emphasis added.) Subparagraph (A) clearly provides the Coast Guard with authority to impose administrative penalties for discharges of hazardous substances and oil.

Subparagraph (B) provides that "[t]he Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to a penalty under subparagraph (A) ...". (emphasis added.) Since the penalties under subparagraph (A) apply to discharges of both hazardous substances and discharges of oil, it would appear, based solely on the language of Section 311(b)(6), that the Administrator may seek civil penalties not only for discharges of hazardous substances but also for discharges of oil.

B. Legislative History

1. Introduction

The 1978 Amendments to the CWA added the penalty provisions of subparagraph (B) to Section 311 and also deleted certain other penalty provisions which had been established by the 1972 Amendments to the CWA. The legislative history of these two sets of amendments indicates that -- notwithstanding the language of the statute -- Congress intended EPA's authority under subparagraph (B) to extend only to hazardous substance discharges.

2. The 1972 Amendments to the Clean Water Act

In the 1972 Amendments to the CWA, Congress establishd clean-up liability provisions and penalty provisions for the discharge of oil and hazardous substances. The provisions relating to discharges of oil imposed liability upon the discharger for the costs of cleanup, removal, and mitigation incurred by the Government under Section 311(c) and (f) and authorized the Coast Guard to impose administrative penalties up to $5,000 per discharge.

The provisions relating to discharges of hazardous substances were somewhat more complicated. Congress distinguished between hazardous substances on the basis of whether they were "removable" or "non-removable". For "removable" hazardous substances, the administrative penalty and cleanup liability provisions outlined above applied in the same way under the same sections 311(b)(6), (c), and (f). However, for hazardous substances that were "non-removable" (and for which the cleanup liability provisions were therefore inapplicable), Congress authorized EPA to seek court-imposed penalties under Section 311(b)(2)(B). Under this subsection, EPA was required to determine which designated hazardous substances could be removed and, for those that could not, establish penalties of increasing severity which were designed to deter such discharges. The penalties which could be imposed by EPA under Section 311(b)(2)(B) were intended to act as an economic incentive for a higher standard of care in the handling of non-removable hazardous substances 1/ and, therefore, were much higher than those authorized for the Coast Guard under Section 311(b)(6). 2/

In its regulations implementing Section 311(b)(2)(B), EPA interpreted the term "removable" narrowly to mean only those substances that could physically be removed from water. 3/ For unlawful discharges of such removable substances, the Agency stated that the cleanup liability provisions of Section 311(c) and (f) would apply. For discharges of substances which could not be physically removed from water but which

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1/ Cong. Rec. S18995 (daily ed., October 14, 1978) (remarks of Senator Muskie); Senate Environment and Public Works Committee, S. Rep. No. 92-414, 93rd Cong., 1st Sess. 66 (1971).

2/ For the first two years following enactment of Clean Water Act Amendments, the penalties were not to exceed $50,000 per discharge incident. Upon expiration of that period, the penalty was increased not to exceed $5,000,000 for the discharge of non-removable hazardous substances from vessels, and $500,000 from facilities.

3/ 43 Fed. Reg. 10488 (March 13, 1978).

were, nonetheless, susceptible to mitigation action to minimize the damage, EPA's hazardous substance regulations provided that they were subject to both the cleanup liability provisions of sections 311(c) and (f) as well as the deterrent penalty provisions of section 311(b)(2)(B).

These regulations (as well as other Section 311 regulations) were challenged by the Manufacturing Chemists Association in federal district court. Manufacturing Chemists Association v. Costle, 455 F. Supp. 968 (W.D. La. 1978). The court held that EPA's regulations subjecting contain discharges to both clean-up liability and deterrent penalty provisions created "a system of penalties which fulfills not in the slightest the original legislative intent." Id. at 977. As the basis for its ruling, the court relied on the Section 311(a)(8) definition of "removable" which explicitly includes "such other acts as may be necessary to minimize or mitigate damage ..." The court also referred to a February 18, 1978 letter from Senator Muskie, which stated:

> Unfortunately, EPA's regulations on this subject are deficient .... [T]hey do not make a distinction between those hazardous substances which can and cannot be removed from water. The statute clearly intended that the distinction be made in order to determine whether a spill of a hazardous substance would be subject to a cleanup liability provision or the deterrent penalty provision. Id. at 979.

3. The 1978 Amendments to the Clean Water Act

The Manufacturing Chemists Association case triggered the introduction of a number of Senate amendments to Section 311. These amendments were added by the Senate to H.R. 12140, an EPA research and development reauthorization bill, which had already passed the House.

The Senate amendments made three major changes in the Section 311 penalty provisions. First, they redesignated Section 311(b)(6) -- the Coast Guard administrative penalty provision for discharges of oil and hazardous substances -- as Section 311(b)(6)(A). Second, they deleted Section 311(b)(2)(B) (the court imposed penalty authority which was keyed to the "removability" of hazardous substance discharges). Third, the amendments established a new court-imposed penalty authority under which the Administrator was authorized to commence a civil action for penalties of up to $50,000 against "any such person subject to the penalty under Section 311(b)(6)(A)." It is this provision which was enacted as Section 311(b)(6)(B).

Congress' intent in adding Section 311(b)(6)(B) was discussed during Senate and House floor debates on the amendments to

H.R. 12140. The legislative history on the purpose of the penalty provision is remarkably consistent on both sides of Congress and focuses exclusively on its application to hazardous substance discharges.

Senator Muskie explained the addition of Section 311(b)(6)(B) as follows:

> [T]he amendment would establish two options for penalizing dischargers of hazardous substances. The first option, which is already in the statute [Section 311(b)(6)(A)] consists of an administratively assessed penalty of up to $5,000 for each violation. The second option would be a civil action in Federal District Court for penalties not to exceed $50,000 per violation, unless the discharge was the result of willful negligence or misconduct, in which case the penalty maximum would be $250,000 per discharge. The amendment specifies the factors the court would assess in establishing the penalty. Cong. Rec. S18995 (daily ed., October 14, 1978) (emphasis added.)

Senator Stafford, the sponsor of the amendment opened his own explanatory comments by inserting into the record without objection a letter from EPA's Assistant Administrator for Water and Hazardous Materials, Mr. Thomas Jorling, to Senator Muskie. In that letter, Mr. Jorling explained the impact of the Manufacturing Chemists Association decision and requested that the Senate consider adding to the House R&D bill, H.R. 12140, a "non-controversial legislative proposal" which would resolve the issues ruled on by the Court. Id. at S19257. With respect to the question of hazardous substance penalties, Mr. Jorling explained the purpose of Section 311(b)(6)(B) as follows:

> The amendments we propose basically place hazardous substances on a par with oil in how they relate to the major components of Section 311, with one major exception. Rather than the $5,000 penalty limit on oil, the limit for hazardous discharges would be $50,000. Id. (emphasis added.)

Following his insertion of EPA's letter into the record, Senator Stafford elaborated at greater length on the purpose of Section 311(b)(6)(B):

> [T]he changes place hazardous substances on a par with oil in their relation to the major components of Section 311, except that the maximum civil penalty for their discharge would be $50,000, compared with $5,000 for oil....

> The $50,000 maximum involves a significant reduction from the existing $500,000 liability for facilities and $5,000,000 liability for vessels. Id., at S19258 (emphasis added.)

Senator Stafford's explanation 4/ appears to reflect an intention that Section 311(b)(6)(B) replace the hazardous substance deterrent penalty provisions of Section 311(b)(2)(B) contained in the 1972 Act. The first paragraph of his comments indicates that the penalties for discharges of hazardous substances and oil were intended to be different: $50,000 for hazardous substances "compared with $5,000 for oil." The second paragraph makes clear that while Section 311(b)(6)(B) represents a "reduction" in the 1972 hazardous substance deterrent penalties, it is in no way intended to eliminate them or fundamentally change their original application and purpose.

On the House side, Representative Breaux introduced the Senate amendments to H.R. 12140 with general explanatory comments similar to those of Senators Muskie and Stafford. He explained that "the bill amends Section 311 of the Act to provide for a program of notification, cleanup, and penalties for the discharge of hazardous substances" and that it "would amend Section 311 in such a way as to meet the court's concerns ..." Cong. Rec., H. 13599 (daily ed., October 14, 1978) (emphasis added). Representative Johnson, Chairman of the House Committee on Public Works and Transportaton, also spoke in favor of the bill and explained that "H.R. 12140 would amend Section 311 of the Federal Water Pollution Control Act concerning the regulation of hazardous substances." Id. at 13599. Chairman Johnson also introduced into the record a letter received from EPA Assistant Administrator for Water and Hazardous Materials, Mr. Thomas Jorling, which further explained the need for such legislation in terms almost identical to the letter received by Senator Muskie.

C. Memorandum of Understanding And Implementing Regulations

EPA and the Coast Guard executed a Memorandum of Understanding which established procedures under which the two agencies would determine whether a hazardous substance discharge should appropriately be subject to any 311(b)(6) penalty and, if so, whether it should be a Coast Guard adminstrative penalty or an EPA civil action penalty. (44 Fed. Reg. 50785, August 29, 1979). The MOU refers to Congress' intent to create a dual option system for penalizing discharges of hazardous substances under either Section 311(b)(6)(A) or Section 311(b)(6)(B). On the question of whether Section 311(b)(6)(B) applies to discharges of oil, Section I of the MOU simply concludes with the statement that "The EPA and the USCG agree that paragraph (B) does not apply to oil discharges." Id.

4/ This view was concurred in by Senator Muskie. Cong. Rec., supra at S18996

While no further explanation of the basis for this agreement is contained in the MOU, EPA's proposed rulemaking to implement Section 311(b)(6)(B) specifically addresses the point:

> The legislative history supporting the November 2, 1978 amendment does not demonstrate an intent to change the penalty structure under Section 311 for oil spill situations. Therefore, EPA does not intend to apply the 311(b)(6)(B) penalty to discharges of oil." 44 Fed. Reg. 10277 (February 16, 1979).

The Agency addressed this issue a second time in promulgating the final rule implementing the 1978 amendments to the Clean Water Act. In a response to one commenter's suggestion that section 311(b)(6)(B) be applied to discharges of oil, EPA again concluded that:

> The legislative history clearly indicates that the Section 311(b)(6)(B) penalty option only be used for discharges of hazardous substances. 44 Fed. Reg. 50774, (August 29, 1979.)

D. Analysis

The fundamental issue raised by Region X is whether, in interpreting Section 311(b)(6)(B), the "plain meaning" of the provision should control, or alternatively whether further reference to legislative history, contemperanous Agency interpretations, and Agency regulations should be considered.

A basic tenent of statutory construction is that statutes are to be interpreted in accordance with their "plain meaning." The relevance of the "plain meaning" rule is well recognized and is often relied upon by the courts. This rule was explained by the Supreme Court in Caminetti v. United States, 242 U.S. 470 (1917):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. 242 U.S. at 485.

As well known and often cited as this fundamental principle is, it is equally well recognized that the rule is by no means inviolate. In United States v. American Trucking Association Inc., 310 U.S. 534 (1940), the Supreme Court made clear that:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use,

> however clear the words may appear on 'superficial examination.' 310 U.S. 543-44 (citation omitted)

The tension between these two rules of statutory interpretation continues to be reflected in the court's treatment of this issue up to the present day. Statutory construction cases reflect a struggle between the recognition, on the one hand, that Congress cannot craft words to address every contingency and, on the other, an understanding that extrinsic interpretive materials, such as legislative history, are susceptible to manipulation for partisan purposes and, accordingly, may be unreliable. 5/

In the period following American Trucking, a number of different approaches to resolving this conflict have developed. In some cases, the courts appear to look back to a strict interpretation of the Caminetti approach. 6/ In other cases, the courts have fashioned a more liberal interpretation of the plain meaning rule; allowing consideration of legislative history where statutory language is ambiguous. 7/ Yet another

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5/ See e.g., United States v. Public Utilities Commission, 345 U.S. 295 (1953) (Jackson, J., concurring); Gemsco v. L. Metcalfe Walling, 324 U.S. 244 (1953); National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Board, 618 F.2d 819, 828 (D.C. Cir. 1980) ("[W]e note that interest groups who fail to persuade a majority of the Congress to accept particular statutory language often are able to have inserted in the legislative history of the statute statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative history.")

6/ See, e.g., National Railroad Passenger Corp., et al. v. National Association of Railroad Passengers, 414 U S. 453 (1974); Gemsco v. L. Metcalfe Walling, 324 U.S. 244 (1953).

7/ See e.g., United States v. Public Utilities Commission, 345 U.S. 295, 315-16 (1953) ("Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion."); Demby v. Schweiker, 671 F.2d 507 (D.C. Cir. 1981); Lawrence v. Staats, 640 F.2d 427 (D.C. Cir. 1981); United States v. United States Steel Corp., 482 F.2d 439, 444 (7th Cir. 1973), cert denied, 414 U.S. 909 (1973) ("We think that the statute is plain on its face, but since words are necessarily inexact and ambiguity is a relative concept, we now turn to the legislative history, mindful that the plainer the language, the more convincing contrary legislative history must be".)

group of cases allows recourse to extrinsic material where adherence to the plain language of the statute (even where such language is unambiguous) would frustrate a larger congressional purpose; such purpose often being devined by reference to applicable legislative history. 8/ Prominent among this latter group is the 1976 Supreme Court case of Train v. Colorado Public Interest Research Group (PIRG), 426 U.S. 1 (1976). In reversing the lower court's "plain-meaning" opinion, the Supreme Court in this case refused to give effect to clear statutory language in the Clean Water Act which included "radioactive materials" within the definition of "pollutant," holding that clear and unambiguous legislative history showed that a literal reading was contrary to Congress' intent.

The only certain conclusion that can be drawn from an examination of case law on this question is that while the "plain-meaning" rule continues to be an accepted principle of statutory interpretation, it is not dispositive in every case. This qualification is particularly true in the presence of conflicting legislative history where alternative statutory constructions are possible that better reflect and more easily fit with stated congressional intent.

As discussed above, an examination of the 1972 amendments to the Clean Water Act and associated legislative history clearly indicates that due to the very nature of certain hazardous substances, Congress considered and explicitly choose to adopt a penalty strategy that in certain repects was different than that provided for oil spills. The fundamental question that must be addressed in considering the 1978 amendments is whether Congress intended to abandon the hazardous substance deterrent penalty established in 1972 or substantially modify it to cover a new class of discharges.

8/ See, e.g., Cass v. United States, 417 U.S. 72 (1974); Malat v. Riddell, 383 U.S. 569, 571 (1966) ("Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself and necessary in order to effect the legislative purpose" (citations omitted)); Wilderness Society v. Morton, 479 F.2d 842, 855 (D.C. Cir. 1973) ("but we have also faced up to the reality that the plain meaning doctrine has always been subservient to a truly discernable legislative purpose however discerned" (citation omitted)); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 379 (D.C. Cir. 1973) ("In ascertaining congressional intent, we begin with the language of a statute, but this is subject to an overriding requirement of looking to all sources including purpose and legislative history, to ascertain discernable legislative purpose"). (citations omitted).

Senator Muskie explained the penalty provisions of the 1978 amendments and left no question that while Congress was modifying the articulation of its hazardous substance spill liability and penalty strategy in response to the Manufacturing Chemists Association decision, it was not abandoning the 1972 strategy or expanding it to cover oil discharges. Senator Stafford's comments reinforce the conclusion that Congress was committed to a special hazardous substance penalty provision and explicitly decided to leave the oil discharge penalty provisions unchanged.

On the House side, explanation and support for H.R. 12140 tracked the debate in the Senate. Representative Breaux specifically pointed out that while the bill provided for hazardous substance penalties, the Coast Guard administrative penalties (which covered oil) were to remain unchanged.

Taken alone, the legislative history provides a persuasive basis for concluding that Congress did not intend to extend the hazardous substance deterrent penalties to discharges of oil. However, other considerations are also relevant to the question and provide further support for this conclusion. Chief among these is the Agency's own involvement in the process that led to the 1978 amendments. While it cannot be presumed that Congress acted only in response to EPA's request for legislative assistance, it is clear from the fact that both the Senate and House formally incorporated EPA's request into the record that the Agency's position was carefully considered.

In his letter of request to Senator Muskie and Representative Johnson, EPA's Assistant Administrator for Water and Hazardous Materials could not have been more explicit on the question of penalties:

> The amendments we propose basically place hazardous substances on a par with oil in how they relate to the major components of Section 311 with one major exception. The present penalty structure would be replaced by one which sets a maximum fine of $50,000 for all hazardous dischargers. Cong. Rec. S19256 and H13600 (daily ed., October 14, 1978).

The request and explanation contained in this letter assumes particular relevance in view of the Supreme Court's holding that an Agency's interpretation "gains much persuasiveness from the fact that it was the [Agency] which suggested the provision's enactment to Congress." U.S. v. American Trucking Associations, Inc., supra, 310 U.S. at 549; Hassett v. Welch, 303 U.S. 303, 310 (1938).

Moreover, EPA's role did not end with its advisory function during the legislative process. Within the first month after

enactment of the 1978 amendments, EPA provided Congress with an Agency interpretation of Section 311(b)(6)(B). In a letter dated October 24, 1978 to the Chairmen of the Senate and House Committees with jurisdiction over the Clean Water Act, EPA's Assistant Administrator for Water and Hazardous Materials, Mr. Jorling, stated:

> It is our understanding that section 311(b)(6)(B) was intended solely to apply to hazardous substances, not to oil, which continues to be covered under section 311(b)(6)(A) of the amended Act .... In accordance with Congressional intent as described below, section 311(b)(6)(B) will only be applied to hazardus substance. (See attached letter)

On the general question of Agency legislative interpretations, it is well settled that courts show "great deference to the interpretation given the statute by the officials or agency charged with its administration" Udall v. Tallman, 380 U.S. 1, 16. Accord, e.g., Zuber v. Allen, 396 U.S. 168, 192 (1969); U.S. v. American Trucking Association, 310 U.S. 534 (1940); NRDC v. Train, 510 F.2d 692, 706 (D.C. Cir. 1975). This rule is particularly applicable when the Agency interpretation at issue "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961), quoting Norwegian Nitrogen Products Co. v. U.S. 288, U.S. 294, 315 (1933). Accord, e.g., U.S. v. Zucca 351, U.S. 91, 96 (1956). Congressional concurrence in an Agency's statutory interpretation is a further factor noted by the Court in Power Reactor Development Co. that may be relied upon as an indication of the interpretation's accuracy. Where Congress has been provided complete and direct notice of a particular statutory construction and has failed to take available legislative opportunities to correct that construction, then this inaction may be taken as "a de facto acquiesence in and ratification of" the Agency interpretation in question. Power Reactor Development Co, v. International Union of Electricians, supra, 367 U.S. at 409.

The Chairmen and ranking minority leaders of the Senate Environment and Public Works Committee and the House Public Works and Transportation Committee were personally notified by letter ten days after enactment of the 1978 amendments of the Agency's interpretation of Section 311(b)(6)(B). Further notice was provided, of course, through the Federal Register publication of the EPA - Coast Guard MOU and also by the proposal and final promulgation of hazardous substance regulations (40 CFR Part 117).

V. CONCLUSION

EPA's present position, which has been expressed in letters to Congress, federal regulations, and the EPA - Coast Guard MOU, is that Section 311(b)(6)(B) does not authorize it to impose civil penalties for discharges of oil. However, Region X suggests that a literal reading of subparagraph (B) leaves open the question of whether this interpretation is too narrow. I believe that the better interpretation of the provision is that does not authorize EPA to seek court imposed penalties for discharges of oil.

It should be noted that if the Agency decides to change its position on the applicability of Section 311(b)(6)(B) it would be necessary before acting on such reinterpretation to publish a renegotiated MOU with the Coast Guard and provide public notice of the change in the Agency's interpretation from that set forth in the proposed and final rulemaking preambles to 40 CFR Part 117.

Attachment

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

October 24, 1978

OFFICE OF WATER AND
HAZARDOUS MATERIALS

Honorable Jennings Randolph
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I want to thank you for your assistance in enacting amendments to section 311 of the Clean Water Act. I deeply appreciate the Congress's willingness to consider the section 311 amendments during the waning moments of the 95th Congress. Without the amendments, EPA could not have implemented any element of the hazardous substances spill program for a number of years. As a result of the efforts of the 95th Congress, we can build on the rulemaking effort conducted for the last few years and get a basic hazardous substances spill program into operation within a few months.

It has been brought to my attention that there may be some confusion over the applicability of the amended section 311(b)(6)(B). It is our understanding that section 311(b)(6)(B) was intended solely to apply to hazardous substances, not to oil, which continues to be covered under section 311(b)(6)(A) of the amended Act. In seeking an amendment to section 311, it was solely our intent to resolve the issues raised in the Court's injunction of the hazardous substances program. In accordance with Congressional intent as described below, section 311(b)(6)(B) will only be applied to hazardous substances.

I believe that Congress's intent to apply section 311(b)(6)(B) solely to hazardous substances is clear. When H.R. 12140 was introduced on the floor of the Senate, Senator Stafford's statement made clear the intent that the reduction of penalties to $50,000 applied solely to hazardous substances. In explaining section 311(b)(6)(B), he stated the amendment creates "two methods for penalizing dischargers of hazardous substances". He further described how the amendment provided for a sufficient incentive for a high standard of care for "hazardous substances discharges." Finally, in describing the factors a Court would consider in assessing a penalty under section 311(b)(6)(B), Senator Stafford indicated that one of the factors, the gravity of the violation, would

include consideration of the "disposal characteristic of the substance". Section 311 of the Act and the recent amendments distinguish "substances" from oil.

The statements made on the floor of the House of Representatives by Congressman John Breaux when the Senate amended version of H.R. 12140 was adopted also support the interpretation that Congress intended to apply section 311(b)(6)(B) to hazardous substances and not to oil. Congressman Breaux stated "...the bill amends section 311 of the Act to provide for a program of notification, clean up, and penalties for the discharge of hazardous substances." In describing the two tier penalty system, Congressman Breaux noted that the Coast Guard's authority under section 311(b)(6)(A) to administratively impose penalties of up to $5,000 for discharges of oil and hazardous materials remains unchanged. Further, in describing the "gravity of the violation" and the discharger's efforts to "mitigate the effects of the discharge", Congressman Breaux indicates that these factors, which the Court is to consider in establishing the penalty under section 311(b)(6)(B), apply to hazardous substances.

Again, thank you for your efforts to enable implementation of a hazardous substances spill program.

Sincerely,

Thomas C. Jorling
Assistant Administrator
for Water and Waste Management

VI. D.

VI. SPECIALIZED ENFORCEMENT TOPICS

D. CITIZEN SUITS

"EPA Response to Citizen Suits", dated July 30, 1984.

JUL 30 1984

MEMORANDUM

SUBJECT: EPA Response to Citizen Suits

FROM: William D. Ruckelshaus /s/ WDR
Administrator

TO: Regional Administrators (Regions I-X)
Regional Counsels (Regions I-X)

I recently met with several environmental groups to discuss their concerns regarding EPA responses to 60-day citizen-suit notices and the citizen suits themselves. The environmental groups have asked us to take several actions in support of citizen suits.

EPA values the efforts of citizen groups to bring instances of non-compliance to our attention and to support EPA efforts to reduce that non-compliance. Of course, in deciding on its own course of action, EPA must review the merits of every citizen suit notice on a case-by-case basis. Nonetheless, I greatly appreciate these groups' efforts to complement the EPA enforcement program and help promote compliance.

During our meeting, the citizen groups thanked me for the cooperation of EPA employees in responding to information requests on non-compliance. I would like to pass this "thank you" on to all of you, and urge all Agency enforcement personnel to continue to cooperate with citizen groups by promptly responding to these requests and reviewing 60-day notices.

As you may know, the Office of Policy, Planning and Evaluation (OPPE) is currently conducting a study of citizen suits through a contract with the Environmental Law Institute (ELI). OPPE expects to complete this study by the end of September 1984. Upon completion of the study, I will decide whether to issue a detailed EPA policy statement on citizen suits.

cc: Ross Sandler, Natural Resources Defense Council

LE-130A:A.Danzig:th:Rm.3404:7/10/84:475-8785:DISK:DANZIG:1/23

JUL 30 1984

Ross Sandler
Senior Attorney
Natural Resources Defense Council
122 East 42nd Street
New York, N.Y. 10168

Dear Mr. Sandler:

I enjoyed meeting with you and representatives of environmental groups on June 12, 1984, to discuss your views on citizen suits. I truly believe that citizen groups have played an important role in bringing instances of non-compliance to EPA's and the public's attention. Your efforts, especially under the Clean Water Act, have brought us closer to statutory goals, and for this I am grateful.

In response to your concerns, I have directed the Regional Offices to: (1) continue to cooperate with requests for information on non-compliance, and (2) to promptly review 60-day citizen-suit notices. (See attached memorandum). EPA will continue to decide on a case-by-case basis how to respond to citizen suit notices after consideration of the merits of the contemplated action and consistency with EPA enforcement priorities.

As you may know, EPA is currently studying citizen suits through a contract to the Environmental Law Institute. Upon completion of the study, expected by the end of September 1984, I will decide whether to issue a more detailed policy statement regarding how EPA should handle citizen suits.

Thank you again for expressing your concerns.

Sincerely yours,

/S/ WILLIAM D. RUCKELSHAUS

William D. Ruckelshaus

Attachment

LE-130A:A.Danzig:th:Rm.3404:7/10/84:475-8785:DISK:DANZIG:1/26

"Clean Water Act Citizen Suit Issues Tracking System", dated October 4, 1985.

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

OCT 4 1985

MEMORANDUM

SUBJECT: Clean Water Act Citizen Suit
Issues Tracking System

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Rebecca Hanmer, Director
Office of Water Enforcement
and Permits

Colburn Cherney
Associate General Counsel
for Water

Ann Shields, Acting
Section Chief, Policy, Legislation and
Special Litigation, DOJ

Regional Counsels, Regions I-X

Purpose

The purpose of this memorandum is to establish procedures by which EPA will monitor important case developments involving national legal and policy issues, in order to decide on an appropriate position for the government to take regarding those issues, in citizen enforcement suits brought under §505 of the Clean Water Act.

Due to the growing number of §505 enforcement actions, and the importance of the legal, technical, and policy issues raised in them, it has become necessary for the Agency to develop a better system to track national issues arising in these citizen suits once they are filed. OECM-Water Division already maintains a log of citizen notices of intent to sue. We will expand the existing system to track subsequent filings,

case developments, and judicial decisions. In that way, the Federal government will be in a better position to decide if, when, and how to participate in cases which may result in the establishment of legal or policy precedents affecting EPA's enforcement actions.

The Regions remain responsible for deciding whether a Federal judicial enforcement action is warranted to address the violations at issue. The new Tracking System does not affect Regional monitoring, review and recordkeeping systems relating to what enforcement response EPA decides to pursue against a violator in the wake of a citizen notice. Instead, the Tracking System is intended to enable the government to make timely and informed decisions as to whether, for example, it should intervene or file an amicus brief in a citizen enforcement suit to protect a Federal interest regarding a legal or policy question of national interest.

Procedures

EPA regulations (40 CFR 135) provide that CWA citizen notices of intent to sue must be sent to both the Regional Administrator (of the Region in which the alleged violations occurred) and the Administrator of EPA as well as to the affected State. My office will notify the Regional Counsel when we receive a citizen notice.

Promptly upon receipt of a §505 enforcement notice (in which the Administrator is not a proposed defendant), OECM-Water will send a short form letter to the prospective citizen plaintiff, requesting that a copy of the filed citizen complaint be sent to my office. (As of September, 1985, there are CWA amendments pending which would require citizen plaintiffs to send complaints and consent decrees to the Agency. If enacted, these amendments would require a response to this first letter.) Upon receipt of a filed complaint, OECM-Water will then request copies of all dispositive pleadings and court judgments or settlements. It is anticipated that voluntary responses to these requests will provide OECM-Water with the means to adequately track the progress of these suits and any substantial issues they raise at trial or on appeal, in the majority of cases.

OECM-Water will maintain a file for each citizen enforcement suit. As pleadings are received, my office will review them to identify those issues raised which are of particular concern or interest to the Federal government. We will also send copies of all citizen complaints and other significant documents to Regional Counsels when requested or appropriate as well as to the Policy, Legislation and Special Litigation (PLSL) office in the Department of Justice. Furthermore, we will share the information received with OWEP, to give the program office an opportunity to review technical and policy issues raised.

When a legal issue arises which may merit some level of involvement by the Federal government, such as the filing of an amicus curiae brief, my office will coordinate any formal response with the Associate General Counsel for Water and with PLSL at the Department of Justice. In those situations, my office will also contact the Regional Counsel and the Director of OWEP's Enforcement Division. This group will be responsible for collectively deciding, in a timely manner, (1) whether government action on a specific issue arising in a citizen suit is warranted, (2) what the government's action should be, and (3) what roles the participating offices will play in pursuing any appropriate action.

As part of this expanded citizen suit tracking system, my office is now initiating the compilation or a compendium of documents which set out the government's position on general issues which have arisen in the context of CWA citizen suits. We will share this compendium with you when it is completed.

The procedures described above make up an interim system for tracking national issues in CWA citizen enforcement suits, and will be undertaken at the beginning of FY86. As other Divisions within OECM continue developing such systems as needed, or as proposed legislative amendments are adopted, the CWA procedures may be modified so as to promote cross-statutory consistency in citizen suit tracking.

If you have any questions about this new citizen suit tracking system, or related CWA §505 issues, please contact me (FTS 475-8180), Assistant Enforcement Counsel Jack Winder (FTS 382-2879), or staff attorney Elizabeth Ojala (FTS 382-2849).

cc: Courtney M. Price
Richard Mays
Directors, Regional Water Management Divisions
David Buente, DOJ
OECM-Water Attorneys
OECM Citizen Suit Work Group Members

Note: As of the date of issuance of this policy compendium, this tracking system has not been implemented by OECM.

"Notes on Section 505 CWA Citizen Suits," dated February 3, 1986.

"Notes on Section 505 CWA Citizen Enforcement Suits, February 3, 1986".

Notes were missing from the Compendium.

Notes on Section 505 CWA Citizen Enforcement Suits, February 3, 1986

I. Statutory Framework

A. Citizens may sue any person violating a CWA "effluent standard or limit," or an AO. (Note that RCRA and proposed CERCLA provisions differ significantly insofar as they authorize citizen suits in response to imminent and substantial endangerments, a standard which arguably does not clearly specify what behavior by a regulated party can keep him out of trouble with citizens).

B. Federal courts may enforce the standard or limit and apply civil penalties for violations of standards, limits or orders.

C. Citizens may not sue if EPA or a State is "diligently prosecuting" a case in court, but may intervene as a matter of right.

D. A court may award the costs of litigation to any party where appropriate.

E. Citizens also may sue EPA to perform any nondiscretionary act or duty. (Note that courts are split on whether CWA enforcement by EPA is discretionary).

F. Pending CWA legislative amendments:

- o a Federal administrative penalty action would bar a citizen suit, but citizens would have the right to participate in an administrative hearing.

- o citizen plaintiffs must provide copies of filed complaints to the Administrator and the Attorney General.

- o citizen suit settlements could not be entered until 45 days after the Administrator and Attorney General receive copies.

- o citizen suits to which the U.S. is not a party may not bind the U.S.

II. Numbers: Notices and Suits

A. Total Notices of Intent to Sue (NOIS): 380 (270: 2/85).

B. By NRDC: 95 (68: 2/85) (25% of Total).

C. By Sierra Club: 115 (82: 2/85) (30% of Total).

D. Against Municipalities: 50 (38: 2/85). Remainder against industrial direct dischargers. No notices for pretreatment violations, to our knowledge.

E. Most in Regions I, II, VI:

Region I: 89 (72: 2/85)

Region II: 73 (44: 2/85)

Region VI: 67 (50: 2/85)

F. About 30% - 40% of the NOIS result in Court actions by citizens. (The total number of active CWA citizen suits is about half of the number of active EPA CWA suits.)

G. Less than 1% of NOIS are dropped due to government enforcement.

H. A few suits have been finally concluded, although many have resulted in partial S.J. on liability. The majority of CWA enforcement cases resulting in new case law are now citizen suits.

III. EPA Responses

A. Upon receiving NOIS, Region reviews to determine if enforcement is underway or appropriate. Generally the Regional Counsel's Office is notified of the determination.

B. If EPA receives a proposed Consent Decree, there is apparently no consistent Agency response pattern.

IV. Legal Issues Arising in Context of Citizen's Suits

A. Standing - What must citizens allege? Basically, alleging that defendant's violating discharges affect a waterbody which a member of the plaintiff citizen group uses is enough.

B. A.O.s - Do they bar citizens' suits? Majority of courts holding no, that only a government action in court, or an administrative action "equivalent" to a court action, can bar a citizen suit.

C. May citizens sue (and impose penalties) solely based on past violations? One circuit court says no, most district courts say yes. Government has said that citizens must allege ongoing violation in good faith, but that potentially intermittent or recurring violation constitutes an ongoing violation.

D. Settlement - Does it bar subsequent Government enforcement for same violations? The Government believes not, but the courts have not decided this issue.

E. DMR's - Are they irrefutable admissions in support of Motion for S.J.? Most courts have held that defenses raised have been insufficient to preclude summary judgment on liability against defendant based on violations reported in DMRs.

F. Can money paid in settlement of a citizen suit go anywhere other than to U.S. Treasury? DOJ strongly believes the answer is no, but the courts have not directly ruled on this issue. Many citizen suit settlements provide for defendant to pay money to some environmental fund not directly associated with the plaintiff.

V. Other General Conclusions

A. Citizen suits are much more numerous under CWA than other statutes because:

- o civil penalties are available
- o DMRs are easily available to help identify violations
- o there are few defenses available to permit violations

B. No indication that EPA is not taking appropriate enforcement action, responding to priority problems. Citizen suit notices have prompted EPA court action in only a small number of cases.

C. No indication to date that Section 505 actions interfere with EPA actions.

D. Possible resource implications:

- o Citizen review of Agency files.
- o Agency review of noticed facilities and files.

- o Plaintiff and/or Defendant requesting Agency assistance.

E. With a few notable exceptions, citizens are winning the cases which are litigated.

F. On the whole, citizen suit settlements do not appear to result in penalties greater than those the government typically obtains. These settlements also typically award attorneys fees to citizens.

G. Regulatees suggest they will agree on less in permitting process and consent AO's if they are not protected from citizens' suits.

H. Agency needs better tracking of citizens' suits, from NOIS through conclusion, particularly because case law developed by citizen suits affects government enforcement. We expect to be asking cooperation from citizen plaintiffs to keep government better informed of filings and developing legal issues.

"Clean Water Act Section 505: Effect of Prior Citizen Suit Adjudications or Settlement on the United States Ability to Sue for same violations", dated June 19, 1987.

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

JUN 19 1987

MEMORANDUM

SUBJECT: Clean Water Act Section 505: Effect of Prior Citizen Suit Adjudications or Settlements on United States' Ability to Sue for Same Violations

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels
Regions I - X

The purpose of this memo is to clarify, in response to several inquiries that this office has received, the United States' position on the question of whether the federal government is precluded from suing a violator in the face of a previous Clean Water Act citizen enforcement suit adjudication or settlement with the same defendant for the same violations. As indicated in the attached documents, our position is that the United States is in no way estopped from suing a violator (on the same violations) for separate or additional relief after a citizen suit has been initiated or concluded. The maximum potential civil penalty liability of the defendant in the U.S. action would be the statutory maximum reduced by any civil penalty assessed in the earlier citizen suit which was actually paid into the U.S. Treasury for the same violations. This position is supported and explained in three attachments to this memo.

Attachment One is the court's order dated March 16, 1987 in U.S. v. Atlas Powder Company, Inc., Civ. No. 86-6984 (E.D.Pa). The court holds that "the United States is not bound by settlement agreements or judgments in cases to which it is not a party." See also Attachment Two, the United States' memorandum in support of a Motion to Dismiss Atlas's Counterclaims, which asserts the general principle that the U.S. is not bound by the results of prior litigation by private parties over a given set of violations because the U.S. has interests distinct from those of any private citizens. The memorandum also quotes an excerpt from the Legislative History of the Water Quality Act of 1987, which clarifies that the new WQA provision that

provides the United States an opportunity to review CWA citizen suit complaints and consent decrees will not change the principle that the U.S. is not bound by judgments in those cases.

Attachment Three is a letter dated April 1, 1987 from the Department of Justice to the judge in Student Public Interest Research Group of New Jersey v. Jersey Central Power and Light Co., Civ. No. 33-2840 (D.N.J.). This letter discusses in detail the non-preclusion issue, with relevant case citations. The letter also emphasizes that civil penalties must be paid to the U.S. Treasury and that any monetary payments made in settlement of citizen suits which are not paid to the U.S. Treasury do not reduce a defendant's potential civil penalty liability in any future government enforcement action. The Department of Justice is routinely issuing letters such as this to parties to proposed CWA citizen suit settlements which purport to bind the United States or to call for payment of civil penalties to any recipient other than the U.S. Treasury.

If you have any questions on these or related citizen suit issues, please contact OECM Water Division attorney Elizabeth Ojala at FTS 382-2949.

Attachments

cc: Susan Lepow
David Buente
Ray Ludwisewski
Ann Shields
James Elder
Associate Enforcement Counsels
Water Management Division Directors, Region I-X
Water Division Attorneys

"Procedures for Agency Responses to Clean Water Act Citizen Suit Activity," dated June 15, 1989.

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

JUN 15 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Procedures for Agency Responses to Clean Water Act Citizen Enforcement Suit Activity

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Regions I-X

James Elder, Director
Office of Water Enforcement and Permits

David Davis, Director
Office of Wetlands Protection

Susan Lepow
Associate General Counsel
for Water

Ann Shields, Section Chief
Policy, Legislation and Special Litigation,
Department of Justice

Purpose

The purpose of this memo is to set out the general procedures to be followed by the Environmental Protection Agency, in conjunction with the Department of Justice, in responding to and monitoring citizen enforcement suits brought under Section 505 of the Clean Water Act, 33 USC 1365.

This memo supersedes prior guidance, issued by this office on October 4, 1985, concerning EPA tracking of citizen suits. That guidance is now obsolete in light of recent amendments to Section 505 requiring citizen suit parties to send copies to EPA and DOJ of complaints and proposed settlements, and in light of EPA's new ability to bring administrative penalty actions and pre-empt potential citizen suits for civil penalties.

The guidance defines roles for various EPA and DOJ offices in addressing matters relating to CWA citizen enforcement suits; however, this guidance in no way affects the fact that the Regions remain responsible for deciding whether a federal enforcement action is warranted to address the violations at issue.

Background

Clean Water Act Section 505(a)(1) authorizes any person with standing to sue any person who is alleged to be in violation of certain Clean Water Act requirements, set out in CWA §505(f). In such lawsuits, the district courts have jurisdiction to enforce the Act and to apply appropriate civil penalties under CWA §309(d). Prior to filing enforcement suits under CWA §505(b)(1), however, citizens must give "60-day notice" of the violations to the Administrator, the State, and the alleged violator. These violation notices must be given in the manner prescribed by the Agency's regulations, found at 40 CFR 135, which require that copies of the notices (sent via certified mail to the alleged violator) be mailed or delivered to the Administrator, the Regional Administrator, the State, and the registered agent of corporate violators. Part 135 provides that the date of service of the notice is the date of postmark.

Through Section 505, Congress has fashioned a distinct role for private enforcement under the Clean Water Act. The purposes of the citizen suit provision are to spur and supplement government enforcement. The required 60-day violation notices are designed to provide the Administrator (or the State) the opportunity to undertake governmental enforcement action where warranted, given Agency priorities and finite resource levels. Where the government does not pursue such action, the citizen enforcer with standing may act as a "private attorney general" and bring the lawsuit independently, for civil penalties and injunctive relief.

Historically, in the majority of cases the regions have not initiated federal referrals as a result of citizen notices, and thus the citizens are allowed to serve the role of "supplemental" enforcers. This is reasonable in terms of best use of the Agency's finite resources, and the consistent setting of federal enforcement priorities, which should not necessarily be driven by citizen enforcement priorities.

Experience suggests that private enforcement is useful in helping to achieve Clean Water Act goals and to promote Clean Water Act compliance. However, it is important for the Agency to monitor citizen lawsuits to the extent possible to ensure proper construction of regulatory requirements and avoid problematic judicial precedents. It is also a good idea for the

federal government to support the citizens where feasible, such as by filing amicus briefs in appellate courts, in order to advance our federal enforcement interests. Examples of amicus curiae briefs which have been filed on behalf of citizens so far include those in Sierra Club v. Union Oil Co. (9th Cir.), Sierra Club v. Shell Oil Co., (5th Cir.), and Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd. (4th Cir. and S. Ct.).

Recent CWA Amendments Affecting Citizen Suits

The Water Quality Act (WQA) of 1987 amended the Clean Water Act, effective February 4, 1987, in two ways respecting citizen suit authorities and responsibilities. Generally, the amended CWA requires that the Administrator and the Attorney General receive copies of complaints and proposed consent decrees in citizen enforcement suits. In addition, citizen suits for civil penalties may now be precluded, in some cases, by administrative penalty actions.

WQA §504 provides as follows:

> Section 505(c) is amended by adding at the end thereof the following new paragraph:
> "(3) PROTECTION OF INTERESTS OF UNITED STATES. - Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator."

OECM-Water Division and the Office of Water are presently working on proposed regulations to govern service of the complaints and consent decrees, which will be published in the Federal Register shortly.

WQA Section 314 amends CWA §309 (governing federal enforcement actions) to add new subsection (g), authorizing federal administrative penalty actions. New CWA §309(g)(6)(A) and (B) provide that citizens may not bring civil penalty actions under Section 505 for the same violations for which (1) the Secretary (Army Corps of Engineers) or the Administrator has commenced and is diligently prosecuting an administrative action under Section 309(g); (2) the State has commenced and is diligently prosecuting an action under a comparable state law; or (3) the Secretary, Administrator or State has issued a final order and the violator has paid a penalty under §309(g) or

comparable state law; unless (a) the citizen's complaint was filed prior to the commencement of the administrative action, or (b) the citizen's 60-day notice was given (in accordance with 40 CFR 135) prior to commencement of the administrative action, and the complaint was filed before the 120th day after the date on which the notice was given.

Thus, under these new amendments, it will be necessary for the Agency to keep track of when citizen notices are served (i.e., postmarked), when complaints are filed, and when proposed consent decrees are received. Moreover, EPA and DOJ need to clarify procedures for deciding how, if at all, to review and respond to citizen enforcement activity. The following sets out the Agency's procedures, in conjunction with DOJ, to implement these responsibilities.

Procedures

(1) Violation Notices

When EPA Headquarters receives a copy of a citizen violation notice, the notice is routed to the Associate General Counsel for Water. That office logs in the notice, files the original, and forwards copies of the notices to the Associate Enforcement Counsel for Water (OECM-Water Division), and the Director of the Office of Water Enforcement and Permits, or the Director of the Office of Wetlands Protection, as appropriate. Under 40 CFR 135, each Regional Administrator must also receive a copy of the notice directly from the citizen; some regions have internal tracking systems, usually handled by the Water Management Divisions. In addition, the Office of Wetlands Protection will forward Clean Water Act §404 notices to their courterparts at the Army Corps of Engineers.

Since late 1983, OECM-Water has kept a region-by-region, chronological log of these citizen notices, recording the name of one notifier and the potential defendant, the location of the facility, and the date on the notice letter. (Recently, OGC has begun recording the "date of postmark," which is the official date of service under the regulations.)

In the regions, the general practice has been for Water Division personnel or Wetlands program personnel to investigate the compliance record of the noticed facility, and to contact the state (if the state runs an approved NPDES program) to inquire what, if any, enforcement action the state intends to take. The program office then makes a determination, with the Office of Regional Counsel, as to whether to initiate a federal enforcement action to address the alleged violations. This memorandum is not intended to change the procedures the regions use to evaluate and respond to the notices.

(2) Complaints

As in the case of violation notices, at Headquarters the Complaints are routed through the Office of General Counsel, to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 complaints to their counterparts at the Army Corps of Engineers. OECM-Water and the Office of Water are currently working together to amend 40 CFR 135 to include requirements relating to service of complaints on EPA and DOJ. We expect these regulatory provisions to require citizen plaintiffs to send copies of complaints to the Regional Administrator in addition to the Administrator and the Attorney General. In the interim, OGC is sending copies to the Regional Counsels. OECM-Water Division keeps a log of the citizen complaints. Attached for your information is a copy of the log which reflects citizen complaint activity through the end of fiscal year 1987.

The regions will retain the authority to recommend whether to initiate a federal enforcement action against the citizen suit defendant (e.g., by intervention in the citizen suit, by filing a separate suit, or by commencing an administrative action) in order to address the defendant's violations. The regions will also normally have the lead on monitoring active citizen suits from notice and filing to conclusion, within their discretion and as resources permit. However, Headquarters will get involved in the citizen enforcement action where national legal or policy issues arise which merit federal attention (other than intervention as a party to address the underlying violations), and each Region is requested to notify OECM-Water Division whenever such an issue comes to the Region's attention.

For example, Headquarters generally will take the Agency lead, working with the Policy, Legislation and Special Litigation (PLSL) Section of the Department of Justice, where issues of national law or policy arise which call for participation as amicus curiae in the district or appellate courts. In such situations, OECM-Water will be responsible for coordinating with PLSL, OGCWater, the appropriate Office of Regional Counsel, and the Office of Water to decide collectively (1) whether government action on a specific issue arising in a citizen suit is warranted, (2) what the government's action should be, and (3) what roles the participating offices will play in pursuing any appropriate action. This type of participation might occur most often in the context of appeals from judgments in citizen suits. However, the Agency will employ the same procedures in deciding whether and how to pursue Federal participation on the District Court level. Examples of issues which the United States has addressed to date in this context include the scope of the upset defense, whether the U.S. can be bound by settlements of suits between private parties, and whether citizens may pursue penalties for wholly past violations.

(3) Consent Decrees

The proposed consent decrees, like the violation notices and the Complaints, are routed through the Office of General Counsel to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 proposed consent decrees to their counterparts at the Army Corps of Engineers. Until 40 CFR 135 is amended to require that copies be sent to the Regions also, OGC will send copies to the Regional Counsels. OECM-Water Division keeps a log of these proposed consent decrees. Attached for your information is a copy of the log which reflects consent decree activity through the end of fiscal year 1987.

Once a copy of a proposed consent decree is received, the United States has 45 days within which to review the proposed consent decree and submit comments, if any. OECM-Water will solicit comments from the appropriate Office of Regional Counsel, to formulate the Agency's position on any issues which may arise in the citizen consent decree. Unless different arrangements are made (e.g., if Federal intervention is contemplated to obtain further relief), OECM-Water will take the lead for the Agency in coordinating with DOJ to formulate proper action by the United States in response to a proposed consent decree, such as a comment letter to the court, whenever necessary or advisable.

A region will have the opportunity, in its discretion and as resources allow, to offer timely case-specific comments on the adequacy of relief in a proposed citizen suit settlement. OECM-Water will consider comments, if any, from the Region received within 35 days after the date the settlement is logged in by the Administrator's office. In any event, the United States is not obliged to offer any comments to the court. Our position has consistently been that the federal government is not bound by the terms of citizen settlements or judgments, as the U.S. has interests distinct from any private litigants, and cannot be deprived of the opportunity to bring a subsequent action for more complete relief, should circumstances warrant.

PLSL/DOJ will provide copies to OECM-Water and the appropriate Regional Counsel of any correspondence submitted to the court or parties in CWA citizen suits and will work with designated EPA representatives in conducting any follow-up activity which results.

If you have questions regarding this matter, please contact David Drelich of my staff at FTS 382-2949.

Attachments

cc: Regional Water Management Division Directors
OECM-Water Attorneys
Doug Cohen, DOJ
Dan Palmer (FDRS)

VI. SPECIALIZED ENFORCEMENT TOPICS

E. SECTION 404

"EPA Enforcement Policy for Noncompliance with Section 404 of the FWPCA," dated June 1, 1976.

APPENDIX E

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

1 JUN 1976

OFFICE OF ENFORCEMENT

MEMORANDUM

Subject: EPA Enforcement Policy for NonCompliance with Section 404 of the FWPCA

From: Assistant Administrator for Enforcement

To: Regional Administrators
Regional Enforcement Directors

I. Background

As you know, the United States Army Corps of Engineers, pursuant to a ruling of the United States District Court for the District of Columbia, NRDC v. Callaway et al, 7 ERC 1784, (D.D.C. March 27, 1975), promulgated interim final regulations, 33 C.F.R. 209, (40 Fed. Reg. 31320, July 25, 1975), concerning the issuance of permits for the discharge of dredged or fill material into navigable waters under section 404(a) of the Federal Water Pollution Control Act, as amended in 1972 (FWPCA). On September 5, 1975, pursuant to section 404(b) of the FWPCA, EPA promulgated interim final guidelines at 40 C.F.R. 230, (40 Fed. Reg. 41292), specifying criteria for disposal sites for dredged or fill materials. Now that the basic elements of the 404 program have been established, it is time to set forth the appropriate administrative and civil and criminal enforcement procedures to be followed by EPA personnel for violations of section 301 of the FWPCA arising out of any form of noncompliance with section 404.

It may be useful to recall that for some time there existed a professional and legal difference of opinion between EPA and the Corps surrounding the meaning of the term "navigable waters" as used in section 404 of the FWPCA. Because vital wetland areas and other significant non-traditional navigable waters were threatened by potential unlicensed discharges of dredged or fill material, EPA found it necessary to formulate its own ad hoc interim section 404 enforcement policy which called for EPA enforcement response against violations or threatened violations in waters over which the Corps was not asserting section 404 jurisdiction. However, the promulgation of the Corps regulations in conjunction with the promulgation of our own guidelines has resolved almost all of our earlier differences of opinion. It is important now that we coordinate closely with the Corps to compel violators and potential violators to submit to the administrative permit review process.

II. Administrative Enforcement Policy

Because the Corps of Engineers has authority under section 404(a) of the FWPCA to issue or deny permits for the discharge of dredged or fill material into waters of the United States, the Corps of Engineers shall function as the first line of administrative enforcement. Current Corps regulations provide District Engineers with authority to issue cease and desist orders for violations of section 404(a), [33 C.F.R. 209.120(g)(12)]. You should establish with the respective Corps Districts in your Region a simple procedure by which the Corps district offices notify you of these administrative actions. Corps regulations also provide for immediate referral to the U.S. Attorney where one of their cease and desist orders is violated, [33 C.F.R. 209.120(g)(12)]. Since this procedure involves no delegation by EPA of the Administrator's section 309 enforcement authority, we can and in certain defined situations may choose to prevent violation of section 301 by issuance of one of our own section 309 administrative orders. At this time, however, I foresee only the following three situations where EPA enforcement personnel need to involve themselves in administrative enforcement arising out of a violation of section 404:

(1) When the Corps of Engineers does not timely issue a cease and desist order against a violator of section 404 in accordance with the Corps regulations promulgated thereunder. In such a case EPA enforcement personnel shall, after consultation with the Corps of Engineers and EPA Headquarters, take appropriate enforcement action under section 309 of the FWPCA. However, such administrative action can be undertaken by EPA only when the Corps refusal is unjustified on the basis of either facts available to EPA which have been transmitted to the Corps District Engineer or EPA's legal interpretation of the FWPCA. I wish to stress that this is an exception to the general policy enunciated above.

(2) In emergency situations when there is clearly insufficient time to notify the Corps of Engineers of facts available to EPA which merit administrative enforcement. In such a case, EPA enforcement personnel shall commence appropriate action under section 309 after notifying EPA Headquarters. However, as soon as possible thereafter EPA shall notify the Corps by telephone or otherwise of the facts which prompted our immediate enforcement action. At that point the Corps should be given the opportunity to issue its own cease and desist order against the violator (after which we would withdraw our administrative order) or to join with us in any civil or criminal action commenced or to be commenced against the violator. I expect this remedy to be used in only the most extraordinary circumstances.

(3) When the Corps of Engineers requests that EPA enforcement personnel issue a section 309 administrative order. In such a case, EPA enforcement personnel shall, if appropriate, issue a section 309 administrative order.

III. Civil and Criminal Enforcement Procedures Upon Referral

While administrative remedies are preferred, whenever it becomes apparent to the appropriate EPA enforcement personnel that a violation merits referral to the U.S. Attorney for civil and/or criminal proceedings, EPA shall first notify the appropriate Corps District Engineer (except in emergency situations identified above), advise him of the facts surrounding the case, and recommend appropriate legal action to be taken. A case may result in enforcement proceedings when referred by the Corps to the U.S. Attorney after consultation and coordination with EPA, or when referred by EPA should the Corps decide not to refer the case, or when instituted by the Department of Justice on its own initiative. Upon referral to the local U.S. Attorney by EPA, one copy of every section 404 referral report, as with any referral report, must be sent (with inclusion of exhibits and attachments optional) to the Director, Water Enforcement Division, EN338, 401 M Street, S.W., Washington, D.C. 20460, and another to Chief, Pollution Control Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530. The Corps will also notify the Department of Justice in Washington. In all cases, EPA must remain fully apprised of all formal section 404 enforcement activities brought by the Department of Justice. We must be particularly diligent in assuring that assertions in briefs and all other legal documents to be filed are consistent with EPA interpretations of such terms as "discharge of pollutants," "navigable waters," "point source," "willful or negligent," and other terms of substantial jurisdictional import under the FWPCA. Where the Regional Administrator is unable to agree with the District Engineer or the U.S. Attorney on a proposed enforcement action, the Region will contact EPA Headquarters by telephone.

When EPA or the Corps is the referring agency, the Department of Justice will always permit EPA to be Of Counsel in a civil or criminal case upon EPA's request. When the Department of Justice brings a civil or criminal case on its own initiative, it will always extend an opportunity to EPA to be Of Counsel in a civil or criminal case. Even where EPA enforcement personnel decide not to formally participate in a particular case as Of Counsel, regional enforcement personnel will be expected to review important legal documents (including any settlement related documents) to insure both the correct use of the important jurisdictional terms found in section 404 (particularly those common to other FWPCA programs) and the proper application of the appropriate environmental criteria.

IV. Jurisdiction

Your office should establish a procedure with Corps districts for coordinating jurisdictional determinations in those occasional situations where presence of "waters of the United States" is unclear (e.g., transition zone of the marsh, small or intermittent streams). When disputes over jurisdiction cannot be resolved at the regional level, please notify this office immediately.

V. Future Developments

The policy enunciated herein has been concurred in by the Department of Justice and the United States Army Corps of Engineers. For the time being, I have chosen to issue this internal policy statement rather than enter into a memorandum of agreement. In furtherance of our understanding, Justice and the Corps will soon issue similar guidance to their field personnel which will be transmitted to you upon receipt by this Office. Of course should actual practice so require, this policy may, in coordination with the other interested agencies, be revised from time to time.

VI. Intra-Agency Communications

Please contact the Director, Water Enforcement Division, at (202) 755-8731 whenever:

(1) questions arise concerning the policy stated here or its application in a particular case;

(2) the Region contemplates the issuance of a section 309 administrative order arising out of noncompliance with section 404;

(3) legal questions arise which necessitate guidance from the Office of General Counsel, such as jurisdictional terms in formal civil or criminal proceedings;

(4) the Region contemplates the referral of a criminal or civil proceeding arising out of noncompliance with section 404; or

(5) the Region believes section 404(c) proceedings may be appropriate.

VII. Conclusion

This policy is intended to promote legal compliance, to assure greater protection of our navigable waters, and to create a reasonable and administratively workable enforcement procedure. I urge you to do your utmost to avoid duplication regarding section 404 matters which are to be handled on a first line basis by the United States Army Corps of Engineers.

Stanley W. Legro

Concurrences:

Peter R. Taft
Assistant Attorney General
Department of Justice

E. Manning Seltzer
Chief Counsel
U. S. Army Corps of Engineers

cc: Dr. Andrew Breidenbach, Assistant Administrator for Water & Hazardous Materials, EPA

Rebecca Hanmer, Director of Federal Activities, EPA

Alvin Alm, Assistant Administrator for Planning and Management, EPA

Robert Zener, General Counsel, EPA

Alfred Ghiorzi, Chief, Pollution Control Section, Dept. of Justice, Land & Natural Resources Division

William N. Hedeman, Jr., Assistant Counsel for Regulatory Functions Office, Chief of Engineers

Betty J. Farwell, Assistant Counsel-for-Litigation Office, Chief of Engineers

Letter from Attorney General to Secretary of the Army regarding Section 404 of the CWA dated September 5, 1979.

5 SEP 1979

Honorable Clifford L. Alexander, Jr.
Secretary of the Army
Washington, D.C. 20310

My dear Mr. Secretary:

I am responding to your letter of March 29, 1979, requesting my opinion on two questions arising under § 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344. You asked whether the Act gives the ultimate administrative authority to determine the reach of the term "navigable waters" for purposes of § 404 to you, acting through the Chief of Engineers, or to the Administrator of the Environmental Protection Agency; and similarly you ask whether the Act gives the ultimate administrative authority to determine the meaning of § 404(f) to you or to the Administrator. Although no specific provision in the Federal Water Pollution Control Act or specific statement in its legislative history speaks directly to your questions, I am convinced after careful consideration of the Act as a whole that the Congress intended to confer upon the Administrator of the Environmental Protection Agency the final administrative authority to make those determinations. Before turning to the specific reasons for my conclusions, I believe that some background description is in order.

The basic objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As one means of achieving that objective, the Act makes the discharge of any pollutant unlawful except in accordance with standards promulgated or permits issued under the Act. 33 U.S.C. § 1311(a). Permits for the discharge of pollutants may be obtained under §§ 402 and 404 of the Act, 33 U.S.C. §§ 1342, 1344, if certain requirements are met. The Administrator of the Environmental Protection Agency and the Secretary of the Army, acting through the Chief of Engineers, share responsibility for issuance of those permits and enforcement of their terms. The Administrator issues permits for point source discharges under the National Pollutant Discharge

Elimination System (NPDES) program established by § 402; the Secretary of the Army issues permits for the discharge of dredged or fill material under § 404. 1/

During consideration of the legislative proposals that resulted in the Federal Water Pollution Control Act Amendments of 1972, the question whether the Secretary should play any role, through the Chief of Engineers, in issuing permits was hotly debated. The bill introduced in the Senate, S. 2770, gave the Administrator the authority to issue permits and treated discharges of dredged or fill material no differently from discharges of any other pollutant. During consideration of the bill both by the Senate Public Works Committee 2/ and on the Senate floor, 3/ amendments were proposed to give the authority to issue permits for discharges of dredged or fill material to the Secretary of the Army. These amendments were offered in recognition of the Secretary's traditional responsibility under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 401 et seq., to protect navigation, including the responsibility to regulate discharges into the navigable waters of the United States. Concerned that the

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1/ A point source is defined in the Act as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft . . . ." 33 U.S.C. § 1362(14).

Dredged and fill material are not defined in the Act, but are defined in regulations promulgated by the Corps of Engineers: Dredged material is "material that is excavated or dredged from waters of the United States," while fill material is "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 C.F.R. § 323.2(k), (m).

2/ Senate Comm. on Public Works, 93rd Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973), at 1509 (hereafter "Legislative History").

3/ Id. at 1386.

Secretary would have insufficient expertise to evaluate the environmental impact of a proposed dredge or fill operation, Senator Muskie, the author of S. 2770, opposed those amendments. 4/ He proposed instead that the Secretary certify the need for any permit for discharge of dredged material to the Administrator, who would retain permit issuing authority. The Senate adopted Senator Muskie's proposal. 5/

The House of Representatives bill, H.R. 11896, on the other hand, gave the Secretary complete responsibility over issuing permits for the discharge of dredged or fill material. Although the House bill required the Secretary to consult with the EPA on the environmental aspects of permit applications, the Secretary had the authority to make the final decision on permit issuance. 6/

The Conference Committee substitute, passed by the Congress as § 404 of the Federal Water Pollution Control Act Amendments of 1972, represented a compromise between the Senate and House positions. It established a separate permit procedure for discharges of dredged or fill material to be administered by the Secretary, acting through the Chief of Engineers. The Administrator, however, retained substantial responsibility over administration and enforcement of § 404. The EPA responsibilities were perhaps best summarized by Senator Muskie during the Senate's consideration of the Conference Report:

> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate Section 301(a).
>
> Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil

4/ Id. at 1387-88.

5/ Id. at 1393.

6/ Id. at 816.

> is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.
>
> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue. 7/

Subsequent amendment of § 404 by the Clean Water Act of 1977, 91 Stat. 1566, altered the relationship between the Secretary and the Administrator in only limited fashion. The amendments gave the Administrator authority comparable to the authority conferred on him by the § 402 NPDES program to approve and to monitor State programs for the discharge of dredged or fill material. 33 U.S.C. § 1344(g)-(l). New subsection (s) gave the Secretary of the Army explicit authority under the Act to take action to enforce those § 404 permits which he had issued. New subsection (n) cautioned that the amendments should not be considered to detract from the Administrator's enforcement authority under § 309 of the Act, 33 U.S.C. § 1319. 8/

7/ Id. at 177. This statement, which is often quoted in explanation of the relative responsibilities of the Corps and EPA under § 404, is included in the Congressional Record as a supplement to Senator Muskie's oral remarks.

8/ Section 309 empowers the Administrator to order compliance with the conditions or limitations of permits issued under § 402 and State permits issued under § 404, and to seek civil and criminal penalties with respect to such permits. Importantly, as the above-quoted history of § 404 indicates, the section also gives the Administrator the authority to bring enforcement actions to stop discharges without a required permit, since such discharges violate the basic prohibition set out in § 301 of the Act. 33 U.S.C. § 131

With that background, I turn to your specific questions. First, you asked whether the Secretary or the Administrator has the authority under § 404 to resolve administrative disputes over interpretation of the jurisdictional term "navigable waters." That question is an important one, since the authority to construe that term amounts to the authority to determine the scope of the § 404 permit program.

The term "navigable waters," moreover, is a linchpin of the Act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402 permit program for point source discharges, 9/ the regulation of discharges of oil and hazardous substances in § 311, 33 U.S.C. § 1321, and the regulation of discharges of vessel sewage in § 312, 33 U.S.C. § 1322. Its definition is not specific to § 404, but is included among the Act's general provisions. 10/ It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether--and to what extent--any particular water body comes within the jurisdictional reach of the federal government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement. Rather, understanding that "navigable waters" can have only one interpretation under the Act, the question is whether Congress intended ultimately for the Administrator or the Secretary to describe its parameters.

The question is explicitly resolved neither in § 404 itself nor in its legislative history. My conclusion that the

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9/ The Act, as stated above, contains a general prohibition against the "discharge of any pollutant" except in compliance with particular standards and permit procedures. § 301(a), 33 U.S.C. § 1311(a). The definition of the phrase "discharge of pollutants" includes a discharge from a point source into "navigable waters." § 502(12), 33 U.S.C. § 1362(12).

10/ "Navigable waters" is defined under the Act as meaning "the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. § 1362(7).

Act leaves this authority in the hands of the Administrator thus necessarily draws upon the structure of the Act as a whole. First, it is the Administrator who has the overall responsibility for administering the Act's provisions, except as otherwise expressly provided. § 101(d), 33 U.S.C. § 1251(d). It is the Administrator as well who interprets the term "navigable waters" in carrying out pollution control responsibilities under sections of the Act apart from § 404.

Additionally, while the Act charges the Secretary with the duty of issuing and assuring compliance with the terms of § 404 permits, it does not expressly charge him with responsibility for deciding when a discharge of dredged or fill material into the navigable waters takes place so that the § 404 permit requirement is brought into play. Enforcement authority over permitless discharges of dredged and fill material is charged, moreover, to the Administrator. 11/

Finally, any argument in favor of the Secretary's authority to interpret the reach of the term "navigable waters" for purposes of § 404 is substantially undercut by the fact that he shares his duties under the section with the Administrator. As outlined above, § 404 authorizes the Administrator to develop guidelines with respect to selection of disposal sites, to approve and oversee State programs for the discharge of dredged or fill material, and to veto on environmental grounds any permit the Secretary proposes to issue.

I therefore conclude that the structure and intent of the Act support an interpretation of § 404 that gives the Administrator the final administrative responsibility for construing the term "navigable waters."

Your second question is whether the Secretary or the Administrator has the final authority to construe § 404(f) of the Act. 33 U.S.C. § 1344(f). That subsection exempts

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11/ 33 U.S.C §§ 1311, 1344(n). The Secretary does have enforcement authority with respect to permitless discharges into navigable waters under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §§ 407, 413. Navigable waters for purposes of that Act have a more restrictive meaning, however, than navigable waters under the Federal Water Pollution Control Act. E.g., National Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

certain activities from regulation under §§ 404, 301(a), and 402. The Corps of Engineers has argued that the responsibility for interpretation of the subsection insofar as it relates to the issuance of the Corps' § 404 permits is vested in the Secretary. For reasons similar to those discussed in connection with your first question, I disagree. It is the Administrator who has general administrative responsibility under the Act, 33 U.S.C. § 1251(d), and who has general authority to prescribe regulations, 33 U.S.C. § 1361(a). In reviewing the statute and its legislative history, I find no indication that Congress intended that the Secretary have final authority to construe that subsection for purposes of his § 404 program. Absent such an indication, I believe that the Act would be strained by a construction allowing the Secretary to give a different content to § 404(f) than the Administrator gives that subsection as it relates to pollution control provisions apart from § 404. I therefore conclude that final authority under the Act to construe § 404(f) is also vested in the Administrator.

Yours sincerely,

Benjamin R. Civiletti
Attorney General

Honorable Clifford L. Alexander, Jr.
Secretary of the Army
Washington, D.C. 20310

My dear Mr. Secretary:

If you approve, I should like to have published, in accordance with 28 U.S.C. 511, my opinion to you regarding questions arising under § 404 of the Federal Water Pollution Control Act.

Please let me know whether you have any objections to the publication.

Yours sincerely,

Benjamin R. Civiletti
Attorney General

"Enforcement of Section 404 of the CWA", dated November 25, 1980.

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

Nov 25 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Enforcement of Section 404 of the Clean Water Act

FROM: Acting Director, Enforcement Division (EN-338)

TO: Regional Enforcement Division Directors

Background

As you may recall, in March 1980, the Enforcement Division initiated discussion with the Corps of Engineers for the purpose of updating and revising the existing June 1, 1976 Enforcement Agreement which had been signed by EPA, the Corps, and the Department of Justice. The proposed new agreement was circulated to all regions for review, and comments were received. Although initial discussions were held with the Corps and DOJ, no progress was made on resolving this matter. However, in October 1980, the Corps approached EPA with the proposition that it lacked authority to enforce against persons discharging dredged or fill materials into waters of the United States without section 404 permits. Although EPA has not drawn any conclusions regarding the Corps' authority or lack of it, the Enforcement Division has agreed to endorse the attached document, dated 7 November 1980, as an interim approach to enforcement of section 404.

EPA's Role in Enforcement of Section 404

Pursuant to sections 301, 309 and 404(n), EPA has authority and responsibility for enforcement of violations of section 301(a) which occur by virtue of discharges of dredged or fill materials into waters of the United States without a permit, or in violation of the terms and conditions of section 404 permits. Pursuant to section 404(s), the Corps of Engineers enforces discharges which violate the terms and conditions of permits it has issued. Therefore, it is reasonable that as a matter of practice, EPA's enforcement effort for violations of section 404 has focused largely on unpermitted discharges. Even in this capacity, however, a number of Regions have persisted in viewing EPA's enforcement role as simply one of support for the Corps' efforts, rather than as a complementary one with independent authority flowing from section 309.

Certain recent developments have underscored the need for EPA to take a more positive approach to enforcement of section 404. The need has arisen most particularly in cases of solid waste discharges requiring section 404 permits pursuant to the Consolidated Permit Regulations, 40 CFR §§122.3 and 122.51(c)(2)(ii), 1/ and in cases where EPA asserts jurisdiction over waters of the United States, but the Corps disagrees. In such cases, the Corps has been and will continue to be reluctant or unwilling to take enforcement action. Therefore, it is incumbent on EPA to exercise its authority under section 309.

Procedures for Enforcing Dredge or Fill Violations

Section 309 authority may take the form of administrative orders or judicial actions, civil or criminal. The procedures for enforcing section 404 requirements are the same as those for any other violation of section 301(a). Administrative orders may be issued by the Regional Administrator's delegatee, with courtesy copies sent to* [illegible] Civil actions should be prepared in standard civil litigation report format, and forwarded to** [illegible] for review and referral to the Department of Justice. [illegible]

In all cases, EPA should notify the appropriate Corps district of a planned or proposed enforcement action. This notification is designed to achieve two results. First, it will insure that the Corps does not take an inconsistent action which would jeopardize the efficacy of EPA's enforcement action. Second, it will afford the Corps an opportunity to join with EPA in the action.

If you have any questions, please contact Joan Ferretti or Betty Cox of my staff at FTS 755-2870.

David Lyons, P.E.

*Office of Enforcement and Compliance Monitoring, Water Division and the Office of Federal Activities, Aquatic Resource Division.

**Office of Enforcement and Compliance Monitoring, Water Division with courtesy copy to Office of Federal Activities, Aquatic Resource Division.

1/ For a fuller discussion of the appropriate enforcement action for such discharges, see Memorandum from R. Sarah Compton, Deputy Assistant Administrator for Water Enforcement, to Enforcement Division Directors and Section 404 Coordinators, September 11, 1980.

Attachment

cc: General E. R. Heiberg, III
Regional §404 Coordinators
George Ciampa, Region I
Richard Weinstein, Region II
Elo-Kai Ojama, Region III
Susan Schub, Region IV
Jerry Frumm, Region V
Tony Anthony, Region VI
Bill Ward, Region VII
Lee Marabel, Region VIII
Ann Nutt, Region IX
John Hammill, Region X

"Enforcement Authority for Violations of Section 404 of the Clean Water Act", dated November 7, 1980.

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314

REPLY TO ATTENTION OF:

7 NOV 1980

DAEN-CWO-N

SUBJECT: Enforcement Authority for Violations of Section 404 of Clean Water Act

Division Engineer, Lower Mississippi Valley

1. Reference:

a. Letter, DAEN-CWZ-B, 26 May 1980, to Division Engineers, subject: Legal Authority Under Section 404 of the Clean Water Act of 1977 to Enter Private Property.

b. Letter, LMVOC, 25 September 1980, to DAEN-CWZ-B, citing agreement to elevate Section 404 permitless enforcement authority problem to EPA/COE Headquarters for resolution.

2. This letter provides clarification to the guidance set forth in the reference 1a above. It shall be implemented on an interim basis pending revision or change of the June 1976 EPA/Corps/Justice enforcement memorandum currently being discussed between OCE and EPA.

3. The Corps should continue to carry out a strong enforcement program including the issuance of cease and desist orders against unauthorized activities. In the past there was clear justification for this position based on the inherent authorities vested in the Chief of Engineers. This residual power was considered to be associated with the implied authority as permitting agent to manage the Section 404 permit program. However, the Civiletti Attorney General Opinion of September 5, 1979, undercut that rationale. Nonetheless, in order to serve the public interest and prevent confusion, we should continue our enforcement program as in the past unless precluded by future judicial decisions. Accordingly, the district engineers shall proceed in the following manner:

a. If the site of the discharge is a "water of the United States," as interpreted by the district engineer, the procedures set forth at 33 CFR 326 shall be followed and, as appropriate, a permit shall be required and an application accepted (no change to present practice).

b. If the site is in a previously designated "special case" pursuant to the Corps/EPA jurisdiction, MOU (Federal Register, Volume 45, No. 129, July 2, 1980, p. 45018), EPA will be responsible for the enforcement action.

If the Corps learns of discharge activities in such special cases it will notify EPA immediately. If a permit is subsequently required, an application will be accepted and processed by the district engineer consistent with current regulations.

c. If lands under a and b above are involved in the same case, EPA will normally be responsible for enforcement actions; however, by mutual agreement, the district engineer may assume the responsibility.

4. Paragraph 6 of the Corps/EPA Jurisdiction MOU states that any jurisdictional determination made by EPA as a result of an enforcement action will be used by the district engineer as the basis for all subsequent 404 actions of that case. Therefore, if EPA (or the Department of Justice on its behalf) brings an enforcement action against the discharger, the district engineer shall, consistent with 33 CFR 326, accept an application for an after-the-fact or subsequent permit application consistent with the assertions made by the EPA in that action. If it is at all unclear from EPA's enforcement action whether all phases of the discharger's activities are taking place in "waters of the United States," the district engineer shall forward the case to EPA for a formal jurisdictional delineation before processing any permit. Informal verbal or written communications (actions other than enforcement actions signed by the regional administrator or his designee) will not in themselves establish jurisdiction. In such case where EPA brings an enforcement action and in ca 3b and 3c above, any public notice will clearly state that the jurisdictional determination has been made by EPA.

5. Pursuant to Section 404(s) of the Clean Water Act, each district engineer shall conscientiously implement enforcement actions against permit condition violations. This applies regardless of the location of the discharge.

6. This letter does not alter our full authority and responsibility to take enforcement action against all violations of the River and Harbor Act of 1899 in traditionally navigable waters of the United States.

FOR THE CHIEF OF ENGINEERS:

E. R. HEIBERG III
Major General, USA
Director of Civil Works

"Guidelines for Specification of Disposal Sites for Dredged or Fill Material", Federal Register Notice, Volume 45, No. 249, dated December 24, 1980.

federal register

Wednesday
December 24, 1980

Part IV

Environmental Protection Agency

Guidelines for Specification of Disposal Sites for Dredged or Fill Material

discharge which will create fast lands, the permitting authority should consider, in addition to the direct effects of the fill inself, the effects on the aquatic environment of any reasonably foreseeable activities to be conducted on that fast land.

Section 230.54 (proposed 230.41) deals with impacts on parks, national and historical monuments, national sea shores, wilderness areas, research sites, and similar preserves. Some readers were concerned that we intended the Guidelines to apply to activities in such preserves whether or not the activities took place in waters of the United States. We intended, and we think the context makes it clear, that the Guidelines apply only to the specification of discharge sites in the waters of the United States, as defined in § 230.3. We have included this section because the fact that a water of the United States may be located in one of these preserves is significant in evaluating the impacts of a discharge into that water.

Wetlands: Many wetlands are waters of the United States under the Clean Water Act. Wetlands are also the subject of Federal Executive Order No. 11990, and various Federal and State laws and regulations. A number of these other programs and laws have developed slightly different wetlands definitions, in part to accommodate or emphasize specialized needs. Some of these definitions include, not only wetlands as these Guidelines define them, but also mud flats and vegetated and unvegetated shallows. Under the Guidelines some of these other areas are grouped with wetlands as "Special Aquatic Sites" (Subpart E) and as such their values are given special recognition. (See discussion of Water Dependency above.) We agree with the comment that the National Inventory of Wetlands prepared by the U.S. Fish and Wildlife Service, while not necessarily exactly coinciding with the scope of waters of the United States under the Clean Water Act or wetlands under these regulations, may help avoid construction in wetlands, and be a useful long-term planning tool.

Various commenters objected to the definition of wetlands in the Guidelines as too broad or too vague. This proposed definition has been upheld by the courts as reasonable and consistent with the Clean Water Act, and is being retained in the final regulation. However, we do agree that vegetative guides and other background material may be helpful in applying the definition in the field. EPA and the Corps are pledged to work on joint research to aid in jurisdictional determinations. As we develop such materials, we will make them available to the public.

Other commenters suggested that we expand the list of examples in the second sentence of the wetland definition. While their suggested additions could legally be added, we have not done so. The list is one of examples only, and does not serve as a limitation on the basic definition. We are reluctant to start expanding the list, since there are many kinds of wetlands which could be included, and the list could become very unwieldy.

In addition, we wish to avoid the confusion which could result from listing as examples, not only areas which generally fit the wetland definitions, but also areas which may or not meet the definition depending on the particular circumstances of a given site. In sum, if an area meets the definition, it is a wetland for purposes of the Clean Water Act, whether or not it falls into one of the listed examples. Of course, more often than not, it will be one of the listed examples.

A few commenters cited alleged inconsistencies between the definition of wetlands in § 230.3 and § 230.42. While we see no inconsistency, we have shortened the latter section as part of our effort to eliminate unnecessary comments.

Unvegetated Shallows: One of the special aquatic areas listed in the proposal was "unvegetated shallows" (§ 230.44). Since special aquatic areas are subject to the presumptions in § 230.10(a)(3), it is important that they be clearly defined so that the permitting authority may readily know when to apply the presumptions. We were unable to develop, at this time, a definition for unvegetated shallows which was both easy to apply and not too inclusive or exclusive. Therefore, we have decided the wiser course is to delete unvegetated shallows from the special aquatic area classification. Of course, as waters of the United States, they are still subject to the rest of the Guidelines.

"Fill Material": We are temporarily reserving § 230.3(t). Both the proposed Guidelines and the proposed Consolidated Permit Regulations defined fill material as material discharged for the primary purpose of replacing an aquatic area with dryland or of changing the bottom elevation of a water body, reserving to the NPDES program discharges with the same effect which are primarily for the purpose of disposing of waste. Both proposals solicited comments on this distinction, referred to as the primary purpose test. On May 19, 1980, acting under a court-imposed deadline, EPA issued final Consolidated Permit Regulations while the 404(b)(1) Guidelines rulemaking was still pending. These Consolidated Permit Regulations contained a new definition of fill material which eliminated the primary purpose test and included as fill material all pollutants which have the effect of fill, that is, which replace part of the waters of the United States with dryland or which change the bottom elevation of a water body for any purpose. This new definition is similar to the one used before 1977.

During the section 404(b)(1) rulemaking, the Corps has raised certain questions about the implementation of such a definition. Because of the importance of making the Final Guidelines available without further delay, and because of our desire to cooperate with the Corps in resolving their concerns about fill material, we have decided to temporarily reserve § 230.3(t) pending further discussion. This action does not affect the effectiveness of the Consolidated Permit Regulations. Consequently, there is a discrepancy between those regulations and the Corps' regulations, which still contain the old definition.

Therefore, to avoid any uncertainty from this situation, EPA wishes to make clear its enforcement policy for unpermitted discharges of solid waste. EPA has authority under section 309 of the CWA to issue administrative orders against violations of section 301. Unpermitted discharges of solid waste into waters of the United States violate section 301.

Under the present circumstances, EPA plans to issue solid waste administrative orders with two basic elements. First, the orders will require the violator to apply to the Corps of Engineers for a section 404 permit within a specified period of time. (The Corps has agreed to accept these applications and to hold them until it resolves its position on the definition of fill material.)

Second, the order will constrain further discharges by the violator. In extreme cases, an order may require that discharges cease immediately. However, because we recognize that there will be a lapse of time before decisions are made on this kind of permit application, these orders may expressly allow unpermitted discharges to continue subject to specific conditions set forth by EPA in the order. These conditions will be designed to avoid further environmental damage.

Of course, these orders will not influence the ultimate issuance or non-issuance of a permit or determine the conditions that may be specified in such a permit. Nor will such orders limit the

Administrator's authority under section 309(b) or the right of a citizen to bring suit against a violator under section 505 of the CWA.

Permitting Authority: We have used the new term "permitting authority," instead of "District Engineer," throughout these regulations, in recognition of the fact that under the 1977 amendments approved States may also issue permits.

Coastal Zone Management Plans

Several commenters were concerned about the relationship between section 404 and approved Coastal Zone Management (CZM) plans. Some expressed concern that the Guidelines might authorize a discharge prohibited by a CZM plan; others objected to the fact that the Guidelines might prohibit a discharge which was consistent with a CZM plan.

Under section 307(b) of the CZM Act, no Federal permits may be issued until the applicant furnishes a certification that the discharge is consistent with an approved CZM plan, if there is one, and the State concurs in the certification or waives review. Section 325.2(b)(2) of the Corps' regulation, which applies to all Federal 404 permits, implements this requirement for section 404. Because the Corps' regulations adequately address the CZM consistency requirement, we have not duplicated § 325.2(b)(2) in the Guidelines. Where a State issues State 404 permits, it may of course require consistency with its CZM plan under State law.

The second concern, that the 404 Guidelines might be stricter than a CZM plan, points out a possible problem with CZM plans, not with the Guidelines. Under 307(f) of CZMA, all CZM plans must provide for compliance with applicable requirements of the Clean Water Act. The Guidelines are one such requirement. Of course, to the extent that a CZM plan is general and area-wide, it may be impossible to include in its development the same project-specific consideration of impacts and alternatives required under the Guidelines. Nonetheless, it cannot authorize or mandate a discharge of dredged or fill material which fails to comply with the requirements of these Guidelines. Often CZM plans contain a requirement that all activities conducted under it meet the permit requirements of the Clean Water Act. In such a case, there could of course be no conflict between the CZM plan and the requirements of the Guidelines.

We agree with commenters who urge that delay and duplication of effort be avoided by consolidating alternatives studies required under different statutes, including the Coastal Zone Management Act. However, since some planning processes do not deal with specific projects, their consideration of alternatives may not be sufficient for the Guidelines. Where another alternative analysis is less complete than that contemplated under section 404, it may not be used to weaken the requirements of the Guidelines.

Advanced Identification of Dredged or Fill Material Disposal Sites

A large number of commenters objected to the way proposed § 230.70, new Subpart I, had been changed from the 1975 regulations. A few objected to the section itself. Most of the comments also revealed a misunderstanding about the significance of identifying an area. First, the fact that an area has been identified as unsuitable for a potential discharge site does not mean that someone cannot apply for and obtain a permit to discharge there as long as the Guidelines and other applicable requirements are satisified.* Conversely, the fact that an area has been identified as a potential site does not mean that a permit is unnecessary or that one will automatically be forthcoming. The intent of this section was to aid applicants by giving advance notice that they would have a relatively easy or difficult time qualifying for a permit to use particular areas. Such advance notice should facilitate applicant planning and shorten permit processing time.

Most of the objectors focused on EPA's "abandonment" of its "authority" to identify sites. While that "authority" is perhaps less "authoritative" than the commenters suggested (see above), we agree that there is no reason to decrease EPA's role in the process. Therefore, we have changed new § 230.80(a) to read:

> "Consistent with these Guidelines, EPA and the permitting authority on their own initiative or at the request of any other party, and after consultation with any affected State that is not the permitting authority, may identify sites which will be considered as:"

We have also deleted proposed § 230.70(a)(3), because it did not seem to accomplish much. Consideration of the point at which cumulative and secondary impacts become unacceptable and warrant emergency action will generally be more appropriate in a permit-by-permit context. Once that point has been so determined, of course, the area can be identified as "unsuitable" under the new § 230.80(a)(2).

* EPA may foreclose the use of a site by exercising its authority under section 404(c). The advance identification referred to in this section is not a section 404(c) prohibition.

Executive Order 12044

A number of commenters took the position that Executive Order 12044 requires EPA to prepare a "regulatory analysis" in connection with these regulations. EPA disagrees. These regulations are not, strictly speaking, new regulations. They do not impose new standards or requirements, but rather substantially clarify and reorganize the existing interim final regulations.

Under EPA's criteria implementing Executive Order 12044, EPA will prepare a Regulatory Analysis for any regulation which imposes *additional* annual costs totalling $100 million or which will result in a total *additional* cost of production of any major product or service which exceeds 5% of its selling price. While many commenters, particularly members of the American Association of Port Authorities (AAPA), requested a regulatory analysis and claimed that the regulations were too burdensome, none of them explained how that burden was an *additional* one attributable to this revision. A close comparison of the new regulation and the explicit and implicit requirements in the interim final Guidelines reveals that there has been very little real change in the criteria by which discharges are to be judged or in the tests that must be conducted; therefore, we stand by our original determination that a regulatory analysis is not required.

Perhaps the most significant area in which the regulations are more explicit and arguably stricter is in the consideration of alternatives. However, even the 1975 regulations required the permitting authority to consider "the availability of alternate sites and methods of disposal that are less damaging to the environment," and to avoid activities which would have significant adverse effects. We do not think that the revised Guidelines' more explicit direction to avoid adverse effects that could be prevented through selection of a clearly less damaging site or method is a change imposing a substantial new burden on the regulated public.

Because the revised regulations are more explicit than the interim final regulations in some respects, it is possible that permit reviewers will do a more thorough job evaluating proposed discharges. This may result in somewhat more carefully drawn permit conditions. However, even if, for purposes of argument, the possible cost of complying with these conditions is considered an *additional* cost, there is no reason to believe that it alone will be anywhere near $100 million annually.

"CWA Section 404 Administrative Orders for Removal or Restoration",dated May 20, 1985.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAY 20 1985

MEMORANDUM

SUBJECT: Clean Water Act, Section 404;
Administrative Orders for Removal or Restoration

FROM: Glenn L. Unterberger
Acting Associate Enforcement Counsel
for Water

TO: Regional Counsels

Enforcement actions to protect wetlands are emphasized in the Agency Priority List for FY 1986-87. Changes in the Agency accountability system now require that regional program offices report periodically upon numbers of wetlands-related inspections conducted and other compliance actions taken. Consequently, we expect that the program offices will be contacting the Offices of Regional Counsel with an increasing number of enforcement actions directed to wetlands protection under the section 404 program.

The purposes of this memorandum are (1) to affirm EPA's position that the Agency may issue administrative orders under section 309 of the Clean Water Act requiring removal of dredged or fill material or restoration of wetlands, in response to such violations, and (2) to identify the legally strongest circumstances for EPA to use these orders.

Background

Pursuant to section 309 of the Clean Water Act, the Agency may take enforcement action if a person has unlawfully discharged dredged or fill material without a permit, or in violation of a permit issued under section 404 by a State.1/ The Agency may also take enforcement action if a person has discharged dredged

or fill material in violation of a permit issued by the Corps of Engineers.2/

The Agency may respond to unpermitted discharges or permit violations by seeking a court order requiring a discharger to remove his fill and otherwise restore the affected waters.3/ The Agency may also administratively order an unpermitted discharger or permit holder to cease an on-going violation and to refrain from committing a future violation.4/

Section 309(a)(3) of the Clean Water Act also is broad enough to provide the Agency with the authority to issue an administrative order requiring an unpermitted discharger or permit violator to remove his fill or otherwise restore the affected waters, even though that authority is less explicit. Absent any judicial opinion which clearly disposes of the issue, the Agency should respond to such violations as discussed below so as to ensure that the Agency's authority to issue restoration and removal orders will be upheld.

Circumstances Supporting EPA Issuance of Administrative Restoration or Removal Orders

The Act and case law discussed below suggest situations in which a court would more likely uphold an administrative

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2/ A discharge in violation of a Corps-issued permit is not "in compliance with ... section[] 404" of the Clean Water Act. Clean Water Act, sec. 301(a). Consequently, the person discharging in violation of a Corps-issued permit is "in violation of section 301", and subject to Agency enforcement action. Clean Water Act, secs. 309(a, b), and 404(n). Procedures to be followed by EPA personnel for violations of section 301 arising out of any form of noncompliance with section 404 (including violations of Corps-issued permits) are set forth in the attached memorandum dated June 1, 1976, from Assistant Administrator for Enforcement Stanley W. Legro.

3/ The Government has obtained restoration orders in many cases. See, e.g., U.S. v. Tull, 20 E.R.C. 2198 (E.D. Va. 1983); U.S.v. Carter, 18 E.R.C. 1810 (S.D. Fla. 1982); U.S. v. Bradshaw, 541 F. Supp. 884 (D. Md. 1982); U.S. v. Kirkland, 518 F. Supp. 65 (S.D. Fla. 1981); U.S. v. Lee Wood Contracting, Inc., 17 E.R.C. 1743 (E.D. Mich. 1981); U.S. v. Isla Verda Investment Corp., 17 E.R.C. 1854 (D.P.R. 1980); U.S. v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980); and U.S. v. Fleming Plantations, 12 E.R.C. 1705 (E.D. La. 1978).

4/ Clean Water Act, sec. 309(a)(3).

restoration or removal order. Cases in which one or more of the following elements are present are likely to be better candidates for such orders.

o The presence of the dredged or fill material is continuing to cause harm or present an identifiable risk of harm even though the discharge of the material has ceased. A court has stated that the Clean Water Act is violated on each day that a discharger allows illegal fill to remain. United States v. Tull, 20 E.R.C. 2198, 2212 (E.D. Va. 1983). A court may therefore hold that an administrative order requiring removal of unlawful fill is an "order requiring such person to comply" with the Act, and thus authorized by section 309(a)(3). If the discharge has ceased, the Agency is better able to present a convincing argument in support of a continuing violation where the dredged or fill material continues to cause harm or present an identifiable risk of harm. Such harm may result from pollutants which continue to leach into the water, from continuing risks to navigation or risks of flood damage associated with the fill, or continuing loss of habitat.

o The remedy required by the administrative order is clearly reasonable. The courts have set forth general criteria for determining whether restoration is appropriate. See, e.g., United States v. Weisman, 489 F. Supp. 1331, 1343 (M.D. Fla. 1980); United States v. Bradshaw, 541 F. Supp. 884, 885 (D. Md. 1982); United States v. Hanna, 19 E.R.C. 1068, 1091 (D.S.C. 1983). In summary, the courts conclude that fashioning relief requires "a touch of equity" and that restoration should: (1) confer maximum environmental benefits; (2) be achievable as a practical matter; and (3) bear an equitable relationship to the degree and kind of wrong that it is intended to remedy.5/ An administrative restoration order is more likely to be upheld if it clearly satisfies those criteria.6/

5/ Analysis of the case law and criteria appears in "Federal Wetlands Law: The Cases and the Problems", 8 Harv. Env. L. Rev. 1, 46-52 (1984), and "Restoration as a Federal Remedy for Illegal Dredging and Filling Operations", 32 Univ. of Miami L. Rev. 105 (1977).

6/ The order should include findings supporting the conclusion that restoration is reasonable, equitable and achievable. See, Clean Water Act, sec. 309(a)(5). The order may also recite that the objective of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act, sec. 101(a).

o The Agency has accorded the discharger notice and an opportunity to be heard prior to issuing the order. Case law suggests that a person receiving an enforcement order under the Clean Water Act is not entitled to an administrative hearing. See, Montgomery Environmental Coalition, Inc. v. E.P.A., 19 E.R.C. 1169, 1170-71 (D.C. Cir. 1983); Parkview Corp. v. Department of the Army, Corps of Engineers, Chicago District, 455 F. Supp. 1350, 1352 (E.D. Wisc. 1978).7/ However, courts have emphasized the importance of giving a discharger adequate opportunity to present its contentions regarding restoration. See, e.g., Weiszmann v. District Engineer, U.S. Army Corps of Engineers, 526 F.2d 1302, 1304 (5th Cir. 1976); United States v. Hanna, 19 E.R.C. 1068, 1091 (D.S.C. 1983); Parkview Corp. v. Department of the Army, Corps of Engineers, Chicago District, 490 F. Supp. 1278, 1285 (E.D. Wisc. 1980). Accordingly, an administrative restoration order is more likely to be upheld if the Agency advised the discharger in writing of the proposed order, sought and considered his comments before issuing the order, and maintained a record of the comments and the basis for the Agency's response to those comments. The Corps' procedures for conducting initial investigations, seeking further information from violators, and issuing restoration orders are set forth in 33 CFR Part 326.

In order to obtain the discharger's views, the Region may issue an order which, by its terms, does not take effect until the person to whom it is issued has had an opportunity to confer with the Agency concerning the alleged violation. Cf., section 309(a)(4). The Region may also issue a "show cause" order directing the respondent to provide information that he wishes the Agency to consider. Cf., 33 C.F.R. 326.3(a)(3). Alternatively, the Region may issue an order requiring the discharger to cease further discharges and to report that it has done so, and to contact the Agency concerning additional information or measures which may be required to insure compliance with the Act.

o The Agency issues its order in coordination with the Corps of Engineers. A Corps' order requiring the removal of fill has withstood judicial challenge. In Parkview Corp. v. Department of the Army, Corps of Engineers, Chicago District, 490 F. Supp. 1278, 1285 (E.D. Wisc. 1980), the Corps ordered a municipality to remove fill which had been placed in wetlands without a permit. The Court concluded that the Corps had

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7/ We are aware of no authority which requires the Agency to hold a hearing prior to issuing an administrative order requiring a violator to cease his violation.

inherent authority to issue such an order. It stated further that it could not find that the Corps acted in an arbitrary or capricious manner in requiring the fill to be removed in that particular case. See, also, Leslie Salt Co. v. Froehlke, 403 F. Supp. 1292 (N.D. Cal. 1974), modified on other grounds, 578 F.2d 742 (9th Cir. 1978) (a Corps' compliance order may do more than forbid future violations of the Clean Water Act; affirmative relief, as well as prohibitory relief, may be ordered). A restoration order issued jointly by the Agency and the Corps is therefore likely to be judicially enforced. I believe that the enforceability of a restoration order issued solely by the Agency will also be enhanced if it was issued after coordination with the Corps.8/

The Agency may want to issue an order requiring restoration in situations where the referenced elements are not all present. For example, the need for prompt removal of an obviously unlawful discharge may persuade the Agency that it ought to issue an order prior to formal exchange of views with the discharger or without exhaustive coordination with the Corps. However, we recommend that the Regions target the use of administrative removal or restoration orders under section 309(a)(3) of the Act where some or all of the elements referenced above are present.

Your staff may wish to direct questions regarding this matter to Gary Hess at FTS 475-8183.

Attachment

cc: Colburn Cherney
Allan Hirsch
Margaret Strand
Jack Chowning
William Jordan
Regional 404 Contacts
Lance Wood
Vicki O'Meara
Bernie Goode
Mo Rees
Marvin Moriarty

BY: GHESS:gh:2/21/85:LE-134W:3201:475-8183:Hess.26
Revised:gh:4/22/85; gh:4/25/85; cl:5/3/85

8/ In addition, the Region should contact the Corps: to ensure that the discharge is unauthorized, either by nationwide or regional general permit or by an individual permit or modification; to determine if the Corps has taken enforcement action; to obtain the Corps' view regarding the existence of a violation; and to confirm that the Corps has not advised the discharger that the discharge is lawful.

Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Regulation of Solid Waste Under the Clean Water Act, dated January 23, 1986, effective date April 23, 1986.

DEPARTMENT OF DEFENSE

Department of the Army

ENVIRONMENTAL PROTECTION AGENCY

Water Pollution Control; Memorandum of Agreement on Solid Waste

February 28, 1986.

AGENCY: Department of the Army, DoD and Environmental Protection Agency.

ACTION: Notice of agreement.

SUMMARY: The Department of the Army and the Environmental Protection Agency (EPA) have entered into an agreement to promote effective control under the Clean Water Act (CWA) of discharges of solid and semi-solid waste materials discharged into the waters of the United States for the purpose of disposal of waste.

DATE: The Memorandum of Agreement (MOA) was executed on January 23, 1986, and shall take effect on April 23, 1986. Written comments received on or before June 23, 1986, will be considered in any future revision undertaken to the Agreement. Written comments received after June 23, 1986, will be considered if the timing of any future revision allows for such consideration.

ADDRESS: Office of the Assistant Secretary of the Army (Civil Works), U.S. Department of the Army, Room 2E570, Washington, DC, 20310-0103; or Office of Federal Activities (A-104), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460.

FOR FURTHER INFORMATION CONTACT:

Morgan Rees, Assistant for Regulatory Affairs, Office of the Assistant Secretary of the Army (Civil Works), Department of the Army, Pentagon, Room 2E569, Washington, DC, 20310, (202) 695-1370.

John Meagher, Director, Aquatic Resource Division, Office of Federal Activities (A-104), Environmental Protection Agency, Washington, DC, 20460, (202) 382-5043.

SUPPLEMENTARY INFORMATION: Under section 404 of the CWA, the Army Corps of Engineers (and States approved by EPA) issue permits for discharges of dredged and fill material into waters of the United States which comply with the Act and applicable regulations. Under section 402 of the CWA (the National Pollutant Discharge Elimination System or NPDES Program), EPA (and States approved by EPA) issue permits for discharges of all other pollutants into waters of the United States, which comply with the Act and applicable regulations.

The MOA was entered into to resolve a difference (since 1980) between Army and EPA over the appropriate CWA program for regulating certain discharges of solid wastes into waters of the United States. The Army Corps of Engineers' definition of "fill material" provides that only those materials discharged for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a waterbody are regulated under the Corps section 404 permit program. These discharges include discharges of pollutants intended to fill a regulated wetland to create fast land for development. The Corps definition excludes pollutants discharged with the primary purpose to dispose of waste which, under the Corps definition, would be regulated under section 402. Under EPA's definition of "fill material," all such solid waste discharges would be regulated under section 404, regardless of the primary purpose of the discharger. This difference has complicated the regulatory program for solid wastes discharged into waters of the United States.

A February 1984 Settlement Agreement in *NWF v. Marsh*, a case brought by 16 environmental groups against Army and EPA on a number of section 404 matters required resolution of the definition of fill issue by September 1984. Army and EPA have been working toward a resolution since settlement. In Section 404 oversight hearings conducted by the Senate Environment and Public Works Committee in 1985, EPA and Army agreed to make every effort to resolve the matter by the end of 1985.

The agreement published today provides an interim arrangement between the agencies for controlling discharges. In the longer term, EPA and Army agree that consideration given to the control of discharges of solid waste both in waters of the United States and upland should take into account the results of studies being implemented under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA), signed into law on November 8, 1984.

The amendments to RCRA require EPA, by November 8, 1987, to submit a report to Congress determining whether the RCRA Subtitle D Criteria (40 CFR Part 257) are adequate to protect human health and the environment from groundwater contamination, and recommending whether additional authorities are needed to enforce the Criteria. In addition, EPA must revise the Criteria by March 31, 1988, for solid waste disposal facilities that may receive hazardous household waste or small quantity generator hazardous waste. At a minimum, these revisions should require not only groundwater monitoring as necessary to detect contamination, but should also establish criteria for the acceptable location of new or existing facilities, and provide for corrective action, as appropriate.

The main focus of the interim arrangement is to ensure an effective enforcement program under section 309 of the CWA for controlling discharges of solid and semi-solid wastes into waters of the United States for the purpose of disposal of waste. When warranted, EPA will normally initiate section 309 action to control such discharges. If it becomes necessary to determine whether section 402 or 404 applies to an ongoing or proposed discharge, the determination will be based upon criteria in the agreement, which provide, *inter alia*, for certain homogeneous wastes to be regulated under the section 402 (NPDES) Program and certain heterogeneous wastes to be regulated under the section 404 Program.

To promote regulatory consistency for those seeking to apply for authorization to discharge these wastes into waters of the United States, the agreement encourages the use of the criteria in the MOA by prospective dischargers. It also provides a procedure for the agencies' consideration of any permit applications received, and calls upon the agencies to advise prospective dischargers regarding the probable unsuitability of certain kinds of wastes for discharge into waters of the United States.

This agreement does not affect the regulatory requirements for materials discharged into waters of the United States for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a water body. Discharges listed in the Corps definition of "discharge of fill material," 33 CFR 323.2(1) remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria in the agreement for section 402 discharges.

Unless extended by mutual agreement, the agreement will expire at such time as EPA has accomplished specified steps in its implementation of RCRA, at which time the results of the study of the adequacy of the existing Subtitle D criteria and proposed revisions to the Subtitle D criteria for solid waste disposal facilities, including those that may receive hazardous household wastes and small quantity generator waste, will be known. In addition, data resulting from actions

under the interim agreement can be considered at that time.

The Department of Army and EPA will ensure that decisions made pursuant to this agreement meet the requirements of the CWA and are consistent with the Act's objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. EPA and Army will also take steps to ensure that discharges of solid and semi-solid wastes into waters of the United States are evaluated consistently under the section 402 and 404 programs, and that this agreement will be implemented in a manner that imposes no unnecessary burden on the regulated sector.

Text

January 17, 1986.

Memorandum of Agreement Between the Assistant Administrator for External Affairs and Water, U.S. Environmental Protection Agency, and the Assistant Secretary of the Army for Civil Works Concerning Regulation of Discharge of Solid Waste Under the Clean Water Act

A. Basis of Agreement

1. Whereas the Clean Water Act has as its principal objective the requirement "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters; and,

2. Whereas section 301 of the Clean Water Act prohibits the discharge of any pollutant into waters of the United States except in compliance with sections 301, 302, 306, 307, 318, 402, and 404 of the Act; and

3. Whereas EPA, and States approved by EPA, have been vested with authority to permit discharges of pollutants, other than dredged or fill material, into waters of the United States pursuant to section 402 of the Clean Water Act that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 40 CFR 122–125; and

4. Whereas the Army, and States approved by EPA, have been vested with authority to permit discharges of dredged or fill material into waters of the United States that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 33 CFR Part 320 *et seq.* and 40 FR Part 230 *et seq.*; and

5. Whereas the definitions of the term "fill material" contained in the aforementioned regulations have created uncertainty as to whether section 402 of the Act or section 404 is intended to regulate discharges of solid waste materials into waters of the United States for the purpose of disposal of waste; and

6. Whereas the Resource Conservation and Recovery Act Amendments of 1984 (RCRA) require that certain steps be taken to improve the control of solid waste; and

7. Whereas interim control of such discharges is necessary to ensure sound management of the Nation's waters and to avoid complications in enforcement actions taken against persons discharging pollutants into waters of the United States without a permit;

8. The undersigned agencies do hereby agree to use their respective abilities cooperatively in an interim program to control the discharges of solid waste material into waters of the United States.

B. Procedures

1. When either agency is aware of a proposed or an unpermitted discharge of solid waste into waters of the United States, the agency will notify the discharger of the prohibition against such discharges as provided in section 301 of the Clean Water Act. Such notice is not a prerequisite for an enforcement action by either agency.

2. Normally, if an activity in B.1 above warrants action, EPA will issue an administrative order or file a complaint under section 309 to control the discharge.

3. In issuing a notice of violation or administrative order or in filing a complaint, it is not necessary in order to demonstrate a violation of section 301(a) of the Clean Water Act to identify which permit a permitless discharge should have had. However, after an enforcement action has commenced, a question may be raised by the court, discharger, or other party as to whether a particular discharge having the effect of replacing an aquatic area with dry land or of changing the bottom elevation of a water body meets the primary purpose test for "fill material" in the Corps definition (33 CFR 323.2(k)). For example, such question may be raised in connection with a defense, or it may be relevant to the relief to be granted or the terms of a settlement.

4. To avoid any impediment to prompt resolution of the enforcement action, if such a question arises, a discharge will normally be considered to meet the definition of "fill material" in 33 CFR 323.2(k) for each specific case by consideration of the following factors:

a. The discharge has as its primary purpose or has as one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation.

b. The discharge results from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities.

c. A principal effect of the discharge is physical loss or physical modification of waters of the United States, including smothering of aquatic life or habitat.

d. The discharge is heterogeneous in nature and of the type normally associated with sanitary landfill discharges.

5. On the other hand, in the situation in paragraph B.3., a pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials.

6. While this document addresses enforcement cases, prospective dischargers who apply for a permit will be encouraged to use the above criteria for purposes of project planning. If a prospective discharger applies for a section 404 permit based on the considerations in paragraph B.4., or for a Section 402 permit based on the considerations in paragraph B.5., the application will normally be accepted for processing. If a prospective discharger applies for a 404 permit for discharge of materials that might be hazardous, he shall be advised that dischargers of wastes to waters of the United States that are hazardous under RCRA are unlikely to comply with the section 404(b)(1) Guidelines. To facilitate processing of applications for permits under sections 402 or 404 for discharges covered by this agreement, an application for such discharge shall not be accepted for processing until the applicant has provided a determination signed by the State or appropriate interstate agency that the proposed discharge will comply with applicable provisions of State law including applicable water quality standards, or evidence of waiver by the State or interstate agency. As mandated under the Clean Water Act, neither a 402 nor a 404 permit will be issued for a discharge of toxic pollutants in toxic amounts. Prospective applicants for section 402 permits shall be advised that the proposed discharge will be evaluated for compliance with the Act, in particular with sections 101(e), 301, 303, 304, 307, 402, and 405 of the Act.

C. Determination of Permit

1. In enforcement cases, where a question arises under paragraph B.3 as to which permit would be required for a permitless discharge, the enforcing agency will determine whether the criteria in paragraph B.4 or B.5, if either, have been satisfied, with concurrence from the other agency. If the enforcing agency concludes that neither set of the criteria has been met and additional analysis is required to determine which Section applies, or if the necessary concurrence is not forthcoming promptly, the Division Engineer and the Regional Administrator (or designees) will consult and determine which permit program is applicable.

2. In non-enforcement situations, the agency receiving an application shall determine whether it meets the criteria in paragraphs 4 or 5, as the case may be. If the agency determines that the criteria applicable to its permit program have not been met, it will ask the other agency to determine whether the criteria for the latter's permit program have been met.

If neither agency determines that the criteria for its permit program have been met, the Division Engineer and the RA (or their designees) shall consult and determine which agency shall process the application in question.

D. Publication in the "Federal Register"

Since this Memorandum of Agreement clarifies the definition of fill material with respect to discharges of solid waste into waters of the United States, the parties to the agreement shall jointly publish it in the **Federal Register** within 45 days after it has been signed.

E. Effective Dates

1. This agreement shall take effect 90 days after the date of the last signature below and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice.

2. This agreement automatically expires at such time as EPA has submitted its Report to Congress on the Results of Study of the Adequacy of the Existing Subtitle D Criteria and has published a Notice of Proposed Revisions to the Subtitle D Criteria in the **Federal Register**, unless the agencies mutually agree that extension of this agreement is needed.

Dated: January 22, 1986.

Jennifer J. Manson,

Assistant Administrator for External Affairs, U.S. Environmental Protection Agency.

Dated: January 23, 1986.

Larry Jensen,

Assistant Administrator for Water, U.S. Environmental Protection Agency.

Dated: January 17, 1986.

Robert K. Dawson,

Assistant Secretary of the Army (Civil Works).

Dated: March 11, 1986.

Jennifer J. Manson,

Assistant Administrator for External Affairs, U.S. Environmental Protection Agency.

Lawrence J. Jensen,

Assistant Administrator for Water, U.S. Environmental Protection Agency.

Robert K. Dawson,

Assistant Secretary of the Army for Civil Works, Department of the Army.

[FR Doc. 86–5611 Filed 3–13–86; 8:45 am]

BILLING CODE 3710-92-M

Intent To Prepare a Draft Supplemental Environmental Impact Statement (SEIS) for the East-bank Barrier Levee Feature of the New Orleans to Venice, Louisiana, Hurricane Protection Project

AGENCY: New Orleans District, Army Corps of Engineers, DOD.

ACTION: Notice of intent to prepare a draft SEIS.

SUMMARY:

1. Proposed Action

In 1962, Pub. L. 874, 87th Congress, authorized the project "Mississippi River Delta at and below New Orleans to Venice, Louisiana." The project would prevent tidal damages along the Mississippi River in lower Plaquemines Parish, Louisiana, by increasing the

"Memorandum and Agreement between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act," dated January 19, 1989, with collateral agreements concerning previously-issued Corps permits, geographic jurisdiction, and Section 404(f) exemption issues.

MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND THE ENVIRONMENTAL PROTECTION AGENCY CONCERNING FEDERAL ENFORCEMENT FOR THE SECTION 404 PROGRAM OF THE CLEAN WATER ACT

I. PURPOSE AND SCOPE

The United States Department of the Army (Army) and the United States Environmental Protection Agency (EPA) hereby establish policy and procedures pursuant to which they will undertake federal enforcement of the dredged and fill material permit requirements ("Section 404 program") of the Clean Water Act (CWA). The U.S Army Corps of Engineers (Corps) and EPA have enforcement authorities for the Section 404 program, as specified in Sections 301(a), 308, 309, 404(n), and 404(s) of the CWA. In addition, the 1987 Amendments to the CWA (the Water Quality Act of 1987) provide new administrative penalty authority under Section 309(g) for violations of the Section 404 program. For purposes of effective administration of these statutory authorities, this Memorandum of Agreement (MOA) sets forth an appropriate allocation of enforcement responsibilities between EPA and the Corps. The prime goal of the MOA is to strengthen the Section 404 enforcement program by using the expertise, resources and initiative of both agencies in a manner which is effective and efficient in achieving the goals of the CWA.

II. POLICY

A. *General.* It shall be the policy of the Army and EPA to maintain the integrity of the program through federal enforcement of Section 404 requirements. The basic premise of this effort is to establish a framework for effective Section 404 enforcement with very little overlap. EPA will conduct initial on-site investigations when it is efficient with respect to available time, resources and/or expenditures, and use its authorities as provided in this agreement. In the majority of enforcement cases the Corps, because it has more field resources, will conduct initial investigations and use its authorities as provided in this agreement. This will allow each agency to play a role in enforcement which concentrates its resources in those areas for which its authorities and expertise are best suited. The Corps and EPA are encouraged to consult with each other on cases involving novel or important legal issues and/or technical situations. Assistance from the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS) and other federal, state, tribal and local agencies will be sought and accepted when appropriate.

B. *Geographic Jurisdictional Determinations.* Geographic jurisdictional determinations for a specific case will be made by the investigating agency. If asked for an oral decision, the investigator will caution that oral statements regarding jurisdiction are not an offici l agency determination. Eac agen y will advise the oth r of any problem trends that they become aware of through case by case determinations and initiate interagency discussions or other action to address the issue. (Note: Geographic jurisdictional determinations for "special case" situations and interpretation of Section 404(f) exemptions for "special Section 404(f) matters" will be handled in accordance with the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act.)

C. *Violation Determinations.* The investigating agency shall be responsible for violation determinations, for example, the need for a permit. Each agency will advise the other of any problem trends that they become aware of through case by case determinations and initiate interagency discussions or other action to address the issue.

D. *Lead Enforcement Agency.* The Corps will act as the lead enforcement agency for all violations of Corps-issued permits. The Corps will also act as the lead enforcement agency for unpermitted discharge violations which do not meet the criteria for forwarding to EPA, as listed in Section III.D. of this MOA. EPA will act as the lead enforcement agency on all unpermitted discharge violations which meet those criteria. The lead enforcement agency will complete the enforcement action once an investigation has established that a violation exists. A lead enforcement agency decision with regard to any issue in a particular case, including a decision that no enforcement action be taken, is final for that case. This provision does not preclude the lead enforcement agency from referring the matter to the other agency under Sections III.D.2 and III.D.4 of this MOA.

E. *Environmental Protection Measures.* It is the policy of both agencies to avoid permanent environmental harm caused by the violator's activities by requiring remedial actions or ordering removal and restoration. In those cases where a complete remedy/removal is not appropriate, the violator may be required, in addition to other legal remedies which are appropriate (e.g., payment of administrative penalties) to provide compensatory mitigation to compensate for the harm caused by such illegal actions. Such compensatory mitigation activities shall be placed as an enforceable requirement upon a violator as authorized by law.

III. PROCEDURES

A. *Flow chart.* The attached flow chart provides an outline of the procedures

EPA and the Corps will follow in enforcement cases involving unpermitted discharges. The procedures in (B.), (C.), (D.), (E.) and (F.) below are in a sequence in which they could occur. However, these procedures may be combined in an effort to expedite the enforcement process.

B. *Investigation.* EPA, if it so requests and upon prior notification to the Corps, will be the investigating agency for unpermitted activities occurring in specially defined geographic areas (e.g., a particular wetland type, areas declared a "special case" within the meaning of the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act). Timing of investigations will be commensurate with agency resources and potential environmental damage. To reduce the potential for duplicative federal effort, each agency should verify prior to initiating an investigation that the other agency does not intend or has not already begun an investigation of the same reported violation. If a violation exists, a field investigation report will be prepared which at a minimum provides a detailed description of the illegal activity, the existing environmental setting, initial view on potential impacts and a recommendation on the need for initial corrective measures. Both agencies agree that investigations must be conducted in a professional, legal manner that will not prejudice future enforcement action on the case. Investigation reports will be provided to the agency selected as the lead on the case.

C. *Immediate Enforcement Action.* The investigating or lead enforcement agency should inform the responsible parties of the violation and inform them that all illegal activity should cease pending further federal action. A notification letter or administrative order to that effect will be sent in the most expeditious manner. If time allows, an order for initial corrective measures may be included with the notification letter or administrative order. Also, if time allows, input from other federal, state, tribal and local agencies will be considered when determining the need for such initial corrective measures. In all cases the Corps will provide EPA a copy of its violation letters and EPA will provide the Corps copies of its §308 letters and/or §309 administrative orders. These communications will include language requesting the other agency's views and recommendations on the case. The violator will also be notified that the other agency has been contacted.

D. ***Lead Enforcement Agency Selection.*** Using the following criteria, the investigating agency will determine which agency will complete action on the enforcement case:

1. EPA will act as the lead enforcement agency when an unpermitted activity involves the following:

a. Repeat Violator(s);
b. Flagrant Violation(s);
c. Where EPA requests a class of cases or a particular case; or
d. The Corps recommends that an EPA administrative penalty action may be warranted.

2. The Corps will act as the lead enforcement agency in all other unpermitted cases not identified in Part III D.1. above. Where EPA notifies the Corps that, because of limited staff resources or other reasons, it will not take action on a specific case, the Corps may take action commensurate with resource availability.

3. The Corps will act as the lead enforcement agency for Corps-issued permit condition violations.

4. Where EPA requests the Corps to take action on a permit condition violation, this MOA establishes a "right of first refusal" for the Corps. Where the Corps notifies EPA that, because of limited staff resources or other reasons, it will not take an action on a permit condition violation case, the EPA may take action commensurate with resource availability. However, a determination by the Corps that the activity is in compliance with the permit will represent a final enforcement decision for that case.

E. *Enforcement Response.* The lead enforcement agency shall determine, based on its authority, the appropriate enforcement response taking into consideration any views provided by the other agency. An appropriate enforcement response may include an administrative order, administrative penalty complaint, a civil or criminal judicial referral or other appropriate formal enforcement response.

F. *Resolution.* The lead enforcement agency shall make a final determination that a violation is resolved and notify interested parties so that concurrent enforcement files within another agency can be closed. In addition, the lead enforcement agency shall make arrangements for proper monitoring when required for any remedy/removal, compensatory mitigation or other corrective measures.

G. *After-the-Fact Permits.* No after-the-fact (ATF) permit application shall be accepted until resolution has been reached through an appropriate enforcement response as determined by the lead enforcement agency (e.g., until all administrative, legal and/or corrective action has been completed, or a decision has been made that no enforcement action is to be taken).

IV. RELATED MATTERS

A. *Interagency Agreements.* The Army and EPA are encouraged to enter into interagency agreements with other federal, state, tribal and local agencies which will provide assistance to the Corps and EPA in pursuit of Section 404 enforcement activities. For example, the preliminary enforcement site investigations or post-case monitoring activities required to ensure compliance with any enforcement order can be delegated to third parties (e.g., FWS) who agree to assist Corps/EPA in compliance efforts. However, only the Corps or EPA may make a violation determination and/or pursue an appropriate enforcement response based upon information received from a third party.

B. *Corps/EPA Field Agreements.* Corps Division or District offices and their respective EPA Regional offices are encouraged to enter into field level agreements to more specifically implement the provisions of this MOA.

C. *Data Information Exchange.* Data which would enhance either agency's enforcement efforts should be exchanged between the Corps and EPA where available. At a minimum, each agency shall begin to develop a computerized data list of persons receiving ATF permits or that have been subject to a Section 404 enforcement action subsequent to February 4, 1987 (enactment date of the 1987 Clean Water Act Amendments) in order to provide historical compliance data on persons found to have illegally discharged. Such information will help in an administrative penalty action to evaluate the statutory factor concerning history of a violator and will help to determine whether pursuit of a criminal action is appropriate.

V. GENERAL

A. The procedures and responsibilities of each agency specified in this MOA may be delegated to subordinates consistent with established agency procedures.

B. The policy and procedures contained within this MOA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the U.S. Deviation or variance from these MOA procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.

C. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of either agency. All formal guidance interpreting this MOA shall be issued jointly.

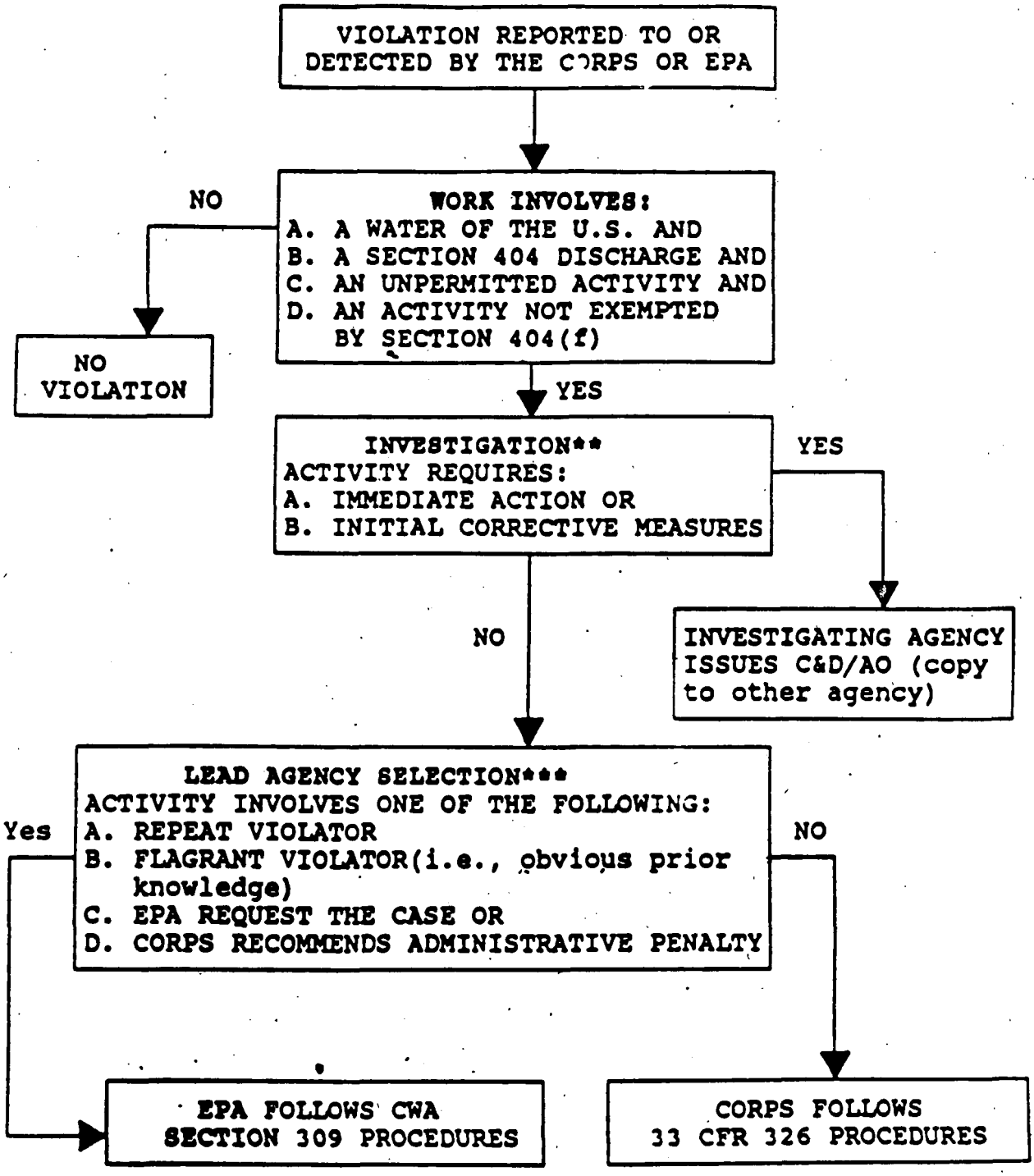
D. This agreement shall take effect 60 days after the date of the last signature below and will continue in effect for five years unless extended, modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice, prior to that time.

JAN. 19, 1989

Robert W. Page (Date)
Assistant Secretary of
the Army (Civil Works)

Rebecca W. Hammer (Date)
Acting Assistant Administrator
for Water
U.S. Environmental Protection Agency

*CORPS/EPA ENFORCEMENT PROCEDURES FOR SECTION 404 UNPERMITTED VIOLATIONS**



* Enforcement procedures for permit condition violation cases are set forth at Part III.D.3. and III.D.4.

** Procedures for investigating unpermitted activity cases are set forth at Part III.B.

*** Examples of situations in which "C" & "D" might arise include cases which are important due to deterrent value, due to the violation occurring in a critical priority resource or in an advanced identification area, involving an uncooperative individual, etc.

DEPARTMENT OF THE ARMY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Section 404 Enforcement Memorandum of Agreement (MOA) Procedures Regarding the Applicability of Previously-Issued Corps Permits

1. The MOA Between the Department of the Army and the Environmental Protection Agency (EPA) Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Section 404 Enforcement MOA) establishes policy and procedures pursuant to which EPA and Army will undertake federal enforcement of the dredged and fill material permit requirements of the Clean Water Act.

2. For purposes of effective administration of the statutory enforcement authorities of both EPA and the U.S. Army Corps of Engineers (Corps), the MOA sets forth an appropriate allocation of enforcement responsibilities between EPA and the Corps. Given that the Corps is the federal permit-issuing authority, for purposes of implementation of the provisions of the Section 404 Enforcement MOA the Corps will be responsible for determining whether an alleged illegal discharge of dredged or fill material is authorized under an individual or general permit.

3. When EPA becomes aware of an alleged illegal discharge, it will contact the appropriate Corps district and request a determination as to whether the discharge is authorized by an individual or general permit.

4. A Corps determination that the discharge is authorized by an individual or general permit represents a final enforcement decision for that particular case. Likewise, a Corps determination that the discharge is not authorized by an individual or general permit (i.e., it is an unpermitted discharge) is final for that particular case.

5. In order to promote effective and expeditious action against possible illegal discharges, the Corps district upon request from EPA is responsible for providing a determination within two working days in those cases where EPA provides the Corps with sufficient information to make this determination in the office. However, if sufficient information is not available to the Corps so that additional investigation by the Corps is needed before it is able to respond to the EPA request, the Corps will provide a determination to EPA within 10 working days. If the Corps does not provide a determination to EPA within the applicable time frame, EPA may continue to investigate the case and determine whether the activity constitutes an unauthorized discharge, and the EPA determination will be final for that particular case.

6. Notwithstanding the above provisions, in situations where an alleged illegal discharge is ongoing and EPA reasonably believes that such discharge is not authorized, EPA may take immediate enforcement action against the discharger when necessary to minimize impacts to the environment. However, EPA will also contact the appropriate Corps district and request a determination as to whether the discharge is authorized by an individual or general permit. A subsequent determination by the Corps, pursuant to paragraph five above, that the discharge is authorized represents a final enforcement decision for that particular case.

7. This guidance shall remain in effect for as long as the Section 404 Enforcement MOA is in effect, unless revisions to or revocation of this guidance is mutually agreed to by the two signatory agencies.

for Robert W. Page (Date)
Assistant Secretary of
the Army (Civil Works)

Rebecca W. Hanmer (Date)
Acting Assistant Administrator
for Water
U.S. Environmental Protection Agency

MEMORANDUM OF AGREEMENT
BETWEEN THE DEPARTMENT OF THE ARMY
AND THE ENVIRONMENTAL PROTECTION AGENCY
CONCERNING THE DETERMINATION OF THE
GEOGRAPHIC JURISDICTION OF THE SECTION 404 PROGRAM
AND THE APPLICATION OF THE EXEMPTIONS
UNDER SECTION 404(f) OF THE CLEAN WATER ACT

I. PURPOSE AND SCOPE.

The United States Department of the Army (Army) and the United States Environmental Protection Agency (EPA) hereby establish the policy and procedures pursuant to which they will determine the geographic jurisdictional scope of waters of the United States for purposes of section 404 and the application of the exemptions under section 404(f) of the Clean Water Act (CWA).

The Attorney General of the United States issued an opinion on September 5, 1979, that the Administrator of EPA (Administrator) has the ultimate authority under the CWA to determine the geographic jurisdictional scope of section 404 waters of the United States and the application of the section 404(f) exemptions. Pursuant to this authority and for purposes and effective administration of the 404 program, this Memorandum of Agreement (MOA) sets forth an appropriate allocation of responsibilities between the EPA and the U.S. Army Corps of Engineers (Corps) to determine geographic jurisdiction of the section 404 program and the applicability of the exemptions under section 404(f) of the CWA.

II. POLICY.

It shall be the policy of the Army and EPA for the Corps to continue to perform the majority of the geographic jurisdictional determinations and determinations of the applicability of the exemptions under section 404(f) as part of the Corps role in administering the section 404 regulatory program. It shall also be the policy of the Army and EPA that the Corps shall fully implement EPA guidance on determining the geographic extent of section 404 jurisdiction and applicability of the 404(f) exemptions.

Case-specific determinations made pursuant to the terms of this MOA will be binding on the Government and represent the Government's position in any subsequent Federal action or litigation regarding the case. In making its determinations, the

Corps will implement and adhere to the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," EPA guidance on isolated waters, and other guidance, interpretations, and regulations issued by EPA to clarify EPA positions on geographic jurisdiction and exemptions. All future programmatic guidance, interpretations, and regulations on geographic jurisdiction, and exemptions shall be developed by EPA with input from the Corps; however, EPA will be considered the lead agency and will make the final decision if the agencies disagree.

III. DEFINITIONS.

A. Special Case. A special case is a circumstance where EPA makes the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404.

Special cases may be designated in generic or project-specific situations where significant issues or technical difficulties are anticipated or exist, concerning the determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404 and where clarifying guidance is or is likely to be needed. Generic special cases will be designated by easily identifiable political or geographic subdivisions such as township, county, parish, state, EPA region, or Corps division or district. EPA will ensure that generic special cases are marked on maps or some other clear format and provided to the appropriate District Engineer (DE).

B. Special 404(f) Matters. A special 404(f) matter is a circumstance where EPA makes the final determination of the applicability of exemptions under section 404(f) of the CWA.

A special 404(f) matter may be designated in generic or project-specific situations where significant issues or technical difficulties are anticipated or exist, concerning the applicability of exemptions under section 404(f), and where clarifying guidance is, or is likely, to be needed. Generic special 404(f) matters will be designated by easily identifiable political or geographic subdivisions such as township, county, parish, state, EPA region, or Corps division or district and by specific 404(f) exemption (e.g., 404(f)(1)(A)).

IV. PROCEDURES.

A. Regional Lists. Each regional administrator (RA) shall maintain a regional list of current designated special cases and special 404(f) matters within each region, including documentation, if appropriate, that there are no current designated special cases or special 404(f) matters in the region.

The RA shall create an initial regional list and transmit it to the appropriate DE within 30 days of the date of the last signature on this MOA. In order to be eligible for a regional list, the designated special cases and special 404(f) matter must be approved by the Administrator. (NOTE: Those geographic areas designated as current special cases pursuant to the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program, may be incorporated into the initial regional lists without additional approval by the Administrator based on township, county, parish, state or other appropriate designation, as described in paragraph III. A. of this MOA but will no longer be designated by forest cover type.)

B. Changes to the Regional Lists. Changes to the regional lists shall be proposed by the RA and approved by the Administrator and may include additions to, amendments to, or deletions from the regional lists. When the RA proposes an addition, amendment, or deletion to the regional list, the RA shall forward the proposal to EPA Headquarters for review and approval. When the RA proposes an addition or amendment in writing or by phone to the appropriate Corps DE, the Corps will not make a final geographic jurisdictional determination within the proposed special case area for a period of ten working days from the date of the RA's notification. The Corps may proceed to make determinations in the proposed special case area after the ten day period if it has not been provided final notification of EPA Headquarters approval of the RA's proposed changes. Deletions to the regional list do not become effective until a revised regional list, approved by EPA Headquarters, is provided to the appropriate DE.

C. Project Reviews. The DE shall review section 404 preapplication inquiries, permit applications, and other matters brought to his attention, which involve the discharge of dredged or fill material into waters of the United States to determine if a current designated special case or special 404(f) matter is involved.

(1) Special Cases/Special 404(f) Matters.

For those projects involving a current designated special case or special 404(f) matter, the DE shall request that the RA make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404 or applicability of the exemptions under section 404(f). The RA shall make the final determination, subject to discretionary review by EPA Headquarters, and transmit it to the DE, and to the applicant/inquirer.

(2) Non-Special Cases/Non-Special 404(f) Matters

For those projects not involving a current designated special case or special 404(f) matter, the DE shall make final determinations and communicate those determinations without a requirement for prior consultation with EPA.

D. Determination of Special Cases or Special 404(f) Matters. When the special case or special 404(f) matter has been designated on a project-specific basis, issuance of the final determination by the RA will serve as guidance relevant to the specific facts of each particular situation, and will terminate the special case or special 404(f) matter designation. When the special case or special 404(f) matter has been designated on a generic basis, EPA Headquarters will develop, in consultation with Army, relevant programmatic guidance for determining the geographic jurisdictional scope of waters of the United States for the purpose of section 404 or the applicability of exemptions under section 404(f). Special cases and special 404(f) matters designated on a generic basis remain in effect until (1) a deletion from the regional list is proposed and processed according to paragraph IV-B of this MOA, or (2) EPA Headquarters issues programmatic guidance that addresses the relevant issues and specifically deletes the special case or special 404(f) matter from the regional list(s), whichever occurs first.

E. Uncertainties Regarding Special Cases/Special 404(f) Matters. Should any uncertainties arise in determining whether a particular action involves a current designated special case or special 404(f) matter, the DE shall consult with the RA. Upon completion of the consultation, the RA will make the final determination as to whether the action involves a current designated special case or special 404(f) matter.

F. Compliance Tracking. In order to track the DE's compliance with EPA guidance, the DE shall make his files available for inspection by the RA at the district office, including field notes and data sheets utilized in making final determinations as well any photographs of the site that may be available. Copies of final geographic jurisdictional determinations will be provided to the RA upon request at no cost to EPA unless the sample size exceeds 10 percent of the number of determinations for the sample period. Copies in excess of a 10 percent sample will be provided at EPA expense. To ensure that EPA is aware of determinations being made for which notification is not forwarded through the public notice process, the Corps will provide copies to EPA of all final determinations of no geographic jurisdiction and all final determinations that an exemption under Section 404(f) is applicable. Should EPA become aware of any problem trends with the DE's implementation of guidance, EPA shall initiate interagency discussions to address the issue.

V. RELATED ACTIONS.

A. Enforcement Situations. For those investigations made pursuant to the 1989 Enforcement MOA between Army and EPA concerning Federal enforcement of section 404 of the CWA, which involve areas that are current designated special cases, the RA shall make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404. The RA's determination is subject to discretionary review by EPA Headquarters, and will be binding regardless of which agency is subsequently designated lead enforcement agency pursuant to the 1989 Enforcement MOA. For those investigations not involving special cases, the agencies will proceed in accordance with the provisions of the 1989 Enforcement MOA.

For those investigations made pursuant to the 1989 Enforcement MOA between Army and EPA concerning Federal enforcement of section 404 of the CWA, which involve current designated special 404(f) matters, the RA shall make the final determination of the applicability of the exemptions under section 404(f). The RA determination is subject to discretionary review by EPA Headquarters, and is binding regardless of which agency is subsequently designated lead enforcement agency pursuant to the 1989 Enforcement MOA. For those investigations not involving special 404(f) matters, the agencies will proceed in accordance with the provisions of the 1989 Enforcement MOA.

B. Advanced Identification. EPA may elect to make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404, as part of the advanced identification of disposal sites under 40 CFR 230.80, subject to discretionary review by EPA Headquarters, and regardless of whether the areas involved are current designated special cases, unless the DE has already made a final geographic jurisdictional determination. Any determinations under this section shall be completed in accordance with paragraph IV of this MOA.

C. 404(c) Actions. EPA may elect to make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404(c) of the CWA.

VI. GENERAL PROVISIONS.

A. All final determinations must be in writing and signed by either the DE or RA. Final determination of the DE or RA made pursuant to this MOA or the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program, will be binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination.

B. The procedures and responsibilities of each agency specified in this MOA may be delegated to appropriate subordinates consistent with established agency procedure. Headquarters procedures and responsibilities specified in the MOA may only be delegated within headquarters.

C. Nothing in this document is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of either agency.

D. This agreement shall take effect and supercede the April 23, 1980, Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program on the 60th day after the date of the last signature below and will continue in effect for five years, unless extended, modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice, prior to that time.

for Robert W. Page
Assistant Secretary of the Army (Civil Works)

January 19, 1989
Date

Rebecca W. Hanmer
Rebecca W. Hanmer
Acting Assistant Administrator for Water
U. S. Environmental Protection Agency

January 19, 1989
Date

"Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of Tabb Lakes v. United States," dated January 25,1990.

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

JAN 25 1990

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

FROM: David G. Davis, Director
Office of Wetlands Protection

TO: Regional Wetlands Division Directors
Office of Regional Counsel Water Branch Chiefs

As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the attached Environmental Protection Agency/Corps of Engineers memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

Please direct any questions or comments concerning this memorandum to Steve Neugeboren in the Office of General Counsel (FTS 382-7703), or to Suzanne Schwartz, Greg Peck, or Cliff Rader of my staff (FTS 475-7799).

Attachment

cc w/attachment: Regional Wetlands Coordinators

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

24 JAN 1990

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

1. As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the enclosed Corps of Engineers/Environmental Protection Agency memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

2. Questions or comments concerning this guidance should be directed to Dr. John Hall (202) 272-0201 or Mr. Lance Wood (202) 272-0035.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl

JOHN P. ELMORE
Chief, Operations, Construction and
Readiness Division
Directorate of Civil Works

United States Environmental Protection Agency

United States Department of the Army

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes* v. *United States*

1. On September 22, 1989, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that the Corps of Engineers may not rely upon memoranda issued on November 8, 1985, and February 11, 1986, by Brigadier General Kelly, then Deputy Director of Civil Works, to assert jurisdiction over isolated waters under section 404 of the Clean Water Act. *Tabb Lakes* v. *United States*, (No. 89-2905, 4th Cir.). This memorandum provides direction on the continued assertion of jurisdiction over isolated waters, as required by 33 CFR 328.3(a)(3), in the wake of the *Tabb Lakes* decision.

2. *Tabb Lakes* focused on an EPA and Corps interpretation of the definition of "waters of the United States" including isolated waters, described at 33 CFR 328.3(a)(3), as follows:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

The EPA General Counsel issued guidance on September 12, 1985, interpreting this regulation to include isolated waters which are or could be used as habitat by birds protected by Migratory Bird Treaties, migratory birds which cross state lines, and by endangered species. Brigadier General Kelly adopted this interpretive guidance in the Corps guidance memoranda cited above which were the subject of the *Tabb Lakes* litigation. In *Tabb Lakes*, the Court held that the Corps may not rely on this

interpretive guidance in making a jurisdictional determination because the guidance was a substantive rule that should have been, but was not, proposed for public comment prior to its adoption by the agencies. The United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters. This memorandum provides guidance on how Corps FOAs and EPA Regional Offices should continue to assert CWA jurisdiction over isolated waters in light of the Court of Appeals decision in *Tabb Lakes*, and pending completion of the rulemaking process.

3. The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside of the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit (i.e., outside the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland).

4. Within the Fourth Circuit, we will follow the holding of *Tabb Lakes*, which was limited to the procedural notice-and-comment issue discussed above. Thus, within the Fourth Circuit, we will not rely upon or cite the above-referenced memoranda in making jurisdictional determinations. However, we will continue to assert jurisdiction, as required by the "waters of the United States" regulatory definition, over all waters, the use, degradation or destruction of which could affect interstate or foreign commerce, as is required by our existing regulations adopted through the Administrative Procedure Act rulemaking process. Corps FOAs and EPA Regions will apply this regulatory definition to each site on a case-by-case basis, and will evaluate all available information in a manner consistent with the language of the regulations and the expressed Congressional intention that Clean Water Act jurisdiction be exercised over all waters to the fullest extent legally permissible under the Commerce Clause of the Constitution.

5. The following applies to CWA jurisdiction over all isolated waters within the Fourth Circuit. The definition of "waters of the United States" at 33 CFR 328.3(a)(3) was promulgated through the APA rulemaking process and remains in full force and effect notwithstanding the *Tabb Lakes* decision. This definition encompasses "isolated" waters, including isolated wetlands, since it specifically cites as examples of jurisdictional waters "...prairie potholes, wet meadows, [and] playa lakes...", all of which are normally "isolated." We fully intend to implement the *Tabb Lakes* decision within the Fourth Circuit; however, we interpret that decision as allowing the Corps and EPA to continue to assert CWA jurisdiction over isolated waters. Accordingly, we expect Corps FOAs and EPA Regional offices within the Fourth Circuit to continue to regulate isolated

waters, including isolated wetlands, as required by existing regulations. Consultation with your Office of Counsel is advisable for doubtful cases.

6. If there ar any questions with regards to implementation, Corps Divisions should contact Mr. Lance Wood (CECC-E, (202) 272-0035) or the Chief, Regulatory Branch (CECW-OR, (202) 272-1785). EPA Regions should contact Mr. Steve Neugeboren (Office of General Counsel, (202) 382-7703) or Ms. Suzanne Schwartz (Office of Wetlands Protection, (202) 475-7799).

For the Chief of Engineers:

1/24/90
Date

JOHN P. ELMORE
Chief, Operations, Construction,
and Readiness Division
Directorate of Civil Works

For the Environmental Protection Agency:

1-19-90
Date

DAVID G. DAVIS
Director
Office of Wetlands Protection

VI. SPECIALIZED ENFORCEMENT TOPICS

F. CONTRACTOR LISTING

"Guidance for Implementing EPA's Contractor Listing Authority", dated July 18, 1984. See GM-31. (Superseded by F.4, below)

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

JUL 18 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance for Implementing EPA's Contractor Listing Authority

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
Assistant Administrator for External Affairs
Assistant Administrator for Policy, Planning and Evaluation
General Counsel
Inspector General
Regional Administrators

I. Purpose

The purposes of this document are to briefly describe: 1) EPA's contractor listing authority, 2) the interim agency policy prior to final promulgation of revisions to the listing regulations at 40 C.F.R. Part 15, and 3) the proposed revisions to 40 C.F.R. Part 15. Further, the document gives some general guidance on when to bring a contractor listing action, and explains how the Agency's Strategic Planning and Management System will account for listing actions as enforcement responses.

II. Background

The Clean Air Act[1] and the Clean Water Act[2], as implemented by executive order[3] and Federal regulation,[4] authorize EPA to

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1/ Clean Air Act, Section 306, 42 U.S.C §7606.
2/ Clean Water Act, Section 508, 42 U.S.C. §1368
3/ Executive Order 11738, September 12, 1973
4/ 40 C.F.R. Part 15

preclude certain facilities from obtaining government contracts, grants, or loans, if the facility is violating pollution contrq standards. Commonly called "contractor listing", this program assures that each Federal Executive Branch agency undertakes procurement and assistance activities in a manner that will result in effective enforcement of the air and water acts. Contractor listing also ensures that owners of noncomplying facilities do not receive an unfair competitive advantage in contract awards based on lower production costs.

In the past, EPA has seldom used contractor listing in the enforcement program. Currently, one facility (Chemical Formulators, Inc., Nitro, West Virginia)[5] is on the List of Violating Facilities. Contractor listing can be an effective enforcement tool, and EPA policy calls for Regional Office enforcement personnel to actively consider the viability of this option to obtain compliance with Clean Air Act and Clean Water Act standards.

With a view toward improving and streamlining the contractor listing program, EPA has proposed revisions to 40 C.F.R Part 15 (copy attached). The proposed revisions provide additional procedural protections to facilities which are the subject of listing recommendations and expand the range of situations which may trigger the listing sanction.

III. Interim Listing Policy While Regulations Undergoing Revisiq

A. Grounds: By statute, EPA must list a facility which has given rise to a person's conviction under Section 309(c) of the CWA or Section 113(c)(1) of the CAA, and that person owns, leases, or supervises such facility (mandatory listing). Otherwise, prior to promulgation of the revised Part 15 regulations, EPA may list a facility only on the following grounds set forth in the current Section 15.20(a)(1) (1979) (discretionary listing). Specifically, EPA may list a facility only if there is continuing or recurring non compliance at the facility and

- The facility has given rise to an injunction, order, judgment, decree, or other form of civil ruling by a Federal, State, or local court issued as a result of noncompliance with clean air or clean water standards, or the facility has given rise to a person's conviction in a State or local court for noncompliance with clean air or clean water standards, and that person owns, leases, or supervises the facility.

- The facility is not in compliance with an order under Section 113(a) of the CAA or Section 309(a) of CWA, or has given rise to the initiation of

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5/ 46 F.R. 16324, March 12, 1981

court action under Section 113(b) of the CAA or 309(b) of the CWA, or has been subjected to equivalent State or local proceedings to enforce clean air or clean water standards.

B. Procedures: Prior to promulgation of the revised regulations, EPA will employ the procedures proposed in the revised regulations for discretionary listing and the procedures in the current regulations [Section 15.20(a)(2)(1979)] for mandatory listing, explained below. EPA will use the procedures proposed in the revised regulations for discretionary listing because these regulations provide greater procedural protections than the current regulations[6]. Because the revised mandatory listing regulations authorize less procedural protections than the current procedures, however, EPA will continue to employ the current regulations until the revised mandatory-listing procedures are legally effective.

We recognize that some confusion may result during the interim period, so you should not hesitate to contact the EPA Listing Official[7] to resolve any problems. Upon promulgation of the final rules, we will revise this guidance as necessary.

IV. The Listing Program and the Proposed Revisions to Part 15

Even under the revised regulations as proposed, the basic framework for listing actions is substantially the same as established by the present regulations. The proposed revisions to Part 15 clarify the distinctions between mandatory and discretionary listing, and establish some different procedures for each type of listing.[8]

A. Mandatory Listing

If a violation at a facility gives rise to a criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, listing of the facility is mandatory if the convicted person owns, leases or supervises the facility. Not only is listing mandatory, but section 15.10 makes the listing effective

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6/ One exception is that EPA will continue to use the Listing Review Panel to review decisions of the Case Examiner. The Panel consists of the AAs for OECM and Policy, Planning and Evaluation, the General Counsel, and a representative from the Office of the Deputy Administrator who shall serve as a non-voting member.

7/ I have designated Edmund J. Gorman of the Office of Legal and Enforcement Policy (LE-130A) as EPA's Listing Official. He can be reached at (FTS) 426-7503.

8/ Hereinafter all citations are to the proposed revised Part 15 regulations unless otherwise expressly stated.

automatically upon a conviction. As soon as a conviction occurs, the Associate Enforcement Counsel for Criminal Enforcement must notify the Listing Official.

The Listing Official is responsible for sending written notification to the facility and to the Federal Register. Both documents must state the basis for and the effective date of the mandatory listing.

Removal from the mandatory list may occur only if: (1) the Assistant Administrator certifies that the facility has corrected the condition that gave rise to the criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, or (2) a court has overturned the criminal conviction.

B. Discretionary Listing

1. Basis for Discretionary Listing

Discretionary listing may occur if the recommending person can show a "record of continuing or recurring noncompliance," and that a requisite enforcement action has been initiated or concluded. The proposed revisions broaden the discretionary listing authorities by including additional statutory provisions under which EPA can bring enforcement actions that can trigger applicability. Under the proposed regulations, any of the following enforcement actions may serve as a basis for listing if there is also a record of continuing or recurring noncompliance at the facility:

1. A federal court convicts any person under Section 113(c)(2) of the CAA, if that person owns, leases, or supervises the facility.

2. A State or local court convicts any person of a criminal offense on the basis of noncompliance with clean air or clean water standards if that person owns, leases, or supervises the facility.

3. A federal, state, or local court issues an injunction, order, judgment, decree, or other form of civil ruling as a result of noncompliance with clean air or clean water standards at the facility.

4. The facility is the recipient of a Notice of Noncompliance under Section 120 of the CAA.

5. The facility has violated an administrative order under:

   - Section 113(a) CAA
   - Section 113(d) CAA
   - Section 167 CAA
   - Section 303 CAA
   - Section 309(a) CWA

6. The facility is the subject of a district court civil enforcement action under:

   - Section 113(b) CAA
   - Section 204 CAA
   - Section 205 CAA
   - Section 211 CAA
   - Section 309(b) CWA

2. Initiating the Discretionary Listing Process

The listing process begins with a recommendation to list filed by a "recommending person" with the Listing Official. Recommending persons include any member of the public, Regional Administrators, the Assistant Administrator for Air and Radiation, the Assistant Administrator for Water, the Associate Enforcement Counsel for Air, the Associate Enforcement Counsel for Water, and Governors. The recommendation to list is a written request that: (1) states the name, address, and telephone number of the recommending person, (2) describes the facility, and (3) describes the alleged continuing or recurring noncompliance, and the parallel enforcement action. Section 15.11(b).

The Listing Official must review the recommendation to determine whether it meets the requirements of Section 15.11(b). If it does, the Listing Official then must transmit the recommendation to the Assistant Administrator for Enforcement and Compliance Monitoring who shall in his/her discretion, decide whether to proceed with the listing action. If he/she decides to so proceed, the Listing Official then must notify the facility of the filing of a recommendation to list. The facility then has 20 working days to request EPA to hold a listing proceeding. If the facility requests the proceeding, the Listing Official must schedule it and notify the recommending person and the facility of the date, time, and location of the proceeding. The Assistant Administrator must designate a Case Examiner to preside over the listing proceeding.[9]

9/ If the facility does not make a timely request for a listing proceeding, the Assistant Administrator will determine whether to list the facility based upon the recommendation to list and any other available information.

3. The Discretionary Listing Proceeding

The discretionary listing proceeding is informal, i.e., there are no formal rules of evidence or procedure. The recommending person and the facility may be represented by counsel, present relevant oral and written evidence and, with the approval of the Case Examiner, either party may call, examine, and cross-examine witnesses. The Case Examiner may refuse to permit cross-examination to the extent it would: (1) prematurely reveal sensitive enforcement information which the government may legally withhold, or (2) unduly extend the proceedings in light of the usefulness of any additional information likely to be produced. Section 15.13(b). A transcript of the proceeding along with any other evidence admitted in the proceeding constitutes the record. For the Case Examiner to approve a recommendation to list, the recommending person must persuade the Case Examiner that he/she has proved each element of a discretionary listing by a preponderance of the evidence.

The Case Examiner must issue a written decision within 30 working days after the proceeding. The Listing Official then must notify the recommending person and the facility of the Case Examiner's decision. The party adversely affected may appeal the decision to the General Counsel. The appeal, which is filed with the Listing Official, must contain a statement of (1) the case and the facts involved, (2) the issues, and (3) why the decision of the Case Examiner is not correct based on the record of the proceeding considered as a whole. The General Counsel must issue a final decision, in writing, as soon as practicable after reviewing the record. The Listing Official then must send written notice of the decision to the recommending person and to the facility, and must publish the effective date of the listing in the Federal Register if the General Counsel upholds the Case Examiner's decision to list.

Removal from the list of Violating Facilities can occur in any of the following circumstances:

1. Upon reversal or other modification of the criminal conviction decree, order, judgment, or other civil ruling or finding which formed the basis for the discretionary listing, which reversal or modification removes the basis for the listing;

2. If the Assistant Administrator for OECM determines that the facility has corrected the condition(s) which gave rise to the listing;

3. If, after the facility has remained on the discretionary list for one year on the basis of Section 15.11(a)(4) or Section 15.11(a)(5) and a basis for listing under Sections 15.11(a)(1), (2), or (3) does not exist, then removal is automatic; or

4. If the Assistant Administrator for OECM has approved a plan for compliance which ensures correction of the condition(s) which gave rise to the discretionary listing.

The removal process begins with a request for removal filed with the Listing Official by the original recommending person or by the facility. The Assistant Administrator for OECM then must review the request and issue a decision as soon as possible. The Listing Official then must transmit the decision to the requesting person.

If the Assistant Administrator for OECM denies a request for removal, the requesting person may file a written request for a removal hearing. A Case Examiner designated by the Assistant Administrator then conducts a removal hearing. The removal hearing is an informal proceeding where formal rules of evidence and procedure are not applicable. The parties to the proceeding may be represented by counsel and may present written and oral testimony. In addition, with the approval of the Case Examiner, the parties may call, examine, and cross-examine witnesses to the extent that any further information produced will be useful in light of the additional time such procedures will take. The Case Examiner must base his/her written decision solely on the record of the removal hearing.

Within 20 working days of the date of the Case Examiner's decision, the party adversely affected may file with the Listing Official a request for review by the Administrator. The Administrator will determine if the Case Examiner's decision is correct based upon the record of the removal hearing considered as a whole. The Administrator then must issue a final written decision.

V. Increased Use of Discretionary Listing.

We believe that the revisions to the discretionary listing regulations are only the first step in the improvement of our contractor listing program as an effective enforcement tool. The second step, actually using the listing authority, will gain for us the necessary experience in this area. Note that for purposes of the Strategic Planning and Management System, regions may show recommendations to list as enforcement actions taken in tracking regional progress toward bringing significant violators into compliance.

Currently, our lack of experience in this area inhibits our ability to offer explicit guidance based upon known formulas. However, we believe that some general points are worth noting.

Listing is a very severe sanction and, therefore, should usually be reserved for the most adversarial situations. If such an adversarial situation already involves time consuming litigation, however, recommending persons employed by EPA should consider the additional resource requirements associated with both the listing proceeding and the potential judicial challenges to the administrative action. When enforcement litigation is in progress, recommending persons employed by EPA should also consider whether the listing proceeding will provide grounds for collateral attack against EPA's case, and whether such attack would be a benefit or hindrance to successful prosecution of the underlying judicial litigation.

In some cases, listing may be an effective alternative to litigation. Note specifically that EPA has the option of using listing as an enforcement response if a facility fails to comply after being subject to an administrative or judicial order. Note further that EPA may bring a listing proceeding based on present "recurring or continuing" violations and a prior judicial or administrative judgment even if the prior action did not address the present violations. Specifically, EPA should consider listing actions for violating facilities for which previously concluded enforcement actions have not stopped the violator from continuing practices constituting a pattern of chronic noncompliance.

Listing may be especially effective if the value of the facility's government contracts, grants, and loans exceeds the cost of compliance. If the value of these assets is less than the compliance costs, listing probably would not provide adequate incentive to comply. On the other hand, if the value of such assets is considerably greater than the cost of compliance, a listing proceeding could conceivably impede progress toward resolving the environmental problem because the facility is more likely to vigorously contest the listing both at the administrative and Federal court levels. Therefore, we believe that listing will be most appropriate for "middle ground cases" for which there is an ongoing parallel action, i.e., ones where the government contract, grants and loans for the facility in question exceed compliance costs but not considerably.

Finally, a listing proceeding is likely to be more efficient, and therefore more effective, if the continuing or recurring noncompliance involves unambiguous and clearly applicable clean air or clean water standards. If the standards are fraught with complications pertaining to the appropriate compliance test method or procedure, for example, the listing proceeding is probably ill-suited to handle such issues.

Prior to filing a recommendation to list, recommending persons employed by EPA must consult with my office to ensure that a recommendation to list comports with national policy and priorities and is otherwise appropriate. We expect that experience, as usual, will prove to be the best teacher. As we gain experience and after final promulgation of the revisions, we will provide further guidance.

Attachment

cc: Assistant Attorney General for Land and Natural Resources
Associate Enforcement Counsels
OECM Office Directors
Regional Counsel I-X
Steve Ramsey, Chief Environmental Enforcement Section, DOJ
Director, Stationary Source Compliance Division
Director, Enforcement Division, Office of Water

"Implementation of Mandatory Contractor Listing", dated August 8, 1984. See GM-32.

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

AUG 08 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Implementation of Mandatory Contractor Listing

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
Associate Enforcement Counsel for Air Enforcement
Associate Enforcement Counsel for Water Enforcement
Associate Enforcement Counsel for Criminal Enforcement
Assistant Attorney General for Land and Natural Resources
Regional Counsels I-X

Introduction and Purpose

Pursuant to statutory requirements, the proposed revisions to 40 CFR Part 15 require that the List of Violating Facilities ("the List") automatically include any facility which gives rise to a criminal conviction of a person under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. Any facility on the List is ineligible to receive any non-exempt Federal government contract, grant, or loan. Removal of a facility from the List occurs only if I certify that the condition giving rise to the conviction has been corrected or if a court reverses or vacates the conviction. This memorandum establishes the procedure to implement the mandatory portion of the contractor listing program. 1/

1/ Guidance on implementation of the discretionary listing authority issued on July 18, 1984.

Procedure for Mandatory Listing

I. A federal district court must enter a guilty verdict or guilty plea of a person under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. The convicted person must own, operate, lease, supervise or have a financial interest in the facility which gave rise to the conviction. Note that criminal convictions under Section 113(c)(2) of the Clean Air Act and criminal convictions entered by a State or local court do not qualify a facility for mandatory listing.

II. Upon notification of an entry of a guilty verdict or guilty plea by the clerk of the district court, the Department of Justice must immediately notify the Associate Enforcement Counsel for Criminal Enforcement (LE-134E). This notification must occur even if the defendant still awaits sentencing, has moved for a new trial or a reduced sentence, or has appealed the conviction.

III. The Associate Enforcement Counsel for Criminal Enforcement must independently verify that the court has entered the guilty verdict or guilty plea.

IV. Upon such verification, the Associate Enforcement Counsel for Criminal Enforcement shall notify EPA's Listing Official (LE-130A) in writing, of the name and location of the facility and of the condition giving rise to the guilty verdict or guilty plea.

V. The Listing Official shall then update the List by publishing a notice in the Federal Register, and shall notify the Associate Enforcement Counsel for Air or Water; the appropriate Regional Counsel; the Compliance Staff, Grants Administration Division, Office of Administration and Resource Management; the General Services Administration, and the facility. A facility remains on the mandatory List indefinitely until it establishes a basis for removal.

Procedure for Removal from the Mandatory List

I. Any person who owns, operates, leases, supervises, or has a financial interest in the listed facility may file with the Listing Official a request to remove that facility from the List. The request must establish one of the following grounds for removal:

   A. The condition at the facility that gave rise to the conviction has been corrected.

   B. The conviction (not just the sentence) was reversed or vacated.

II. The Listing Official must transmit the request for removal to the Assistant Administrator for OECM.

III. The Assistant Administrator for OECM, or her or his designee, shall review the request for removal and shall consult the appropriate Regional Counsel to determine whether the condition at the facility giving rise to the conviction has been corrected, or if the conviction has been reversed or vacated.

IV. The Assistant Administrator for OECM shall determine as expeditiously as practicable whether to remove the facility from the list.

V. If the Assistant Administrator for OECM decides to remove the facility from the list, a written notification of such determination shall be sent to the facility and to the Listing Official who shall promptly publish a notice of removal in the Federal Register.

VI. If the Assistant Administrator for OECM decides not to remove the facility from the List, the Listing Official shall send written notice of the decision to the person requesting removal. The notice shall inform the person owning, operating, leasing, supervising or having a financial interest in the facility of the opportunity to request a removal hearing before a Case Examiner (See 40 CFR Part 15 for the selection and duties of the Case Examiner).

VII. If the Case Examiner, or the Administrator upon appeal of the Case Examiner's decision, decides to remove the facility from the List, the Listing Official shall be notified. The Listing Official shall then promptly remove the facility from the List. If the Case Examiner or the Administrator upon appeal, decides not to remove the facility from the list, then the Listing Official shall send written notice of the decision to the person requesting removal.

It is important to note that any decision regarding the listing or removal of a facility from the List does not affect any other action by any government agency against such a facility, including debarment from government contracting.

I believe these procedures will enable us to conduct the mandatory listing program in an efficient manner. If you have any questions, please contact EPA's Listing Official, Allen J. Danzig, at (FTS) 475-8777.

cc: Stephen Ramsey, DOJ
Belle Davis, GAD/OARM
Judson W. Starr,/DOJ

"Policy on Implementing Contractor Listing Program", dated August 27, 1985.
(deleted - Draft Policy only)

"Guidance on Implementing the Discretionary Contractor Listing Program", dated November 26, 1986. See GM-53.

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

NOV 26 1986

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Guidance on Implementing the Discretionary Contractor Listing Program

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
General Counsel
Inspector General
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X

I. Purpose

This document establishes Agency policy and procedures for implementing the discretionary contractor listing program in EPA enforcement proceedings. It should be read in conjunction with the final revisions to the contractor listing regulations (40 CFR Part 15, 50 FR 36188, September 5, 1985), and the guidance document, "Implementation of Mandatory Contractor Listing" (General Enforcement Policy No. GM-32, August 8, 1984). The procedures to be followed in all contractor listing actions are contained in the rule and are summarized in an Appendix to this document. This policy applies only to discretionary listing proceedings and supersedes the "Guidance for Implementing EPA's Contractor Listing Authority" (General Enforcement Policy No. GM-31, July 18, 1984).

The revisions to the contractor listing regulations, together with this guidance document and other management initiatives, should encourage greater use of the Agency's listing authority and should expedite the process for listing a facility.

II. Background

The Clean Air Act (CAA), Section 306, and the Clean Water Act (CWA), Section 508, as implemented by Executive Order 11738, authorize EPA to prohibit facilities from obtaining federal government contracts,

grants or loans (including subcontracts, subgrants and subloans), as a consequence of criminal or civil violations of the CAA or CWA. Commonly called "contractor listing," this program provides EPA with an effective administrative tool to obtain compliance with the CAA and CWA where administrative or judicial action against a facility has failed to do so.

On July 31, 1984, EPA proposed revisions to the contractor listing regulations (40 CFR Part 15 (49 FR 30628)) to simplify and clarify the procedural opportunities which EPA will provide to parties to listing or removal actions and to provide for mandatory (i.e., automatic) listing of facilities which give rise to criminal convictions under Section 113(c)(1) of the CAA or Section 309(c) of the CWA. Final rules were promulgated on September 5, 1985 (50 FR 36188).

III. Appropriate Cases for Discretionary Listing Recommendations

In numerous cases, initiation of a listing action has proved to be effective in achieving more expeditious compliance and case settlements. While regional offices should consider making contractor listing recommendations in every case where the criteria of 40 CFR Part 15 are met, listing is a tool to be used in conjunction with other enforcement actions. (See IV. Standard of Proof in Listing Proceedings, page 4.) The circumstances surrounding each case will dictate whether a listing action should be initiated. In particular, use of listing may be appropriate in the following cases:

A. Violations of Consent Decrees

Regional offices should strongly consider making listing recommendations for all cases of noncompliance with consent decrees under the CAA or CWA. The recommendation should be prepared at the earliest possible time after the Region learns of noncompliance with the decree, but no later than the filing of a motion to enforce the decree. Initiation of the listing action should be supplementary to, and not in lieu of, a motion to enforce the decree. Where a consent decree covers CAA or CWA violations as well as violations of other environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) or the Toxic Substances Control Act (TSCA) (where EPA does not have contractor listing authority), a listing recommendation also should be considered.

B. Continuing or Recurring Violations Following Filed Civil Judicial Actions

Where EPA has filed a civil judicial enforcement action, the Regional Office should initiate a listing action at the earliest possible time after it determines that: (1) noncompliance is ongoing, (2) the defendant is not making good faith efforts to

comply, and (3) an expeditious settlement does not appear likely. For example, a defendant may make a firm settlement offer that is far below the economic savings it realized from its noncompliance, making settlement unlikely.

Similarly, where EPA initiates a multi-media civil enforcement action against violations under the CAA or CWA and other environmental statutes (such as RCRA or TSCA), and continuing water or air compliance problems exist without good faith corrective efforts, the Region should consider bringing a listing action. Therefore, it is important that all CAA and CWA counts be included in a multi-media enforcement action.

C. Violations of Administrative Orders

Where noncompliance continues after an administrative order has been issued under the CAA or CWA, and the Regional Office determines that the facility is not making sufficient efforts to come into compliance, a listing recommendation should be considered. Initiation of a listing action generally should not be in lieu of filing a civil judicial action to enforce the administrative order, but should support the civil action. The Regional Office should consider initiating a listing action at the same time that it files the civil judicial action.

D. Multi-Facility Noncompliance within a Single Company

Contractor listing can be an effective tool to address a pattern of noncompliance within a single company. Where continuing or recurring CAA or CWA violations occur at two or more facilities within the same company, and EPA previously has taken an enforcement action against each, the Regional Office should consider making listing recommendations in all such cases.

While each facility's continuing or recurring noncompliance must be proved separately (i.e., one may not use one violation from branch facility A and one violation from branch facility B to constitute the minimum two violations required), one listing recommendation describing noncompliance at two or more facilities may be submitted to the Assistant Administrator for the Office of Enforcement and Compliance Monitoring (OECM). A joint listing proceeding may be held concerning all facilities. Joint consideration of two or more facilities' violations will require fewer Agency resources than listing each facility separately. It will also discourage companies from switching government contracts from a listed facility to another facility without taking steps to correct the violations which gave rise to the listing.

To accomplish this, the Regional Office, with headquarters staff support, should review the EPA enforcement docket to see if a potential listing candidate has committed CAA or CWA violations at other company facilities. Note that a company's facilities may be known by the parent company name or by the names of company

subsidiaries. Regional offices may obtain information on other company facilities from Charlene Swibas, Chief, Information Services Section, NEIC (FTS 776-3219), who will search EPA's Facility Index System which lists this information for all EPA regions, or provide a Dunn and Bradstreet report containing this information.

The Region may also request data on administrative orders issued against a company under the headquarters Permit Compliance System (for CWA violations) and the Compliance Data System (for CAA violations). In some cases EPA has issued administrative orders and filed civil enforcement actions against company facilities which are located in more than one region. Such multi-regional inquiries may be coordinated with the Headquarters participating attorney and the Agency's Listing Official.

E. Other Circumstances Where Listing is Appropriate

The regulation provides two other situations where listing may be appropriate. First, EPA can list a facility after it has issued a Notice of Noncompliance under Section 120 of the CAA. The threat of listing in combination with noncompliance penalties can impose a sufficiently severe economic cost on a facility to encourage efforts to achieve both compliance and quicker settlements. Second, Regional Offices may recommend listing when a state or local court convicts any person who owns, operates, or leases a facility of a criminal offense on the basis of noncompliance with the CAA or the CWA. They also may recommend listing when a state or local court has issued an injunction, order, judgement, decree (including consent decrees), or other civil ruling as a result of noncompliance with the CAA or CWA.

IV. Standard of Proof in Listing Proceedings

It will be the responsibility of the Office of Regional Counsel to represent the Agency at any listing proceeding (where one is requested by the affected facility). According to 40 CFR Section 15.13(c), "[t]o demonstrate an adequate basis for listing a facility, the record must show by a preponderance of the evidence that there is a record of continuing or recurring non-compliance at the facility named in the recommendation to list and that the requisite enforcement action has been taken."

"Requisite enforcement action" can be established by reference to an issued administrative or court order, or a filed civil judicial action. "Continuing or recurring" violations are understood to mean two or more violations of any standard at a facility, which violations either occur or continue to exist over a period of time. Such a violation occurs even when different standards are violated and time has elapsed between violations. Thus, in a listing proceeding, it is not necessary to prove all violations of CAA or CWA standards alleged in the underlying enforcement action. Nonetheless,

the regional attorney must carefully review the sufficiency of the evidence and evaluate anticipated defenses.

V. Fairness Concerns in EPA Use of Contractor Listing

It is the intent of this guidance document to encourage the use of the Agency's contractor listing authority in appropriate cases. However, it must be recognized that listing is a severe sanction. Before making a recommendation in any case, the Regional Office should determine that the continuing or recurring noncompliance involves clearly applicable CAA or CWA standards. Likewise, Agency enforcement personnel must be careful in using listing terminology during discussions with defendants. During settlement negotiations, for example, it is certainly proper for EPA to advise a defendant of the range of available EPA enforcement authorities, including contractor listing. However, EPA personnel must distinguish between a listing recommendation (made by a "recommending person," usually the Regional Administrator, to the Assistant Administrator for OECM), a notice of proposed listing by the Agency to the affected facility (which is sent by the Listing Official after a preliminary decision to proceed is made by the Assistant Administrator for OECM), and a final decision to list which is made either by an Agency Case Examiner at the end of a listing proceeding, or by the Assistant Administrator for OECM if no listing proceeding is requested. Where appropriate, EPA personnel should explain that the Regional Administrator's listing recommendation does not constitute a final Agency decision to list.

VI. Press Releases on Contractor Listing Actions

EPA will use press releases and other publicity to inform existing and potential violators of the CAA and the CWA that EPA will use its contractor listing authority in appropriate situations. The November 21, 1985, "Policy on Publicizing Enforcement Activities" (GM-46), states that "[i]t is EPA policy to issue press releases when the Agency: (1) files a judicial action or issues a major administrative order or complaint (including a notice of proposed contractor listing and the administrative decision to list)...." As discussed in that policy, the press release should be distributed to both the local media in the area of the violative conduct and the trade press of the affected industry.

VII. Coordination with the Department of Justice

To ensure that information presented during a listing proceeding will not compromise the litigation posture of any pending legal action against a party, EPA will coordinate with the Department of Justice (DOJ) before a recommendation to list is made to the Assistant Administrator for OECM. If the recommending party is an EPA regional office official, he or she shall coordinate with the appropriate DOJ attorney before a recommendation is submitted to the Listing Official. He or she shall also provide the DOJ attorney's comments to the Listing Official as part of the recommendation

package. If the recommending party is not an EPA official, the Listing Official shall coordinate with the EPA Office of Regional Counsel and the appropriate DOJ attorney before a recommendation to list is presented to the Assistant Administrator for OECM.

VIII. Applicability of Contractor Listing to Municipalities

Municipalities are subject to listing under appropriate circumstances. State and local governments and other municipal bodies are specifically identified by 40 CFR §15.4 as "persons" whose facilities may be listed. The standards for recommending that a municipal facility be listed are the same as those for listing other facilities. Listing may not be the most effective enforcement tool in many municipal cases because often the only federal funds received by a municipal facility are grant funds to abate or control pollution, which are exempted from the listing sanction by 40 CFR §15.5. However, listing still should be considered in cases where a municipal facility receives nonexempt funds or where the principles underlying the listing authority otherwise would be furthered by a recommendation to list.

IX. Use of Listing in Administrative Orders

Enforcement offices may wish to inform violating facilities early in the enforcement process of the possibility of being listed. Many facilities do not know about the listing sanction; such knowledge may provide additional impetus for a facility to take steps to come into compliance. For example, some EPA regions notify facilities whose violations make them potential candidates for listing of this possibility in the cover letter which accompanies an administrative order requiring them to take action to correct their noncompliance.

X. Obtaining Information Concerning Government Contracts Held by a Facility Under Consideration for Listing

After an EPA recommending person, usually the Regional Administrator, has submitted a listing recommendation to the Listing Official, the regional office attorney handling the case may require the facility to provide a list of all federal contracts, grants, and loans (including subcontracts, subgrants, and subloans). To insure that such a requirement is not imposed prematurely, the regional office attorney should require this information from a facility only after advising the Listing Official of his or her intention to do so. Requiring this information from the facility is not a prerequisite for listing a facility.

Requiring this information from a facility may be accomplished by telephone or through a letter similar to the models provided in Attachments D and E. Attachment D is a model letter requesting information from a facility which is violating an administrative order issued under the authority of the Clean

Water Act for violating its National Pollutant Discharge Elimination System (NPDES) permit. Attachment E is a letter to a facility which EPA and the Department of Justice have filed a civil suit against for violating the Clean Air Act. Regional office attorneys may elect to have such a request letter serve as notification to the facility that EPA is considering instituting a listing action, or they may wish to inform the facility before sending such a letter. Which approach is taken will depend on the regional office attorney's judgment of the notification's effects on the overall case against the facility.

XI. Headquarters Assistance in Preparing and Processing Listing Recommendations

In order to encourage the use of the contractor listing authority in appropriate cases, OECM staff have been directed to assist regional offices in preparing listing recommendations. Attached are model listing recommendations indicating the level of detail and support that should be provided with recommendations. (See Attachments A, B, and C for model listing recommendations.) Where a listing recommendation is sufficient, the Assistant Administrator for OECM will decide whether to proceed with the listing action under Section 15.11(c) (i.e., by directing the Listing Official to issue a notice of proposed listing to the affected facility) within two weeks after receiving the recommendation. Questions concerning contractor listing may be directed to the Agency Listing Official, Cynthia Psoras, LE-130A, FTS 475-8785, E-Mail Box EPA2261.

Attachments

cc: John Ulfelder
Senior Enforcement Counsel
Associate Enforcement Counsel for Air
Associate Enforcement Counsel for Water
Director, Office of Water Enforcement and Permits
Director, Stationary Source Compliance Division
Director, Office of Compliance Analysis and Program Operations
Director, NEIC
Director, Water Management Division (Regions I-X)
Director, Air Management Division (Regions I, III, V and IX)
Director, Air and Waste Management Division (Regions II and VI)
Director, Air, Pesticides and Toxics Management Division (Region IV)
Director, Air and Toxics Division (Regions VII, VIII and X)
David Buente, Department of Justice (DOJ)
Nancy Firestone, DOJ

The Listing Program and Final Revisions to 40 CFR Part 15

A. Mandatory Listing

If a violation at a facility gives rise to a criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, listing of the facility is mandatory (and effective upon conviction under 40 CFR Section 15.10). As soon as a conviction occurs, the Director of the Office of Criminal Enforcement, within the Office of Enforcement and Compliance Monitoring (OECM), must verify the conviction and notify the Listing Official. The Listing Official sends written notification to the facility and to the Federal Register. Both documents must state the basis for and the effective date of the mandatory listing.

Removal from the mandatory list may occur only if: (1) the Assistant Administrator certifies that the facility has corrected the condition that gave rise to the criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, or (2) a court has overturned the criminal conviction. The August 8, 1984, memorandum, "Implementation of Mandatory Contractor Listing," (GM-32) discusses the procedures for mandatory listing in more detail

B. Discretionary Listing

1. Basis for Discretionary Listing

The following enforcement actions may serve as a basis for discretionary listing if there is also a record of continuing or recurring noncompliance at a facility:

a. A federal court finds any person guilty under Section 113(c)(2) of the CAA, if that person owns, leases, or supervises the facility.

b. A state or local court convicts any person of a criminal offense on the basis of noncompliance with clean air or clean water standards if that person owns, leases, or supervises the facility.

c. A federal, state, or local court issues an injunction, order, judgment, decree (including consent decrees), or other form of civil ruling as a result of noncompliance with the CWA or CWA at the facility.

d. The facility is the recipient of a Notice of Noncompliance under Section 120 of the CAA.

e. The facility has violated an administrative order under:

- CAA Section 113(a)
- CAA Section 113(d)
- CAA Section 167
- CAA Section 303
- CWA Section 309(a)

f. The facility is the subject of a district court civil enforcement action under:

- CAA Section 113(b)
- CAA Section 167
- CAA Section 204
- CAA Section 205
- CAA Section 211
- CWA Section 309(b)

2. The Discretionary Listing Process

a. Listing Recommendation and Notice of Proposed Listing

The discretionary listing process begins when a "recommending person" files a listing recommendation with the Listing Official. Recommending persons may include any member of the public, Regional Administrators, the Assistant Administrator for Air and Radiation, the Assistant Administrator for Water, the Associate Enforcement Counsel for Air, the Associate Enforcement Counsel for Water, and the Governor of any State. The recommendation to list: (1) states the name, address, and telephone number of the recommending person; (2) identifies the facility to be listed, and provides its street address and mailing address; and (3) describes the alleged continuing or recurring noncompliance, and the requisite enforcement action (see 40 CFR Section 15.11(b)). The recommendation to list should describe the history of violations in detail, including the specific statutory, regulatory, or permit requirements violated. In addition, regional offices may include as attachments to the listing recommendation documents prepared for other purposes, such as complaints, litigation reports, and other explanatory material which describes the nature of the violations. (See Attachments for model listing recommendations.)

The Listing Official must determine whether the recommendation meets the requirements of Section 15.11(b). If the recommendation is sufficient and the Assistant Administrator for OECM decides to proceed under Section 15.11(c), the listing official will contact the regional office to ensure that it still wishes to proceed. If the decision is made to proceed, the listing official provides notice of the proposed listing to the owner or operator of the affected facility and provides the owner or operator of the facility 30 days to request a listing proceeding. A listing proceeding is not a formal hearing; rather, it is an informal administrative proceeding presided over by an Agency Case Examiner. If the facility's owner or operator requests a listing proceeding, the Listing Official must schedule it and notify the recommending person and

the owner or operator of the date, time, and location of the proceeding. The Assistant Administrator designates a Case Examiner to preside over the listing over the listing proceeding.1/

b. Listing Proceeding

The Federal Rules of Civil Procedure and Evidence are not used during listing proceedings. The Agency and the facility may be represented by counsel and may present relevant oral and written evidence. With the approval of the Case Examiner, either party may call, examine, and cross-examine witnesses. The Case Examiner may refuse to permit cross-examination to the extent it would: (1) prematurely reveal sensitive enforcement information which the government may legally withhold, or (2) unduly extend the proceedings in light of the usefulness of any additional information likely to be produced (see Section 15.13(b)). A transcript of the proceeding along with any other evidence admitted in the proceeding constitutes the record. The Agency must prove each element of a discretionary listing by a preponderance of the evidence (see Section 15.13(c)).

The Case Examiner must issue a written decision within 30 calendar days after the proceeding. The party adversely affected may appeal the decision to the General Counsel. The appeal, which is filed with the Listing Official, must contain a statement of: (1) the case and the facts involved, (2) the issues, and (3) why the decision of the Case Examiner is not correct based on the record of the proceeding considered as a whole. The General Counsel must issue a final decision, in writing, as soon as practicable after reviewing the record. The Listing Official then must send written notice of the decision to the recommending person and to the facility, and must publish the effective date of the listing in the Federal Register if the General Counsel upholds the Case Examiner's decision to list.

c. Removal from the List of Violating Facilities

Removal from the List of Violating Facilities can occur in any of the following circumstances:

1. Upon reversal or other modification of the criminal conviction decree, order, judgment, or other civil ruling or finding which formed the basis for the discretionary listing, where the reversal or modification removes the basis for the listing;

1/ If the owner or operator of the facility does not make a timely request for a listing proceeding, the Assistant Administrator will determine whether to list the facility based upon the recommendation to list and any other available information.

2. If the Assistant Administrator for OECM determines that the facility has corrected the condition(s) which gave rise to the listing;

3. Automatically if, after the facility has remained on the discretionary list for one year on the basis of Section 15.11(a)(4) or Section 15.11(a)(5) and a basis for listing under Sections 15.11(a)(1), (2), or (3) does not exist; or

4. If the Assistant Administrator for OECM has approved a plan for compliance which ensures correction of the condition(s) which gave rise to the discretionary listing.

The original recommending person or the owner or operator of the facility may request removal from the list. The Assistant Administrator for OECM then must review the request and issue a decision as soon as possible. The Listing Official then must transmit the decision to the person requesting removal.

If the Assistant Administrator for OECM denies a request for removal, the requesting person may file a written request for a removal proceeding to be conducted by a Case Examiner designated by the Assistant Administrator. The Federal Rules of Civil Procedure and Evidence are not used during a removal proceeding. The Case Examiner's written decision must be based solely on the record of the removal proceeding.

Within 30 calendar days after the date of the Case Examiner's decision, the owner or operator of the facility may file with the Listing Official a request for review by the Administrator. The Administrator will determine if the Case Examiner's decision is correct based upon the record of the removal proceeding considered as a whole. The Administrator then must issue a final written decision.

VI. G.

VI. SPECIALIZED ENFORCEMENT TOPICS

G. FEDERAL FACILITIES

"FEDERAL FACILITIES COMPLIANCE", dated January 4, 1984. See GM-25.*

"Federal Facilities Compliance Strategy," dated November, 1988. See GM-25 (revised).

VI. SPECIALIZED ENFORCEMENT TOPICS

H. OVERSIGHT AND STATE PROGRAM COORDINATION

"Implementing State/Federal Partnership in Enforcement: State/Federal Enforcement Agreements", dated June 26, 1984. Superseded by H.3, below.

Policy on Performance-Based Assistance, dated May 31, 1985.

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

MAY 31 1985

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Policy on Performance-Based Assistance

FROM: Lee M. Thomas

TO: Assistant Administrators
General Counsel
Inspector General
Associate Administrator
Regional Administrators
Staff Office Directors
Division Directors

I am pleased to issue the attached policy on EPA's performance-based assistance to States. This policy represents an important step in the continuing effort to achieve environmental results through a strong EPA/State partnership.

Our assistance to States covers a wide range of continuing environmental programs. In the past, the process for developing and managing assistance agreements has varied significantly among programs and Regions. This policy establishes an Agency-wide approach toward negotiating assistance agreements, conducting oversight of those agreements, and responding to key oversight findings. While the aim of the policy is a consistent approach across Agency programs, it retains considerable flexibility for Regions to tailor assistance agreements to the unique environmental conditions of particular States.

This policy is effective immediately. The accompanying Question and Answer Package explains how FY'86 assistance agreements will be expected to comply with it and details the rationale behind major policy components.

The Deputy Administrator will monitor implementation of the Policy on Performance-Based Assistance and issue special instructions as necessary. I expect Assistant Administrators to advise the Deputy Administrator of actions planned or taken to make their program policies, guidance and procedures fully consistent with this policy within thirty days.

Regional Administrators are responsible for ensuring that their staffs and States receive, understand and begin to apply this policy package to their assistance activities. To assist in its prompt and proper implementation, members of the task force and staff instrumental in the development of this policy have agreed to make Regional visits to explain and discuss it.

I would like to commend the task force that developed this policy, whose members included managers and staff from EPA's Headquarters and Regions, and State Environmental Directors, and representatives from the Washington-based Executive Branch Organizations. I believe they have done an excellent job and hope their effort can serve as a model for future EPA/State decision-making.

I look forward to strong Agency commitment to this policy. You can be assured of my full support as EPA and the States move forward with its implementation.

Attachments

POLICY ON PERFORMANCE-BASED ASSISTANCE

I am pleased to issue this EPA Policy on Performance-Based Assistance. This document was developed by a task force composed of representatives from EPA Headquarters and Regions, State environmental agencies and Executive Branch Organizations to establish a consistent, Agency-wide approach toward negotiating and managing assistance agreements with States.

The three major components of the policy describe how assistance agreements should be negotiated, how a State's performance against negotiated commitments should be assessed, and what actions should be taken to reward accomplishments and correct problems. The overall approach is one of EPA/State cooperation in setting and attaining environmental goals through effective State programs.

I anticipate strong Agency commitment to the principles of this policy and look forward to the strengthening of the EPA/State partnership I believe will result from this approach.

5/31/85

Lee M. Thomas
Administrator

Date

EPA POLICY ON PERFORMANCE-BASED ASSISTANCE

PURPOSE

This policy establishes an Agency-wide approach which links U.S. EPA's assistance funds for continuing State environmental programs to recipient performance. The approach employs assistance as a management tool to promote effective State environmental programs. The policy's goal is the consistent and predictable application of the performance-based approach across Agency programs and among Regions.

Mechanisms for tying EPA assistance to a recipient's accomplishment of specific activities agreed to in advance are contained in EPA's regulations governing State and Local Assistance (40 CFR Part 35, Subpart A). The degree and manner in which EPA programs and Regions have applied these regulations has varied greatly. Through this policy, the Agency articulates how it will consistently manage its intergovernmental assistance.

SCOPE

EPA's Regions will be expected to implement the portions of this policy governing the management of assistance agreements ("Oversight" and "Consequences of Oversight" sections) upon the policy's issuance. To the greatest extent possible, this policy should also guide the negotiation of grants and cooperative agreements for fiscal year 1986.

This policy supersedes all previous policies on performance-based assistance to the extent they conflict with the approach outlined below. It elaborates on regulations governing State and and Local Assistance (40 CFR Part 35, Subpart A) promulgated October 12, 1982, and the General Regulation for Assistance Programs (40 CFR Part 30) promulgated September 30, 1983. This policy does not replace funding or grant/cooperative agreement requirements established by Federal statutes or EPA regulations. States applying for Federal financial assistance are required to have adequate financial management systems capable of ensuring proper fiscal control.

The policy complements and is in complete accordance with EPA's Policy on Oversight of Delegated Programs (April 4, 1984) and the Policy Framework for State/EPA Enforcement "Agreements" (June 26, 1984).

While this policy will refer to all assistance recipients as "States" (since States receive most of EPA's assistance for continuing environmental programs), it applies equally to interstate and local agencies which receive similar support.

PRINCIPLES AND APPROACH

PRINCIPLES

This policy on performance-based assistance is designed to strengthen the EPA/State partnership by ensuring that EPA assistance facilitates the implementation of national environmental goals and promotes and sustains effective State environmental programs. The policy provides a framework within which EPA and States can clarify performance expectations and solve problems through a system of negotiation, according to a predictable but flexible set of national guidelines. This framework is built around several fundamental principles which will also guide the policy's implementation:

- o EPA will use performance-based assistance as a management tool to promote and recognize the effective performance of State environmental programs, and to ensure mutual accountability;

- o EPA Regions and programs will retain flexibility to tailor the performance-based approach to their needs and the policy's guiding principles;

- o States and EPA should share a common set of expectations regarding performance commitments and likely responses to identified problems. There should be no surprises as EPA and States relate to each other under this policy;

- o In negotiating State performance objectives, EPA and the States will seek realistic commitments and presume good faith in their accomplishment;

- o EPA and the States should maintain continuous dialogue for the rapid identification, solution and escalation of problems to top level managers;

- o EPA is fully committed to the success of State environmental programs and will seek opportunities to acknowledge their accomplishments.

APPROACH

The policy consists of three basic parts. The first section describes components of assistance agreements and how they are to be negotiated. The second section lays out EPA's expectations for the review and evaluation of assistance agreements and escalation of significant findings. The final section describes how EPA should respond to the findings of oversight: rewarding strong performance; applying corrective actions to solve problems; escalating significant conflicts to top management; and, in cases of persistent performance problems, imposing sanctions.

ASSISTANCE AGREEMENT

Clear expectations for program performance are crucial to an effective EPA/State partnership. Annual assistance agreements provide a key vehicle for expressing these performance expectations. Negotiated work programs, contained in an assistance agreement, form a fundamental basis for evaluation of State performance.

An assistance agreement should include three components: 1) a work program; 2) identification of support (other than federal assistance funds) a State needs from EPA to accomplish work program commitments; and, 3) a monitoring and evaluation plan.

APPROACH

EPA will require that the top national priorities as identified in Agency guidance be explicitly addressed in all State work programs. As EPA and States negotiate outputs, national priorities should be tailored to the real environmental conditions of each State and Region.

Assistance agreements may include outputs based on a State's priorities if those activities promise to deliver a greater environmental benefit than a national priority. State priorities should represent only those activities allowable under Federal statutes.

The appropriate mix of national and State priorities will vary from work program to work program, according to the unique features of each environmental program in each State. Regional offices must exercise their judgment and negotiate with States over what combination of national and State priorities can deliver the greatest environmental benefit with resources available after EPA's top national priorities have been addressed.

To better facilitate the negotiation of assistance agreements, the Agency's Operating Guidance should be strengthened through early State involvement in defining the order and scope of Agency priorities, a realistic consideration of funding limitations throughout its development, and specific identification of top priorities by Program Offices.

The development and oversight of an assistance agreement should be supervised by one senior Regional manager. EPA Regional Administrators are ultimately accountable for all assistance agreements made with States and should be familiar with the significant outputs and conditions of each agreement. They will be responsible for all major assistance-related decisions.

Assistance agreements may be amended by mutual agreement of the Regional Administrator and his/her State counterpart. A major change in national or State priorities, environmental emergencies, and the discovery of greatly overestimated commitments are examples of the types of circumstances which may necessitate renegotiation.

WORK PROGRAM

The work program should specify the outputs a State will produce under its federal assistance award (including the State match and level of effort) and the resources and time frames for completing the outputs.

- o Outputs should be measurable commitments, reflective to the extent possible of real environmental results. They should be ambitious but realistic commitments -- achievable objectives rather than lofty goals.

- o Work programs should focus on the objectives a State will meet, not how the State will accomplish an output.

- o Past performance should affect work programs. The good or poor performance of a State (or EPA) identified through oversight should influence the outputs and conditions contained in the next annual assistance agreement.

- o Work programs should specifically identify completion timeframes for outputs. EPA may also specify interim milestones and reporting requirements based on the priority needs of national programs and in keeping with good management practice. Reporting required under an assistance agreement should be consistent with EPA's information systems.

- o States should draft their work programs but may request assistance from EPA Regions in developing them.

- o States should be encouraged to volunteer a comprehensive work program that indicates activities, if any, outside those paid for with the federal and State funds included in the federal assistance agreement budget. Awareness of State responsibilites not related to federal assistance greatly enhances EPA's understanding of the scope of State environmental programs. Should a State choose to submit plans for its entire program, it need not indicate resource levels, but only program activities. EPA will not examine these activities in the course of assistance oversight except when necessary to ascertain the cause of a performance problem or to identify the corrective action which can best address a problem.

SUPPLEMENTAL EPA SUPPORT TO STATES

An assistance agreement should describe the types of support EPA will endeavor to provide in addition to an assistance award to enable a State to meet its work program outputs. Regions should consult with Headquarters about support which will require Headquarters action.

- The assistance agreement should describe the specific research, technical advice, guidance, regulations, contractor assistance or other support EPA will furnish States to enable them to fulfill specific work program outputs, making clear that accomplishment of the outputs is contingent upon the receipt of the EPA support. If EPA does not furnish the support described in the assistance agreement, the State will be relieved of output commitments contingent upon that support.

EVALUATION PLAN

The final component of an assistance agreement is a plan for EPA's evaluation of State performance. The evaluation plan should be mutually acceptable to EPA and a State.

- The plan should outline the schedule and scope of review EPA will conduct and should identify areas the evaluation will focus on.
- An evaluation plan must specify at least one on-site review per year, performance measures, and reporting requirements.

ASSISTANCE OVERSIGHT

EPA should oversee assistance agreements both informally and formally. Regions and States should maintain continuous dialogue so that States may alert EPA to problems they are experiencing and EPA can monitor State progress toward accomplishing outputs. EPA should also periodically conduct a formal evaluation of State performance. Oversight should identify the successes and problems States have encountered in meeting their commitments. Oversight also entails the joint analysis of identified problems to determine their nature, cause, and appropriate solution, and the escalation of significant findings (both positive and negative) to top managers in the Region and the State.

APPROACH

The formal assessment of State performance under assistance agreements should occur as part of EPA's comprehensive review and evaluation of State programs. This process is governed by EPA's Policy on Oversight of Delegated Programs which states that evaluations should focus on overall program performance (within a given program), rather than individual actions; they should be based on objective measures and standards agreed to in advance; they should be conducted on-site at least once a year by experienced, skilled EPA staff; they should contain no

surprises for States regarding content or expectations; and results should be documented in a written report.

EPA should adhere to these principles of oversight and to the scope and schedule of evaluation agreed to in the assistance agreement.

FEATURES

- o States are responsible for notifying EPA in a timely manner of problems they experience in trying to accomplish their outputs. Likewise, EPA is responsible for promptly notifying States of its inability to supply promised support.

- o Formal and informal evaluations by EPA should be constructive, conducted in the spirit of promoting good performance through problem-solving, not fault-finding.

- o EPA's review and evaluation should emphasize overall performance within each program, concentrating on the composite picture revealed by total outputs and the quality of accomplishments.

- o EPA should focus on a State's performance against work program outputs and conditions unless other aspects of a State's program (procedures, processes, other activities) must be examined to analyze a problem or find its appropriate solution.

- o Formal review of State performance under the assistance agreement will entail, at a minimum, one on-site annual evaluation of each assistance agreement.

- o Review and evaluation of assistance agreements should be conducted by skilled, experienced EPA evaluators.

- o Oversight findings, successes as well as problems, should be documented to establish an accurate record of State performance over time.

- o Assistance oversight should use existing reporting and evaluation mechanisms to the extent possible.

CONSEQUENCES OF OVERSIGHT

Once the assistance oversight process has identified and documented areas in which States have had success or difficulty in meeting their commitments under the assistance agreement, EPA should respond to those oversight findings. Potential responses range from rewards and incentives for good performance, application of corrective actions to solve uncovered problems, and the imposition of sanctions to address persistent, serious performance problems.

APPROACH TO OVERSIGHT RESPONSE

The Agency's goal in providing performance-based assistance is to promote national program objectives by supporting effective State environmental programs. Actions in response to oversight findings will be oriented toward finding the most effective ways to maintain or improve a State program's performance. Wherever possible, EPA should acknowledge excellent performance and help States solve problems which impede performance through corrective actions.

If problems regarding State achievement of work program commitments persist, EPA should pursue corrective steps as necessary based on experience with a given State. In general, sanctions should be imposed only when corrective actions have failed to solve persistent, significant performance problems. Before taking any sanction against a State, EPA should raise the performance issue to the highest levels of the Region and State necessary to negotiate an effective solution to the underlying problem. Sanctions should not be necessary if both parties are explicit, straightforward and realistic in their expectations of one another and approach the assistance agreement process in the spirit of cooperation.

INCENTIVES

- When a State meets its negotiated commitments or otherwise demonstrates success, the EPA Regional Office should take steps to acknowledge excellent State performance at the conclusion of the oversight review or at the end of the assistance agreement period.

- EPA is committed to publicizing State program success. Assured recognition of a State's environmental achievements is one of the most effective incentives at EPA's disposal. Publicizing accomplishments also benefits States with performance problems by providing them with models for success.

- In general, when a State demonstrates steady progress or a sustained level of high performance against negotiated commitments, EPA will institute the most appropriate rewards for achievement and incentives to promote continued success. Possible actions include but are not limited to:

    - Reducing the number, level, scope and/or frequency of reviews, reporting, or inspections to the minimum necessary for effective national program management;

    - Increasing State flexibility in using funds for special projects or State priorities;

    - Offering financial incentives (within existing resources), such as supplemental funding;

- Publicizing program successes through joint media presentations, awards, special letters of commendation to the Governor, or technology transfer to other States, EPA Regions and Headquarters.

CORRECTIVE ACTIONS

o When oversight review uncovers a performance problem and determines its cause, EPA and the State must act on those findings by taking appropriate corrective steps.

o Regions must initiate discussions with those States where problems have emerged, and work cooperatively with them to establish effective remedial strategies. This negotiated strategy should specify the time frame during which EPA will expect the problem to be resolved, and any interim milestones that will be necessary to monitor State progress.

o Regions and States should follow a corrective action strategy based on the unique history and needs of a given State. This policy does not prescribe any particular sequence of corrective actions which must be undertaken, nor does it link specific corrective actions to particular types of performance problems.

o Possible corrective actions include but are not limited to: providing EPA technical or managerial assistance, training, or additional resources; increasing the number and/or frequency of reporting and oversight requirements; and shifting State resources or otherwise renegotiating the assistance agreement.

o If a Region is not able to provide a particular essential type of specialized assistance to a State, the Region should bring this corrective action requirement to the attention of Headquarters program managers for action as appropriate.

o The intent of this policy is to see that EPA assumes a constructive approach in responding to State performance problems. When corrective actions have failed, or EPA and a State cannot agree on a corrective action, the Region may consider imposing a sanction. If a sanction is contemplated, the performance issue should be escalated to the highest appropriate level of EPA and the State. The following sequence should be observed whenever possible to ensure that significant problems receive prompt attention and are solved expeditiously:

  a. The Regional Division Director responsible for managing the assistance agreement will raise the issue to the attention of the Deputy Regional Admininstrator or Regional Administrator and advise his/her State counterpart of this notification.

b. The Regional Administrator will personally contact the State Environmental Director or other appropriate State manager to attempt to reach agreement on a corrective action, and to discuss the contemplated sanction.

c. National Program Managers should be advised of any State program problems warranting a sanction, and should be notified of any final decision to take such action.

d. If negotiations between the Regional Administrator and State counterpart fail to solve the problem, the Regional Administrator should judge under what circumstances notification of the Governor should occur.

SANCTIONS

- Regional Administrators must recognize that national responsibility for any State environmental program continues after the imposition of a sanction. They should make arrangements for completion of crucial outstanding outputs and should take steps to promote and sustain activities the State is performing effectively.

- As with corrective actions, any decision to impose a sanction must be based on EPA's particular experience with any given State. The Regional Administrator is responsible for determining when a problem may be significant enough to warrant such action, and for determining the appropriate type of sanction to apply.

- Current regulations detail those sanctions traditionally available to EPA. They include: stop-work actions, withholding payment, suspension or termination of agreement for cause, agreement annulment, and other appropriate judicial or administrative actions.

- Adjusting the schedule for award or payment of assistance funds to quarterly, semi-annual, or other similar restrictive disbursement schedules is considered a sanction under the terms of this policy. (The customary mechanisms for the release of funds, such as standard letter of credit procedures, are not affected by this policy.)

- 40 CFR Part 30 Subpart L details formal procedures for resolving EPA/State disputes concerning assistance agreements. These procedures provide the opportunity for a State to document the grounds for any objections to the imposition of a sanction and for EPA to review its decision and address the State's objections on the basis of a written record.

Policy on Performance-Based Assistance
Question and Answer Package

PURPOSE

1. What is the purpose of this policy?

This policy lays out a framework for managing EPA's assistance to States for continuing environmental programs. It ties performance against negotiated work program outputs to federal financial assistance funds. It provides a consistent approach for managing assistance programs through negotiating work outputs, overseeing States' performance against agreed upon commitments, solving problems through corrective action strategies, and imposing sanctions when corrective actions have failed or EPA and a State cannot agree on a corrective action strategy.

Although the policy aims for a consistent approach toward managing assistance agreements, it provides Regional managers with flexibility to use their best judgment in applying the provisions of this policy to specific conditions that exist within their Regions and among programs.

TIMING

2. How will this policy affect FY'86 assistance agreements?

Any FY'86 assistance agreement negotiated after the issuance of this policy will be expected to conform to all of its provisions.

Assistance agreements for FY'86 agreed upon prior to the issuance of the Policy on Performance-Based Assistance will not have to be renegotiated. However, EPA's Regions will be expected to manage those assistance agreements according to the approach outlined in the "Oversight" and "Consequences of Oversight" sections of the policy.

FY'86 assistance agreements may be amended if a Region and State both agree to do so, under the terms of governing regulations.

All assistance agreements for FY'87 will be negotiated and managed according to this policy.

PRIORITIES

3. Why should EPA assistance support some State priorities in addition to national priorities?

"State priorities" refer to activities which are allowable for funding under federal statutes and which, although not always important enough nationwide to warrant a place

on or at the top of the national priority list, are of great concern to a particular State due to that State's unique environmental conditions. Recognizing that each of EPA's continuing environmental programs requires a combination of Federal and State resources, EPA may direct some of its assistance to support what States view as their most significant initiatives, if those activities promise to deliver a greater environmental benefit than a national priority. (National priorities include Regional priorities). In many instances, a State's priority activities will correspond closely to the list of national priorities in a given program, but the State may wish to distribute resources among those activities with a slightly different emphasis. The Regions have flexibility under this policy to negotiate support for those activities, consistent with Program Guidance.

4. How is the proper balance between national and State priorities to be achieved?

The appropriate mix of national and State priorities will vary from work program to work program, according to the unique features of each environmental program in each State. After ensuring that top national priorities as identified in the Agency Operating Guidance and Regional Guidance are included in a work program, Regional officials must exercise their judgment and negotiate with a State over what combination of national and State priorities can deliver the greatest environmental benefit given the remaining resources available.

GUIDANCE

5. How should the Agency Operating Guidance be refined to facilitate improved work planning?

EPA's annual Operating Guidance should clearly articulate national priorities. The Agency Priority list should be limited to those top priorities across all media. Each Program Office should also list priority activities in its media area, ranking them and identifying those which must be reflected in every State work program. The Program Office and Agency priority lists should complement one another. EPA will involve states early on in defining the order and scope of Agency and Program Office priorities.

EPA Regions should negotiate work program outputs based upon priorities as identified and ranked in the Guidance. Carefully delineated priorities will help ensure work programs that contain clear and measureable output commitments.

ESCALATION

6. What is the purpose of the escalation sequence outlined in the policy?

The Policy on Performance-Based Assistance establishes a problem-solving approach toward managing EPA assistance to States. It has been designed to promote the prompt identification and resolution of any problems States encounter in trying to fulfill the output commitments they agree to meet. The purpose in laying out a process by which issues can be surfaced quickly up the chain of command in both Regions and States is to ensure that significant problems receive the prompt attention of managers capable of solving those problems expeditiously. This sequence was included in the policy to address concern that State performance problems too frequently lie unattended at the lower levels of Regions and States where they become bigger problems.

While this process calls for consultation with State representatives and notification of the National Program Manager, EPA's Regions are responsible for managing the escalation sequence and rendering any final decision to impose a sanction.

7. Under what circumstances should the escalation sequence be followed?

The escalation sequence was designed specifically as a mechanism for obtaining quick decisions on whether EPA will impose a sanction on a State demonstrating performance problems. By establishing a predictable process for addressing these major conflicts, the policy seeks to expedite, not encumber with formality, resolution of the most serious problems likely to be encountered in an assistance relationship. While this escalation sequence applies uniquely to decisions regarding sanctions, the policy encourages the escalation of any significant information (positive and negative) regarding the performance of a State program within both Regions and States as appropriate.

QUARTERLY DISBURSEMENTS

8. Why does this policy classify quarterly disbursement schedules (or similar restrictive disbursement schedules) as sanctions?

Quarterly disbursement schedules involve awarding a portion of a State's grant each quarter or imposing quarterly performance-based restrictions on standard payment procedures. The Task Force agreed that putting States on quarterly or semi-annual disbursement schedules makes it difficult for

States to plan their programs, which are generally based on a yearly cycle. The Task Force felt that this type of action would signify a lack of faith in a State's ability to perform. Consequently, the Task Force viewed this type of action as a sanction which would reflect a State's inability to perform. As with other sanctions, quarterly disbursement schedules, should not be imposed before attempting to resolve the problem through more cooperative efforts (corrective actions) or after a demonstration of continued past performance problems by a State. As with all sanction decisions, the decision to place a State on a quarterly disbursement schedule should be made at the highest level of the Region.

A quarterly disbursement schedule signifies that the recipient's performance would be reviewed after each quarter to determine whether full release of funds would be made for the next quarter. Under the policy, putting a State on this type of schedule is considered to be a sanction.

9. Does this policy affect draw-downs under the letter of credit or other payment mechanisms?

The customary mechanisms for the release of funds are not affected by this policy. For example, letter of credit procedures, which are used by most Regions, provide a system whereby the recipient may promptly obtain the funds necessary to finance the Federal portion of a project, and which precludes the withdrawal of funds from the Department of the Treasury any sooner than absolutely necessary. (Payment procedures are described in the Assistance Administration Manual, 12/3/84, Chapter 33.) However, to the extent that Regions impose performance-related restrictions on letter of credit or other payment mechanisms, these restrictions would be considered a sanction under the policy.

10. How will this policy affect States currently on quarterly disbursement schedules?

Currently, a number of States are on quarterly disbursement schedules, primarily under the RCRA program. This policy does not prohibit the practice of imposing a quarterly schedule on a State, but it does consider this practice a sanction. It is not necessary to amend FY'85 or FY'86 assistance agreements that already place States on quarterly disbursement schedules. However, States should not automatically be either extended or taken off of quarterly schedules for the following year's grant cycle. In deciding whether to continue or discontinue quarterly disbursements, Regions should review State performance. A decision to continue or discontinue a quarterly schedule should be based on the presence or absence of performance problems, or successful or unsuccessful attempts to resolve the problems through corrective steps. Regional and programatic differences call for Regional managers to use their best judgment in making such decisions.

11. What does this policy imply for withholding funds for problems that are not directly related to a State's performance of negotiated outputs under the assistance agreement?

This policy relates primarily to a State's performance of negotiated outputs under an assistance agreement. The decision to withhold funds from a State for output-related problems is a sanction which should be preceded by appropriate corrective actions and notification of high-level managers. However, funds are sometimes withheld for problems not directly related to a State's accomplishment of negotiated outputs under an assistance agreement. This may occur as a result of problems with a State's financial reporting and accounting system. For problems resulting from improper fiscal management or administrative practice (but not directly related to a State's performance on work outputs), the Regions may withhold funds in accordance with governing regulations.

OTHER QUESTIONS AND ANSWERS

12. Do assistance administration procedures need to be changed?

No. The policy was developed carefully so as not to conflict with the Agency's existing procedures for managing assistance agreements. Procedural details for administration are provided in the current (12/3/84) Assistance Administratio Manual and they are consistent with the policy.

13. Why does the policy encourage the submission of comprehensive State work plans but not require them?

The current policy is consistent with existing requlations for State and Local Assistance (40 CFR Part 35, Subpart A). The policy encourages but does not require States to volunteer a comprehensive work program that indicates all activities the State is conducting under its environmental program.

14. Why does this policy call for a mutually acceptable evaluation plan?

The policy calls for EPA's evaluation of State performance to be described in a plan that is mutually acceptable to EPA and the State before the assistance agreement is finalized. This is consistent with the regulation which calls for the Regional Administrator to develop an evaluation plan in consultation with the State, and it reflects the principles of EPA's Policy on Oversight of Delegated Programs. Under the policy, changes to the original evaluation plan could occur as corrective actions.

15. How can the assistance agreement be amended?

Both the policy and the regulation allow for the assistance agreement to be amended at any time by mutual agreement between the Regional Administrator and the State. Either party (State or Region) may ask for amendment of the assistance agreement. (See 40 CFR Part 30-700, Subpart G.)

16. Do Regions have discretion to devise corrective action strategies and determine the timing and sequence of corrective actions?

Yes. Regions should attempt to implement corrective action strategies which respond to the problem in a timely and appropriate manner.

17. Why doesn't the policy deal with the "quality" of outputs?

While this Policy on Performance-Based Assistance focuses on State performance against measureable outputs, it complements and is in complete conformance with EPA's Policy on Oversight of Delegated Programs, which calls for review and evaluation activities which ensure quality State programs. Most of EPA's programs have instituted evaluation programs which examine not only "beans," but the quality of those beans. The oversight of work program outputs should occur as part of a comprehensive examination of State program performance.

18. How do State output commitments relate to SPMS commitments?

EPA should always discuss with States any State commitments to be included in EPA's Strategic Planning and Management System. Under a system of performance-based assistance, it is imperative that work program outputs which are also SPMS commitments be agreed upon in advance by Regions and States. Since poor performance may have fiscal consequences under a performance-based system, it would be unfair to hold States accountable for SPMS measures they were not aware of or did not accept.

"Revised Policy Framework for State/EPA Enforcement Agreements", dated August 25, 1986 (Supersedes H.1). See also GM-41, revised.

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

AUG 25 1986

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Revised Policy Framework for State/EPA Enforcement Agreements

FROM: A. James Barnes
Deputy Administrator

TO: Assistant Administrators
Associate Administrator for Regional Operations
Regional Administrators
Regional Counsels
Regional Division Directors
Directors, Program Compliance Offices
Regional Enforcement Contacts

I am pleased to transmit to you a copy of the Agency's revised Policy Framework for State/EPA Enforcement Agreements. The Policy Framework, originally developed in 1984, along with program-specific implementing guidance, will continue to serve as the blueprint for our State/EPA enforcement relationship. The revised Policy Framework integrates new guidance developed since its original issuance. It reinforces the Guidance for the FY 1987 Enforcement Agreements Process which I transmitted to you on April 15, 1986 and should serve as your guide for negotiations and implementation of the Enforcement Agreements.

Although the intent of the revisions was to incorporate new policy, the process gave the Agency, with the assistance of the Steering Committee on the State/Federal Enforcement Relationship, an opportunity to reassess with the States our original approach. This process has clearly reaffirmed that the basic approaches we put in place in 1984 for an effective working partnership are sound and that all parties continue to be committed to its effective implementation.

The revisions incorporate into the Policy Framework addenda developed over the past two years in the areas of oversight of State civil penalties, involvement of the State Attorneys General

in the Enforcement Agreements process, and implementation of nationally managed or coordinated cases. The revisions also reflect, among other things, some of the points that have been emphasized in my annual guidances on the Enforcement Agreements process, the Evaluation Report on Implementation of the Agreements, and the Agency's Criminal Enforcement and Federal Facilities Compliance draft strategies.

I am firmly committed to full and effective implementation of the Policy Framework and am relying on your continued personal attention to this important effort. I plan to review the Region's performance in implementing the revised Policy Framework and the program-specific guidance, particularly the "timely and appropriate" enforcement response criteria, as part of my semi-annual regional visits.

I encourage you to share the revised Policy Framework with your State counterparts.

Attachments

cc: Steering Committee on the State/Federal Enforcement Relationship

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS

August 1986
(originally issued June 1984)

OFFICE OF ENFORCEMENT
AND COMPLIANCE MONITORING

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS[1/]

Achieving and maintaining a high level of compliance with environmental laws and regulations is one of the most important goals of Federal and State environmental agencies, and is an essential prerequisite to realizing the benefits of our regulatory programs. While States and local governments have primary responsibility for compliance and enforcement actions within delegated or approved States, EPA retains responsibility for ensuring fair and effective enforcement of Federal requirements, and a credible national deterrence to noncompliance. An effective State/Federal partnership is critical to accomplishing these goals, particularly given limited State and Federal resources. The task is difficult and one of the most sensitive in the EPA/State relationship, often compounded by differences in perspectives on what is needed to achieve compliance.

To establish an effective partnership in this area, and implement the State/Federal enforcement relationship envisioned in the Agency Oversight and Delegation policies, EPA called for State-specific enforcement agreements to be in place beginning FY 1985 which will ensure there are: (1) clear oversight criteria, specified in advance, for EPA to assess good State --or Regional-- compliance and enforcement program performance; (2) clear criteria for direct Federal enforcement in delegated States with procedures for advance consultation and notification; and (3) adequate State reporting to ensure effective oversight.

This document is the Agency's policy framework for implementing an effective State/Federal enforcement relationship through national program guidance and Regional/State agreements. It is the product of a Steering Committee effort involving all major national EPA compliance and enforcement program directors, State Associations, State officials from each of the media programs, and the National Governors' Association. EPA anticipates that the relationship, and the use of the agreements first established in FY 1985, will evolve and improve over time. They will be reviewed, and updated where necessary, on an annual basis. The Policy Framework will be subject to periodic review and refinement. Originally issued on June 26, 1984, the Policy Framework has been updated to reflect additional guidance developed since that time.

1/ The term Enforcement Agreement is used throughout to describe the document(s), be it an existing grant, SEA, MOU, or separate Enforcement Agreement, which contains the provisions outlined in the Policy Framework and related media-specific guidance. (See p.4 for description of form of agreement.)

Policy Framework Overview

The Policy Framework applies both to Headquarters program offices in their development of national guidance and to Regions in tailoring program guidance to State-specific needs and agreements. Although enforcement agreements are not required for States which do not have delegated or approved programs, Regions are encouraged to apply to these States certain policies and provisions where relevant, particularly advance notification and consultation protocols. The Policy Framework is divided into six sections, to address the following key areas:

A. State/Federal Enforcement "Agreements": Form, Scope and Substance (pages 4-7)

This section sets forth for Regions and States developing enforcement agreements, the areas that should be discussed, priorities, and the degree of flexibility that Regions have in tailoring national guidance to State-specific circumstances, including the form and scope of agreements.

B. Oversight Criteria and Measures: Defining Good Performance (pages 8-17)

This section is primarily addressed to EPA's national programs, setting forth criteria and measures for defining good performance generally applicable to any compliance and enforcement program whether administered by EPA or a State. It forms the basis for EPA oversight of State programs. A key new area that should receive careful review is the definition of what constitutes timely and appropriate enforcement response, Section B, Criterion #5, pages 11-13.

C. Oversight Procedures and Protocols (pages 18-20)

This section sets forth principles for carrying out EPA's oversight responsibilities, including approach, process and follow-up.

D. Criteria for Direct Federal Enforcement in Delegated States (pages 21-25)

This section sets forth the factors EPA will consider before taking direct enforcement action in a delegated State and what States may reasonably expect of EPA in this regard including the types of cases and consideration of whether a State is taking timely and appropriate enforcement action. It also establishes principles for how EPA should take enforcement action so that we can be most supportive of strengthening State programs.

E. Advance Notification and Consultation (pages 26-30)

This section sets forth EPA's policy of "no surprises" and what arrangements must be made with each State to ensure the

policy is effectively carried out by addressing planned inspections, enforcement actions, press releases, dispute resolution and assurances that publicly reported performance data is accurate.

F. State Reporting (pages 31-35)

This section sets forth seven key measures EPA will use, at a minimum, to manage and oversee performance by Regions and States. It summarizes State and regional reporting requirements for: (1) compliance rates; (2) progress in reducing significant non-compliance; (3) inspection activities; (4) formal administrative enforcement actions; and (5) judicial actions, at least on a quarterly basis. It also discusses required commitments for inspections and for addressing significant non-compliance.

In addition, it sets forth State and regional requirements for recordkeeping and evaluation of key milestones to assess the timeliness of their enforcement response and penalties imposed through those actions.

Appendices

Appendix A: Annual priorities and implementing guidance provides a list of the annual priorities for implementing the enforcement agreements and a summary index of what national program guidance has been or will be issued by programs to address the areas covered by the Policy Framework for State/EPA Enforcement Agreements.

Appendix B: Addendum to the Policy Framework on "Implementing Nationally Managed or Coordinated Enforcement Actions," issued January 4, 1985.

Appendix C: Guidance on "Division of Penalties with State and Local Governments," issued October 30, 1985.

A. STATE/FEDERAL ENFORCEMENT AGREEMENTS: FORM, SCOPE, AND SUBSTANCE

This section sets forth the form, scope and substance of the State/Federal Enforcement Agreements as well as the degree of flexibility Regions have in tailoring national policy to individual States.

1. What Form Should the Agreements Take?

We do not anticipate the need for a new vehicle or document for the State/Federal enforcement agreements. Wherever possible, State/Federal agreements should be set forth in one or more of a number of existing formats: grant agreements, State/EPA Agreements, Memoranda of Agreement or Understanding or a statement of Regional Office operating policy. Where there are new documents the appropriate linkage should be made to grants and SEA's as applicable. To the extent the areas covered by this Policy Framework translate into specific output commitments and formal reporting requirements, they may belong in the grant agreements as specified in national program grant guidance. Regions should discuss with the States at an early stage in the planning process their views on both the form and substance of the agreements. Once the basic agreements are in place, Regions should consider most aspects of the written agreements as multi-year, minimizing the need to renegotiate the agreements each year. Regions should conduct an annual review with the States to identify needed revisions and additions to the agreements to address identified problems or reflect further national guidance.

2. What is the Scope of the Agreements?

This guidance and the State/EPA agreements cover all aspects of EPA's civil compliance and enforcement programs, including those activities involving Federal facilities. The criminal enforcement program is not included and will be addressed elsewhere.

Discussions between EPA Regions and States should cover the minimum areas listed below:

- Oversight Criteria and Measures: Good Performance Defined --See Section B.
- Oversight Procedures and Protocols -- See Section C.
- Criteria for Direct EPA Enforcement -- See Section D.
- Procedures for Advance Notification and Consultation -- See Section E.
- Reporting Requirements -- See Section F.

However, Regions and States are not expected to duplicate national Program guidance in their agreements -- we are not looking for lengthy documents. Written agreements resulting from these discussions could cover topics which are not clearly specified elsewhere. If not otherwise specified, national policy will apply and should be so stated in the state agreements. Although not required for non-delegated or unapproved programs, Regions are encouraged to apply certain policies and provisions where relevant, particularly advance notification and consultation protocols.

This Policy Framework and the resulting State/EPA Enforcement Agreements are intended to enhance enforcement of State and Federal environmental laws. Each agreement should be careful to note that nothing in them or this Policy Framework constitutes or creates a valid defense to regulated parties in violation of environmental statutes, regulations or permits.

3. Parties to the Agreements and Participants in the Process.

It is important to involve the appropriate State and regional personnel early in the agreements process. In the Regions, this means involving the operating level program staff and the Regional Counsel staff along with top management; and in the States it means the participation of all the organizational units responsible for making enforcement work, e.g., State program staff, those responsible for oversight of field operations, staff attorneys, and the State Attorneys General (AG). The State agency should have the lead in establishing effective relationships with the State AG or State legal staff, as appropriate. The Regions should ensure that there is adequate communication and coordination with these other participants in the enforcement process. States are strongly encouraged to commit advance notification and consultation procedures/protocols between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Region should seek to incorporate these written protocols into the State/EPA Enforcement Agreements (See discussion on pages 17 and 26-27).

4. What Flexibility do Regions Have?

Regions must be allowed substantial flexibility to tailor agreements to each State, as the agreements process is intended to be based upon mutual understandings and expectations. This flexibility should be exercised within the framework of national program policy and the Agency's broad objectives. Specifically,

a. Oversight Criteria:

Oversight criteria would generally be provided in national program guidance but Regions should tailor their general oversight to address environmental and other priorities in the Region or State, and other specific areas of concern that are unique to an individual State, including any issues raised by the scope of State enforcement authorities, unique technical problems and available expertise, and areas targeted for improvement.

In addition, Regions and States should adapt national timely and appropriate enforcement response criteria to State-specific circumstances to fit State authorities and procedures as follows:

(i) Timeliness: The national program guidance on key milestones and timeframes should be applied to all States with adjustments to accommodate each State's laws and legal procedures. Such adjustment can be important particularly where the proposed enforcement action cannot possibly take place within the proposed timeframes or where a State chooses to address problems more expeditiously than the Federal guidelines. The trigger points should be realistic expectations, but within modest variance from the national goals. Other adjustments should not be made solely because a State program consistently takes longer to process these actions due to constraints other than procedural requirements, e.g., resources. However, if this is the case the timeframes should serve as a basis for reviewing impediments with the State to identify how problems can be overcome and to explore ways over time for the State program to perform more efficiently. (See discussion in Section B, p.13)

The timeframes are not intended to be rigid deadlines for action, but rather are: (1) general targets to strive for in good program performance; (2) trigger points that EPA and States should use to review progress in individual cases; and (3) presumptions that, if exceeded, EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State. It is not the Agency's intention to assume the major enforcement role in a delegated State as a result of these timeframes. The trigger points should be realistic expectations, but within modest variance from the national goals. It must also be realized that in some programs we need experience with the timeframes to assess how reasonable and workable they really are and further, that judgments on what is a reasonable timetable for action must ultimately be case specific. For example, complex compliance problems may require longer-term studies to define or achieve an appropriate remedy.

(ii) Appropriate Enforcement Response:

(a) Choice of response: National medium-specific program guidance applicable to State programs on appropriate enforcement response should be followed (See Appendix A). There is usually sufficient flexibility within such guidance to allow the exercise of discretion on how best to apply the policies to individual cases. The Agency is making every effort to set forth a consistent national policy on enforcement response for each program. It is therefore essential that in setting forth clear expectations with States this guidance not be altered.

(b) Definitions of formal enforcement actions: Regions should reach agreement with States as to how certain State enforcement actions will be reported to and interpreted by EPA. This should be based upon the essential characteristics and impact of State enforcement actions, and not merely upon what the actions are called. National program guidance setting forth consistent criteria for this purpose should be followed, pursuant to the principles listed in Section B, pages 11-12.

(c) Civil Penalties and Other Sanctions: Program guidance must also be followed on where a penalty is appropriate. Regions have the flexibility to consider other types of State sanctions that can be used as effectively as cash penalties to create deterrence, and determine how and when it might be appropriate to use these sanctions consistent with national guidance. Regions and States should reach understanding on documentation to evaluate the State's penalty rationale. Maximum flexibility in types of documentation will be allowed to the State.

5. Procedures and Protocols on Notification and Consultation:

Regions and States should have maximum flexibility to fashion arrangements that are most conducive to a constructive relationship, following the broad principles outlined in this document.

6. State-Specific Priorities:

In addition, while of necessity EPA must emphasize commitments by States to address significant noncompliance and major sources of concern, Regions should be sensitive to the broad concerns of State Programs including minor sources and the need to be responsive to citizen complaints. Regions should discuss the State's perspective on both its own and national priorities, and take into account State priorities to the extent possible.

7. What Does it Mean to Reach Agreement?

To the extent possible, these agreements should reflect mutual understandings and expectations for the conduct of Federal and State enforcement programs. At a minimum, EPA Regions must: (1) be clear and ensure there are "no surprises"; (2) make arrangements with the States so that actions taken are constructive and supportive; and (3) tailor the application of the national program guidance to the States' programs and authorities. Where mutual agreement cannot be achieved, clear unilateral statements of policy will have to suffice, with commitments to try to seek further agreements over time. Areas where agreements have not been reached should be clearly identified for senior Agency management attention.

B. OVERSIGHT CRITERIA AND MEASURES: DEFINING GOOD PERFORMANCE

The first step to achieving strong and effective national compliance and enforcement programs is a clear definition of what constitutes good performance. Because each of EPA's programs embodies unique requirements and approaches, good performance must be defined on a program-specific basis. Adjustments also must be made in applying criteria and measures to the States and Regions, based upon their environmental problems and authorities. Nevertheless, there are several basic elements which will generally be applicable to a good compliance and enforcement program in any of our medium-specific programs. The following outlines the criteria and measures that form the common framework for defining a quality program. The framework is to serve as a guide to the national programs as they develop, in cooperation with Regions and States, the criteria they will use to assess their performance in implementing national compliance and enforcement programs.

The framework is not intended to be adopted word-for-word by the programs, nor is there any format implied by this list. What is important are the concepts. This section addresses only the elements of a quality program. Issues such as how oversight should be conducted are addressed in Section C. Each national program may choose to focus on certain elements of performance in a given year.

These criteria and measures are intended to apply to the implementing agency, that is, to an approved or delegated State or to an EPA Region in the event a program is not "delegated." Our philosophy is that EPA should be held to the same standards as we would apply to the States if they were implementing the program. Portions may also apply to those non-approved or non-delegated States which are administering portions of the programs under cooperative agreements.

CRITERION #1 Clear Identification of and Priorities for the Regulated Community

A quality compliance and enforcement program is based upon an inventory of regulated sources which is complete, accurate and current. The data should in turn be accessible, preferrably in automated data systems which are accurate, and up-to-date. The scope of coverage for the inventory should be appropriately defined by each program as it is probably not feasible to identify every person or facility subject to environmental laws and regulations, especially when they are numerous small sources. Those priorities should be clearly established in national program guidance and tailored to State-specific circumstances as appropriate.

The inventory of sources or other relevant information on sources should be utilized as a basis for a priority-setting system established by the administering agency. These priorities should reflect and balance both national priorities and state-specific priorities. A quality program uses those priorities as a basis for program management. National priorities are generally set forth in EPA's Operating Year Guidance and program-specific compliance and enforcement strategies. State-specific priorities should address not only efforts to achieve broad based compliance but also should assess the expected environmental impact of targeting enforcement and compliance monitoring to specific geographic areas or against certain source types. Ambient monitoring systems can provide an important point of departure for priority-setting.

CRITERION #2 Clear and Enforceable Requirements

Requirements established through permits, administrative orders and consent decrees should clearly define what a specific source must do by a date certain, in enforceable terms. It is not EPA's intention in this policy framework to suggest that EPA conduct a top down review of a State or Regional program's entire regulatory program. However, areas where provisions cannot be enforced due to lack of clarity or enforceable conditions should be identified and corrected.

CRITERION #3 Accurate and Reliable Compliance Monitoring

There are four objectives of compliance monitoring:

- reviewing source compliance status to identify potential violations;
- helping to establish an enforcement presence;
- collecting evidence necessary to support enforcement actions regarding identified violations; and
- developing an understanding of compliance patterns of the regulated community to aid in targeting activity, establishing compliance/enforcement priorities, evaluating strategies, and communicating information to the public.

The two factors in assessing the success of a compliance monitoring program are coverage and quality.

Coverage: Each program's strategy should reflect a balance between coverage: (1) for breadth, to substantiate the reliability of compliance statistics and establish an enforcement presence; and (2) for targeting those sources most likely to be out of compliance or those violations presenting the most serious environmental or public health risk.

Inspections: Each administering agency should have a written and reviewable inspection strategy, reviewed and updated annually, as appropriate: in some programs a multi-year strategy may be preferable. The strategy should demonstrate the minimum coverage for reliable data gathering and compliance assessment set forth in national program guidance and meet legal requirements for a "neutral inspection scheme." The strategy should also address how the inspections will most effectively reach priority concerns and potential noncompliers including the use of self-reported data, citizen complaints and historic compliance patterns. The strategy will be assessed on whether it embodies the appropriate mix of categories of inspections, frequency and level of detail. Inspections should then be carried out in a manner consistent with the inspection strategy.

Source Self-Monitoring and Reporting: The administering agency should ensure that minimum national requirements for source self-monitoring and reporting are imposed and complied with, either through regulation or permit condition, pursuant to national guidance as appropriate.

Quality: Each program should define minimum standards for quality assurance of data and data systems, and timely and complete documentation of results. At a minimum, each program should have a quality assurance program to insure the integrity of the compliance monitoring program. This quality assurance program should address essential lab analysis and chain of custody issues as appropriate.

Inspections: Inspectors should be able to accurately document evidence needed to determine the nature and extent of violations, particularly the presence of significant violations. Documentation of inspection findings should be timely, complete and able to support subsequent enforcement responses, as appropriate to the purpose of the inspection. Federal oversight inspections should corroborate findings. Oversight inspections are a principal means of evaluating both the quality of an inspection program and inspector training.

Source Self-Monitoring: The administering agency should have a strategy for and implement quality assurance procedures, with sufficient audits and follow-up action to ensure the integrity of self-reported data.

CRITERION #4 High or Improving Rates of Continuing Compliance

The long-term goal of all of our compliance and enforcement programs is to achieve high rates of continuing compliance across the broad spectrum of the regulated community. Until that goal is achieved, compliance rates can fluctuate for several reasons. In assessing how well an administering agency is meeting the goal of high or improving rates of

compliance, other factors must be assessed in addition to the overall compliance rate. Improved inspections or inspection targeting often can result in a temporary decrease in rates of compliance until newly found violations are corrected and the regulated community responds to the more vigorous attention to specific compliance problems. In these instances, a decrease in the rate of compliance would be a sign of a healthy compliance and enforcement program. At a minimum, programs should design mechanisms to track the progress of all sources out of compliance through major milestones up to achieving final physical (full) compliance with applicable regulations and standards.

Program quality must also be assessed in terms of how well the program is returning significant noncompliers to compliance. The use of lists of significant violators and specific commitments to track and resolve significant noncompliance should be part of the planning process of the administering agency, and, between States and Regions. The lists should be developed in consultation with the States and continually updated each fiscal year and sources on it tracked through to final physical compliance.

CRITERION #5 Timely and Appropriate Enforcement Response

Quality enforcement programs ensure that there is timely and appropriate enforcement response to violations. Expectations for what constitutes timely and appropriate action should be based upon national program guidance, tailored to the procedures and authorities in a given State and assessed in regard to particular circumstances surrounding each instance of violation. National programs must establish benchmarks or milestones for what constitutes timely and appropriate enforcement action, forcing progress in enforcement cases toward ultimate resolution and full physical compliance. This concept is a key new feature to our compliance and enforcement program implementation.

In designing oversight criteria for timely enforcement response, each program will attempt to capture the following concepts:

1. A set number of days from "detection" of a violation to an initial response. Each program should clearly define when the clock starts, that is, how and when a violation is "detected."

2. Over a specified period of time, a full range of enforcement tools may be used to try to achieve compliance, including notices of violation, warning letters, phone calls, site visits, etc. The adequacy of these responses will be assessed based upon whether they result in expeditious compliance.

3. A prescribed number of days from initial action within which a determination should generally be made, that

either compliance has been achieved or an administrative enforcement action has been taken (or a judicial referral has been initiated, as appropriate) that, at a minimum:

- Explicitly requires recipient to take some corrective/remedial action, or refrain from certain behavior, to achieve or maintain compliance;
- Explicitly is based on the issuing Agency's determination that a violation has occurred;
- Requires specific corrective action, or specifies a desired result that may be accomplished however the recipient chooses, and specifies a timetable for completion;
- May impose requirements in addition to ones relating directly to correction (e.g., specific monitoring, planning or reporting requirements); and
- Contains requirements that are independently enforceable without having to prove original violation and subjects the person to adverse legal consequences for noncompliance.

4. A specific point at which a determination is made either that final physical compliance has been achieved, that the source is in compliance with a milestone in a prior order, or that escalation to a judicial enforcement action has been taken if such actions have not already been initiated.

   In developing program-specific guidance, this milestone may be treated more as a concept than as a fixed timetable, taking into account the fact that the administrative hearing process and the State Attorney General's actions are not within the direct control of the administering agency.[2/] What is important, is the embodiment of the concept of timely follow-up and escalation, in requirements for tracking and management.

5. Final physical compliance date is firmly established and required of the facility. Although it is not possible for programs to establish any national timeframes, the concept of final physical compliance by a date certain should be embodied in EPA and State enforcement actions.

6. Expeditious physical compliance is required. It may not be possible for programs to define "expeditious" in terms of set time periods, but some concept of "expeditious" (i.e., that the schedule will result in a return to full physical compliance as quickly as can reasonably be expected) should be embodied in each program's guidance.

2/ See p. 17, 26-27, regarding the State Agency's responsibilities for coordinating with the State Attorney General or other legal staffs.

Timeframes established by the national programs for each of these minimum milestones are principally intended to serve as trigger points and not as absolute deadlines, unless specifically defined as such. Whatever timeframes are established are intended to apply only to Federal requirements as adopted by the States, and do not apply to State statutes and requirements that go beyond those required by Federal law. The timeframes are key milestones to be used to manage the program, to trigger review of progress in specific cases, and a presumption of where EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State.

Timeframes and their use in management will evolve over time as they will have to reflect different types of problems that may warrant different treatment. For example, programs will have to take into account such factors as new types of violations, the difference between operating and maintenance violations versus those that require installation of control equipment, emergency situations which may fall outside the scope of the normal timeframes for action, etc.

Administering agencies are expected to address the full range of violations in their enforcement responses considering the specific factors of the case and the need to maintain a credible enforcement presence. However, the new management approach setting forth desired timeframes for timely action could have resource implications beyond what is currently available to or appropriate for the full range of sources and violations. Therefore, as we begin to employ the concept of timely and appropriate enforcement response, at a minimum, the focus should be on the greatest problems, i.e., the significant noncompliers. Over time, and with more experience, this concept should be phased-in to cover a broader range of violations. This in no way should constrain the programs from applying the concepts broadly.

The choices of appropriate response are to be defined within the constraints of national program guidance and applied by the administering agency based upon consideration of what is needed: (1) in general, to achieve expeditious correction of the violation, deterrence to future noncompliance and fairness; and (2) in individual circumstances, based upon the gravity of the violation, the circumstances surrounding the violation, the source's prior record of compliance and the economic benefits accrued from noncompliance. With three exceptions, the form of the enforcement response is not important by itself, as long as it achieves the desired compliance result. The exceptions generally fall into the following three categories:

1. If compliance has not been achieved within a certain timeframe, the enforcement response should meet minimum requirements, usually associated with at least the issuance of an administrative order (see criteria listed above) or judicial referral.

2. Because of the need to create a strong deterrence to noncompliance, it is important to assess penalties in certain cases, and only certain types of enforcement actions can provide penalties. Each program must clearly define, as appropriate, the circumstances under which nothing less than a penalty or equivalent sanction will be acceptable. (See Criterion #6 below.)

3. In some circumstances, a judicial action or sanction is usually the only acceptable enforcement tool. Each program must define these circumstances as appropriate. For example, a judicial action might be required where a compliance schedule for Federal requirements goes beyond Federal statutory deadlines.

A good program should have adequate legal authority to achieve the above objectives. Where deficiencies have been identified, steps should be taken to fill identified gaps.

CRITERION # 6 Appropriate Use of Civil Judicial and Administrative Penalty and Other Sanction Authorities to Create Deterrence[3/]

1. Effective Use of Civil Penalty Authorities and Other Sanctions:

Civil penalties and other sanctions play an important role in an effective enforcement program. Deterrence of noncompliance is achieved through: 1) a credible likelihood of detecting a violation, 2) the speed of the enforcement response, and 3) the likelihood and severity of the sanction. While penalties or other sanctions are the critical third element in creating deterrence, they can also contribute to greater equity among the regulated community by recovering the economic benefit a violator gains from noncompliance over those who do comply.

Effective State and regional programs should have a clear plan or strategy for how their civil penalty or other sanction authorities will be used in the enforcement program. At a minimum, penalties and/or sanctions should be obtained where programs have identified that a penalty is appropriate (see Criterion #5 above).

The anticipated use of sanctions should be part of the State/EPA Enforcement Agreements process, with Regions and States discussing and establishing how and when the State generally plans to use penalties or other approaches where some sanction is required.

3/ Excerpts from the Policy on "Oversight of State Civil Penalties" 2/28/86. The focus of the policy is on both civil judicial and civil administrative penalties, and does not cover criminal penalties.

EPA generally prefers the use of cash penalties to other types of sanctions.[4/] However, there may be other sanctions which are preferable to cash penalties in some circumstances. In particular, States may have a broader range of remedies than those available at the Federal level. Examples of other sanctions may be: pipeline severance (UIC), license revocation (FIFRA) or criminal sanctions including fines and/or incarceration. National program guidance should clarify in general terms how the use of other types of sanctions fits into the program's penalty scheme at the Federal and State levels, e.g., whether they are substitutes for or mitigate a cash penalty.[5/] In any case, States are urged to use cash penalty authorities in those cases for which a penalty is "appropriate" and/or to use other sanctions pursuant to these agreements with the Regions.

EPA encourages States to develop civil administrative penalty authority in addition to civil judicial penalty authority, and to provide sufficient resources and support for successful implementation where they do not already have this authority. In general, a well designed administrative penalty authority can provide faster and more efficient use of enforcement resources, when compared to civil judicial authorities. Both civil judicial and administrative penalty authorities are important, complementary, and each should be used to greatest advantage. EPA is similarly seeking to gain administrative penalty authority for those Federal programs which do not already have it. To support State efforts to gain additional penalty authorities, EPA will share information collected on existing State penalty authorities and on the Federal experience with the development and use of administrative authorities.

2. Oversight of Penalty Practices:

EPA Headquarters will oversee Regional penalties to ensure Federal penalty policies are followed. This oversight will focus both on individual penalty calculations and regional penalty practices and patterns.

4/ In limited circumstances where they meet specified criteria, EPA and DOJ policies and procedures allow for alternative payments -- such as beneficial projects which have economic value beyond the costs of returning to compliance -- in mitigation of their penalty liability.

5/ Until program-specific guidance is developed to define the appropriate use of civil sanctions, the Region and State should consider whether the sanction is comparable to a cash penalty in achieving compliance and deterring noncompliance. Costs of returning to compliance will not be considered a penalty. Criminal authorities, while not clearly comparable to cash penalties, can be used as effectively as cash penalties to create deterrence in certain circumstances.

EPA will review state penalties in the context of the State's overall enforcement program not merely on its use of cash penalties. While individual cases will be discussed, the program review will more broadly evaluate how penalties and other sanctions can be used most effectively. The evaluation will consider whether the penalties or other sanctions are sought in appropriate cases, whether the relative amounts of penalties or use of sanctions reflect increasing severity of the violation, recalcitrance, recidivism etc., and bear a reasonable relationship to the economic benefit of noncompliance (as applicable) and whether they are successful in contributing to a high rate of compliance and deterring noncompliance. EPA may also review the extent to which State penalties have been upheld and collected.

3. Development and Use of Civil Penalty Policies:

EPA Regions are required to follow written Agency-wide and program specific penalty policies and procedures.

EPA encourages States to develop and use their own State penalty policies or criteria for assessing civil penalties. The advantages of using a penalty policy include:

- leads to improved consistency;
- is more defensible in court;
- generally places the Agency in a stronger position to negotiate with the violator;
- improves communication and support within the administering agency and among the agency officials, attorneys and judges especially where other organizations are responsible for imposing the penalty;
- when based on recoupment of economic benefit and a component for seriousness, deters violations based upon economic considerations while providing some equity among violators and nonviolators; and
- can be used by judges as a basis for penalty decisions.

EPA encourages States to consider EPA's penalty policies as they develop their own penalty policies.

4. Consideration of Economic Benefit of Noncompliance:

To remove incentives for noncompliance and establish deterrence, EPA endeavors, through its civil penalties, to recoup the economic benefit the violator gained through noncompliance. EPA encourages States to consider and to quantify where possible, the economic benefit of noncompliance where this is applicable. EPA expects States to make a reasonable effort to calculate economic benefit and encourages States to attempt to recover this amount in negotiations and litigation. States may use the Agency's computerized model (known as BEN) for calculating that benefit or different approaches to calculating economic benefit. EPA will provide technical assistance to States on calculating the economic benefit of noncompliance, and has made the BEN computer model available to States.

CRITERION #7 Accurate Recordkeeping and Reporting

A quality program maintains accurate and up-to-date files and records on source performance and enforcement responses that are reviewable and accessible. All recordkeeping and reporting should meet the requirements of the quality assurance management policy and procedures established by each national program consistent with the Agency's Monitoring Policy and Quality Assurance Management System. Reports from States to Regions, Regions to Headquarters must be timely, complete and accurate to support effective program evaluation and priority-setting.

State recordkeeping should include some documented rationale for the penalties sought to support defensibility in court, enhance Agency's negotiating posture, and lead to greater consistency. These records should be in the most convenient format for administration of the State's penalty program to avoid new or different recordkeeping requirements.

CRITERION #8 Sound Overall Program Management

A quality program should have an adequate level, mix and utilization of resources, qualified and trained staff, and adequate equipment. The intention here is not to focus on resource and training issues unless there is poor performance identified elsewhere in the program. In those instances, these measures can provide a basis for corrective action by the administering agency. There may be, however, some circumstances in which base level of trained staff and equipment can be defined by a national program where it will be utilized as an indicator of whether the program is adequate.

Similarly, a good compliance and enforcement program should have a clear scheme for how the operations of other related organizations, agencies and levels of government fit into the program, especially the State Attorneys General or other appropriate State legal organizations. The State Agency should, at a minimum, ensure that the State AG, internal legal counsel, or other appropriate government legal staff are consulted on the enforcement commitments the State is making to EPA to assure that the level of legal enforcement support and associated resources needed to accomplish the agreed-upon goals are secured. This coordination should result in timely review of initial referral packages, satisfactory settlement of cases, as appropriate, timely filing and prosecution of cases, and prompt action where dischargers violate consent decrees. (See Section E, p. 26-27).

C. OVERSIGHT PROCEDURES AND PROTOCOLS

This section addresses how EPA should conduct its oversight function, its approach, process and follow-up, to build and improve individual programs and overall national performance. On May 31, 1985, the Agency issued the Policy on Performance-Based Assistance, which contains guidance on how Regions should oversee assistance agreements. Both of these policies call for oversight with a problem-solving orientation with clear identification of actions needed to correct problems or recognize good performance.

1. Approach

The goal of oversight should be to improve the State (or Regional) compliance and enforcement program. To accomplish this, oversight should be tailored to fit State performance and capability. The context must be the whole State compliance and enforcement program, although EPA's focus for audit purposes will be on national priority areas.

No new oversight process is intended here. Existing procedures such as mid-year reviews, periodic audits and oversight inspections as established by each program and Region should be used. Administering agencies should identify strengths and weaknesses of the State and Federal programs and develop mutual commitments to correct problems.

EPA oversight of State performance should be consistent with the following principles:

a. Positive oversight findings should be stressed as well as the negative ones.

b. Positive steps that can be taken to build the capability of State programs in problem areas should be emphasized. This should include providing technical assistance and training -- by EPA staff to the extent possible.

c. EPA action to correct problems should vary, depending on the environmental or public health effect of the problem and whether it reflects a single incident or a general problem with the State program.

d. The States should be given an opportunity to formally comment on EPA's performance. Regions should provide information to the States that is available on its performance against the national standards, including their performance on meeting the "timely and appropriate" criteria, as well as their performance on commitments to that State.

e. EPA should give States sufficient opportunity to correct identified problems, and take corrective action pursuant to the criteria for direct enforcement established in Section D.

f. EPA should use the oversight process as a means of transferring successful regional and State approaches from one Region or State to the other.

2. Process

Several actions can result in the most constructive review of the State's programs:

a. To the extent possible, files to be audited will be identified in advance, with some provision for random review of a percentage of other files if necessary.

b. Experienced personnel should be used to conduct the audit/review -- EPA staff should be used to the extent possible to build relationships and expertise.

c. There should be an exit interview and every opportunity should be made to discuss findings, comment on and identify corrective steps based upon a review draft of the written report.

d. Opportunity should be made for staffs interacting on enforcement cases and overseeing State performance to meet personally rather than rely solely upon formal communications -- this applies to both technical and legal staffs.

3. Follow-Up and Consequences of Oversight

When State performance meets or exceeds the criteria and measures for defining good program performance, EPA should reward this performance in some of the following ways:

a. reduce the number, level or scope, and/or frequency of reviews or of some reporting requirements consistent with statutory or regulatory requirements;

b. reduce the frequency and number of oversight inspections; and/or

c. allow the program more flexibility in applying resources from an almost exclusive focus on national priorities e.g., major sources, to addressing more priorities of concern to the State e.g., minor sources.

When State performance fails to meet the criteria for good State performance, EPA may take some of the following actions, as appropriate:

a. suggest changes in State procedures;

b. suggest changes in the State's use of resources or training of staff;

c. provide technical assistance;

d. increase the number of oversight inspections and/or require submittal of information on remedial activities;

e. provide other workable State models and practices to States with problems in specific areas and match State staff with expertise in needed area;

f. if State enforcement action has not been timely and appropriate, EPA may take direct enforcement action;

g. track problem categories of cases more closely;

h. grant awards could be conditioned by targeting additional resources to correct identified problems or reduced based on poor performance where such performance is not due to inadequate resources; and/or

i. consider de-delegation if there is continued poor performance.

D. CRITERIA FOR DIRECT FEDERAL ENFORCEMENT IN DELEGATED STATES

This section addresses criteria defining circumstances under which approved State programs might expect direct Federal enforcement action and how EPA will carry out such actions so as to be most supportive of strengthening State programs.

1. When Might EPA Take Direct Enforcement Action in Approved States?

A clear definition of roles and responsibilities is essential to an effective partnership, since EPA has parallel enforcement authority under its statutes whether or not a State has an approved or delegated program. As a matter of policy in delegated or approved programs, primary responsibility for action will reside with State or local governments with EPA taking action principally where a State is "unwilling or unable" to take "timely and appropriate" enforcement action. Many States view it as a failure of their program if EPA takes an enforcement action. This is not the approach or view adopted here. There are circumstances in which EPA may want to support the broad national interest in creating an effective deterrent to noncompliance beyond what a State may need to do to achieve compliance in an individual case or to support its own program.

Because States have primary responsibility and EPA clearly does not have the resources to take action on or to review in detail any and all violations, EPA will circumscribe its actions to the areas listed below and address other issues concerning State enforcement action in the context of its broader oversight responsibilities. The following are four types of cases EPA may consider taking direct enforcement action where we have parallel legal authority to take enforcement action:

a. State requests EPA action
b. State enforcement response is not timely and appropriate
c. National precedents (legal or program)
d. Violation of EPA order or consent decree

In deciding whether to take direct enforcement in the above types of cases, EPA will consider the following factors:

- Cases specifically designated as nationally significant (e.g., significant noncompliers, explicit national or regional priorities)
- Significant environmental or public health damage or risk involved
- Significant economic benefit gained by violator
- Interstate issues (multiple States or Regions)
- Repeat patterns of violations and violators

How these factors are applied for the various types of cases is discussed below.

a. State requests EPA action:

The State may request EPA to take the enforcement action for several reasons including but not limited to: where State authority is inadequate, interstate issues involving multiple States which they cannot resolve by themselves, or where State resources or expertise are inadequate, particularly to address the significant violation/violators in the State in a timely and appropriate manner. EPA should honor requests by States for support in enforcement. EPA will follow its priorities in meeting any such requests for assistance, considering significance of environmental or public health damage or risk involved, significant economic benefit gained by a violator, repeat patterns of violations and violators. Based on this general guidance, each program office may develop more specific guidance on the types of violations on which EPA should focus. Regions and States are strongly encouraged to plan in advance for any such requests for or areas needing EPA enforcement assistance during the State/EPA Enforcement Agreements Process.

b. State Enforcement is not "Timely and Appropriate"

The most critical determinant of whether EPA will take direct enforcement action in an approved State is whether the State has or will take timely and appropriate enforcement action as defined by national program guidance and State/Regional agreements. EPA will defer to State action if it is "timely and appropriate" except in very limited circumstances: where a State has requested EPA action (a, above), there is a national legal or program precedent which cannot be addressed through coordinated State/Federal action (c, below), EPA is enforcing its own enforcement action (d, below) or the case of a repeat violator, where the State response is likely to prove ineffective given the pattern of repeat violations and prior history of the State's success in addressing past violations.

(i) Untimely State Enforcement Response:

If a State action is untimely, EPA Regions must determine after advance notification and consultation with the State whether the State is moving expeditously to resolve the violation in an "appropriate" manner.

(ii) Inappropriate State Action:

EPA may take direct action if the State enforcement action falls short of that agreed to in advance in the State/EPA Enforcement Agreements as meeting the requirements of a formal enforcement response (See Section B, page 13) where a formal enforcement response is required. EPA may also take action if the content of the enforcement action is inappropriate, i.e., if remedies are

clearly inappropriate to correct the violation, if compliance schedules are unacceptably extended, or if there is no appropriate penalty or other sanction.

(iii) Inappropriate Penalty or other Sanction:

For types of violations identified in national program guidance as requiring a penalty or equivalent sanction, EPA will take action to recover a penalty if a State has not assessed a penalty or other appropriate sanction. EPA generally will not consider taking direct enforcement action solely for recovery of additional penalties unless a State penalty is determined to be grossly deficient after considering all of the circumstances of the case and the national interest. In making this determination, EPA will give every consideration to the State's own penalty authority and any applicable State penalty policy. EPA will consider whether that State's penalty bears any reasonable relationship to the seriousness of the violation, the economic benefit gained by the violator (where applicable) and any other unique factors in the case. While this policy provides the basis for deciding whether to take direct Federal action on the basis of an inadequate penalty, this issue should be discussed in more detail during the agreements process to address any state-specific circumstances and procedures established to address generic problems in specific cases. Where identified in national guidance and agreed to between the Region and State, other sanctions will be acceptable as substitutes or mitigation of penalty amounts in these considerations.

Program-specific national guidance on expectations for State penalty assessments may be developed in consultation with the States and applied for determining adequacy of penalty amounts after being applied in practice in EPA Regions. It is the current expectation of Agency managers that EPA will continue to gain experience in implementing its own penalty policies before national programs consider such guidance. Thus, in the near term a determination that a penalty is "grossly deficient" will remain a judgment call made on a case-by-case basis.

c. National Precedents

This is the smallest category of cases in which EPA may take direct enforcement action in an approved State, and will occur rarely in practice. These cases are limited to those of first impression in law or those fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis. Some of these cases may most appropriately be managed or coordinated at the national level. Additional guidance on how potential cases will be identified, decisions made to proceed and involvement of States and Regions in that process, has been developed as Appendix B to this document.

d. Violation of EPA order or consent decree:

EPA places a high priority on following through on enforcement actions until final compliance is achieved. If EPA has taken administrative, civil or criminal judicial enforcement in a delegated or approved State, EPA will take any follow up enforcement action on violations of those agreements or orders to preserve the integrity of Federal enforcement actions.

2. How Should EPA Take Action So As To Better Support Strong State Programs?

Section E describes in some detail the principles and procedures for advance notification and consultation with States. These are imperatives for a sound working relationship. In all of these circumstances, where EPA may overfile a State action on the basis that it is not timely and appropriate EPA should work with the State as early as possible in the case, well before completion of a State action which, if resulting in expeditious compliance by the facility, would render any subsequent EPA involvement unconstructive, ineffective or moot. This is particularly important since it is EPA policy that once a case has been commenced, EPA generally will not withdraw that case in light of subsequent or simultaneous State enforcement action.

In particular, Regions also should identify, with their States, particular areas in which arrangements can or should be made, in advance, for direct EPA enforcement support where State authorities are inadequate or compliance has been a continuing problem.

There are several other approaches identified here for how EPA can take enforcement action, where it is appropriate, in a manner which can better support States.

To the maximum extent possible, EPA should make arrangements with States to:

a. Take joint State/Federal action -- particularly where a State is responsibly moving to correct a violation but lacks the necessary authorities, resources, or national or interstate perspective appropriate to the case.

b. Use State inspection or other data and witnesses, as appropriate.

c. Involve States in creative settlements and to participate in case development -- so that the credibility of States as the primary actor is perceived and realized.

d. Arrange for division of penalties with State and local governments[6/] (to the extent they participate in Federal enforcement actions, and where permitted by law) -- to enhance Federal/State cooperation in enforcement.

e. Issue joint press releases and share credit with the State -- to ensure EPA is not in competition with the State and that EPA action is not erroneously perceived as a weakness or failure in the State's program.

f. Keep States continually apprised of events and reasons for Federal actions -- to avoid conflicting actions and to build a common understanding of goals and the State and Federal perspectives.

3. How Do the Expectations for "Timely and Appropriate Action" Apply to EPA in Delegated States?

In delegated States, EPA performs an oversight function, standing ready to take direct Federal enforcement action based upon the factors stated above. In its oversight capacity, in most cases, EPA will not obtain real-time data. As indicated in Section F on State Reporting, EPA will receive quarterly reports and will supplement these with more frequent informal communications on the status of key cases. Therefore, we do not expect EPA Regions, through their oversight, to be able to take direct enforcement action following the exact same timeframes as those that apply to the administering agency. However, when EPA does determine it is appropriate to take direct Federal action, EPA staff are expected to adhere to the same timeframes as applicable to the States starting with the assumption of responsibility for enforcement action.

6/ See Appendix C for Agency Policy on "Division of Penalties with State and Local Governments," issued October 30, 1985.

E. ADVANCE NOTIFICATION AND CONSULTATION

A policy of "no surprises" must be the centerpiece of any effort to ensure the productive use of limited Federal and State resources and an effective "partnership" in achieving compliance. This principle should be applied to all aspects of the compliance and enforcement program covering inspections, enforcement activities, press releases and public information, and management data summaries upon which State and national performance are assessed.

In order to guarantee that there is ample advance notification and consultation between the proper State and Federal officials, EPA Regions should confer annually with each State, discuss the following areas and devise agreements as appropriate. The agreements should be unique to each State and need not cover all areas -- so long as there is a clear understanding and discussion of how each area will be addressed.

1. Advance Notification to Affected States of Intended EPA Inspections and Enforcement Actions

   Agreements should identify:

   - who should be notified, e.g.
     -- the head of the program if it involves potential Federal enforcement; and
     -- who is notified of proposed/planned Federal inspections.

   - how the State will be notified, e.g.
     -- the agencies share inspection lists; and
     -- the agency contact receives a telephone call on a proposed Federal enforcement case.

   - when they will be notified -- at what point(s) in the process, e.g.
     -- when a case is being considered; and/or
     -- when a case is ready to be referred, or notice order issued.

   Some specific provisions need to be made to address the following:

   a. Advance Notification of State Attorneys General or other legal staff of potential EPA enforcement actions[7/]

      While EPA's primary relationship with the State is and should continue to be with the State agency that has been delegated or been approved to administer the programs, EPA needs to ensure that all parties in the

7/ In some States there are legal organizations that have direct enforcement authority which by-passes the State AG, e.g., District Attorneys, internal legal counsel, Governor's General Counsel. In these instances, this guidance would apply to these other organizations.

State affected by a pending EPA enforcement action receive appropriate advance notification. In addition, when EPA negotiates commitments each year with the State to address specific significant violators, it is important that all the parties affected by these commitments are aware of the legal enforcement support and associated resources needed to accomplish these goals.

As part of the State/EPA Enforcement Agreements process, the Region should discuss with the State agency their internal procedures and/or protocols for advance notification and consultation with the State AG or other legal staff. The State agency is responsible for assuring that the State AG or other legal staff are properly notified and consulted about planned Federal enforcement actions and/or enforcement initiatives on an ongoing basis. States are strongly encouraged to commit advance notification and consultation procedures/protocols reached between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Regions should seek to incorporate these written protocols into the State/EPA Enforcement Agreements.

The Region should do everything possible to work through the State agency on the issue of communicating with the State AG or other legal staff on potential EPA enforcement actions as well as other matters. However, if the State agency does not have a workable internal procedure and if problems persist, the Region, after advance notification and consultation with the State agency, may make arrangements for directly communicating with the State AG or other legal staff.

The Region and State agency should discuss how the outside legal organizations will be consulted on the commitments the State is making to EPA on addressing significant violators each year. These consultations are intended to clarify the legal enforcement support needed to accomplish these goals. This is particularly important for those State agencies dependent upon the State AG or other outside legal organizations to implement their enforcement program.

State agencies are also encouraged to notify these organizations of the anticipated timing of the negotiations each year with EPA on the Enforcement Agreements, grants, and related documents.

Regions are encouraged to work with their State agencies to set up a joint meeting at least annually to which all parties are invited--the program and legal staffs of both the EPA Region and the State agency(s), plus U.S. Attorney staff and State AG staff--to review EPA's enforcement priorities and recent program guidance.

b. Federal Facilities

Federal facilities may involve a greater or different need for coordination, particularly where the Federal facilities request EPA technical assistance or where EPA is statutorily required to conduct inspections (e.g., under RCRA). The advance notification and consultation protocols in the State/EPA Enforcement

Agreements should incorporate any of the types of special arrangements necessary for Federal facilities. The protocols should also address how the State will be involved in the review of Federal agency A-106 budget submissions, and include plans for a joint annual review of patterns of compliance problems at Federal facilities in the State.

c. Criminal Enforcement

Although the Policy Framework does not apply to the criminal enforcement program, to improve the coordination with States on criminal investigations and assist the States in their criminal enforcement efforts the Regions should discuss with States any affirmative plans for cross-referrals and cooperative criminal investigations. Such discussions should include the Special Agent in Charge and appropriate program staff familiar with criminal enforcement.

In cases where other States or jurisdictions may be directly and materially affected by the violation, i.e., environmental or public health impacts, EPA's Regional Offices should attempt to notify all of the States that are interested parties or are affected by the enforcement action through the communication channels established by the State agreements, working through the appropriate Regional Office. This notification process is particularly important for hazardous waste cases in which regulatees often operate across State boundaries.

Protocols for advance notification must be established with the understanding that each party will respect the other's need for confidentiality and discretion in regard to the information being shared, where it is appropriate. Continuing problems in this regard will be cause for exceptions to the basic principle of advance notification.

Many of our statutes or regulations already specify procedures for advance notification of the State. The State/Federal agreements are intended to supplement these minimum requirements.

2. Establishment of a Consultative Process

Advance notification is only an essential first step and should not be construed as the desired end result of these

State/Federal agreements. The processes established should be consultative and should be designed to achieve the following:

a. Inspections

Advance notice to States through sharing of lists of planned Federal inspections should be designed so that State and Federal agencies can properly coordinate the scheduling of site inspections and facilitate joint or multi-media inspections as appropriate. This should generally be done for all programs whether or not they are delegated, except for investigative inspections which would be jeopardized by this process.

b. Enforcement Actions

Federal and State officials must be able to keep one another current on the status of enforcement actions against noncomplying facilities. Regularly scheduled meetings or conference calls at which active and proposed cases and inspections are discussed may achieve these purposes.

3. Sharing Compliance and Enforcement Information

The Region and State should discuss the need for a process to share, as much as practicable, inspection results, monitoring reports, evidence, including testimony, where applicable for Federal and/or State enforcement proceedings. The Regions should also establish mechanisms for sharing with the States copies of reports generated with data submitted by the Regions and States, including comparative data -- other States in the Region and across Regions.

4. Dispute Resolution

The Region and State should agree in advance on a process for resolving disputes, especially differences in interpretation of regulations or program goals as they may affect resolution of individual instances of noncompliance. As stated in the policy on Performance-Based Assistance, the purpose in laying out a process by which issues can be surfaced quickly up the chain of command in both the Regions and States is to ensure that significant problems receive the prompt attention of managers capable of solving these problems expeditiously.

5. Publicizing Enforcement Activities

EPA has made commitments to account publicly for its compliance and enforcement programs. It is EPA's policy to publicize all judicial enforcement actions and significant administrative actions to both encourage compliance and serve as a deterrent to noncompliance.

While State philosophies on these matters may vary, the Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement.

Discussions should address how and when this coordination would take place. Regions should consult with the State on any enforcement related EPA press release or other media event which affects the State. To the extent possible, the State should be given an opportunity to join in the press release or press conference if it has been involved in the underlying enforcement action. Further, EPA generated press releases and public information reports should acknowledge and give credit to relevant State actions and accomplishments when appropriate.

6. Publicly Reported Performance Data

Regions should discuss with States mechanisms for ensuring the accuracy of data used to generate monthly, quarterly and/or annual reports on the status of State and Federal compliance and enforcement activities. Opportunities should be provided to verify the accuracy of the data with the States prior to transmittal to headquarters. Time constraints may be a real limitation on what can be accomplished, but it is important to establish appropriate checks and control points if we are to provide an accurate reflection of our mutual accomplishments. If there are no data accuracy concerns, these mechanisms may not be needed.

APPENDIX A: ANNUAL PRIORITIES AND PROGRAM GUIDANCES

Annual Priorities for Implementing Agreements

FY 1985: Given the enormity of the task in the first year, 3 priorities were established:

- ° defining expectations for timely and appropriate enforcement action;
- ° establishing protocols for advance notification and consultation; and
- ° reporting State data.

FY 1986: Building on the FY 1985 process, three areas were emphasized:

- ° expanding the scope of the agreements process to cover all delegable programs;
- ° adapting national guidance to State-specific circumstances; and
- ° ensuring a constructive process for reaching agreement.

FY 1987: Continuing to refine the approaches and working relationships with the States, three areas are to be emphasized:

- ° improving the implementation and monitoring of timely and appropriate enforcement response with particular emphasis on improving the use of penalty authorities;
- ° improving the involvement of State Attorneys General (or other appropriate legal staff) in the agreements process; and
- ° implementing the revised Federal Facilities Compliance Strategy.

APPENDIX A

EXI[ING OR PLANNED NATIONAL GUIDANCE AFFECTING STATE/EPA ENFORCEMENT AGREEMENTS PROCESS Revised: 8/14/86

Cross-cutting National Guidance: ° Revised Policy Framework for State/Federal Enforcement Agreements--reissued 8/86
° Agency-wide Policy on Performance-Based Assistance--issued by Admin. 5/31/85

NOTE. Underlining represents guidance still to be issued.

Water - NPDES	Drinking Water	Air	RCRA	FIFRA	Fed. Fac.
°"National Guidance for Oversight of NPDES Programs FY 1987." (issued 4/18/86)	°"FY 85 Initiatives on Compliance Monitoring & Enforcement Oversight." 6/29/84	°"Guidance on Timely & Appropriate"... for Significant Air Violators." 6/28/84	°"Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA." (reissued 6/86)	°Final FY 87 Enforcement & Certification Grant Guidance (issued 4/18/86)	°FF Compliance Strategy (to be issued 10/86)
°Final Regulation-Definition of instances of non-compliance reported in NCR. (8/26/85)	°"Final Guidance on PWS Grant Program Implementation" (3/20/84)	°"Timely and Approp. Enforcement Response Guidance" 4/11/86	°"RCRA Penalty Policy" 5/8/84	°Interpretative Rule - FIFRA State Primacy Enforcement Responsibilities. 40 FR Part 173 1/5/83.	°FF Prog. Manual for Implementing CERCLA Responsibilities of Federal Agencies (draft/ 85: to be issued in final after CERCLA reauthorization)
°QNCR Guidance (issued 3/86)	°Reqs - NIPDWR, 40CFR Part 141 and 142.	°National Air Audit System Guidelines for FY 1986. (issued 2/86)	°FY 1987 "RCRA Implementation Plan" (reissued 5/19/86)		
°Inspection Strategy and Guidance (issued 4/85)	°DW annual Reporting Requirements - "Guidance for PWSS Program Reporting Requirements" 7/9/84	°"Guidance on Federally-Reportable Violations." 4/11/86	°"RCRA Enforcement Response Policy" (issued 12/21/84) (to be revised by 12/86)		
°Revised EMS (Enforcement Management System) (issued 3/86)	°"FY's 85-86 Strategy for Eliminating Persistent Violations at Community Water Systems." Memo from Paul Baltay 3/18/85.	°Inspection Frequency Guidance (issued 3/19/85 and reissued 6/11/86)	°"Compliance and Enforcement Program Descriptions in Final Authorization Application and State Enforcement Strategies," memo from Lee Thomas to RAs. (issued 6/12/84)		
°NPDES Federal Penalty Policy (issued 2/11/86)	°Guidance for the Development of FY 86 PWSS State Program Plans and Enforcement Agreements" (issued 7/3/85)	°"Final Technical Guidance on Review and Use of Excess Emission Reports" Memo from Ed Reich to Air Branch Chiefs --Guidance for Regional Offices (issued 10/5/84)			
°Strategy for issuance of NPDES minor permits (issued 2/86)					

NPDES	DRINKING WATER	AIR	RCRA	FIFRA	FED FAC
	°Guidance on FY 86 UIC Enforcement Agreements" ICPG #40 (issued 6/28/85) °"FY 87 SPMS & OWAS Targets for the PWSS Program" (SNC definition) (issued 7/10/86) °Guidance on FY 87 UIC Enforcement Agreements (Draft issued 7/1/86) °Guidance on FY 87 PWSS Enforcement Agreements (issued 8/8/86) °Guidance on Use of AO Authority under SDWA Amendments (to be issued pending legislation)	°"Technical Guidance on the Review and use of Coal Sampling and Analysis Data:" EPA-340/1-85-010. 10/30/85 Guidance for Regional Offices	°Compliance Monitoring & Enforcement Log - form for recording monthly compliance data from States & Regions. °Technical Enforcement Guidance on Ground Water Monitoring (Interim Final Aug. 1985) °Compliance order Guidance for Ground Water Monitoring (issued Aug. 85) °Loss of Interim Status Guidance (issued Aug. 85)		

EPA POLICY ON IMPLEMENTING NATIONALLY MANAGED OR COORDINATED ENFORCEMENT ACTIONS

This policy addresses how EPA will handle the small subset of federal civil enforcement cases, both administrative and judicial, which are managed or coordinated at the EPA Headquarters level. The policy was developed to ensure these actions are identified, developed and concluded consistent with the principles set forth in the Policy Framework for State/EPA Enforcement "Agreements." It covers the criteria and process for deciding what cases might best be managed or coordinated nationally; the roles and relationships of EPA Headquarters and regional offices and the States; and protocols for active and early consultation with the involved States and Regions.

A. Criteria for Nationally Managed or Coordinated Enforcement Cases

Most enforcement cases are handled at the state, local or EPA regional level for reasons of efficiency and effectiveness and because of the primary role that States and local governments have in enforcement under most of the major environmental statutes. The Policy Framework identifies several instances in which direct enforcement actions may be taken by EPA, which in most instances will be handled by EPA Regions pursuant to the State/EPA Enforcement "Agreements." However, some of those cases may most appropriately be managed or coordinated at the national level by EPA Headquarters.

In addition to instances in which an EPA Region requests Headquarters assistance or lead in an enforcement case, these "national" cases will usually arise within the context of three of the criteria for direct EPA action mentioned in the Policy Framework:

-- National Precedent (legal or program precedent): the degree to which the case is one of first impression in law or the decision is fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis.

-- Repeat Patterns of Violations and Violators: the degree to which there are significant patterns of repeat violations at a given facility or type of source or patterns of violations within multi-facility regulated entities. The latter is of particular concern where the noncompliance is a matter of national (e.g., corporate) policy or the lack of sound environmental management policies and practices at a national

*Issued by the Assistant Administrator for the Office of Enforcement and Compliance Monitoring, [illegible]

level which can best be remedied through settlement provisions which affect such national policies and practices.

-- Interstate Issues (multiple States or Regions): the degree to which a case may cross regional or state boundaries and requires a consistent approach. This is particularly important where there may be a potential for interregional transfers of pollution problems and the case will present such issues when EPA Regions or States are defining enforcement remedies.

EPA's response to any of these circumstances can range from increased headquarters oversight and legal or technical assistance, to close coordination of State and Regional enforcement actions, to direct management of the case by Headquarters.

There are essentially two types of "National" cases. A nationally managed case is one in which EPA Headquarters has the responsibility for the legal and/or technical development and management of the case(s) from the time the determination is made that the case(s) should be nationally managed in accordance with the criteria and process set forth in this policy. A nationally coordinated case(s) is one which preserves responsibility for lead legal and technical development and management of the cases within the respective EPA regions and/or state or local governments. This is subject, however, to the oversight, coordination and management by a lead Headquarters attorney and/or program staff on issues of national or programmatic scope to ensure that all of the cases within the scope of the nationally coordinated case are resolved to achieve the same or compatible results in furtherance of EPA's national program and enforcement goals.

Section C below describes more fully the roles and relationships of EPA headquarters, regional, and state personnel, both legal and technical, in either nationally managed or nationally coordinated cases.

There are several factors to apply to assess whether, in addition to the normal Headquarters oversight, a case should be handled as: (1) nationally managed; or (2) nationally coordinated. None of these factors may necessarily be sufficient in themselves but should be viewed as a whole. These factors will include:

-- availability or most efficient use of State or EPA Regional or Headquarters resources.

-- ability of the agency to affect the outcome through alternative means. One example is issuance of timely policy guidance which would enable the States, local governments or EPA Regions to establish the appropriate precedent through independent action.

-- favorable venue considerations.

-- environmental results which could be achieved through discrete versus concerted and coordinated action, such as potential for affecting overall corporate environmental practices.

-- location of government legal and technical expertise at EPA Headquarters or in the Regions, recognizing that expertise frequently can be tapped and arrangements made to make expertise available where needed.

To the extent possible, where cases warrant close national attention, EPA Headquarters will coordinate rather than directly manage the case on a national basis thereby enabling Regions and States to better reflect facility-specific enforcement considerations.

B. Process for Identifying Nationally-Managed or Coordinated Cases -- Roles and Responsibilities

EPA recognizes the importance of anticipating the need for nationally managed or coordinated cases to help strengthen our national enforcement presence; and of widely sharing information both on patterns of violations and violators and on legal and program precedent with EPA Regions and States. To do this:

Headquarters program offices, in cooperation with the Office of Enforcement and Compliance Monitoring should use the Agency's strategic planning process to help identify upcoming enforcement cases of national precedence and importance. They also should develop and disseminate to Regions information on anticipated or likely patterns or sources of violations for specific industries and types of facilities.

Regional offices are responsible for raising to Headquarters situations which pose significant legal or program precedent or those in which patterns of violations are occurring or which are likely to be generic industry-wide or company-wide which would make national case management or coordination particularly effective.

State and local officials are encouraged to raise to EPA Regional Offices situations identified above which would make national case management or coordination particularly effective.

Whether a case will be managed or coordinated at the national level will be decided by the Assistant Administrator for Enforcement and Compliance Monitoring after full consultation with the affected program Assistant Administrators, Regional Administrators and state or local governments in what is intended to be a consensus building process. There will be a full discussion among all of the parties of all of

the ramifications for the program and a review of all of the important criteria involved in the decision. In the event of a lack of consensus as to whether the case should be managed or coordinated at the national level, the AA for OECM shall make the determination, with an opportunity for a hearing and timely appeal to the Administrator or Deputy Administrator by the Regional or other EPA Assistant Administrator.

The Regions will be responsible for communicating with any affected States using mechanisms established in the State/EPA Enforcement "Agreements," to raise the possibility of national case management or coordination and to ensure that timely information on the status of any independent state, local or regional enforcement actions can and would be factored into the decisions regarding: (1) whether to manage the case nationally; (2) whether to coordinate the case nationally; (3) what legal and technical assistance might be provided in a State lead case; and (4) what facilities to include in the action.

C. Case Development -- Roles and Responsibilities

Nationally managed cases are those that are managed out of EPA Headquarters with a lead headquarters enforcement attorney and a designated lead headquarters program contact. Notwithstanding headquarters lead, in most instances, timely and responsive Regional office legal and technical support and assistance is expected in developing and managing the case. In these instances, the Regions will receive credit for a case referral (on a facility basis) for this effort. The decision on the extent of Regional office involvement and case referral credit will be made at the time of decision that the case should be nationally managed. Regions which play a significant role in the development and/or prosecution of a case will be involved in the decision-making process in any case settlement proceedings and the Regional Administrator will have the opportunity to formally concur in any settlement.

Nationally coordinated cases are those that are coordinated out of EPA Headquarters with lead regional and/or state or local attorneys and associated program office staff. The headquarters attorney assigned to the case(s) and designated headquarters program office contact have clear responsibility for ensuring national issues involved in the case which require national coordination are clearly identified and developed and in coordinating the facility-specific actions of the regional offices to ensure that the remedies and policies applied are consistent. This goes beyond the normal headquarters oversight role. The headquarters officials have both a facilitator role in coordinating information exchange and a policy role in influencing the outcome for the identified issues of national concern.

Whether a case is nationally managed or nationally coordinated, as a general rule if EPA is managing a case, States will be invited to participate fully in case development and to formally join in the proceedings if they so desire by attending meetings and planning sessions. States will be consulted on settlement decisions but will be asked to formally concur in the settlement only if they are parties to the litigation.

On a case-by-case basis, the National Enforcement and Investigations Center (NEIC) may be asked to play a role in either type of national case to coordinate evidence gathering, provide needed consistency in technical case development and policy, witnesses and chain of custody, and/or to monitor consent decree compliance.

D. Press Releases and Major Communications

A communications plan should be developed at an early stage in the process. This should ensure that all of the participating parties have an opportunity to communicate their role in the case and its outcome. Most important, the communications plan should ensure that the essential message from the case, e.g., the anticipated precedents, gets sufficient public attention to serve as a deterrent for potential future violations.

All regional and state co-plaintiffs will be able to issue their own regional, state-specific or joint press releases regarding the case. However, the timing of those releases should be coordinated so that they are released simultaneously, if possible.

It is particularly important that the agencies get maximum benefit from the deterrent effect of these significant national cases through such mechanisms as:

-- more detailed press releases to trade publications i.e., with background information and questions and answers
-- development of articles
-- interviews with press for development of more in-depth reporting
-- press conferences
-- meetings with public/environmental groups -- including meetings on the settlement of national cases which have generated intense local or national interest
-- speeches before industry groups about actions
-- communications with congressional committees

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

OCT 30 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Division of Penalties with State and Local Governments

FROM: Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Regional Administrators
Associate Enforcement Counsels
Program Enforcement Division Directors
Regional Counsels

This memorandum provides guidance to Agency enforcement attorneys on the division of civil penalties with state and local governments, when appropriate. In his "Policy Framework for State/EPA Enforcement Agreements" of June 26, 1984, Deputy Administrator Al Alm stated that the EPA should arrange for penalties to accrue to states where permitted by law. This statement generated a number of inquiries from states and from the Regions. Both the states and the Regions were particularly interested in what factors EPA would consider in dividing penalties with state and local governments. In addition, the issue was raised in two recent cases, U.S. v Jones & Laughlin (N.D. Ohio) and U.S. v Georgia Pacific Corporation (M.D. La.). In each case, a state or local governmental entity requested a significant portion of the involved penalty. Consequently, OECM and DOJ jointly concluded that this policy was needed.

EPA generally encourages state and local participation in federal environmental enforcement actions. State and local entities may share in civil penalties that result from their participation, to the extent that penalty division is permitted by federal, state and local law, and is appropriate under the circumstances of the individual case. Penalty division advances federal enforcement goals by:

1) encouraging states to develop and maintain active enforcement programs, and

2) enhancing federal/state cooperation in environmental enforcement.

However, penalty division should be approached cautiously because of certain inherent concerns, including:

1) increased complexity in negotiations among the various parties, and the accompanying potential for federal/state disagreement over penalty division; and

2) compliance with the Miscellaneous Receipts Act, 31 U.S.C. §3302, which requires that funds properly payable to the United States must be paid to the U.S. Treasury. Thus any agreement on the division of penalties must be completed prior to issuance of and incorporated into a consent decree.

As in any other court-ordered assessment of penalties under the statutes administered by EPA, advance coordination and approval of penalty divisions with the Department of Justice is required. Similarly, the Department of Justice will not agree to any penalty divisions without my advance concurrence or that of my designee. In accordance with current Agency policy, advance copies of all consent decrees, including those involving penalty divisions, should be forwarded to the appropriate Associate Enforcement Counsel for review prior to commencement of negotiations.

The following factors should be considered in deciding if penalty division is appropriate:

1) The state or local government must have an independent claim under federal or state law that supports its entitlement to civil penalties. If the entire basis of the litigation is the federal enforcement action, then the entire penalty would be due to the federal government.

2) The state or local government must have the authority to seek civil penalties. If a state or local government is authorized to seek only limited civil penalties, it is ineligible to share in penalties beyond its statutory limit.

3) The state or local government must have participated actively in prosecuting the case. For example, the state or local government must have filed complaints and pleadings, asserted claims for penalties and been actively involved in both litigating the case and any negotiations that took place pursuant to the enforcement action.

4) For contempt actions, the state or local government must have participated in the underlying action giving rise to the contempt action, been a signatory to the underlying consent decree, participated in the contempt action by filing pleadings asserting claims for penalties, and been actively involved in both litigating the case and any negotiations connected with that proceeding.1/

The penalties should be divided in a proposed consent decree based on the level of participation and the penalty assessment authority of the state or locality. Penalty division may be accomplished more readily if specific tasks are assigned to particular entities during the course of the litigation. But in all events, the division should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties. Penalty division should not take place until the end of settlement negotiation. The subject of penalty division is a matter for discussion among the governmental plaintiffs. It is inappropriate for the defendant to participate in such discussions.

cc: F. Henry Habicht II, Assistant Attorney General
Land and Natural Resources Division

1/ If the consent decree contains stipulated penalties and specifies how they are to be divided, the government will abide by those terms.

VI.H.4. "Policy on Flexible State Enforcement Responses to Small Community Violations", November 22, 1995.

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

NOV 2 2 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Policy on Flexible State Enforcement Responses to Small Community Violations

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
General Counsel
Regional Administrators
Deputy Regional Administrators
Regional Counsel
Regional Enforcement Coordinators

The attached Policy on Flexible State Enforcement Responses to Small Community Violations (Small Communities Policy) implements parts of Reinventing Environmental Regulation Initiatives 13 and 21 announced by President Clinton on March 16, 1995. These two initiatives seek to enhance the environmental compliance of small communities and to promote alternative strategies for communities to achieve environmental and economic goals.

Specifically, the Small Communities Policy seeks to assure States that they have, within appropriate limits, the flexibility to design and use multimedia compliance assistance and compliance prioritization measures as alternatives to traditional enforcement responses when addressing a small community's environmental violations. The Small Community Policy establishes the parameters for State small community environmental compliance assistance programs that EPA will generally consider adequate and recommends options for States to follow in developing and implementing their programs, but leaves many of the details to the discretion of States. EPA believes this approach will ensure adequate protection of public health and the environment while affording States flexibility to develop small community environmental compliance assistance programs tailored to local conditions and specific State needs.

Please note that this policy does not mandate action on the part of States. States are free to offer compliance assistance or not. Should States choose, however, to offer environmental compliance assistance to small communities, those doing so in a manner consistent with the framework provided in this policy can generally expect EPA to defer to their actions.

I wish to thank the many commenters who reviewed the June 30, 1995 draft policy and provided comments. The policy I issue today is a better document because of your efforts. If you have questions or further comments, please contact Kenneth Harmon of the Chemical, Commercial Services and Municipal Division at (202) 564-4079.

Attachments

cc: Small Community Coordinators, Regions I-X

Policy on Flexible State Enforcement Responses to Small Community Violations

United States Environmental Protection Agency

November 1995

This policy expresses EPA's support for States'[1] use of enforcement flexibility to provide compliance incentives for small communities. EPA acknowledges that States and small communities can realize environmental benefits by negotiating, entering into, and implementing enforceable compliance agreements and schedules that require communities to correct all of their environmental violations expeditiously while allowing the community to prioritize among competing environmental mandates on the basis of comparative risk[2]. States may provide small communities an incentive to request compliance assistance by waiving part or all of the penalty for a small community's violations if the criteria of this policy have been met. If a State acts in accordance with this policy and addresses small community environmental noncompliance with compliance assistance in a way that represents reasonable progress toward compliance, EPA generally will not pursue a separate Federal civil administrative or judicial action for penalties or additional injunctive relief.

This policy does not apply to any criminal conduct by small communities or their employees. To the extent that this policy may differ from the terms of other applicable enforcement response policies, this document supersedes those policies.

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[1] This policy will also apply to the actions of territories and to the actions of Native American Tribes where conditions have been met for EPA to treat the Tribe as a State.

[2] EPA currently has a number of risk assessment resources available to the public, including its computer-based Information Risk Information System (IRIS). EPA comparative risk projects across the country have provided training and technical assistance to more than 45 State, local, tribal and watershed risk assessment efforts in an attempt to bring together stakeholders to reach consensus on which local environmental problems pose the most risk to human health, ecosystem health, and quality of life; and to develop consensus on an action plan to reduce those risks. EPA does not suggest that States and small communities need prepare a formal comparative risk assessment as part of the small community environmental compliance assistance process.

Flexible State Enforcement Responses

EPA's deference to a State's exercise of enforcement discretion in response to a small community's violations will be based on an assessment of the adequacy of the process the State establishes and follows in:

- responding expeditiously to a community's request for compliance assistance;
- selecting the communities to which it offers compliance assistance and a flexible enforcement response;
- assessing the community's good faith and compliance status;
- establishing priorities for addressing violations; and
- ensuring prompt correction of all environmental violations.

EPA will give its deference more readily to a State that has previously submitted a description of its small community environmental compliance assistance program to the Agency, thereby allowing EPA to familiarize itself with the adequacy of the State's processes.

Selecting communities

EPA intends this policy to apply only to small communities unable to satisfy all applicable environmental mandates without the State's compliance assistance. Such communities, generally comprised of fewer than 2,500 residents[3], should be:

- non-profit
- governing entities (incorporated or unincorporated)
- that own facilities that supply municipal services.

EPA's evaluation of the appropriateness of a State's small community environmental compliance assistance program will depend in part on whether the State uses measures of administrative, technical, and financial capacity to limit provision of the benefits of this policy to those communities that truly need assistance. Such capacity measures could

[3] EPA selected a population figure of 2,500 to be consistent with 42 U.S.C. 6908, which established the Small Town Environmental Planning Program, and which defined the term small town to mean "an incorporated or unincorporated community...with a population of less than 2,500."

include, among other things, number of staff and their responsibilities, degree of isolation from other nearby communities, evaluation of existing infrastructure, average household income, the last decade's median housing values, employment opportunities, population projections, population age representation, revenue sources, revenue generating capacity, the level of government that operates the utility systems, current bond debt, and an assessment of the impact of other Federal mandates competing with environmental mandates for the community's resources.

Not less than quarterly, a State should provide EPA with a list of communities participating in its small community environmental compliance assistance program to ensure proper State and Federal coordination on enforcement activity.

Assessing good faith and compliance status

In considering whether a State has established and is following an adequate process for assessing a small community's good faith, EPA generally will look at such factors as the participating communities' candor in contacts with State regulators and the communities' efforts to comply with applicable environmental requirements. Measures of a small community's efforts to comply include:

- attempts to comply or a request for compliance assistance prior to the initiation of an enforcement response;
- prompt correction of known violations;
- willingness to remediate harm to public health, welfare, or the environment;
- readiness to enter into a written and enforceable compliance agreement and schedule; and
- adherence to the schedule.

A State's assessment of a small community's compliance status should identify:

- every environmental requirement to which the community's municipal operations are subject;
- the community's current and anticipated future violations of those requirements:
- the comparative risk to public health, welfare, or the environment of each current and anticipated future violation; and
- the community's compliance options.

In addition, EPA recommends that the process developed by the State include consideration of regionalization and restructuring as compliance alternatives, and consideration of the impact of promulgated regulations scheduled to become effective in the future.

Priorities for addressing violations

States seeking EPA's deference should require small communities to correct any identified violations of environmental regulations as soon as possible, taking into consideration the community's administrative, technical, and financial capacities, and the State's ability to assist in strengthening those capacities. A small community should address all of its violations in order of risk-based priority.[4] Any identified violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment is to be addressed immediately in a manner that abates the endangerment or harm and reduces the threat. Activities necessary to abate the endangerment or harm and reduce the threat posed by such violations or circumstances are not to be delayed while the State and small community establish and implement the process for assigning priorities for correcting other violations.

Ensuring prompt correction of violations

If the small community cannot correct all of its violations within 180 days of the State's commencement of compliance assistance to the community, the State and the community should, within 180 days of the State's commencement of compliance assistance to the community, enter into and begin implementing a written and enforceable compliance agreement and schedule[5] that:

- establish a specified period for correcting all outstanding violations in order of risk-based priority;[6]

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[4] EPA does not intend that establishment of risk-based priorities be viewed as mandating delay in addressing low priority violations that can be easily and quickly corrected without affecting progress toward addressing higher priority violations requiring long term compliance efforts.

[5] Neither a State nor a community may unilaterally alter or supersede a community's obligations under existing Federal administrative orders or Federal judicial consent decrees.

[6] States may allow weighing of unique local concerns and characteristics, but the process should be sufficiently standardized and objective that an impartial third person using the same process and the same facts would not reach significantly different results. Public notification and public participation are an important part of the priority setting process.

- incorporate interim milestones that demonstrate reasonable progress toward compliance;

- contain provisions to ensure continued compliance with all environmental requirements with which the community is in compliance at the time the agreement is entered; and

- incorporate provisions, where they would be applicable to the small community, to ensure future compliance with any additional already promulgated environmental requirements that will become effective after the agreement is signed.

Consultation with EPA during the drafting of a compliance agreement and schedule and the forwarding of final compliance agreements and schedules to EPA are recommended to ensure appropriate coordination between the State and EPA.

Limits on EPA Deference

EPA reserves all of its enforcement authorities. EPA will generally defer to a State's exercise of its enforcement discretion in accordance with this policy, except that EPA reserves its enforcement discretion with respect to any violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment.[7]

The Policy on Flexible State Enforcement Responses to Small Community Violations does not apply if, in EPA's judgment:

- a State's small community environmental compliance assistance program process fails to satisfy the adequacy criteria stated above; or

- a State's application of its small community environmental compliance assistance program process fails in a specific case adequately to protect public health and the environment because it neither requires nor results in reasonable progress toward, and achievement of, environmental compliance by a date certain.

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[7] EPA will regard any unaddressed violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment in a small community participating in a State environmental compliance assistance program as a matter of national significance which requires consultation with or the concurrence of, as appropriate, the Assistant Administrator for Enforcement and Compliance Assurance or his or her delegatee before initiation of an EPA enforcement response.

Where EPA determines that this policy does not apply, and where EPA has reserved its enforcement discretion, other existing EPA enforcement policies remain applicable. The State's and EPA's options in these circumstances include discretion to take or not take formal enforcement action in light of factual, equitable, or community capacity considerations with respect to violations that had been identified during compliance assistance and were not corrected. Neither the State's actions in providing, nor in failing to provide, compliance assistance shall constitute a legal defense in any enforcement action. However, a community's good faith efforts to correct violations during compliance assistance may be considered a mitigating factor in determining the appropriate enforcement response or penalty in subsequent enforcement actions.

Nothing in this policy is intended to release a State from any obligations to supply EPA with required routinely collected and reported information. As described above, States should provide EPA with lists of participating small communities and copies of final compliance agreements and schedules. States should also give EPA immediate notice upon discovery of a violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents serious threats to, public health, welfare, or the environment.

This policy has no effect on the existing authority of citizens to initiate a legal action against a community alleging environmental violations.

This policy sets forth factors for consideration that will guide the Agency in its exercise of enforcement discretion. It states the Agency's views as to how the Agency intends to allocate and structure enforcement resources. The policy is not final agency action, and is intended as guidance. This policy is not intended for use in pleading, or at hearing or trial. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

Policy Assessment

Measuring the success of compliance assistance programs is a critical component of EPA's ability to assess the results of compliance and enforcement activities. EPA will work with States to evaluate the effectiveness of the Policy on Flexible State Enforcement Responses to Small Community Violations. Within three years following its issuance, EPA will consider whether the policy should be continued, modified, or discontinued.

VI. SPECIALIZED ENFORCEMENT TOPICS

I. PROVIDING ENFORCEMENT INFORMATION TO OUTSIDE PARTIES

"Policy Against No Action Assurances", dated November 16, 1984. See GM-34.*

"Enforcement Document Release Guideline", dated September 16, 1985. GM-43.*

"Policy on Publicizing Enforcement Activities", dated November 21, 1985. Modified by I.5, below.

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

NOV 21 1985

MEMORANDUM

SUBJECT: Policy on Publicizing Enforcement Activities

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

Jennifer Joy Manson
Assistant Administrator for External Affairs

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

Attached is the EPA Policy on Publicizing Enforcement Activities, a joint project of the Office of Enforcement and Compliance Monitoring and the Office of Public Affairs. The document establishes EPA policy on informing the public about Agency enforcement activities. The goal of the policy is to improve communication with the public and the regulated community regarding the Agency's enforcement program, and to encourage compliance with environmental laws through consistent public outreach among headquarters and regional offices.

To implement this policy, national program managers and public affairs directors should review the policy for the purpose of preparing program-specific procedures where appropriate. Further, program managers should consider reviewing the implementation of this policy in EPA Regional Offices during their regional program reviews. These follow-up measures should ensure that publicity of enforcement activities will constitute a key element of the Agency's program to deter environmental noncompliance.

Attachment

EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES

I. PURPOSE

This memorandum establishes EPA policy on informing the public about Agency enforcement activities. This policy is intended to improve EPA communication with the public and the regulated community regarding the goals and activities of the Agency's enforcement program. Appropriate publication of EPA enforcement efforts will both encourage compliance and serve as a deterrent to noncompliance. The policy provides for consistent public outreach among headquarters and regional offices.

II. STATEMENT OF POLICY

It is the policy of EPA to use the publicity of enforcement activities as a key element of the Agency's program to deter noncompliance with environmental laws and regulations. Publicizing Agency enforcement activities on an active and timely basis informs both the public and the regulated community about EPA's efforts to promote compliance.

Press releases should be issued for judicial and administrative enforcement actions, including settlements and successful rulings, and other significant enforcement program activities. Further, the Agency should consider employing a range of methods of publicity such as press conferences and informal press briefings, articles, prepared statements, interviews and appearances at seminars by knowledgeable and authorized representatives of the Agency to inform the public of these activities. EPA will work closely with the states in developing publicity on joint enforcement activities and in supporting state enforcement efforts.

III. IMPLEMENTATION OF POLICY

A. When to Use Press Releases [1]/

1. Individual Cases

It is EPA policy to issue press releases when the Agency: (1) files a judicial action or issues a major administrative order or complaint (including a notice of proposed contractor listing and the administrative decision to list); (2) enters into a major judicial or administrative consent decree or files a motion to enforce such a decree; or (3) receives a successful court ruling. In determining whether to issue a press release,

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1/ The term "press release" includes the traditional Agency press release, press advisories, notes to correspondents and press statements. The decision on what method should be used in a given situation must be coordinated with the appropriate public affairs office(s).

EPA personnel will consider: (1) the amount of the proposed or assessed penalty (e.g., greater than $25,000); (2) the significance of the relief sought or required in the case, and its public health or environmental impact; (3) whether the case would create national or program precedence; and (4) whether unique relief is sought. However, even enforcement actions that do not meet these criteria may be appropriate for local publicity in the area where the violative conduct occurred. Where appropriate, a single press release may be issued which covers a group or category of similar violations.

Where possible, press releases should mention the environmental result desired or achieved by EPA's action. For example, where EPA determines that a particular enforcement action resulted (or will result) in an improvement in a stream's water quality, the press release should note such results. In addition, press releases must include the penalty agreed to in settlement or ordered by a court.

Press releases can also be used to build better relationships with the states, the regulated community, and environmental groups. To this end, EPA should acknowledge efforts by outside groups to foster compliance. For example, where a group supports EPA enforcement efforts by helping to expedite the cleanup of a Superfund site, EPA may express its support for such initiatives by issuing a press release, issuing a statement jointly with the group, or conducting a joint press conference.

2. Major Policies

In addition to publicizing individual enforcement cases, EPA should publicize major enforcement policy statements and other enforcement program activities since knowledge of Agency policies by the regulated community can deter future violations. Such publicity may include the use of articles and other prepared statements on enforcement subjects of current interest.

3. Program Performance

Headquarters and regional offices should consider issuing quarterly and annual reports on Agency enforcement efforts. Such summaries present an overview of the Agency's and Regions' enforcement activities; they will allow the public to view EPA's enforcement program over time, and thus give perspective to our overall enforcement efforts. The summaries should cover trends and developments in Agency enforcement activities, and may include lists of enforcement actions filed under each statute. The Office of Enforcement and Compliance Monitoring's (OECM) Office of Compliance Analysis and Program Operations, and the Offices of Regional Counsel will assist the Public Affairs Offices in this data gathering. Public Affairs Offices can also rely on the figures contained in the Strategic Planning Management System.

4. Press Releases and Settlement Agreements

EPA has, on occasion, agreed not to issue a press release as part of a settlement agreement. EPA should no longer agree to a settlement which bars a press release or which restricts the content of a press release. On January 30, 1985, the Deputy Administrator issued an abbreviated press release policy, which stated in pertinent part that: "It is against EPA policy to negotiate the agency's option to issue press releases, or the substance of press releases, with parties outside of EPA, particularly those parties involved in settlements, consent decrees or the regulatory process." This policy will help to ensure consistency in the preparation of press releases and equitable treatment of alleged violators.

B. Approval of Press Releases

EPA must ensure that press releases and other publicity receive high priority in all reviewing offices. By memorandum dated August 23, 1984, the Office of External Affairs directed program offices to review and comment on all press releases within two days after the Office of Public Affairs submits its draft to the program office; otherwise concurrence is assumed. This review policy extends to OECM and the Offices of Regional Counsel for enforcement-related press releases.

C. Coordination

1. Enforcement, Program, and Public Affairs Offices

More active use of publicity requires improved coordination among regional and headquarters enforcement attorneys, program offices and public affairs offices. The lead office in an enforcement case, generally the regional program office in an administrative action and the Office of Regional Counsel or OECM in a judicial action, should notify the appropriate Public Affairs Office at the earliest possible time to discuss overall strategy for communicating the Agency's action (e.g., prior notice to state or local officials) and the the timing of a press release. The lead office should stay in close contact with Public Affairs as the matter approaches fruition.

2. Regional and Headquarters Offices of Public Affairs

Regional and headquarters Public Affairs Offices should coordinate in developing press releases both for regionally-based actions that have national implications and for nationally managed or coordinated enforcement actions. Whenever possible, both regional and headquarters offices should send copies of draft press releases to their counterparts for review and comment. Both such offices should also send copies of final releases to their counterparts.

3. EPA and DOJ

EPA can further improve the timeliness and effectiveness of its press releases regarding judicial actions by coordinating with DOJ's Office of Public Affairs. When an EPA Office of Public Affairs decides that a press release in a judicial enforcement case is appropriate, it should notify DOJ or the appropriate U.S. Attorney's Office to ensure timeliness and consistency in preparation of press releases. DOJ has been requested to notify OECM when DOJ intends to issue a release on an EPA-related case. EPA's Office of Public Affairs will immediately review such draft releases, and, if necessary to present the Agency's position or additional information, will prepare an Agency release.

4. EPA and the States

Another important goal of this policy is to encourage cooperative enforcement publicity initiatives with the states. The June 26, 1984, "EPA Policy on Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement 'Agreements,'" describes key subjects that EPA should discuss with the states in forming state-EPA Enforcement Agreements. The section on "Press Releases and Public Information," states that the "Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement." Further, as discussed in the subsequent January 4, 1985, Agency guidance on "Implementing Nationally Managed or Coordinated Enforcement Actions," the timing of state and EPA releases "should be coordinated so that they are released simultaneously."

Accordingly, EPA Public Affairs Offices should consult with the relevant state agency on an EPA press release or other media event which affects the State. EPA could offer the State the option of joining in a press release or a press conference where the State has been involved in the underlying enforcement action. Further, EPA-generated press releases and public information reports should acknowledge and give credit to relevant state actions and accomplishments when appropriate.

Finally, it is requested that EPA Public Affairs Offices send the State a copy of the EPA press release on any enforcement activity arising in that state.

D. Distribution of Press Releases

The distribution of EPA press releases is as important as their timeliness. Press releases may be distributed to the local, national, and trade press, and local and network television stations.

1. Local and National Media

EPA must "direct" its press releases to ensure that the appropriate geographical areas learn about EPA enforcement activities. To accomplish this goal, the appropriate Public Affairs Office should send a press release to the media and interest groups in the affected area, i.e., the local newspaper and other local publications, television and radio stations, and citizen groups. The headquarters Public Affairs Office, in conjunction with the appropriate regional office, will issue press releases to the national press and major television networks where an EPA enforcement activity has national implications.

2. Targeted Trade Press and Mailing Lists

The Agency must also disseminate information about enforcement activities to affected industries. Sending a press release to relevant trade publications and newsletters, particularly for a significant case, will put other potential violators on notice that EPA is enforcing against specific conduct in the industry. It is also useful to follow up such press releases with speeches to industry groups and articles in relevant trade publications, reinforcing the Agency's commitment to compliance.

To ensure the appropriate distribution of publicity, we are requesting each of the regional Public Affairs Offices, in cooperation with the Regional Counsels and regional program offices, to establish or review and update their mailing lists of print media, radio and television stations, state and local officials, trade publications, and business and industry groups for each of the enforcement programs conducted in the Regions.

E. Use of Publicity Other Than Press Releases

EPA headquarters and regional offices have generally relied on press releases to disseminate information on enforcement activities. Other types of enforcement publicity are also appropriate in certain instances.

1. Press Conferences and Informal Press Briefings

Press conferences can be a useful device for highlighting an enforcement activity and responding to public concerns in a specific area. Regional Administrators should consider using press conferences to announce major enforcement actions and to elaborate on important simultaneously issued press releases. Press conferences should also be considered where an existing or potential public hazard is involved. The regional Public Affairs Office should always inform the headquarters Public Affairs

Office when it decides to hold a press conference to provide an opportunity for the Administrator's advance knowledge and involvement if necessary.

2. Informal Meetings with Constituent Groups

To further supplement EPA efforts to inform the public and regulated community, regional offices should meet often with constituent groups (states, environmental groups, industry, and the press) to brief these groups on recent enforcement developments. These meetings can be organized by the Public Affairs Offices. By informing the public, EPA increases public interest in its enforcement program and thereby encourages compliance.

3. Responding to Inaccurate Statements

EPA should selectively respond to incorrect statements made about EPA enforcement activities. For example, EPA may want to respond to an editorial or other article which inaccurately characterizes EPA enforcement at a Superfund site with a "letter to the editor." Where an agency response is deemed to be appropriate, it should promptly follow the inaccurate statement.

4. Articles and Prepared Statements

EPA's Public Affairs Offices and the Office of Enforcement and Compliance Monitoring occasionally prepare articles on various aspects of the Agency's enforcement program. For example, Region I issues a biweekly column to several newspapers in the Region covering timely enforcement issues such as asbestos in schools. We encourage all regional and headquarters offices to prepare feature articles on enforcement issues. When the regional office is developing an article on a subject with national implications, it should contact the headquarters Office of Public Affairs to obtain a possible quote from the Administrator and to discuss whether the article should be expanded to a national perspective. Likewise, appropriate regions should be consulted in the preparation of headquarters articles or statements which refer to actions of or facilities in particular regions.

5. Interviews

In some cases, headquarters and regional Public Affairs Offices should consider arranging media interviews with the Regional Administrator, Deputy Administrator, the Administrator, or other EPA officials. Such an interview will reflect the Agency's position on a particular enforcement activity or explain EPA's response to an enforcement problem.

"Memorandum to General Counsels" (Concerning FOI requests pertaining to subjects involved in ongoing or anticipated litigation), dated March 27, 1986.

The Associate Attorney General

Washington, D.C. 20530

March 27, 1986

MEMORANDUM TO GENERAL COUNSELS

It is becoming increasingly obvious that the ability of the Department of Justice effectively to represent the interests of the various agencies of the Executive Branch is being severely impaired by difficulties in coordinating obligations under the Freedom of Information Act ("FOIA") with litigation activities. This problem is particularly serious for the United States Attorneys' offices and, if allowed to continue unchecked, will almost certainly result in the loss of litigation that may be of significant importance to your agency.

FOIA, of course, is generally available to any person seeking government documents. FOIA requestors often do not identify the parties or the special interests they represent, and almost never indicate whether the requested documents will be used to support ongoing or contemplated litigation against the United States. Compounding the problem, FOIA personnel frequently are not fully aware of the full extent of the governmental interests implicated by a FOIA request. In particular, FOIA personnel often do not know of actual or impending litigation involving the subject matter of the requested documents.

Typically, each agency has a disclosure system designed to meet the needs and demands upon the agency in view of its substantive programs. Lack of coordination between these personnel and the persons with knowledge that documents relate to pending or potential litigation severely impairs the ability of the attorneys responsible for litigation effectively to represent the interests of the United States. Accordingly, I am requesting that all agencies establish procedures which will

identify FOIA requests which pertain to subjects involved in ongoing or anticipated litigation.

If a FOIA request involves matters pertaining to ongoing litigation, it is essential that both the agency and the Department of Justice attorneys assigned to the litigation be informed of the request to ensure coordination of the government's position in the litigation with any release of documents under the FOIA. If no litigation is pending, but can be reasonably anticipated in the future, the FOIA request should be carefully reviewed by an agency attorney in light of that likelihood. In all instances where litigation is a possibility, agencies should maintain records identifying the documents released pursuant to a FOIA request so that the litigating attorneys can become fully informed of the documents made available to other parties. In addition, documents relating to agency investigations of matters which are in litigation or may reasonably be expected to result in litigation should be marked, where appropriate, to indicate that they are attorney work product. This will assist the FOIA personnel in identifying potentially exempt documents. Discretionary disclosures should be coordinated with the litigating attorney rather than relying solely on the existing FOIA release procedures. This will permit the attorney to protect the interests of the agency implicated in the litigation itself.

The general nature of the guidance set forth above meshes well with many agencies' present practices. However, because the persons responsible for disclosure sometimes are unaware of litigative concerns, I ask that you ensure that persons responsible for maintenance of documents subject to a FOIA request notify disclosure personnel whenever there is an indication that requested documents are or may be pertinent to pending or potential litigation. In other words, the document custodian should be told that it is his or her duty to inform the FOIA personnel of any pending or potential litigation pertaining to documents which are the subject of a FOIA request.

To summarize, I request that:

- Each document custodian be required to notify any person within the agency interested in the documents of any potential or pending litigation on the subject to which the documents pertain;

- Litigating attorneys (including Department of Justice attorneys) always be contacted when a FOIA request seeks documents pertaining to ongoing litigation;

- All discretionary disclosures relating to matters in litigation be closely coordinated with the litigating attorneys;

- A record be maintained so that the litigating attorneys will know which documents have been released;

- Documents be marked as attorney work product when it is correct and feasible to do so;

- FOIA personnel be made sensitive to the potential litigative interests of the government;

- Litigating attorneys routinely check with the agency's FOIA personnel in every litigation matter to determine whether any relevant documents have been the subject of a FOIA request.

I would appreciate your comments and suggestions on the proposals outlined above to enhance our ability to defend significant suits affecting each government agency. In addition, I suggest that you direct the persons responsible for FOIA matters within your agency to provide a report to you on the actions taken to implement these proposals. I would greatly appreciate it if you would send a copy of that report to Mr. David J. Anderson, Branch Director, Federal Programs Branch, Room 3643, plus any other periodic reports you may request to ensure that the concerns expressed in this letter, which I am sure you share, are not forgotten when personnel changes occur or over the course of time.

I firmly believe that these proposals, if implemented, will significantly enhance the ability of the Department of Justice to protect your agency's interests in litigation. Thank you for your cooperation in this matter.

Sincerely,

ARNOLD I. BURNS
Associate Attorney General

cc: Executive Office for United States Attorneys

"Addendum to GM-46: Policy on Publicizing Enforcement Activities," dated August 4, 1987. (Contains discussions on explaining differences between initial penalty demands and final penalty.)

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

AUG - 4 1987

MEMORANDUM

SUBJECT: Addendum to GM-46: Policy on Publicizing Enforcement Activities

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement
and Compliance Monitoring

Jennifer Joy Wilson
Assistant Administrator for External Affairs

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

I. ISSUE

Significant differences can exist between civil penalties proposed at the initiation of enforcement cases and the final penalties to be paid at the conclusion of such matters. This memorandum provides guidance on addressing the issue of the "penalty gap" where the difference between the proposed and final penalty is appreciable. EPA must avoid any public misperception that EPA is not serious about enforcement when such differences occur.

II. DISCUSSION

Attached is an "Addendum to the EPA Policy on Publicizing Enforcement Activities", GM-46, issued November 21, 1985. The Addendum provides standard text to be included in any press release announcing the settlement of an enforcement case in which the penalty amount finally assessed differs appreciably from the amount proposed.

Press releases issued at the filing of cases normally state the amount of the civil penalty being sought by the Agency. The proposed penalty may be the maximum statutory amount allowable under applicable law, or a penalty amount as calculated by application of an Agency penalty policy which assigns specific penalties to various violations of law.

When a case is settled, however, the penalty to be paid by the violator is oftentimes appreciably less than the penalty sought by the Agency at the initiation of the action. Members of the public may question any difference between these two amounts, especially persons who are not familiar with the laws, regulations, and published policies of the Agency.

The Addendum points out that a number of mitigating factors can result in a penalty adjustment, and that Congress on occasion has dictated that EPA take into account such factors in determining the amount of a civil penalty (e.g., TSCA §16, 15 U.S.C. 2615).

Attachment

ADDENDUM TO EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES, GM-46, ISSUED NOVEMBER 21, 1985

I. PURPOSE

This addendum to the EPA Policy on Publicizing Enforcement Activities, GM-46, issued November 21, 1985, provides standard text which should be included in EPA press releases which announce the settlement of an enforcement case in which the final penalty is appreciably less than the proposed penalty.

The purpose of the text is to preclude any public misperception that EPA is not serious about enforcement when these appreciable differences occur.

II. BACKGROUND

Congress has directed the Agency in certain instances to consider specific mitigation factors in assessing a final penalty. Accordingly, the Agency regularly takes into account such factors as the gravity of the violation(s), the violator's compliance history, and its degree of culpability--in addition to weighing such litigation concerns as the clarity of the regulatory requirements and the strength of the government's evidentiary case--when negotiating a civil penalty amount as part of a settlement agreement. Guidance for applying mitigating adjustment factors is included in the Agency's published penalty policies.

III. POLICY

Since it is the policy of EPA to use publicity of enforcement activities as a key element in the Agency's program to promote compliance and deter violations, public awareness and accurate perceptions of the Agency's enforcement activities are extremely important.

Appreciable differences between civil penalty amounts proposed at the commencement of enforcement cases and the final penalty sums to be paid at the conclusion of such matters may be erroneously perceived as evidence that EPA is not serious about enforcing the Nation's environmental laws. Consequently, such differences should be explained and accounted for in the Agency's communications to the public.

It is the policy of EPA that when press releases are issued to announce the settlement of enforcement cases in which the settlement penalty figure is appreciably less than the initially proposed penalty amount, such releases should include standard text (see Section IV, p.2) to ensure that the general public is

adequately informed of the analysis behind the final penalty amount, and the reasons justifying the penalty reduction. The release should also describe any environmentally beneficial performance required under the terms of the settlement which goes beyond actions being taken simply to come into compliance.

IV. IMPLEMENTATION OF POLICY

When a press release is issued at the settlement of an enforcement action, any such press release that includes the announcement of a final penalty assessment which is appreciably different from the penalty proposed at the outset of the case should include the following standard text:

> "The civil penalty in this action was the product of negotiation after careful consideration by the government of the facts constituting the violation, the gravity of the misconduct, the strength of the government's case, and established EPA penalty policies.
>
> [NOTE: Include the following paragraph only in cases involving environmentally beneficial performance.]
>
> "In agreeing to this $_____ penalty, the government recognizes the contribution to long-term environmental protection of [briefly summarize here the environmentally beneficial performance explained in detail in the body of the release]."

VI.I.6. "Policy on Compliance Incentives for Small Businesses", June 3, 1996 (Effective June 10, 1996)

federal register

Monday
June 3, 1996

Part IV

Environmental Protection Agency

[redacted] Policy on Compliance Incentives for Small Businesses; Notice

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5512-7]

Interim Policy on Compliance Incentives for Small Businesses

AGENCY: Office of Enforcement and Compliance Assurance, EPA.

ACTION: Notice of final policy.

SUMMARY: The Office of Enforcement and Compliance Assurance (EPA) is issuing this *Final Policy on Compliance Incentives for Small Businesses*. This Final Policy is intended to promote environmental compliance among small businesses by providing them with incentives to participate in compliance assistance programs or to conduct environmental audits and to then promptly correct violations. The Policy accomplishes this in two ways: by setting forth guidelines for the Agency to reduce or waive penalties for small businesses that make good faith efforts to correct violations, and by providing guidance for States and local governments to offer these incentives.

EFFECTIVE DATE: This Policy is effective June 10, 1996.

FURTHER INFORMATION CONTACT: David Hindin, 202-564-2235, Office of Regulatory Enforcement, Mail Code 2248-A, or Karin Leff, 202-564-7068, Office of Compliance, Mail Code 2224-A, United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION: Pursuant to this Policy, EPA will refrain from initiating an enforcement action seeking civil penalties, or will mitigate civil penalties, whenever a small business makes a good faith effort to comply with environmental requirements by receiving on-site compliance assistance or promptly disclosing the findings of a voluntarily conducted environmental audit, subject to certain conditions. These conditions require that the violation: is the small business's first violation of the particular requirement; does not involve criminal conduct; has not and is not causing a significant health, safety or environmental threat or harm; and is remedied within the corrections period. Moreover, EPA will defer to State actions that are consistent with the criteria set forth in this Policy.

This Final Policy supersedes the Interim version of the Policy issued in June 1995. See 60 FR 32675, June 23, 1995. The Agency revised the Interim version based on the comments we received from the public in response to the Federal Register notice, as well as the comments we received from EPA Regional offices and States. The major change in this final version of the Policy is to allow small businesses to obtain the penalty relief provided by this Policy not only by using on-site compliance assistance, but also by conducting an environmental audit, and promptly disclosing and correcting the violations. There are two reasons for this change. First, this addresses the major criticism of the Interim Policy that there are few on-site compliance assistance programs sponsored or run by government agencies. Thus, this change enables more small businesses to use the Policy. Second, fairness suggests that if small businesses who seek taxpayer funded compliance assistance from the government can get penalty relief, then businesses who spend their own money to do an audit, should be able to get similar relief.

We also have slightly modified the penalty relief guidelines in section F of the Policy. Guidelines 1 and 2 remain the same as they were in the June 1995 Interim version. We have added a new third guideline which states:

> 3. If a small business meets all of the criteria, except it has obtained a significant economic benefit from the violation(s) such that it may have obtained an economic advantage over its competitors, EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of any economic benefit associated with the violations. EPA retains this discretion to ensure that small businesses that comply with public health protections are not put at serious marketplace disadvantage by those who have not complied. EPA anticipates that this will occur very infrequently.

This new guideline is necessary to ensure that we continue to provide a national level playing field. Small businesses that make significant expenditures to comply with the law should not be put at an economic disadvantage by those who did not comply. Most of the other changes in the final Policy are clarifications or editorial in nature. The entire text of the Policy appears below.

Dated: May 10, 1996.

Steven A. Herman,

Assistant Administrator, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency.

A. Introduction

This document sets forth the U.S. Environmental Protection Agency's Policy on Compliance Incentives for Small Businesses. This Policy is one of the 25 regulatory reform initiatives announced by President Clinton on March 16, 1995, and implements, in part, the Executive Memorandum on Regulatory Reform, 60 FR 20621, April 26, 1995.

The Executive Memorandum provides in pertinent part:

> To the extent permitted by law, each agency shall use its discretion to modify the penalties for small businesses in the following situations. Agencies shall exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question. For those violations that may take longer to correct than the period set by the agency, the agency shall use its enforcement discretion to waive up to 100 percent of the financial penalties if the amounts waived are used to bring the entity into compliance. The provisions [of this paragraph] shall apply only where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or significant threat to health, safety, or the environment.

This Policy also implements section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996, signed into law by the President on March 29, 1996.

As set forth in this Policy, EPA will refrain from initiating an enforcement action seeking civil penalties, or will mitigate civil penalties, whenever a small business makes a good faith effort to comply with environmental requirements by receiving compliance assistance or promptly disclosing the findings of a voluntarily conducted environmental audit, subject to certain conditions. These conditions require that the violation: is the small business's first violation of the particular requirement; does not involve criminal conduct; has not and is not causing a significant health, safety or environmental threat or harm; and is remedied within the corrections period. Moreover, EPA will defer to State actions that are consistent with the criteria set forth in this Policy.

B. Background

The Clean Air Act (CAA) Amendments of 1990 require that States establish Small Business Assistance Programs (SBAPs) to provide technical and environmental compliance assistance to stationary sources. On August 12, 1994, EPA issued an enforcement response policy for stationary sources which provided that an authorized or delegated state program may, consistent with federal requirements, either:

> (1) Assess no penalties against small businesses that voluntarily seek compliance assistance and correct violations revealed as a result of compliance assistance within a limited period of time; or
>
> (2) Keep confidential information that identifies the names and locations of specif

small businesses with violations revealed through compliance assistance, where the SBAP is independent of the state enforcement program.

In a further effort to assist small businesses to comply with environmental regulations, and to achieve health, safety, and environmental benefits, the Agency is adopting a broader policy for all media programs, including water, air, toxics, and hazardous waste.

C. Purpose

This Policy is intended to promote environmental compliance among small businesses by providing incentives for them to participate in on-site compliance assistance programs and to conduct environmental audits. Further, the Policy encourages small businesses to expeditiously remedy all violations discovered through compliance assistance and environmental audits. The Policy accomplishes this in two ways: by setting forth a settlement penalty Policy that rewards such behavior, and by providing guidance for States and local governments to offer these incentives.

D. Applicability

This Policy applies to facilities owned by small businesses as defined here. A small business is a person, corporation, partnership, or other entity who employs 100 or fewer individuals (across all facilities and operations owned by the entity).[1] This definition is a simplified version of the CAA § 507 definition of small business. On balance, EPA determined that a single definition would make implementation of this Policy straightforward and would allow for consistent application of the Policy in a multimedia context.

This Policy is effective June 10, 1996 and on that date supersedes the Interim version of this Policy issued on June 13, 1995 and the September 19, 1995 Qs and As guidance on the Interim version. This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that EPA administers, except for the Public Water System Supervision Program under the Safe Drinking Water Act.[2] This Policy applies to all such actions filed after the effective date of this Policy, and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the amount of the civil penalty.

This Policy sets forth how the Agency expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate civil settlement penalty for violations by small businesses. It states the Agency's views as to the proper allocation of enforcement resources. This Policy is not final agency action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This Policy is to be used for settlement purposes and is not intended for use in pleading, or at hearing or trial. To the extent that this Policy may differ from the terms of applicable enforcement response policies (including penalty policies) under media-specific programs, this document supersedes those policies. This Policy supplements, but does not supplant the August 12, 1994 Enforcement Response Policy for Treatment of Information Obtained Through Clean Air Act Section 507 Small Business Assistance Programs.

E. Criteria for Civil Penalty Mitigation

EPA will eliminate or mitigate its settlement penalty demands against small businesses based on the following criteria:

1. The small business has made a good faith effort to comply with applicable environmental requirements *as demonstrated by satisfying either a. or b. below.*

a. Receiving on-site compliance assistance from a government or government supported program that offers services to small businesses (such as a SBAP or state university), and the violations are detected during the compliance assistance. If a small business wishes to obtain a corrections period after receiving compliance assistance from a confidential program, the business must promptly disclose the violations to the appropriate regulatory agency.

b. conducting an environmental audit (either by itself or by using an independent contractor) and promptly disclosing in writing to EPA or the appropriate state regulatory agency all violations discovered as part of the environmental audit pursuant to section H of this Policy.

For both a. and b. above, the disclosure of the violation must occur before the violation was otherwise discovered by, or reported to the regulatory agency. See section I.1 of the Policy below. Good faith also requires that a small business cooperate with EPA and provide such information as is necessary and requested to determine applicability of this Policy.

2. *This is the small business's first violation of this requirement.* This Policy does not apply to businesses that have previously been subject to an information request, a warning letter, notice of violation, field citation, citizen suit, or other enforcement action by a government agency for a violation of that requirement within the past three years. This Policy does not apply if the small business received penalty mitigation pursuant to this Policy for a violation of the same or a similar requirement within the past three years. If a business has been subject to two or more enforcement actions for violations of environmental requirements in the past five years, this Policy does not apply even if this is the first violation of this particular requirement.

3. *The business corrects the violation within the corrections period set forth below.*

Small businesses are expected to remedy the violations within the shortest practicable period of time, not to exceed 180 days following detection of the violation. However, a small business may take an additional period of 180 days, *i.e.*, up to a period of one year from the date the violation is detected, only if necessary to allow a small business to correct the violation by implementing pollution prevention measures. For any violation that cannot be corrected within 90 days of detection, the small business should submit a written schedule, or the agency should issue a compliance order with a schedule, as appropriate. Correcting the violation includes remediating any environmental harm associated with the violation,[3] as well as implementing steps to prevent a recurrence of the violation.

4. The Policy applies if:

a. The violation has not caused actual serious harm to public health, safety, or the environment; and

b. The violation is not one that may present an imminent and substantial endangerment to public health or the environment; and

c. The violation does not present a significant health, safety or

[1] The number of employees should be considered as full-time equivalents on an annual basis, including contract employees. Full-time equivalents means 2,000 hours per year of employment. For example, see 40 CFR § 372.3.

[2] This Policy does not apply to the Public Water System Supervision (PWSS) Program because it already has an active compliance assistance program and EPA has a policy to address the special needs of small communities. See November 1995 Policy on Flexible State Enforcement Response to Small Community Violations.

[3] If significant efforts will be required to remediate the harm, the Policy will not apply since criterion 4 is likely not to have been satisfied.

environmental threat (e.g., violations involving hazardous or toxic substances may present such threats); and

d. The violation does not involve criminal conduct.

F. Penalty Mitigation Guidelines

EPA will exercise its enforcement discretion to eliminate or mitigate civil settlement penalties as follows.

1. EPA will eliminate the civil settlement penalty in any enforcement action if a small business satisfies *all* of the criteria in section E.

2. If a small business meets all of the criteria, except it needs a longer corrections period than provided by criterion 3 (i.e., more than 180 days for non-pollution prevention remedies, or 360 days for pollution prevention remedies), EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of any economic benefit associated with the violations.[4]

3. If a small business meets all of the criteria, except it has obtained a significant economic benefit from the violation(s) such that it may have obtained an economic advantage over its competitors, EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of the significant economic benefit associated with the violations. EPA retains this discretion to ensure that small businesses that comply with public health protections are not put at a serious marketplace disadvantage by those who have not complied. EPA anticipates that this situation will occur very infrequently.

If a small business does not fit within guidelines 1, 2 or 3 immediately above, this Policy does *not* provide any special penalty mitigation. However, if a small business has otherwise made a good faith effort to comply, EPA has discretion, pursuant to its applicable enforcement response or penalty policies, to refrain from filing an enforcement action seeking civil penalties or to mitigate its demand for penalties.[5] Further, these policies allow for mitigation of the penalty where there is a documented inability to pay all or a portion of the penalty, thereby placing emphasis on enabling the small business to finance compliance. See Guidance on Determining a Violator's Ability to Pay a Civil Penalty of December 1986. Penalties also may be mitigated pursuant to the Interim Revised Supplemental Environmental Projects Policy of May 1995 (60 F.R. 24856, 5/10/95) and Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Policy of December 1995 (60 FR 66706, December 22, 1996).

G. Compliance Assistance

1. Definitions and Limitations

Compliance assistance[6] is information or assistance provided by EPA, a State or another government agency or government supported entity to help the regulated community comply with legally mandated environmental requirements. Compliance assistance does not include enforcement inspections or enforcement actions.[7]

In its broadest sense, the content of compliance assistance can vary greatly, ranging from basic information on the legal requirements to specialized advice on what technology may be best suited to achieve compliance at a particular facility. Compliance assistance also may be delivered in a variety of ways, ranging from general outreach through the Federal Register or other publications, to conferences and computer bulletin boards, to on-site assistance provided in response to a specific request for help.

The special penalty mitigation considerations provided by this Policy only apply to civil violations which were identified as part of an *on-site* compliance assistance visit to the facility. If a small business wishes to obtain a corrections period after receiving compliance assistance from a confidential program, the business must promptly disclose the violations to the appropriate regulatory agency and comply with the other provisions of this Policy. This Policy is restricted to on-site compliance assistance because the other forms of assistance (such as hotlines) do not expose a small business to an increased risk of enforcement and do not provide the regulatory agency with a simple way to determine when the violations were detected and thus when the violations must be corrected. In short, small businesses do not need protection from penalties as an incentive to use the other types of compliance assistance.

2. Delivery of On-Site Compliance Assistance by Government Agency or Government Supported Program

Before on-site compliance assistance is provided under this Policy or a similar State policy, businesses should be informed of how the program works and their obligations to promptly remedy any violations discovered. Ideally, before on-site compliance assistance is provided pursuant to this Policy or similar State policy, the agency should provide the facility with a document (such as this Policy) explaining how the program works and the responsibilities of each party. The document should emphasize the responsibility of the facility to remedy all violations discovered within the corrections period and the types of violations that are excluded from penalty mitigation (e.g., violations that caused serious harm). The facility should sign a simple form acknowledging that it understands the Policy. Documentation explaining the nature of the compliance assistance visit and the penalty mitigation guidelines is essential to ensure that the facility understands the Policy.

At the end of the compliance assistance visit, the government agency should provide the facility with a list of all violations observed and report within 10 days any additional violations identified resulting from the visit, but not directly observed, e.g., results from review and analysis of data or information gathered during the visit. Any violations that do not fit within the penalty mitigation guidelines in the Policy—e.g., those that caused serious harm—should be identified. If the violations cannot all be corrected within 90 days, the facility should be requested to submit a schedule for remedying the violations or a compliance order setting forth a schedule should be issued by the agency.

3. Requests for On-Site Compliance Assistance

EPA, States and other government agencies do not have the resources to provide on-site compliance assistance to all small businesses that request such assistance. This Policy does not create any right or entitlement to compliance assistance. A small business that requests on-site compliance assistance will not necessarily receive such assistance. If a small business requests on-site compliance assistance (or an other type of assistance) and the

[4] The "gravity component" of the penalty includes everything except the economic benefit amount. In determining the appropriate amount of the gravity component of the penalty to mitigate, EPA should consider the nature of the violations, the duration of the violations, the environmental or public health impacts of the violations, good faith efforts by the small business to promptly remedy the violation, and the facility's overall record of compliance with environmental requirements.

[5] For example, in some media specific penalty policies, if good faith efforts are undertaken, the penalty calculation automatically factors in such efforts through a potentially smaller economic benefit or gravity amount.

[6] Compliance assistance is sometimes called compliance assessments or technical assistance.

[7] Of course, during an inspection or enforcement action, a facility may receive suggestions and information from the regulatory authority about how to correct and prevent violations.

assistance is not available, the government agency should provide a prompt response indicating that such assistance is not available. The small business should be referred to other public and private sources of assistance that may be available, such as clearinghouses, hotlines, and extension services provide by some universities. In addition, the small business should be informed that it may obtain the benefits offered by this Policy by conducting an environmental audit pursuant to the provisions of this Policy.

H. Environmental Audits

For purposes of this Policy, an environmental audit is defined as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." See EPA's new auditing policy, entitled Incentives for Self-Policing, 60 FR 66706, 66711, December 22, 1995.

The violation must have been discovered as a result of a voluntary environmental audit, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the Policy does not apply to:

(1) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(2) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or

(3) violations discovered through an audit required to be performed by the terms of a consent order or settlement agreement.

The small business must fully disclose a violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA or the appropriate state or local government agency.

I. Enforcement

To ensure that this Policy enhances and does not compromise public health and the environment, the following conditions apply:

1. Violations detected through inspections, field citations, reported to an agency by a member of the public or a "whistleblower" employee, identified in notices of citizen suits, or previously reported to an agency as required by applicable regulations or permits, remain fully enforceable.

2. A business is subject to all applicable enforcement response policies (which may include discretion whether or not to take formal enforcement action) for all violations that had been detected through compliance assistance and were not remedied within the corrections period. The penalty in such action may include the time period before and during the correction period.

3. A State's or EPA's actions in providing compliance assistance is not a legal defense in any enforcement action. This Policy does not limit EPA or a state's discretion to use information on violations revealed through compliance assistance as evidence in subsequent enforcement actions.

4. If a field citation is issued to a small business (e.g., under the Underground Storage Tank program[8]), the small business may provide information to the Agency to show that specific violations cited in the field citation are being remedied under a corrections schedule established pursuant to this Policy or similar State policy. In such a situation, EPA would exercise its enforcement discretion not to seek civil penalties for those violations.

J. Applicability to States[9]

EPA recognizes that states are partners in enforcement and compliance assurance. Therefore, EPA will defer to state actions in delegated or approved programs that are generally consistent with the criteria set forth in this Policy. Whenever a State agency provides a correction period to a small business pursuant to this Policy or a similar policy, the agency should notify the appropriate EPA Region.

This notification will assure that federal and state enforcement responses are properly coordinated.

K. Public Accountability

Within three years of the effective date of this Policy, EPA will conduct a study of the effectiveness of this Policy in promoting compliance among small businesses. EPA will make the study available to the public. EPA will make publicly available the terms of any EPA agreements reached under this Policy, including the nature of the violation(s), the remedy, and the schedule for returning to compliance.

[FR Doc. 96-13713 Filed 5-31-96; 8:45 am]
BILLING CODE 6560-60-P

[8] The Underground Storage Tank (UST) field citation program provides for substantially reduced penalties in exchange for the rapid correction of certain UST violations for first time violators. See *Guidance for Federal Field Citation Enforcement, OSWER Directive 9610.16, October 1993.*

[9] States includes tribes.

VI.I.7. "Processing Requests for Use of Enforcement Discretion", March 3, 1995.

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

MAR 0 3 1995

MEMORANDUM

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Processing Requests for Use of Enforcement Discretion

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

In light of the reorganization and consolidation of the Agency's enforcement and compliance assurance resources activities at Headquarters, I believe that it is useful to recirculate the attached memorandum regarding "no action" assurances[1] as a reminder of both this policy and the procedure for handling such requests. The Agency has long adhered to a policy against giving definitive assurances outside the context of a formal enforcement proceeding that the government will not proceed with an enforcement response for a specific individual violation of an environmental protection statue, regulation, or legal requirement. This policy, a necessary and critically important element of the wise exercise of the Agency's enforcement discretion, and which has been a consistent feature of the enforcement program, was formalized in 1984 following Agency-wide review and comment. Please note that OECA is reviewing the applicability of this policy to the CERCLA enforcement program, and will issue additional guidance on this subject.

A "no action" assurance includes, but is not limited to: specific or general requests for the Agency to exercise its enforcement discretion in a particular manner or in a given set of circumstances (i.e., that it will or will not take an enforcement action); the development of policies or other statements purporting to bind the Agency and which relate to or would affect the Agency's enforcement of the Federal environmental laws and regulations; and other similar requests

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[1] Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, Policy Against "No Action" Assurances (Nov. 16, 1984) (copy attached).

for forbearance or action involving enforcement-related activities. The procedure established by this Policy requires that any such written or oral assurances have the advance written concurrence of the Assistant Administrator for Enforcement and Compliance Assurance.

The 1984 reaffirmation of this policy articulated well the dangers of providing "no action" assurances. Such assurances erode the credibility of the enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. Given limited Agency resources, this credibility is a vital incentive for the regulated community to comply with existing requirements. In addition, a commitment not to enforce a legal requirement may severely hamper later, necessary enforcement efforts to protect public health and the environment, regardless of whether the action is against the recipient of the assurances or against others who claim to be similarly situated.

Moreover, these principles are their most compelling in the context of rulemakings: good public policy counsels that blanket statements of enforcement discretion are not always a particularly appropriate alternative to the public notice-and-comment rulemaking process. Where the Agency determines that it is appropriate to alter or modify its approach in specific, well-defined circumstances, in my view we must consider carefully whether the objective is best achieved through an open and public process (especially where the underlying requirement was established by rule under the Administrative Procedures Act), or through piecemeal expressions of our enforcement discretion.

We have recognized two general situations in which a no action assurance may be appropriate: where it is expressly provided for by an applicable statute, and in extremely unusual circumstances where an assurance is clearly necessary to serve the public interest *and* which no other mechanism can address adequately. In light of the profound policy implications of granting no action assurances, the 1984 Policy requires the advance concurrence of the Assistant Administrator for this office. Over the years, this approach has resulted in the reasonably consistent and appropriate exercise of EPA's enforcement discretion, and in a manner which both preserves the integrity of the Agency and meets the legitimate needs served by a mitigated enforcement response.

There may be situations where the general prohibition on no action assurances should not apply under CERCLA (or the Underground Storage Tanks or RCRA corrective action programs). For example, at many Superfund sites there is no violation of law. OECA is evaluating the applicability of no action assurances under CERCLA and RCRA and will issue additional guidance on the subject.

Lastly, an element of the 1984 Policy which I want to highlight is that it does not and should not preclude the Agency from discussing fully and completely the merits of a particular action, policy, or other request to exercise the Agency's enforcement discretion in a particular manner. I welcome a free and frank exchange of ideas on how best to respond to violations, mindful of the Agency's overarching goals, statutory directives, and enforcement and compliance priorities. I do, however, want to ensure that all such requests are handled in a consistent and coordinated manner.

Attachment

cc: OECA Office Directors
Regional Counsels
Regional Program Directors

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

NOV 16 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy Against "No Action" Assurances

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

This memorandum reaffirms EPA policy against giving definitive assurances (written or oral) outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or other legal requirement.

"No action" promises may erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. This credibility is vital as a continuing incentive for regulated parties to comply with environmental protection requirements.

In addition, any commitment not to enforce a legal requirement against a particular regulated party may severely hamper later enforcement efforts against that party, who may claim good-faith reliance on that assurance, or against other parties who claim to be similarly situated.

This policy against definitive no action promises to parties outside the Agency applies in all contexts, including assurances requested:

- both prior to and after a violation has been committed;
- on the basis that a State or local government is responding to the violation;

- on the basis that revisions to the underlying legal requirement are being considered;

- on the basis that the Agency has determined that the party is not liable or has a valid defense;

- on the basis that the violation already has been corrected (or that a party has promised that it will correct the violation); or

- on the basis that the violation is not of sufficient priority to merit Agency action.

The Agency particularly must avoid no action promises relating either to violations of judicial orders, for which a court has independent enforcement authority, or to potential criminal violations, for which prosecutorial discretion rests with the United States Attorney General.

As a general rule, exceptions to this policy are warranted only

- where expressly provided by applicable statute or regulation (e.g., certain upset or bypass situations)

- in extremely unusual cases in which a no action assurance is clearly neccessary to serve the public interest (e.g., to allow action to avoid extreme risks to public health or safety, or to obtain important information for research purposes) and which no other mechanism can address adequately.

Of course, any exceptions which EPA grants must be in an area in which EPA has discretion not to act under applicable law.

This policy in no way is intended to constrain the way in which EPA discusses and coordinates enforcement plans with state or local enforcement authorities consistent with normal working relationships. To the extent that a statement of EPA's enforcement intent is necessary to help support or conclude an effective state enforcement effort, EPA can employ language such as the following:

"EPA encourages State action to resolve violations of the _____ Act and supports the actions which (State) is taking to address the violations at issue. To the extent that the State action does not satisfactorily resolve the violations, EPA may pursue its own enforcement action."

TAB VI.J

VI. SPECIALIZED ENFORCEMENT TOPICS

J. TOXICS/TOXICITY CONTROL

"Policy for Development of Water Quality-Based Permit Limitations for Toxic Pollutants," dated February, 1984. See II.A.7.

"Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy," dated January 25, 1989. Includes Compliance Monitoring and Enforcement Strategy, dated 1/19/89.

Attachment A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
January 25, 1989

OFFICE OF WATER

MEMORANDUM

SUBJECT: Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy

FROM: Rebecca W. Hanmer, Acting Assistant Administrator
Office of Water

TO: Regional Administrators

Since the issuance of the "Policy for the Development of Water Quality-based Permit Limitations for Toxic Pollutants" in March of 1984, the Agency has been moving forward to provide technical documentation to support the integrated approach of using both chemical and biological methods to ensure the protection of water quality. The Technical Support Document for Water Quality-based Toxics Control (September, 1985) and the Permit Writer's Guide to Water Quality-based Permitting for Toxic Pollutants (July, 1987) have been instrumental in the initial implementation of the Policy. The Policy and supporting documents, however, did not result in consistent approaches to permitting and enforcement of toxicity controls nationally. When the 1984 Policy was issued, the Agency did not have a great deal of experience in the use of whole effluent toxicity limitations and testing to ensure protection of water quality. We now have more than four years of experience and are ready to effectively use this experience in order to improve national consistency in permitting and enforcement.

In order to increase consistency in water quality-based toxicity permitting, I am issuing the attached Bas Permitting Principles for Whole Effluent Toxicity (Attachment .) as a standard with which water quality-based permits should conform. A workgroup of Regional and State permitting, enforcement, and legal representatives developed these minimum acceptable requirements for toxicity permitting based upon national experience. These principles are consistent with the toxics control approach addressed in the proposed Section 304(l) regulation. Regi s should use these principles when reviewing draft State permits. If the final Section 304(l) regulations include changes in this area, we will update these principles as necessary. Expanded guidance on the use of these principles will be sent out shortly by James Elder, Director of the Office of

Water Enforcement and Permits. This expanded guidance will include sample permit language and permitting/enforcement scenarios.

Concurrent with this issuance of the Basic Permitting Principles, I am issuing the Compliance Monitoring and Enforcement Strategy for Toxics Control (Attachment 2). This Strategy was developed by a workgroup of Regional and State enforcement representatives and has undergone an extensive comment period. The Strategy presents the Agency's position on the integration of toxicity control into the existing National Pollutant Discharge Elimination System (NPDES) compliance and enforcement program. It delineates the responsibilities of the permitted community and the regulatory authority. The Strategy describes our current efforts in compliance tracking and quality assurance of self-monitoring data from the permittees. It defines criteria for review and reporting of toxicity violations and describes the types of enforcement options available for the resolution of permit violations.

In order to assist you in the management of whole effluent toxicity permitting, the items discussed above will join the 1984 Policy as Appendices to the revised Technical Support Document for Water Quality-based Toxics Control. To summarize, these materials are the Basic Permitting Principles, sample permit language, the concepts illustrated through the permitting and enforcement scenarios, and the Enforcement Strategy. I hope these additions will provide the needed framework to integrate the control of toxicity into the overall NPDES permitting program.

I encourage you and your staff to discuss these documents and the 1984 Policy with your States to further their efforts in the implementation of EPA's toxics control initiative.

If you have any questions on the attached materials, please contact James Elder, Director of the Office of Water Enforcement and Permits, at (FTS/202) 475-8488.

Attachments

cc: ASWIPCA
Water Management Division Directors

1984

BASIC PERMITTING PRINCIPLES FOR WHOLE EFFLUENT TOXICITY

1. Permits must be protective of water quality.

   a. At a minimum, all major permits and minors of concern must be evaluated for potential or known toxicity (chronic or acute if more limiting).

   b. Final whole effluent toxicity limits must be included in permits where necessary to ensure that State Water Quality Standards are met. These limits must properly account for effluent variability, available dilution, and species sensitivity.

2. Permits must be written to avoid ambiguity and ensure enforceability.

   a. Whole effluent toxicity limits must appear in Part I of the permit with other effluent limitations.

   b. Permits contain generic re-opener clauses which are sufficient to provide permitting authorities the means to re-open, modify, or reissue the permit where necessary. Re-opener clauses covering effluent toxicity will not be included in the Special Conditions section of the permit where they imply that limit revision will occur based on permittee inability to meet the limit. Only schedules or other special requirements will be added to the permit.

   c. If the permit includes provisions to increase monitoring frequency subsequent to a violation, it must be clear that the additional tests only determine the continued compliance status with the limit; they are <u>not</u> to verify the original test results.

   d. Toxicity testing species and protocols will be accurately referenced/cited in the permit.

3. Where not in compliance with a whole effluent toxicity limit, permittees must be compelled to come into compliance with the limit as soon as possible.

   a. Compliance dates must be specified.

   b. Permits can contain requirements for corrective actions, such as Toxicity Reduction Evaluations (TREs), but corrective actions cannot be delayed pending EPA/State approval of a plan for the corrective actions, unless State regulations require prior approval. Automatic corrective actions subsequent to the effective date of a final whole-effluent toxicity limit will not be included in the permit.

Explanation of the Basic Permitting Principles

The Basic Permitting Principles present the minimum acceptable requirements for whole-effluent toxicity permitting. They begin with a statement of the goal of whole-effluent toxicity limitations and requirements: the protection of water quality as established through State numeric and narrative Water Quality Standards. The first principle builds on the Technical Support Document procedures and the draft Section 304(l) rule requirements for determining potential to violate Water Quality Standards. It requires the same factors be considered in setting whole-effluent toxicity based permits limits as are used to determine potential Water Quality Standards violations. It defines the universe of permittees that should be evaluated for potential violation of Water Quality Standards, and therefore possible whole-effluent limits, as all majors and minors of concern.

The second permitting principle provides basic guidelines for avoiding ambiguities that may surface in permits. Whole-effluent toxicity limits should be listed in Part I of the permit and should be derived and expressed in the same manner as any other water quality-based limitations (i.e., Maximum Daily and Average Monthly limits as required by Section 122.45(d)).

In addition, special re-opener clauses are generally not necessary, and may mistakenly imply that permits may be re-opened to revise whole-effluent limits that are violated. This is not to imply that special re-opener clauses are never appropriate. They may be appropriate in permits issued to facilities that currently have no known potential to violate a Water Quality Standard; in these cases, the permitting authority may wish to stress its authority to re-open the permit to add a whole-effluent limit in the event monitoring detects toxicity.

Several permittees have mistakenly proposed to conduct additional monitoring subsequent to a violation to "verify" their results. It is not possible to verify results with a subsequent test whether a new sample or a split-sample which has been stored (and therefore contains fewer volatiles) is used. For this reason, any additional monitoring required in response to a violation must be clearly identified as establishing continuing compliance status, not verification of the original violation.

The second principle also deals with the specification of test species and protocol. Clearly setting out the requirements for toxicity testing and analysis is best done by accurately referencing EPA's most recent test methods and approved equivalent State methods. In this way, requirements which have been published can be required in full, and further advances in technology and science may be incorporated without lengthy permit revisions.

The third and final permitting principle reinforces the responsibility of the permittee to seek timely compliance with the requirements of its NPDES permit. Once corrective actions have been identified in a TRE, permittees cannot be allowed to delay corrective actions necessary to comply with water quality-based whole effluent toxicity limitations pending Agency review and approval of voluminous reports or plans. Any delay on the part of the permittee or its contractors/agents is the responsibility of the permittee.

The final principle was written in recognition of the fact that a full-blown TRE may not be necessary to return a permittee to compliance in all cases, particularly subsequent to an initial TRE. As a permittee gains experience and knowledge of the operational influences on toxicity, TREs will become less important in the day to day control of toxicity and will only be required when necessary on a case-specific basis.

Background to the Compliance Monitoring and Enforcement Strategy for Toxics Control

The Compliance Monitoring and Enforcement Strategy for Toxics Control sets forth the Agency's strategy for tracking compliance with and enforcing whole-effluent toxicity monitoring requirements, limitations, schedules and reporting requirements.

The Strategy delineates the respective responsibilities of permittees and permitting authorities to protect water quality through the control of whole-effluent toxicity. It establishes criteria for the review of compliance data and the quarterly reporting of violations to Headquarters and the public. The Strategy discusses the integration of whole-effluent toxicity control into our existing inspection and quality assurance efforts. It provides guidelines on the enforcement of whole-effluent toxicity requirements.

The Strategy also addresses the concern many permittees share as they face the prospect of new requirements in their permit - the fear of indiscriminate penalty assessment for violations that they are unable to control. The Strategy recognizes enforcement discretion as a means of dealing fairly with permittees that are doing everything feasible to protect water quality. As indicated in the Strategy, this discretion deals solely with the assessment of civil penalties, however, and is not an alternative to existing procedures for establishing relief from State Water Quality Standards. The Strategy focuses on the responsibility of the Agency and authorized States to require compliance with Water Quality Standards and thereby ensure protection of existing water resources.

01/19/89

COMPLIANCE MONITORING AND ENFORCEMENT STRATEGY FOR TOXICS CONTROL

I. Background

Issuance of NPDES permits now emphasizes the control of toxic pollutants, by integrating technology and water quality-based permit limitations, best management practices for toxic discharges, sludge requirements, and revisions to the pretreatment implementation requirements. These requirements affect all major permittees and those minor permittees whose discharges may contribute to impairment of the designated use for the receiving stream. The goal of permitting is to eliminate toxicity in receiving waters that results from industrial and municipal discharges.

Major industrial and municipal permits will routinely contain water quality-based limits for toxic pollutants and in many cases whole effluent toxicity derived from numerical and narrative water quality standards. The quality standards to establish NPDES permit limits are discussed in the "Policy for the Development of Water Quality-based Permit Limits for Toxic Pollutants," 49FR 9016, March 9, 1984. The Technical Support Document for Water Quality-based Toxics Control, EPA #440/44-85032, September, 1985 and the Permit Writer's Guide to Water Quality-based Permitting for Toxic Pollutants, Office of Water, May, 1987, provide guidance for interpreting numerical and narrative standards and developing permit limits.

The Water Quality Act (WQA) of 1987 (PL 100-4, February 4, 1987) further directs EPA and the States to identify waters that require controls for toxic pollutants and develop individual control strategies including permit limits to achieve control of toxics. The WQA established deadlines, for individual control strategies (February 4, 1989) and for compliance with the toxic control permit requirements (February 4, 1992). This Strategy will support the additional compliance monitoring, tracking, evaluation, and enforcement of the whole effluent toxicity controls that will be needed to meet the requirements of the WQA and EPA's policy for water quality-based permitting.

It is the goal of the Strategy to assure compliance with permit toxicity limits and conditions through compliance inspections, compliance reviews, and enforcement. Water quality-based limits may include both chemical specific and whole effluent toxicity limits. Previous enforcement guidance (e.g., Enforcement Management System for the National Pollutant Discharge Elimination System, September, 1986; National Guidance for Oversight of NPDES Programs, May, 1987; Guidance for Preparation of Quarterly and Semi-Annual Noncompliance Reports, March, 1986) has dealt with

chemical-specific water quality-based limits. This Strategy will focus on whole effluent toxicity limits. Such toxicity limits may appear in permits, administrative orders, or judicial orders.

II. Strategy Principles

This strategy is based on four principles:

1) Permittees are responsible for attaining, monitoring, and maintaining permit compliance and for the quality of their data.

2) Regulators will evaluate self-monitoring data quality to ensure program integrity.

3) Regulators will assess compliance through inspections, audits; discharger data reviews, and other independent monitoring or review activities.

4) Regulators will enforce effluent limits and compliance schedules to eliminate toxicity.

III. Primary Implementation Activities

In order to implement this Strategy fully, the following activities are being initiated:

A. Immediate development

1. The NPDES Compliance Inspection Manual was revised in May 1988 to include procedures for performing chronic toxicity tests and evaluating toxicity reduction evaluations. An inspector training module was also developed in August 1988 to support inspections for whole effluent toxicity.

2. The Permit Compliance System (the national NPDES data base) was modified to allow inclusion of toxicity limitations and compliance schedules associated with toxicity reduction evaluations. The PCS Steering Committee will review standard data elements and determine if further modifications are necessary.

3. Compliance review factors (e.g., Technical Review Criteria and significant noncompliance definitions) are being proposed to evaluate violations and appropriate response.

4. A Quality Assurance Fact Sheet has been developed (Attached) to review the quality of toxicity test results submitted by permittees.

5. The Enforcement Response Guide in the Enforcement Management System will be revised to cover the use of administrative penalties and other responses to violations of toxicity controls in permits. At least four types of permit conditions are being examined: (1) whole-effluent toxicity monitoring (sampling and analysis), (2) whole effluent toxicity-based permit limits, (3) schedules to conduct a TRE and achieve compliance with water quality-based limits, and (4) reporting requirments.

B. Begin development in Spring 1989

With the assistance of the Office of Enforcement and Compliance Monitoring (OECM), special remedies and model forms will be developed to address violations of toxicity permit limits (i.e., model consent decrees, model complaints, revised penalty policy, model litigation reports, etc.)

IV. Scope and Implementation of Strategy

A. Compliance Tracking and Review

1. Compliance Tracking

The Permits Compliance System (PCS) will be used as the primary system for tracking limits and monitoring compliance with the conditions in NPDES permits. Many new codes for toxicity testing have already been entered into PCS. During FY 89, headquarters will provide additional guidance to Regions and States on PCS coding to update existing documentation. The Water Enforcement Data Base (WENDB) requirements as described in the PCS Policy Statement already require States and Regions to begin incorporating toxicity limits and monitoring information into PCS.

In addition to guidance on the use of PCS, Headquarters has prepared guidance in the form of Basic Permitting Principles for Regions and States that will provide greater uniformity nationally on approaches to toxicity permitting. One of the major problems in the tracking and enforcement of toxicity limits is that they differ greatly from State-to-State and Region-to-Region. The Permits Division and Enforcement Division in cooperation with the PCS Steering Committee will establish standard codes for permit limits and procedures for reporting toxicity results based on this guidance.

Whole effluent toxicity self-monitoring data should undergo an appropriate quality review. (See attached checklist for suggested toxicity review factors.) All violations of permit limits for toxics control should be reviewed by a professional qualified to assess the noncompliance. Regions and States should designate appropriate staff.

2. Compliance Review

Any violation of a whole effluent toxicity limit is of concern to the regulatory agency and should receive an immediate professional review. In terms of the Enforcement Management System (EMS), any whole effluent violation will have a violation review action criterion (VRAC) of 1.0. However, the appropriate initial enforcement response may be to require additional monitoring and then rapidly escalate the response to formal enforcement if the noncompliance persists. Where whole effluent toxicity is based on a pass-fail permit limitation, any failure should be immediately targeted for compliance inspection. In some instances, assessment of the compliance status will be required through issuance of Section 308 letters and 309(a) orders to require further toxicity testing.

Monitoring data which is submitted to fulfill a toxicity monitoring requirement in permits that do not contain an independently enforceable whole-effluent toxicity limitation should also receive immediate professional review.

The burden for testing and biomonitoring is on the permittee; however, in some instances, Regions and States may choose to respond to violations through sampling or performance audit inspections. When an inspection conducted in response to a violation identifies noncompliance, the Region or State should initiate a formal enforcement action with a compliance schedule, unless remedial action is already required in the permit.

B. Inspections

EPA/State compliance inspections of all major permittees on an annual basis will be maintained. For all facilities with water quality-based toxic limits, such inspections should include an appropriate toxic component (numerical and/or whole effluent review). Overall the NPDES inspection and data quality activities for toxics control should receive greater emphasis than in the present inspection strategy.

1. Regional/State Capability

The EPA's "Policy for the Development of Water Quality-based Permit Limits for Toxic Pollutants" (March 9, 1984 Federal Register) states that EPA Regional Administrators will assure that each Region has the full capability to conduct water quality assessments using both biological and chemical methods and provide technical assistance to the States. Such capability should also be maintained for compliance biomonitoring inspections and toxics sampling inspections. This capability should include both inspection and laboratory capability.

2. Use of Nonsampling Inspections

Nonsampling inspections as either compliance evaluations (CEIs) or performance audits (PAIs) can be used to assess permittee self-monitoring data involving whole effluent toxicity limits, TREs, and for prioritization of sampling inspections.* As resources permit, PAIs should be used to verify biomonitoring capabilities of permittees and contractors that provide toxicity testing self-monitoring data.

3. Quality Assurance

All States are encouraged to develop the capability for acute and chronic toxicity tests with at least one fish and one invertebrate species for freshwater and saltwater if appropriate. NPDES States should develop the full capability to assess compliance with the permit conditions they establish.

EPA and NPDES States will assess permittee data quality and require that permittees develop quality assurance plans. Quality assurance plans must be available for examination. The plan should include methods and procedures for toxicity testing and chemical analysis; collection, culture, maintenance, and disease control procedures for test organisms; and quality assurance practices. The

Due to resource considerations, it is expected that sampling inspections will be limited to Regional/State priorities in enforcement and permitting. Routine use of CEIs and PAIs should provide the required coverage.

permittee should also have available quality control charts, calibration records, raw test data, and culture records.

In conjunction with the QA plans, EPA will evaluate permittee laboratory performance on EPA and/or State approved methods. This evaluation is an essential part of the laboratory audit process. EPA will rely on inspections and other quality assurance measures to maintain data quality. However, States may prefer to implement a laboratory certification program consistent with their regulatory authorities. Predetermined limits of data acceptability will need to be established for each test condition (acute/chronic), species-by-species.

C. Toxicity Reduction Evaluations (TREs)

TREs are systematic investigations required of permittees which combine whole effluent and/or chemical specific testing for toxicity identification and characterization in a planned sequence to expeditiously locate the source(s) of toxicity and evaluate the effectiveness of pollution control actions and/or inplant modifications toward attaining compliance with a permit limit. The requirement for a TRE is usually based on a finding of whole effluent toxicity as defined in the permit. A plan with an implementation schedule is then developed to achieve compliance. Investigative approaches include causative agent identification and toxicity treatability.

1. Requiring TRE Plans

TRE's can be triggered: 1) whenever there is a violation of a toxicity limit that prompts enforcement action or 2) from a permit condition that calls for a toxicity elimination plan within a specified time whenever toxicity is found. The enforcement action such as a 309(a) administrative order or State equivalent, or judicial action then directs the permittee to take prescribed steps according to a compliance schedule to eliminate the toxicity. This schedule should be incorporated into the permit, an administrative order, or judicial order and compliance with the schedule should be tracked through PCS.

2. Compliance Determination Followup

Compliance status must be assessed following the accomplishment of a TRE plan using the most efficient and effective methods available. These methods include site visits, self-monitoring, and inspections.

Careful attention to quality assurance will assist in minimizing the regulatory burden. The method of compliance assessment should be determined on a case-by-case basis.

D. Enforcing Toxic Control Permit Conditions

Enforcement of toxic controls in permits depends upon a clear requirement and the process to resolve the noncompliance. In addition to directly enforceable whole effluent limits (acute and chronic, including absolute pass-fail limits), permits have contained several other types of toxic control conditions: 1) "free from" provisions, 2) schedules to initiate corrective actions (such as TREs) when toxicity is present, and/or 3) schedules to achieve compliance where a limit is not currently attained. Additional requirements or schedules may be developed through 308 letters, but the specific milestones should be incorporated into the permit, administrative order or State equivalent mechanism, or judicial order to ensure they are enforceable.

1. The Quarterly Noncompliance Report (QNCR)

Violations of permit conditions are tracked and reported as follows:

a. Effluent Violations

Each exceedance of a directly enforceable whole effluent toxicity limit is of concern to the regulatory agency and, therefore, qualifies as meeting the VRAC requiring professional review (see section IV.A.2.).

These violations must be reported on the QNCR if the violation is determined through professional review to have the potential to have caused a water quality impact.

All QNCR-reportable permit effluent violations are considered significant noncompliance (SNC).

b. Schedule Violations

Compliance schedules to meet new toxic controls should be expeditious. Milestones should be established to evaluate progress routinely and minimize delays. These milestones should be tracked and any slippage of 90 days or more must be reported on the QNCR.

The following milestones are considered SNC when 90 days or more overdue: submit plan/schedule to conduct TRE, initiate TRE, submit test results, submit implementation plan/schedule (if appropriate), start construction, end construction, and attain compliance with permit.

c. Reporting/Other Violations

Violation of other toxic control requirements (including reports) will be reported using criteria that are applied to comparable NPDES permit conditions. For example, failure to submit a report within 30 days after the due date or submittal of an inaccurate or inadequate report will be reportable noncompliance (on the QNCR).

Only failure to submit toxicity limit self-monitoring reports or final TRE progress reports indicating compliance will be SNC when 30 days or more overdue.

Resolution (bringing into compliance) of all three types of permit violations (effluent, schedule, and reporting/other) will be through timely and appropriate enforcement that is consistent with EPA Oversight Guidance. Administering agencies are expected to bring violators back into compliance or take formal enforcement action against facilities that appear on the QNCR and are in SNC; otherwise, after two or more quarters the facility must be listed on the Exceptions List.

2. Approaches to Enforcement of Effluent Limitations

In the case of noncompliance with whole effluent toxicity limitations, any formal enforcement action will be tailored to the specific violation and remedial actions required. In some instances, a Toxicity Reduction Evaluation (TRE) may be appropriate. However, where directly enforceable toxicity-based limits are used, the TRE is not an acceptable enforcement response to toxicity noncompliance if it requires only additional monitoring without a requirement to determine appropriate remedial actions and ultimately compliance with the limit.

If the Regions or States use administrative enforcement for violations of toxic requirements, such actions should require compliance by a date certain, according to a set schedule, and an

administrative penalty should be considered.[1] Failure to comply with an Administrative Order schedule within 90 days indicates a schedule delay that may affect the final compliance date and a judicial referral is the normal response. In instances where toxicity has been measured in areas with potential impacts on human health (e.g., public water supplies, fish/shellfish areas, etc.), regions and states should presume in favor of judicial action and seek immediate injunctive relief (such as temporary restraining order or preliminary injunction).

In a few highly unusual cases where the permittee has implemented an exhaustive TRE plan[2], applied appropriate influent and effluent controls[3], maintained continued compliance with all other effluent limits, compliance schedules, monitoring, and other permit requirements, but is still unable to attain or maintain compliance with the toxicity-based limits, special technical evaluation may be warranted and civil penalty relief granted. Solutions in these cases could be pursued jointly with expertise from EPA and/or the States as well as the permittee.

Some permittees may be required to perform a second TRE subsequent to implementation of remedial action. An example of the appropriate use of a subsequent TRE is for the correction of new violations of whole effluent limitations following a period of

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[1]Federal Administrative penalty orders must be linked to violations of underlying permit requirements and schedules.

[2]See Methods for Aquatic Toxicity Identification Evaluations, Phase I, Toxicity Characterization Procedures, EPA-600/3-88/035, Table 1. An exhaustive TRE plan covers three areas: causative agent identification/toxicity treatability; influent/effluent control; and attainment of continued compliance. A listing of EPA protocols for TREs can be found in Section V (pages 11 and 12).

[3]For industrial permittees, the facility must be well-operated to achieve all water quality-based, chemical specific, or BAT limits, exhibit proper O & M and effective BMPs, and control toxics through appropriate chemical substitution and treatment. For POTW permittees, the facility must be well-operated to achieve all water quality-based, chemical specific, or secondary limits as appropriate, adequately implement its approved pretreatment program, develop local limits to control toxicity, and implement additional treatment.

sustained compliance (6 months or greater in duration) indicating a different problem from that addressed in the initial TRE.

3. Enforcement of Compliance Schedule and Reporting Requirements

In a number of instances, the primary requirements in the permits to address toxicity will be schedules for adoption and implementation of biomonitoring plans, or submission of reports verifying TREs or other similar reporting requirements. Regions and States should consider any failure (1) to conduct self-monitoring according to EPA and State requirements, (2) to meet TRE schedules within 90 days, or (3) to submit reports within 30 days of the specified deadline as SNC. Such violations should receive equivalent enforcement follow-up as outlined above.

4. Use of Administrative Orders With Penalties

In addition to the formal enforcement actions to require remedial actions, Regions and States should presume that penalty AO's or State equivalents can be issued for underlying permit violations in which a formal enforcement action is appropriate. Headquarters will also provide Regions and States with guidance and examples as to how the current CWA penalty policy can be adjusted.

5. Enforcement Models and Special Remedies

OWEP and OECM will develop standard pleadings and language for remedial activities and compliance milestones to assist Regions and States in addressing violations of toxicity or water quality-based permit limits. Products will include model litigation reports, model complaints and consent decrees, and revised penalty policy or penalty algorithm and should be completed in early FY 1989.

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V. Summary of Principal Activities and Products

A. Compliance Tracking and Review guidance

1. PCS Coding Guidance - May, 1987; revision 2nd Quarter 1989

2. Review Criteria for Self-monitoring Data (draft attached)

B. Inspections and Quality Assurance

1. Revised NPDES Compliance Inspection Manual - May 1988.

2. Quality Assurance Guidance - 3rd Quarter FY 1989.

3. Biomonitoring Inspection Training Module - August 1988.

4. Additions of a reference toxicant to DMRQA program - (to be determined)

C. Toxics Enforcement

1. Administrative and Civil Penalty Guidance - 4th Quarter FY 1989

2. Model Pleadings and Complaints - 2nd Quarter 1989

3. EMS Revision - 2nd Quarter FY 1989

D. Permitting Consistency

1. Basic Permitting Principles - 2nd Quarter FY 1989

E. Toxicity Reduction Evaluations

1. Generalized Methology for Conducting Industrial Toxicity Reduction Evaluations - 2nd Quarter FY 1989

2. Toxicity Reduction Evaluation Protocol for Municipal Wastewater Treatment Plants - 2nd Quarter FY 1989

3. Methods for Aquatic Toxicity Indentification Evaluations

a. Phase I. Toxicity Characterization Procedures, EPA-600/3-88/034- September 1988

b. Phase II. Toxicity Identification Procedures, EPA-600/3-88/035- 2nd Quarter 1989

c. Phase III. Toxicity Confirmation Procedures- EPA-600/3-88/036 - 2nd Quarter FY 1989

Attachment

QUALITY CONTROL FACT SHEET FOR SELF-BIOMONITORING ACUTE/CHRONIC TOXICITY TEST DATA

Permit No. _____

Facility Name _____

Facility Location _____

Laboratory/Investigator _____

Permit Requirements:

Sampling Location _____ Type of Sample _____

Limit _____ Test Duration _____

Type of Test _____ Test Organism Age _____

Test Results:

LC50/EC50/NOEL _____ 95% Confidence Interval _____

Quality Control Summary:

Date of Sample: _____ Dates of Test: _____

Control Mortality: _____% Control Mean Dry Weight _____

Temperature maintained within ±2°C of test temperature? Yes____ No___

Dissolved oxygen levels always greater than 40% saturation?

Yes_____ No____

Loading factor for all exposure chambers less than or equal to maximum allowed for the test type and temperature? Yes____ No_____

Do the test results indicate a direct relationship between effluent concentration and response of the test organism (i.e., more deaths occur at the highest effluent concentrations)? Yes____ No_____

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"Quality Assurance Guidance for Compliance Monitoring in Effluent Biological Toxicity Testing", dated March 7, 1990.

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

MAR 7 1990

OFFICE OF WATER

MEMORANDUM

SUBJECT: Quality Assurance Guidance for Compliance Monitoring in Effluent Biological Toxicity Testing

FROM: David N. Lyons, P.E., Chief
Enforcement Support Branch (EN-338)

TO: Compliance Branch Chiefs, Water Management Division
Surveillance Branch Chiefs, Environmental Services Div.
Regions 1 - 10

I am attaching the "QA Guidance for Compliance Monitoring in Effluent Biological Toxicity Testing" for your distribution.

This document will supplement the QA section (Chapter 8) in the NPDES Compliance Inspection Manual. The objective of this guidance is to help NPDES inspectors, trained or untrained in the principles of biological testing, to understand the parameters that influence the acceptability of test data, and to recognize data that are invalid for verifying compliance.

Earlier drafts were reviewed by a workgroup consisting of Headquarters, Regional and State staff. Their comments were incorporated in this version. If you have any questions, please feel free to contact my staff, Samuel To (FTS-475-8322) and Theodore Coopwood (FTS-475-8327).

Attachment

QUALITY ASSURANCE GUIDANCE
FOR
COMPLIANCE MONITORING
IN EFFLUENT BIOLOGICAL TOXICITY TESTING

February 1990

Office of Water Enforcement and Permits
U.S. Environmental Protection Agency

TABLE OF CONTENTS

INTRODUCTION

The purpose of this document is to provide quality assurance guidance for review and evaluation of effluent toxicity testing. It will serve as an addendum to the NPDES Compliance Inspection Manual. Its objective is to help those both trained and untrained in the principles of biological testing to understand the parameters that influence the acceptability of test data, and recognize data that are invalid for verifying compliance.

The primary goal of quality assurance is to ensure that all environmentally related measurements submitted to the U.S. Environmental Protection Agency (EPA) in permittee self monitoring reports represent data of known quality. The quality of data is known when all components associated with its derivation are thoroughly documented, and the documentation is verifiable and defensible. It is EPA's policy to ensure that data representing environmentally related measurements are of known quality.[a]

Quality Assurance is especially important in the NPDES program which obtains the majority of its information on permittee compliance from test data submitted by the permittees. Compliance with NPDES permit effluent limitations requires that accurate test results be within the allowable quantity or concentration prescribed in the permit.

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[a] Quality Assurance is the program that assures the reliability of data. It includes policies, objectives, principles, programs, and procedures to produce data of known and accepted quality. It may include quality control, which is the routine application of detailed procedures for obtaining prescribed standards of performance in the monitoring and measurement process.

This guidance focuses on the quality assurance considerations that affect the acceptability of whole-effluent toxicity test data submitted by permittees. Whole-effluent toxicity tests involve the exposure of selected test organisms to prescribed concentrations of effluent under controlled test conditions for a specified time to determine effluent toxicity. Toxicity may be exhibited by changes in organism mortality, growth, reproduction or other physical response when compared to a control. As with specific chemical analyses, whole-effluent toxicity tests must conform to a specified set of physical conditions to be considered valid. Only valid tests can confirm compliance with an effluent limitation.

GENERAL QUALITY ASSURANCE CONCERNS

Objectives

The objectives of a toxicity testing quality assurance program are to ensure that generated data reflect accurately the conditions that the data represent, that commonly accepted or standard practices have been followed in all facets of data generation, and that each step of data generation from sample collection to reported results has an appropriate written verifiable log or record.

Quality Assurance Program

The elements of a good quality assurance program are designed to ensure that the above objectives are fulfilled. Such elements should be contained in a written quality assurance plan for each facility conducting toxicity testing. The plan for each facility should contain:[4,5]

a) Facility quality assurance policy
b) Standard operating procedures
c) System and performance audits
d) Facilities and equipment
e) Qualifications and training of personnel
f) Quality assurance/quality control responsibilities
g) Administrative sample handling procedures
h) Sample custody and chain-of-custody procedures
i) Applicable instrument calibration procedures, frequency, and records
j) Laboratory practices to ensure that reagents and standard solutions have not violated respective shelf holding time

The aspects of the quality assurance plan dealing with effluent toxicity tests should discuss:

a) Effluent sampling and handling
b) Source, condition and handling of test organisms
c) Condition of equipment
d) Test conditions
e) Instrument calibration
f) Replication
g) Use of reference toxicants
h) Record keeping
i) Data evaluation
j) Data reporting

The plan should specify where verifiable logs or records should be maintained and retained to identify the responsible person for each aspect of the data generating procedure, and the practices that will ensure that possible tampering with sample quality has not occurred.

Test organisms are the analytical instruments in a toxicity test. They respond to the elements of their environment in accordance with their individual sensitivity. Methods for toxicity testing have been accepted and published by EPA.[6,7,8] Quality assurance practices require that documentation shows that these methods have been followed or that any deviations are fully explained and documented.

Sampling and sample handling requires that sample holding time is not violated. Test organisms should be positively identified to species and be disease-free, of known age, and of good health; their source should be recorded and reference toxicant testing documented. Laboratory temperature control equipment must be adequate to maintain recommended test water temperatures. Test materials fabrication must not influence test solution or control water quality. Analytical methods must include quality control practices outlined in EPA methods manuals or as specified in

official EPA methods.[9,10] Instruments used for routine measurements of chemical and physical parameters must be calibrated and standardized according to accepted procedures. Dilution water should be appropriate to the objectives of the study.[6,7,8] Water temperature, dissolved oxygen, salinity or water hardness, and pH should be maintained within the limits specified for each test. Replication of test procedures are specified in the test instructions. Reference toxicants should be used to verify efficacy of laboratory procedures and health of organisms. Proper, accurate, complete record keeping and data reporting are essential. All of these parameters are specified in the methods manuals.

Review of Quality Assurance Procedures

One method used to evaluate permittee adherence to good quality assurance and test protocols is through an inspection or audit. A quality assurance inspection or audit would examine documents, records, and procedures, including:

a) Quality assurance program plan
b) Quality assurance audit reports and inspection records
c) Laboratory certifications
d) Equipment calibration records
e) Collection and management of samples to laboratory
f) Chain-of-custody and responsible-person procedures
g) Sample management, storage, and security within laboratory
h) Record keeping
i) Laboratory facility and equipment condition
j) Training and experience of personnel
k) Source, maintenance, and apparent health of test organisms
l) Source and results of reference toxicants (i.e., reference toxicant test results and control survival)
m) Shelf life and labeling of reagents and standard test solutions

n) Methods for preparation of laboratory standards and synthetic or artificial waters including the source of any sea salts used.

o) Deviations from standard procedures

p) Test reports that were rejected for unacceptable QA/QC by a regulatory agency

q) Adequacy of space and equipment for work load

r) Methods for laboratory waste disposal

An inspection or audit should determine compliance with minimum acceptable criteria for collecting samples, conducting the tests, and analyzing test results. In addition to examining the equipment and facilities, the acquisition, culture, maintenance, and acclimation of test organisms should be investigated. Detailed considerations of the primary aspects of whole-effluent toxicity testing follow.

SAMPLE COLLECTION AND TEST PROCEDURES

Effluent and Receiving Water Sampling

The effluent sampling point should be the same as specified in the National Pollutant Discharge Elimination System permit. The collector of a sample should be recorded. It is essential that the sample be characteristic of the wastewater discharge. When chlorination is practiced, regulatory authorities measure the toxicity of the effluent at different steps in the process; i.e. prior to chlorination, or after chlorination, or after dechlorination with sodium thiosulfate. Receiving water samples are collected upstream from the outfall being tested or from uncontaminated surface water with similar natural qualities. It is common practice to collect grab samples for receiving water toxicity studies, and receiving water may be specified as a source of dilution water in effluent toxicity tests. These grab sample collections should be conducted following the specifications for each test method.[6,7,8]

Aeration during collection and transfer of effluents should be minimized to reduce the loss of volatile chemicals. Sample holding time, from time of collection to initiation of the test, should not exceed 36 hours. Samples collected for off-site toxicity testing are to be chilled to 4°C when collected, shipped in ice to the laboratory, and there transferred to a 4°C refrigerator until used.

The above precautions are taken to maintain the potential toxicity characteristics and integrity of the wastewater and to ensure that such characteristics are not changed following sample collection and prior to toxicity testing. Precautions should be taken to ensure that any materials used in sample collection or throughout the testing process will not affect the integrity of

the sample being tested. Any alterations to effluent or dilution water samples should be well documented even if that adjustment is standard, including the use of sea salts or hypersaline brine (HSB) to adjust the salinity of freshwater effluents.

Facilities, Equipment, and Test Chambers

Specific requirements have been developed for facilities and equipment used in toxicity testing,[6,7,8] and should be referred to during the conduct of each method. To summarize:

- Laboratory temperature control equipment must maintain recommended test water temperatures.

- All materials that come in contact with the effluent must be such that there is no leaching or reaction that potentially would alter the integrity of the wastewater being tested. Tempered glass and perfluorocarbon plastics (Teflon^{R}) should be used whenever possible to minimize sorption and leaching of toxic substances. These materials may be reused following decontamination.

- Plastics such as polyethylene, polypropylene, polyvinyl chloride, and TYGON^{R} may be used as test chambers or to store effluents, but caution should be exercised in their use because they might introduce toxicants when new, or carry over toxicants from one test to another if reused.

- The use of large glass carboys is discouraged for safety reasons. Glass or disposable polystyrene containers are used for test chambers.

- New plastic products of a type not previously used should be tested for toxicity before initial use by

exposing the test organisms in the test system where the material is used.

- Silicone adhesive used to construct glass test chambers absorbs some organochlorine and organophosphorus pesticides. As little of the adhesive as possible should be in contact with the water and any beads of adhesive inside the containers should be removed.

- Cleaning of equipment should be rigorous and thorough.

Analytical Methods

Routine chemical and physical analyses must include established quality control practices outlined in EPA methods manuals or in 40 CFR 136 particular approved methods.[4,5]

Calibration and Standardization of Equipment and Reagents

Instruments used for routine measurements of chemical and physical parameters such as pH, dissolved oxygen, temperature, conductivity, alkalinity, and salinity/hardness must be calibrated and standardized according to instrument manufacturers' procedures. Wet chemical methods used to measure alkalinity and hardness must be standardized according to procedures specific in the EPA method. Logs should be maintained for the calibration of instruments.

Dilution Water

Dilution water should be the same as specified in the permit. If required, dilution water may be synthetic water, ground water, seawater, artificial seawater or hypersaline brine (HSB) made from a non-contaminated source of natural seawater (above 30 0/00 salinity) appropriate to the objectives of the study and

logistical constraints, and should follow recommendations of each individual method. Holding time and holding temperature for dilution water are specified as similar to that for effluent samples. Dilution water is considered acceptable if test organisms have adequate survival (during acclimation and testing), growth, and reproduction in the test chambers during a test; and give the predicted results when tested using a reference toxicant.

Water temperature within the test chambers must be monitored continually and maintained within the limits specified for each test. Dissolved oxygen concentrations must also be maintained within the limits specified, and pH should be checked and recorded at the beginning of the test and at least daily throughout the test. In regard to dissolved oxygen, if it is necessary to aerate during the test, and the protocol allows aeration, all concentrations and controls must be aerated and the fact noted on the test report.

Record Keeping

Records should detail all information about a sample and test organisms, including:

a) Collection: date; time; location; pre-, post-, or dechlorinated; weather conditions, methods, and collector

b) Transportation: method, chain of custody, packing to ensure correct temperature maintenance, and security

c) Laboratory: storage, analysis, and security

d) Testing: elapsed time from sample collection, treatment, and type of test

e) Test organism: species, source, age, health, and feeding

f) Records of diseased or discarded organisms

g) Test results including replicates and controls

h) All calculations that impact test results and data interpretation

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i) Any observations of a non-routine occurrence that may be important in interpretation of results

j) Equipment and instrument calibrations

k) Any deviation from the protocol.

Records should be kept in bound notebooks. Observations should be recorded as they occur to prevent the loss of information. Notebook data and observations should be initialed and dated by the observer.

TEST ORGANISMS

Organisms Used

The standard freshwater test organisms used in chronic toxicity tests are the fathead minnow, Pimephales promelas; the cladoceran, Ceriodaphnia dubia; and the green alga, Selenastrum capricornutum. Marine and estuarine organisms currently include the sheepshead minnow, Cyprinodon variegatus; the inland silverside, Menidia beryllina; the mysid, Mysidopsis bahia; the sea urchin, Arbacia punctulata; and the red alga, Champia parvula. Organisms used should be disease-free, and positively identified to species (ideally by an expert taxonomist).

Quality and Source of Test Organisms

When organism breeding cultures are maintained, the sensitivity of the offspring should be determined in a toxicity test performed with a reference toxicant at least once each month. If preferred, this reference toxicant test may be performed concurrently with an effluent toxicity test. The standard reference toxicant test should be conducted using the exact method for which the organisms are being evaluated.

Food Quality

Suitable foods must be obtained as described in the toxicity testing methods manuals. Limited quantities of reference food, information on commercial sources of good quality foods, and procedures for determining food suitability are available from the Quality Assurance Branch, Environmental Monitoring and Support Laboratory, U.S. Environmental Protection Agency, Cincinnati, OH 45268. The suitability of each new supply of food must be determined in a side-by-side test in which the response

of test organisms fed with the new food is compared with the response of organisms fed a reference food or a previously used, satisfactory food. Preparation of food should follow methods accepted and published.[6,7,8]

Reference Toxicants

Reference toxicants are standard chemicals that can be used to evaluate test organism sensitivity, laboratory procedures, and equipment. Their use allows a laboratory to compare the response of test organisms to a reference toxicant under local laboratory conditions.

When a toxicity value from a test with a reference toxicant does not fall within the expected range for the test organisms when using standard dilution water (i.e., reconstituted water), the sensitivity of the organisms and the overall credibility of the test system are suspect and should be examined for defects, and the health of the organisms questioned. The test should be repeated with a different batch of test organisms.

Four reference toxicants are available to establish the precision and validity of toxicity data generated by biomonitoring laboratories; copper sulfate ($CuSO_4$), sodium chloride (NaCl), sodium dodecylsulfate (SDS), and cadmium chloride ($CdCl_2$). The reference toxicants may be obtained by contacting the Quality Assurance Branch, Environmental Monitoring and Support Laboratory, U.S. Environmental Protection Agency, Cincinnati, OH, 45268. Instructions for their use and the expected toxicity values for the reference toxicants are provided with the samples. To ensure comparability of quality-assured data on a national scale, all laboratories must use the same source of reference toxicant and the same formulation of moderately hard, synthetic dilution water for freshwater tests and the same sea salt or HSB for marine tests.

Control Charts

A control chart often is prepared for each reference toxicant and organism combination. With such a chart the cumulative trend from a series of tests can be evaluated. The mean value and upper and lower control limits are recalculated with each successive point until the statistics stabilize. The upper and lower control limits are two standard deviations from the mean. Outliers, which are values that fall outside the upper and lower control limits, and trends of increasing or decreasing sensitivity are readily identified.

ASSESSING DATA QUALITY

Test Acceptability

Test acceptability depends upon test organism mortality in the test controls. It varies among organisms and tests. For acute toxicity tests,[b] the control survival must be 90 percent or greater for a valid test. For valid freshwater chronic fathead minnow or Ceriodaphnia dubia effluent toxicity tests,[c] control

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[b] An acute toxicity test is a test of short duration where the organism response is typically observed in 96 hours or less. These tests are used to determine the effluent concentration, expressed as a percent volume, that is lethal to 50 percent of the organisms within the prescribed time period (LC_{50}). Where death is not easily detected, such as with invertebrates, immobilization is considered equivalent to death. Static and flow-through testing systems are used. Static tests include nonrenewal test where the organisms are exposed to the same effluent solution for the duration of the test, and renewal tests where the test organisms are exposed to a fresh solution of the same concentration of effluent every 24 hours or other prescribed interval. A flow-through test typically uses a diluter system and continuous feed of mixtures of effluent and diluent to a series of test chambers to ensure that different organisms are exposed continuously to different effluent concentrations throughout the test period.

[c] A chronic toxicity test is designed to measure long-term adverse effects of effluents on aquatic organisms. The organism's response is usually observed in 7 to 9 days, while the test period itself can last from one hour to several days. These test are used to determine the more subtle effects of toxicants such as adverse effects on survival, growth, reproduction, fertility and fecundity, and the occurrence of birth defects (teratogenicity). These effects can be quantitatively expressed in various ways, such as by determining the concentration at which 50 % of the organisms show a particular adverse effect (EC_{50}); or by observing the highest tested concentration at which the organisms' responses are not significantly different statistically from controls (the no observable effect concentration, or NOEC); or by observing the lowest observable effect concentration at which organisms' responses are different statistically from controls (the lowest observable effect concentration, or LOEC).

survival must be at least 80 percent. For the fathead minnow larval survival and growth test, the average dry weight of the surviving controls should equal or exceed 0.25 mg. For the Ceriodaphnia dubia survival and reproduction test, there should be an average of 15 or more young/surviving females in the control solutions. For valid reference toxicant tests, control survival growth and reproduction is the same as stated for the definitive test. For the marine short-term chronic tests with sheepshead minnow, silverside, or mysid, control survival must be equal to or exceed 80 percent in a valid test. The sea urchin test requires control egg fertilization of 70 to 90 percent. The Champia parvula test requires that control mortality does not exceed 20 percent and that plants have an average of 10 or more cystocarps. Other specifications for test acceptability are provided in test protocols.[6,7,8]

An individual test may be conditionally acceptable if temperature, DO, and other specified conditions fall outside specifications, depending on the degree of the departure and the objectives of the tests. The acceptability of the test will depend on the best professional judgment and experience of the investigator. The deviation from test specifications must be noted when reporting data from the test.

Precision

Precision is an expression of the degree of reproducibility of results. The ability of a laboratory to obtain consistent, precise results should be demonstrated with reference toxicants before measuring effluent toxicity. The single laboratory (intra-laboratory) precision of each type of test to be used in a laboratory should be determined by performing five or more tests with a reference toxicant. In cases where the test data are calculated in lethal concentrations (LC_{50}) and associated confidence intervals, precision can be described by the mean,

standard deviation, and relative standard deviation (percent coefficient of variation, or CV) of the calculated end points from the replicated tests. However, in cases where the results are reported in terms of the No-Observed-Effect Concentration (NOEC) and Lowest-Observed-Effect Concentration (LOEC), precision can only be described by listing the NOEC-LOEC interval for each test. In this case, it is not possible to express precision in terms of a commonly used statistic.

A new statistical procedure, an Inhibition Concentration (IC) will allow CVs to be calculated on chronic tests. CVs can be calculated for chronic tests because the IC, like the LC, is a point estimate derived from a mathematical model that assumes a continuous dose-response relationship. Specifically, the IC is a point estimate of the concentration that would cause a percent reduction in a non-quantal biological measurement such as fecundity or growth. Since the IC is a point estimate rather than a range, precision can be described in standard statistical terms such as mean, standard deviation, and percent coefficient of variation or CV.[11]

Other factors which can affect test precision include test organism age, condition, and sensitivity; temperature control; feeding; and type of dilution water used. However, these parameters are considered acceptable when the reference toxicity data are within the acceptable range.

Accuracy

Accuracy is the nearness of a measurement to its true value. In a biological toxicity test, accuracy is enhanced with test replication. Testing protocols are designed with replication sufficient to ensure that organism mortality or other effects will be as close to the true value as practicable when dealing with life sciences. Using EPA-approved test procedures, regular

and thorough laboratory inspections and audits, reference toxicants, and performance evaluation checks will ensure the highest degree of accuracy currently attainable in biological toxicity testing.

However, the accuracy of toxicity tests cannot be determined. This is because toxicity is a relative rather than an absolute concept, since only organisms can "measure" toxicity, and there is no true or absolute reference organism. Test results can be compared, but accuracy, as defined by a deviation from a true value, cannot be determined.[12]

Completeness

Completeness is the amount of data collected compared to the amount intended to be collected or required. Following EPA testing protocol will ensure completeness of results. According to the protocol a valid test requires a specified number of organisms to be exposed to a test solution under controlled conditions in both the test and the control for the test.

Representativeness

Representativeness is the extent to which the data collected accurately reflect the population or group being sampled. In conducting biological toxicity testing, there are two areas of representativeness concern: One is in collecting the sample of test solution to which the test organisms are exposed; the other is the species of organism used for the test. Methods of sample collection are detailed in the EPA testing protocol. A sample collector must adhere to standard operating procedures in sample collection, ensure that any sample collecting equipment is operating properly, and ensure that the integrity of the collected sample is preserved without dilution or contamination. The collected sample must, to the greatest extent possible,

represent the conditions that the collected sample was designed to represent. The other question relates to whether or not the organisms chosen for testing represent the universe of organisms in the environment that may be at risk when exposed to the test solution. In this context, representative means the most sensitive, and therefore the most protective of resident species. EPA has taken great care as a result of years of research experience to recommend particular organism species as test organisms. Considering the state-of-the-knowledge, the EPA test protocol's recommended test organisms are representative of the organism universe that they have been selected to represent.

Comparability

Comparability is the similarity of data from different sources. Standard procedures for test solution collection, conducting the test, and analyzing the resultant data must be observed by all who are engaged in NPDES biological toxicity testing to ensure that comparability of results is maintained. Different procedures will have different precision levels, thus invalidating a comparison of results among laboratories. EPA protocols on biological toxicity testing are detailed and specific. Strict adherence to these protocols when conducting a test, along with the use of reference toxicants and performance evaluation tests, alleviate many of the comparability concerns that otherwise would occur.

Replication and Test Sensitivity

The sensitivity of the tests will depend in part on the number of replicates, the statistical probability level selected, and the type of statistical analysis. The minimum recommended number of replicates varies with the test and the statistical method used in each protocol. If the variability remains constant, the sensitivity of the test will increase as the number of replicates is increased.

REPORTING RESULTS

The report should detail specific information about sampling, organism culture, and the test, including why it was performed, where, when, and how. Plant operations, source of effluent and dilution water, test methods, test organisms, quality assurance (i.e., physical-chemical measurements and organism response), data analysis and test results should be discussed. Facts should be complete, accurate, and understandable. Report format and contents have been recommended.[8]

Good writing is a systematic recording of organized thought. It involves a clear, concise, orderly presentation of an understandable message. Quality assurance measures are as important in report preparation as elsewhere in an investigation. Generally, such quality assurance takes the form of report peer review. A review should establish that each sentence is clear, technically accurate, and devoid of a dual meaning, and that no unanswered questions about the toxicity test remain. A toxicity testing report should contain the necessary data, readily accessible, for use in EPA data systems such as the Permit Compliance System. The report should be examined and reexamined to prevent data management errors in transcription, expression of units, and calculations. The use of preprinted forms is helpful because attention then is focused on specific data requirements. Checking of data and calculations by an individual not associated with the initial calculations is employed to minimize errors. Reducing the number of people involved in data transfer can minimize data management errors.

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3. Technical support document for water quality-based toxics control. U.S. EPA, Washington, D.C. EPA-440/4-85/032, 1985.

4. Guidelines and specifications for preparing quality assurance program plans. Quality Assurance Management Staff, U.S. EPA, Sept 1987.

5. Preparing perfect quality assurance project plans. Risk Reduction Engineering Laboratory, Cincinnati, OH, EPA/600/9-89/087 October, 1989.

6. Methods for measuring the acute toxicity of effluents to freshwater and marine organisms. 1985. U.S. EPA. Cincinnati, OH, EPA-600/4-85/013.

7. Short-term methods for estimating the chronic toxicity of effluents and receiving waters to freshwater organisms. 1989. Second Edition. U.S. EPA, Cincinnati, OH, EPA-600/4-89/001.

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10. Methods for chemical analysis of water and wastes. Revised 1983. U.S. EPA, Cincinnati, OH, EPA-600/4-79/020.

11. Guidelines establishing test procedures for the analysis of pollutants under the Clean Water Act; Proposed Rule with Request for Comments. 51 FR 50215, December 4, 1989.

12. Supplement to "Short-term methods for estimating the chronic toxicity of effluents and surface waters to freshwater organisms." U.S. EPA, Washington, D.C. EPA-60014-89/001.

VI.J.4. "National Policy Regarding Whole Effluent Toxicity Enforcement", August 14, 1995.

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

AUG 14 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: National Policy Regarding Whole Effluent Toxicity Enforcement

FROM: Robert Van Heuvelen, Director
Office of Regulatory Enforcement

for Michael Cook, Director
Office of Wastewater Management

TO: Water Management Division Directors, Regions I-X
Regional Counsels, Regions I-X
State NPDES Directors

The purpose of this joint memorandum is to clarify National policy with regard to the two most common issues raised by the regulated community involving the enforcement of whole effluent toxicity (WET) requirements in NPDES permits: 1) single exceedances of WET limits, and 2) inconclusive toxicity reduction evaluations (TREs).

Single Exceedances

Section 309 of the Clean Water Act (CWA) states that any violation of a permit condition or limitation is subject to enforcement. Through EPA's "Enforcement Management System" (EMS) guidance, the EPA Regional or State enforcement authority is encouraged to initiate an appropriate enforcement response to all permit violations. EPA's overall approach to enforcement applies to all parameters--once a facility has been identified as having an apparent permit violation(s), the permitting authority reviews all available data on the seriousness of the violation, the compliance history of the facility, and other relevant facts to determine whether to initiate an enforcement action and the type of action that is appropriate. The EMS recommends an escalating response to continuing violations of any parameter.

EPA does not recommend that the initial response to a single exceedance of a WET limit, causing no known harm, be a formal enforcement action with a civil penalty. The "Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy"

issued by the Office of Water on January 25, 1989 states that any violation of a WET limit is of concern and should receive an immediate, professional review. It does not necessarily require that a formal enforcement action be taken--the enforcement authority has discretion on selecting an appropriate response.

Guidance on enforcement responses to WET violations was added to the EMS in 1989. For example, EPA's recommended response to an isolated or infrequent violation of a WET limit, causing no known harm, is issuance of a letter of violation or an Administrative Order (AO), which does not include a penalty. As with violations of any parameter, the EMS recommends an escalating enforcement response to continuing violations of a WET limit.

The regulated community has expressed concern about the potential for third party lawsuits for single exceedances of WET limits. **Citizens cannot sue a permittee on the basis of a single violation of a permit limit.** Under § 505(a) of the CWA, citizens are allowed to take a civil action against anyone who is alleged "to be in violation" of any standard or limit under the CWA. In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), the Supreme Court held that the most natural reading of "to be in violation" is "a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation--that is, a reasonable likelihood that a past polluter will continue to pollute in the future."

Inconclusive TREs

The 1989 "Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy" states on page 9:

> "In a few highly unusual cases where the permittee has implemented an exhaustive TRE plan, applied appropriate influent and effluent controls, maintained compliance with all other effluent limits, compliance schedules, monitoring, and other permit requirements, but is still unable to attain or maintain compliance with the toxicity-based limits, special technical evaluation may be warranted and civil penalty relief granted. Solutions in these cases could be pursued jointly with expertise from EPA and/or the States as well as the permittee."

EPA is committed to providing technical support in the "highly unusual cases" described above and is in the process of determining the number of facilities nationwide that fit in this category. As the WET program has grown and evolved, sources for this type of technical support have shifted to EPA Regions, States, and Tribes. In a conference call with Regional permits and enforcement staff in April and feedback from the annual

Biological Advisory Committee in May, the Regions requested support from Headquarters in helping to establish national WET technical expertise to address issues such as inconclusive TREs. There has been a national mechanism for this type of support in the past, as a complement to Regional and State/Tribal efforts (e.g., the National Effluent Toxicity Assessment Center). A national vehicle for this type of effort is currently being evaluated with a view toward providing additional support for the national WET program.

EPA believes that the science behind the WET program and test procedures is sound and continually improving, and fully supports the mid-course evaluations that are being planned and executed through an upcoming WET workshop, as well as other planned or ongoing studies. The September 1995 workshop is being organized by the Society for Environmental Toxicology and Chemistry (SETAC) as part of their Pellston workshop series, through partial funding from EPA and other groups. The purpose of the workshop is to assess where we are in the WET program--i.e., identify technical issues that have been resolved and need no further work as well as explore associated technical issues that do need further research, clarification, or resolution. Because participation in the workshop is by invitation only, an open forum will be held soon after the workshop to discuss the results with all interested parties.

Please call us or have your staff call Kathy Smith (ORE) at 202-564-3252 or Donna Reed (OWM) at 202-260-9532 if you have any questions regarding this matter.

cc: Tudor Davies (OST)
NPDES Branch Chiefs, Regions I-X

TAB VI.K

VI. SPECIALIZED ENFORCEMENT TOPICS

K. SLUDGE

*** "Permitting and Enforcement Strategy for Implementation of the Technical Sludge Standards in 40 CFR Part 503", dated November 4, 1991.

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

NOV 4 1991

OFFICE OF
WATER

MEMORANDUM

SUBJECT: **Permitting and Enforcement Strategy for Implementation of the Technical Sludge Standards in 40 CFR Part 503**

FROM: Michael B. Cook, Director
Office of Wastewater Enforcement and Compliance

TO: Water Management Division Directors
Regions I - X

The final rule and preamble for the Part 503 sludge technical standards was sent by the Office of Science and Technology (OST) to the Regions on October 29, 1991 in order to initiate the process of workgroup review that will ultimately culminate in promulgation of the final rule. We believe that implementation considerations are key to the sludge program -- both from the standpoint of the structure of the rule itself as well in support of the rule after promulgation.

Accordingly, we have developed a draft permitting and enforcement strategy covering the various items which will be necessary for effective rule implementation. This strategy was developed based on our ongoing discussions with Regional representatives and was reviewed and commented on by two Regions. We contemplate that these activities would be completed by the Office of Wastewater Enforcement and Compliance, with support and assistance from OST, Office of General Counsel, Office of Enforcement, Regions, and States. The time frames shown in the strategy are designed to track the final promulgation date for the 503 regulations. The anticipated date for final promulgation is the subject of ongoing discussions among several offices. We will keep you apprised of the results of these discussions.

Please recognize that the outline is preliminary and will be the subject of discussions within headquarters, with your offices, and with States (to the extent possible) over the coming weeks. We are also sending copies of these materials to the Regional Permits and Enforcement Branch Chiefs and to the Regional sludge coordinators. We think it will be extremely important to have their input on our implementation plans and look forward to these discussions over the coming weeks. These discussions should lead to a more detailed version of the strategy which will elaborate on many of the items discussed.

Thank you for your support of this important program. Please let me know if you have any questions or suggestions on our implementation plans.

Attachments

cc: Permits Branch Chiefs, Regions I - X
Enforcement Branch Chiefs, Regions I - X
Sludge Coordinators, Regions I - X

PERMITTING AND ENFORCEMENT STRATEGY FOR THE IMPLEMENTATION OF THE TECHNICAL SLUDGE STANDARDS IN 40 CFR PART 503

Overall Strategy

Self Implementation and Phased Permit Issuance: The Office of Wastewater Enforcement and Compliance (OWEC) intends to implement the Part 503 Technical Sludge Standards by relying, to the extent necessary, on the self implementing nature of Part 503 in the initial period following promulgation of the standards; and on individual sludge permits in a phased approach occurring in the 5 years subsequent to the establishment of the standards.

Compliance Deadlines: The strategy assumes that, whether or not a permit has been issued, the compliance date for requirements derived from Part 503 will be 1 year from publication (except for recordkeeping requirements and certain management practices which would be required to begin in advance of this date); unless specified otherwise by a permit or the rule.

Self-Monitoring and Inspections: Compliance with the sludge use and disposal requirements will be verified through the receipt of self monitoring information, as required by permits, and through the inspection of facility records required to be created and maintained by the rule. Information on facility compliance will be tracked using the Permit Compliance System (PCS) (except as otherwise specified for certain types of information).

Enforcement: Enforcement will be taken in accordance with the appropriate regulations, policy, and guidance referenced in this strategy. This enforcement will involve EPA responses including notices of violation, administrative orders, administrative penalty orders, civil law suits and criminal prosecution.

Implementation Workgroup: OWEC is considering the formation of an implementation work group to consider issues which may arise following promulgation of Part 503. This work group may include representatives from the Regions, States, OST and ORD.

The following sections outline the various components of this strategy and indicate the approximate time for completion of each piece. A comprehensive time chart of the entire process is included as an attachment.

A. State Programs

State Sludge Programs: The Agency's ultimate objective is to authorize all States to administer the Sludge permitting and enforcement program.

- OWEC will attempt to expedite the approval process for States interested in obtaining program approval. Limited contractor assistance to prepare State submissions is now (and has been) available.

- OWEC is considering a National Workshop on the development of State Sludge Programs. Such a workshop could be held in the summer of 1992.

EPA/State Roles: Pending State program approval, EPA will implement and enforce the Part 503 requirements. Guidance, including EPA/State Agreements (similar to interim agreements) on the potential role of an unapproved State will be provided by the date of final promulgation and will address the following elements:

- In a third quarter FY 92 OWEC Memorandum, States will be encouraged to assist in implementation and enforcement to the extent they are able and willing to do so.

- Permits drafted by unapproved States must contain Part 503 requirements, even where State law is more stringent.

- Permits drafted by unapproved States will be forwarded to EPA for issuance. Where possible, Federal permits will be issued in concert with State and Local permits in order to minimize disruption within the regulated community.

- Reports of inspections conducted by unapproved States must be forwarded to the Regional office.

B. Permit Applications

Permit application information will be required in accordance with the following approach:

- **Application Forms/Guidance:** In the near term, data will be collected individually from each facility based on guidance on needed application data for each use and disposal practice which will be made available (to coincide with promulgation of Part 503). In the long term, EPA will rely on the new application Form 2A for application data (expected adoption in Summer 1993).

- **Notification:** The strategy calls for effective notification, by the date of final Part 503 rule promulgation, of the treatment works treating domestic sewage which must submit

- **Application Information:** Treatment Works will be asked to identify all practices and avenues of disposal in their application and will be tracked according to this declaration (i.e., may not arbitrarily switch, without effective notice, from cumulative loads to APL concentration limits).

- **Application Deadlines:** The current Parts 122/501 regulations require Treatment Works Treating Domestic Sewage to submit application information within 120 days of 503 promulgation (unless an NPDES permit renewal application is due prior to the full 120 days).

- **Application Information for Site-Specific Permit Limits:** Those Treatment Works desiring site specific permit conditions (on a parcel-by-parcel basis) must request such conditions and provide the site specific data at the time of permit application.

Options For Managing Application Submissions

- Applications will be directed to States with authorized sludge programs. In the absence of authorized programs, the strategy assumes all applications will be submitted to EPA Regional Offices unless EPA directs a facility to submit data to a State Agency pursuant to an EPA/State Agreement.

  - Strategy could call for all Treatment Works (16,000) to submit application data (data used to identify Class I universe);

  - Strategy could call for all major and other pretreatment POTWs (4000) to submit application data within 120 days with remaining applications submitted at time of permit renewal; or

  - Strategy could call for Class I (pretreatment and incinerator facilities) (2000) to submit data, with the remaining applications submitted at the time of permit renewal.

- **Updating Pending Applications and Permit Actions:** Strategy will require that, at the time of final rule promulgation, Treatment Works with pending applications be required to update or supplement their applications with necessary data on their sludge practices. After promulgation of part 503, issuance of Class I Facility permits may be delayed until the Part 503 standards are incorporated into the permit.

C. Permit Issuance

OWEC strategy calls for permit issuance to Treatment Works Treating Domestic Sewage. In most instances, EPA ... POTW ... deemed to be "Treatment Works Treating Domestic Sewage" and required to seek a permit. (Where entities which are not considered to be Treatment Works Treating domestic Sewage" undertake activities covered by the rule, they would still be required under the rule to meet all applicable requirements.)

1. **Land Application:** POTWs; Significant Independent Contractors in the business of applying sludge (Contractor's permit is issued by jurisdiction in which sludge is applied).

2. **D & M:** POTWs; Large Non-POTW D&M Manufacturers.

3. **Surface Disposal:** POTW; Non-POTW Operator of Disposal Unit (If POTW is not operator, POTW will be required to send sludge to permitted facility).

4. **Incinerator:** POTW; Non-POTW Operator of Incinerator (If POTW is not operator, POTW will be required to send sludge to permitted facility).

Options for Prioritizing the Issuance of Sludge Permits (or reopen NPDES Permits in the case where EPA retains the NPDES program or a State Sludge Program is approved):

- **Strategy calls for issuing or reopening permits for all majors and other pretreatment facilities (4000);**

- **Strategy calls for issuing or reopening of Class I facilities (2000);**

- **Strategy calls for issuing or reopening permits based on prioritized use and disposal practices (e.g., incinerators [200] in first six months);**

- **Strategy calls for issuing or reopening permits at Regional discretion; or**

- **Strategy calls for issuing those permits for which permittee has requested site-specific requirements.**

D. Permit Development

Selection of the appropriate option for pollutant limits will be based on an evaluation of information submitted by the permittee and other relevant information. The permittee would be expected to indicate which of the regulatory options it wished to pursue and submit the requisite information. Final development of permit limitations and conditions would be at the discretion of the Permitting Authority after evaluation of all relevant information. The decision to develop site specific permit limits on a parcel-by-parcel basis would also be determined in accordance with this approach.

- **Permit Writer's Guidance:** OWEC promulgated sludge permit regulations in May, 1989. Supplemental permit writer's guidance providing direction on incorporating Part 503 into permits (including selecting appropriate limits, site specific permitting and development of monitoring/reporting requirements) will be needed. Target date for Draft - date of final promulgation. Additional guidance supporting permitting (e.g., developing

air dispersion models for incinerators) will be made available as soon as possible thereafter.

- **Tools:** Depending on Part 503, National General Permit or Model Individual Permits will be provided to implement requirements for Non-Majors, or Non-Class I Facilities. Target for Draft - date of final promulgation; Final - one year after final promulgation.

- **Training:** Permit Writer Training conducted in all Regional offices on Part 503 requirements, technical support document, and available supporting guidance. The first 5 workshops will be held in conjunction with the AMSA workshops 3 to 6 months following promulgation.

E. Septage Appliers

Part 503 is anticipated to be completely self-implementing regarding the regulation of septage appliers. This group will not be specifically targeted for permit issuance or inspections. The Part 503 rule does require recordkeeping by septage appliers and in the event an environmental problem is suspected to have been caused by the application of septage, the case will be thoroughly investigated and enforcement will be taken as warranted.

F. Compliance Activities

OWEC expects to concentrate its compliance activities on Class I Facilities. These facilities will undergo routine inspection and will be expected to submit self monitoring data.

- **DMRs:** OWEC is considering the need to develop a new DMR for sludge reporting purposes. Such a document will require OMB approval and therefore its availability at the time of promulgation cannot be assured.

- **Data Tracking:** The submission of self monitoring data will be tracked as well as sludge quality values and prescribed management practices.

- **Inspection Guidance:** OWEC has already issued guidance on inspection activities during the interim period prior to Part 503. It is anticipated that this guidance will be supplemented with references to Part 503 no later than one year after final promulgation. Inspection coverage of Class I Facilities by Regions and approved States will be determined by the date of final promulgation.

- **Inspector Training:** OWEC expects to sponsor supplemental inspector training on sludge requirements in the second through fourth quarters of FY 1993.

- **Receipt of Data:** OWEC anticipates receiving compliance data from Regions and Approved States on a semiannual basis.

- **PCS:** The Permit Compliance System (PCS) is being modified to accommodate sludge data. While this process is expected to be ongoing, initial modifications are expected to be completed at the time of Part 503 promulgation. Changes to the PCS Policy and WENB data elements will also be made at this time.

- **SNC:** OWEC is also planning to establish a definition of significant noncompliance for reporting and enforcement purposes. Target date is September 30, 1992.

G. EPA Enforcement Activities

As with other EPA regulatory programs, the circumstances warranting the enforcement of Part 503 requirements is a matter within the discretion of each Region. Significant noncompliance with sludge requirements should be responded to with a formal enforcement action either by EPA or an approved State. Where enforcement actions are taken for other Clean Water Act violations, sludge violations will be expected to be included in the case.

- **Enforcement Management System: The Agency's EMS will have to be revised to integrate the enforcement of sludge requirements into the existing enforcement program (Target date - one year after final promulgation).**

- **Penalty Calculations: Supplemental guidance on penalty calculations to determine BEN and Gravity will need to be provided (Target date - one year after final promulgation).**

- **Consent Decrees: Model administrative orders, civil complaints, and consent decree addressing sludge noncompliance may be made available (Target date - one year after final promulgation).**

- **Data Bases: Existing data bases will be used to track pending Federal enforcement actions (no modification needed).**

H. Public Outreach

OWEC plans to conduct extensive public outreach to ensure the regulated community and the public have an opportunity to become familiar with the Part 503 requirements and ask questions regarding the implementation and enforcement of the rules. Outreach will include cosponsoring public workshops with AMSA, making presentations at AMSA, ASWIPCA and WPCF Conferences, and responding to individual inquiries. OWEC will, by the date of final promulgation of the rule, prepare and distribute to the public, an implementation strategy for the Part 503 Standards, which includes Q's and A's.

Regional training and oversight will be conducted through discussions at the Branch Chief and Water Management Division Meetings, permit writer and inspector training, and as a component of the Annual Regional Review process. In addition, OWEC plans to sponsor a National Meeting shortly after final promulgation of the rule, for both Federal and State sludge personnel. Finally, State sludge programs will be encouraged through direct Regional contacts with State Agencies.

*** "Compliance Tracking and Enforcement of the Interim Sludge Requirements", dated January 3, 1991.

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

JAN 3 1991

OFFICE OF WATER

MEMORANDUM

SUBJECT: Compliance Tracking and Enforcement of the Interim Sludge Requirements

FROM: James R. Elder, Director
Office of Water Enforcement and Permits

TO: Water Management Division Directors
Regions I-X

The purpose of this memorandum is to ensure that procedures are established in your Region for data tracking, compliance evaluation, and enforcing the requirements outlined in the Interim Sludge Permitting Strategy issued in September, 1989. At a minimum, procedures should be in place for: compliance evaluation and tracking of permit requirements related to sludge; identifying instances of noncompliance with these permit requirements; and enforcement against such noncompliance. These activities are designed to be incorporated into existing procedures to minimize the burden on the Region. These measures are necessary to ensure appropriate implementation of the sludge management program in the interim and for establishing a foundation for the long-term sludge program. The long-term sludge program will begin with the promulgation of the technical sludge regulations, which are expected to be promulgated in January, 1992.

Background

On May 2, 1989, EPA promulgated the Sludge State Program and Permitting Requirements Final Rule (40 CFR Parts 122, 123, 124 and 501). This rule provided the legal and programmatic framework for a national sludge use and disposal program by establishing the requirements and procedures for addressing sludge management in permits issued by EPA, or States with an approved sludge management program. The rule also codified EPA's authority to take interim measures prior to the promulgation of the long-term technical sludge regulations. These authorities include requiring monitoring and reporting of sludge quality and the authority to establish case-by-case requirements for sludge use and disposal.

In September, 1989, the Office of Water (OW) issued the final Sewage Sludge Interim Permitting Strategy. This Strategy outlined EPA's policies for implementing the requirements of Section 405(d)(4) of the Clean Water Act in the interim period prior to the promulgation of the final technical sludge regulations. The Strategy centered around the requirements for sludge management to be imposed in NPDES permits issued to POTWs. In order to implement the requirements of Section 405(d)(4) of the Clean Water Act, the Strategy requires that:

- All NPDES permits issued to POTWs shall require that the permittee comply with all existing federal regulations governing the use and disposal of sewage sludge;
- All permits shall contain a reopener clause to be used upon promulgation of the Part 503 technical regulations to incorporate these requirements into the permit;
- The permittee shall notify the permitting authority of any significant change in its sludge use or disposal practice;
- All permits shall contain sludge monitoring requirements; and
- All permits issued to priority POTWs shall contain additional conditions developed on a case-by-case basis as necessary to ensure protection of public health and the environment.

Therefore, at the time of permit reissuance, all POTWs should have conditions for sludge management included in their NPDES permit.

The Interim Strategy and the Part 501 rule establish the framework for managing sludge prior to the promulgation of the technical sludge regulations. As such, they represent the minimum implementation activities required for sludge program management. In order to enforce these requirements, it will be necessary to implement the measures identified below, including: tracking and data entry, compliance assessment, inspections and enforcement.

EPA has the primary responsibility for compliance tracking and enforcement of sludge requirements in the interim period. A primary empnasis of the interim strategy, however, is to encourage States with existing effective sludge management

programs to accept the responsibility for sludge implementation in the interim period through the development of an agreement between the State and EPA. Where an agreement has been established for sludge management, the responsibilities for sludge implementation and enforcement can be shared pursuant to the conditions in the agreement. States should be encouraged to take on the responsibility for sludge permitting, tracking and data entry, compliance assessment, inspections, and enforcement in the interim period to the extent that they are willing and able to do so.

Tracking and Data Entry

The Permit Compliance System (PCS) should be used for tracking the sludge quality monitoring data received from POTWs, and for evaluating compliance with monitoring requirements and case-by-case sludge conditions, including any applicable sludge limits.

The requirement to monitor and report sludge quality applies to all POTWs with NPDES permits, whereas additional case-by-case conditions are to be imposed on "priority" POTWs. These requirements are to be included in the permit at the time of permit reissuance. In most cases, these priority facilities will be majors, but in some cases priority sludge facilities will be minors. Data entry into PCS is required for all facilities defined as majors (including those facilities which are selected as majors by the Region). Therefore, sludge monitoring data reported to the Region by priority facilities which are majors should be entered into PCS. We recommend tracking sludge monitoring data from minor facilities, but data entry into PCS for these facilities is not required.

The federal regulations (40 CFR 122.41(l)(4)(i)) require that sludge reports be submitted on DMRs or forms specified by the prmitting authority. Since the manner of reporting will affect the ease with which data can be entered into PCS, we recommend that your Region require the use of DMRs, or other forms which use the same format, for sludge reporting so that data entry is facilitated into PCS.

Within PCS, the tracking of sludge monitoring data can be accomplished through the use of the pipe schedule family. Sludge data can be tracked under a separate "pipe" which is designated solely for tracking sludge and which is described as such in the [illegible] field. In order to distinguish sludge from effluent data, enter [illegible] of the pipe description (PIPE) field. In this way, sludge monitoring data can be differentiated from effluent data received from the same facility. Once the sludge "pipe" has been established, the pollutants for which the sludge is monitored can be entered as

Parameter Limit data. To further distinguish sludge from effluent data at the Parameter Limit level, use the monitoring location (MLOC) of "+" in PCS. If any applicable case-by-case numeric limits have been established for sludge in the POTW's permit, these limits can also be entered as Parameter Limit data into PCS. In rare instances, where case-by-case numeric limits have been established by the permit writer for more than one disposal option, the Region should use a separate "pipe" in PCS for each such disposal option. The numerical data received from POTWs on sludge quality can be entered into PCS as Measurement Violation data. Once these data are entered, PCS will compare the data with any applicable limits to determine the compliance status of the facility.

Compliance Assessment

Data which are input into PCS in the manner described above will show up on the QNCR in the case of absent or missing data under the pipe schedule. If only certain pollutants are missing from the sludge data in PCS, then the facility will be in RNC. If all data are missing for sludge under the pipe schedule, the facility will be in SNC and will be so identified by PCS. Violations of applicable sludge limits will not automatically be determined to be SNC or RNC, since it is unlikely that enough data will be input for the system to make the RNC or SNC calculation. The Region can manually flag these limit violations as RNC in the same way as for effluent violations. Sludge violations, like any other violations identified as SNC are required to be responded to in a timely and appropriate manner by the permitting authority.

Inspections

EPA Headquarters is developing guidance for incorporating sludge into existing inspections in the interim period. This guidance should be available early in 1991 and contains, among other things, sludge inspection checklists which can be incorporated into the existing CEI and PAI inspections. These checklists are designed to assist inspectors in determining compliance with interim sludge requirements. The existing NPDES Inspection Manual (May, 1988) also contains questions to assist in evaluating sludge treatment operations. These questions can be used during current inspections until the new checklists are distributed to the Regions.

conditions for priority facilities. Therefore, the Regions should focus their inspection activities for sludge at these same facilities. Evaluating compliance with sludge permit conditions should be combined with the CEI or PAI, but may be conducted as a

separate site visit. For priority sludge facilities, compliance with sludge permit conditions should be determined as part of the regularly scheduled site visit.

Enforcement

Violations of sludge permit conditions constitute noncompliance with the Clean Water Act and, as such, are subject to enforcement action. If a facility is determined to be in noncompliance with any applicable sludge requirements, the Region should follow the principles of their existing EMS to develop compliance information and to translate that information into appropriate enforcement action. The Region should pay particular attention to facilities which fail to submit required sludge monitoring reports, since the data contained in these reports will form a basis for developing permit conditions for the long-term sludge program.

One of the primary objectives for imposing sludge conditions in permits in the interim period is to establish base-line data regarding sludge quality and sludge use and disposal practices. These data will be crucial once the long-term sludge program is initiated since these data will be used to establish appropriate permit conditions for sludge use and disposal. It is necessary to begin the preparation for the long-term program now so that data are available and procedures are in place prior to the effective date of the upcoming technical sludge regulations.

[illegible] regarding the requirements in the interim period for sludge, or if you want to discuss these requirements further, contact me at (FTS) 475-8488. The staff contact familiar with these sludge compliance monitoring and enforcement issues is Lee Okster, (FTS) 475-8329.

cc: Cynthia Dougherty
Regional Sludge Coordinators

TAB VI.L

"Enforcement Efforts Addressing Sanitary Sewer Overflows", March 7, 1995.

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

MAR 07 1995

MEMORANDUM

SUBJECT: Enforcement Efforts Addressing Sanitary Sewer Overflows

FROM: Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

Robert Perciasepe, Assistant Administrator
Office of Water

TO: Water Management Division Directors, Regions I - X
Regional Counsels, Regions I - X
State Directors

Sanitary sewer overflows (SSOs) are discharges of untreated sewage from a separate sanitary sewer collection system prior to the headworks of a sewage treatment plant. These systems are designed to collect and convey sewage from households and businesses and wastewater from industries to sewage treatment plants for treatment in accordance with Clean Water Act requirements prior to discharge to waters of the United States. Due to the physical characteristics of some pipelines (joints, broken sections, installation below groundwater levels, manholes, and illegal connections), these systems also collect storm water and ground water. SSO discharges to waters of the United States are prohibited by the Clean Water Act unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Discharges without an NPDES permit are illegal. In addition, SSO discharges often cause violations of water quality standards and violate NPDES permit requirements for proper operation and maintenance. SSOs are important concerns for the environment, human health, the owners and the regulatory agencies.

The Environmental Protection Agency (EPA) has limited information about the magnitude of SSO problems nationally and about how various NPDES permitting authorities are addressing the serious infrastructure, health and water quality problems caused by SSOs. The EPA must also ensure appropriate national consistency in addressing SSOs.

The EPA is beginning a dialogue among interested parties on how to improve our knowledge about this serious problem. Initiating the dialogue has caused some participants and others to question the EPA about how the dialogue will affect SSO enforcement actions. The dialogue will not affect in any way ongoing enforcement actions that address SSOs. The dialogue also will not preclude the EPA or States from bringing additional enforcement actions. The EPA believes that a delay in enforcement is unwarranted because of the seriousness of many of these discharges to public health and water quality.

The EPA hopes the dialogue will result in a better understanding nationally of the problem and perhaps national guidance to States and Regions on how to better protect the public and the environment from these serious sources of water pollution and human health risks.

If you have any questions on this memorandum, please contact either Alan Morrissey of the Office of Enforcement and Compliance Assurance at (202) 564-4026, or Kevin Weiss of the Office of Wastewater Management at (202) 260-9524.

VI.L.2. Addition of Chapter X to Enforcement Management System (EMS): "Setting Priorities for Addressing Discharges from Separate Sanitary Sewers', March 7, 1996.

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

MAR 7 1996

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Addition of Chapter X to Enforcement Management System (EMS): Setting Priorities for Addressing Discharges from Separate Sanitary Sewers

FROM: Steven A. Herman
Assistant Administrator

TO: Water Management Division Directors, Regions I-X
NPDES State Enforcement Directors
Regional Counsels, Regions I-X

I am pleased to transmit to you a new chapter in final form for the Enforcement Management System (EMS) Guide. This new chapter provides a method of setting priorities for addressing discharges of untreated sewage from separate sanitary sewer collection systems prior to the headworks of a sewage treatment plant. Included with this chapter is an Enforcement Response Guide, specifically tailored to these types of discharges.

I want to express my appreciation to those Regional, Headquarters, State personnel, and the members of the Federal Advisory Sub-Committee for Sanitary Sewer Overflows (SSO) who helped develop this document. The Advisory Sub-Committee reviewed it at two public meetings in August and October, 1995. The cooperation and hard work of all interested parties has produced this final document which I believe will help protect public health and the environment from these serious sources of water pollution.

This guidance supplements the current EMS by establishing a series of guiding principles and priorities for use by EPA Regions and NPDES States in responding to separate sanitary sewer discharge violations. The guidance allows sufficient flexibility to alter these priorities based on the degree of public health or environmental risk presented by specific discharge conditions. Implementation of this guidance by EPA and the States will promote national consistency in addressing discharges from separate sanitary sewers. Implementation will also ensure that

enforcement resources are used in ways that maximize public health and environmental benefits.

The Regions should ensure that all approved States are aware of this additional EMS guidance, and the Regions and NPDES States should begin the process of modifying their written EMS documents to include it. Both Regions and States should have these documents revised and implemented no later that November 15, 1996.

If you have questions about this document, please feel free to contact Brian J. Maas, Director, Water Enforcement Division (202/564-2240), or Kevin Bell of his staff (202/564-4027).

cc: Mike Cook, OWM

Attachments

THE ENFORCEMENT MANAGEMENT SYSTEM

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

(CLEAN WATER ACT)

CHAPTER X: Setting Priorities for Addressing Discharges from Separate Sanitary Sewers

U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF REGULATORY ENFORCEMENT

1996

Setting Priorities for Addressing Discharges from Separate Sanitary Sewers

Discharges of raw or diluted sewage from separate sanitary sewers before treatment can cause significant public health and environmental problems. The exposure of the public to these discharges and the potential health and environmental impacts are the primary reasons EPA is developing this additional guidance on these discharges. This document provides a method of setting priorities for regulatory response, and serves as a supplement to the Enforcement Management System guidance (EMS, revised February 27, 1986). As such, this document addresses only those discharges which are in violation of the Clean Water Act. As a general rule, the discharges covered by this guidance constitute a subset of all discharges from separate sanitary sewer systems.

Legal Status

In the context of this document, a "discharge from a separate sanitary sewer system" (or "discharge") is defined as any wastewater (including that combined with rainfall induced infiltration/inflow) which is discharged from a separate sanitary sewer that reaches waters of the United States prior to treatment at a wastewater treatment plant. Some permits have specific requirements for these discharges, others have specific prohibitions under most circumstances, and still other permits are silent on the status of these discharges.

The legal status of any of these discharges is specifically related to the permit language and the circumstances under which the discharge occurs. Many permits authorize these discharges when there are no feasible alternatives, such as when there are circumstances beyond the control of the municipality (similar to the concepts in the bypass regulation at 40 CFR Part 122.41 (m)). Other permits allow these discharges when specific requirements are met, such as effluent limitations and monitoring/reporting.

Most permits require that any non-compliance including overflows be reported at the end of each month with the discharge monitoring report (DMR) submittal. As a minimum, permits generally require that overflow summaries include the date, time, duration, location, estimated volume, cause, as well as any observed environmental impacts, and what actions were taken or are being taken to address the overflow. Most permits also require that any non-compliance including overflows which may endanger health or the environment be reported within 24 hours, and in writing within five days. Examples of overflows which may endanger health or the environment include major line breaks, overflow events which result in fish kills or other significant harm, and overflow events which occur in environmentally sensitive areas.

For a person to be in violation of the Clean Water Act: 1) a person must own, operate, or have substantial control over the conveyance from which the discharge of pollutants occurs, 2) the discharge must be prohibited by a permit, be a violation of the permit language, or not be authorized by a permit, and 3) the discharge must reach waters of the United States. In addition, discharges that do not reach waters of the United States may nevertheless be in violation of Clean Water Act permit requirements, such as those requiring proper operation and maintenance (O&M), or may be in violation of state law.

Statement of Principles

The following six principles should be considered as EPA Regions and States set priorities for addressing violating discharges from separate sanitary sewers:

1. All discharges (wet weather or dry weather) which cause or contribute significantly to water quality or public health problems (such as a discharge to a public drinking water supply) should be addressed as soon as physically and financially possible. Other discharges may, if appropriate, be addressed in the context of watershed/basin plans (in conjunction with state or federal NPDES authorities).

2. Discharges which occur in high public use or public access areas and thus expose the public to discharges of raw sewage (i.e., discharges which occur in residential or business areas, near or within parks or recreation areas, etc.) should be addressed as soon as physically and financially possible.

3. Dry weather discharges should be addressed as soon as physically and financially possible.

4. Discharges due to inadequate operation and routine maintenance should be addressed as soon as possible. (Physical and financial considerations should be taken into account only in cases where overflow remedies are capital intensive.)

5. Discharges which could be addressed through a comprehensive preventive maintenance program or with minor capital investment should be addressed as soon as physically and financially possible.

6. With respect to principles 1 through 5 above, schedules of compliance which require significant capital investments should take into account the financial capabilities of the specific municipality, as well as any procedures required by state and local law for publicly owned facilities in planning, design, bid, award, and construction. (See later sections on Schedules).

Causes of Sanitary Sewer Discharges

Discharges from separate sanitary sewers can be caused by a variety of factors including, but not limited to:

1. Inadequate O&M of the collection system. For example, failure to routinely clean out pipes, failure to properly seal or maintain manholes, failure to have regular maintenance of deteriorating sewer lines, failure to remedy poor construction, failure to design and implement a long term replacement or rehabilitation program for an aging system, failure to deal expeditiously with line blockages, or failure to maintain pump stations (including back-up power).

2. Inadequate capacity of the sewer system so that systems which experience increases in flow during storm events are unable to convey the sewage to the wastewater treatment plant. For example, allowing new development without modeling to determine the impact on downstream pipe capacity, insufficient allowance for extraneous flows in initial pipe design (e.g. unapproved connection of area drains, roof leaders, foundation drains), or overly optimistic Infiltration/Inflow reduction calculations.

3. Insufficient capacity at the wastewater treatment plant so that discharges from the collection system must occur on a regular basis to limit flows to the treatment plant. For example, basic plant designs which do not allow sufficient design capacity for storm flows.

4. Vandalism and/or facility or pipeline failures which occur independent of adequate O&M practices.

Applicable Guidance

For many years, EPA and the States have been working with municipalities to prevent discharges from separate sanitary sewer systems. The preferred method has been to use the general policy on responding to all violations of the Clean Water Act which is contained in the EMS guidance. Factors which are considered are the frequency, magnitude, and duration of the violations, the environmental/public health impacts, and the culpability of the violator. This guidance sets up a series of guiding principles for responding to separate sanitary sewer discharge violations, and it supplements the current EMS.

Every EPA Region and State uses some form of this general enforcement response guidance as appropriate to the individual state processes and authorities. Under the guidance, various EPA Regions and States have taken a large number of formal enforcement actions over the past several years to address sanitary sewer discharge problems across the country. Responses have included administrative orders and/or civil judicial actions

against larger municipalities to address sanitary sewer discharge problems, resulting in substantial injunctive relief in some cases.

As a result of EPA Region and State enforcement efforts, a number of municipalities have invested substantial resources in diagnostic evaluations and designing, staffing, and implementing O&M plans. Other municipalities have undertaken major rehabilitation efforts and/or new construction to prevent sanitary sewer discharges.

Priorities for Response

There are approximately 18,500 municipal separate sanitary sewage collection systems (serving a population of 135 million), all of which can, under certain circumstances, experience discharges. Given this fact, the Agency has developed a list of priorities in dealing with the broad spectrum of separate sanitary sewer discharges to ensure that the finite enforcement resources of EPA and the States are used in ways that result in maximum environmental and public health benefit. However, these priorities should be altered in a specific situation by the degree of health or environmental risks presented by the condition(s).

In the absence of site-specific information, all separate sanitary sewer discharges should be considered high risk because such discharges of raw sewage may present a serious public health and/or environmental threat. Accordingly, first priority should be given within categories (such as dry weather discharges and wet weather discharges) to those discharges which can be most quickly addressed. The priority scheme listed below takes this into account by first ensuring that municipalities are taking all necessary steps to properly operate and maintain their sewerage systems. Corrective action for basic O&M is typically accomplished in a short time, and can yield significant public health and environmental results.

Risk again becomes a determinant factor when conditions warrant long term corrective action. The goal here should be to ensure that capital intensive, lengthy compliance projects are prioritized to derive maximum health and environmental gains.

The priorities for correcting separate sanitary sewer discharges are typically as follows:

1) Dry weather, O&M related: examples include lift stations or pumps that are not coordinated, a treatment plant that is not adjusted according to the influent flow, poor communication between field crews and management, infiltration/inflow, and/or pretreatment problems.

2) Dry weather, preventive maintenance related: examples include pumps that fail due to poor maintenance, improperly calibrated flow meters and remote monitoring equipment, insufficient maintenance staff, deteriorated pipes, and/or sewers that are not cleaned regularly.

3) Dry weather, capacity related: examples include an insufficient number or undersized pumps or lift stations, undersized pipes, and/or insufficient plant capacity.

4) Wet weather, O&M related: examples include excessive inflow and/or infiltration (such as from improperly sealed manhole covers), inadequate pretreatment program (i.e. excessive industrial connections without regard to line capacity), uncoordinated pump operations, treatment plant operation that is not adjusted according to the influent flow, poor coordination between field crews and management, illegal connections, and/or no coordination between weather forecast authorities and sewer system management.

5) Wet weather, preventive maintenance related: examples include poor pump maintenance leading to failure, improperly calibrated flow meters and remote monitoring equipment, insufficient maintenance staff, and/or sewers that are not cleaned regularly.

6) Wet weather, O&M minor capital improvement related: examples include the upgrading of monitoring equipment, pumps, or computer programs, and/or repair or replacement of broken manholes or collapsed pipes.

7) Wet weather capacity, quick solution related: examples include a known collection system segment that is a "bottleneck", pumps beyond repair in need of replacement, and/or need for additional crews or technical staff.

8) Wet weather, capacity, health impact related requiring long term corrective action: examples include frequent discharges to public recreational areas, shellfish beds, and/or poor pretreatment where the total flow is large.

9) Wet weather, capacity, sensitive area related requiring long term corrective action: examples include discharges to ecologically and environmentally sensitive areas, as defined by State or Federal government.

Selecting A Response

The appropriate regulatory response and permittee response for separate sanitary sewer discharges will depend on the specifics of each case. The regulatory response can be informal, formal, or some combination thereof. Typical regulatory

responses include a phone call, Letter of Violation (LOV), Section 308 Information Request, Administrative Order (AO), Administrative Penalty Order (APO), and/or judicial action. The permittee response can range from providing any required information to low cost, non-capital or low capital improvements to more capital intensive discharge control plans.

The attached chart lists some categories of separate sanitary sewer noncompliance along with the range of response for each instance. The chart is intended as a guide. The responses listed on the chart are not to be considered mandatory responses in any given situation. EPA and the States should use the full range of regulatory response options (informal, formal, or some combination thereof) to ensure that the appropriate response or remedy is undertaken by the permittee or municipality. All regulatory responses should be in accordance with the concept of the EMS regarding orderly escalation of enforcement action.

Developing Compliance Schedules

A compliance schedule should allow adequate time for all phases of a sanitary sewer discharge control program, including development of an O&M plan, diagnostic evaluation of the collector system, construction, and enhanced O&M. Municipalities should be given a reasonable length of time to develop schedules so they can realistically assess their compliance needs, examine their financing alternatives, and work out reasonable schedules for achieving compliance. Nevertheless, timelines for schedules should be as short as physically and financially possible.

Short Term Schedules

In general, short term schedules would be appropriate for sanitary sewer discharges involving O&M problems, or where only minor capital expenses are needed to correct the problem. The schedule should have interim dates and a final compliance date incorporated in the administrative order or enforcement mechanism.

Comprehensive Discharge Control Schedules

Comprehensive discharge control schedules should be used where specific measures must be taken to correct the discharges, and the measures are complicated, costly, or require a significant period of time to implement. If appropriate, these schedules should include the use of temporary measures to address high impact problems, especially where a long term project is required to correct the sanitary sewer discharge violation.

When working with municipalities to develop comprehensive schedules, EPA Regions and States should be sensitive to their

special problems and needs, including consideration of a municipality's financial picture. Factors that should be considered are the municipality's current bond rating, the amount of outstanding indebtedness, population and income information, grant eligibility and past grant experience, the presence or absence of user charges, and whether increased user charges would be an effective fund-raising mechanism, and a comparison of user charges with other municipalities of similar size and population.

Physical capability should be considered when schedules are developed. Schedules should include interim milestones and intermediate relief based on sound construction techniques and scheduling such as critical path method. Compliance schedules should be based on current sewer system physical inspection data adequate to design sanitary sewer discharge control facilities. Schedules should not normally require extraordinary measures such as overtime, short bidding times, or other accelerated building techniques. Where possible, schedule development should be completed according to normal municipal government contracting requirements.

Financial capability should also be considered in schedule development, including fiscally sound municipal financing techniques such as issuing revenue bonds, staging bond issuance, sequencing project starts, sensitivity to rate increase percentages over time.

Note: The intent of this guidance is to aid the Regions and States in setting priorities for enforcement actions based on limited resources and the need to provide a consistent level of response to violations. This does not represent final Agency action, but is intended solely as guidance. This guidance is not intended for use in pleading, or at hearing or trial. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This guidance supplements the Agency's Enforcement Management System Guide (revised February 27, 1986).

ENFORCEMENT RESPONSE GUIDE
DISCHARGES FROM SEPARATE SANITARY SEWERS

NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE
Discharge without a permit or in violation of general prohitition	Isolated & infrequent, dry weather O&M related	Phone call, LOV, 308 request
Discharge without a permit or in violation of general prohibition	Isolated & infrequent, dry weather capacity related	308 request, AO, APO, Judicial action
Discharge without a permit or in violation of general prohibition	Isolated & infrequent, wet weather O&M related	Phone call, LOV, 308 request
Discharge without a permit or in violation of general prohibition	Isolated & infrequent, wet weather, quick and easy solution	LOV, 308 request
Discharge without a permit or in violation of general prohibition	Isolated & infrequent, wet weather capacity related, health and/or sensitive areas	LOV, 308 request, AO, APO
Discharge without a permit in violation of general prohibition	Isolated & infrequent, wet weather capacity related, non-health, non-sensitive areas	Phone call, LOV, 308 request
Discharge without a permit or in violation of general prohibition	Cause unknown	Phone call, LOV, 308 request
Discharge without a permit or in violation of general prohibition	Permittee does not respond to letters, does not follow through on verbal or written agreement	AO, APO, judicial action
Discharge without a permit or in violation of general prohibition	Frequent, does not significantly affect water quality, no potential public health impact	LOV, 308 request, AO, APO
Discharge without a permit or in violation of general prohibition	Frequent, cause or contribute significantly to WQ problems, or occur in high public use and public access areas, or otherwise affect public health	AO, APO, judicial action

ENFORCEMENT RESPONSE GUIDE
DISCHARGES FROM SEPARATE SANITARY SEWERS

NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE
Missed interim date in CDCP	Will not cause late final date or other interim dates	LOV
Missed interim date in CDCP	Will result in other missed dates, no good and valid cause	LOV, AO, APO, judicial action
Missed final date in CDCP	Violation due to force majeure	Contact permittee and require documentation of good or valid cause
Missed final date in CDCP	Failure or refusal to comply without good and valid cause	AO, APO or judicial action
Failure to report overflows (as specified in permit)	Isolated and infrequent, health related	Phone call, LOV, AO, APO
Failure to report overflows (as specified in permit)	Isolated and infrequent, water quality and environment related	Phone call, LOV, AO, APO
Failure to report overflows (as specified in permit)	Permittee does not respond to letters, does not follow through on verbal or written agreement, or frequent violation	AO, APO, judicial action, request for criminal investigation
Failure to report permit requirements	Any instance	Phone, LOV, AO, APO

CDCP=Comprehensive Discharge Control Plan

TAB VI.M

"Storm Water Enforcement Strategy", January 12, 1994.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

JAN 12 1994

MEMORANDUM

SUBJECT: Storm Water Enforcement Strategy

FROM: Michael B. Cook, Director
Office of Wastewater Enforcement and Compliance

Frederick F. Stiehl
Enforcement Counsel for Water

TO: Water Management Division Directors
Regions I-X

Regional Counsels
Regions I-X

Attached is the Storm Water Enforcement Strategy for FY 1994-1995. This strategy incorporates comments received from Regions and States on two draft versions as well as input by an EPA/State Storm Water Workgroup. The Workgroup meeting in February included representatives from Headquarters, three Regions, and two States.

The strategy focuses on getting regulated entities "into the system" by identifying and taking action against Municipal Separate Storm Sewer System (MS4) entities and facilities that have not filed a permit application. While the approach to dealing with the MS4 universe is relatively straightforward, the large remaining number of regulated facilities requires that we utilize different approaches than we have in the past to deal with noncompliance. Some approaches utilize "sweeps" which concentrate activity in a watershed or geographic location. Such activities may be mailings, telephone canvassing or inspections and then publication of these activities in order to give visibility to the program. Regions will also want to review any active judicial cases to determine whether a facility is subject to the storm water regulations, coordinate with municipalities regarding facilities within its jurisdiction, and inquire as to the status of a facility's permit application during routine NPDES inspections. Citizen complaints and contact with local sediment/erosion control programs will also be an important source of information for construction sites.

Three points from the strategy are worth highlighting: 1) Section 308 letters may be used to request the submittal of a NOI/permit application from more than nine addressees nationwide: 2) a storm water discharge need not be observed in order to determine inclusion in the program (but evidence of a conveyance for a discharge must exist), and; 3) failure to apply for a permit is a violation of Section 308, as this section requires reports or other information to carry out Section 402.

Although this strategy was developed for use by EPA Regions, States may want to adopt a similar approach to enforcement. Several Regions have begun compliance/enforcement activities and we need to share information about Regional as well as State activities. The National Storm Water Coordinators' Meeting, scheduled for February 2-4, 1994 in Washington, DC, will be an excellent opportunity to exchange ideas and experiences about the compliance/enforcement issues of the program.

Finally, we want to thank Gerry Levy of Region I for his participation as leader of the Storm Water Workgroup. If you have any questions regarding the strategy, contact David Lyons at (202)-260-8310 or John Lyon at (202)-260-8177.

Attachment

cc: Compliance Branch Chiefs, Regions I-X
Permits Branch Chiefs, Region I-X
Water Branch Chiefs, ORC, Regions I-X
Storm Water Coordinators, Regions I-X

STORM WATER ENFORCEMENT STRATEGY
FY 1994-1995

Summary

The goal of this enforcement strategy is: Equitable and consistent enforcement against non-complying priority storm water dischargers used in combination with incentive measures to achieve compliance. Full participation and compliance by the entire regulated community is the long term goal of this strategy, as it is for all the Agency's enforcement strategies. Although this strategy was developed for use by EPA Regions, approved NPDES States may want to adopt a similar approach when developing their enforcement strategy.

Outreach has been the primary mechanism used thus far to achieve compliance. To provide for a nationally coordinated effort, starting in FY 1994, we will increase the use of compliance monitoring and enforcement to obtain compliance. The compliance/enforcement priorities for the program in FY 1994-1995 are identification of and action against: 1) municipal separate storm sewer systems (MS4s) entities that have failed to submit a timely and complete permit application; 2) regulated facilities which failed to apply for a permit and are outside the jurisdiction of a regulated MS4; and 3) regulated facilities which failed to apply for a permit and are within jurisdiction of a regulated MS4.

The way the Agency intends to manage its storm water program is based on three principles: 1) integration of storm water compliance/enforcement activities into NPDES and other media inspection activities; 2) use of publicity to maximize the impact of any enforcement actions; and 3) expediting the Administrative Penalty Order/Administrative Order issuance process. The size of the regulated universe far exceeds that of the traditional NPDES program. Therefore, Regions and States are encouraged to make use of new approaches to enforcement and share information with each other about what works and what doesn't.

This strategy discusses the compliance/enforcement activities to identify non-filers, use of local/State sediment/erosion control programs to manage regulated construction sites, and ways to expedite the issuance of the Administrative Penalty Order and Administrative Order.

STORM WATER ENFORCEMENT STRATEGY
FY 1994-1995

I. Storm Water Program Background

A. General

Pollutants in storm water discharges from many sources are largely uncontrolled. The National Water Quality Inventory: 1990 Report to Congress provides a general assessment of water quality based on biennial reports submitted by States as required by Section 305(b) of the Clean Water Act (CWA). The report indicates that approximately 30% of identified cases of water quality impairment are attributable to storm water discharges. States identified a number of major sources of storm water runoff that cause water quality impacts, including separate storm sewer systems, and construction, waste disposal, and resource extraction sites.

The Federal Water Pollution Control Act of 1972 prohibits the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Efforts to improve water quality under the NPDES program traditionally have focused on reducing pollutants in discharges of industrial process wastewater and from municipal sewage treatment plants. Efforts to address storm water discharges under the NPDES program have generally been limited to certain industrial categories with effluent limits for storm water.

In response to the need for comprehensive NPDES requirements for discharges of storm water, Congress amended the CWA in 1987 to require EPA to establish a two-phased NPDES permitting approach to address storm water discharges. To implement these requirements, on November 16, 1990 EPA published initial permit application requirements for certain categories of storm water discharges associated with industrial activity and discharges from municipal separate storm sewer systems (MS4s) located in municipalities with a population of 100,000 or more. Storm water discharge permits will provide a mechanism for monitoring the discharge of pollutants to waters of the United States and for establishing source controls where needed.

The following storm water discharges are covered under Phase I of the program:

1) A discharge which has been permitted prior to February 4, 1987[1];

2) Storm water discharges associated with industrial activity from 11 industrial categories identified narratively and by Standard Industrial Classification (SIC) codes;

3) Discharges from large MS4s (systems serving a population of 250,000 or more) and

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[1] EPA has established effluent guideline limitations for storm water discharges for ten subcategories of industrial dischargers: cement manufacturing, mineral mining and processing, feedlots, fertilizer manufacturing, petroleum refining, phosphate manufacturing, steam electric, coal mining, ore mining and dressing, and asphalt. Most of the existing facilities in these subcategories already have a permit which addresses storm water discharges.

medium MS4s (systems serving a population of 100,000 or more but less than 250,000)

4) Discharges which are designated by the permitting authority because the discharge contributes to a violation of a water quality standard or is a significant polluter of waters of the United States.

All other storm water discharges fall under Phase II of the program. A September 1992 Federal Register Notice was issued requesting comments on what Phase II sources should be selected as priorities, how to control sources, and when the Phase II program should be implemented.

B. Permits for Municipal Separate Storm Sewer Systems (MS4)

A municipal separate storm sewer system (MS4) is defined as any conveyance or system of conveyances that is owned or operated by a State or local government entity designed for collecting and conveying storm water which is not part of a Publically Owned Treatment Works (POTW). As of November 1993, approximately 790 MS4 entities have been identified as having to apply for a permit. Nationwide, there will be approximately 265 permits to address the MS4 universe since some permits will cover more than one permittee. The regulations do not apply to discharges from combined sewer systems or small MS4s[2] (serving a population under 100,000).

Part 2 permit applications for large MS4s were to be submitted by November 16, 1992 and by May 17, 1993 for medium MS4s. Permits are to be issued one year from the Part 2 permit application date. In non-approved NPDES States, Regions process the applications. The statute stipulates that the permits must: 1) effectively prohibit non-storm water discharges into storm sewers; and 2) require controls to reduce the discharge of pollutants to the Maximum Extent Practicable (MEP), including compliance with water quality standards.

MS4 permittees will also have responsibility for establishing and administering storm water management programs to control discharges (including discharges associated with industrial activity from regulated facilities), prohibiting illicit discharges, requiring compliance, and carrying out inspections, surveillance, and monitoring. EPA promulgated regulations on November 16, 1990 requiring MS4 permittees to submit an annual status report by the anniversary of the date of the issuance of the permit to reflect the development of their storm water management program. The reports will be used by the permitting authority to aid in evaluating compliance with permit conditions and where necessary, to modify the permit to address changed conditions. The annual report will contain at least the following information: the status of implementing the components of the program that are established as permit conditions; proposed changes to the program; revisions to the assessment of controls and fiscal analysis; summary of data, including monitoring data, accumulated throughout the year; annual expenditures and budget for the upcoming year; a summary describing the number and nature of enforcement actions, inspections, and public education programs; and identification of water quality improvements or degradation.

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[2] Some small MS4 entities have been designated as storm water permittees either individually or as co-permittees.

C. Facility Permits for Storm Water Discharges Associated with Industrial Activity

The term 'storm water discharge associated with industrial activity' is defined as the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Eleven categories of facilities that have a point source storm water discharge associated with industrial activity discharging to waters of the US must apply for coverage. (Attachment A) The application deadline for most permit applications was October 1, 1992. Facilities that discharge into a small, medium, or large MS4 are considered direct dischargers and are also required to submit signed copies of the permit application to the operator of the MS4. Discharges of storm water to a combined sewer system or POTW are excluded.

The NPDES regulatory scheme provided three potential routes for facilities to apply for permit coverage for storm water discharges associated with industrial activity:

1) Individual Permit- applications for these permits are processed in the Regions for non approved NPDES States;

2) Group Application- provided an alternative mechanism for groups with a sufficiently similar discharge to apply for permit coverage; to date, 750 group applications have been submitted to Headquarters representing 40,000 facilities in 31 industrial sectors; a separate general permit to cover facilities in the non-approved NPDES States will be issued by EPA.

3) General Permit- intended to initially cover the majority of storm water discharges associated with industrial activity in non-approved NPDES States; approximately 60,000 facilities have submitted a Notice Of Intent (NOI) to be covered under general permits issued by NPDES States and approximately 25,000 facilities have submitted NOIs to be covered in the non-approved NPDES States; facilities submit an NOI to an EPA contractor for processing to obtain coverage under the federal general permit.

General permits, at a minimum, require development of a storm water pollution prevention plan (SWPPP) to reduce pollutant loadings at a facility's site and an annual compliance evaluation of the SWPPP. Facilities were required to prepare their SWPPP by April 1, 1993 and implement it by October 1, 1993. Certain facilities are required to monitor storm water discharges semi-annually and report annually while others are required to monitor annually but not submit a discharge monitoring report (DMR). It is estimated that 3,800 facilities in the 12 non-approved NPDES States and 12,000 facilities in approved NPDES States are required to monitor.

D. Facility Permits for Storm Water Discharges From Construction Sites

A subset of regulated facilities is construction sites for which a separate general permit has been issued. The NOI requires certification that a SWPPP has been prepared for the site, and such plan complies with approved State and/or local sediment and erosion plans or permits and/or storm water management plans or permits.

Owner/Operators of regulated construction sites (disturbances over 5 acres) were required to obtain coverage under an individual or general permit by October 1, 1992 where disturbances

commenced before October 1, 1992. For disturbances commencing after October 1, 1992, an owner/operator is required to apply for general permit coverage at least 48 hours prior to the start of construction activities or 90 days prior to the start of construction activities for coverage under an individual permit.

II. Compliance Activities and Program Priorities

A. General

Fundamental to the storm water program is the filing of a permit application, as failure to do so allows a facility or MS4 entity to escape regulatory scrutiny. Therefore, the compliance/ enforcement priorities in the early stages of the storm water program--through FY 1994-1995--are the identification of:

1) MS4s that have failed to submit a timely or complete Part 2 permit application (or Part 1 application for MS4s that are designated at a future date);

2) regulated facilities that have failed to apply for a permit and are outside of the jurisdiction of a regulated MS4, and;

3) regulated facilities that have failed to apply for a permit and are within the jurisdiction of a regulated MS4.

Review of DMRs, SWPPPs, and other permit requirements for every facility is not a high-priority activity for FY 1994 and 1995. However, there may be circumstances under which Regions and States will want to closely monitor a facility's compliance with the storm water permit and to take action for failure to comply with that permit. Usually, this would be a case where non-compliance is contributing to an environmental problem.

Given the level of funding available for storm water enforcement, we will need to be efficient and innovative in our monitoring and enforcement approaches. To that end, every effort should be made to integrate storm water compliance activities into existing programs within and outside of the NPDES program.

The goal for FY 1994 and again in 1995 is that each Region undertake at least one "sweep" in each year to identify and enforce against regulated facilities that have failed to apply for a permit. The goal of this effort is to persuade other non-filers to voluntarily submit permit applications as well as to solve environmental problems. The Regional approach should be described in a Storm Water Work Plan. This Storm Water Work Plan can be incorporated in the Strategic Plan to be submitted by each Region for FY 1994.

The Regional sweep might target high priority watersheds, geographic locations, or a category of facilities to identify non-filers. The decision of which specific areas to target and the type and scope of activity is left to the Regions, although some preference should be given to addressing storm water problems in high priority watersheds. Where all the States in a Region have approved NPDES programs, the Region should work with at least one State to conduct a storm water effort in that Region.

As with other new programs, it is important to look for and widely publicize signature enforcement cases in the early stages of the program. The use of a "sweep"--whether one particular activity or combination of suggested activities--offers an excellent opportunity for publicizing the Agency's and States' enforcement efforts in the area of storm water.

This strategy does not address the issue of data collection and maintenance. However, a long term goal of the enforcement program will be development of an inventory of entities regulated by the program. The Compliance Information and Evaluation Branch has completed a Draft Feasibility Study which will be sent to the Regions for review. The proposed system solution is continued use of PCS to track the storm water inventory.

One final component of the strategy is to provide positive incentives for compliance to compliment the enforcement program. There already exists a National Storm Water Awards Program to recognize MS4 entities and facilities with industrial activity that are responsibly addressing their storm water obligations. The Regions and States might consider adopting such programs at their levels as well. In addition, Regions and States should continue to take every opportunity to explain the requirements of the storm water program to the regulated community.

B. Municipal Storm Sewer Systems

Part 2 applications for large MS4s were required to be submitted by November 16, 1992 and for medium MS4s by May 17, 1993. Regions should be monitoring the MS4s for compliance with the appropriate deadline. Where the entity responsible for submission of an MS4 application has not complied with a deadline, the Region should address this noncompliance as a top enforcement priority in the storm water program. Regions may begin with an informal action but should escalate to formal action if compliance is not achieved within 90 days.

To date, no MS4 permits in non-approved NPDES States have been issued. It is anticipated that compliance monitoring of these permits will be more difficult than traditional NPDES permits due to the newness of the storm water program in general, uniqueness of each MS4 permittee's approach to storm water management and lack of easily evaluated quantitative requirements of the permit. Because of these difficult implementation issues, Regional compliance/enforcement staff are encouraged to work with the permit staff to ensure the enforceability of the MS4 permits.

Annual reports submitted by MS4s should provide the permitting authority information on successes, failures and extent of enforcement activities. It is recognized that some MS4s are in the process--and may be for some time--of developing the legal authority to implement a local enforcement program for storm water discharges from facilities. Assessing compliance with MS4 permits will be left for FY 1995 and beyond. However, it is suggested that where deficiencies are identified in the annual report that will take over one year to correct, a timetable for correction be embodied in an enforceable schedule. Discretion is left to the Regions as to whether to address these problems in FY 1994-1995.

C. Facilities with Storm Water Discharges Associated with Industrial Activity

Outreach activities by the Headquarters Permits Division and Regions have been the primary method of encouraging facilities to comply with the permit application process and permit requirements in the non-approved NPDES States. Examples of ongoing outreach activities, in Regions and States include: Storm Water Workshops conducted in coordination with or conducted

via trade organizations; Mailings of Fact Sheets, General Permit, and/or Guidance Documents followed up with phone calls or visits to the site; and the EPA National Storm Water HOTLIN

After the first quarter of FY 1994, compliance and enforcement staff should increase their focus on locating regulated facilities that have failed to file a permit application/NOI and that are outside of the jurisdiction of a regulated MS4. To the extent possible, the Regions should integrate these efforts with other NPDES compliance activities and multi-media program operations.

There are several information sources that can be used to develop a list of facilities that are potentially subject to the regulations. Some sources are:

Toxics Release Inventory to identify SARA Title III facilities;
State Department of Labor databases;
State industrial records;
Lists of NPDES or other environmental regulatory program permittees;
Telephone books;
Municipal pretreatment records;
Trade Association membership lists;
Job Service/Employment Service listings; and
Local authorities which issue buildings permits.

EPA Headquarters provides a list of NOI submittals for non-approved NPDES States on a monthly basis to the Regions and has an inclusive list of facilities that participated in the group application process. The group application list identifies both current participants (40,000 facilities), a well as facilities that are no longer using the group application mechanism (25,000 facilities). The group application list will be available when the general permit becomes final. Data from the NOI list and group application list can be compared to that of a compiled list of facilities that potentially are subject to the regulations from the above mentioned information sources.

The Regions should consider for FY 1994 and 1995, the activities below to identify facilities that have failed to comply with the permit application process and should publicize compliance and enforcement actions after they have been concluded to give visibility to the storm water enforcement program.

Mailings: If EPA has reason to believe that a regulated facility has failed to apply for a permit. (for example, a regulated industry's name does not appear on any permit application list) a Section 308 letter can be sent to the facility along with a Fact Sheet and NOI/permit application. The letter should state that the permit application be filled out by a date certain if the regulations apply.[3] If a facility responds indicating that there is no point source discharge and therefore not

[3] A Section 308 letter requesting that more than nine addressees nationwide fill out anything other than a NOI/permit application form may require approval from OMB per requirements of the Paperwork Reduction Act (PRA). For example, EPA cannot request a 'certification of non-applicability' from more that nine addressees nationwide. These

subject to the regulations, that information should be confirmed at a later date in a site inspection.

Judicial Case Review: Municipal[4] and non-municipal judicial cases that are active or are being developed for non-storm water NPDES violations should be reviewed to determine whether or not the facility needs a NPDES permit for storm water discharges and if so, whether or not a permit application has been submitted. If it is determined that the facility failed to file an application then the complaint can be amended to include 'failure to apply for a permit' or 'discharge without a permit'. The decision to amend the existing complaint or issue a separate AO requiring compliance or APO should be made on a case-by-case basis. However, considering these facilities are familiar with EPA regulatory programs, amending an existing complaint may be appropriate action.

Telephone Canvassing: Phone calls to facilities potentially subject to the regulations explaining the storm water program with questions to determine inclusion in the program or as a follow-up to a mailing strategy can be made[5]. Information request letters can then be sent based on the facility's response.

Field Inspections: For purposes of identifying facilities that have failed to apply for a storm water permit, Regions may choose to focus their inspection activity within watersheds, or in areas with water quality-related problems due in part to storm water sources. If a facility has applied for a permit, the inspector should request to see the SWPPP to verify its existence and implementation.

NPDES compliance inspections/Multi-media inspections: To the extent possible, NPDES inspectors or inspectors from other media should complete a storm water screening checklist while in the field to verify whether the facility is covered by storm water requirements. The storm water

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restrictions do not apply if the PRA enforcement exception applies. Also, the OMB control number for NPDES permit applications is 2040-0086 (expiration date August 31, 1995) and should be displayed on Section 308 letters requesting submittal of a storm water permit application.

[4] Category (ix) of facilities which must submit applications for storm water permits: Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including lands dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1 MGD or more, or required to have an approved pretreatment program under 40 CFR Part 403. Not included are farm lands, domestic gardens, or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with Section 405 of the CWA.

[5] Telephone surveys are subject to the same OMB/PRA approval as Section 308 letters. Questions requiring more than nine surveyees nationwide provide more information than what is necessary to fill out an NOI/permit application may require approval.

checklist in the multi-media screening inspections can be used for this purpose. NPDES program staff may conduct an in-depth storm water evaluation while they are at the facility for other purposes.

Routine Enforcement Contact: When meeting with a facility for other enforcement issues, Compliance Officers can inquire as to the status of the facility's compliance with the storm water regulations. A field inspector can make inquiries without going through a detailed checklist of the need for a permit or compliance with the permit. If it is determined that a facility should obtain storm water coverage or is not complying with a permit (for example, the facility has not developed a SWPPP) enforcement should proceed on a case-by-case basis.

Municipal Coordination: The Part 1 permit application required an MS4 entity to provide the location and NPDES permit number of any known discharge to the storm sewer system (40 CFR 122.26.d.1.iii.B.(4)). Also, the Part 2 permit application required an MS4 entity to provide an inventory, organized by watershed, of the name, address and description (such as SIC code) of the principal products or services provided by each facility which may discharge storm water associated with industrial activity to the system (40 CFR 122.26.d.2.ii).

All facilities with discharges of storm water associated with industrial activity through an MS4 will be subject to local ordinances implementing management programs, as well as to the terms of a federal permit. The list of facilities discharging into an MS4 can be matched with a list of NOIs/permit applications received to verify compliance with the application process. Although the MS4 entity does not have authority to enforce the federal permit application requirements or a federal permit, compliance and enforcement activities of the local program will be done by the MS4 entity. However, it should be noted that the MS4 entity may not be able to enforce its own program for some time because it presently lacks necessary local legal authority or--in the case of medium size municipalities--the permit will not be effective until May 17, 1994.

An MS4 entity can refer a case of a facility that has failed to apply for a federal permit or suspected non-compliance with a federal permit to EPA. Although compliance and enforcement efforts for this group of facilities is not top priority, the Region may want to include them for targeted activities but, should coordinate activities with the municipality to avoid duplication of efforts.

D. Construction Sites

The construction industry in general is regulated at the State and local level. A May 1990 Survey by the Maryland Department of Environmental Resources (Attachment B) indicates that thirteen States have mandatory sediment/erosion control programs or storm water management programs, two States have programs for portions of the State, and an additional nine States have developed guidance for local government use. Most large municipalities, which will eventually include all medium and large MS4s, have some type of sediment/erosion and storm water control program. The general approach, then, for construction sites will be to defer to local or State agencies where there are effective and equivalent programs in place.

Generally, construction sites are highly visible, capital intensive operations that have a high potential for environmental degradation. Because of their high visibility, citizen complaints can be expected more than with other types of industrial activities and are useful as a source for

identifying potential violators. Regions should either refer complaints to local programs or follow up directly. Where State or effective local programs do not exist. Regions should prioritize unpermitted construction sites the same way as other regulated facilities. Again, failure to comply with permit requirements should be addressed at the Regions' discretion during FY 1994-1995.

III. Enforcement Approach

A. Establishment of a Violation

Two criteria must be met for a facility to be subject to the storm water regulations: 1) the industrial activity at a facility must be described (usually by SIC code) in 40 CFR 122.26 of the regulations; and 2) the facility must have a point source discharge to waters of the United States either directly or through a separate storm sewer system. The question of whether a storm water discharge must be observed by an inspector to determine inclusion in the program has been raised. The Office of Enforcement has advised that a facility's inclusion in the program is not dependant on whether a discharge from a point source has been observed. Section 502 of the CWA defines any point source to be 'any discernable, confined, and discrete conveyance . . . . from which pollutants are or may be discharged'. Therefore, an actual discharge need not be observed but there must be evidence of some conveyance for pollutants when a storm event occurs.

A second question frequently raised is: How to cite 'failure to apply for a permit' as a violation? Section 308 of the CWA requires an owner/operator of a point source to 'make such reports or provide such information' the administrator requires to carry out Section 402 or any requirement established under Section 402. The permit application regulations were promulgated pursuant to both Sections 308 and 402 and thus the permit application is considered information required to implement Section 402 of the Clean Water Act. Since the permit application regulations have been published in the November 16, 1990 Federal Register, any regulated facility that failed to submit a permit application is automatically in violation of Section 308. Wording of any notice of violation, AO, or APO should therefore cite 'failure to apply for a permit' as a violation of Section 308.

As an alternative to a violation of Section 308, a facility can be in violation of Section 301 for 'discharge without a permit' providing there is evidence of a conveyance for pollutants from the industrial activity areas of the facility and an actual discharge (i.e., a precipitation event causing a discharge) has occurred.

B. Overall Strategy

As indicated earlier in this strategy, the enforcement priorities for the storm water program for FY 1994 and 1995 are to address MS4s that have not applied for a storm water permit on a timely basis, and to identify and enforce, as necessary, where facilities with industrial activity have failed to apply for a permit--with priority given to facilities outside the jurisdiction of a regulated MS4. The level of activity with regard to the assessment of compliance with existing permits will be left to the discretion of the Region.

As a strategy for addressing industrial facilities which have failed to apply for a permit as required, each Region is asked to undertake some activity annually in 1994 and again in 1995.

The purpose of any activity is twofold--to address environmental problems and to serve as a vehicle for publicizing EPA's commitment to enforcing storm water requirements, thus creating a deterrent to noncompliance. The design and scope of activities is left to the discretion of the Region. It could be organized on a watershed basis or it might address a category of facilities which is of concern. Whatever the design, it should be significant enough to serve as a vehicl publicizing Regional activity in the storm water area through such means as a press release, press briefing, trade press publications or other means the Region may choose.

As a general rule, the Enforcement Management System establishes the principle of escalation of enforcement response for continuing, uncorrected noncompliance. This storm water strategy, in fact, recommends beginning with informal enforcement and escalating the severity of the response when an MS4 entity fails to submit complete permit applications on a timely basis. However, because of the limited resources available to address regulated facilities, one of the principles on which this strategy is built is that the maximum possible deterrent effect be achieved with any single enforcement action. For that reason, this strategy recommends, but does not require, the use of penalties as a sanction when a facility has failed to apply for a permit. Of course, any enforcement action that is initiated should take into account the circumstances surrounding the violation, for equitable treatment of violators. During this initial phase of the storm water enforcement program, when any facility submits a permit application voluntarily, without having EPA invest resources to find the facility, the Regions may choose to forego or reduce penalties on a case-by-case basis, thereby providing an incentive to other facilities to comply with permit application requirements.

C. Expedited APOs

Field citations[6] are currently being utilized by other environmental programs on the Federal, State, and local levels and are useful in addressing many prevalent, clear-cut violations that are relatively easy to correct. While the Water Program does not currently have field citation authority, the basic administrative compliance and penalty order authorities can be used in more efficient ways.

There are several ways to make the APO more efficient--to expedite the APO: 1) issue APOs for facilities with the same violation at approximately the same time so that a single 30-day public notice can be used[7]; 2) issue a complaint and a proposed consent order at the same time; and 3) standardize penalty amounts to be assessed, based on the economic benefit for 'failure to submit a permit application', to avoid recalculation for each facility[8]. Existing

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[6] 'Field citation' as used in this strategy is an APO issued in the field unencumbered by a 30-day public notice period. For this strategy, the term 'Expedited APO' will be used. Reauthorization of the CWA may include Field Citation authority.

[7] When the administrative penalty complaint is first issued, an administrative record should be simultaneously opened at the Regional Office pursuant to proposed 40 CFR Section 28.16.

[8] Headquarters may develop a matrix which could be used to determine the economic benefit and gravity component of the penalty using a small, medium, and large facility. In the interim, no

delegations of authority limit the issuance of APOs to the Branch Chief level. As a result, inspectors cannot be authorized to issue APOs until that delegation is changed. There are, however, other ways to speed up the APO and AO issuance process. These might include: faxing of violation paperwork to the office by the inspector for required signatures or phoning-in of violations by inspectors for immediate penalty issuance from the office. A combination of one or more of the above approaches should result in a less resource intensive, more efficient penalty issuance process.

Attached for your information is a copy of a public notice used by one Region to cover multiple violating facilities, as well as the simultaneous issuance of a complaint and a proposed consent decree. (Attachment C) A letter to the complainant would specify that the consent order will become final after signature by both parties without further agency action, if no public comments are received. The letter would explain the administrative process, the requirement to publish the proposed order for public comment, and the respondent's right within 30 days to either return the signed consent order with payment or request a hearing.

If the respondent agrees to pay the penalty and submits a check before the consent order can be signed by EPA, EPA can hold the respondent's penalty payment check. Where not prohibited by state law, the check should be postdated to 45 days after the date of issuance of the complaint to allow time for publication of the public notice requesting comments within 30 days. If no public comments are received, the proposed order would become final after agency signature and EPA would process the penalty payment. If comments are received, the Regional Administrator or designee would follow established Agency procedures for resolving public comments. If the respondent chooses to contest the initial complaint, EPA would adjudicate the matter under the hearing procedures.

IV. Allocation of Responsibilities

The list below provides a summary of ongoing and future activities to implement this strategy.

Headquarters Permits Division
Continue Storm Water HOTLINE
Continue monthly update of NOI submissions to the Regions (ongoing)
Provide Regions a list of group applicants, current as well as original participants (upon final approval of the general permit)

Headquarters Enforcement Support Branch
Update the storm water component of NPDES inspector guidance and training (ongoing)
Develop guidance on storm water data elements and reporting requirements for Regions and States (mid FY 1994)

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settlement should normally be less than $500 for failure to submit an application and the proposed assessment should routinely be $1000 or more, taking into account economic benefit and gravity.

Act as a clearinghouse for success/failure of approaches to enforcement/compliance issues of the storm water program (ongoing)
Pursue streamlining efforts of the APO process such as delegation of authority below DD level

Headquarters Compliance Information Branch
Finalize the Storm Water Feasibility Study Mission Needs Analysis to develop a storm water tracking system (mid FY 1994)

Regions
Continue outreach efforts
Review MS4 Permits for enforceability
Follow-up on late or incomplete MS4 permit applications
Investigate local programs that manage storm water discharges from construction sites
Undertake one sweep in FY 1994 and again in FY 1995 to identify regulated facilities that have failed to apply for a permit

State	State Program?	Comments
Rhode Island	No	Has optional state SC program. Has no state SW program, but has issued SW manual for guidance.
South Carolina	No	Has optional state SC program. Has no state SW program.
South Dakota	No	No state SW/SC programs.
Tennessee	No	Some local governments have SC programs. State awaiting EPA regulation revision to strengthen SW program.
Texas	No	State provides legislation to form Conservation Districts to handle SC concerns.
Utah	No	No state SW/SC programs.
Vermont	No	Has optional state SW/SC programs.
Virginia	No, SW Yes, SC	Has statewide SC program, implemented by Department of Conservation and Recreation. The state SW program is optional for local governments but mandatory for state projects.
Washington	No	Has state SW/SC program for the Puget Sound area. Aiming for statewide SW/SC legislation after 1991.
West Virginia	No	Has optional state SC program. Some local governments have own SW program. State is seeking mandatory SC legislation.
Wisconsin	No	Has optional state SW/SC programs.
Wyoming	No	No state SW/SC programs.

LOCATIONS OF ALLEGED VIOLATIONS:

BUSINESS OR ACTIVITY OF RESPONDENTS: WASTEWATER TREATMENT

RESPONDENTS' PERMIT NUMBERS:

NATURE OF ALLEGED VIOLATIONS: FAILURE TO SUBMIT A COMPLETE DISCHARGE MONITORING REPORT-QUALITY ASSURANCE REPORT TO EPA

PROPOSED PENALTY: 10,000

DOCKET NUMBERS: EPA-CWA-II-93-109, 116, 118, 125, 126, 127, 132, 134

DATE FILED WITH REGIONAL HEARING CLERK: [_____]

NAME, MAILING ADDRESS, AND TELEPHONE NUMBER OF REGIONAL HEARING CLERK:

FOR FURTHER INFORMATION: PERSONS WISHING TO RECEIVE A COPY OF PART 28, REVIEW THE COMPLAINT OR OTHER DOCUMENTS FILED BY THE PARTIES IN THIS PROCEEDING, COMMENT UPON THE PROPOSED PENALTY ASSESSMENT, OR PARTICIPATE IN ANY HEARING THAT MAY BE HELD, SHOULD CONTACT THE REGIONAL HEARING CLERK IDENTIFIED ABOVE.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ATTACHMENT C

DATE OF NOTICE: [_____]

PUBLIC NOTICE NUMBER: [_____]

COMMENT PERIOD OPEN UNTIL: [_____]

ACTION: NOTICE OF PROPOSED ASSESSMENT OF CLEAN WATER ACT SECTION 309(G) CLASS I ADMINISTRATIVE PENALTY AND OPPORTUNITY TO COMMENT

EPA IS AUTHORIZED UNDER SECTION 309(G) OF THE CLEAN WATER ACT, 33 U.S.C. §1319(G), TO ASSESS A CIVIL PENALTY AFTER PROVIDING THE PERSON SUBJECT TO THE PENALTY NOTICE OF THE PROPOSED PENALTY AND THE OPPORTUNITY FOR A HEARING, AND AFTER PROVIDING INTERESTED PERSONS PUBLIC NOTICE OF THE PROPOSED PENALTY AND A REASONABLE OPPORTUNITY TO COMMENT ON ITS ISSUANCE. UNDER SECTION 309(G), ANY PERSON WHO WITHOUT AUTHORIZATION DISCHARGES A POLLUTANT TO A NAVIGABLE WATER, AS THOSE TERMS ARE DEFINED IN SECTION 502 OF THE ACT, 33 U.S.C. §1362, MAY BE ADMINISTRATIVELY ASSESSED A CIVIL PENALTY OF UP TO $25,000 BY EPA. CLASS I PROCEEDINGS FOR SECTION 309(G) OF THE CLEAN WATER ACT ARE CONDUCTED IN ACCORDANCE WITH THE "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT" ("PART 28"), WHICH HAS BEEN PUBLISHED IN THE FEDERAL REGISTER, AT 56 FED. REG. 29,996 (JULY 1, 1991). THE FEDERAL REGISTER IS AVAILABLE AT MOST LIBRARIES.

"Policy for End of Moratorium for Storm Water Permitting", October 18, 1994.

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

OCT 18 1994

MEMORANDUM

SUBJECT: Policy for End of Moratorium for Storm Water Permitting--October 1, 1994

FROM: for Michael B. Cook, Director
Office of Wastewater Management

for Robert Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Water Management Division Directors, Regions I - X
NPDES State Water Program Directors

Section 402(p)(1) of the Clean Water Act (CWA) provides that National Pollutant Discharge Elimination System (NPDES) permits cannot be required for discharges composed entirely of storm water prior to October 1, 1994, except for discharges identified in Section 402(p)(2) of the Act. The purpose of this memorandum is to provide guidance from the Environmental Protection Agency (EPA or Agency) with respect to permit application requirements for these discharges after October 1, 1994.

Background

In 1972, the Federal Water Pollution Control Act (later known as the Clean Water Act or CWA), was amended to provide that a point source discharge of pollutants to waters of the United States is unlawful except as authorized by a NPDES permit. The 1987 amendments to the CWA provides three exemptions from this permit requirement for certain discharges composed entirely of storm water, two of which are permanent, and one of which was temporary. Section 402(l)(2) of the CWA provides that the EPA shall not require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities if the storm water discharge is not contaminated by contact with, or does not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations.[1] Section

[1] See 40 CFR 122.26(a)(2) for implementing regulations.

502(14) of the CWA excludes agricultural storm water discharges from the definition of point source, thereby excluding these discharges from the requirement to be authorized by an NPDES permit.[2]

Section 402(p)(1) of the CWA provides that EPA or NPDES States cannot require a permit for discharges composed entirely of storm water prior to October 1, 1994,[3] except for discharges identified in Section 402(p)(2) of the Act. Section 402(p)(2) identifies five classes of discharges composed entirely of storm water which were exempt from the moratorium on NPDES permits.[4] This constitutes phase I of the storm water program:

(A) A discharge with respect to which has been issued a permit prior to February 4, 1987;

(B) A discharge associated with industrial activity;

(C) A discharge from a municipal separate storm sewer system (MS4) serving a population of 250,000 or more;

(D) A discharge from a municipal separate storm sewer system (MS4) serving a population of 100,000 or more, but less than 250,000; and

(E) A discharge for which the Administrator or the State determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

Section 402(p)(6) of the CWA requires that EPA, in consultation with State and local officials, is to issue regulations by no later than October 1, 1993,[5] which designate additional storm water discharges not identified in Section 402(p)(2) of the CWA to be regulated to protect water quality and establish a comprehensive program to regulate such designated

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[2] See 40 CFR 122.2 for implementing regulations.

[3] The 1987 amendments to the CWA provided that permits for affected storm water sources could not be required prior to October 1, 1992. The moratorium deadline was extended to October 1, 1994, by the Water Resources Development Act of 1992.

[4] See 40 CFR 122.26(a)(1) for implementing regulations.

[5] The 1987 amendments to the CWA provided that EPA must issue regulations under Section 402(p)(6) of the CWA by October 1, 1992. This deadline was extended to October 1, 1993, by the Water Resources Development Act of 1992.

sources. This constitutes phase II of the storm water program. EPA has not issued these regulations at this time.

Several legislative proposals were introduced in Congress to amend certain provisions of the CWA, including NPDES requirements for storm water discharges. All major proposals would either eliminate the statutory requirement at Section 402(p)(6) to establish NPDES regulations for discharges composed entirely of storm water previously in the permit moratorium (discharges not identified in Section 402(p)(2)), and would identify which moratorium storm water discharges, if any, would be subject to the NPDES program, or would give EPA additional time to identify those discharges subject to permit requirements. Congress did not act on reauthorization of the CWA this session, so none of the comprehensive amendments to the storm water section of the law were adopted.

Clarification of Requirements

EPA did not issue regulations for implementing the requirements of Section 402(p)(6) of the CWA before October 1, 1994. However, the Agency and approved NPDES States are unable to waive the statutory requirement that point source discharges of pollutants to waters of the United States need an NPDES permit.

At this time, EPA has completed a draft study identifying potential point source discharges of storm water for regulatory consideration under the requirements of Section 402(p)(6) of the CWA. In addition, the Agency has initiated a process to develop implementing regulations.

General application requirements for the NPDES program are contained in 40 CFR 122.21(f). As noted above, however, a process is underway to develop more specific requirements relating to storm water dischargers covered by section 402(p)(6). Development of more focussed application requirements will be part of this effort. EPA plans to develop these requirements through the rulemaking process and will seek comment and public input before issuing final regulations.

Dischargers previously covered by the moratorium should note that under EPA's Storm Water Enforcement Strategy (dated January 12, 1994) the Agency's compliance/enforcement priorities in the early stages of the storm water program, through FY 1995, will be the identification of and appropriate compliance and enforcement action on:

1. Phase I MS4s that have failed to submit a timely or complete permit application;

2. Regulated phase I storm water discharges associated with industrial activity that have failed to apply for a permit and are outside of the jurisdictional boundaries of a regulated phase I MS4; and

3. Regulated phase I storm water discharges associated with industrial activity that have failed to apply for a permit and are within the jurisdictional boundaries of a regulated phase I MS4.

The Agency does recognize that under the CWA, citizen suits can be brought against operators of phase II point source discharges composed entirely of storm water to waters of the U.S. that are not authorized by an NPDES permit after October 1, 1994.

If you have any questions, please contact Cynthia Dougherty, Director, Permits Division, at (202) 260-9545, or have your staff contact William Swietlik, Chief, Storm Water Section, at (202) 260-9529.

cc: Susan G. Lepow

TAB VI.N

"Water Quality Strategy for Animal Feeding Operations", February 18, 1994.

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

FEB 18 1994

MEMORANDUM

OFFICE OF WATER

SUBJECT: Water Quality Strategy for Animal Feeding Operations

FROM: Robert Perciasepe
Assistant Administrator

TO: Regional Water Management Division Directors
State Water Program Directors

Attached is the Water Quality Strategy for Animal Feeding Operations. This document was developed by an EPA/State feedlot workgroup which has worked together on feedlot issues since April 1992. The Strategy was transmitted to you on September 29, 1993, by Michael Cook, Director, Office of Wastewater Enforcement and Compliance, for your review and comments. Your comments were very helpful and have been incorporated into the strategy where possible.

The Regions and Headquarters should immediately begin implementing the Strategy, which includes permitting, verification of compliance, and education and outreach efforts. This Strategy is designed to be easily integrated into other strategies or initiatives (e.g., the Watershed Initiative or Storm Water Initiative) as part of the NPDES program and should not be disruptive of ongoing activities. The Regions should work with States to incorporate Strategy activities into State Plans.

The Strategy's initial emphasis is on: 1) issuing general or individual permits to concentrated animal feeding operations (CAFOs) contributing to water quality impairments, including smaller facilities that merit designation as CAFOs; 2) enforcing existing CAFO permits, especially where CAFO discharges cause or contribute to water quality impairment; and 3) expanding educational efforts to explain regulatory requirements to the animal management community.

The Guidance Manual on NPDES Regulations for Concentrated Animal Feeding Operations (also transmitted to you in draft form on September 29) will be distributed at a later date. Comments sent by the Regions and States were generally favorable. At present, the Guidance is being reviewed by several national animal producers' associations and public interest groups. The Guidance is designed to provide all interested parties a clear and common understanding of the NPDES regulations for CAFOs.

Attachment

WATER QUALITY STRATEGY FOR ANIMAL FEEDING OPERATIONS

December 1993

I. Summary

The goal of this strategy is to achieve greater protection of water resources through promoting, encouraging and requiring sound environmental management and practices in the animal feeding operation (AFO or feedlot) community. Although this strategy was developed for use by EPA Regions, States may want to adopt a similar approach when developing strategies for feedlots.

The strategy is based on: 1) promoting sound environmental management at all livestock feeding operations; 2) improving data quality; 3) maximizing impact through targeting activities; 4) establishing a greater field presence; and 5) evaluating "what works." The Agency intends to include other federal agencies, State agencies, producer associations, and citizens in compliance evaluation and communication activities.

The strategy includes background information on the National Pollutant Discharge Elimination System (NPDES) regulatory program for concentrated animal feeding operations (CAFOs) and it briefly describes the EPA/State Feedlot Workgroup which developed this strategy. Most importantly, the strategy includes three major thrusts: permitting, compliance evaluation, and public outreach and education.

The key milestones for implementing this strategy are: FY 1994 - improve data quality, develop a compliance evaluation targeting strategy, develop a communications strategy, enforce existing individual and general permits especially where CAFOs cause or significantly contribute to water quality impairment; FY 1995 - continue work of FY 1994, develop State Plans to issue general or individual permits for critical watersheds, conduct compliance evaluations in a targeted watershed.

II. Background

The 1972 Amendments to the Federal Water Pollution Control Act (also known as the Clean Water Act (CWA)), prohibit the discharge of pollutants from a point source into waters of the United States except in compliance with conditions of an NPDES permit. Section 502 of the Act defined a "concentrated animal feeding operation" (CAFO) as a point source. As a result, NPDES regulations at 40 CFR 122.23 and Appendix B were promulgated which provide that CAFOs are feedlots that discharge at times other than the event of a 25-year, 24-hour rainfall and: 1) feed or maintain more than 1,000 animal units (AUs); 2) feed or maintain 301 to 1,000 animal units and discharge into waters of the United States through a man-made conveyance or by direct contact between the facility and a water of the U.S.; or 3) are designated on a case-by-case basis as a significant contributor of pollution.

In 1974, effluent limitations guidelines for CAFOs having more than 1,000 AUs were promulgated at 40 CFR 412. The guidelines require that there be no discharge except as a result of chronic or catastrophic rainfall which causes overflow of a facility designed, constructed, and operated to hold all process generated wastewater plus the runoff from a 25-year, 24-hour rainfall. These limitations are based on the best available technology economically achievable (BAT). There are no effluent limitation guidelines for CAFOs having 1,000 or less AUs.

A number of NPDES permits were initially issued by EPA to feedlots during the mid 1970s, and permits for CAFOs having more than 1,000 AUs were emphasized. In EPA Regions 6, 7, and 8 (where most commercial beef feeder facilities are located), site inspections were conducted by EPA and the States at many feedlots to develop facility-specific requirements placed in individual NPDES permits. Most individual permits issued during this period were classified as "minor" permits when compared to other permits issued to municipalities and industrial sources. Several EPA Regions (6, 8, 9, and 10) have issued general permits which are estimated to cover over 1,400 feedlots in seven States (Arizona, Idaho, Louisiana, Oklahoma, New Mexico, South Dakota, and Texas).

III. Feedlot Workgroup

A. Purpose of the Feedlot Workgroup

After reviewing information from various sources which identified livestock feeding facilities as significant sources of water quality impairment, the Director of the Office of Wastewater Enforcement and Compliance (OWEC) convened an EPA/State Feedlot Workgroup. The charge to the Workgroup was to evaluate in more detail the impacts and relative priority of feedlots in different parts of the country relative to other sources of pollution and determine what has been done and what remains to be done under the NPDES program to address this category of point sources.

Four subgroups were created from the Feedlot Workgroup membership in order to examine the following feedlot issues: 1) identification of the magnitude and geographic extent of water pollution caused by animal waste; 2) examination of methods to verify compliance of CAFOs; 3) examination of how to improve permit coverage of CAFOs, including guidance on the regulatory requirements concerning feedlots; and 4) methods to promote compliance and environmental excellence in the feedlot industry.

B. General Findings of Workgroup Studies

Several important findings emerged from the subgroups' studies (these studies are included in *The Report of the EPA/State Feedlot Workgroup*, which was published by the Office of Wastewater Enforcement and Compliance in September 1993). Data indicate that animal waste impairs surface water uses at approximately the same level

as oth significant sources of water pollution such as storm sewers/runoff or combi sev. verflc . Animal waste has also caused serious impairment of some ground- wat esourc Even though feedlots cause a significant number of water quality imp. ents, t . workgroup found that only a fraction of CAFOs are covered by NPDES permits, and far fewer receive compliance inspections. The Workgroup also found that the feedlot industry is distinguished from other industries in the level of cooperation among producers and the extensive communication networks that presently exist. For th reas , it is be ved th t education and outreach activities on the part of EPA and th State would be especially fruitful in attaining greater compliance.

C. Common Themes

The feedlot subgroups noticed common themes as they completed the analysis phase of their work. One theme was the need to improve the amount and quality of data concerning feedlots. Another was the need for targeting to: 1) focus permitting, c pliance and enforcement resources where they will achieve the greatest e ironmental benefit and 2) reach distinct segments of the feedlot industry with education and outreach activities. The Workgroup recognizes the need to target ground water and/or surface water resources to protect high quality waters as well as remediate impaired watersheds. For the purposes of this strategy, priority or critical watersheds should be determined consistent with and in support of Agency initiatives for protection of human health, ground or surface waters that are drinking water sources, and ecosystems (i.e., watershed protection).

EPA and State permitting agencies should coordinate their NPDES activities with the animal waste management activities of other federal, State, and local programs. Programs which should be considered for coordination include those developed under the Coastal Zone Act Reauthorization and Amendments (CZARA), the section 319 Nonpoint Source Pollution Control Management Program, Comprehensive State Ground Water Protection Programs, Wellhead Protection Program, the United States Department of Agriculture's (USDA's) Agricultural Conservation Program and Water Quality Incentives Program, and State and local regulatory and financial incentive programs.

IV. Permitting Strategy

The Office of Wastewater Enforcement and Compliance paradigm for all point sources consists of a two step process that includes: A) focusing resources towards regulating point sources in those watersheds where environmental impacts on ecological and human health are the greatest and B) NPDES permit coverage of all CAFOs. To this end, the Agency has developed a cost effective yet environmentally protective NPDES permitting strategy for regulating CAFOs. This strategy recognizes that permitting authorities have little if any resources for starting new initiatives, and focuses controls on CAFOs in high priority watersheds. Many of the ideas expressed in this strategy are based on State and EPA Regional input provided in *Feedlot Case*

Studies of Selected States (published as a section of *The Report of the EPA/State Feedlot Workgroup* (EPA, September 1993)).

A. Targeting Critical Watersheds

By October 1995, EPA will work with the States in the development of State Plans to ensure that those plans include a schedule for permit coverage of CAFOs contributing to water quality impairment in critical watersheds. Permit coverage can be obtained through the issuance of individual or general permits.

1. NPDES Guidance on CAFOs. To assist EPA Regions and approved States in understanding the applicability of NPDES regulations when permitting CAFOs, a guidance document on the NPDES feedlots regulations, Guidance Manual on NPDES Regulation for Concentrated Animal Feeding Operations (the Guidance Manual), has been developed for the permit writer. The Guidance Manual guides the permit writer through:

- Determining when an AFO becomes a CAFO
  - Defines what is meant by the 25-year, 24-hour storm event and when to apply the exemption for feedlots which discharge only in the event of a 25-year, 24-hour storm event
  - Defines a "manmade conveyance" and how it may be interpreted by permitting authorities
- Making case-by-case designations of CAFOs
  - Explains the lack of liability under the NPDES program for water quality impairments on the part of animal feeding operations not meeting the definition of a CAFO nor designated as one
  - Defines how other animals (other than those animals listed in 40 CFR 122 Appendix B) may be regulated under the existing regulations
- Establishing appropriate permit conditions

2. Case-Specific CAFO Designations. For case-by-case designations of CAFOs, the permitting authority may use an inspection form similar to the sample form provided in Appendix B of the Guidance Manual when conducting on-site inspections. The sample form focuses on waste handling, treatment and/or management operations information, discharge information, and water quality assessment data. In considering AFOs for designation as CAFOs, the permitting authority should consider AFOs:

- In critical watersheds

- In watersheds having high AFO and/or CAFO density

  Based on proximity to waters of the United States or proximity to waters with known or suspected impairments

  Based on the amount of animal waste reaching waters of the U.S.

  That were established before implementation of existing Federal/State/local waste handling statutes or development of newer waste handling technologies

  That have received substantiated citizen or local government complaints regarding surface and/or ground-water pollution

B. NPDES Coverage of All CAFOs

To implement the second step of the permitting process, EPA will work with the States to ensure that all CAFOs are covered by an individual or general NPDES permit. To assist in this effort, a model CAFO fact sheet/permit has been developed.

V. Compliance Evaluation Strategy

A. Data Management

Before any meaningful compliance monitoring effort is undertaken, the quality and amount of feedback data entered in the Permit Compliance System (PCS) needs to be improved. At a minimum, all permitted CAFOs should be identified by June 1, 1994, and their required data elements[1] entered into PCS by October 1, 1994, to allow tracking of permitting, inspection, and compliance information.

In order to develop further and refine a compliance monitoring strategy, monitoring and assessment data must be improved. Available sources of water quality and compliance data should be inventoried and accessed.

At present, water quality inventories prepared under the mandate of section 305(b) of the CWA may be the best available data source. To improve the utility of the water quality data compiled under the section

[1]Required data elements include Water Enforcement National Data Base (WENDB) data elements including permit facility data, permit event data, inspection data, and significant compliance data. Regions and States may choose to enter additional PCS data pertinent to the CAFO category, including receiving waters, code of Federal Regulations (to indicate whether the CAFO is subject to effluent guideline limitations), and enforcement action data including penalty amounts and dates assessed.

305(b) report, it will be recommended that the guidance for the next report request more specific data on feedlot impacts.

- Water quality assessment data in the Office of Water (OW) Waterbody System (WBS) should be inventoried to target water quality-limited areas with feedlot problems in the States that are now using WBS.

The likelihood that an area has a manure nutrient surplus can be derived using USDA or Department of Commerce (via the Census of Agriculture) data. The areas can be ranked by the inventory of animals and other risk factors, targeting as many as resources allow. These areas should then be matched with or superimposed on the waterbody problem areas. In the future, the WBS will incorporate geo-reference data so that the WBS can then be used in Geographic Information System (GIS) applications.

B. Annual Report

While CAFOs have not routinely been required to submit discharge monitoring reports (DMRs), 40 CFR 122.44(i)(2) requires that all permittees report "monitoring results" at least annually. Regions and States may choose to invoke this requirement by issuing permits which require permittees to provide an annual written certification that they have implemented all permit requirements for pollution prevention practices dealing with waste management and disposal or beneficial reuse.

C. Targeting Compliance Activities

While many feedlots are classified as "minors," they still have the potential to impair water quality. Therefore, compliance monitoring activities, both annual report and inspections, will be conducted on a targeted population. Each Region should evaluate available data and targeting tools to identify priority watersheds or other geographic areas with measurable feedlot problems. For implementation in FY 1995, a targeting strategy should be developed with each State to identify candidates for compliance review and compliance inspections. This strategy should be applied to at least one priority watershed or geographic area per State and may be integrated into other watershed or geographic initiatives.

General permits now in place in the States of Arizona, Idaho, Louisiana, New Mexico, Oklahoma, South Dakota and Texas should be targeted during FY 1994 for review to ensure all facilities subject to NPDES requirements have filed a notice of intent. Any significant complaints received on CAFOs should trigger compliance review and/or enforcement action where the problem is not resolved in a timely manner.

D. Development of Monitoring Tools

To facilitate coverage, the Agency will seek to develop additional tools for expanding compliance evaluation. During FY 1994, the use of aerial photographic techniques will be piloted in at least one Region. Also during FY 1994, the Agency will seek to promote the use of trained public involvement. Training materials will be developed for use by Regions and States. This effort will be integrated into the ongoing

efforts of the Office of Wetlands, Oceans and Watersheds volunteer monitoring coordinator.

E. Interagency Agreements

To gain the support of other federal agencies in gathering information to promote compliance at feedlot operations and to provide a means for distributing guidance and information to the operators, the Agency will seek to establish interagency agreements with the USDA and with the Fish and Wildlife Service (FWS). Agreements should be prepared on a Region-by-Region basis under the umbrella of a national memorandum of understanding. However, if this approach proves too administratively cumbersome, it may be more appropriate to either 1) develop one agreement between the agencies nationally or 2) develop a standard agreement that can be modified to suit the differing activities in each State.

A model interagency agreement will be developed using guidance and input from each party to the agreement. Typical areas covered in an agreement should include: purpose; authority; period of effectiveness; activities covered; development of implementation plans; resources and cost sharing; inspections, sampling, and other information collection; reporting; training; agreement to testify; and enforcement. Each agreement would remain in effect until either party chooses to terminate or amend it. Annual operating plans and coordination meetings should be established.

The FWS has already given notice to their field offices about EPA's interest in using their resources to document feedlot pollution problems.

If the agencies are agreeable, the implementation of these agreements should take one to two years using a team to develop each agreement.

The Regions should also seek support from other units of State and local government (e.g., State Health Departments) in gathering information and promoting environmentally sound management practices. Representatives of these agencies often visit livestock feeding facilities on a monthly basis. Collaboration with these units could be emphasized within targeted watersheds.

VI. Strategy for Effecting Change and Encouraging Excellence

Efforts to effect change and encourage excellence will cover the areas of permittee regulations, educational information, and compliance monitoring enforcement. The purpose is to promote strategies that highlight improved communication with the agricultural community and provide an opportunity for feedback. EPA will work in partnership with States and USDA to make full use of the many systems and programs they have in place.

The size of this industry and its potential for impact on the environment indicates a need to communicate with all facilities and their associated support industries regardless of whether or not they are covered by a NPDES permit. The Agency will supplement its normal regulatory approaches by encouraging environmentally sound management of feedlot operations through education, information dissemination and incentives. A communications strategy utilizing communication vehicles already available in this industry will be developed at both the national and Regional levels during FY 1994. These strategies should be based on the following criteria:

1. System or network available for easy access to the owner/operator of animal facilities

2. Likelihood of this project being implemented due to cost and work time expense to the Agency

3. Probability that the project would be accepted by the owner/operator and, therefore, lead to changed behavior patterns

4. Likelihood that the industry's understanding of, and working relationship with, EPA will be improved

A. Permitting/Regulatory Process

The permitting/regulatory process provides an excellent opportunity for interaction between the Agency and the public. The Agency will utilize the existing mechanisms to allow for more information dissemination. EPA and the States should work together in the process of developing regulations, technical standards and permits to use every available opportunity to provide the livestock feeding industry with information on the regulatory process and decision making.

Starting immediately the Regions, working in cooperation with the States, will develop a communications strategy for each feedlot general permit. The Regions and States are encouraged to use a strategy similar to the one used by Region 6 (See Appendix).

By April 30, 1994, the Agency will develop an easy-to-understand summary of all federal requirements (CZARA of 1990, storm water, NPDES, ground water, etc.) covering feedlots.

B. Compliance/Enforcement

Enforcement actions are necessary to maintain the integrity of the NPDES permit program. They may be taken for failure to apply for or comply with the conditions of an individual or general permit. An enforcement action has an immediate effect on the facility subject to the action. However, publicizing an enforcement action can generate a more far-reaching deterence effect. Therefore, through the compliance/enforcement component of the communication strategy, EPA will publicize enforcement actions as a

means for promoting compliance and improved environmental management among regulated feedlots. Publicizing enforcement actions also would be intended to increase awareness among smaller, unregulated facilities that they may be designated as a CAFO because of poor animal waste management practices. The potential for being so designated can be a strong incentive for smaller facilities to manage their waste more carefully. EPA will emphasize ways in which operators of such smaller facilities can manage their waste to protect water quality and thus minimize the chance that they may be regulated in the future. This will encourage operators of livestock feeding facilities to be aware of their potential environmental problems and to reduce their environmental profile.

During FY 1994, the Agency should take enforcement actions against facilities that fail to comply with existing regulations or fail to apply for newly-issued general permits. These activities will primarily be administrative and will seek penalties as appropriate.

C. Education/Information

The Agency will work with USDA, States, associations and contractor operations that are willing to provide EPA with a vehicle to inform operators about proper environmental practices. The Agency and States will provide the following educational resources (these are prioritized, starting with the most important):

1. **Provide educational packets** on environmental management, funding and regulation information to all participating associations and appropriate State and federal agencies once per year starting April 1, 1994. EPA Headquarters (HQ) will consolidate information from nonpoint source (NPS), permitting, enforcement, and funding programs and make copies available to other agencies and producers. The packets will be developed with input from USDA and State Departments of Agriculture. However, emphasis will be placed on providing clear guidance on EPA regulations, permits and enforcement actions. Information sheets such as "How to Comply With an EPA Inspection" and "Wetlands Protection" will also be provided in these packets. These packets will be mailed out to all State and federal agencies, as well as to all State and national producer organizations for their member/constituency use. The information will be updated once per year. This packet should be compiled by HQ and should include Regional and State input and concerns. The mailing list for this project should be developed from a survey of interested organizations.

2. **Provide effective speaker(s)** to participate at requested functions and seminars that are sponsored by other agencies and associations. Each Region and State and HQ will have specific speakers trained to provide talks to the agricultural community. This approach to "consumer education" provides EPA and States with the perfect opportunity to improve public understanding and to emphasize pollution prevention measures and philosophies. EPA and States will provide speakers to participate on agricultural talk shows on TV and radio. The goal is a minimum of one presentation per State each year on regulating the livestock feeding industry. HQ

develop handout materials and provide slides to all of the Regions and States on the regulation of livestock feeding facilities. Subjects covered will include clear definition of "who's covered," "the agriculture exemption - what does it mean?," EPA's pollution prevention initiative and permit compliance/enforcement actions.

3. Utilize electronic bulletin boards (computer networks) and existing newsletters to provide quick updates on EPA regulations, programs, and funding (e.g., deadline reminders for permits or grants and addresses where information can be obtained) when rapid communication is needed. This will be done through the NPS Bulletin Board and other bulletin boards. The NPS program also has an occasionally published newsletter, *Nonpoint News-Notes*, which is distributed to the public. Updates to electronic bulletin boards and newsletters will be provided by OWEC's communications coordinator.

D. Incentive Programs

Incentive programs often include awards, grants, loans or regulatory action. These programs may change attitudes more rapidly than just providing information alone.

1. Awards and/or Recognition. EPA will use every opportunity to encourage producer associations to give environmental excellence awards and provide courtesy inspections. The Agency will participate, if requested, in developing criteria by which facilities could be evaluated for awards. Associations also will be encouraged to provide courtesy inspections whereby an association inspector visits facilities to identify possible compliance violations for the benefit of the operator. Materials and training for courtesy inspection also can be provided. Awards programs will allow the livestock feeding industry to have guidelines and benchmarks to use in their endeavors.

2. Regulatory Action. The potential for enforcement actions is always a strong incentive for environmental compliance by regulated facilities. In addition, designating an AFO as a CAFO could prove very effective in reducing water quality impacts if there is sufficient cause (e.g., theAFO discharge causes water quality impairment).

(Each Region and State should determine the degree to which available grants and loans may be used as incentives for AFOs. This strategy does not cover the use of grants and loans).

APPENDIX

Region 6 Communication Strategy for the Issuance of a General Permit for all Concentrated Animal Feeding Operations:

Meetings With the Industry In the process of writing, proposing and issuing the permit, the Region scheduled several meetings with representatives from industry. The industry representatives provided technical information about the operations of the regulated facilities to the permit writer and informed the permit writer of the concerns and opinions prevalent in the industry. The meetings also provided the permit writer access to the industry to educate them about the regulatory process from the very beginning. The industry representatives then distributed information to the operators and regulated public prior to permit proposal. The meeting process was an important stage in permit development for an industry that largely has gone unregulated, and it cut down on the initial shock and negative reaction which could have resulted from the proposal of a mostly unexpected permit.

Public Hearing Process Along with the public hearing and comment period process, the Region provided workshops with each of several public hearings. The workshops allowed the EPA permit writer to interact directly with the regulated public. The importance of this forum cannot be adequately measured. This format allows for the free exchange of information to dispel misinformation and allow for more comprehensive education of both the public and the permit writer. However, what cannot be measured is the benefit derived from allowing confused and angry individuals the opportunity to "blow off steam" at the very agency they are frustrated with and then approach the problems more calmly - which makes the public comment period a more productive process.

Additional Outreach Personnel from the Region made themselves available to give talks at other workshops and seminars. The major benefit derived from these activities was to show the Agency's willingness to work with industry and the public; the public was provided a person to talk with instead of cold regulatory language on a page. Because we were willing to extend ourselves, so were the individuals we were regulating. This activity also extended the benefits derived from the workshops held by EPA.

This enabled the Region to help the public understand both the regulatory process and EPA's responsibility to protect the environment. The public was able to see, first hand, how EPA uses information and data to make determinations about permit conditions.

"Memo Clarifying the CERCLA Reporting Requriements for Releases of Ethylene Glycol from Deicing Operations at Airports", August 2, 1996.

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

AUG 2 1996

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Mr. Robert Van Voorhees
Ms. Carol Lynn Green
Bryan Cave LLP
700 Thirteenth St., NW
Washington, D.C. 20005-3960

Dear Mr. Van Voorhees and
Ms. Green:

This is in response to your request for clarification of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 103(a) reporting requirement for releases of hazardous substances (specifically ethylene glycol) during deicing operations at airports in quantities equal to or in excess of Reportable Quantities (RQs). This also provides a more specific response to your inquiries about releases of hazardous substances to waters of the United States and applicability of the "federally permitted release" exemption for discharges to waters of the U.S. We have reviewed regulations at 40 CFR parts 117 and 302, and the preambles of these and related rules. We have also coordinated this response with the Office of Solid Waste and Emergency Response, the Office of Water, and the Office of General Counsel.

CERCLA Release Reporting

CERCLA Section 103(a) and the implementing regulations require any person in charge of a vessel or facility to immediately notify the National Response Center (NRC) of a release of a hazardous substance from such vessel or facility if, in a 24-hour period, the release is of a quantity equal to or greater than the quantity specified in 40 CFR 302.[1] With regard to the obligation to report releases of ethylene glycol being used for aircraft deicing at airports, the "facility" may include the truck applying the deicer, the airplane to which the deicer is applied, or the entire airport.[2] Currently, the person in charge of any one of these facilities from which a release into

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[1] See 42 U.S.C. 9603(a); 40 CFR 302.6(a).

[2] See CERCLA Section 101(9), 42 U.S.C. 9601(9)(broad definition of the term "facility").

the environment of 5,000 pounds or more of ethylene glycol in any 24-hour period occurs (if not exempted as a federally permitted release) must report that release to the NRC. In addition, all releases subject to reporting under CERCLA Section 103(a) are also reportable under Section 304 of the Emergency Planning and Community Right-to-Know Act to the state emergency planning commission and the local emergency planning committee for any area likely to be affected by the release. See 60 Fed. Reg. 30926, 30928 (June 12, 1995); 40 CFR 302.6(a); 40 CFR 355.40.

Persons in charge of these different facilities, i.e., the trucks, airplanes, and airports, may coordinate their actions to ensure that releases of ethylene glycol into the environment in quantities equal to or exceeding the RQ are reported. For example, the person or entity in charge of the airport could coordinate and aggregate the ethylene glycol releases which occur during airport deicing operations, and be responsible for reporting to the NRC releases to the environment that equal or exceed the RQ in any 24-hour period (that are not otherwise exempted from reporting requirements as discussed below).

However, each person in charge of a facility, including those in charge of the deicing trucks and airplanes, still would bear the burden of ensuring that releases from those facilities are reported properly and accurately, either on their own or as aggregated and reported by the airport. Finally, releases of ethylene glycol as a result of deicing operations at airports in quantities that equal or exceed the RQ in a 24-hour period (and that are not otherwise federally permitted as discussed below) may qualify for reduced release reporting under the continuous release reporting regulation. See 40 CFR 302.8.

Federally Permitted Release Exemption

CERCLA Section 103(a) exempts those persons in charge of vessels and facilities from reporting releases that are federally permitted. The federally permitted release exemptions under CERCLA Section 101(10) could potentially apply to releases of hazardous substances to all environmental media, though different parts of these exemptions apply for releases to different media. See 42 U.S.C. Section 9601(10).

Federally Permitted Release Exemption for CWA Discharges

Such "federally permitted releases" are defined in CERCLA Section 101(10) to include three types of point source discharges covered or pertaining in specified ways to permits under Section 402 of the Clean Water Act (CWA). See 42 U.S.C. Section 9601(10)(A)-(C). This statutory language of CERCLA Section 101(10)(A)-(C) is taken directly from the CWA Section 311

definition of "discharge."[3] Although the EPA has not provided a final interpretation of the meaning of "federally permitted release" under CERCLA Section 101(10), EPA has provided its interpretation of CWA Section 311(a)(2)(A)-(C) in 40 CFR 117.12, and is using those regulatory provisions to respond to your inquiry.

As noted above, the regulations at 40 CFR 117.12 define three types of federally permitted releases of hazardous substances to waters of the U.S. A release is federally permitted, and therefore exempt from both the CWA Section 311(b)(5) and CERCLA reporting requirement, only if the circumstances of the release meet all the criteria under any one of these three definitions. This determination must be made on a case by case basis for each release of a hazardous substance in quantities equal to or in excess of the RQ. To determine whether a release is federally permitted, the discharger must review the National Pollutant Discharge Elimination System (NPDES) permit requirements, the permit application and record for final permit, the specific circumstances relating to the release, and the criteria for the three exemptions under 40 CFR 117.12. Under these definitions, the discharger must have an NPDES permit [or State Pollutant Discharge Elimination System (SPDES) permit from an authorized state] or, under the third definition, have submitted a permit application.

The first federally permitted release definition applies to discharges in compliance with an NPDES permit. A discharge is "in compliance" if the permit contains an effluent limitation specifically applicable to the substance discharged, or an effluent limitation applicable to another waste parameter which has specifically been identified in the permit as intended to limit such substance (i.e., an indicator pollutant), and the discharge is in compliance with the effluent limitation. See 40 CFR 117.12(b).

Under the second definition, the substance and its amount, origin, source, and treatment must be identified in the public record (i.e., the permit, permit application or other document contained in the record for final permit); the identified treatment system must be in place and must be capable of treating the identified amount of the identified substance; and the NPDES permit must require the identified substance to be treated in the event of an onsite release. This second exclusion will not exempt a discharge resulting from an onsite release of the identified substance which exceeds the quantity or concentration contemplated in the public record. See 40 CFR 117.12(c).

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[3] See 42 U.S.C. Section 1321(a)(2)(A)-(C).

The third definition addresses continuous or anticipated intermittent discharges of hazardous substances from a point source, identified in an NPDES permit or permit application, which occur within the scope of the relevant operating or treatment systems. A release meets this definition if the hazardous substance is discharged from a point source for which a valid permit exists or for which a permit application has been submitted, and the discharge of the hazardous substance results from:

- the contamination of storm water or noncontact cooling water, provided that the storm water or cooling water is not contaminated by an onsite spill; or,

- a continuous or anticipated intermittent discharge of process waste water, and the discharge originates within the manufacturing or treatment systems; or,

- an upset or failure of a treatment system or of a process producing a continuous or anticipated intermittent discharge where the upset or failure results from a control problem, an operator error, a system failure or malfunction, an equipment or system start-up or shutdown, an equipment wash, or a production schedule change, provided that such upset or failure is not caused by an onsite spill of a hazardous substance. See 40 CFR 117.12(d).

In summary, discharges of hazardous substances to waters of the U.S. which are not subject to and in compliance with an effluent limitation in an NPDES permit, and which are not covered by the second or third exemption, will be subject to the CERCLA reporting requirement.

For airport deicing operators covered by one of the EPA's NPDES storm water general permits (either the Baseline General Permit or the Multisector General Permit[4]), the exemption for an "anticipated intermittent discharge" is potentially applicable to releases of ethylene glycol during routine deicing operations. Such releases in quantities equal to or exceeding the RQ are exempt from the reporting requirement under CERCLA Section 103 only if the release meets all of the following:

- the discharge occurs through a storm water outfall identified to receive deicing operation discharges in the

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[4] "Final NPDES General Permits for Storm Water Discharges Associated with Industrial Activity," dated September 9, 1992, and September 25, 1992, or "Final National Pollutant Discharge Elimination System Storm Water Multisector General Permit for Industrial Activities," dated September 29, 1995, and February 9, 1996.

permittee's Storm Water Pollution Prevention Plan (SWPPP)(the SWPPP would be considered either part of the NPDES permit or part of the NPDES permit application)[5];

- the ethylene glycol released to waters of the U.S. is a component of storm water. Storm water is defined as storm water runoff, snow melt runoff, and surface runoff and drainage. Dry weather discharges of ethylene glycol (i.e., discharges generated by processes other than those included in the definition of storm water) to waters of the U.S. are not authorized by the storm water NPDES permits and are not exempt from the CERCLA reporting requirement;

- the SWPPP identifies the use of ethylene glycol during deicing operations and the areas of the airport where it will be used;

- it is not the first such release of the calendar year in a quantity equal to or in excess of the RQ (see next paragraph); and,

- the contamination of storm water with ethylene glycol is not the result of a spill.

Although the discharge of ethylene glycol in storm water to a water of the U.S. may meet the 40 CFR Part 117 criteria for federally permitted releases, it is important to note that for discharges covered under either the EPA's Baseline General Permit or Multisector General Permit, these permits contain independent reporting and prevention requirements for releases of hazardous substances equal to or in excess of RQs. For releases of ethylene glycol-contaminated storm water that occur as a result of routine deicing operations, both general permits require the permittee to report to the NRC the first such release that equals or exceeds the RQ each calendar year. In addition, these permits require the permittee to provide a written description in the SWPPP of the dates on which all such releases occurred, the type and estimate of the amount of material released, and the circumstances leading to such releases. Moreover, the SWPPP must be reviewed by the permittee to identify possible additional measures to prevent or minimize such releases, and the SWPPP must be modified where appropriate.

Where a permitted storm water discharge contains a hazardous substance in an amount equal to or in excess of the RQ, but does not meet the 40 CFR 117.12(d) criteria for anticipated

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[5] For the Baseline General Permit, see 57 Fed. Reg. 41308 (September 9, 1992), or 57 Fed. Reg. 44446 (September 25, 1992). For the Multisector General Permit, see 60 Fed. Reg. 51215 (September 29, 1995).

intermittent discharges, the EPA storm water general permits require the permittee to take several actions. First, the discharger must notify the NRC immediately after becoming knowledgeable of the release. In addition, the permittee must modify the SWPPP for the facility within 14 days of knowledge of the release to provide a description of the release, an account of the circumstances leading to the release, and the date of the release. The SWPPP must also be reviewed by the permittee and appropriately modified to identify measures to prevent the recurrence of such releases and to respond to such releases. Finally, the permittee must submit to EPA within 14 days a written description of the release, the date that such release occurred, the circumstances leading to the release, and the steps to be taken to modify the SWPPP.[6]

The EPA storm water general permits also clarify that releases of hazardous substances caused by non-storm water discharges, such as onsite spills of ethylene glycol, are not authorized by these permits, and the discharger must report all such discharges in excess of RQs as required by CERCLA Section 103. In addition, all unauthorized discharges of pollutants to waters of the U.S. are a violation of the CWA regardless of the quantity discharged.

It is also important to stress that, regardless of whether a release is exempt from the CERCLA reporting requirement, the permittee is still required to comply with all conditions and limitations of its NPDES permit. For permittees covered by one of the EPA's storm water general permits, the permittee must develop an SWPPP that identifies potential sources of pollution that may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. In addition, the SWPPP shall describe and ensure the implementation of practices that are to be used to reduce the pollutants in these storm water discharges. Failure to comply with all conditions of the NPDES permit, including the SWPPP and the reporting requirements described above, could subject the permittee to an enforcement action under the CWA which can include penalties of up to $25,000 per day per violation.

The federally permitted release exemptions under CERCLA Section 101(10)(A)-(C) apply only to those portions of releases of hazardous substances that are ultimately discharged through the permitted outfall to a water of the U.S. Therefore, if any of the ethylene glycol released during routine deicing operations is <u>not</u> collected by the storm water collection or drainage system

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[6] For the Baseline General Permit, <u>see</u> 57 Fed. Reg. 41263 and 41307 (September 9, 1992) or 57 Fed. Reg. 44445 (September 25, 1992). For the Multisector General Permit, <u>see</u> 60 Fed. Reg. 50813 and 51114 (September 29, 1995).

and discharged through the permitted outfall, but is released to the land surface, air, water or other environmental media as defined by CERCLA Section 101(8), the permittee would normally have to report all remaining nonpermitted portions of such releases where the total of the nonpermitted portions equals or exceeds the RQ. Of course, if any of these remaining portions are federally permitted under other provisions of CERCLA Section 101(10) that relate to other media, those federally permitted portions are also exempt. Currently, however, there are no federal permits that address releases of ethylene glycol to the air or land surface. Therefore, all releases of ethylene glycol to these environmental media that collectively, along with any non-federally permitted releases to water, equal or exceed the RQ must be reported to the NRC.

I hope this letter clarifies the CERCLA reporting requirements for releases of ethylene glycol from deicing operations at airports. If you have additional CERCLA-related questions, please call Beth Crowley of my staff at 202-564-4177. If you have additional NPDES-related questions, please call Susan Johnson at 202-564-8329.

Sincerely,

Robert Van Heuvelen

Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement

cc: Andrew Gordon, OGC
Stephen Sweeney, OGC
Bill Zobel, OERR
Bill Swietlik, OWM
Nancy Cunningham, OWM

"Combined Sewer Overflow (CSO) Control Policy", April 19, 1994, 59 FR 18688.

federal register

Tuesday
April 19, 1994

Part VII

Environmental Protection Agency

Combined Sewer Overflow (CSO) Control Policy; Notice

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4732-7]

Combined Sewer Overflow (CSO) Control Policy

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy.

SUMMARY: EPA has issued a national policy statement entitled "Combined Sewer Overflow (CSO) Control Policy." This policy establishes a consistent national approach for controlling discharges from CSOs to the Nation's waters through the National Pollutant Discharge Elimination System (NPDES) permit program.

FOR FURTHER INFORMATION CONTACT: Jeffrey Lape, Office of Wastewater Enforcement and Compliance, MC-4201, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 260-7361.

SUPPLEMENTARY INFORMATION: The main purposes of the CSO Control Policy are to elaborate on the Environmental Protection Agency's (EPA's) National CSO Control Strategy published on September 8, 1989, at 54 FR 37370, and to expedite compliance with the requirements of the Clean Water Act (CWA). While implementation of the 1989 Strategy has resulted in progress toward controlling CSOs, significant public health and water quality risks remain.

This Policy provides guidance to permittees with CSOs, NPDES authorities and State water quality standards authorities on coordinating the planning, selection, and implementation of CSO controls that meet the requirements of the CWA and allow for public involvement during the decision-making process.

Contained in the Policy are provisions for developing appropriate, site-specific NPDES permit requirements for all combined sewer systems (CSS) that overflow as a result of wet weather events. For example, the Policy lays out two alternative approaches—the "demonstration" and the "presumption" approaches—that provide communities with targets for CSO controls that achieve compliance with the Act, particularly protection of water quality and designated uses. The Policy also includes enforcement initiatives to require the immediate elimination of overflows that occur during dry weather and to ensure that the remaining CWA requirements are complied with as soon as practicable.

The permitting provisions of the Policy were developed as a result of extensive input received from key stakeholders during a negotiated policy dialogue. The CSO stakeholders included representatives from States, environmental groups, municipal organizations and others. The negotiated dialogue was conducted during the Summer of 1992 by the Office of Water and the Office of Water's Management Advisory Group. The enforcement initiatives, including one which is underway to address CSOs during dry weather, were developed by EPA's Office of Water and Office of Enforcement.

EPA issued a Notice of Availability on the draft CSO Control Policy on January 19, 1993, (58 FR 4994) and requested comments on the draft Policy by March 22, 1993. Approximately forty-one sets of written comments were submitted by a variety of interest groups including cities and municipal groups, environmental groups, States, professional organizations and others. All comments were considered as EPA prepared the Final Policy. The public comments were largely supportive of the draft Policy. EPA received broad endorsement of and support for the key principles and provisions from most commenters. Thus, this final Policy does not include significant changes to the major provisions of the draft Policy, but rather, it includes clarification and better explanation of the elements of the Policy to address several of the questions that were raised in the comments. Persons wishing to obtain copies of the public comments or EPA's summary analysis of the comments may write or call the EPA contact person.

The CSO Policy represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost effective CSO controls that ultimately meet appropriate health and environmental objectives. The Policy recognizes the site-specific nature of CSOs and their impacts and provides the necessary flexibility to tailor controls to local situations. Major elements of the Policy ensure that CSO controls are cost effective and meet the objectives and requirements of the CWA.

The major provisions of the Policy are as follows.

CSO permittees should immediately undertake a process to accurately characterize their CSS and CSO discharges, demonstrate implementation of minimum technology-based controls identified in the Policy, and develop long-term CSO control plans which evaluate alternatives for attaining compliance with the CWA, including compliance with water quality standards and protection of designated uses. Once the long-term CSO control plans are completed, permittees will be responsible to implement the plans' recommendations as soon as practicable.

State water quality standards authorities will be involved in the long-term CSO control planning effort as well. The water quality standards authorities will help ensure that development of the CSO permittees' long-term CSO control plans are coordinated with the review and possible revision of water quality standards on CSO-impacted waters.

NPDES authorities will issue/reissue or modify permits, as appropriate, to require compliance with the technology-based and water quality-based requirements of the CWA. After completion of the long-term CSO control plan, NPDES permits will be reissued or modified to incorporate the additional requirements specified in the Policy, such as performance standards for the selected controls based on average design conditions, a post-construction water quality assessment program, monitoring for compliance with water quality standards, and a reopener clause authorizing the NPDES authority to reopen and modify the permit if it is determined that the CSO controls fail to meet water quality standards or protect designated uses. NPDES authorities should commence enforcement actions against permittees that have CWA violations due to CSO discharges during dry weather. In addition, NPDES authorities should ensure the implementation of the minimum technology-based controls and incorporate a schedule into an appropriate enforceable mechanism, with appropriate milestone dates, to implement the required long-term CSO control plan. Schedules for implementation of the long-term CSO control plan may be phased based on the relative importance of adverse impacts upon water quality standards and designated uses, and on a permittee's financial capability.

EPA is developing extensive guidance to support the Policy and will announce the availability of the guidances and other outreach efforts through various means, as they become available. For example, EPA is preparing guidance on the nine minimum controls, characterization and monitoring of CSOs, development of long-term CSO control plans, and financial capability.

Permittees will be expected to comply with any existing CSO-related requirements in NPDES permits,

consent decrees or court orders unless revised to be consistent with this Policy.

The policy is organized as follows:

List of Subjects in 40 CFR Part 122

Water pollution control.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: April 8, 1994.

Carol M. Browner,

Administrator.

Combined Sewer Overflow (CSO) Control Policy

I. Introduction

A. Purpose and Principles

The main purposes of this Policy are to elaborate on EPA's National Combined Sewer Overflow (CSO) Control Strategy published on September 8, 1989 at 54 FR 37370 (1989 Strategy) and to expedite compliance with the requirements of the Clean Water Act (CWA). While implementation of the 1989 Strategy has resulted in progress toward controlling CSOs, significant water quality risks remain.

A combined sewer system (CSS) is a wastewater collection system owned by a State or municipality (as defined by section 502(4) of the CWA) which conveys sanitary wastewaters (domestic, commercial and industrial wastewaters) and storm water through a single-pipe system to a Publicly Owned Treatment Works (POTW) Treatment Plant (as defined in 40 CFR 403.3(p)). A CSO is the discharge from a CSS at a point prior to the POTW Treatment Plant. CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment requirements applicable to POTWs.

CSOs consist of mixtures of domestic sewage, industrial and commercial wastewaters, and storm water runoff. CSOs often contain high levels of suspended solids, pathogenic microorganisms, toxic pollutants, floatables, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants. CSOs can cause exceedances of water quality standards (WQS). Such exceedances may pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the Nation's waterways.

This Policy is intended to provide guidance to permittees with CSOs, National Pollutant Discharge Elimination System (NPDES) permitting authorities, State water quality standards authorities and enforcement authorities. The purpose of the Policy is to coordinate the planning, selection, design and implementation of CSO management practices and controls to meet the requirements of the CWA and to involve the public fully during the decision making process.

This Policy reiterates the objectives of the 1989 Strategy:

1. To ensure that if CSOs occur, they are only as a result of wet weather;
2. To bring all wet weather CSO discharge points into compliance with the technology-based and water quality-based requirements of the CWA; and
3. To minimize water quality, aquatic biota, and human health impacts from CSOs.

This CSO Control Policy represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost-effective CSO controls that ultimately meet appropriate health and environmental objectives and requirements. The Policy recognizes the site-specific nature of CSOs and their impacts and provides the necessary flexibility to tailor controls to local situations. Four key principles of the Policy ensure that CSO controls are cost-effective and meet the objectives of the CWA. The key principles are:

1. Providing clear levels of control that would be presumed to meet appropriate health and environmental objectives;
2. Providing sufficient flexibility to municipalities, especially financially disadvantaged communities, to consider the site-specific nature of CSOs and to determine the most cost-effective means of reducing pollutants and meeting CWA objectives and requirements;
3. Allowing a phased approach to implementation of CSO controls considering a community's financial capability; and
4. Review and revision, as appropriate, of water quality standards and their implementation procedures when developing CSO control plans to reflect the site-specific wet weather impacts of CSOs.

This Policy is being issued in support of EPA's regulations and policy initiatives. This Policy is Agency guidance only and does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the law and regulations on the basis of specific facts when permits are issued. The Administration has recommended that the 1994 amendments to the CWA endorse this final Policy.

B. Application of Policy

The permitting provisions of this Policy apply to all CSSs that overflow as a result of storm water flow, including snow melt runoff (40 CFR 122.26(b)(13)). Discharges from CSSs during dry weather are prohibited by the CWA. Accordingly, the permitting provisions of this Policy do not apply to CSOs during dry weather. Dry weather flow is the flow in a combined sewer that results from domestic sewage, groundwater infiltration, commercial and industrial wastewaters, and any other non-precipitation related flows (e.g., tidal infiltration). In addition to

the permitting provisions, the Enforcement and Compliance section of this Policy describes an enforcement initiative being developed for overflows that occur during dry weather.

Consistent with the 1989 Strategy, 30 States that submitted CSO permitting strategies have received EPA approval or, in the case of one State, conditional approval of its strategy. States and EPA Regional Offices should review these strategies and negotiate appropriate revisions to them to implement this Policy. Permitting authorities are encouraged to evaluate water pollution control needs on a watershed management basis and coordinate CSO control efforts with other point and nonpoint source control activities.

C. Effect on Current CSO Control Efforts

EPA recognizes that extensive work has been done by many Regions, States, and municipalities to abate CSOs. As such, portions of this Policy may already have been addressed by permittees' previous efforts to control CSOs. Therefore, portions of this Policy may not apply, as determined by the permitting authority on a case-by-case basis, under the following circumstances:

1. Any permittee that, on the date of publication of this final Policy, has completed or substantially completed construction of CSO control facilities that are designed to meet WQS and protect designated uses, and where it has been determined that WQS are being or will be attained, is not covered by the initial planning and construction provisions in this Policy; however, the operational plan and post-construction monitoring provisions continue to apply. If, after monitoring, it is determined that WQS are not being attained, the permittee should be required to submit a revised CSO control plan that, once implemented, will attain WQS.

2. Any permittee that, on the date of publication of this final Policy, has substantially developed or is implementing a CSO control program pursuant to an existing permit or enforcement order, and such program is considered by the NPDES permitting authority to be adequate to meet WQS and protect designated uses and is reasonably equivalent to the treatment objectives of this Policy, should complete those facilities without further planning activities otherwise expected by this Policy. Such programs, however, should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy.

3. Any permittee that has previously constructed CSO control facilities in an effort to comply with WQS but has failed to meet such applicable standards or to protect designated uses due to remaining CSOs may receive consideration for such efforts in future permits or enforceable orders for long-term CSO control planning, design and implementation.

In the case of any ongoing or substantially completed CSO control effort, the NPDES permit or other enforceable mechanism, as appropriate, should be revised to include all appropriate permit requirements consistent with Section IV.B. of this Policy.

D. Small System Considerations

The scope of the long-term CSO control plan, including the characterization, monitoring and modeling, and evaluation of alternatives portions of this Policy may be difficult for some small CSSs. At the discretion of the NPDES Authority, jurisdictions with populations under 75,000 may not need to complete each of the formal steps outlined in Section II.C. of this Policy, but should be required through their permits or other enforceable mechanisms to comply with the nine minimum controls (II.B), public participation (II.C.2), and sensitive areas (II.C.3) portions of this Policy. In addition, the permittee may propose to implement any of the criteria contained in this Policy for evaluation of alternatives described in II.C.4. Following approval of the proposed plan, such jurisdictions should construct the control projects and propose a monitoring program sufficient to determine whether WQS are attained and designated uses are protected.

In developing long-term CSO control plans based on the small system considerations discussed in the preceding paragraph, permittees are encouraged to discuss the scope of their long-term CSO control plan with the WQS authority and the NPDES authority. These discussions will ensure that the plan includes sufficient information to enable the permitting authority to identify the appropriate CSO controls.

E. Implementation Responsibilities

NPDES authorities (authorized States or EPA Regional Offices, as appropriate) are responsible for implementing this Policy. It is their responsibility to assure that CSO permittees develop long-term CSO control plans and that NPDES permits meet the requirements of the CWA. Further, they are responsible for coordinating the review of the long-term CSO control plan and the development of the permit with the WQS authority to determine if revisions to the WQS are appropriate. In addition, they should determine the appropriate vehicle (i.e., permit reissuance, information request under CWA section 308 or State equivalent or enforcement action) to ensure that compliance with the CWA is achieved as soon as practicable.

Permittees are responsible for documenting the implementation of the nine minimum controls and developing and implementing a long-term CSO control plan, as described in this Policy. EPA recognizes that financial considerations are a major factor affecting the implementation of CSO controls. For that reason, this Policy allows consideration of a permittee's financial capability in connection with the long-term CSO control planning effort, WQS review, and negotiation of enforceable schedules. However, each permittee is ultimately responsible for aggressively pursuing financial arrangements for the implementation of its long-term CSO control plan. As part of this effort, communities should apply to their State Revolving Fund program, or other assistance programs as appropriate, for financial assistance.

EPA and the States will undertake action to assure that all permittees with CSSs are subject to a consistent review in the permit development process, have permit requirements that achieve compliance with the CWA, and are subject to enforceable schedules that require the earliest practicable compliance date considering physical and financial feasibility.

F. Policy Development

This Policy devotes a separate section to each step involved in developing and implementing CSO controls. This is not to imply that each function occurs separately. Rather, the entire process surrounding CSO controls, community planning, WQS and permit development/revision, enforcement/compliance actions and public participation must be coordinated to control CSOs effectively. Permittees and permitting authorities are encouraged to consider innovative and alternative approaches and technologies that achieve the objectives of this Policy and the CWA.

In developing this Policy, EPA has included information on what responsible parties are expected to accomplish. Subsequent documents will provide additional guidance on how the objectives of this Policy should be met. These documents will provide further guidance on: CSO permit writing, the nine minimum controls, long-term CSO

control plans, financial capability, sewer system characterization and receiving water monitoring and modeling, and application of WQS to CSO-impacted waters. For most CSO control efforts however, sufficient detail has been included in this Policy to begin immediate implementation of its provisions.

II. EPA Objectives for Permittees

A. Overview

Permittees with CSSs that have CSOs should immediately undertake a process to accurately characterize their sewer systems, to demonstrate implementation of the nine minimum controls, and to develop a long-term CSO control plan.

B. Implementation of the Nine Minimum Controls

Permittees with CSOs should submit appropriate documentation demonstrating implementation of the nine minimum controls, including any proposed schedules for completing minor construction activities. The nine minimum controls are:

1. Proper operation and regular maintenance programs for the sewer system and the CSOs;
2. Maximum use of the collection system for storage;
3. Review and modification of pretreatment requirements to assure CSO impacts are minimized;
4. Maximization of flow to the POTW for treatment;
5. Prohibition of CSOs during dry weather;
6. Control of solid and floatable materials in CSOs;
7. Pollution prevention;
8. Public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts; and
9. Monitoring to effectively characterize CSO impacts and the efficacy of CSO controls.

Selection and implementation of actual control measures should be based on site-specific considerations including the specific CSS's characteristics discussed under the sewer system characterization and monitoring portions of this Policy. Documentation of the nine minimum controls may include operation and maintenance plans, revised sewer use ordinances for industrial users, sewer system inspection reports, infiltration/inflow studies, pollution prevention programs, public notification plans, and facility plans for maximizing the capacities of the existing collection, storage and treatment systems, as well as contracts and schedules for minor construction programs for improving the existing system's operation. The permittee should also submit any information or data on the degree to which the nine minimum controls achieve compliance with water quality standards. These data and information should include results made available through monitoring and modeling activities done in conjunction with the development of the long-term CSO control plan described in this Policy.

This documentation should be submitted as soon as practicable, but no later than two years after the requirement to submit such documentation is included in an NPDES permit or other enforceable mechanism. Implementation of the nine minimum controls with appropriate documentation should be completed as soon as practicable but no later than January 1, 1997. These dates should be included in an appropriate enforceable mechanism.

Because the CWA requires immediate compliance with technology-based controls (section 301(b)), which on a Best Professional Judgment basis should include the nine minimum controls, a compliance schedule for implementing the nine minimum controls, if necessary, should be included in an appropriate enforceable mechanism.

C. Long-Term CSO Control Plan

Permittees with CSOs are responsible for developing and implementing long-term CSO control plans that will ultimately result in compliance with the requirements of the CWA. The long-term plans should consider the site-specific nature of CSOs and evaluate the cost effectiveness of a range of control options/strategies. The development of the long-term CSO control plan and its subsequent implementation should also be coordinated with the NPDES authority and the State authority responsible for reviewing and revising the State's WQS. The selected controls should be designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS, including existing and designated uses.

This policy identifies EPA's major objectives for the long-term CSO control plan. Permittees should develop and submit this long-term CSO control plan as soon as practicable, but generally within two years after the date of the NPDES permit provision, Section 308 information request, or enforcement action requiring the permittee to develop the plan. NPDES authorities may establish a longer timetable for completion of the long-term CSO control plan on a case-by-case basis to account for site-specific factors which may influence the complexity of the planning process. Once agreed upon, these dates should be included in an appropriate enforceable mechanism.

EPA expects each long-term CSO control plan to utilize appropriate information to address the following minimum elements. The Plan should also include both fixed-date project implementation schedules (which may be phased) and a financing plan to design and construct the project as soon as practicable. The minimum elements of the long-term CSO control plan are described below.

1. Characterization, Monitoring, and Modeling of the Combined Sewer System

In order to design a CSO control plan adequate to meet the requirements of the CWA, a permittee should have a thorough understanding of its sewer system, the response of the system to various precipitation events, the characteristics of the overflows, and the water quality impacts that result from CSOs. The permittee should adequately characterize through monitoring, modeling, and other means as appropriate, for a range of storm events, the response of its sewer system to wet weather events including the number, location and frequency of CSOs, volume, concentration and mass of pollutants discharged and the impacts of the CSOs on the receiving waters and their designated uses. The permittee may need to consider information on the contribution and importance of other pollution sources in order to develop a final plan designed to meet water quality standards. The purpose of the system characterization, monitoring and modeling program initially is to assist the permittee in developing appropriate measures to implement the nine minimum controls and, if necessary, to support development of the long-term CSO control plan. The monitoring and modeling data also will be used to evaluate the expected effectiveness of both the nine minimum controls and, if necessary, the long-term CSO controls, to meet WQS.

The major elements of a sewer system characterization are described below.

a. Rainfall Records—The permittee should examine the complete rainfall record for the geographic area of its existing CSS using sound statistical procedures and best available data. The permittee should evaluate flow variations in the receiving water body to correlate between CSOs and receiving water conditions.

b. Combined Sewer System Characterization—The permittee should evaluate the nature and extent of its sewer system through evaluation of available sewer system records, field inspections and other activities necessary to understand the number, location and frequency of overflows and their location relative to sensitive areas and to pollution sources in the collection system, such as indirect significant industrial users.

c. CSO Monitoring—The permittee should develop a comprehensive, representative monitoring program that measures the frequency, duration, flow rate, volume and pollutant concentration of CSO discharges and assesses the impact of the CSOs on the receiving waters. The monitoring program should include necessary CSO effluent and ambient in-stream monitoring and, where appropriate, other monitoring protocols such as biological assessment, toxicity testing and sediment sampling. Monitoring parameters should include, for example, oxygen demanding pollutants, nutrients, toxic pollutants, sediment contaminants, pathogens, bacteriological indicators (e.g., Enterococcus, E. Coli), and toxicity. A representative sample of overflow points can be selected that is sufficient to allow characterization of CSO discharges and their water quality impacts and to facilitate evaluation of control plan alternatives.

d. Modeling—Modeling of a sewer system is recognized as a valuable tool for predicting sewer system response to various wet weather events and assessing water quality impacts when evaluating different control strategies and alternatives. EPA supports the proper and effective use of models, where appropriate, in the evaluation of the nine minimum controls and the development of the long-term CSO control plan. It is also recognized that there are many models which may be used to do this. These models range from simple to complex. Having decided to use a model, the permittee should base its choice of a model on the characteristics of its sewer system, the number and location of overflow points, and the sensitivity of the receiving water body to the CSO discharges. Use of models should include appropriate calibration and verification with field measurements. The sophistication of the model should relate to the complexity of the system to be modeled and to the information needs associated with evaluation of CSO control options and water quality impacts. EPA believes that continuous simulation models, using historical rainfall data, may be the best way to model sewer systems, CSOs, and their impacts. Because of the iterative nature of modeling sewer systems, CSOs, and their impacts, monitoring and modeling efforts are complementary and should be coordinated.

2. Public Participation

In developing its long-term CSO control plan, the permittee will employ a public participation process that actively involves the affected public in the decision-making to select the long-term CSO controls. The affected public includes rate payers, industrial users of the sewer system, persons who reside downstream from the CSOs, persons who use and enjoy these downstream waters, and any other interested persons.

3. Consideration of Sensitive Areas

EPA expects a permittee's long-term CSO control plan to give the highest priority to controlling overflows to sensitive areas. Sensitive areas, as determined by the NPDES authority in coordination with State and Federal agencies, as appropriate, include designated Outstanding National Resource Waters, National Marine Sanctuaries, waters with threatened or endangered species and their habitat, waters with primary contact recreation, public drinking water intakes or their designated protection areas, and shellfish beds. For such areas, the long-term CSO control plan should:

a. Prohibit new or significantly increased overflows;

b. i. Eliminate or relocate overflows that discharge to sensitive areas wherever physically possible and economically achievable, except where elimination or relocation would provide less environmental protection than additional treatment; or

ii. Where elimination or relocation is not physically possible and economically achievable, or would provide less environmental protection than additional treatment, provide the level of treatment for remaining overflows deemed necessary to meet WQS for full protection of existing and designated uses. In any event, the level of control should not be less than those described in Evaluation of Alternatives below; and

c. Where elimination or relocation has been proven not to be physically possible and economically achievable, permitting authorities should require, for each subsequent permit term, a reassessment based on new or improved techniques to eliminate or relocate, or on changed circumstances that influence economic achievability.

4. Evaluation of Alternatives

EPA expects the long-term CSO control plan to consider a reasonable range of alternatives. The plan should, for example, evaluate controls that would be necessary to achieve zero overflow events per year, an average of one to three, four to seven, and eight to twelve overflow events per year. Alternatively, the long-term plan could evaluate controls that achieve 100% capture, 90% capture, 85% capture, 80% capture, and 75% capture for treatment. The long-term control plan should also consider expansion of POTW secondary and primary capacity in the CSO abatement alternative analysis. The analysis of alternatives should be sufficient to make a reasonable assessment of cost and performance as described in Section II.C.5. Because the final long-term CSO control plan will become the basis for NPDES permit limits and requirements, the selected controls should be sufficient to meet CWA requirements.

In addition to considering sensitive areas, the long-term CSO control plan should adopt one of the following approaches:

a. "Presumption" Approach

A program that meets any of the criteria listed below would be presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA, provided the permitting authority determines that such presumption is reasonable in light of the data and analysis conducted in the characterization, monitoring, and modeling of the system and the consideration of sensitive areas described above. These criteria are provided because data and modeling of wet weather events often do not give a clear picture of the level of CSO controls necessary to protect WQS.

i. No more than an average of four overflow events per year, provided that the permitting authority may allow up to two additional overflow events per year. For the purpose of this criterion, an overflow event is one or more overflows from a CSS as the result of a precipitation event that does not receive the minimum treatment specified below; or

ii. The elimination or the capture for treatment of no less than 85% by volume of the combined sewage collected in the CSS during precipitation events on a system-wide annual average basis; or

iii. The elimination or removal of no less than the mass of the pollutants, identified as causing water quality impairment through the sewer system

characterization, monitoring, and modeling effort, for the volumes that would be eliminated or captured for treatment under paragraph ii. above. Combined sewer flows remaining after implementation of the nine minimum controls and within the criteria specified at II.C.4.a.i or ii, should receive a minimum of:

- Primary clarification (Removal of floatables and settleable solids may be achieved by any combination of treatment technologies or methods that are shown to be equivalent to primary clarification.);
- Solids and floatables disposal; and
- Disinfection of effluent, if necessary, to meet WQS, protect designated uses and protect human health, including removal of harmful disinfection chemical residuals, where necessary.

b. "Demonstration" Approach

A permittee may demonstrate that a selected control program, though not meeting the criteria specified in II.C.4.a. above is adequate to meet the water quality-based requirements of the CWA. To be a successful demonstration, the permittee should demonstrate each of the following:

i. The planned control program is adequate to meet WQS and protect designated uses, unless WQS or uses cannot be met as a result of natural background conditions or pollution sources other than CSOs;

ii. The CSO discharges remaining after implementation of the planned control program will not preclude the attainment of WQS or the receiving waters' designated uses or contribute to their impairment. Where WQS and designated uses are not met in part because of natural background conditions or pollution sources other than CSOs, a total maximum daily load, including a wasteload allocation and a load allocation, or other means should be used to apportion pollutant loads;

iii. The planned control program will provide the maximum pollution reduction benefits reasonably attainable; and

iv. The planned control program is designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS or designated uses.

5. Cost/Performance Considerations

The permittee should develop appropriate cost/performance curves to demonstrate the relationships among a comprehensive set of reasonable control alternatives that correspond to the different ranges specified in Section II.C.4. This should include an analysis to determine where the increment of pollution reduction achieved in the receiving water diminishes compared to the increased costs. This analysis, often known as knee of the curve, should be among the considerations used to help guide selection of controls.

6. Operational Plan

After agreement between the permittee and NPDES authority on the necessary CSO controls to be implemented under the long-term CSO control plan, the permittee should revise the operation and maintenance program developed as part of the nine minimum controls to include the agreed-upon long-term CSO controls. The revised operation and maintenance program should maximize the removal of pollutants during and after each precipitation event using all available facilities within the collection and treatment system. For any flows in excess of the criteria specified at II.C.4.a.i., ii. or iii and not receiving the treatment specified in II.C.4.a, the operational plan should ensure that such flows receive treatment to the greatest extent practicable.

7. Maximizing Treatment at the Existing POTW Treatment Plant

In some communities, POTW treatment plants may have primary treatment capacity in excess of their secondary treatment capacity. One effective strategy to abate pollution resulting from CSOs is to maximize the delivery of flows during wet weather to the POTW treatment plant for treatment. Delivering these flows can have two significant water quality benefits: First, increased flows during wet weather to the POTW treatment plant may enable the permittee to eliminate or minimize overflows to sensitive areas; second, this would maximize the use of available POTW facilities for wet weather flows and would ensure that combined sewer flows receive at least primary treatment prior to discharge.

Under EPA regulations, the intentional diversion of waste streams from any portion of a treatment facility, including secondary treatment, is a bypass. EPA bypass regulations at 40 CFR 122.41(m) allow for a facility to bypass some or all the flow from its treatment process under specified limited circumstances. Under the regulation, the permittee must show that the bypass was unavoidable to prevent loss of life, personal injury or severe property damage, that there was no feasible alternative to the bypass and that the permittee submitted the required notices. In addition, the regulation provides that a bypass may be approved only after consideration of adverse effects.

Normally, it is the responsibility of the permittee to document, on a case-by-base basis, compliance with 40 CFR 122.41(m) in order to bypass flows legally. For some CSO-related permits, the study of feasible alternatives in the control plan may provide sufficient support for the permit record and for approval of a CSO-related bypass in the permit itself, and to define the specific parameters under which a bypass can legally occur. For approval of a CSO-related bypass, the long-term CSO control plan, at a minimum, should provide justification for the cut-off point at which the flow will be diverted from the secondary treatment portion of the treatment plant, and provide a benefit-cost analysis demonstrating that conveyance of wet weather flow to the POTW for primary treatment is more beneficial than other CSO abatement alternatives such as storage and pump back for secondary treatment, sewer separation, or satellite treatment. Such a permit must define under what specific wet weather conditions a CSO-related bypass is allowed and also specify what treatment or what monitoring, and effluent limitations and requirements apply to the bypass flow. The permit should also provide that approval for the CSO-related bypass will be reviewed and may be modified or terminated if there is a substantial increase in the volume or character of pollutants being introduced to the POTW. The CSO-related bypass provision in the permit should also make it clear that all wet weather flows passing the headworks of the POTW treatment plant will receive at least primary clarification and solids and floatables removal and disposal, and disinfection, where necessary, and any other treatment that can reasonably be provided.

Under this approach, EPA would allow a permit to authorize a CSO-related bypass of the secondary treatment portion of the POTW treatment plant for combined sewer flows in certain identified circumstances. This provision would apply only to those situations where the POTW would ordinarily meet the requirements of 40 CFR 122.41(m) as evaluated on a case-by-case basis. Therefore, there must be sufficient data in the administrative record (reflected in the permit fact sheet or statement of basis) supporting all the requirements in 40 CFR 122.41(m)(4) for approval of an anticipated bypass.

For the purposes of applying this regulation to CSO permittees, "severe property damage" could include

situations where flows above a certain level wash out the POTW's secondary treatment system. EPA further believes that the feasible alternatives requirement of the regulation can be met if the record shows that the secondary treatment system is properly operated and maintained, that the system has been designed to meet secondary limits for flows greater than the peak dry weather flow, plus an appropriate quantity of wet weather flow, and that it is either technically or financially infeasible to provide secondary treatment at the existing facilities for greater amounts of wet weather flow. The feasible alternative analysis should include, for example, consideration of enhanced primary treatment (e.g., chemical addition) and non-biological secondary treatment. Other bases supporting a finding of no feasible alternative may also be available on a case-by-case basis. As part of its consideration of possible adverse effects resulting from the bypass, the permitting authority should also ensure that the bypass will not cause exceedances of WQS.

This Policy does not address the appropriateness of approving anticipated bypasses through NPDES permits in advance outside the CSO context.

8. Implementation Schedule

The permittee should include all pertinent information in the long term control plan necessary to develop the construction and financing schedule for implementation of CSO controls. Schedules for implementation of the CSO controls may be phased based on the relative importance of adverse impacts upon WQS and designated uses, priority projects identified in the long-term plan, and on a permittee's financial capability.

Construction phasing should consider:

a. Eliminating overflows that discharge to sensitive areas as the highest priority;

b. Use impairment;

c. The permittee's financial capability including consideration of such factors as:

i. Median household income;

ii. Total annual wastewater and CSO control costs per household as a percent of median household income;

iii. Overall net debt as a percent of full market property value;

iv. Property tax revenues as a percent of full market property value;

v. Property tax collection rate;

vi. Unemployment; and

vii. Bond rating;

d. Grant and loan availability;

e. Previous and current residential, commercial and industrial sewer user fees and rate structures; and

f. Other viable funding mechanisms and sources of financing.

9. Post-Construction Compliance Monitoring Program

The selected CSO controls should include a post-construction water quality monitoring program adequate to verify compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of CSO controls. This water quality compliance monitoring program should include a plan to be approved by the NPDES authority that details the monitoring protocols to be followed, including the necessary effluent and ambient monitoring and, where appropriate, other monitoring protocols such as biological assessments, whole effluent toxicity testing, and sediment sampling.

III. Coordination With State Water Quality Standards

A. Overview

WQS are State adopted, or Federally promulgated rules which serve as the goals for the water body and the legal basis for the water quality-based NPDES permit requirements under the CWA. WQS consist of uses which States designate for their water bodies, criteria to protect the uses, an anti-degradation policy to protect the water quality improvements gained and other policies affecting the implementation of the standards. A primary objective of the long-term CSO control plan is to meet WQS, including the designated uses through reducing risks to human health and the environment by eliminating, relocating or controlling CSOs to the affected waters.

State WQS authorities, NPDES authorities, EPA regional offices, permittees, and the public should meet early and frequently throughout the long-term CSO control planning process. Development of the long-term plan should be coordinated with the review and appropriate revision of WQS and implementation procedures on CSO-impacted waters to ensure that the long-term controls will be sufficient to meet water quality standards. As part of these meetings, participants should agree on the data, information and analyses needed to support the development of the long-term CSO control plan and the review of applicable WQS, and implementation procedures, if appropriate. Agreements should be reached on the monitoring protocols and models that will be used to evaluate the water quality impacts of the overflows, to analyze the attainability of the WQS and to determine the water quality-based requirements for the permit. Many opportunities exist for permittees and States to share information as control programs are developed and as WQS are reviewed. Such information should assist States in determining the need for revisions to WQS and implementation procedures to better reflect the site-specific wet weather impacts of CSOs. Coordinating the development of the long-term CSO control plan and the review of the WQS and implementation procedures provides greater assurance that the long-term control plan selected and the limits and requirements included in the NPDES permit will be sufficient to meet WQS and to comply with sections 301(b)(1)(C) and 402(a)(2) of the CWA.

EPA encourages States and permittees jointly to sponsor workshops for the affected public in the development of the long-term CSO control plan and during the development of appropriate revisions to WQS for CSO-impacted waters. Workshops provide a forum for including the public in discussions of the implications of the proposed long-term CSO control plan on the water quality and uses for the receiving water.

B. Water Quality Standards Reviews

The CWA requires States to periodically, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. States must provide the public an opportunity to comment on any proposed revision to water quality standards and all revisions must be submitted to EPA for review and approval.

EPA regulations and guidance provide States with the flexibility to adapt their WQS, and implementation procedures to reflect site-specific conditions including those related to CSOs. For example, a State may adopt site-specific criteria for a particular pollutant if the State determines that the site-specific criteria fully protects the designated use (40 CFR 131.11). In addition, the regulations at 40 CFR 131.10(g), (h), and (j) specify when and how a designated use may be modified. A State may remove a designated use from its water quality standards only if the designated use is not an existing use. An existing use is a use actually attained in the water body on or after November 28, 1975. Furthermore, a State may not remove a designated use that will be attained by implementing the

technology-based effluent limits required under sections 301(b) and 306 of the CWA and by implementing cost-effective and reasonable best management practices for nonpoint source controls. Thus, if a State has a reasonable basis to determine that the current designated use could be attained after implementation of the technology-based controls of the CWA, then the use could not be removed.

In determining whether a use is attainable and prior to removing a designated use, States must conduct and submit to EPA a use attainability analysis. A use attainability analysis is a structured scientific assessment of the factors affecting the use, including the physical, chemical, biological, and economic factors described in 40 CFR 131.10(g). As part of the analysis, States should evaluate whether the designated use could be attained if CSO controls were implemented. For example, States should examine if sediment loadings from CSOs could be reduced so as not to bury spawning beds, or if biochemical oxygen demanding material in the effluent or the toxicity of the effluent could be corrected so as to reduce the acute or chronic physiological stress on or bioaccumulation potential of aquatic organisms.

In reviewing the attainability of their WQS and the applicability of their implementation procedures to CSO-impacted waters, States are encouraged to define more explicitly their recreational and aquatic life uses and then, if appropriate, modify the criteria accordingly to protect the designated uses.

Another option is for States to adopt partial uses by defining when primary contact recreation such as swimming does not exist, such as during certain seasons of the year in northern climates or during a particular type of storm event. In making such adjustments to their uses, States must ensure that downstream uses are protected, and that during other seasons or after the storm event has passed, the use is fully protected.

In addition to defining recreational uses with greater specificity, States are also encouraged to define the aquatic uses more precisely. Rather than "aquatic life use protection," States should consider defining the type of fishery to be protected such as a cold water fishery (e.g., trout or salmon) or a warm weather fishery (e.g., bluegill or large mouth bass). Explicitly defining the type of fishery to be protected may assist the permittee in enlisting the support of citizens for a CSO control plan.

A water quality standard variance may be appropriate, in limited circumstances on CSO-impacted waters, where the State is uncertain as to whether a standard can be attained and time is needed for the State to conduct additional analyses on the attainability of the standard. Variances are short-term modifications in water quality standards. Subject to EPA approval, States, with their own statutory authority, may grant a variance to a specific discharger for a specific pollutant. The justification for a variance is similar to that required for a permanent change in the standard, although the showings needed are less rigorous. Variances are also subject to public participation requirements of the water quality standards and permits programs and are reviewable generally every three years. A variance allows the CSO permit to be written to meet the "modified" water quality standard as analyses are conducted and as progress is made to improve water quality.

Justifications for variances are the same as those identified in 40 CFR 131.10(g) for modifications in uses. States must provide an opportunity for public review and comment on all variances. If States use the permit as the vehicle to grant the variance, notice of the permit must clearly state that the variance modifies the State's water quality standards. If the variance is approved, the State appends the variance to the State's standards and reviews the variance every three years.

IV. Expectations for Permitting Authorities

A. Overview

CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment regulations applicable to publicly owned treatment works (*Montgomery Environmental Coalition vs. Costle*, 646 F.2d 568 (D.C. Cir. 1980)).

All permits for CSOs should require the nine minimum controls as a minimum best available technology economically achievable and best conventional technology (BAT/BCT) established on a best professional judgment (BPJ) basis by the permitting authority (40 CFR 125.3). Water quality-based requirements are to be established based on applicable water quality standards.

This policy establishes a uniform, nationally consistent approach to developing and issuing NPDES permits to permittees with CSOs. Permits for CSOs should be developed and issued expeditiously. A single, system-wide permit generally should be issued for all discharges, including CSOs, from a CSS operated by a single authority. When different parts of a single CSS are operated by more than one authority, permits issued to each authority should generally require joint preparation and implementation of the elements of this Policy and should specifically define the responsibilities and duties of each authority. Permittees should be required to coordinate system-wide implementation of the nine minimum controls and the development and implementation of the long-term CSO control plan.

The individual authorities are responsible for their own discharges and should cooperate with the permittee for the POTW receiving the flows from the CSS. When a CSO is permitted separately from the POTW, both permits should be cross-referenced for informational purposes.

EPA Regions and States should review the CSO permitting priorities established in the State CSO Permitting Strategies developed in response to the 1989 Strategy. Regions and States may elect to revise these previous priorities. In setting permitting priorities, Regions and States should not just focus on those permittees that have initiated monitoring programs. When setting priorities, Regions and States should consider, for example, the known or potential impact of CSOs on sensitive areas, and the extent of upstream industrial user discharges to the CSS.

During the permittee's development of the long-term CSO control plan, the permit writer should promote coordination between the permittee and State WQS authority in connection with possible WQS revisions. Once the permittee has completed development of the long-term CSO control plan and has coordinated with the permitting authority the selection of the controls necessary to meet the requirements of the CWA, the permitting authority should include in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan, including conditions for water quality monitoring and operation and maintenance.

B. NPDES Permit Requirements

Following are the major elements of NPDES permits to implement this Policy and ensure protection of water quality.

1. Phase I Permits—Requirements for Demonstration of Implementation of the Nine Minimum Controls and Development of the Long-Term CSO Control Plan

In the Phase I permit issued/modified to reflect this Policy, the NPDES authority should at least require permittees to:

a. Immediately implement BAT/BCT, which at a minimum includes the nine minimum controls, as determined on a BPJ basis by the permitting authority;

b. Develop and submit a report documenting the implementation of the nine minimum controls within two years of permit issuance/modification;

c. Comply with applicable WQS, no later than the date allowed under the State's WQS, expressed in the form of a narrative limitation; and

d. develop and submit, consistent with this Policy and based on a schedule in an appropriate enforceable mechanism, a long-term CSO control plan as soon as practicable, but generally within two years after the effective date of the permit issuance/modification. However, permitting authorities may establish a longer timetable for completion of the long-term CSO control plan on a case-by-case basis to account for site-specific factors that may influence the complexity of the planning process.

The NPDES authority should include compliance dates on the fastest practicable schedule for each of the nine minimum controls in an appropriate enforceable mechanism issued in conjunction with the Phase I permit. The use of enforceable orders is necessary unless Congress amends the CWA. All orders should require compliance with the nine minimum controls no later than January 1, 1997.

2. Phase II Permits—Requirements for Implementation of a Long-Term CSO Control Plan

Once the permittee has completed development of the long-term CSO control plan and the selection of the controls necessary to meet CWA requirements has been coordinated with the permitting and WQS authorities, the permitting authority should include, in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan as soon as practicable. Where the permittee has selected controls based on the "presumption" approach described in Section II.C.4, the permitting authority must have determined that the presumption that such level of treatment will achieve water quality standards is reasonable in light of the data and analysis conducted under this Policy. The Phase II permit should contain:

a. Requirements to implement the technology-based controls including the nine minimum controls determined on a BPJ basis;

b. Narrative requirements which insure that the selected CSO controls are implemented, operated and maintained as described in the long-term CSO control plan;

c. Water quality-based effluent limits under 40 CFR 122.44(d)(1) and 122.44(k), requiring, at a minimum, compliance with, no later than the date allowed under the State's WQS, the numeric performance standards for the selected CSO controls, based on average design conditions specifying at least one of the following:

i. A maximum number of overflow events per year for specified design conditions consistent with II.C.4.a.i; or

ii. A minimum percentage capture of combined sewage by volume for treatment under specified design conditions consistent with II.C.4.a.ii; or

iii. A minimum removal of the mass of pollutants discharged for specified design conditions consistent with II.C.4.a.iii; or

iv. performance standards and requirements that are consistent with II.C.4.b. of the Policy.

d. A requirement to implement, with an established schedule, the approved post-construction water quality assessment program including requirements to monitor and collect sufficient information to demonstrate compliance with WQS and protection of designated uses as well as to determine the effectiveness of CSO controls.

e. A requirement to reassess overflows to sensitive areas in those cases where elimination or relocation of the overflows is not physically possible and economically achievable. The reassessment should be based on consideration of new or improved techniques to eliminate or relocate overflows or changed circumstances that influence economic achievability;

f. Conditions establishing requirements for maximizing the treatment of wet weather flows at the POTW treatment plant, as appropriate, consistent with Section II.C.7. of this Policy;

g. A reopener clause authorizing the NPDES authority to reopen and modify the permit upon determination that the CSO controls fail to meet WQS or protect designated uses. Upon such determination, the NPDES authority should promptly notify the permittee and proceed to modify or reissue the permit. The permittee should be required to develop, submit and implement, as soon as practicable, a revised CSO control plan which contains additional controls to meet WQS and designated uses. If the initial CSO control plan was approved under the demonstration provision of Section II.C.4.b., the revised plan, at a minimum, should provide for controls that satisfy one of the criteria in Section II.C.4.a. unless the permittee demonstrates that the revised plan is clearly adequate to meet WQS at a lower cost and it is shown that the additional controls resulting from the criteria in Section II.C.4.a. will not result in a greater overall improvement in water quality.

Unless the permittee can comply with all of the requirements of the Phase II permit, the NPDES authority should include, in an enforceable mechanism, compliance dates on the fastest practicable schedule for those activities directly related to meeting the requirements of the CWA. For major permittees, the compliance schedule should be placed in a judicial order. Proper compliance with the schedule for implementing the controls recommended in the long-term CSO control plan constitutes compliance with the elements of this Policy concerning planning and implementation of a long term CSO remedy.

3. Phasing Considerations

Implementation of CSO controls may be phased based on the relative importance of and adverse impacts upon WQS and designated uses, as well as the permittee's financial capability and its previous efforts to control CSOs. The NPDES authority should evaluate the proposed implementation schedule and construction phasing discussed in Section II.C.8. of this Policy. The permit should require compliance with the controls proposed in the long-term CSO control plan no later than the applicable deadline(s) under the CWA or State law. If compliance with the Phase II permit is not possible, an enforceable schedule, consistent with the Enforcement and Compliance Section of this Policy, should be issued in conjunction with the Phase II permit which specifies the schedule and milestones for implementation of the long-term CSO control plan.

V. Enforcement and Compliance

A. Overview

It is important that permittees act immediately to take the necessary steps to comply with the CWA. The CSO enforcement effort will commence with

an initiative to address CSOs that discharge during dry weather, followed by an enforcement effort in conjunction with permitting CSOs discussed earlier in this Policy. Success of the enforcement effort will depend in large part upon expeditious action by NPDES authorities in issuing enforceable permits that include requirements both for the nine minimum controls and for compliance with all other requirements of the CWA. Priority for enforcement actions should be set based on environmental impacts or sensitive areas affected by CSOs.

As a further inducement for permittees to cooperate with this process, EPA is prepared to exercise its enforcement discretion in determining whether or not to seek civil penalties for past CSO violations if permittees meet the objectives and schedules of this Policy and do not have CSOs during dry weather.

B. Enforcement of CSO Dry Weather Discharge Prohibition

EPA intends to commence immediately an enforcement initiative against CSO permittees which have CWA violations due to CSOs during dry weather. Discharges during dry weather have always been prohibited by the NPDES program. Such discharges can create serious public health and water quality problems. EPA will use its CWA Section 308 monitoring, reporting, and inspection authorities, together with NPDES State authorities, to locate these violations, and to determine their causes. Appropriate remedies and penalties will be sought for CSOs during dry weather. EPA will provide NPDES authorities more specific guidance on this enforcement initiative separately.

C. Enforcement of Wet Weather CSO Requirements

Under the CWA, EPA can use several enforcement options to address permittees with CSOs. Those options directly applicable to this Policy are section 308 Information Requests, section 309(a) Administrative Orders, section 309(g) Administrative Penalty Orders, section 309 (b) and (d) Civil Judicial Actions, and section 504 Emergency Powers. NPDES States should use comparable means.

NPDES authorities should set priorities for enforcement based on environmental impacts or sensitive areas affected by CSOs. Permittees that have voluntarily initiated monitoring and are progressing expeditiously toward appropriate CSO controls should be given due consideration for their efforts.

1. Enforcement for Compliance With Phase I Permits

Enforcement for compliance with Phase I permits will focus on requirements to implement at least the nine minimum controls, and develop the long-term CSO control plan leading to compliance with the requirements of the CWA. Where immediate compliance with the Phase I permit is infeasible, the NPDES authority should issue an enforceable schedule, in concert with the Phase I permit, requiring compliance with the CWA and imposing compliance schedules with dates for each of the nine minimum controls as soon as practicable. All enforcement authorities should require compliance with the nine minimum controls no later than January 1, 1997. Where the NPDES authority is issuing an order with a compliance schedule for the nine minimum controls, this order should also include a schedule for development of the long-term CSO control plan.

If a CSO permittee fails to meet the final compliance date of the schedule, the NPDES authority should initiate appropriate judicial action.

2. Enforcement for Compliance With Phase II Permits

The main focus for enforcing compliance with Phase II permits will be to incorporate the long-term CSO control plan through a civil judicial action, an administrative order, or other enforceable mechanism requiring compliance with the CWA and imposing a compliance schedule with appropriate milestone dates necessary to implement the plan.

In general, a judicial order is the appropriate mechanism for incorporating the above provisions for Phase II. Administrative orders, however, may be appropriate for permittees whose long-term control plans will take less than five years to complete, and for minors that have complied with the final date of the enforceable order for compliance with their Phase I permit. If necessary, any of the nine minimum controls that have not been implemented by this time should be included in the terms of the judicial order.

D. Penalties

EPA is prepared not to seek civil penalties for past CSO violations, if permittees have no discharges during dry weather and meet the objectives and schedules of this Policy. Notwithstanding this, where a permittee has other significant CWA violations for which EPA or the State is taking judicial action, penalties may be considered as part of that action for the following:

1. CSOs during dry weather;

2. Violations of CSO-related requirements in NPDES permits; consent decrees or court orders which predate this policy; or

3. Other CWA violations.

EPA will not seek penalties for past CSO violations from permittees that fully comply with the Phase I permit or enforceable order requiring compliance with the Phase I permit. For permittees that fail to comply, EPA will exercise its enforcement discretion in determining whether to seek penalties for the time period for which the compliance schedule was violated. If the milestone dates of the enforceable schedule are not achieved and penalties are sought, penalties should be calculated from the last milestone date that was met.

At the time of the judicial settlement imposing a compliance schedule implementing the Phase II permit requirements, EPA will not seek penalties for past CSO violations from permittees that fully comply with the enforceable order requiring compliance with the Phase I permit and if the terms of the judicial order are expeditiously agreed to on consent. However, stipulated penalties for violation of the judicial order generally should be included in the order, consistent with existing Agency policies. Additional guidance on stipulated penalties concerning long-term CSO controls and attainment of WQS will be issued.

Paperwork Reduction Act

The information collection requirements in this policy have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq* and have been assigned OMB control number 2040–0170.

This collection of information has an estimated reporting burden averaging 578 hours per response and an estimated annual recordkeeping burden averaging 25 hours per recordkeeper. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch; EPA; 401 M Street SW. (Mail Code 2136); Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and

Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

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"January 1, 1997, Deadline for Nine Minimum Controls in Combined Sewer Control Policy", November 18, 1996.

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

NOV 18 1996

MEMORANDUM

SUBJECT: January 1, 1997, Deadline for Nine Minimum Controls in Combined Sewer Overflow Control Policy

FROM: Robert Perciasepe
Assistant Administrator
Office of Water

Steven A. Herman
Assistant Administrator
Office of Enforcement and Compliance Assurance

TO: Water Management Division Directors, Regions I-X
Regional Counsels, Regions I-X
State Directors

The purpose of this memorandum is to call your attention to the January 1, 1997, deadline for implementation of the nine minimum controls by National Pollutant Discharge Elimination System (NPDES) permittees that have combined sewer systems. Implementation of the nine minimum controls is the first key milestone identified in the Combined Sewer Overflow Control Policy (CSO Policy) and is a top Agency priority. We emphasize the importance of meeting this deadline, and we urge you to take the steps necessary to achieve it.

On April 19, 1994, EPA published its Combined Sewer Overflow (CSO) Control Policy in the Federal Register (59 FR 18688). The CSO Policy was developed during a negotiated policy dialogue which included representatives from States, environmental groups, and municipal organizations. CSOs consist of mixtures of sanitary sewage, industrial wastewater and storm water runoff. During storm events, a major portion of the combined flow may be discharged untreated into the receiving water. As noted in the CSO Policy (59 FR at 18689):

> CSOs can cause exceedances of water quality standards (WQS). Such exceedances may pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the Nation's waterways.

The CSO Policy describes a phased process for achieving control of CSOs and compliance with the technology-based and water quality-based requirements of the Clean Water Act. The

first phase involves prompt implementation of best available technology economically achievable (BAT)/best conventional pollutant control technology (BCT). At a minimum, BAT/BCT includes the nine minimum controls, as determined on a best professional judgment (BPJ) basis by the permitting authority. The first phase also includes development of a long-term CSO control plan that will provide for attainment of water quality standards (WQS).

The nine minimum controls are measures that can reduce CSOs and their effects on receiving water quality and that should not require significant engineering studies or major construction. They are as follows:

* Proper operation and maintenance;
* Maximum use of the collection system for storage;
* Review and modification of pretreatment requirements;
* Maximization of flow to the publicly owned treatment works (POTW) for treatment;
* Prohibition of CSOs during dry weather;
* Control of solid and floatable materials in CSOs;
* Pollution prevention;
* Public notification of CSO occurences and impacts;
* Monitoring of CSO impacts and the efficacy of CSO controls. See 59 FR at 18691.

The nine minimum controls are to be implemented, with appropriate documentation, "as soon as practicable but no later than January 1, 1997." 59 FR at 18691.

EPA's guidance Combined Sewer Overflows: Guidance for Nine Minimum Controls (EPA-832-B-95-003, May 1995) discusses how to implement the nine minimum controls and to document their implementation. This document may be obtained through EPA's Water Resource Center (Tel. 202-260-7786) (E-mail waterpubs@epamail.epa.gov) or through the National Small Flows Clearinghouse (Tel. 1-800-624-8301).

As already noted, implementation of the nine minimum controls is a top Agency priority, and we believe it is an essential component of a municipality's CSO control program. We intend to track the status of implementation closely during FY 1997 through a CSO program performance plan developed under the Government Performance and Results Act. Under the performance plan, EPA Regional and State permitting authorities will be expected to compile and report data to EPA Headquarters during the second quarter of FY 1997, and periodically thereafter, regarding various aspects of CSO program implementation, including implementation of the nine minimum controls by their CSO communities.

The CSO Policy contemplates that implementation of the nine minimum controls should become an enforceable obligation through inclusion in "an appropriate enforceable mechanism." 59 FR at 18691. For those permits subject to renewal before January 1, 1997, the new permits should include a provision requiring implementation of the nine minimum controls by January 1, 1997. For permits not subject to renewal before January 1, 1997, the permitting authority should reopen the current permit to add a provision requiring implementation of the nine minimum controls by January 1, 1997, if cause exists pursuant to 40 CFR 122.62(a) or (b) or analogous State regulations. An administrative order to require implementation of the nine minimum controls would normally be appropriate in instances where the CSO permittee is in violation of a permit condition, including violation of a permit limit incorporating narrative standards (such as no discharge of floatables, or no discharge of toxics in toxic amounts) or where there is a violation of a permit condition prohibiting exceedance of a numeric State water quality standard.

EPA has encouraged permittees to move forward to implement the nine minimum controls prior to inclusion of such a requirement in a permit or other enforceable mechanism, and we recognize that many communities have made significant progress in implementing the nine minimum controls and in developing or implementing long-term control plans. Permittees should be reminded that EPA's approach, as stated in the CSO Policy, not to seek civil penalties for past CSO violations will not apply unless the nine minimum controls are implemented by January 1, 1997. See 59 FR at 18697.

EPA Regions and States are encouraged to continue compliance assistance efforts to ensure implementation of the nine minimum controls by January 1, 1997.

If you have questions concerning this memorandum, please contact either John Lyon of the Office of Regulatory Enforcement (Tel. 202-564-4051) or Ross Brennan of the Office of Wastewater Management (Tel. 202-260-6928).

VII. ANNUAL DOCUMENTS AND SHORT-TERM INITIATIVES

VII.1. "EPA Agency Operating Guidance - FY 1986-1987", dated February 1985.** EXPIRED. Effective through September 30, 1986.

VII.2. "FY86 Guidance For Oversight Of NPDES Programs", dated June 28, 1985.** EXPIRED. Effective through September 30, 1986.

"NATIONAL MUNICIPAL POLICY ENFORCEMENT INITIATIVE", dated August 9, 1985. Attachments excluded.

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

AUG 9 1985

OFFICE OF
WATER

MEMORANDUM

SUBJECT: National Municipal Policy Enforcement Initiatiye

FROM: J. William Jordan, Director
Enforcement Division (EN-338)

Glenn L. Unterberger
Associate Enforcement Counsel
for Water (LE-134W)

TO: Regional Water Management Division Directors
Regional Counsels
Regions I-X

In order to focus nationwide attention on the July 1, 1988 compliance deadline for POTWs, we are preparing an enforcement initiative for the National Municipal Policy (NMP). We expect that grouping a number of well-selected cases into an enforcement initiative will advance substantially the Environmental Protection Agency's (EPA) efforts to obtain compliance by the deadline. We seek your participation in this initiative. The filing of cases in this initiative is tentatively scheduled for the first quarter of FY 1986. The purpose of this memorandum is to request a list of candidates from all Regions for the enforcement initiative. Based on the information available at Headquarters, we have generated a preliminary list for your review and revision. This memorandum also describes the criteria to be used in selecting candidates and a proposed schedule for implementing the NMP enforcement initiative.

An NMP enforcement initiative was discussed at the National Branch Chiefs' meeting in May of this year and in subsequent conference calls with all Regions participating. At the Branch Chiefs' meeting, all Regions were asked by Rebecca Hanmer to develop a preliminary list of enforcement initiative candidates. To date, we have received such lists from two Regions. Several other Regions are still actively preparing these lists, since in many cases, Municipal Compliance Plans (MCPs) were not due to be submitted until June of this year. If we are to have a successful enforcement initiative which demonstrates EPA's resolve to hold to the 1988 compliance deadline, we must be prepared to back this resolve through aggressive enforcement. The enforcement initiative will clearly demonstrate the importance the Agency places on municipal compliance.

Purpose of the Initiative

The purpose of this initiative is to send a message to both those municipalities already committed to a July 1, 1988 schedule and those municipalities which have not, that EPA is serious about the deadline. State inventories have identified many POTWs which need construction to comply with permit limits. While many of these municipalities have agreed to a schedule requiring compliance with the July 1, 1988 deadline, it appears that a significant number have not submitted schedules and that a number of POTWs plan to submit schedules which extend beyond July 1, 1988. If EPA is to maintain a credible and evenhanded approach to all municipalities, we must be prepared to address those municipalities where the deadline will not be met or, as in many cases, is not even being taken seriously.

Scope of Enforcement Initiative

Under this initiative the following factors should be applied to select POTWs for action:

- The POTW is currently in violation of permit requirements.

- Major construction is needed to achieve compliance.

- The municipality has not submitted a required MCP, has submitted a deficient MCP, or has included a schedule which extends beyond the July 1, 1988 deadline. It is preferable to include POTWs which appear to be capable of meeting the deadline so we can reinforce its importance.

- It should be clear for each selected POTW what effluent limits are required; therefore, any 301(h), revised WQS, or redefined secondary issue should already be resolved.

- Selected facilities should be major permittees and, wherever possible, be larger municipalities to send as strong a signal as possible (i.e., 10 MGD and greater).

- All municipalities which have received State administrative extensions beyond the July 1, 1988 deadline should automatically be considered for inclusion in this initiative.

- Municipalities where it may be physically impossible to complete construction by July 1, 1988 should not be excluded from consideration. All such POTWs must be submitted for judicial action if the schedule extends beyond July 1, 1988, though not necessarily under this initiative.

- Municipalities where there is uncertainty as to the financial capabilities for construction should not be excluded. Financial experts funded through HQ are available to augment Regional analysis of the financial situation of municipalities.

- Municipalities which have proven to be recalcitrant should be considered first.

This initiative is intended to help ensure that EPA is taking serious enforcement action against facilities which have not received Federal construction grant funding. Nevertheless, EPA should also be taking enforcement action against POTWs which have received grants or are in the grants process consistent with the priorities set out in the National Municipal Policy and the April 1984 implementation guidance.

As a first step in helping to define the universe of possible candidates for this initiative, we have completed a search of the national Permit Compliance System (PCS) to identify those POTWs which, based on effluent data, appear to need major construction of treatment facilities. The POTWs with the most consistent and largest effluent violations were then cross-referenced with the national inventory of NMP POTWs submitted by each Region to identify those which have not committed to an acceptable compliance schedule. It appears from this preliminary review that there are a number of good candidates in all Regions for the NMP initiative. Since the PCS does not contain effluent data for all facilities in many Regions, the attached list should in no way be considered a complete list of possible candidates. Each Region should review the list and verify possible candidates and add any other candidates which may be appropriate to consider. If any of the candidates should not be included because the State will bring the judicial action before December 15, 1985, then indicate so and give an approximate date for the State action. Candidates should not be rejected unless the State filing is projected prior to the Federal filing date. Ultimately, we are looking to file at least a couple of the best cases in each Region as a part of this initiative so as to send a truly national message to the POTW community.

Schedule for the NMP Enforcement Initiative

1.	Regions review attached list, making additions and deletions, and submit preliminary list to Headquarters OWEP.	August 23, 1985
2.	Regions review submitted MCP schedules as they come into identify final candidates. Submit list of probable final candidates.	September 15, 1985
3.	Submit litigation reports for final candidates to Headquarters.	November 1, 1985
4.	Approximate DOJ filing date.	December 15, 1985

We will be working closely with the Department of Justice to assure that the NMP enforcement initiative cases are quickly moved through the referral system. Where effluent violations have occurred, it will be particularly helpful to make sure that the necessary documentation, such as DMRs, are assembled to include in litigation reports and that inspections are conducted where necessary to confirm the extent of the violations and the compliance measures likely to be needed.

Any problems which will need expert contractor assistance to resolve, such as physical or financial capability questions, should be identified as early as possible. Regions need not have the final answers from the contractor review of the financial or physical factors before submitting referral packages to Headquarters. Since it is expected that this support will be needed in many of the cases, it will probably be an ongoing process before and after filing. The contact person for this assistance is Brian Maas of the Enforcement Support Branch (FTS 475-8322).

We realize that the above schedule will require a significant commitment from Regional Water Programs and Regional Counsels Offices, as well as Headquarters EPA and Department of Justice Offices; however, this initiative is critical to accomplishing the major goals of the National Municipal Policy. If you have any questions or comments on the enforcement initiative, please contact either of us. If you desire any additional information on the attached lists call David Lyons, Chief of the Enforcement Support Branch (FTS 475-8310) or Brian Maas. Please submit the preliminary list to David Lyons. Caroline Poplin (FTS 475-8184) will serve as the OECM staff contact.

Attachment

cc: William Whittington

VII. ANNUAL DOCUMENTS AND SHORT-TERM INITIATIVES

4. "A Guide To The Office Of Water Accountability System And Mid-Year Evaluations", dated September, 1985.** EXPIRED. Effective through September 30, 1986 only.

5. "EPA Agency Operating Guidance - FY 1987, dated March 1986".** EXPIRED.

6. "A Guide To The Office Of Water Accountability System And Mid-Year Evaluations-Fiscal Year 1987", dated March 1986.** EXPIRED.

7. "FY87 Guidance For Oversight Of NPDES Programs", dated April 18, 1986.** EXPIRED.

8. "EPA Agency Operating Guidance- FY 1988" dated March, 1987.** Selected portions only. EXPIRED.

9. "GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS", dated May, 1987 (This document is reproduced at I.7., this Compendium).

10. "Guidance for the FY 1988 State/EPA Enforcement Agreements Process", dated April 31 (sic), 1987. EXPIRED.

11. "A Guide To The Office Of Water Accountability System And Mid-Year Evaluations, Fiscal Year 1988", dated May, 1987. Selected portions only. EXPIRED.

12. "FY 1988 Office Of Water Operating Guidance", dated June, 1987. Selected portions only. EXPIRED.

7756

"FY 1989 Office of Water Operating Guidance", dated March 1988, Selected Portions Only.

United States
Environmental Protection
Agency

Office of
the Administrator
Washington, D.C.

March 1988

EPA

Agency Operating Guidance

FY 1989

Office of Water

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FY 1989 WATER PROGRAMS AGENCY OPERATING GUIDANCE

I. ASSISTANT ADMINISTRATOR'S OVERVIEW

The Water Programs portion of the FY 1989 Operating Guidance provides national direction to EPA, States and the regulated community in carrying out programs mandated under Federal water protection statutes. These statutes include: the Safe Drinking Water Act (SDWA), the Clean Water Act (CWA, as newly amended by the Water Quality Act of 1987) and the Marine Protection, Research and Sanctuaries Act (MPRSA). The Agency and the States also implement programs to protect groundwater quality through authorizations under several different statutes.

The Office of Water (OW) uses a management accountability system to set priorities, define performance expectations, and track and assess Regional and State performance. The Office of Water Accountability System (OWAS) includes the OW portion of the Guidance, the accompanying SPMS measures, the OW program evaluation guide with quantitative and qualitative measures, and the OW mid-year Regional evaluations. As part of the mid-year process, the Regions provide the OW Assistant Administrator with their projected operating strategy and plan for FY 1990, including an overview of Regional and State priorities and their relationship to national priorities. This is done before FY 1990 commitments are made to set the context for negotiation of State work programs and those commitments. The Regions present their plans at the time of the senior management review for the FY 1989 mid-year evaluation and, as described in Section III, negotiate specific Regional projects prior to the beginning of the fiscal year.

Part I of this Guidance outlines the major program directions for Water Programs in FY 1989, and describes three major program concerns: controlling the discharge of toxic pollutants into surface waters, developing State Clean Water Strategies, and ensuring program accountability while providing Regions and States with flexibility to address their particular concerns. Part II contains specific program guidance and priority activities for the water programs organized by three problem areas around which OW has structured its FY 1989 program planning. Part III provides the process through which Regions negotiate Region-specific initiatives for FY 1989.

Activities with associated SPMS measures are denoted by [SPMS] appearing at the end of the activities. Additionally, in line with the Agency format, activities increased from the FY 1988 Operating Guidance are indicated by a plus (+) in the left margin, new activities are indicated by the letter (N), and decreased activities are indicated by a dash (-). No notation indicates that the activity is the same as in FY 1988.

A. PROGRAM DIRECTIONS AND PRIORITIES

FY 1989 will be critical for Water Programs. States and EPA will be meeting near-term deadlines and requirements for implementing programs to address both newly identified and long standing problems as demanded by the Water Quality and Safe Drinking Water Acts as well as continuing to operate traditional base programs. Water Programs' approach for dealing with these challenges is to focus our efforts to areas of greatest risk, and where the results of our efforts will reap the greatest benefit. In 1989, Water Programs will focus on three problem areas:

1. Protecting Drinking Water Sources

FY 1989 is critical to the Drinking Water Program as it implements the first new substantive provisions related to the 1986 Safe Drinking Water Act amendments including enforcement of the first new volatile organic compound and microbiological Maximum Contaminant Levels (MCLs), State adoption of authority to implement the surface water treatment rule (for filtration), implementation of the revised public notification requirements, initiation of the one-year requirement to assess all 15,000 surface water systems, and enforcement of the ban on lead-content plumbing materials and lead public notification.

The Drinking Water Program will continue developing the regulatory framework for controlling drinking water contaminants by satisfying the statutory schedule for regulatory development as well as a continuing emphasis on enforcing existing drinking water standards. EPA will be increasing its efforts to build additional State capacity to implement new regulatory requirements, including mobilizing the regulated community for voluntary compliance with the new requirements.

The Water Program continues to believe that wellhead protection activities are a key component in States' protection of wells which supply public water systems. Therefore, we see a major emphasis on providing technical assistance to States in developing either wellhead protection programs or other wellhead protection initiatives. Water Programs will increase assistance to States as they review and refine their groundwater strategies and develop a more comprehensive approach to groundwater protection, including application of classification guidelines, and development of preventative approaches.

Finally, to protect our underground sources of drinking water, a key FY 1989 objective is more effective compliance and enforcement of the UIC program, including emphasizing approaches to control "high risk" injection practices into Class V wells which, in some States, are not effectively regulated now for most subclasses (e.g., agricultural drainage wells) and many of which may pose serious threat to underground water supplies.

2. Protecting Critical Habitats

In line with the legislated mandates and our increasing concern for high risk, vulnerable ecosystems, including wetlands, near coastal waters, estuaries, and lakes, EPA is strengthening its programs for developing anticipatory approaches in identifying and resolving the most serious wetlands losses; expediting Section 404 policy development; and enhancing State and local wetlands protection capability. In protecting our near coastal waters and oceans, we are strengthening EPA management support to an expanding estuary program. We recognize that toxics and nonpoint source (NPS) pollution are major contributors to problems in these critical areas. Therefore, we are increasing technical and programmatic support to State and local officials by documenting and disseminating successful control approaches through technology transfer from the near coastal, estuary, Chesapeake Bay and Great Lakes programs.

3. Protecting Surface Waters

In this area we propose to accelerate the development and adoption of water quality standards, primarily for toxic pollutants, by increasing EPA assistance to States, increasing EPA review of State standards and tracking State progress; continue investigating regulated and unregulated industries known to and/or suspected of discharging significant amounts of highly toxic pollutants, developing requisite regulations; review Individual Control Strategies (ICSs) which (under the Water Quality Act of 1987) are to be submitted by February 19[illegible]; focus the NPDES program on implementing these ICSs in NPDES permits and pretreatment programs where States/EPA have identified toxicity problems and data exist to establish water-quality based controls; increase emphasis on the regulation of stormwater discharges and assure progress in establishing sludge management programs; and maintain enforcement levels with greater emphasis on post-BAT/water quality requirements. Recognizing the critical role of the monitoring program in these activities, we propose to expand our surface water data base to identify hazardous substances; and develop exposure analyses using a risk-based, geographic approach.

Finally, we plan to continue the development and updating of water quality criteria, including investigation of improved biological assessment methodologies (bio-criteria).

B. MANAGEMENT PRINCIPLES

The following management principles will guide Water Program activities in meeting the challenges of FY 1989.

1. Enlarging the EPA/State Partnership

Water Programs will work actively to create a dialogue for participation among Federal, State, and local agencies, industry, environmentalists, and the public. In particular, Water Programs will take a leadership role in establishing networks with other Federal agencies in stimulating coordination among a variety of State and local agencies, and in encouraging public participation in the sharing of information, and the development of consistent, supportive protection approaches.

2. Integrating Water Program Responsibilties

As States implement their State Clean Water Strategies (SCWS) in FY 1989, the Water Programs will take a leadership role in encouraging Regions and States to coordinate their many CWA program responsibilities, to set priorities to target water resources for immediate action, and to identify the most important water resources for future controls. We will be watching for SCWS applications to CWA programs in those States that did not choose to participate in the 1988 process, for potential use in Drinking Water Programs, as well as for cross-media applications that will improve the effectiveness of environmental programs.

3. Targeting Based On Comparative Risk Assessments

In setting priorities and managing resources the Water Programs will meet legislatively mandated requirement and increasingly focus on high risk areas with the greatest potential environmental benefits and with feasible solutions in terms of the available tools and resources.

4. Indian Tribal Participation

Both the Safe Drinking Water Act Amendments of 1986 and the Water Quality Act of 1987 authorize EPA to treat Indian tribes which meet identified criteria as States for various pollution control activities. By the beginning of FY 1989, regulations will be in effect enabling eligible tribes to receive grants and contractual assistance under the Safe Drinking Water and Clean Water Acts (including municipal wastewater treatment) and to assume public water system and underground injection control enforcement responsibility. Other regulations are anticipated in FY 1989 including establishment of tribal water quality standards, delegation of NPDES permitting activities, and assumption of the Section 404 dredge and fill program. For these programs, and other pertinent activities, the word "State" includes tribes as appropriate.

C. CONTROLLING THE DISCHARGE OF TOXIC POLLUTANTS INTO SURFACE WATERS

Given the level of public attention to potential environmental and public health impacts, as well as the WQA amendments, the Agency's highest CWA priority in FY 1989 continues to be protecting the nation's surface waters from point source discharges, especially hazardous and toxic pollutants. By February 4, 1989, Section 304(l) requires States to develop lists of impaired waters, identify point sources and amounts of pollutants they discharge that cause toxic impacts, and develop individual control strategies (ICSs) for each such point source.

The general effect of §304(l) is to focus national surface water quality protection programs immediately on addressing known water quality problems due entirely or substantially to point source discharges of §307(a) toxic pollutants. Controls for these pollutants must be established as soon as possible, but no later than the statutory timeframes set forth in §304(l). However, EPA considers the WQA statutory requirements only one component of the ongoing national program to control toxics. EPA will require all known water quality problems due to any pollutants to be controlled as soon as possible, giving the same priority to controls for non-§307(a) pollutants as for controls where only §307(a) pollutants are involved. Such problems include any violation of State numeric criteria for any pollutant known to cause toxic effects and any violation of a State narrative water quality standard that prohibits instream toxicity due to any pollutant (including chlorine, ammonia, and whole effluent toxicity) based on ambient or effluent analysis.

States are required by §303(c)(2)(B) to adopt numeric criteria in water quality standards (WQS) for all the toxic pollutants listed pursuant to §307(a) where criteria have been published and where the the discharge or presence of those toxic pollutants can reasonably be expected to interfere with designated uses. These criteria are to be numeric, or, where numeric toxic criteria are not available, States must adopt toxics criteria based on biological monitoring or assessment methods. While this mandate may be met by traditional in-stream WQS, States may comply by adopting a procedure to be applied to the narrative water quality criterion, which is used to calculate numeric criteria to use as the basis for deriving WLAs/TMDLs and NPDES permit limits.

Under the WQA, States must adopt numeric criteria in WQS by the end of this triennial review period (FY 1990). Where a State does not adopt toxic chemical-specific criteria, it is EPA policy that States must be able to demonstrate that the particular toxic pollutant is not relevant because it is not present in the waters, or, if present, is not interfering with attaining uses, and new/existing dischargers are not likely to lead to interference with attaining the uses. As part of this triennial process,

States will also upgrade their anti-degradation programs to protect existing high quality waters, and will adopt effective whole effluent toxicity control programs.

Section 304(l) requires States to develop and submit to EPA lists of impaired waters. In FY 1989, States will refine and expand these lists, submitted initially to EPA in FY 1988, in order to meet the statutory deadline for their final submission. §304(l) also requires States to establish individual control strategies (ICSs) by the statutory deadline to reduce the discharge of toxic pollutants from each identified point source. Controls will be established as effluent limits in NPDES permits that assure, in combination with existing nonpoint source controls, the attainment and maintenance of applicable WQS for toxic pollutants and toxicity.

The immediate emphasis of §304(l) and the national program for toxics control requires States and EPA to address problems identified through review of existing and readily available data. However, States and EPA Regions will continue to collect new water quality data to assure that changes in water quality are identified and any gaps in existing data are filled to provide a reasonable basis for identifying and solving cases of water quality impairment. Revised State monitoring strategies will probably be necessary to address toxic pollutants and nonpoint source information needs in a cost-effective manner, based on EPA's Surface Water Monitoring Strategy.

D. STATE CLEAN WATER STRATEGIES

In FY 1988, EPA encouraged States voluntarily to develop State Clean Water Strategies (SCWSs) to set forth their priorities for action over a multi-year period, and to provide a basis for targeting their water pollution prevention and control efforts on water resources they determined to be most valuable and/or most threatened. In developing these SCWSs, States chose a format and scope of coverage that best suited their particular needs--so long as the final management plan was multi-year and recognized the interconnections among water programs. The nature of the final State management plans, therefore, would vary depending upon whether a State elected to use a comprehensive, integrated approach or a more traditional programmatic approach to convert its concepts into a multi-year strategy.

Where States took advantage of this opportunity, FY 1989 will be the first year for implementation of these multi-year management plans. As the plans vary, so will the nature of the FY 1989 implementation activities. States that adopted the more traditional, programmatic approach will be implementing the first round of actions set forth in the multi-year plan, and may want to strengthen further their public interest coalitions in an effort to generate State funding needed to carry out specific programmatic activities such as nonpoint source pollution control. Where States opted to focus more broadly across programs, implementation activities may involve focusing a combination of the tools and resources of several programs on

protecting and restoring specific areas of concern, such as estuaries, near coastal waters, special groundwater areas, or wetlands. FY 1989 might also be a year in which these States work to build a more Regional/local base of support for action and funding for these geographic-based initiatives.

As States meet the February ., 1989, statutory deadline for activities under 304(1) of the Clean Water Act, they will update their SCWSs to complete integration of key long-term activities that will be necessary to fully implement the surface water toxics control provisions of the law. These changes may include expanding and/or setting priorities for new water quality monitoring for toxics, as necessary; and collecting new data where current data are not adequate to assure problems have been identified. States may also choose to update other aspects of their SCWSs as a result of new information.

To assist States in carrying out their SCWSs, EPA Regions will work with States to coordinate program requirements and to provide incentives to States to implement their risk-based approaches to targeted water resources. In addition, in FY 1989 EPA Headquarters will promote transfer of information and ideas generated by States that developed SCWSs in FY 1988. EPA expects that these individual State experiences will provide a body of information that may be useful to other States that decide to develop multi-year plans for water programs based on a targeting and ranking exercise. EPA Headquarters will work with the States to package this information, and to provide n-site peer group expertise to new States that may benefit. A will also consider the usefulness of this approach in other wat r activities and programs, particularly activities under the ife Drinking Water Act.

E. FLEXIBILITY/ACCOUNTABILITY: NATIONAL CONSISTENCY vs. REGIONAL/STATE NEEDS AND PRIORITIES

The 1987 Water Quality Act (WQA) ratified existing surface water programs and set forth a number of new activities and initiatives to address emerging water pollution problems. Soon after enactment, EPA and the States agreed they would strive to meet the statutory goals, requirements, and deadlines of the Act to the fullest extent possible. In doing so, EPA and the States also agreed they would pursue with vigor both the new initiatives under the 1987 WQA and the ongoing programs, priorities, and responsibilities of the traditional CWA programs. This has come to be known as "maintaining the base program," which means that, as we move forward with new and/or expanded water quality management programs that have not been sufficiently funded (such as protection of estuaries and nonpoint source control in general), we do whatever is necessary to assure that the water quality gains already made through the existing (largely technology-based) point source controls are maintained. The

fundamental issue at debate is one of flexibility versus accountability or the degree to which Regions and States do less in the base program in order to account for new activities.

In response to the need to provide Regions and States with a vehicle to allow such flexibility to occur, States were encouraged to develop State Clean Water Strategies (SCWSs) as one process for setting out a plan that would give EPA an opportunity to make a reasoned judgment whether a State's alternative program made sense even though certain activities did not take place (see section on SCWS). In addition, EPA and the States will work together to explore other ways to improve the balance between accountability and flexibility, including:

- Ways to increase efficiencies/improve effectiveness in operation of the base program;
- Ways to make better use of Agency/OW accountability systems to provide both the national consistency Headquarters seeks and the flexibility Regions and States desire; and
- Ways to improve State fiscal capacity over the longer-term, accompanied by better use of performance-based grants.

EPA and the States will work together on these issues throughout FY 1988, with the expectation that some of this work will come to fruition in FY 1989.

II. ENVIRONMENTAL PROBLEM AREAS

C. PROTECTING SURFACE WATERS

1. Strategy

EPA and State water programs will continue and accelerate their efforts to protect and restore the nation's surface waters through effective implementation of traditional CWA activities along with the WQA initiatives. Consistent with the WQA mandates, EPA and the States will focus on protecting human health and aquatic resources by identifying and controlling toxic pollutants and hazardous substances entering the nation's surface water (see earlier section on "Controlling the Discharge of Toxic Pollutants into Surface Waters").

In addition, EPA and the States will carry out a number of CWA activities related to water quality standards, monitoring, NPDES permitting, pretreatment, nonpoint source control, and enforcement. EPA will work with the States to help: upgrade monitoring programs to improve the identification of impaired waters; upgrade water quality standards programs to incorporate standards for toxic pollutants and upgrade anti-degradation and whole effluent toxicity control programs. As State toxic control programs are upgraded, EPA and the States will implement improved controls for toxic pollutants and toxicity through NPDES permits. EPA and the States will also help local POTWs upgrade and refine their approved local pretreatment programs. EPA and the States will maintain their NPDES enforcement capability to ensure compliance with water quality- and technology-based requirements, and will improve their pretreatment enforcement capabilities. EPA will make effective use of its Federal administrative penalty authority to assure faster, more cost-effective enforcement against direct and indirect dischargers.

EPA will assist the States by undertaking activities to prepare for later phases of toxics control by developing information on new toxic pollutants and hazardous chemicals (i.e. beyond the 126 priority pollutants) that could cause significant problems for surface waters. EPA will place priority on bioaccumulative pollutants and other chemicals (generally carcinogenic or mutagenic pollutants) that could require controls for human health related use that are more stringent than those needed to protect aquatic species. EPA will also develop effluent guidelines and water quality criteria or advisories to serve as the basis for new State water quality standards and fourth round permits in the early 1990s.

In an effort to strengthen State responsibility for water programs, EPA will work with States to maintain effective State NPDES programs, and to increase the level of program approvals by

approving new State pretreatment and sludge management programs and approving whole or partial NPDES programs. EPA will also continue the phase-out of the Federal Construction Grants Program, leaving in its place financially viable State Revolving Funds and POTW user charge systems to meet municipal financing needs for long-term compliance. EPA will also continue to ensure that scarce resources are used efficiently to produce reliable, high quality, effective municipal wastewater treatment systems.

In the nonpoint source area, the WQA mandates a multi-year approach. State Management Programs are initially expected to target control actions at specific nonpoint source problems or areas where water quality data are available to support development of effective nonpoint source controls. In the longer-term, States are expected to maximize environmental benefit by devoting resources and efforts to water resources in a priority order that recognizes the values of the waterbody in question, the benefits of various control actions (including evidence of local public interest and support), and the problem(s) controllability.

2. Indicators

The following indicators are being considered by EPA as a means to evaluate the long term impact of the programs described in this section. They are not accountability measures for evaluating FY 1989 program performance or impact.

a. Sizes and location of areas classified for various designated uses.

b. Sizes and location of areas that fully or partially do not support uses and are threatened due to point and nonpoint sources.

c. Sizes of waters with elevated levels of toxics.

d. Extent of fish tissue contamination.

e. Municipal wastewater treatment works projects which initiate operations and were funded with assistance of a construction grant or other assistance under an SRF.

f. Industrial and municipal compliance.

e. NPDES Permitting

In recognition of the importance of toxic pollutant controls, the Water Quality Act of 1987 (WQA) added section 304(l) to the CWA with specific deadlines to accelerate activities for controlling certain toxic discharges to surface waters where water quality is now impaired. This new mandate is one component of the ongoing national toxics control program. In FY 89, Regions and NPDES States will expedite permitting actions to set toxics limits. Where appropriate, States will translate the results of whole effluent toxicity and water quality studies begun in earlier years into water quality-based limits to meet existing and new water quality standards. Where major or minor dischargers are on waters listed under §304(l), individual control strategies (ICSs) must be established in permits by February 4, 1989. Within 120 days, EPA must review and approve or disapprove all State ICSs submitted in accordance with the February 4, 1989 deadline. Where State ICSs are disapproved, EPA must issue ICSs by June, 1990.

In addition, where instream toxicity problems are identified, even if the source is not listed under 304(l) (because the pollutant involved is not a priority 307(a) pollutant) States and Regions will reissue permits to include, as appropriate, toxicity based limits, toxicity reduction evaluations, compliance schedules, biomonitoring, revised local pretreatment programs, and pollutant-specific limits. In unusual cases, Regions and States may require permittees to conduct appropriate studies leading to future permit limits, but only where data deficiencies make it impossible to set appropriate limits now. Administering agencies will also reissue and/or modify permits to implement BAT guidelines for organic chemicals to reflect best currently available technology on a case-by-case basis where guidelines are outdated or unavailable and to incorporate sludge requirements and needed revisions to pretreatment implementation requirements.

In FY 1989, NPDES permitting authorities will begin to focus on section 405 requirements for controlling sludge use and disposal. EPA will develop regulations for incorporating sludge use/disposal criteria in NPDES permits. Generally, EPA will defer to State sludge permitting efforts wherever they exist, and will focus on appropriate monitoring requirements, along with compliance with existing sludge standards. Where sludge disposal practices are presenting a threat to human health and the environment, EPA and States will take appropriate permitting and enforcement actions to address the concern. When the technical criteria regulations are promulgated, NPDES permits with such criteria must be issued to all covered POTWs unless the requirements are covered in another permit issued under an approved State permit program.

Consistent with the 1937 WQA, EPA Headquarters will develop regulations and guidance on: new permit application and control requirements; stormwater application requirements for industry and for municipalities with storm sewers serving 100,000 or more population; antibacksliding; FDF variances; variances for non-conventional pollutants (ammonia, chlorine, color, iron, and total phenols); and other new permit related authorities. Regions and States will modify certain permits to reflect new authorities (e.g., coal remining). Stormwater dischargers will begin to prepare permit applications (due to EPA and States one year after regulations are promulgated).

In FY 1989, the Regions and States will continue to implement the RCRA corrective action process begun in FY 1988. In FY 1988, the Regions (or the State where applicable) will have initiated the corrective action process by issuing RCRA "rider" permits to POTWs subject to corrective action requirements. In FY 1989, the Regions and States will complete the second phase of corrective action, the RCRA Facility Investigation, and will initiate interim corrective measures where appropriate. Regions will review CERCLA and RCRA remedial actions involving discharges to surface waters or POTWs to ensure that appropriate technology and water quality limits are met.

Headquarters

- o Headquarters/Regions will provide oversight, guidance, and technical assistance to Regions/States to complete the toxics activities noted above by the statutory deadline of February 4, 1989. (Ongoing)

- o Headquarters will issue regulations to implement the WQA and provide technical assistance and training for permit writers, and contract assistance to develop permits. (Ongoing)

- o ORD will continue to support toxicity reduction evaluations for the development of water quality based permit limitations in the Municipal Wastewater Program and the development of Best Conventional Technology (BCT) and Best Available Technology (BAT) limitations in the Industrial Wastewater Program. Information will be developed on treatability of RCRA wastes that will be useful in predicting effluent concentrations, POTW pass-through and potential water quality problems. (Ongoing)

Regions/States

+ o Regions/States will reissue all major permits expired or expiring in FY 1989. (Ongoing) [SPMS]

+ o Regions/States will establish ICSs for all facilities listed under 304(l) by 2/4/89. (Second Quarter [SPMS]

- o Regions/States will reopen permits for some major and minor dischargers to incorporate water quality-based limits based on studies required at the time of permit issuance, and will modify other major permits as needed to impose necessary and appropriate toxic controls. (Ongoing)

N o Regions will assist States to take needed steps to strengthen their toxics control programs in accordance with Action Plans established in FY 1988 (joint monitoring, water quality standards and permitting program). (Ongoing)

N o Regions will review, approve and disapprove as appropriate State permits issued to dischargers in waters listed under §304(l)(B) and will issue federal permits where States fail to correct any deficiencies in individual control strategies. (Third and Fourth Quarters) [SPMS]

+ o Regions/States will implement the RCRA permit-by-rule requirement and establish corrective action requirements where necessary for POTWs that are receiving hazardous wastes not mixed with domestic sewage. (Ongoing)

+ o Regions/States will begin to include sludge monitoring and existing national sludge regulatory requirements in NPDES and State sludge permits. (Ongoing)

f. NPDES Enforcement

In FY 1989, the CWA enforcement priority will be given to protection of the gains achieved in implementing the National Municipal Policy (NMP) through aggressive enforcement against major and water quality affecting minors that are violating MCP schedules. Administering agencies will coordinate pretreatment and NMP enforcement actions so that, when an action is taken in response to noncompliance in one program, consideration is given to the other.

Industrial enforcement efforts will continue to focus attention on significant noncompliance. As the NPDES program turns its attention increasingly to enforcement of new controls for toxics and hazardous wastes, it will place more emphasis on considering cross-media impacts in prioritizing enforcement cases and on the role and use of expanded CWA criminal enforcement authorities.

EPA, in cooperation with the States, will implement a Compliance Monitoring and Enforcement Strategy for Toxics Control. The strategy focuses on inspections to monitor acute and chronic toxicity; criteria targeting enforcement responses to violations that pose the greatest potential risk to aquatic life and human health; lab performance evaluation criteria for toxicity analysis (ORD); and an updated DMR/QA program to meet new and expanded needs for toxicity controls.

Headquarters

+ o Headquarters (OWEP/OECM) will revise the Clean Water Act Penalty Policy and Enforcement Management System to address the use of administrative penalties to further supplement civil, judicial and criminal enforcement actions in assuring compliance with the Clean Water Act. (Ongoing)

o Headquarters/Regions will analyze the effectiveness of referral/case management and support process based in part on an FY 1987 analysis of the variation in ORC/WMD productivity, as well as new arrangements with DOJ. (Ongoing)

Regions/States

o Regions will fully implement CWA administrative penalty authority consistent with FY 1987 national guidance; Regions will also adhere to FY 1987 national guidance on the best use of the entire spectrum of existing/new/expanded CWA enforcement mechanisms (compliance only Administrative Orders, administrative penalties (2 tiers), civil and criminal referrals, and contractor listing). (Ongoing)

N o Regions/States will increase the use of inspections assess permittee biomonitoring capabilities and evaluate permittee procedures/techniques for toxicity reduction evaluations. (Ongoing) [SPMS]

N o Regions/States will take timely and appropriate enforcement against SNC violations, including those involving toxic pollutants. (Ongoing) [SPMS]

o Regions/States will ensure timely and accurate data entry of WENDB data elements for pretreatment and NPDES. (Ongoing)

o Regions/States will monitor POTW compliance with NPDES milestones in consent decrees, permits and administrative orders, and initiate/escalate enforcement actions as necessary based on the 9/22/87 Enforcement Strategy. (Ongoing) [SPMS]

o Regions will ensure that EPA judicial referrals/consent decrees and final administrative penalty orders contain appropriate civil penalties consistent with the CWA Penalty Policy; NPDES States will comply with penalty provisions in the National Guidance for Oversight of NPDES Programs. (Ongoing)

o Regions and States will ensure compliance with all formal enforcement actions (AOs civil and criminal) by tracking cases from initiation of referrals to entry of consent decrees or court orders, and by prompt follow up action when deadlines are missed. (Ongoing)

o Regions will provide technical support for criminal investigations and prosecutions in program priority areas. Regions shall refer to the Office of Criminal Investigation matters involving suspected criminal violations, including significant unpermitted discharge and false reporting, or other fraud to the Agency. (Ongoing)

+ o Regions/States will enforce against: POTW non-respondence to 308 letters concerning POTWs receiving hazardous wastes; POTWs that are required to have RCRA permits, but do not; and POTWs not complying with corrective action plans. (Ongoing)

g. Pretreatment

The goal is to assure that POTWs* fully implement and enforce pretreatment controls for conventional and toxic pollutants and hazardous wastes that are necessary to protect human health, the environment, and the treatment works. Administering Agencies

* Throughout this section, wherever POTWs are cited, the same requirements apply to States or EPA acting as Control Authority in lieu of local program .

should give priority to modifying the requirements of the approved program and NPDES permit: 1) to incorporate new requirements resulting from new or revised regulations; or 2) to correct inadequacies identified in the operations of the POTW pretreatment program. Additionally, Administering Agencies should closely monitor the performance of POTWs to identify those that should be reported on the Quarterly Noncompliance Report and should take necessary action to return these POTWs to compliance.

In FY 1989, 395 POTWs with approved local programs have permits which will expire. Administering Agencies should use this opportunity to modify these permits to incorporate new or revised requirements established in amendments to the General Pretreatment Regulations as a result of the Domestic Sewage Study (DSS) or Pretreatment Implementation Review Task Force (PIRT). Additionally, the NPDES permit and/or approved program should be modified to incorporate needed changes or refinements to the approved program identified through audits, inspections or annual reports and to ensure that these requirements are enforceable. Administering Agencies should give emphasis to establishing specific levels of activity and timeframes for issuance of industrial user (IU) control mechanisms, monitoring IU performance, and enforcing against IUs who are in noncompliance. Administering Agencies should continue to give emphasis to the following three key areas to ensure effective implementation:

- Program Modification: Regions and States will formally modify approved pretreatment programs to incorporate new requirements or correct inadequacies. Modification and approval will follow the FY 88 amendments to the General Pretreatment Regulations, and focus on the following three areas:

    a. Local Limits - In accordance with the 1985 policy memorandum and the FY 88 Local Limits Guidance Manual, site specific technically-based local limits must be developed for each approved program and periodically reevaluated.

    b. Control Mechanisms - Based on the FY 88 IU Permitting Guidance Manual, the PIRT amendments and the DSS amendments, POTWs may need to develop and issue stronger IU control mechanisms for significant industrial users (SIUs).

    c. Enforcement Procedures - POTWs must be accountable for surfacing IU noncompliance and enforcement actions within certain time frames. Where approved programs do not specify detailed enforcement response procedures, they should be modified to include them consistent with the 1986 Pretreatment Compliance Monitoring and Enforcement Guidance (PCME).

- o Enforcement: Regions and States will assure that POTWs operate their approved programs and comply with reporting requirements. Where POTWs fail to successfully implement their program as measured by the FY88 guidance on reportable noncompliance, Administering Agencies should use technical assistance, formal enforcement or a program modification to eliminate the problem. When technical assistance is the chosen approach a schedule for return to compliance should be developed. If the schedule is longer than 90 days, it should be incorporated, at a minimum, in an administrative order.

- o Data Management: Regions and States will assure that POTWs have in place and employ appropriate mechanisms to track and determine compliance rates for SIU's consistent with the PCME, and that POTWs report such data at least annually. States and Regions will employ PCS to track pretreatment information and assist in identifying POTWs which meet the criteria for reportable non-compliance.

Where there is an approved program, and the POTW has not taken all available action to secure the compliance of the IU, action against both the POTW and the IU will usually be appropriate. Where EPA or the State is the Control Authority, enforcement action should be taken against those IUs which have not complied with categorical standards, giving priority to IUs where the POTW has been identified as having toxics discharge problems.

Headquarters

- o Headquarters (OWEP) will promulgate change to the NPDES and General Pretreatment regulations based on the recommendations of DSS. (Third Quarter)

- o Headquarters (ORD) will develop information on treatability of hazardous wastes that will be useful in predicting effluent concentrations, POTW pass-through, and potential water quality problems. (Ongoing)

- o Headquarters will issue guidance to improve POTW control mechanisms, compliance tracking and enforcement (e.g., setting local limits for toxic pollutants/hazardous wastes; setting priorities for enforcement; etc.), and a companion document on oversight responsibilities of administering agencies. (Ongoing)

Regions/States

- o Regions/States will assess and assist POTWs as they implement/enforce their programs and adopt new regulations resulting from the findings of the DSS; the focus will be on adequate control mechanisms for compliance tracking of, or enforcement against, IUs. (Ongoing) [SPMS]

- Regions/States will place highest priority on enforcement against POTWs consistent with reportable noncompliance guidance which discusses how to determine whether a POTW is failing to implement its local program (and against some IUs within those POTWs). EPA will also take enforcement against IUs where POTWs do not have, or are not required to have, approved local programs. (Ongoing) [SPMS]

- Regions will use new criminal enforcement authorities consistent with new/expanded CWA authorities, with special attention on knowing/negligent introduction into a sewer system/POTW of toxic pollutants/hazardous wastes (as defined by CWA §§311(b)(2)(A) and 307(a); CERCLA §102; SDWA §3001; TSCA §7) in excess of legal limits. Regions will provide technical support for criminal investigations and prosecutions in pretreatment cases. (Ongoing)

- States that act as control authorities in lieu of local programs will implement/enforce the pretreatment program consistent with national guidance, and will be held to the same standards of implementation as local authorities. (Ongoing)

h. NPDES State Program Approval, Review, and Oversight

In FY 1989, the goal is to further strengthen the Federal/State partnership by approving new State NPDES, pretreatment and sludge programs, improving the legal and regulatory basis of current State programs, and conducting effective oversight to ensure sound, consistent implementation of State programs. As State NPDES and pretreatment programs mature and as more States assume these responsibilities, these activities continue to grow in importance. In addition, EPA will work with any Indian tribes seeking to administer the NPDES program as authorized by the WQA.

The Regions will continue to encourage NPDES States to assume authority for the pretreatment program, and will continue to condition §106 grants accordingly. Regions should continue to encourage State program modifications for general permitting authority, since this will be a key to successful implementation of FY 1990 stormwater program activities for all NPDES States. In addition, the CWA amendments are expected to produce increased activity with respect to State program assumptions, including approval of State NPDES or other federally authorized programs to include sludge requirements, and treatment of Indians as States. Finally, Regions, with Headquarters assistance, will continue to review State programs to ensure that current State laws and regulations provide adequate authority to administer and enforce the national NPDES/pretreatment program requirements under the CWA, as amended. Special emphasis will be given to following up on Action Plans established by States and Regions in FY 1988 to strengthen water quality based permitting for toxic pollutants and toxicity.

WATER ENFORCEMENT AND PERMITS
FY 89 PROGRAM SUPPLEMENTAL GUIDANCE

GUIDANCE	FINAL PUBLICATION DATE
Interim Implementation Strategy for Sludge Issuance	March 1988
Guidance for Writing Interim Case-by-Case Permit Requirements for Sludge Issuance	March 1988
State Program Review Guidance	December 1987
304(l) Guidance	March 1988
Designation of Dischargers Contributing to Water Quality Standards Violations or Significant Contributor of Pollutants	March 1988
Compliance Monitoring and Enforcement Strategy for Toxics Control	March 1988
Guidance on the Collection of Stipulated Penalities	July 1988
Enforcement Strategy for Industrial Users Where EPA is the Control Authority	April 1988
Guidance on Development of Penalties for Pretreatment Implementation Cases	March 1988
PCS Evaluation Study-Recommendations and Data Entry Guidelines	February 1988

OFFICE OF WATER

STRATEGIC PLANNING AND MANAGEMENT SYSTEM

FY 1989 MEASURES

DEFINITIONS AND PERFORMANCE EXPECTATIONS FOR THESE MEASURES
ARE FOUND IN THE FY 1989 OFFICE OF WATER EVALUATION GUIDE

OFFICE OF WATER
FY 1989
Program: Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Achieve and maintain high levels of compliance in the NPDES program. (continued)	Report, by Region, the total number of EPA Administrative Orders and the total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatment. Report the number of Class I and Class II proposed administrative penalty orders issued by EPA for NPDES, pretreatment, and 402 wetlands violations.	WQ/E-8	Q 1,2,3,4
	Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorney General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts (OECM will report EPA referrals)	WQ/E-9	Q 1,2,3,4
Effectively enforce the pretreatment program.	Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and track by State the number of POTWs in that universe where action taken resolves the violation. Report EPA and State separately for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	WQ/E-10	Q 2,4
	Report, by Region, the number of pretreatment State civil referrals sent to State Attorneys General, the number of criminal actions filed in State courts, the number of State cases filed, and the number of administrative penalty orders. (OECM will report EPA referrals.)	WQ/E-11	Q 1,2,3,4
Identify compliance problems and guide corrective actions through inspections.	Track, by Region, against targets, the number of major permittees inspected at least once (combine EPA and State inspections and report as one number).	WQ/E-12	Q 1,2,3,4

OFFICE OF WATER
FY 1989
Program: Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Assess toxicity control needs and reissue major permits in a timely manner.	Track, against targets, the number of permits reissued to major facilities during FY 89 (report NPDES States and non-NPDES States separately).	WO-11	O 1,2,3,4
	Identify the number of permits reissued and the number modified during FY 89 that reflect water quality based assessments for toxics. Of these, report number that are Individual Control Strategies (NPDES States, non-NPDES States; report majors and 304(1) listed minor separately.)	WO-12	O 1,2,3,4
Assure NPDES permits are fully in effect and enforceable.	Identify, by Region, the number of pending evidentiary hearing requests and track, by Region, progress against quarterly targets for the evidentiary hearing requests pending at the beginning of FY 1989 resolved by EPA and for the number resolved by NPDES States.	WO-13	O 1,2,3,4
Effectively implement approved local pretreatment programs.	Track, by Region, against quarterly targets, the number of: 1) audits of approved local pretreatment programs conducted by EPA and the number conducted by approved pretreatment States; and 2) approved local pretreatment inspections conducted by EPA and the number conducted by the States for POTWs.	WO-14	O 1,2,3,4

OFFICE OF WATER
FY 1989
Program: Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Implement the National Municipal Policy	Identify, by Region, the number of major municipals on MCPs and the number that are not in compliance with their schedule (report EPA/State separately).	WQ/E-2	Q 1,2,3,4
	Report, by Region, the number of major facilities addressed by formal enforcement actions against municipalities that are not complying with their schedules (report State/EPA separately).	WQ/E-3	Q 1,2,3,4
Achieve and maintain high levels of compliance in the NPDES program.	Track, by Region, the number of major permittees that are: on final effluent limits and not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	WQ/E-4	Q 1,2,3,4
	Track, by Region, the number and percentage of major permittees in significant noncompliance with: final effluent limits; construction schedules; interim effluent limits; reporting violations (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	WQ/E-5	Q 1,2,3,4
	Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators) (Report separately: municipal, industrial, Federal). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters.	WQ/E-6	Q 1,2,3,4
	Report, by Region, the number of major permittees that are on the previous exception list which have returned to compliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action by the QNCR completion date, and the number that were unresolved. (After a permittee has been reported as returned to compliance or addressed by a formal enforcement action, it should be dropped from subsequent lists. (Report separately: municipal, industrial, Federal facilities)	WQ/E-7	Q 1,2,3,4

"A Guide to the Office of Water Accountability System and Mid-Year Evaluations, Fiscal Year 1989," dated March 1988. Selected Portions ONLY.

March 1988

A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS

Fiscal Year 1989

Office of Water
U.S. Environmental Protection Agency
Washington, D.C. 20460

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WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Develop and Approve/Modify Local Pretreatment Programs	(A) What rationale does the Region/States use to add/delete municipalities from the list of required local programs?	(a) Identify the local pretreatment programs requiring approval but not yet approved at the beginning of the fiscal year and distinguish between those newly identified in FY 89 and those previously required. (list separately: nonpretreatment States, approved pretreatment States).	No/No	10/31/88
	(B) What are the Region/States doing to encourage local program modifications where deficiencies are identified? Is the Region/State relying solely on the POTW to identify deficiencies?	(b) Track progress against targets for the programs approved during FY 1989 (list separately: non-pretreatment States, approved pretreatment States).	No/OW	Quarterly
	(C) When a local program submitted for approval is not acceptable, what follow-up action is taken by the Region/State if the local program is not resubmitted in the time prescribed by the Approval Authority?			
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements	(A) How do the Region/States ensure that local pretreatment programs are fully implementing NPDES permit pretreatment requirements? Other pretreatment program requirements? Are POTWs experiencing problems with implementing the significant noncompliance (SNC) criteria?	(a) Report, by Region, the number of pretreatment administrative orders issued by EPA to IUs and the number of pretreatment equivalent actions issued by States to IUs.	No/No	Quarterly

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements (continued)	(B) What are the criteria the Region/States use to select pretreatment referral cases? What is the involvement of ORC in the selection and preparation of cases?	(b) Pretreatment Referrals (1) Report by Region the number of pretreatment State civil referrals sent to State Attorneys General, the number of criminal actions filed in State courts, the number of State cases filed, and the number of administrative penalty orders.	Yes/SPMS HQ/E-11	Quarterly
	(C) What is the level of coordination for pretreatment cases between the compliance section and ORC in the Region and the respective agencies in the States? If less than satisfactory, what steps is the Region taking to improve coordination? (D) How do the Regions and States identify and respond to industrial noncompliance with categorical pretreatment standard deadlines in a municipality where there is an approved pretreatment program?	(2) # of pretreatment referrals or State equivalent actions: --civil referrals sent to HQ/DOJ/SAG: --civil referrals filed; and --criminal referrals filed in response to: o POTW non-submittal of an approvable pretreatment program o other POTW pretreatment violations o industrial user pretreatment violations (list separately EPA, States)	No/No	Quarterly

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements (continued)		(c) Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and track by State the number of POTWs in that universe where action taken resolves the violation. Report EPA and State separately for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	Yes/SPMS WQ/E-10	Quarterly
	(E) Is the Region/State using the Guidance on Reportable Noncompliance for Pretreatment Implementation to identify POTWs which should be listed on the QNCR? Is the Region/State having any difficulty in interpreting or using the Guidance? If so, in what areas?			
	(F) Has the Region provided training to POTWs on the Pretreatment Compliance Monitoring and Enforcement Guidance? What other steps have been taken to implement the Guidance?			

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation	(A) How do Regions/States establish priorities for pretreatment oversight of POTWs? (B) How do Regions independently assess the effectiveness of POTW program implementation in pretreatment States?	(a) Track, by Region, against quarterly targets, the number of (1) audits of approved local pretreatment programs conducted by EPA and the number approved by pretreatment States; and (2) inspections of approved local pretreatment programs conducted by EPA and the number conducted by the States for POTWs.	Yes/SPMS WQ-14	Quarterly
	(C) What are the criteria used by EPA/States to select industrial users to be inspected? Do the Region/States place a priority on inspecting IUs subject to Federal categorical standards which are located where there is no local program? What do the results of these inspections indicate? What use is being made of IU results? Does the Region/State include personnel from the approved POTW in the IU inspection?	(b) Report number of EPA and State pretreatment inspections of: --IUs that discharge to unapproved POTWs --IUs that discharge to approved POTWs (list separately: IU of an unapproved POTW, IU of an approved POTW; EPA, States)	No/No	Quarterly
	(D) Does the Region/State use the Audit/PCI checklist in conducting POTW pretreatment reviews? If the checklist is modified, describe the modifications.	(c) Track # of POTW annual reports required/received/ reviewed (non-pretreatment States, pretreatment States)	No/No	Quarterly

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(E) How are audits used by Region/States to overview implementation? What are the findings from these audits? What follow-up actions are taken when problems are identified? Do the Regions review State audits and reports? How often? Do Regions keep copies of State audits, reports, and follow-up documents on file?	(d) Identify # of POTWs that need to conduct local limits headworks loading analysis (non-pretreatment States, approved pretreatment States).	No/No	Quarterly
	(F) How are inspections used by Regions/States to overview implementation? What are the findings from these inspections? What follow-up actions are taken when problems are identified?	(e) Track # of POTWs requesting changes to local limits (non-pretreatment States, approved pretreatment States).	No/No	Quarterly
	(G) Are inspections used to track follow-up actions required by an earlier audit? If not, how is audit follow-up determined?	(f) Track, by Region, against quarterly targets, the number of pretreatment POTWs which Regions/States determine have issued adequate control mechanisms.	No/OW	Quarterly
	(H) Aside from audits and/or inspections, what other oversight mechanisms are the Regions/States using to evaluate POTW performance year to year?			
	(I) Are annual report submissions by POTWs reviewed by the Region/State? What criteria are used for these reviews? Does the Region require the POTW to use the SNC definition in reporting on compliance by IUs?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(J) Are POTWs considering all appropriate factors in developing local limits, including protection of water quality (State numeric standards and narrative "free from" standards, Federal criteria), sludge quality and worker health and safety? Characterize the changes being made to local limits. What is the Region/State strategy for assuring POTWs develop/implement adequate local limits? Do NPDES permits include toxicity limits and numeric limits for organic chemicals that may be used to establish local limits? Are they being reflected in local limits?			
	(K) Are control mechanisms adequate? Are POTW enforcement procedures adequate? How is adequacy determined and what follow-up is taken when deficiencies are found? Are control mechanisms updated regularly to address new pollutant levels? Do mechanisms address organic pollutants, hazardous constituents or toxicity?			
	(L) What mechanisms are being used by approval authorities to determine if local programs are properly applying categorical standards to IUs? To what extent are local programs failing to properly apply categorical standards? What problems are being encountered?			

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(M) Are POTWs taking necessary enforcement actions against industrial users when they are in noncompliance? Where POTWs do not act expeditiously, what actions are the Regions/States taking?			
4. Enforce Pretreatment Standards as a Control Authority	(A) Have Region/States completed an inventory of categorical industrial users in cities without required pretreatment programs? How were the inventories conducted? How will the inventory be maintained?	(a) Identify # of categorical IUs in nonpretreatment cities (report non-pretreatment States and pretreatment States separately).	No/No	3/89 and 9/89
	(B) Does the Region/State notify these categorical industrial users of their pretreatment and RCRA responsibilities?	(b) Track levels (percent) of significant noncompliance by categorical IUs in non-pretreatment cities. (Report separately for non-pretreatment States and pretreatment States).	No/No	3/89 and 9/89
	(C) Does the Region/State receive and evaluate baseline monitoring reports, compliance reports, and periodic monitoring reports from IUs in non-pretreatment cities? How does the Region establish compliance schedules and monitoring frequencies?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Enforce Pretreatment Standards as a Control Authority (continued)	(D) How do the Regions and States identify and respond to industrial noncompliance with categorical pretreatment standard deadlines in a municipality where there is an approved pretreatment program? Where there is not an approved pretreatment program? Are Regions/States having difficulty implementing the SNC definitions?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Identify Compliance Problems	(A) Do the Regions'/States' compliance rates show improvement in FY 1989?	(a) Track, by Region, the number of major permittees that are: --on final effluent limits and --not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	Yes/SPMS WQ/E-4	Majors: Quarterly (Data lagged one quarter)
	(B) Is the QNCR regulation/guidance being properly applied in the Region/States? Is the Region reviewing State QNCRs to ensure proper reporting? If reviews identify inadequate QNCRs what action is the Region taking?	(b) Track, by Region, the # and % of major permittees in significant noncompliance with: --final effluent limits; --construction schedules; --interim effluent limits --reporting violations (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States)	Yes/SPMS WQ/E-5	Majors: Quarterly (Data lagged one quarter)
	(C) Are there new reasons for municipal/nonmunicipal noncompliance in the Region/States? What is the Regions/States strategy for dealing with such noncompliance.			
2. Expand Enforcement Efforts Under the National Municipal Policy	(A) Have the Region/States completed filed enforcement cases against major POTWs? If not, what is delaying action?	(a) Identify, by Region, the number of major municipals on MCPs that are not in compliance with their schedule (report EPA/State separately).	Yes/No WQ/E-2	Quarterly

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Expand Enforcement Efforts Under the National Municipal Policy (continued)	(B) To what extent are the Region/States still establishing permit/compliance schedules for all remaining POTWs?	(b) Report, by Region, the number of major facilities addressed by formal enforcement actions against municipalities that are not complying with their schedules (report EPA/State separately).	Yes/No WQ/E-3	Quarterly
	(C) How are the Region/States tracking and documenting noncompliance with all interim milestones (non-SNC) in permits/enforceable schedules? How are the Region/States responding to noncompliance with interim milestones in permits/enforceable schedules? How are schedules adjusted following slippage? Where no action is taken, what is the rationale?	(c) Of those reported in (b), provide a separate count for judicial orders.	No/No	Quarterly
	(D) If there is major slippage in a construction schedule, is the Region/State seeking judicially imposed schedules? If not, why not?			
	(E) Are the Region and the States enforcing MCP schedules for affected minors? When will this be completed?			
3. Ensure Industrial Compliance with BAT and Water Quality Based Toxic Requirements	(A) How do the Region and each State direct compliance monitoring efforts to enforce BAT and water quality based toxic requirements?			

WATER ENFORCEMENT AND PERMITS

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ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Ensure Industrial Compliance with BAT and Water Quality Based Toxic Requirements (continued)	(B) Do the Region and each State have sufficient laboratory and biomonitoring capability to conduct the necessary analysis to support toxic inspections?			
	(C) Are Regions/States implementing the Compliance Monitoring and Enforcement Strategy for Toxics Control?			
4. Improve Quality and Timeliness of Enforcement Responses	(A) How has the mix of enforcement actions for the Region (AOs, penalty orders) changed since gaining authority to assess administrative penalties?	(a) ADMINISTRATIVE ORDERS (1) Report, by Region, the total number of EPA Administrative Orders and total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatment. Report the number of Class I and Class II proposed administrative penalty orders issued by EPA for: --NPDES violations; --pretreatment violations; or --402 wetlands violations.	Yes/No WQ/E-8	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(B) Is the Region using the penalty authority effectively--in terms of number of orders issued, timely response and completion, effective negotiation and advocacy?	(2) Of those reported in (1) above, break out by the following categories: --municipal permittees (major/minor) --non-municipal permittees (major/minor) --Federal permittees (major/minor) --unpermitted facilities 402 --section 311 actions --SPCC (list separately: EPA, NPDES States). Note: We recognize that in some Regions these responsibilities are split between Divisions, in which case each Division should submit data for its appropriate piece.	No/No	Quarterly
		(b) Track the total amount of EPA administrative penalties assessed.	No/No	Quarterly
	(C) Is the Region conforming to the Guidance on the use of Penalty Orders, including the addendum on the Penalty Policy?	(c) CLOSE OUT UNIVERSE # of EPA AOs with final compliance dates between July 1, 1988 through June 30, 1989.	No/No	10/15/88
	(D) Has the Region experienced any problems in carrying out the Class I or Class II hearing process? How frequently are hearings requested in each Class?	(d) CLOSE OUTS ACHIEVED # and % of (b) which are successfully closed out (the final step is achieved or action is referred to Headquarters or DOJ).	No/OW	Quarterly

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ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(E) How frequently are comments from the public received on penalty orders? Have any consent decrees been modified by the RA as a result of public petition?	(e) REFERRALS (1) Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorneys General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts.	Yes/No WQ/E-9	Quarterly
	(F) Does the Region routinely use 309(a) administrative orders in combination with penalty orders when compliance has not yet been achieved?	(2) # of 309 referrals or equivalent actions generated: --civil referrals sent to HQ/DOJ/SAG; --civil referrals filed; --criminal referrals filed (list separately: EPA, NPDES States)	No/No	Quarterly
	(G) How frequently does the Region have to institute collection actions to collect administrative penalties assessed? Do the NPDES States have administrative penalty authority? Does the State authority meet criteria for pre-emption of Federal action?	(3) Track the number of referrals (EPA and State) with penalties assessed.	No/No	Quarterly
	(H) Are the Regions/States working effectively with Federal facility coordinators to improve enforcement response times to instances of noncompliance by Federal facilities? If not, what is the nature of the problem? Are approved States using their full range of enforcement authority against Federal facilities? If so, what are the results? If not, why not?	(4) Track the amount of time lapsed from the time of initiation of the case to filing and the amount of time lapsed from filing to signing of the consent decrees. Report by State respectively.	No/No	Second and Fourth Quarters

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(I) Do Region/States track AO requirements closely? Have all close-outs been reported to Headquarters? Are they reported promptly upon close out?	(f) Identify by name and NPDES number all permittees with active consent decrees and report their compliance status as follows: --in compliance with decrees; --in violation of decree, but remedial action taken; and --in violation of decree, no remedial action taken (list separately: major, minor; municipal, nonmunicipal, Federal).	No/No	Quarterly
	(J) How do the Region and States ensure that violations of Court Orders/AOs get prompt enforcement action?	(g) Track, by Region, the total number of settlements of Judicial/Consent Decrees filed in Federal Courts.	No/No	Quarterly
	(K) How is the enforcement agreement used to identify enforcement priorities and appropriate follow-up? How does the Region assess compliance with the agreements?	(h) # of follow-up actions on DMR/QA performance sample results: --nonrespondents; --permittees requiring corrective action; --major permittees with incomplete reporting.	No/No	Semi-annually: April 1, 1989 and October 1, 1989
	(L) What is the level of coordination between the compliance section and ORC in the Region? Are there any problems in implementing the administrative penalty authority? If less than satisfactory, what steps is the Region taking to improve coordination?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Response (continued)	(M) What is the level of coordination between the NPDES States enforcement program and the state Attorney General's Office? Are there established procedures for coordination and communication? If less than satisfactory, what steps is the State taking to improve coordination? Are State AGs generally filing cases within the goal of 60-90 days? (N) Have the Region and approved States negotiated a basis for Regional evaluation of the States' penalty program, including identification of sanctions which might be used in lieu of penalties and the documentation which must be maintained by the State for review? Are States complying with the provisions of the agreement on penalties? To what extent are States calculating economic benefit? Are States seeking penalties in the majority of cases? Are States getting the penalty amounts they are seeking? (O) What problems is the Region encountering in assessing penalties using the CWA Penalty Policy? Is the Region experiencing problems/delays with Headquarters reviews? Explain. Is the Region generally getting the penalty amounts identified in the referral? What improvements could be made to the review process to speed up the referral process?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(P) Do Regions/States use PCS to track compliance with consent decree schedules? If not, why not?			
	(Q) What types of action are being taken in response to violations of consent decrees? Are stipulated penalties collected? Are civil contempt proceedings initiated? Are the decrees modified? Are additional compliance monitoring requirements imposed?			
	(R) What are the reasons for the Regions/States failure to take remedial action against permittees that violate their consent decrees?			
	(S) What problems still need to be addressed by the Region/States to make the DMR/QA program more effective? Should it cover pretreatment?			
	(T) How do you ensure the quality of data collected by permittees and subsequent data transfer, and data storage in PCS?			
	(U) How do you promote better quality of future DMR data when drafting new permits?			

WATER ENFORCEMENT AND PERMITS

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ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(V) What procedures does the Region have in place to identify criminal cases? What role does the Office of Regional Counsel play in identification and case development? Has the staff provided technical support for criminal investigations and prosecutors? How has the Region made use of the new CWA criminal enforcement authorities?			
	(W) What is the trend in the number of EPA formal enforcement actions relative to State activity since the implementation of the timely and appropriate criteria in FY 85?			
5. Non-NPDES Enforcement	(A) Have the Region/States taken any enforcement actions to protect water, including wetlands, from unpermitted discharges of solid waste?			
	(B) What criteria does the Region use in determining where Spill Prevention Control and Countermeasure Plan inspections should be conducted? Does the Region always require that the plan be amended after a spill of 1,000 gallons or more?			
6. Increase Use of PCS as the Primary Source of NPDES and Pretreatment Program Data	(A) Describe the use of PCS by the States and the Region and explain what steps are or need to be taken to comply with the PCS Policy?	(a) Track, by Region, against targets, the percent of data entry of WENDB elements for pretreatment and NPDES.	No/OW	Quarterly

WATER ENFORCEMENT AND PERMITS

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ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTIN FREQUENC
6. Increase Use of PCS as the Primary Source of NPDES and Pretreatment Program Data (continued)	(B) What actions are Region/States taking to improve the quality of PCS data?			
	(C) Do the Region/States use the preprinted DMR form to minimize compliance tracking problems and PCS entry workload? What is the Region doing to encourage the States to use preprinted DMRs? If the States are not using preprinted DMRs, why?			
	(D) How is the Region encouraging direct State use of PCS? Is the Region giving priority in assistance and program grant funding to States that are direct users of PCS? If States are not using PCS consistent with the PCS Policy Statement are grant conditions being imposed to expedite compliance?			
7. Improve Effectiveness of Inspection Activities	(A) Do the Region/States have annual compliance inspection plans for each States? How does the Region provide its States with advance notice of inspections? Discuss how Regional and State efforts are coordinated. Discuss use of independent and joint inspections and State file reviews to overview the State inspection program.	(a) Track, by Region, against targets, the number of major permittees inspected at least once (combine EPA and State inspections and report as one number).	Yes/SPMS WQ/E-12	Second an Fourth Quarters

WATER ENFORCEMENT AND PERMITS

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ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
7. Improve Effectiveness of Inspection Activities (continued)	(B) How do Regions/States determine which facility and what type of inspection to conduct?	(b) # of inspections: --permittee inspections (list separately: major, minor; municipal, non-municipal, Federal; EPA, State) --toxic inspections --biomonitoring inspections	No/No	Quarterly
	(C) Why are total number of inspections large, yet all majors are not inspected at least once?	(c) Identify the number of Regional and State inspection plans.	No/No	October 1, 1988
	(D) How do Regions/States determine the need for toxic/toxicity inspections/TREs?			
	(E) Do the Regions/States prepare quarterly lists of facilities to be inspected? Is the inspection mix consistent with the "primary use" criteria included in the NPDES Inspection Strategy?			
	(F) How do the Regions/States use DMR/QA performance sample results for targeting compliance inspections?			
	(G) What mechanism is used to assure that inspection results are provided to the Regions/States in a timely manner? Are the data entered into PCS only after the report has been completed and signed by the reviewer or supervisor?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
7. Improve Effectiveness of Inpsection Activities (continued)	(H) How does the Region/State follow-up when inspection results are unsatisfactory? When Region uncovers problems, does the Region/State follow-up with a more intensive inspection?			
	(I) Have the Region/States verified that Reconnaissance Inspections of major permittees counted for coverage purposes were conducted at major permittees meeting the requirements specified in the definition section?			
8. Update and Use EMS Enforcement Procedures	(A) For each State/Region which still do not have written EMS procedures, when will the Region/States have written updated procedures?			
	(B) Have the Region/States implemented use of the Violation Review Action Criteria included in the FY 1986 EMS as the basis for determining when violations should receive professional review? Do Regions/States follow the Enforcement Response Guide (ERG)? If not, when will the Region/States begin to use these criteria or equivalent criteria and the ERG?			

WATER ENFORCEMENT AND PERMITS

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ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
8. Update and Use EMS Enforcement Procedures (continued)	(C) What kinds of formal enforcement actions are the Region/States using? Has the Region reviewed each States enforcement instruments to ensure that they meet the definition of formal action? Have the States made any necessary statutory or regulatory changes to ensure equivalency of State administrative mechanism equivalent to EPA section 309 AOs? (D) What kinds of informal actions (if any) are the Region/States using in lieu of formal enforcement action? Are these actions documented properly? Are they effective?			
9. Use Guidance Criteria and Milestones for Response to Noncompliance	(A) What is the screening process used by the Region and States for identifying violations and applying SNC criteria? How are short term violations requiring Regional/State judgement handled? Does the Region use the Exception List as a way of tracking State programs?	(a) EXCEPTION LIST UNIVERSE (1) Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters. (List separately: municipal, industrial, Federal facilities.)	Yes/No WQ/E-6	Quarterly (Data lagged one quarter.)

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)	(B) What management level reviews the Exception List and how is it used? How do the Region and States use the Exception List to establish a priority for committing compliance/enforcement resources? (C) What problems have the Region/States been facing that would prevent them from meeting the timeliness prescribed? Which States consistently miss commitments?	(2) Identify by name and NPDES number major permittees appearing on two or more consecutive QNCRs as being in significant noncompliance with: --final effluent limits (FEL) --construction schedules (CS); --interim effluent limits (IEL) without being returned to compliance or addressed with a formal enforcement action. (List separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	No/No	Quarterly (Data lagged on quarter.
	(D) Is there consistent application of the criteria/milestones from State to State within the Region? If not, what steps is the Region planning to take to improve consistency?	(b) EXCEPTION LIST TRACKING (1) Report, by Region, the number of major permittees that are on the previous exception list which have returned to compliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action, and the number that were unresolved as of the end of the quarter. (List municipal, industrial, Federal facilities separately.)	Yes/No WQ/E-7	Quarterly (Data lagged on quarter.)

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ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)		(2) Identify the names and total number of major permittees listed in the Exception List universe for the previous quarter for which one of the following has occurred: --# returned to compliance --# not yet in compliance but addressed with a formal enforcement action --# that are unresolved as of the end of the quarter, and the number of consecutive quarters each facility has appeared on the QNCR. (List separately: municipal, industrial, Federal facilities; SNC with FEL, CS, IEL; NPDES States, non-NPDES States).	No/No	Quarterly (Data lagged on quarter.)

"Guidance for the FY 1989 State/EPA Enforcement Agreement Process," date June 20, 1988. See GM-57.

"FY 1990 Office of Water Operating Guidance," dated March, 1989. Selected portions ONLY.

United States
Environmental Protection
Agency

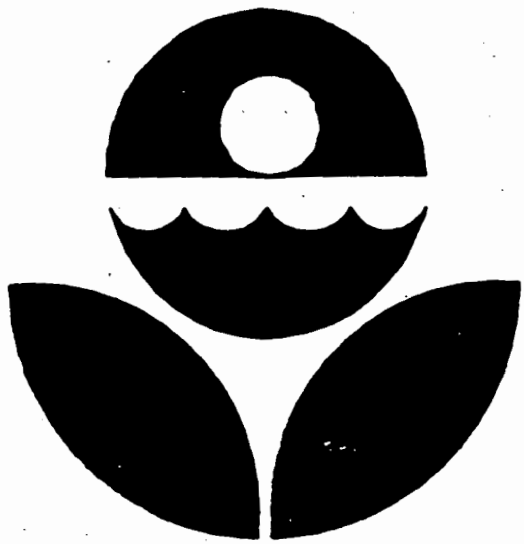
Office of
The Administrator
Washington DC 20460

March

EPA

Agency Operating Guidance

FY 1990



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Office of Water

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FY 1990 WATER PROGRAMS AGENCY OPERATING GUIDANCE

ASSISTANT ADMINISTRATOR'S OVERVIEW

The Water portion of the Agency's FY 1990 Operating Guidance provides national direction to EPA, States, Indian Tribes, and the regulated community in carrying out programs mandated under Federal water protection statutes. These statutes include: the Safe Drinking Water Act (SDWA), as amended by the Lead Contamination Control Act of 1988; the Clean Water Act (CWA); and the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended by the Ocean Dumping Ban Act of 1988. The Agency and the States also implement programs to protect groundwater quality through provisions under several different statutes.

The Office of Water (OW) uses a management accountability system to set priorities, define performance expectations and track and assess EPA and State performance. This system is vital to the effective functioning of the Water programs because it links a number of organizations at the Federal and State level (and, in some programs, local governments as well) to a common set of objectives and expectations when they are operating under these Federal statutes. The Office of Water Accountability System (OWAS) includes the OW portion of the Guidance, the accompanying SPMS measures, the OW program evaluation guide with quantitative and qualitative measures, and the OW mid-year Regional evaluations.

During the FY 1990 mid-year review process, the Regions provide the OW Assistant Administrator with their projected operating strategy and plan for FY 1991, including an overview of Regional and State priorities and their relationship to national priorities. This is done before FY 1991 commitments are made to set the context for negotiation of State work programs and those commitments. The mid-year evaluations also provide the Regions the opportunity to present and discuss Region-specific initiatives. These initiatives are directed at correcting Region-specific problems that will result in significantly increased environmental protection or substantially reduced health/environmental risks.

The term State does not include Indian Tribes. The terms Indian Tribes, Indian Tribes treated as States, and Indian Tribes with Primacy are inserted after the term State where it is appropriate to do so.

Activities with associated SPMS measures are denoted by [SPMS] appearing at the end of the activities. Additionally, in line with the Agency format, activities increased from the FY 1989 Operating Guidance are indicated by a plus (+) in the left margin, new activities are indicated by the letter (N), and decreased activities are indicated by a dash (-). No notation indicates that the level of activity is the same as in FY 1989.

PROGRAM DIRECTIONS AND PRIORITIES

As a Nation, we have made impressive gains in the battle for Clean Water. Many of America's rivers, streams and lakes have been restored through the Federal, State, and local investment in science, regulatory actions, wastewater treatment. Generally the Nation has drinking water that is abundant and safe. The price for this level of quality is perpetual vigilance to ensure that our protection systems are maintained. Wastewater treatment systems must be constantly operated, maintained, and upgraded. New industry and municipal discharges must be stringently regulated. Drinking water sources must be protected, treated, and monitored to deal with a growing list of contaminants.

Despite our progress, we have not eliminated the underlying causes of contamination. In fact, they are growing with our population and economy. Habitat loss, especially wetlands and coastal areas threatens the ecological values we are struggling to protect. Nonpoint source pollution remains a serious problem and is now attracting more Congressional and public attention because our point sources are largely controlled. The plight of our near coastal waters and beaches is under scrutiny by the Congress, press, and public. Preventing the contamination of our underground sources of drinking water is an increasing concern of Congress and the public. Clearly, our job is not done.

Our arsenal of water program tools and responsibilities is abundant and public support for our programs is strong. New programs like Wellhead Protection, Nonpoint Source and the National Coastal and Marine Policy give us even greater opportunities to be effective through stimulating use of environmentally sound land management practices that augment and reinforce traditional pollution control approaches.

In FY 1990 we face the major challenge of maintaining the integrity of our base programs and taking advantage of our new opportunities, while facing substantial shortages in funding.

The programs we put forward in this Guidance are ambitious. Our operating policy is to demand as much Federal and State performance as the system can generate, to stimulate increasing cost-effectiveness in carrying out many of our repetitive tasks,

to advocate creative work-sharing arrangements among Federal, State, local and private programs, and to evaluate tradeoffs within a context of broad, basin-wide or State-wide strategies to address areas of greatest risk and benefit.

Both the Clean Water Act and the Safe Drinking Water Act programs are largely delegated to the States; thus effective State as well as EPA performance is critical to achieve success under these laws. In addition, EPA and States are increasingly dependent on local governments in newer geographic-based water programs such as Class V Underground Injection Control, Nonpoint Source, Wellhead Protection and National Estuary Programs through consensus-building. This leads to some competition between Federal and State priorities, as well as tension between the decentralized structure and the need for national consistency, which must be managed within a climate of work-sharing and mutual respect.

A sound Federal/State partnership is essential to implement national programs in a comprehensive, coordinated fashion. In 1990, as a result of new and continuing demands from Federal Water statutes, EPA and States must take a leadership role in building public awareness and support to address Federal, State, and local funding needs in order to continue to:

- Reduce human health risks posed by drinking water and protect ground-water resources that serve as drinking water supplies;
- Protect and maintain critical aquatic habitats, including wetlands, from point and nonpoint sources of pollution; and
- Protect and maintain the Nation's surface waters from point source discharges, especially hazardous and toxic pollutants.

In addition, Water programs will participate in EPA's strategic effort to bring about a long-term shift towards pollution prevention through source reduction and environmentally sound recycling. EPA will develop its Pollution Prevention Strategy in 1989, with each program, including Water, formulating its own plan in conjunction with the States and Regions. In 1990 EPA headquarters, Regions, and States will begin implementing a Water Programs' Pollution Prevention Plan.

EPA's Water programs will work with Indian Tribes on a government-to-government basis to take all appropriate actions, consistent with available resources, and to assist Indian Tribes in improving and maintaining the quality of their water resources. In 1990, as EPA completes pertinent enabling guidance and regulations, EPA will place emphasis on awarding grants to

Indian Tribes. In this regard, EPA will be reviewing and approving Indian Tribe applications for treatment as States as required by statute. In addition, emphasis will be placed on improving communications with Indian Tribes and States to encourage cooperative working arrangements.

A. Protecting Drinking Water Sources

EPA and State Drinking Water programs face many new challenges in 1990 in protecting drinking water at the tap and preventing contamination of ground waters and surface waters that serve as drinking water supplies. In 1990, EPA places high priority on States accepting primacy for the new EPA regulations, implementing the new program requirements, and enforcing against violators of existing standards. In accordance with this priority:

- EPA and EPA Regions will continue to develop safe drinking water standards in accordance with the requirements of the 1986 SDWA Amendments.

- States will need to increase enforcement substantially, master new program capabilities, and adopt new regulations to implement many new provisions of the 1986 Safe Drinking Water Act. Specifically, States will be expected to:

  - Enforce the first new Maximum Contaminant Levels (MCLs);

  - Expand monitoring requirements for volatile organic compounds;

  - Assume primacy for the new requirements in the surface water treatment, coliform, and lead/corrosion rules;

  - Initiate assessments of more than 9,000 surface water systems pursuant to the new treatment rule with emphasis on approximately 4,000 unfiltered systems;

  - Enforce the ban on plumbing materials containing lead and lead public notification regulations; and

  - Implement the provisions of the Lead Contamination Control Act.

+ o Regions/States will reopen permits for organic chemical plants, bleached kraft pulp mills, and others to incorporate technology-based and water quality-based limits based on studies required at the time of permit issuance, and will modify other major permits as needed to impose necessary and appropriate toxic controls. There will be more focus on developing limits to protect human health. (Ongoing)

+ o Regions/States will follow the interim sludge permitting strategy by including sludge monitoring and existing national sludge regulatory requirements in NPDES and State sludge permits. (Ongoing) [SPMS]

o Regions/States will implement the RCRA permit-by-rule requirement and establish corrective action requirements where necessary for POTWs that are receiving hazardous wastes not mixed with domestic sewage. (Ongoing)

N o Regions/States will prepare permit strategies addressing all CSO discharges by January 15, 1990. (Second Quarter)

N o Regions/States will focus increased attention on permit issuance to NPDES permittees discharging to marine/estuarine waters, especially to control the discharge of bioaccumulative and persistent toxicants. (Ongoing) [SPMS]

6. NPDES Enforcement

The goals for the NPDES enforcement program in FY 90 are to expand upon the success of the National Municipal Policy by ensuring continued municipal compliance and to increase our enforcement presence in emerging program areas such as toxic controls and sludge. Specifically, in the municipal area emphasis will shift from construction of facilities to improving compliance of constructed facilities with final effluent limits. EPA will develop a Municipal Compliance Maintenance Strategy which will provide guidance for identifying the cause(s) of POTW noncompliance through diagnostic inspections and establishing compliance correction plans utilizing section 308 letters, administrative orders, or where necessary judicial actions.

In support of this municipal compliance emphasis, EPA will increase attention to the enforcement of pretreatment implementation requirements for POTWs, improve monitoring/inspections to evaluate compliance with toxic requirements in NPDES permits, and increase the use of diagnostic inspections and tracking to identify and correct chronic noncompliance. Administering agencies will coordinate

pretreatment and municipal enforcement actions so that, when an action is taken in response to noncompliance in one program, consideration is given to the other.

In FY 90, the enforcement program will become more involved in emerging program areas. EPA will place a high priority on identifying and enforcing toxic permit requirements. EPA, in cooperation with the States, will implement the Compliance Monitoring and Enforcement Strategy for Toxics Control. The strategy focuses on inspections to monitor acute and chronic toxicity; criteria targeting enforcement responses to violations that pose the greatest potential risk to aquatic life and human health; lab performance evaluation criteria for toxicity analysis; and an updated DMR/QA program to meet new and expanded needs for toxicity controls. EPA will also initiate enforcement of permits for combined sewer overflows and enforcement of sludge requirements in permits.

Headquarters

- o Headquarters will evaluate the use of available enforcement mechanisms to ensure the optimum use of enforcement authorities. Headquarters/Regions will assess State penalty practices. (Fourth Quarter)

N o Headquarters will provide guidance to set priorities for monitoring and enforcement of sludge requirements. (First Quarter)

N o Headquarters/Regions will revise NPDES Oversight Guidance to establish criteria for more effective oversight of approved States. (Second Quarter)

N o Headquarters will provide a full range of assistance to States and Regions to assure that PCS is being utilized effectively and efficiently. (Ongoing)

N o Headquarters will take the necessary steps to assure that PCS has the elements to allow for effective linking to other information systems. This requires entry of latitude/longitude data in PCS; identifying other environmental information systems with relevant information; and designing, distributing and using specially designed programs to facilitate system linkages, data download and uploads and data analyses.

N o Headquarters (OWEP/ORD) will expand the DMR QA program to include a reference toxicant to test permittees' ability to conduct whole effluent toxicity tests. (Second Quarter)

N o OWEP will coordinate with the Office of Municipal Pollution Control in the development and implementation of the Municipal Compliance Maintenance Program. (Ongoing)

N o Headquarters will continue to encourage Regions to deliver inspector training and ensure that both new and experienced inspectors receive program-specific training. (Ongoing)

+ o Headquarters will work to implement the new EPA Federal Facility Compliance Strategy, signed by the Administrator on November 8, 1988. (Ongoing)

Regions/States/Indian Tribes

- o Regions and States, using the entire spectrum of enforcement mechanisms, will ensure compliance with all formal enforcement actions (AOs, civil and criminal) by tracking cases from initiation of referrals to entry of consent decrees or court orders, and by prompt follow up action when deadlines are missed. (Ongoing)

- o Regions will provide technical support for criminal investigations and prosecutions in program priority areas. Regions shall refer to the Office of Criminal Investigation matters involving suspected criminal violations, including significant unpermitted discharge and false reporting, or other fraud to the Agency. (Ongoing)

- o Regions will ensure that EPA judicial referrals/consent decrees and final administrative penalty orders contain appropriate civil penalties consistent with the CWA Penalty Policy; NPDES States will comply with penalty provisions in the National Guidance for Oversight of NPDES Programs. (Ongoing)

- o Regions/States will take timely and appropriate enforcement against SNC violations, including those involving toxic pollutants. (Ongoing) [SPMS]

- o Regions/States will increase the use of inspections to assess permittee biomonitoring capabilities and evaluate permittee procedures/techniques for toxicity reduction evaluations. (Ongoing) [SPMS]

- o Regions/States will continue to ensure timely and accurate data entry of WENDB data elements for pretreatment and for administrative penalty orders. (Ongoing)

N o Regional enforcement staff will coordinate with Near Coastal program staff to determine whether enforcement action is required for less than significant noncompliance. (Ongoing)

N o Regions/States will monitor compliance with sludge requirements in NPDES permits. (Ongoing)

N o Regions/States will develop and implement Municipal Compliance Maintenance programs for anticipating when a POTW will reach design capacity. (1st Quarter)

7. Pretreatment

The goal is to assure that POTWs[1] fully implement and enforce pretreatment controls for conventional, nonconventional and toxic pollutants and hazardous wastes that are necessary to protect human health, the environment, and the treatment works. Administering Agencies should give priority to: 1) modifying the requirements of the approved program and NPDES permit to incorporate new requirements resulting from new or revised regulations and to correct inadequacies identified in the operations of the POTW pretreatment program, and 2) identifying those POTWs that meet the criteria for reportable noncompliance and report them on the Quarterly Noncompliance Report. Where the POTW also meets the new definition of significant noncompliance, formal enforcement action should be initiated when the POTW does not return to compliance within a timeframe consistent with the definition.

Administering Agencies, as they oversee local program implementation, should continue to give emphasis to the following three key areas to ensure effective implementation:

o Program Modification: Regions and States will formally modify approved pretreatment programs to incorporate new requirements or correct inadequacies. Modification and approval will follow the October 17, 1988, amendments to the General Pretreatment Regulations, and focus on the following four areas:

a. Local Limits - In accordance with the 1985 policy memorandum and the FY 88 Local Limits Guidance Manual, site specific technically-based local limits must be developed for each approved program and periodically re-evaluated.

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[1]Throughout this section, wherever POTWs are cited, the same requirements apply to States or EPA acting as Control Authority in lieu of local program.

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b. Legal Authority - Consistent with section 403.8 of the Pretreatment Regulations, particularly as revised by the PIRT rule, POTWs, and in some cases States, will need to modify their legal authorities.

c. Control Mechanisms - Based on the FY 89 IU Permitting Guidance Manual, and the PIRT amendments POTWs may need to develop and issue stronger IU control mechanisms for significant industrial users (SIUs).

d. Enforcement Procedures - POTWs are responsible for ensuring the compliance of industrial users with pretreatment standards, including taking effective enforcement actions within reasonable time frames. Where approved programs do not specify detailed enforcement response procedures, they should be modified to include them consistent with the 1986 Pretreatment Compliance Monitoring and Enforcement Guidance (PCME).

- Enforcement: Regions and States will assure that POTWs operate their approved programs and comply with reporting requirements. Where POTWs fail to successfully implement their program as measured by the guidance on significant noncompliance, Administering Agencies should take timely enforcement action to address the problem. Where the POTW does not act promptly to correct the situation, formal enforcement action should be initiated against the POTW to address the noncompliance.

  Where there is an approved program, and the POTW has not taken all actions available under its authority, to secure the compliance of the IU, action against both the POTW and the IU will usually be appropriate. Where EPA or the State is the Control Authority, enforcement action should be taken against those IUs which have not complied with categorical standards, giving priority to IUs where the POTW has been identified as having interference or pass-through problems.

- Data Management: Regions and States will assure that POTWs have in place and employ appropriate mechanisms to track and determine compliance rates for SIU's, using the definition of significant noncompliance when it is promulgated, and that POTWs report such data at least annually. States and Regions will employ PCS to track pretreatment information and assist in identifying POTWs which meet the criteria for reportable non-compliance and significant noncompliance. Regions and States should also use PCS to identify the compliance of IUs where EPA or the State is the Control Authority.

For State-run pretreatment programs, special attention will be given to monitoring and evaluating performance. Regions should ensure that States are inputting data into existing tracking

systems as appropriate and should monitor the overall performance of the program to ensure that industrial users are in compliance.

Where there is no approved local program Regions/States should evaluate the need to develop local programs consistent with section 403.8.

Headquarters

- o Headquarters (OWEP) will promulgate changes to the NPDES and General Pretreatment regulations based on the recommendations of DSS. (Second Quarter)

N o Headquarters will propose changes to the NPDES regulations on the Quarterly Noncompliance Report to incorporate reporting requirements for pretreatment implementation. (Fourth Quarter)

N o Headquarters will provide guidance defining the definition of significant noncompliance for POTWs which fail to implement their approved programs. (First Quarter)

Regions/States/Indian Tribes

+ o Regions/States will assess and provide technical assistance to POTWs as they implement/enforce their programs and adopt new regulations resulting from the findings of the DSS. (Ongoing)

+ o Regions/States will continue to place highest priority on enforcement against POTWs consistent with the guidance to be issued on significant noncompliance. Regions should continue to report all POTWs on the QNCR which meet the criteria for reportable noncompliance. (Ongoing)

- o Regions will use criminal enforcement authorities against appropriate industrial users with special attention on knowing/negligent introduction into a POTW of toxic pollutants/hazardous wastes (as defined by CWA sections 311(b)(2)(A) and 307(a); CERCLA section 102; RCRA section 3001; TSCA section 7) in excess of legal limits. Regions will provide technical support for criminal investigations and prosecutions in pretreatment cases. (Ongoing)

+ o Regions/States that act as control authorities will implement/enforce the pretreatment program consistent with national guidance, and will be held to the same standards of implementation as local authorities. (Ongoing)

- o Regions/States will ensure that all approved pretreatment programs are inspected or audited annually. (Ongoing) [SPMS]

+ o Regions/States will assure that all POTWs with approved programs for more than two years have in place and are implementing adequate and enforceable control mechanisms for at least 95% of SIUs. (Fourth Quarter)

N o Regions/States will ensure that approved POTWs implement the definitions for significant noncompliance and significant industrial users as soon as they are promulgated. (Ongoing)

8. NPDES and Pretreatment State Program Approval, Review, and Oversight

In FY 90, the goal is to further strengthen the Federal/State partnership by conducting effective oversight to ensure sound, consistent implementation of State programs, improving the legal and regulatory basis of current State programs, and approving new State NPDES, pretreatment and sludge programs. As State NPDES and pretreatment programs mature and as more States assume these responsibilities, these activities continue to grow in importance. In addition, EPA will work with any Indian tribes seeking to administer the NPDES program as authorized by the WQA. Regions will continue to negotiate agreements with their States on managing and overseeing NPDES programs consistent with the Oversight Guidance and applicable NPDES/pretreatment regulations. By 1990, many of the initiatives begun in earlier years will be institutionalized into other documents and agreements, and more emphasis will be placed on follow up by Headquarters and by Regions to ensure the sound, consistent application of these principles and practices.

The Regions, with Headquarters assistance, will continue to review State programs to ensure that current State laws and regulations provide adequate authority to administer and enforce the national NPDES/pretreatment program requirements under the CWA, as amended. Continued emphasis will be given to following up on Action Plans established by States and Regions in FY 1988/89 to strengthen water quality based permitting for toxic pollutants and toxicity.

The Regions will continue to encourage NPDES States to assume authority for the pretreatment program, and will continue to condition section 106 grants accordingly. Regions should accelerate efforts to encourage State program modifications for general permitting authority, since this will be a key to successful implementation of stormwater program activities for all NPDES States. In addition, the CWA amendments are expected to produce increased activity with respect to State program

assumptions, including development of approvable State NPDES or other federally authorized programs to include sludge requirements, and treatment of Indians as States.

Headquarters

- o Headquarters will provide guidance/assistance to all Regions in conducting legal reviews, correcting program deficiencies, and responding to litigation/administrative petitions from third parties seeking withdrawal of State programs. (Ongoing)

N o Headquarters will promulgate changes to NPDES Regulations to incorporate requirements of the Water Quality Act of 1987, including the treatment of Indian tribes as States, and to clarify existing regulatory provisions. (Fourth Quarter)

N o Headquarters will work with the Regions to assist Indian tribes seeking to administer the NPDES program. (Ongoing)

Regions/States/Indian Tribes

- o Regions will increase their oversight of State-run pretreatment programs, and will take appropriate steps to correct problems where States are not adequately implementing/enforcing program requirements. (Ongoing)

- o Regions will continue to review/approve programs/program modification requests for NPDES (including pretreatment, general permits and sludge) and review and approve partial NPDES programs. (Ongoing)

+ o Regions will work with States to implement their toxic control action plans. (Ongoing)

9. State Revolving Fund Management

In the implementation of the State Revolving Fund program authorized under Title VI of the Clean Water Act, FY 1990 will be the key to the future of the program. Almost 40 States are projected to receive their initial capitalization grants by the end of FY 1989 and the remainder during FY 1990. Most States will therefore be completing their first SRF annual cycle by the end of FY 1990. It is crucial to the success of the SRF program that EPA and the States provide the necessary technical and financial resources. This is vital to ensure that each State's program is developed to effectively deal with municipal wastewater financing needs of both large and small communities.

U.S ENVIRONMENTAL PROTECTION AGENCY

Office of Water

FY 1990 SPMS Measures and Definitions

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OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Assess toxicity control needs and reissue major permits in a timely manner.	Track, against targets, the number of permits reissued to major facilities during FY 90 (report NPDES States and non-NPDES States separately).	WQ-11	Q 1,2,3,4
	Identify the number of final permits reissued and the number modified during FY 90 that include water quality based limits for toxics. Of these, report number that are Individual Control Strategies (NPDES States, non-NPDES States; report major and minors separately.)	WQ-12	Q 1,2,3,4
Assure NPDES permits are fully in effect and enforceable.	Identify, by Region, the number of pending evidentiary hearing requests and track, by Region, progress against quarterly targets for the evidentiary hearing requests for major permits pending at the beginning of FY 90 resolved by EPA and for the number resolved by NPDES States.	WQ-13	Q 1,2,3,4
Effectively implement approved local pretreatment programs.	Track, by Region, against quarterly targets, for approved local pretreatment programs: 1) the number audited by EPA and the number audited by approved pretreatment States; and 2) the number inspected by EPA and the number inspected by States.	WQ-14	Q 1,2,3,4
Reissuance of priority municipal permits which contain interim sludge conditions.	Track, against targets, total number of permits issued to priority sludge facilities containing sludge conditions necessary to meet the requirements of CWA section 405(d)(4).	WQ-15	Q 1,2,3,4
Encourage permitting efforts in near coastal waters.	Identify the number of permits reissued in near coastal waters (report separately: NPDES States and non-NPDES States).	WQ-16	Q 1,2,3,4

WQ-6 Nonpoint Sources (cont.)

This measure begins the process of shifting the nonpoint source management and control program from the development stage in FY 1989 to implementation. Because the long-term focus of the nonpoint source program is on watershed and site-specific clean-up projects, this measure will be modified in FY 1991 to place highest priority on identifying and tracking major watershed and site-specific nonpoint source pollution control programs and projects.

WQ-7 Indian Tribe Program Grants

This measure assesses Agency progress in awarding CWA program grants to qualified Indian Tribes as required by the WQA of 1987. Specifically, it tracks (by Region) the number of Indian Tribes qualified to be treated as a State, the number of Tribes that submit grant applications, and the list of Tribes that receive CWA program grants (include major activities and funding sources). Describe Regional procedures for reviewing and ranking Indian Tribe grant proposals and for evaluating performance.

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OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Achieve and maintain high levels of compliance in the NPDES program.	Track, by Region, the number of major permittees that area: on final effluent limits and not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	WQ/E-4	Q 1,2,3,4
	Track, by Region, the number and percentage of major permittees in significant noncompliance with: final effluent limits; construction schedules; interim effluent limits; reporting violations; pretreatment implementation requirements (list separtely; municipal, industrial, Federal facilities; NPDES States, non-NPDES State).	WQ/E-5	Q 1,2,3,4
	Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters. (Report separately: municipal, industrial, Federal).	WQ/E-6	Q 1,2,3,4
	Report, by Region, the number of major permittees that are on the previous exception list which have returned to copliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action by the QNCR completion data, and the number that were unresolved (not returned to compliance during the quarter or addressed by a formal enforcement action by the QNCR completion date). (Report separately: municipal, industrial, Federal facilities).	WQ/E-7	Q 1,2,3,4

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OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Achieve and maintain high levels of compliance in the NPDES program. (continued)	Report, by Region, the total number of (a) EPA Administrative Compliance Orders and the total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatement; (b) Class I and Class II proposed administrative penalty orders issued by EPA for NPDES violations and pretreatment violations; and (c) Administrative penalty orders issued by States for NPDES violations and pretreatment violations.	WQ/E-8	Q 1,2,3,4
	Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorneys General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts	WQ/E-9	Q 1,2,3,4
Effectively enforce the pretreatment program.	Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and tract by State the number of POTWs in that universe where action taken either resolved or established an enforceable schedule to resolve RNC. report separately by State for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	WQ/E-10	Q 1,2,3,4

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OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Identify compliance problems and guide corrective action through inspections.	Track, by Region, against targets, the number of major permittees inspected and least once (combine EPA and State inspections and report as one number).	WQ/E-12	Q 1,2,3,4

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WQ 11/12 Permit Reissuance; Toxic Permits

The universe for measure WQ-11 is the total number of major permits with expiration dates before October 1, 1990, according to PCS data on October 10, 1989 (i.e., the number of major permits that have or will expire by the end of FY 90). Measure WQ-11 is the total number of major permits issued with issuance dates (i.e., date signed by permit authority) during FY 90. Status as of the close of each quarter will be taken from PCS on the 10th of the month following the end of the quarter.

Measure WQ-12 is all permits (major and minor) that include water quality based limits on specific chemicals or whole effluent toxicity and with issuance (modification) dates (i.e., date signed by EPA or State permit authority) during FY 90. Of those permits, the number that are ICSs is to be identified. This measure deals only with final permits; however, because ICSs may also be draft permits with a schedule for final issuance, this number of ICSs will not include all ICSs. WQ-12 is specifically designed to count water quality-based permits issued in FY 1990. ICSs are a subset of this universe. Since "limit" is specifically designed to exclude permits which only include monitoring requirements, such permits would not be counted as ICSs.

A water quality-based permit limit is a limit that has been developed to ensure a discharge does not violate State water quality standards. Such limits are expressed as maximum daily and average monthly values in Part I of the NPDES permit. They can be expressed as concentration values for individual chemicals and/or pollutant parameters such as effluent toxicity. Effluent toxicity can also be expressed in toxic limits. Limits should be reflective of data available through water quality-based assessments and should protect against impacts to aquatic life and human health.

As a matter of policy, EPA regards the new statutory requirements to control point sources as a component of the ongoing national program for toxics control. In the national toxics control program, all known problems due to any pollutant are to be controlled (using both new and existing statutory authorities) as soon as possible, giving the same priority to these controls as for controls where only 307(a) pollutants are involved. Known toxicity problems include violations of any applicable State numeric criteria or violations of any applicable State narrative water quality standard due to any pollutant (including chlorine, ammonia, and whole effluent toxicity), based upon ambient or effluent analysis. States and Regions will continue to issue all remaining permits, including those requiring the collection of new water quality data where existing data are inadequate to assess WQ conditions.

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Performance Expectation: The goal of the State and EPA NPDES program is to have reissued major and minor permits in effect on the date the prior permit expires. Permit applications are due and should be acted upon during the last six months of a permit's term. Most States and Regions, should be able to reissue 100% of their expiring major permits except where unusual, complex and difficult issues prevent timely permit reissuance.

Regional quarterly reports for these measures will be reported to the Director of the Office of Water Enforcement and Permits.

WQ 13 Evidentiary Hearings

The term "evidentiary hearing" is meant to encompass not only EPA issued permit appeals pursuant to 40CFR 124 but also any NPDES State issued permit appeals (whether adjudicatory or non-adjudicatory in nature). The meaning includes any and all administrative appeals to permit conditions for major facilities, whether the appeals stay or do not stay permit conditions. Evidentiary hearings for EPA issued permits are not considered to be pending if they are on appeal to the Administrator as of the beginning of FY 1990.

An evidentiary hearing should be regarded as resolved once a final decision has been issued, a negotiated settlement has been reached, or the appeal of an initial decision has been denied.

Performance Expectation: Evidentiary hearings should be resolved as expeditiously as possible. The target should reflect resolution of all pending hearings. Although the measure is intended to reduce the backlog of pending hearings, consideration should be given to new hearings requests made during FY90 that have priority over pending requests. Such requests may be counted against commitments where they are priority cases (based on Regional/State evaluation).

WQ 14 Pretreatment Audits and Inspections

A local pretreatment program audit is a detailed on-site review of an approved program to determine its adequacy. The audit report identifies needed modifications to the approved local program and/or the POTW's NPDES permit to address any problems. The audit includes a review of the substantive requirements of the program, including local limits, to ensure protection against pass through and interference with treatment works and the methods of sludge disposal. The

auditor reviews the procedures used by the POTW to ensure effective implementation and reviews the quality of local permits and determinations (such as implementation of the combined wastestream formula). In addition, the audit includes, as one component, all the elements of a pretreatment compliance inspection (PCI).

In certain cases, non-pretreatment States will be allowed to conduct audits for EPA. If a non-pretreatment State has the experience, training, resources and capabilities to effectively conduct audits, these audits could be counted. A determination of whether a non-pretreatment State could conduct the audit for EPA will be worked out between EPA HQ and the Region during the commitment negotiation process on a case-by-case basis.

The pretreatment compliance inspection (PCI) assesses POTW compliance with its approved pretreatment program and its NPDES permit requirements for implementation of that program. The checklist to be used in conducting a PCI assesses the POTW's compliance monitoring and enforcement program, as well as the status of issuance of control mechanisms and program modifications. A PCI must include a file review of a sample of industrial user files. Note that this measures tracks "coverage" of approved pretreatment programs, not the number of audits or inspections conducted, which may be greater than the number of programs since some programs may be inspected/audited more than once a year.

Performance Expectation: At a minimum, audits should be performed at least once during the term of the POTW's permit. Although an audit includes all the elements of a PCI, as one component, the activity should not be counted as both an audit and a PCI; it should be counted as an audit. In any given year, all POTWs that are not audited should have a PCI as part of the routine NPDES inspection at that facility, i.e. audits plus inspections should equal 100 percent of approved POTWs, except where mitigating circumstances prevent this (mitigating circumstances will be approved during negotiation process). For purposes of reporting, both audits and pretreatment compliance inspections should be lagged by one quarter, i.e. same as NPDES inspections. Also, where both an audit and an inspection are conducted for a POTW, for purposes of coverage, only that audit will be counted.

WQ-15: Sludge Permitting

Priority sludge facilities are: 1) pretreatment POTWs; 2) POTWS that incinerate their sludge; and 3) any other POTWs with known or suspected problems with their sludge quality or disposal practices. Pretreatment POTWs and POTWs that incinerate sludge may be considered to be non-priority if such decision is supported by information showing no cause for concern. The sludge conditions are to be included in permits as the NPDES pern. xpires and is reissued. The sludge

conditions may be incorporated in another permit (such as a permit issued under the Clean Air Act, or a State permit pursuant to an agreement between EPA and the State) and referenced to the NPDES permit.

WQ-16: Near Coastal Waters Permitting

In accordance with EPA's near coastal waters initiative and the Marine Policy, Regions with coastal dischargers will accelerate actions for reissuing permits to these facilities. A near coastal water is one with measurable salinity and tidal influences. Permits should contain water quality based limits based on available wasteload allocations and should be analyzed for persistent, bioconcentratable toxicants. EPA's Permit Writers Guide for Marine and Estuarine Waters should be followed. This measure includes all expired or expiring permits (major and minors) reissued in FY 90 (not modifications).

WQ E-4/5 NPDES Compliance

A facility is considered to be on final effluent limits when the permittee has completed all necessary construction (including all start-up or shakedown period specified in the permit or enforcement action) to achieve the ultimate effluent limitation in the permit reflecting secondary treatment, BPT, BAT, or more stringent limitations, such as State required limitations or water quality based limitations, or limitations established by a variance or a waiver. A facility on a "short-term" schedule (one year or less) for corrections such as composite correction plans, where compliance can be achieved through improved operation and maintenance (rather than construction) is considered to be on final effluent limits. A facility is reported to be in significant noncompliance with its final effluent limits when it exceeds the criteria for unresolved significant noncompliance found in the combinations of violations:

-- final effluent limit
-- compliance schedule (short term/non-construction)
-- final effluent limit and compliance schedule
-- final effluent limit and reporting requirements
-- final effluent limit, compliance schedule and reporting requirements
-- compliance schedule and reporting requirements

A facility is reported to be in significant noncompliance with its reporting requirements when it exceeds the criteria for unresolved significant noncompliance for reporting violations only.

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A facility is reported to be in significant noncompliance for failure to comply with pretreatment implementation requirements when it meets the criteria identified in the guidance defining significant noncompliance for pretreatment implementation.

A facility is considered to be "not on final effluent limits" if the permittee does not meet the definition of a "facility on final effluent limits" or when a permit, court order/consent order or an Administrative Order require construction such as for a new plant, an addition to an existing plant or a tie-in to another facility. A facility is reported to be in significant noncompliance with its construction schedule when it exceeds the criteria for unresolved significant noncompliance violations of:

— construction schedule
— construction schedule and interim effluent limits
— construction schedule and reporting requirements
— construction schedule, interim effluent limits and reporting requirements.

A facility is reported to be in SNC with its interim effluent limits when it exceeds the criteria for unresolved SNC violations of:

— interim effluent limits
— interim effluent limits and reporting requirements

A facility is reported to be in SNC with its reporting requirements when it exceeds the criteria for unresolved SNC violations of reporting requirements only.

Major P.L.92-500 permittees are tracked as part of the major municipals.

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0 E-6/7 Exceptions List

NOTE: For SPMS report the number only. As part of OWAS, report both the number and the name and the number of quarters he facility has been in SNC.

lso, the name list must be submitted with the numbers; only the fact sheet, with justification, will be reported by the 15th day of the beginning of the next quarter. In regard to all major permittees listed in significant noncompliance on he Quarterly Noncompliance Report (QNCR) for any quarter, Regions/NPDES States are expected to ensure that these facilities have returned to compliance or have been addressed with a formal enforcement action by the permit authority within the following quarter (generally within 60 days of the end of that quarter). In the rare circumstances where formal enforcement action is not taken, the administering Agency is expected to have a written record that clearly justifies why the alternative action (e.g.,enforcement action, permit modification in process, etc.) was more appropriate. Where it is apparent that the State will not take appropriate formal enforcement action before the end of he following quarter, the States should expect the Regions to do so. This translates for Exceptions List reporting as follows:

Exception Lists reporting involves tracking the compliance status of major permittees listed in significant noncompliance on two or more consecutive QNCRs without being addressed with a formal enforcement action. Reporting begins on January 1, 1990 based on permittees in SNC for the quarters ending June 30, and September 30, that have not been addressed with a formal enforcement action by November 30. Regions are also expected to complete and submit with their Exception List a fact sheet which provides adequate justification for a facility on the Exception List. The fact sheet should be submitted by the 15th day of the beginning of the next quarter. After a permittee has been reported as returned to compliance or addressed by a formal enforcement action, it should be dropped from subsequent lists.

Reporting is to be based on the quarter reported in the QNCR (one quarter lag).

Returned to compliance (refer to the QNCR Guidance for a more detailed discussion of SNC and SNC resolution) for Exception List facilities refers to compliance with the permit, order, or decree requirement for which the permittee was placed on the Exception List (e.g., same outfall, same parameter). Compliance with the conditions of a formal enforcement action taken in response to an Exception List violation counts as an enforcement action (rather than return to compliance) unless the requirements of the action are completely fulfilled and the permittee achieves absolute compliance with permit limitations.

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rmal enforcement actions against non-federal permittees include any statutory remedy such as Federal Administrative der or State equivalent action, a judicial referral (sent to HQ/DOJ/SAG), or a court approved consent decree. A ction 309(g) penalty administrative Order (AO) will not, by itself, count as a formal enforcement action since it only sesses penalties for past violations and does not establish remedies for continuing noncompliance. Unless the cility has returned to compliance, a 309(a) compliance order should accompany the 309(g) penalty order. Formal forcement actions against federal permittees include Federal Facility Compliance Agreements, documenting the dispute d forwarding it to Headquarters for resolution, or granting them Presidential exemption.

E-8 Administrative Orders

adquarters will report EPA Administrative Compliance Orders (AOs) and State equivalent actions from PCS. All AOs must entered into PCS by the 2nd update of the new quarter to be counted in the report. (Include: POTW implementation pe pretreatment AOs; IU AOs under pretreatment section 2(a)). The number of proposed EPA administrative penalty ders should be tracked by Class I and Class II. For State-issued orders, proposed or initial orders should be counted ere there is a two step process (i.e., proposed and final).

E-9 Referrals

e active case docket consists of all referrals currently at the State Attorney General and the number of referrals led in State Court. A case is concluded when a signed consent decree is filed with the State Court; the case is smissed by the State Court; the case is withdrawn by the State Attorney General after it is filed in a State Court; or e State Attorney General declines to file the case. OECM will report the same data for Federal referrals; State ferrals will be reported to the Regions.

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WQ E-10 Reportable Noncompliance

Regions and/or States should apply reportable noncompliance (RNC) criteria to all approved POTW pretreatment programs at least twice between July 1989 and June 1990. All reporting should be a summary of information that is listed and updated on the QNCR on a quarterly basis.

Report POTWs in RNC by EPA State (non-pretreatment State) or pretreatment State. Refer to the Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Requirements (Reportable Noncompliance Guidance) for a definition of reportable noncompliance by pretreatment POTWs. The second quarter report should include the number of POTWs that met RNC between July and December 1989. If a POTW was identified as RNC before July, 1989 and still meets the criteria, it should be counted on the second quarter report. For the fourth quarter report include POTWs in RNC between January and June 1990 and POTWs reported for the second quarter that were not resolved or resolved pending. Credit is given for any of the three actions, listed in the measure, that resolves RNC (i.e., results in resolved pending or resolved status). However, if technical assistance is the chosen approach, a schedule for compliance should be established. If the schedule is 90 days or longer, it should be incorporated into an enforceable document. End of year compliance status should be reported for all POTWs that were identified as RNC between July 1989 and June 1990. Report the total number of POTWs that are considered reportable noncompliance (RNC), resolved pending (RP), or resolved (RE) as of the final report. POTWs that are in compliance with enforceable administrative or judicial schedules to resolve RNC as of the final report date should be counted as RP.

WQ E-11 Pretreatment Referrals

The active case docket consists of all referrals currently with the State Attorney General and the number of referrals filed in State Courts. OECM will report the same data for Federal referrals; State referrals will be reported to the Regions.

WQ E-12 Inspections

As the inspections strategy states, all major facilities should receive the appropriate type of inspection each year by either EPA or the State. As part of the NPDES inspection, verification of sludge management practices should be conducted as appropriate. EPA and States collectively commit to the number of major permittees inspected each year with

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Water Enforcement and Permits Definitions

Compliance Evaluation Inspection (CEI), Compliance Sampling Inspection (CSI), Toxic Inspection (TOX), Biomonitoring spection (BIO), Performance Audit Inspection (PAI), Diagnostic Inspection (DIAG), or Reconnaissance Inspection (RI). connaissance Inspections will only count toward the commitment when they are done on facilities that meet the llowing criteria:

- The facility has not been in SNC for any of the four quarters prior to the inspection.
- The facility is not a primary industry as defined by 40 CFR, Part 122, Appendix A.
- The facility is not a municipal facility with a pretreatment program.

mitments for major permittee inspections should be quarterly targets and are to reflect the number of major mittees inspected at least once. The universe of major permittees to be inspected is defined as those listed as jors in PCS. Multiple inspections of one major permittee will count as only one major permittee inspected (however, l multiple NPDES inspections will be included in the count for the measure that tracks the total number of all spections, see next paragraph).

e measure for tracking total inspection activity will not have a commitment. CEI, CSI, TOX, BIO, PAI, RI, and DIAG of jor and minor permittees will be counted. Pretreatment inspections for IUs and POTWs will be counted only toward etreatment inspection commitments. Multiple inspections of one permittee will be counted as separate inspections; connaissance Inspections will be counted. It is expected that up to 10% of EPA resources will be set aside for utral inspections of minor facilities.

en conducting inspections of POTWs with approved pretreatment programs, a pretreatment inspection component (PCI) uld be added, using the established PCI checklist. An NPDES inspection with a pretreatment component will be unted toward the commitments for majors, and the PCI will count toward the commitment for POTW pretreatment spections. (This will be automatically calculated by PCS.) Regions are encouraged to continue CSI inspections of TWs where appropriate. Industrial user inspections done in conjunction with audits or PCIs or those done independent POTW inspections will be counted as IU inspections. Tracking of inspections will be done at Headquarters based on trievals from the Permit Compliance System (PCS) according to the following schedule:

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

INSPECTIONS	RETRIEVAL DATE The First working day after the second update in:
July 1, 1989 through Sep. 30, 1989	Jan. 1990
July 1, 1989 through Dec. 31, 1989	April 1990
July 1, 1989 through March 31, 1990	July 1990
July 1, 1989 through June 30, 1990	Oct. 1990

*Inspections may not be entered into PCS until the inspection report with all necessary lab results has been completed and the inspector's reviewer or supervisor has signed the completed 3560-3 form.

Note: SPMS only tracks the number of major permittees inspected. OWAS tracks the number of inspections.

OFFICE OF WATER
FY 1990
Municipal Pollution Control

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
tate Revolving Fund lanagement	Track, by Region, progress against quarterly targets for (1) net outlays for combined construction grants and SRF, (2) net outlays for construction grants, and (3) net outlays for State Revolving Fund (SRF) program.	WQ-8	Q 1,2,3,4
	Track, by Region, progress against quarterly Regional Headquarters targets for the number of States, by name, which have been awarded an SRF capitalization grants (cumulative by quarter).	WQ-9	Q 1,2,3,4
lanagement of On-going onstruction Grants Program	Track, by Region, progress against quarterly targets for the number of Step 3, Step 2+3, Step 7, Marine CSO and PL 87-660 projects administratively completed.	WQ-10	Q 1,2,3,4

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(M) What is the level of coordination between the NPDES States enforcement program and the state Attorney General's Office? Are there established procedures for coordination and communication? If less than satisfactory, what steps is the State taking to improve coordination? Are State AGs generally filing cases within the goal of 60-90 days?			
	(N) Have the Region and approved States negotiated a basis for Regional evaluation of the States' penalty program, including identification of sanctions which might be used in lieu of penalties and the documentation which must be maintained by the State for review? Are States complying with the provisions of the agreement on penalties? To what extent are States calculating economic benefit? Are States seeking penalties in the majority of cases? Are States getting the penalty amounts they are seeking? [illegible] review process to speed up			
	(O) What problems is the Region encountering in assessing penalties using the CWA Penalty Policy? Is the Region experiencing problems/delays with Headquarters reviews? Explain. Is the Region generally getting the penalty amounts identified in the referral? What improvements could be made to the review process to speed up the referral process?			

"A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS, FISCAL YEAR 1990", dated March, 1989. Selected portions only.

A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS

Fiscal Year 1990

Office of Water
U.S. Environmental Protection Agency
Washington, D.C. 20460

2365

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State Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
2. Review Approved NPDES State Statutory and Regulatory Authority (continued)	Office of Reg.- -inal participate in -iews? In what way? Do t- -icipate in the process c- -cting States for review -- making commitments? Do they follow through with their work? In a timely manner? Are priorities a problem? If so, how are conflicts resolved? (C) Does the Region have a routine mechanism for learning of changes to State laws and regulations? If so, describe the process.			
3. Execute EPA/State NPDES Agreements	(A) What problems have arisen in the development of EPA/State NPDES agreements? How are they resolved? Are there any particular elements of national policy and guidance on State overview that have been difficult to implement? Do all the agreements include provisions for EPA evaluation of State penalty practices?			

State Program Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Provide Effective Oversight of Approved NPDES State Programs	(A) To what extent has the Region implemented the "Guidance on Oversight of NPDES Programs"? (B) Does the Region carry out a program of regularly scheduled assessments of each approved NPDES State to assure the adequacy of authorities, funding and staffing and to assure a demonstrated ability to set program priorities and effectively implement the NPDES program? What is the frequency; who is involved; and how is it done for each delegated State? What is the nature and timing of follow-up? Does this include identification of State needs and problems, evaluation of performance and providing of technical assistance?			

State Program Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Provide Effective Oversight of Approved NPDES Programs (continued)	(C) How frequently does the Region conduct PCR, PIR and WQPCRs? How many permits/ programs are reviewed? How many industrial permits and what industrial categories? How many municipal permits? How are results provided to States and describe how Region verifies that the problem/deficiency is corrected. (D) Does oversight of State compliance monitoring include an assessment of new toxic/toxicity monitoring requirements? Does the Region check the States compliance inspection activity with particular emphasis on toxic problems?			

State Program Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Provide Effective Oversight of Approved NPDES Programs (continued)	(E) Where the pretreatment program is run by the State (in whole or in part), how does the Region overview the performance of the State? Does the Region's review include an evaluation of legal authorities, procedures, personnel and funding? What corrective actions are taken to correct identified deficiencies? (F) How are 106 grants and the work program development process used to assure effective implementation of NPDES State programs? What enforcement and permitting priority areas identified in the FY 90 Operating Guidance are specifically addressed? What ones are not and why?			

WATER ENFORCEMENT AND PERMITS

RCRA Activities for NPDES Facilities

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Implement Corrective Action Requirements	(A) Has the Region/State updated their information on POTWs who receive hazardous wastes by dedicated pipe or manifested hazardous waste delivered by truck or rail? (B) What is the status of RCRA 3007 information gathering letters? Do any remain to be issued by EPA/States to municipalities? (C) What is the status of POTW notifications received and reviews completed? (D) Has the Region/State established a RCRA permit by rule for each subject POTW? (E) How many POTWs stopped receiving hazardous waste by truck, rail or dedicated pipe since the Regional/State notification of RCRA?	(a) Identify number of POTWs for which a RCRA permit by rule has been established. (b) Of those POTWs which receive hazardous wastes by truck, rail or dedicated pipe, report the total number of determinations made. Report determinations by: 1) number of determinations made that there is no need for corrective actions; and 2) number of determinations that there is a need for corrective actions.	Nb/Nb Nb/Nb	Quarterly Quarterly

WATER ENFORCEMENT AND PERMITS

RCRA Activities for NPDES Facilities

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Implement Corrective Action Requirements (continued)	(F) Has the Region/State begun the corrective action process for each POTW subject to the RCRA permit by rule, and established appropriate corrective action requirements? How were appropriate requirements established (e.g., RCRA RIDER permits, amendments to NPDES permits, other)? Is the first stage of the corrective action process, the RCRA Facility Assessment, specifically addressed? (G) How are the Regions, States/POTWs coordinating with RCRA/CERCLA staff in evaluating off-site removal of RCRA/CERCLA wastes into POTW collection systems?	(c) Identify number of POTWs for which the corrective action process has been established to implement 3004(u) of RCRA. The corrective action process includes any or all of the specific steps of a RCRA facility assessment, remedial investigations, and corrective measures. (d) List RCRA/CERCLA clean up projects in which a decision is made to discharge to a POTW. Specify control measure or pretreatment requirements in place.	Nb/Nb Nb/Nb	Quarterly Quarterly

WATER ENFORCEMENT AND PERMITS

RCRA Activities for NPDES Facilities

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	EI SPMS/ COMMITMENT	REPORTING FREQUENCY
2. Implement Regulatory/Programmatic Changes Based on the Domestic Sewage Exemption Study	(A) Describe the Region's strategy State by State for implementing the regulatory changes in the DSS rulemaking. (B) Has the Region worked with POTWs to implement regulatory/-programmatic changes (e.g., new local limits)? (C) Has the Region worked with NPDES States to initiate State regulatory/programmatic changes?			

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	EI SPMS/ COMMITMENT	REPORTING FREQUENCY
1. Develop and Approve/Modify Local Pretreatment Programs	(A) What rationale does the Region/States use to add/delete municipalities from the list of required local programs? (B) What are the Region/States doing to encourage local program modifications where deficiencies are identified? Is the Region/State relying solely on the POTW to identify deficiencies? (C) How does the Region identify needed POTW program modifications, determine whether they constitute a major modification and review and approve, disapprove major modifications? D) When a local program submitted for approval is not acceptable, what follow-up action is taken by the Region/State if the local program is not resubmitted in the time prescribed by the Approval Authority?	(a) Identify the local pretreatment programs requiring approval but not yet approved at the beginning of the fiscal year and distinguish between those newly identified in FY 90 and those previously required. (List separately: non-pretreatment States, approved pretreatment States). (b) Track progress against targets for the programs approved during FY 90 (list separately: non-pretreatment States, approved pretreatment States).	10/90 10/CH	10/31/89 Quarterly

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements	(A) How do the Region/States ensure that local pretreatment programs are fully implementing NPDES permit pretreatment requirements? Other pretreatment program requirements?	(a) Report, by Region, the number of pretreatment administrative compliance orders issued by EPA to IUs and the number of pretreatment equivalent actions issued by States to IUs.	Yes/SPMS MO/E-10	Quarterly
	(B) What criteria do the Region/States use to decide to refer a POTW for failure to implement as opposed to using administrative enforcement action?	(b) Pretreatment Referrals		
	(C) What is the level of coordination for pretreatment cases between the compliance section and ORC in the Region and the respective agencies in the States? If less than satisfactory, what steps is the Region taking to improve coordination?	(1) Report, by Region, the number of State pretreatment civil and criminal referrals sent to State Attorneys General and the number of State civil and criminal cases filed.	Yes/SPMS MO/E-11	Quarterly
	(D) How do the Regions and States identify and respond to industrial noncompliance with categorical pretreatment standard deadlines in a municipality where there is an approved pretreatment program?	(2) Report the number of EPA and State pretreatment referrals sent to HQ/DOJ/SAG by: o POTW pretreatment violations; o industrial user pretreatment violations (list separately EPA, States).	Yes/SPMS MO/E-10	Quarterly

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements (continued)	(E) Is the Region/State using the Guidance on Reportable Noncompliance for Pretreatment Implementation to identify POTWs which should be listed on the QNCR? Is the Region/State having any difficulty in interpreting or using the Guidance? If so, in what areas? Have the Region/States successfully implemented the new definition of significant noncompliance for POTWs which fail to implement their programs? What problems are the Region/States experiencing? (F) Has the Region/State provided training assistance to legal staff of the POTWs or pretreatment authorities? What other steps have the Region/States taken to improve POTW enforcement of pretreatment requirements?	(c) Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and track by State the number of POTWs in that universe where action taken either resolves or establishes an enforceable schedule to resolve RNC. Report separately, by State, for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	Yes/SPMS MO/E-10	Second and Fourth Quarters

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Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
1. Oversee Effectiveness of Local Pretreatment Program Implementation	(A) How do Regions/States establish priorities for pretreatment oversight of POTWs? (B) How do Regions independently assess the effectiveness of POTW program implementation in pretreatment States? (C) Does the Region/State use the Audit/PCI checklist in conducting POTW pretreatment reviews? If the checklist is modified, describe the modifications.	(a) Track, by Region, against quarterly targets, for approved local pretreatment programs, 1) the number audited by EPA and the number audited by approved pretreatment States; and (2) the number inspected by EPA and the number inspected by States.	Yes/SPMS MQ-14	Quart
		(b) Report number of EPA and State pretreatment inspections of IUs where EPA or the State is control authority. (List separately: EPA/State)	Nb/Nb	Quarterly
		(c) Identify number of POTWs that need to conduct local limits headworks loading analysis (non pretreatment States; approved pretreatment States.)	Nb/Nb	Quarterly
		(d) Track number of POTWs requesting changes to local limits (nonpretreatment States; approved pretreatment States)	Nb/Nb	Quarterly

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
1. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(D) What are the criteria used by EPA/States to select industrial users to be inspected? Do the Region/-States place a priority on inspecting IUs subject to Federal categorical standards which are located where there is no local program? What do the results of these inspections indicate? What use is being made of IU results? Does the Region/State include personnel from the approved POTW in the IU inspection? (E) How are audits used by Regions/States to overview implementation? What are the findings from these audits? What follow-up actions are taken when problems are identified? Do the Regions review State audits and reports? How often? Do Regions keep copies of State audits, reports and follow-up documents on file?	(e) Identify, separately, the number of pretreatment POTWs which have adequate control mechanisms and the number of pretreatment POTWs on enforceable schedules that do not yet have adequate control mechanisms in place (non-pretreatment States, pretreatment States).	Nb/Nb	10/31/89
		(f) Track, by Region, against quarterly targets, the number of POTWs which comply during FY 90 with their enforcement schedules to assure adequate control mechanisms.	Nb/CM	Quarterly

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(F) How are inspections used by Regions/States to oversee implementation? What are the findings from these inspections? What follow-up actions are taken when problems are identified? (G) Are inspections used to track follow-up actions required by an earlier audit? If not, how is audit follow-up determined? (H) Aside from audits and/or inspections, what other oversight mechanisms are the Regions/States using to evaluate POTW performance year to year? (I) Are annual report submissions by POTWs reviewed by the Region/State? What criteria are used for these reviews? Are all POTWs using the definition of significant noncompliance (PCME guidance, July 1986) to evaluate and report IU performance?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(J) Are POTWs considering all appropriate factors in developing local limits, including protection of water quality (State numeric standards and narrative "free from" standards, Federal criteria), sludge quality and worker health and safety? Characterize the changes being made to local limits. What is the Region/State strategy for assuring POTWs develop/implement adequate local limits? Do NPDES permits include toxicity limits and numeric limits for organic chemicals that may be used to establish local limits? Are they being reflected in local limits?			

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMITMENT	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(K) Are control mechanisms adequate? Are POTW enforcement procedures adequate? How is adequacy determined and what follow-up is taken when deficiencies are found? Are control mechanisms updated regularly to address new pollutant levels? Do mechanisms address organic pollutants, hazardous constituents or toxicity? (L) What mechanisms are being used by approval authorities to determine if local programs are properly applying categorical standards to IUs? To what extent are local programs failing to properly apply categorical standards? What problems are being encountered? (M) Are POTWs taking necessary enforcement actions against industrial users when they are in noncompliance? Where POTWs do not act expeditiously, what actions are the Regions/States taking?			

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Enforce Pretreatment as a Control Authority	(A) Have Region/States completed an inventory of categorical industrial users in cities without required pretreatment programs? How were the inventories conducted? How will the inventory be maintained? (B) Does the Region/State take appropriate enforcement action to ensure that baseline monitoring reports, compliance reports, and periodic reports on compliance are submitted by IUs in non-pretreatment cities? Does the Region/State use the appropriate mechanism to ensure that compliance reports representative of the actual discharge are submitted by IUs in non-pretreatment cities? (C) Does the Region/State receive and evaluate baseline monitoring reports, compliance reports, and periodic monitoring reports from IUs in non-pretreatment cities? How does the Region establish compliance schedules and monitoring frequencies?	(a) Identify # of categorical IUs in nonpretreatment cities (report non-pretreatment States and pretreatment States separately). (b) Report the percent of significant noncompliance by categorical IUs in non-pretreatment cities where EPA is the Control Authority and where the State is the Control Authority.	Yb/Yb Yb/Yb	Second and Fourth Quarters Second and Fourth Quarters

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
5. Oversee Effectiveness of State-run programs	(A) Are State-run programs putting data into existing systems on the performance of IUs and on local programs where there are approved programs? (B) What mechanisms does the Region use to oversee the effectiveness of State-run programs? (C) Are these States taking necessary enforcement actions to ensure that IUs are in compliance with pretreatment standards?	(a) Report by State for each State run program the percent of IUs in significant noncompliance.	No/No	Second and Fourth Quarters

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
1. Identify Compliance Problems	(A) Do the Regions'/States' compliance rates show improvement in FY 1990? (B) Is the QNCR regulation/guidance being properly applied in the Region/States? Is the Region reviewing State QNCRs to ensure proper reporting? If reviews identify inadequate QNCRs what action is the Region taking? (C) Are there new reasons for municipal/nonmunicipal noncompliance in the Region/States? What is the Regions/States strategy for dealing with such noncompliance?	(a) Track, by Region, the number of major permittees that are: —on final effluent limits and —not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States. (b) Track, by Region, the # and % of major permittees in significant noncompliance with: —final effluent limits; —construction schedules; —interim effluent limits; —reporting violations —pretreatment implementation requirements (list separately: municipal, industrial, Federal facilities, NPDES States, non-NPDES States).	Yes/SPMS MQ/E-4 Yes/SPMS MQ/E-5	Majors: Quarterly (Data lagged one quarter) Majors: Quarterly (Data lagged one quarter)

[illegible] ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	EI SRMS/ COMPONENT	REPORTING FREQ.
2. Follow Through on National Municipal Policy Implementation	(A) Have the Region/States completed filed enforcement cases against major POTWs? If not, what is delaying action?	(a) Identify, by Region, the number of major municipals or NCPs and the # that are not in compliance with their schedule (report EPA/State separately).	Nb/Nb	Quarterly
	(B) To what extent are the Region/States still establishing permit/compliance schedules for all remaining POTWs?	(b) Report, by Region, the number of major facilities addressed by formal enforcement actions against municipalities that are not complying with their schedules (report EPA/State separately).	Nb/Nb	Quarterly
	(C) How are the Region/States tracking and documenting noncompliance with all interim milestones (non-SNC) in permits/enforceable schedules? How are the Region/States responding to noncompliance with interim milestones in permits/enforceable schedules? How are schedules adjusted following slippage? Where no action is taken, what is the rationale?	(c) Report, by State, the percent reduction in major POTW SNC with FEL.	Nb/Nb	Quarterly
		(d) Report, by State, the number of major POTWs required to develop composite correction plans.	Nb/Nb	Quarterly

[illegible] ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	EI SRMS/ COMPONENT	REPORTING FREQ.
2. Follow Through on National Municipal Policy Implementation (Continued)	(D) If there is major slippage in a construction schedule, is the Region/State seeking judicially imposed schedules? If not, why not?			
	(E) Are the Region and the States enforcing NCP schedules for affected minors? When will this be completed?			
	(F) What are the Regions/States doing to decrease the level of SNC with FEL for major POTWs?			
	(G) Have Regions/States developed a Municipal Compliance Maintenance Strategy and a system for identifying when a POTW will reach design capacity?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Ensure Industrial Compliance with BAT and Water Quality Based Toxic Requirements	(A) How do the Region and each State direct compliance monitoring efforts to enforce BAT and water quality based toxic requirements? (B) Do the Region and each State have sufficient laboratory and biomonitoring capability to conduct the necessary analysis to support toxic inspections? (C) Are Regions/States implementing the Compliance Monitoring and Enforcement Strategy for Toxics Control? (D) Do the Regions/States have sufficient expertise to evaluate TREs? If not, what steps are being taken to assure expertise?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses	(A) How has the mix of enforcement actions for the Region (AOs, penalty orders) changed since gaining authority to assess administrative penalties? Has the Region used the administrative penalty authority against the full range of facilities in noncompliance?	(a) ADMINISTRATIVE ORDERS (1) Report, by Region, the total number of (a) EPA Administrative Compliance Orders and total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatment; (b) Class I and Class II proposed administrative penalty orders issued by EPA for: —NPDES violations; —pretreatment violations; (c) Administrative penalty orders issued by States for NPDES violations and pretreatment violations.	Yes/No IQ,T-S	Quarterly

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[illegible]

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)		(2) Of those reported in (1) above, break out by the following categories: —municipal permittees (major/minor) —non-municipal permittees (major/minor) —federal permittees (major/minor) —unpermitted facilities 402 —section 311 actions —SPCC (list separately: EPA, NPDES States). Note: We recognize that in some Regions these responsibilities are split between Divisions, in which case each Division should submit data for its appropriate piece.	Yes/No	Quarterly

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[illegible]

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(B) Has the Region experienced any problems in effectively implementing administrative penalty authority? If so, what kind of problems?	(B) Track the total amount of EPA administrative penalties assessed and the amount of State administrative penalties assessed.	Yes/No	Quarterly
	(C) Is the Region conforming to the Guidance on the use of Penalty Orders, including the addendum on the Penalty Policy?	(C) [illegible] of EPA ACs with final compliance dates between July 1 1989 through June 30, 1990.	Yes/No	10/15/89
	(D) Has the Region experienced any problems in carrying out the Class I or Class II hearing process? How frequently are hearings requested in each class?	(d) Track, against targets, the # and % of EPA ACs in effect June 30, 1989, with final compliance dates between July 1, 1989 and June 30, 1990 which are successfully closed out.	Yes/No	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(E) How frequently are comments from the public received on penalty orders? Have any consent decrees been modified by the RA as a result of public petition? Are there any final penalty orders for which the penalty is overdue and uncollected for more than 60 days?	(e) REFERRALS (1) Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorneys General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts.	Yes/Yb HQ/E-9	Quarterly
		(2) # of 309 referrals generated: —civil referrals sent to HQ/DOJ; —civil referrals filed; —criminal referrals filed	Nb/Nb	Quarterly
		(3) Track the number of referrals (EPA and State) with penalties proposed.	Nb/Nb	Quarterly
		(4) Track by permit name and NPDES number State judicial cases with penalties assessed and amount collected.	Nb/Nb	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(F) Does the Region routinely use 309(a) administrative orders in combination with penalty orders when compliance has not yet been achieved? (G) Do the NPDES States have administrative penalty authority? If not, is such authority under consideration in any of the State legislatures? Does the State authority meet criteria for pre-emption of federal action? (H) How frequently does the Region have to institute collection actions to collect administrative penalties assessed?	(5) Report the name and amount of time lapsed from the time of initiation of the case to filing and the amount of time lapsed from filing to signing of the consent decrees for each case. Report by State respectively.	Yb/Nb	Second and Fourth Quarters
		(f) Identify by name and NPDES number all permittees with active consent decrees and report their compliance status as follows: —in compliance with decrees; —in violation of decree, but remedial action taken; and —in violation of decree, no remedial action taken (list separately: major, minor, municipal, non-municipal, Federal..	Yb/Nb	Quarterly
		(g) Track, by Region, the total number of settlements of Judicial Consent Decrees filed in Federal Courts.	Yb/Nb	Quarterly

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	EI SPMS/ CMS/NPDES	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(I) Are the Regions/States working effectively with Federal facility coordinators to improve enforcement response times to instances of noncompliance by Federal facilities? If not, what is the nature of the problem? Are approved States using their full range of enforcement authority against Federal facilities? If so, what are the results? If not, why not? (J) Do Region/States track AO requirements closely? Have all close-outs been reported to Headquarters? Are they reported promptly upon close-out? (K) How do the Region and States ensure that violations of Court Orders/AOs get prompt enforcement action?	(h) # of follow-up actions on DMR/CA performance sample results: —nonrespondents; —permittees requiring corrective action; —major permittees with incomplete reporting.	3b/3b	Semi-annually: April 1, 1990 and October 1, 1990

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	EI SPMS/ CMS/NPDES	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(L) What is the level of coordination between the compliance section and ORC in the Region? Are there any problems in implementing the administrative penalty authority? If less than satisfactory, what steps is the Region taking to improve coordination? (M) What is the level of coordination between the NPDES States enforcement program and the state Attorney General's Office? Are there established procedures for coordination and communication? If less than satisfactory, what steps is the State taking to improve coordination? Are State AGs generally filing cases within the goal of 60-90 days?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(N) Have the Region and approved States negotiated a basis for regional evaluation of the States' penalty program, including identification of sanctions which might be used in lieu of penalties and the documentation which must be maintained by the State for review? Are States complying with the provisions of the agreement on penalties? To what extent are States calculating economic benefit? Are States seeking penalties in the majority of cases? Are States getting the penalty amounts they are seeking? (O) What problems is the Region encountering in assessing penalties using the CWA Penalty Policy? Is the Region experiencing problems/delays with Headquarters reviews? Explain. Is the Region generally getting the penalty amounts identified in the referral? What improvements could be made to the review process to speed up the referral process?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(P) Do Regions/States use PCS to track compliance with consent decree schedules? If not, why not? (Q) What types of action are being taken in response to violations of consent decrees? Are stipulated penalties collected? Are civil contempt proceedings initiated? Are the decrees modified? Are additional compliance monitoring requirements imposed? (R) What are the reasons for the Regions/States failure to take remedial action against permittees that violate their consent decrees? (S) What problems still need to be addressed by the Region/States to make the SNC/CA program more effective? Should it cover pretreatment?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	HQ SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(T) How do Regions/States ensure the quality of data collected by permittees and subsequent data transfer, and data storage in PCS? (U) How do Regions/States promote better quality of future DMR data when drafting new permits? (V) What procedures does the Region have in place to identify criminal cases? What role does the Office of Regional Counsel play in identification and case development? Has the staff provided technical support for criminal investigations and prosecutors? How has the Region made use of the new CWA criminal enforcement authorities?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	HQ SPMS/ COMMITMENT	REPORTING FREQUENCY
5. Non-NPDES Enforcement	(A) Have the Region/States taken any enforcement actions to protect water, including wetlands, from unpermitted discharges of solid waste? (B) What criteria does the Region use in determining where Spill Prevention Control and Countermeasure Plan inspections should be conducted? Does the Region always require that the plan be amended after a spill of 1,000 gallons or more?			
6. Increase use of PCS as the Primary Source of NPDES and Pretreatment Program Data	(A) Describe the use of PCS by the States and the Region and explain what steps are, or need to be, taken to comply with PCS Policy. B) Do the Region/States use the preprinted DMR form to minimize compliance tracking problems and PCS entry workload? What is the Region doing to encourage the States to use preprinted DMRs? If the States are not using preprinted DMRs, why?	(a) Track, by Region, against targets, the percent of data entry of NPDES elements for pretreatment and NPDES.	HQ, OW	Quarterly

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
6. Increase the use of PCS as the Primary Source of NPDES and Pretreatment Program Data (continued)	(C) What actions are Region/States taking to improve the quality of PCS data? (D). How is the Region encouraging direct State use of PCS? Is the Region giving priority in assistance and program grant funding to States that are direct users of PCS? If States are not using PCS consistent with the PCS Policy Statement are grant conditions being imposed to expedite compliance?			
7. Improve Effectiveness of Inspection Activities	(A) Do the Region/States have annual compliance inspection plans for each State? How does the Region provide its States with advance notice of inspections? Discuss how Regional and State efforts are coordinated. Discuss use of independent and joint inspections and State file reviews to overview the State inspection program.	(a) Track, by Region, against targets, the number of major permittees inspected at least once (combine EPA and State inspections and report as one number).	Yes/SPMS WQ/E-12	Quarterly

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
7. Improve Effectiveness of Inspection Activities	(B) How do Regions/States determine which facility and what type of inspection to conduct? (C) Why are total number of inspections large, yet all majors are not inspected at least once? (D) How do Regions/States determine the need for toxic/toxicity inspections/DMRs? (E) Do the Regions/States prepare quarterly lists of facilities to be inspected? Is the inspection mix consistent with the "primary use" criteria included in the NPDES Inspection strategy? (F) How do the Regions/States use DMR QA performance sample results for targeting compliance inspections?	(b) # of inspections: —toxic inspections —biomonitoring inspections —permittee inspections (list separately: Federal, EPA, State; major, minor; municipal, non-municipal) (c) Identify the number of Regional and State inspection plans.	Yb/Yb Yb/Yb	Quarterly October 1989

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMENTS	REP FREQ
7. Improve Effectiveness of Inspection Activities (continued)	(G) What mechanism is used to assure that inspection results are provided to the Regions/States in a timely manner? Are the data entered into PCS only after the report has been completed and signed by the reviewer or supervisor? (H) How does the Region/State follow-up when inspection results are unsatisfactory? When Region uncovers problems, does the Region/State follow-up with a more intensive inspection? (I) Have the Region/States verified that Reconnaissance Inspections of major permittees counted for coverage purposes were conducted at major permittees meeting the requirements specified in the definition section?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMENTS	REPORTING FREQUENCY
8. Update and Use EMS Enforcement Procedures	(A) Does each approved State have written EMS procedures? If not, what is being done to get these procedures in place? (B) Have the Region/States implemented use of the Violation Review Action Criteria included in the FY 1986 EMS as the basis for determining when violations should receive professional review? Do Regions/States follow the Enforcement Response Guide (ERG)? If not, when will the Region/States begin to use these criteria or equivalent criteria and the ERG?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
8. Update and Use EMS Enforcement Procedures (continued)	(C) What kinds of formal enforcement actions are the Region/State using? Has the Region reviewed each States enforcement instruments to ensure that they meet the definition of formal action? Have the States made any necessary statutory or regulatory changes to ensure equivalency of State administrative mechanism equivalent to EPA section 309 AOs? (D) What kinds of informal actions (if any) are the Region/States using in lieu of formal enforcement action? Are these actions documented properly? Are they effective?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance	(A) What is the screening process used by the Region and States for identifying violations and applying SNC criteria? How are short term violations requiring Regional/State judgement handled? Does the Region use the Exception List as a way of tracking State programs?	(a) EXCEPTION LIST ANALYSIS (1) Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters. List separately: municipal, industrial, Federal facilities.	Yes/No NO/E-6	Quarterly (Data lagged one quarter.)

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMITMENT	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)	(B) What management level reviews the Exception List and how is it used? How do the Region and States use the Exception List to establish a priority for committing compliance/enforcement resources? (C) What problems have the Region/State been facing that would prevent them from meeting the timeliness presented? Which States consistently miss commitments? (D) Is there consistent application of the criteria/milestones from State to State within the Region? If not, what steps is the Region planning to take to improve consistency?	(2) Identify by name and NPDES number major permittees appearing on two or more consecutive QNCRs as being in significant noncompliance with: —final effluent limits (FEL) —construction schedules (CS); —interim effluent limits (IEL) without being returned to compliance or addressed with a formal enforcement action. (List separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	Yes/No	Quarterly (Data lagged one quarter.)

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SI SPMS/ COMMITMENT	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)		(b) EXCEPTION LIST TRACKING (1) Report, by Region, the number of major permittees that are on the previous exception list which have returned to compliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action by the EIR completion date, and the number that were unresolved (not returned to compliance during the quarter or addressed by a formal enforcement action by the EIR completion date). Report municipal, industrial, Federal facilities separately.	Yes/No AO/E-7	Quarterly (Data lagged one quarter)

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)		(2) Identify by name and total number of major permittees listed in the Exception List universe for the previous quarter for which one of the following has occurred: — # returned to compliance; — # not yet in compliance but addressed with a formal enforcement action; — # that are unresolved as of the end of the quarter; and the number of consecutive quarters each facility has appeared on the QNCR. (List separately: municipal, industrial, Federal facilities; SIC with FEL, CS, IEL; NPDES States, non-NPDES States)	Sh/Hb	Quarterly (Data lagged one quarter)
10. Take Enforcement as Required to Obtain Compliance with POTW Sludge Requirements	(A) What criteria are used by Regions and States to select POTWs for sludge compliance inspections? (B) What are the overall findings of these inspections?	(a) Track the number of formal enforcement actions taken by EPA and States to address violations of sludge requirements.	Sh/Hb	Second and Fourth Quarters

Enforcement

ACTIVITIES	QUALITATIVE MEASURES
10. Take Enforcement as Required to Obtain Compliance with POTW Sludge Requirements	(C) Are there any special problems in taking enforcement action against POTWs for sludge operations? (D) When IUs are the source of sludge violations, what actions are being taken to stop IU violations?

"Use of Administrative Penalty Orders (APO's) in FY 89", dated March 13, 1990. Without attachments.

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

MAR 13 1990

OFFICE OF WATER

MEMORANDUM

SUBJECT: Use of Administrative Penalty Orders (APOs) in FY 89

FROM: Richard G. Kozlowski, Director
Enforcement Division

Robert G. Heiss
Associate Enforcement Counsel for
Water Enforcement

TO: Compliance Branch Chiefs (Regions I - X)
Regional Counsels (Regions I - X)

The purpose of this memorandum is to transmit for your information a report on the use of administrative penalty orders in FY 89.

FY 89 was a significant year for implementation of the Clean Water Act administrative penalty authority. The number of proposed orders increased 61% over FY 88 and the number of final orders increased by 417%. As you will see from the report there were improvements in other indicators as well.

While data for FY 90 indicates that performance to-date is at approximately the same level as in FY 89, there are at least four Regions which have not yet issued a proposed order this year. We would be interested in comments as to why this is the case and whether it may suggest a lower level of administrative penalty issuance overall in FY 90.

Attachment

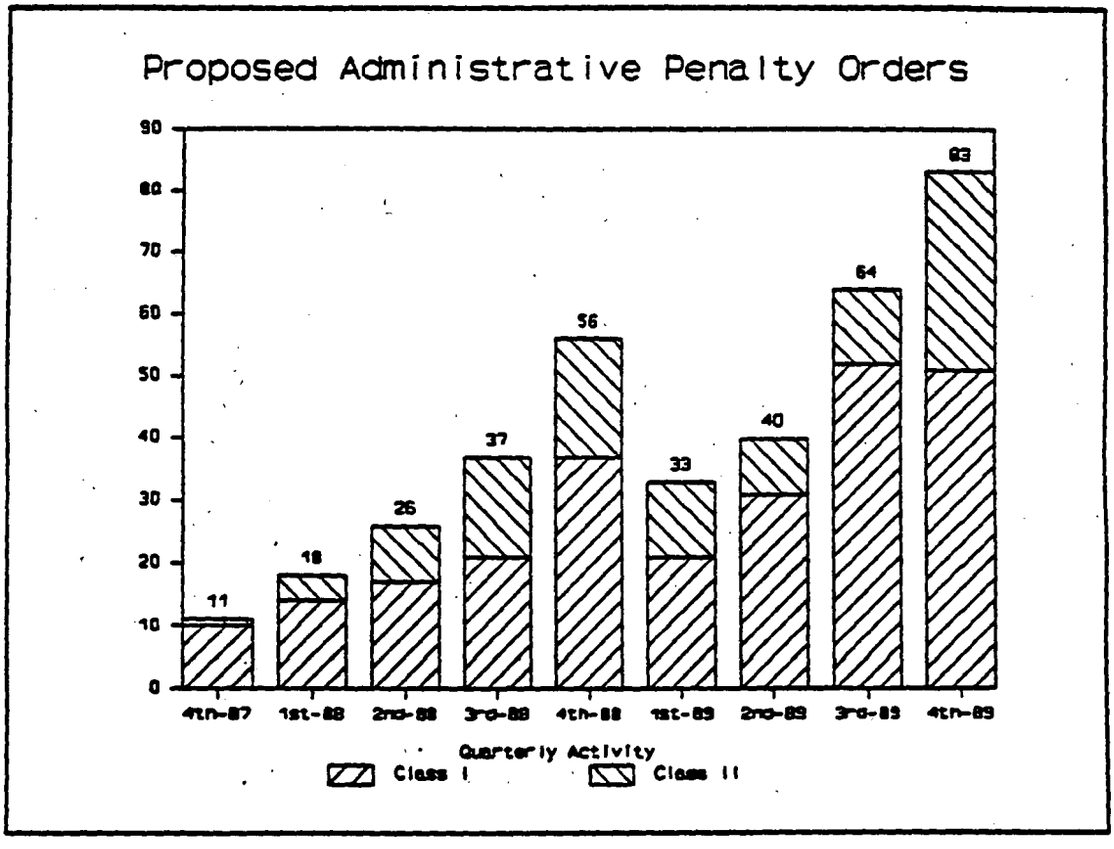
ADMINISTRATIVE PENALTY ORDERS

IN FY89

This report summarizes use of administrative penalty orders for NPDES and pretreatment violations during FY89. The data is drawn from the Permit Compliance System (PCS), supplemented by hard copy records as maintained on a dBASE data base management system, and for final orders has been reviewed by the Regions in the penalty data review process.

Proposed Orders

EPA proposed a total of 220 administrative penalty orders in FY89. This was an increase of 61% over the 137 proposed orders in FY88. The number of proposed administrative penalty orders by quarter is shown in Figure 1 below. Each quarter of FY89 showed significant



increases over the corresponding quarter in FY88. Also, the pattern established in FY88 of proposing significantly more administrative penalty orders in the third and fourth quarters continued. This uneven quarterly distribution of APO enforcement activity may represent higher productivity in the third and fourth quarters caused by SPMS (now STARS) measurements, mid-year reviews,

and other EPA organizational and administrative considerations or seasonal patterns in regional office enforcement activity where inspections and enforcement planning occupy more of the first two quarters and actual enforcement proposals the rest of the fiscal year. In any event, the third and fourth quarters continue to produce the most administrative penalty orders.

The increase in the number of proposed orders was across the board against municipals, non-municipals and industrial users. Figure 2 shows that the greatest increase was against industrial users (84%); second greatest increase was against municipals (65%); and the third greatest against non-municipals (51%).

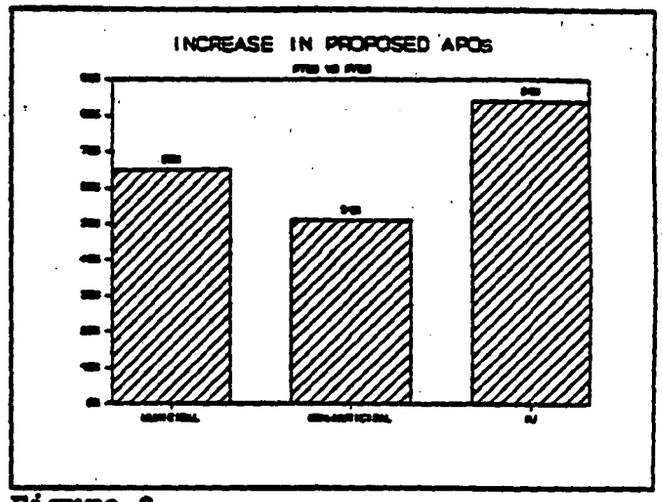


Figure 2

The proportion of proposed orders which were Class II decreased from 35% of all orders in FY88 to 30% in FY89. The reasons for this decline are not clear. Some regions have expanded the use of Class I actions against selected groups of violators and thus reduced the proportion of Class II actions. These groups have included feed lot operators, categorical IUs with reporting violations (where the POTW is not the control authority), coastal seafood processors, small oil well drillers and placer miners.

In FY89 six regions expanded the total number of proposed administrative penalty orders. Figure 3 indicates the increase/decrease in APOs relative to FY88. 55% of all proposed administrative penalty orders were issued in undelegated States. For the 12 undelegated States a total of 121 administrative penalty orders were proposed. Figure 4 shows use of administrative penalty orders in the

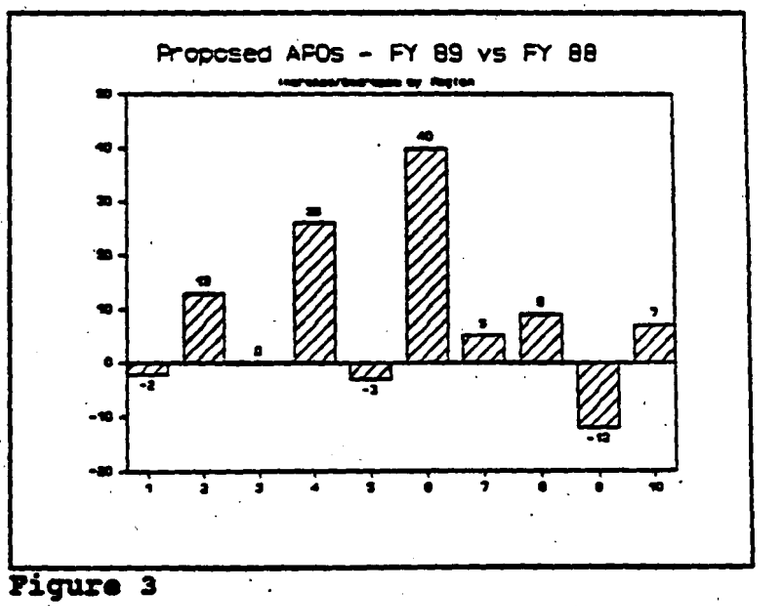


Figure 3

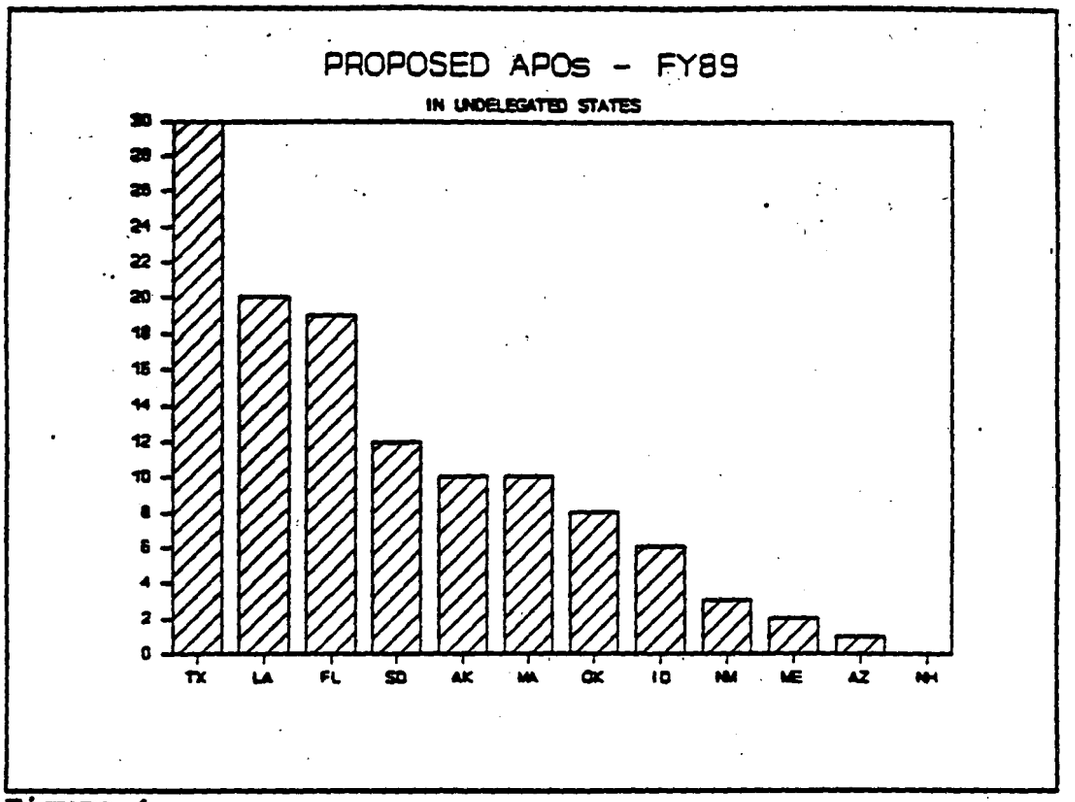


Figure 4

undelegated States.

In terms of the types of violations cited in the proposed administrative penalty orders, there was a 162% increase relative to FY88 in pretreatment APOs. Increases over FY88 were also shown for administrative penalty orders with effluent violations (54%), unpermitted and/or unauthorized discharges (39%), and operations and maintenance violations (800%). The number of facilities cited for schedule and non-reporting violations decreased slightly from FY88.

Proposed administrative penalty orders for pretreatment shifted significantly between FY88 and FY89. As a result of the Pretreatment Initiative, actions against municipals (POTW's) increased significantly. Class 1 APOs against municipals increased fivefold over FY88; Class 2 APOs increased sevenfold. (See Figure 5 on the next page). In FY88 a majority of the proposed pretreatment APOs against municipals were Class 1; in FY89 Class 2 APOs were in the majority.

Administrative penalty orders against industrial users were in sharp contrast. For proposed administrative penalty orders against industrial users the overwhelming proportion were Class 2 (79%) in

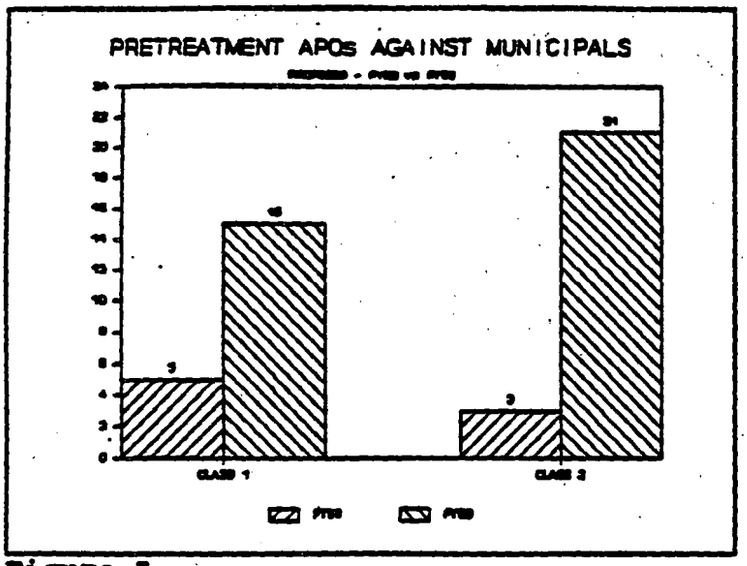


Figure 5

FY88. In FY89, the proportion shifted significantly with 80% being Class 1 actions. The reason for this shift away from Class 2 usage against IUs appears to be a result of a shift in the type of violations cited. In FY88 the Class 2 actions tended to be against categorical IUs with serious violations of their standards. FY89 Class 1 administrative penalty orders against IUs tended to be for failure to submit periodic reports.

Final Orders

The total penalties for all concluded NPDES administrative penalty orders in FY89 were $2,801,525. This is an increase of more than 500% over FY88 which was the first full year of implementation. The total number of final administrative penalty orders was 166, a fourfold increase over 40 final administrative penalty orders in FY88. Of the 166 final orders, 120 were Class I penalty orders and 46 were Class II penalty orders. The final penalty orders were issued for a variety of violations: 83 for effluent violations (50% of total); 39 for pretreatment violations (24%); 11 for failure to submit discharge monitoring reports or submission of late reports (7%); 25 for unpermitted facilities or unauthorized discharges (15%); four for failure to start or complete scheduled construction (these are frequently NMP violations) (2%); and four for operations and maintenance violations (2%).

Average Penalty Amounts for Final Orders

The average penalty amount for all (166) administrative penalty orders which became final during FY89 is $16,877. This is a 25% increase over the FY88 average of $13,545. This significant increase reflected the greater proportion of Class 2 orders among the final FY89 APOs. Class 2 orders were 28% of the total final orders in FY89 and 20% of those in FY88. The average penalty for Class 1 penalty orders rose slightly to $8,369 from $8,212. The average penalty for Class 2 orders increased 12% to $39,097 from $34,875.

The average penalty against municipals increased 48% to $16,343 from $11,067 in FY88. The average penalty against non-municipals

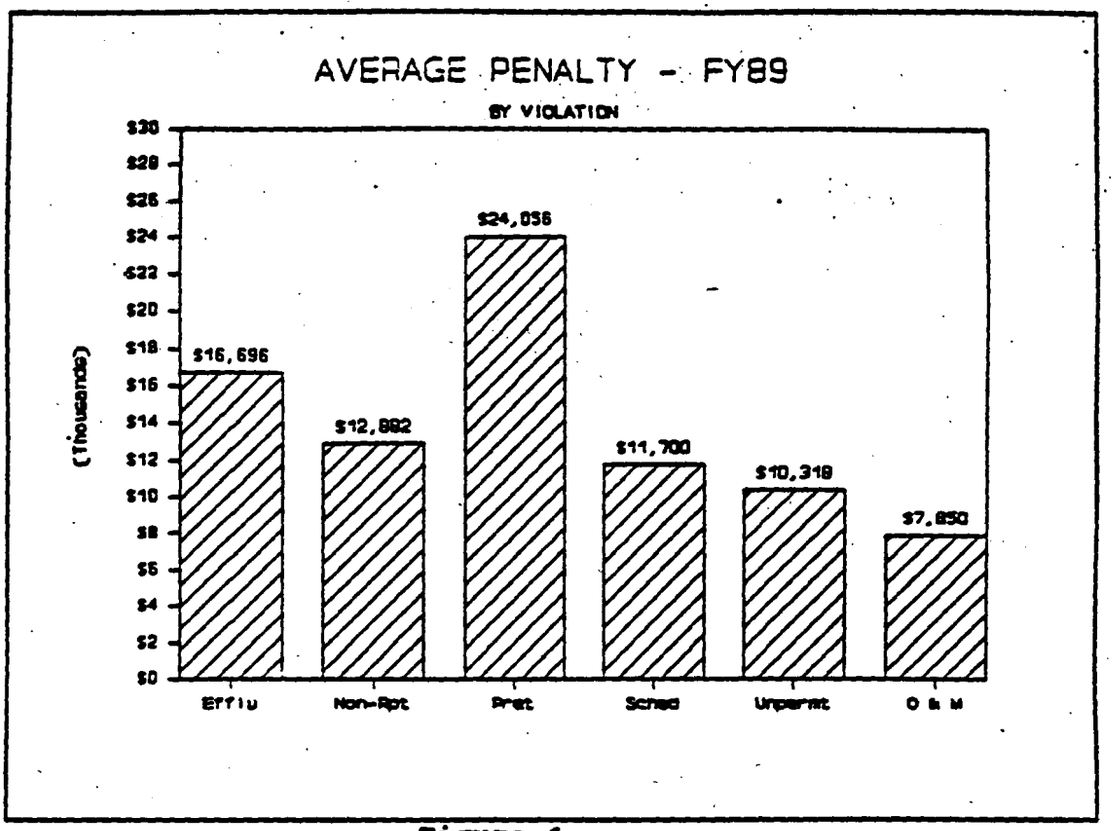


Figure 6

increased 32% to $15,311 from $11,627 in FY88. Thus, municipal violators incurred slightly higher penalties on average than non-municipal violators (excluding industrial users). In FY88 there were no final Class 1 penalties against industrial users. The average Class 2 penalty against industrial users in FY89 was $41,583 compared with $40,000 in FY88.

Among the categories of violations for which data is available, the highest average penalty was for pretreatment violations. (See Figure 6). The pretreatment average penalty was $24,056. The second highest and most frequent penalty was for effluent violations ($16,696). The average penalty for other types of violations for which data are available are: non-reporting ($12,882), schedule ($11,700), unpermitted or unauthorized discharges ($10,318) and operations and maintenance violations ($7,850).

Use Against Majors

Over one-half of all final Class 2 administrative penalty orders were assessed against facilities classified as Majors. For Class 1 final cases, 27% were assessed against Majors. The overall percentage for all final orders was 34%. The percentage of final cases issued to majors by region is shown in Figure 7.

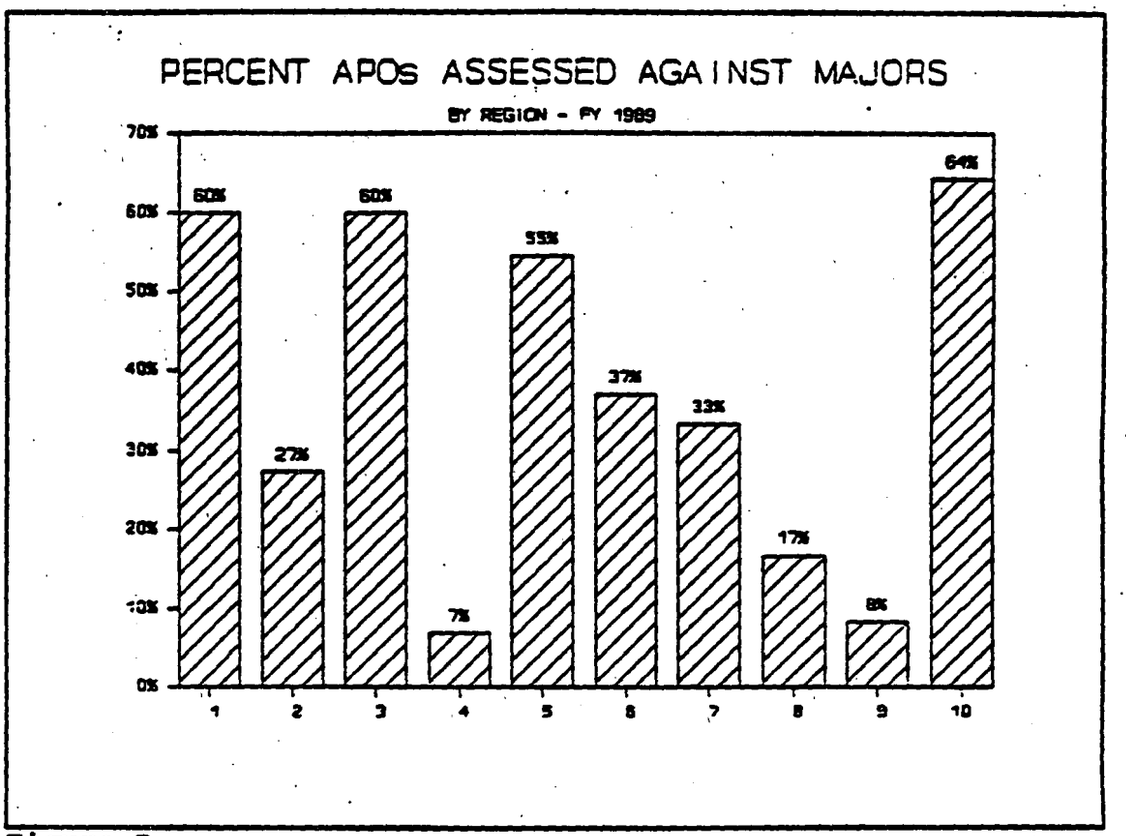


Figure 7

Efficiencies of Use

The average penalty order in FY89 was concluded within 156 days of being issued. Class 1 cases, on an average, took 136 days to conclude; Class 2 cases, 210 days. In FY88 the average for all final orders was 136 days; for Class 1 orders, 129 days; and for Class 2 orders, 152 days. Thus the average number of days to settlement increased for both Class 1 and 2 orders in FY89. The average for FY89 Class 1 cases increased 7 days or 5% while the average for FY89 Class 2 cases increased 58 days or 38%. (Technically, the averages of days to settlement for the FY88 and FY89 are not comparable since the possible worst case differs by 365 days between FY88 and FY89.)

An analysis of the FY89 Class 1 cases indicates that the average penalty for the cases concluded in less than 136 days (the average for Class 1 cases) was $8,715. This compares with the average penalty of $7,651 for those concluded after 136 days. For Class 2 final cases, the same analysis was done. For the cases concluded in less than 210 days (the average for all Class 2 cases) the average penalty was $49,631. For the cases concluded after 210 days the average penalty was $30,200.

Summary and Conclusions

Significant increases were achieved in FY89 for most major indicators on administrative penalty orders. The number of proposed orders increased 61% to 220; the number of final orders increased 415% to 166; total penalties increased 518% to $2,801,525; and the average penalty increased 25% to $16,877. It appears, however, that increases of this magnitude for some of these indicators were as a result of gaining succesful experience and use. The level of increase achieved may not be sustainable in the years to come.

Three major observations were made regarding the proposal of administrative penalty orders: First, a disproportionate number of administrative penalty orders were proposed in the third and fourth quarters. Secondly, there was a decrease in the use of Class 2 administrative penalty orders in general and against industrial user violators, specifically. Third, 45% of the administrative penalty orders were issued in delegated States.

For final orders the major observations were: Increases in average penalty for both Class 1 and Class 2 final orders; a significant increase (48%) in the average penalty against municipals so that the average penalty for municipals exceeded that of non-municipals; use against majors for over one-third of the APOs; and an increase in the number of days between proposal and the final date to an average of 156 days. Also, it appears that the longer a case takes to conclude, on average, the lower the penalty.

Strategies for using administrative penalty orders seem to vary by region. Most obviously, Region IV uses predominantly Class 1 orders; while Regions V and VII predominantly use Class 2 orders. Three regions did not increase their use of APOs in FY89; the rest did. Three regions settle orders, on average, much faster than others. For pretreatment violations six regions issued APOs against Industrial Users; nine Regions issued them against municipals.

In summary, FY89 was a year of major increases in the use of administrative penalty orders. Its predominant use continues to be against violators of permit effluent limits but its flexibility as an enforcement tool was shown in the sharp increase in use against pretreatment violators. The number of APOs proposed in the

first quarter of FY90 increased over the first quarter of FY89. However, use in the first quarter was limited to only six regions.

Attachments

Additional graphs and information on FY89 administrative penalty orders is provided in the following attachments: (1) the number of administrative penalty orders proposed by Region; (2) average penalty by Region; (3) average time to settlement; (4) highest penalty by Region; (5) number of proposed pretreatment APOs by Region a list of final administrative penalty orders by Region and State; (6) a list of proposed and final orders by Region and State; and (7) a list of final administrative penalty orders by violation and type.

2800

"CWA Civil Judicial and Administrative Penalty Practices Report for FY 89.

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: CWA Civil Judicial and Administrative Penalty Practices Report for FY89

FROM: Robert G. Heiss
Associate Enforcement Counsel
for Water

James R. Elder, Director
Office of Water Enforcement
and Permits

TO: Gerald A. Bryan, Director
Office of Compliance Analysis
and Program Operation

Attached is the Clean Water Act Civil Judicial and Administrative Penalty Practices Report covering cases concluded in FY89. The penalty numbers represent the decree or order amount without reduction to present value for those penalties to be paid over extended periods. If you have any questions regarding this report please contact Kathy Summerlee of the Office of Enforcement and Compliance Monitoring at 382-2879 or Ken Keith of the Office of Water Enforcement and Permits at 245-3714.

We look forward to receiving the final agency-wide report when it is completed.

Attachment

cc: George Alderson
Ken Keith
Rich Kozlowski
Kathy Summerlee

CWA CIVIL JUDICIAL AND ADMINISTRATIVE PENALTY PRACTICES REPORT FOR FY89

1. Use and Level of Penalties

This report summarizes the use and levels of civil judicial and administrative penalties in FY89 in cases concluded under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program.

Section 309(d) provides that any person who violates certain enumerated sections of the Clean Water Act, any NPDES or Section 404 permit condition or limitation implementing any one of those enumerated sections, any requirement in a pretreatment program, or any EPA-issued administrative order, shall be subject to a penalty of $25,000 per day for each such violation. Prior to enactment of the Water Quality Act (WQA) in February 1987, such violations were subject to a penalty of $10,000 per day per violation.

Section 309(d), as amended by the WQA of 1987, also lists criteria which the court must consider in determining the amount of the civil penalty. Specifically, the court must consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator and such other matters as justice may require."

The authority to seek administrative NPDES penalties is found in Section 309(g) of the Act. Prior to enactment of the WQA in 1987, the Agency did not have authority to seek administrative penalties. The WQA authorizes EPA to institute Class I or Class II administrative penalty actions. In Class I actions, EPA may seek penalties of up to $25,000, at a rate not to exceed $10,000 per violation. In Class II actions, the maximum is $125,000, also assessed at a rate not to exceed $10,000 per day. Class II penalty proceedings must conform to the Administrative Procedures Act. EPA issued guidance on administrative penalty orders in August 1987, and Regional Offices began imposing penalties shortly thereafter.

For purposes of settlement, penalties are calculated according to EPA's February 1986 Clean Water Act penalty policy. An addendum to the policy for the calculation of administrative penalties was issued in August 1987. Essentially, the policy requires the recoupment of economic benefit and a gravity component. Adjustments are authorized for inability to pay and litigation considerations. The economic benefit is typically calculated using EPA's BEN computer software program.

2. Statutory Changes to Penalty Authorities

There have been no changes to the penalty authorities under the Clean Water Act since the WQA of 1987.

3. Possible Influences on Use and Level of Penalties

There are several factors which may have affected the amount of penalties the United States has received in settling or litigating Clean Water Act cases in FY89:

a. For the second full year, the availability of administrative penalty authority, pursuant to the WQA of 1987;

b. The Clean Water Act settlement penalty policy which, absent ability to pay or litigation considerations, requires recoupment of economic benefit and a gravity component;

c. Use of the BEN computer model to calculate economic benefit; and

d. The agency's emphasis on enforcement of the National Municipal Policy and the pretreatment regulations.

4. Use of Penalties

Ninety-eight percent of the judicial cases concluded in FY89 included a penalty.* See Table 1. This continues the post-1985 trend of concluding virtually all Clean Water Act civil judicial cases with a penalty. See Figure 1 (Use of Penalties in CWA Judicial Cases FY75-89).

Virtually all administrative penalty actions in FY89 were concluded with a penalty. See Table 4.

5. Judicial Penalty Profile

The penalties which establish the data base for the judicial penalty profile include only upfront, cash penalties payable to the United States.

Only entered consent decrees or judicial decisions are counted as concluded cases in the data base. Multiple complaints consolidated in one consent decree or decision are counted as one concluded case.

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* The one case concluded without a civil penalty was Ashland in Region III which was also the subject of a criminal case netting a penalty of over 2 million dollars.

a. Number of Cases

The total number of judicial cases concluded in FY89 (including those concluded without a penalty) was 56. This is a drop to approximately the level reported for FY86. See Figure 1.

b. Total Penalties

Total penalties for all concluded judicial cases in FY89 was $9,744,000. See Table 1. See Figure 2 (Clean Water Act Penalties By Year - Judicial Cases).

c. Typical Penalties

The median penalty for all concluded judicial cases in FY89 (including those concluded without a penalty) was $50,000. See Table 1. This is an increase from FY88 median of $37,500 and a new high point for Clean Water Act NPDES Cases. See Figure 3 (Median Penalties - Clean Water Act - All Concluded Judicial Cases).

d. Highest Penalties

The highest penalty in FY89 was negotiated by Region V in a concluded case against Koch for $1,540,000. The next highest penalty was negotiated by Region VIII against Metropolitan Denver Sewage Disposal District for $1,125.000. See Table 3.

e. Comparison of Regional Uses and Levels of Judicial Penalties

Two Regions concluded cases with penalties of over one million dollars in FY89. Region V obtained the largest amount of penalties, $3,389,000. Regions III, IV, VI and VIII obtained penalties of over $1,000,000 total.

In terms of the number of cases concluded, Region IV concluded the most cases (15) followed by Region VI (9). See Table 3.

6. Administrative Penalties Profile

The penalties which constitute the data base for the administrative penalty profile reflect upfront, cash penalties which are to be paid to the United States generally within 30 to 60 days. In a few instances payment terms extended beyond 60 days without interest payment. Since discounting these few extended payments to present value would not change the data significantly, they have not discounted.

a. Total Penalties and Number and Type of Cases

In FY89 the total penalties for all concluded NPDES administrative penalty orders was $2,801,525. This was an increase of 500% over FY88 which was the first full year of implementation. The total number of final administrative penalty orders was 166, a four-fold increase over the 40 final administrative penalty orders in FY88. Of the 166 concluded administrative penalty orders, 120 were Class I penalty orders and 46 were Class II penalty orders. The penalty orders were issued for a variety of violations: effluent violations (83); pretreatment violations (39); failure to submit discharge monitoring reports or submission of late reports (11); unpermitted facilities or unauthorized discharges (25); failure to start or complete scheduled construction (these are frequently National Municipal Policy violations) (4); and operations and maintenance violations (4).

b. Efficiencies of Use

The administrative penalty orders in FY89 were concluded, on an average, within 156 days of being issued. Class I cases, on an average, took 136 days to conclude; Class II cases, 210 days. All of the penalty orders concluded in FY89 were achieved by consent order; none of the concluded cases were decided as a result of a formal hearing.

c. Typical Penalties

The median penalty for administrative penalty orders concluded in FY89 was $10,000. This was in increase of 18% over the FY88 median penalty. The median for Class I actions was $5,750 and for Class II actions $35,000. Ninety cases were concluded with penalties of $10,000 or more.

d. Penalties Issued to Municipalities

Sixty-one of the 166 respondents were municipalities. The median penalty assessed against municipalities ($10,000) was identical to the median penalty for all administrative penalty orders concluded in FY89.

e. Pretreatment Penalties

Thirty-nine penalties were issued for pretreatment violations, 27 to industrial users (IUs) and 12 to municipalities for failure to implement all or part of a pretreatment program. The median penalty assessed against IUs was $14,000; the median penalty assessed against a municipality was $18,750.

f. Highest Penalties

The largest penalty order concluded in FY89 was issued by Region I against an industrial user, Imperial Pearl Company,

for $100,000. The next highest, issued by Region VI, was for $98,000 against AT&T Information Systems Inc. The highest penalty against a municipality was for $65,000, issued to the City of McAllen, Texas.

Comparison of Regional Use and Level of Penalties

Region VI issued almost one-third (54) of the administrative penalty orders concluded in FY89. In Region VI authority for the NPDES program is vested in EPA for all but one State. Regions IV and X had the second and third largest number of final administrative penalty orders (29 and 14 respectively).

Region VI obtained the highest amount of penalties ($921,825). Region V had the second highest amount of penalties ($336,000).

TABLE 1
CWA-NPDES
Total Civil Judicial Penalties
For All Cases Concluded in FY 1989

Total Dollars	No. Cases w/Penalty	No. Cases w/o Penalty	Total Cases	% of total w/Penalty	Average Penalty	Average All Concl. Cases	Median Penalty	Median All Concl. Cases	Highest Pena
9,744,000	55	1	56	98%	177,164	174,000	55,000	50,000	1,540,000

TABLE 2
CWA-NPDES
Total Civil Judicial Penalties
By Size of Penalty FY1989

Zero $	≤ $5,000	< $10,000	< $25,000	< $50,000	< 100,000	<$1 Million	≥ $1 Million
1	4	3	7	9	15	15	2

TABLE 3
CWA-NPDES
Total Civil Judicial Penalties

Region	Total Dollars	No. Cases w/Penalty	No. Cases w/o Penalty	Total Cases	% of Total w/Penalty	Average Penalty	Average All Concl. Cases	Median Penalty	Median All Concl. Cases	Highest Pena
1	206,500	4	0	4	100%	51,625	51,626	53,250	53,250	90,000
2	388,000	6	0	6	100%	64,667	64,667	50,000	50,000	170,000
3	1,616,500	5	1	6	83%	323,300	269,417	180,000	333,750	800,000
4	1,356,000	15	0	15	100%	90,400	90,400	40,000	40,000	500,000
5	3,389,000	9	0	9	100%	376,556	376,556	50,000	50,000	1,540,000
6	1,011,000	6	0	6	100%	168,500	168,500	63,500	63,500	750,000
7	137,000	1	0	1	100%	137,000	137,000	137,000	137,000	137,000
8	1,355,000	4	0	4	100%	338,750	338,750	80,000	80,000	1,125,000
9	80,000	2	0	2	100%	40,000	40,000	40,000	40,000	60,000
10	205,000	3	0	3	100%	68,333	68,333	50,000	50,000	150,000
TOTAL	$9,744,000	55	1	56	98%	177,164	174,000	55,000	50,000	1,540,000

VII.20.

"FY 1990 Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", dated September 27, 1989. Reproduced at VI.B.33. this compendium.

VII.21. FY 1995 Guidance Document for Enforcement and Compliance Assurance--Memorandum of Agreement Process, September 10, 1994.

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

SEP 20 1994

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: FY 1995 Guidance Document for Enforcement and Compliance Assurance

FROM: Steven A. Herman, Assistant Administrator
for Office of Enforcement and Compliance Assurance

TO: Regional Administrators

A memorandum dated June 14, 1994, from Elaine G. Stanley, Director, Office of Compliance, transmitted the draft FY 1995 Guidance Document for Enforcement and Compliance and requested your comments. We appreciate your comments and have revised the document to reflect these comments as well as those received from Headquarters' offices. The final guidance document for developing your FY 95 Regional/Headquarters Memorandum of Agreement (MOA) is attached. This document sets the stage for developing a landmark comprehensive and unified enforcement and compliance plan.

We believe this final document is more reflective of our intent to provide Regions with solid direction in developing a plan to address OECA's strategic objectives for assuring compliance, while also allowing the Regions flexibility to meet these objectives during FY 1995. While recognizing the necessity of maintaining traditional enforcement outputs for deterrence purposes, we must strive to create the appropriate balance, as envisioned by the Administrator, between traditional enforcement activities and innovative approaches for ensuring compliance. Further, we need to ensure that any changes in enforcement activities are balanced with measurable, non-traditional activities which promote compliance. During the last several months the National Enforcement Investigation Center (NEIC) has solicited Regional needs for support on their enforcement program in FY 95. The agreements reached for this support should be reflected in MOA negotiations.

OECA has attempted to incorporate in its MOA process the relevant and successful features of MOA processes run by the Office of Air and Radiation and the Office of Pollution Prevention, Pesticides and Toxics. However, as the Agency's first MOA which integrates enforcement and compliance assurance

activities from all of EPA's media programs, the OECA MOA is more comprehensive in scope than the single media MOAs you have developed. As we proceed through this first year of the annual OECA MOA process, all participants should recognize that we are implementing this process for the first time, and that it will be improved as we gain more experience.

When submitting your Regional MOA proposal, please provide two copies to the Planning Branch, of the Enforcement Planning, Targeting and Data Division within the Office of Compliance by November 4, 1994. The Planning Branch will facilitate the coordination effort for finalizing and negotiating the MOAs and consulting with other offices within OECA in the process. We expect negotiation on the MOA will be concluded by January 13, 1995. Final signed MOAs will be transmitted to the Regions.

I appreciate your commitment to making the enforcement program stronger and more effective and look forward to working together to achieve this goal. I also want to thank you and your staff for past and future cooperation which has helped OECA get off the ground quickly and effectively. Please address any questions or concerns to Jack Neylan, Chief, Planning Branch, at 202/260-7825.

cc: Assistant Administrators
Deputy Regional Administrators
Regional Counsels
Regional Multi-media Coordinators
OECA Office Directors

FY 95 GUIDANCE FOR THE ENFORCEMENT AND COMPLIANCE ASSURANCE MEMORANDUM OF AGREEMENT PROCESS

I. INTRODUCTION

The purpose of the Headquarters/Regional Memorandum of Agreement (MOA) is to implement a consolidated enforcement and compliance program to promote and achieve EPA's national goals. The process is further expected to enhance Headquarters/Regional partnerships within the new organizational structure, as we work together to strengthen well-established methods of enforcement and develop new approaches to compliance assurance.

The FY 95 MOA guidance that follows begins the transition for developing a comprehensive plan by unifying the enforcement and compliance planning process through the preparation of a single MOA. The development of the FY 95 guidance was necessarily compressed due to the fact that the Office of Enforcement and Compliance Assurance (OECA) was not officially reorganized until June 8, 1994. The development of FY 96 guidance will feature a timely and collaborative priority-setting process involving media programs, Regions, states, and other partners. Such a process was not possible for FY 95.

Our FY 95 guidance and MOA process focuses on building successful enforcement and compliance assurance programs. This approach requires that this guidance define success in enforcement and compliance assurance, and the next section provides that definition.

II. DEFINING SUCCESS IN ENFORCEMENT AND COMPLIANCE ASSURANCE

A successful enforcement and compliance assistance program is one which reflects the following strategic objectives:

1.) Achieves compliance and environmental improvement by using a broad range of tools such as compliance monitoring, expanded outreach, compliance assistance, and civil and criminal enforcement actions;

2.) Maintains an imposing enforcement presence by keeping total enforcement outputs at current levels, assures that violators do not profit from these violations, and ensures vigorous, timely, and high quality enforcement against violations of environmental statutes;

3.) Uses multi-media, whole-facility, sector-oriented, and/or place-based approaches to target remediation, enforcement and compliance assurance activities. Also incorporates environmental justice and pollution prevention into targeting and planning activities.

4.) Moves toward measuring results and the impact of activities in more sophisticated and meaningful ways.

As we proceed into FY 95, the MOA process will be used as a tool to integrate these four OECA objectives with enforcement and compliance assurance priorities identified by Headquarters media programs, Regions, and states. The MOA guidance encourages the use of the full range of tools to achieve compliance, but also recognizes the importance of maintaining traditional enforcement outputs (e.g., civil/administrative/criminal actions and inspections) at the level of previous years. The MOA process will be used to strike a balance between the need to move toward new approaches and the need to maintain traditional outputs.

Among the purposes for which your Region should use the MOA submission are to: request Regional adjustments to previously identified Headquarters media program enforcement priorities (i.e., if that priority is not appropriate for your Region); propose Region specific enforcement priorities not reflected in media-specific enforcement guidance (i.e., if you have identified a Regional environmental problem which can be addressed through use of enforcement and compliance assurance tools); and to propose trade-offs in the use of various tools and activities (e.g., the use of compliance assistance in place of compliance monitoring inspections for a particular initiative, greater use of multi-media cases and reduced production of certain single-media cases). All enforcement and compliance assurance portions of MOAs developed in accordance with media-specific guidance should be attached to this MOA.

This guidance explains how adjustments and trade-offs can be proposed in your MOA submission so they can be discussed in MOA negotiations with OECA.

III. SPECIFIC FY 95 ACTIVITIES AND COMMITMENTS

The following discussion provides additional details for each of the four objectives along with Headquarters support directed to each objective and a request for Regional activities which support the objective. Regions should use this discussion as they develop their individual MOAs and tailor activities and resources to their highest priorities. The MOAs should also reflect and incorporate the agreements reached between the National Enforcement Investigation Center (NEIC) and the Regions for support of Regional activities in FY 95. Section IV presents a format for the Regions to use in preparing and submitting their MOA to Headquarters.

Objective 1: Using a Broad Range of Tools to Maximize Enforcement and Compliance

Description: EPA has a wide variety of tools to use to bring about compliance with the nation's environmental laws. These tools can be seen as a spectrum -- from compliance assistance designed to prevent violations, compliance monitoring to identify violations, administrative and civil litigation to correct and deter violations, and criminal prosecutions to deter noncompliance and to punish violators.

A successful program utilizes the full range of tools to achieve maximum compliance. The selection and application of these tools should be tailored to the specific environmental or noncompliance problem being addressed. For some problems, one tool is appropriate, for others a mix of tools is the most effective strategy, while still others might require various tools to be used in stages, over time.

Headquarters Support: To facilitate this element of a broad and innovative enforcement and compliance assurance program, the following activities are planned or underway at Headquarters:

Policies:

- Issue a shutdown policy for repeat offenders. This policy will focus on the universe of combustion facilities. (Resource Conservation and Recovery Act (RCRA) Enforcement Division)

- Develop a policy for determining National Pollutant Discharge Elimination System (NPDES) compliance for limits below detection levels. (Water Enforcement Division)

- o Issue a policy providing for enhanced public participation during the enforcement process and will, if appropriate, work with the Regions to launch a pilot project under this policy. (RCRA Enforcement Division and Office of Site Remediation Enforcement)

- o Develop a national Sanitary Sewer Overflow (SSO) policy in coordination with Office of Water. (Water Enforcement Division)

Guidance:

- o Worker Protection Standards Interpretive Guidance. (Agriculture and Ecosystem Division)

- o Guidance on alternative compliance approaches for use with small towns. (Chemical, Commercial Services and Municipal Division)

- o Develop a multi-media plain english guidance to regulations for the dry cleaning industry. (Chemical, Commercial Services and Municipal Division)

- o Draft RCRA Waste Analysis Plan (WAP) Guidance for Boiler and Incinerator Furnaces (BIFs). (Chemical, Commercial Services and Municipal Division)

- o Develop Monetary Awards Program Guidance. (Air Enforcement Division)

- o Develop Field Citations Program Guidance. (Air Enforcement Division)

- o Develop Citizens' Suits Guidance. (Air Enforcement Division)

- o Develop the General Duty Clause Guidance under section 112(r). (Air Enforcement Division)

- o Develop applicability and compliance guidance under the New Source Review provisions. (Air Enforcement Division)

- o Develop guidance for acid rain programs. (Air Enforcement Division)

- o Develop guidance and provide assistance to Regions to ensure effective use of Alternative Dispute Resolution (ADR), De Minimis settlements, and mixed funding. (Office of Site Remediation Enforcement)

Training:

- o Organize and operate a facility in Washington, D.C., to train Headquarters, Regional, and state personnel in traditional enforcement and innovative compliance assurance activities. (Enforcement Capacity and Outreach Office)

- o Develop and conduct a Land Disposal Restrictions Update Course covering the Phase I and II Rules. (RCRA Enforcement Division)

- o Develop and conduct a RCRA Enforcement Practitioners Course for regional and state legal and technical personnel, provided that adequate funding can be obtained through the National Enforcement Training Institute (NETI). (RCRA Enforcement Division)

- o Guidance and training on Executive Order (E.O.) 12856 Federal Facility Pollution Prevention Plans. (Federal Facilities)

- o Provide training on pollution prevention for inspectors and other enforcement personnel. (Enforcement Capacity and Outreach Office)

- o Develop and conduct a course to "train-the-trainer" on environmental justice. (Enforcement Capacity and Outreach Office)

Others:

- o Finalize a Federal Register Notice announcing EPA's intention to develop pilot projects under the Environmental Leadership Program. (Enforcement Planning, Targeting, and Data Division)

- o Continuation of work by an Agency-wide workgroup to address environmental auditing issues. (Enforcement Planning, Targeting and Data Division).

- o Assistance in complying with new Municipal Waste Combustion Ash requirements. (Chemical, Commercial Services and Municipal Division)

- o Additional Federal Facility Compliance Agreement (FFCA) Inspection Reimbursement Interagency Agreements (IAGs) with Department of Energy (DOE), Department of Defense (DOD), and Civilian Federal Agencies. (Federal Facilities)

- o Assist in Maximum Available Control Technology (MACT) standard implementation as rules are promulgated. (Manufacturing, Energy and Transportation Division)

- o Promulgate Enhanced Monitoring Rule for major air pollution sources and conduct training for Regions and States. (Manufacturing, Energy and Transportation Division)

- o Finalize Field Citations Rule. (Air Enforcement Division)

- o Chairmanship of FY 95 Worker Protection Initiative Workgroup and support to regions and states on worker protection compliance monitoring and case development. (Toxics and Pesticides Enforcement Division)

- o Develop technical documents on major industrial categories (relating to process, pollution sources, and waste streams) for use by regions and states in enforcement programs. (National Enforcement Investigations Center)

- o Work with the Office of Solid Waste and Emergency Response (OSWER) to assure timely implementation of 40 CFR subpart S and Hazardous Waste Identification Rule - Contaminated Media Regulations. (Office of Site Remediation Enforcement)

- o Revisit Cost Recovery Strategy to determine if changes to cost threshold are needed. (Office of Site Remediation Enforcement)

- o Provide guidance to implement Superfund Reform Act (SRA) changes if SRA passes. (Office of Site Remediation Enforcement)

- o Review Enforcement Project Management Handbook, and amend if appropriate. (Office of Site Remediation Enforcement)

- o Initiate and maintain an electronic bulletin board for OECA to provide information to the Regions, States, and regulated community. (Enforcement Capacity and Outreach Office)

Regional MOA Commitment:

For Objective 1, each media priority (listed in Appendix 1)[1] should be considered a work component, as discussed in section IV, The MOA Process, "Description of OECA Objectives". As described in this section, for each media priority your submission should provide an explanation of activities, the support you will need from Headquarters, and the Regional commitment you are prepared to make. In the event that the Regions feel the media priorities do not provide a complete discussion of their enforcement and compliance programs, Regions should feel free to provide additional information regarding their ongoing program efforts. Section IV provides a format and examples of the level of detail expected. (To avoid duplication, wherever appropriate, reference the enforcement and compliance assurance portion of your Regional media specific MOA, which you should attach to the OECA MOA.)

The Region should also discuss its overall approach to meeting the objective of using appropriate tools to achieve maximum compliance, highlighting in particular the use of compliance assistance in your Region's enforcement and compliance assurance programs. At the end of this section, the Region should provide a specific list of compliance assistance activities they are undertaking in FY 95, for example, workshops with industry groups on implementation of new regulations or training sessions for states.

Objective 2: Maintaining an Enforcement Presence

Description: EPA must maintain and improve its capacity to use a deterrence-based approach for assuring compliance. Enforcement actions are a primary means for assuring compliance because they demonstrate to the regulated community that noncompliance will be detected and punished. Inspections will remain a strong tool for achieving a Federal presence and for assessing compliance. The credibility of the Agency depends on a strong and effective enforcement program. Traditional enforcement activity remains a major motivating force for the regulated community's efforts to comply with requirements and behave in an environmentally-responsible manner.

A successful program maintains an enforcement presence by keeping total enforcement outputs at current levels. For example, we expect that total inspections should remain at a consistent level, but within that total the targets for those inspections, as well as the mix of single media and multi-media inspections, will necessarily shift over time. This also means that total case outputs should also remain at least at current levels, but within that total there may well be shifts in the number of outputs for particular categories of cases from year to year.

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[1] Appendix 1 includes the following media programs: Water; Federal Facilities; Air; Toxics; Pesticides; RCRA; Remediation; Multi-media; and Criminal.

Headquarters Support: To facilitate this element of a broad and innovative enforcement and compliance assurance program, the following activities are planned or underway at Headquarters:

Enforcement Response Policies/Guidance:

- Provide revised policy concerning the use of Supplemental Environmental Projects (SEP's). (Multi-media Enforcement Division)
- Complete the revisions to the RCRA Enforcement Response Policy. (RCRA Enforcement Division)
- Revise the Clean Air Act penalty policy. (Air Enforcement Division)
- Complete Municipal NPDES Penalty Policy. (Water Enforcement Division)
- Revise the Significant Noncompliance (SNC) guidance for National Pollutant Discharge Elimination System (NPDES) and Pretreatment. (Water Enforcement Division)
- Develop guidance to enhance settlements. (Office of Site Remediation Enforcement)
- Issue a guidance document that will assist the Regions in calculating the estimated economic benefit of non-compliance. (RCRA Enforcement Division)
- Finalize policy guidance on "global settlements." (Office of Criminal Enforcement/Office of Regulatory Enforcement)
- Hazardous organic National Emission Standards for Hazardous Air Pollutants (NESHAP) inspection guidance. (Chemical, Commercial Service and Municipal Division)
- Multi-media Inspection Enforcement Program Guidance and Interim Final Status Report. (Federal Facilities)

Training:

- Conduct an Advanced Penalty Policy Training Course for Regional personnel. (RCRA Enforcement Division)
- Deliver Superfund Enforcement Course and Attorney Orientation Course. (Office of Site Remediation Enforcement)
- Develop and deliver a comprehensive multi-media inspection training course. (Enforcement Capacity and Outreach Office)
- Present a revised version of the Basic Inspector Training Course. (Enforcement Capacity and Outreach Office)
- Present a revised version of the training course in Negotiations. (Enforcement Capacity and Outreach Office)

- o Continue to provide training in the use of BEN/ABEL to support economic analysis of enforcement case penalties. (Enforcement Capacity and Outreach Office)

Other:

- o Issue a plain language guide to the RCRA Civil Penalty Policy to assist the Regions in explaining RCRA complaints and settlements to the general public. (RCRA Enforcement Division)

- o Draft integrated municipal inspection form for water incorporating NPDES, sludge, and pretreatment. (Chemical, Commercial Service and Municipal Division)

- o Provide BEN/ABEL support for economic analysis of enforcement case penalties. (Multi-media Enforcement Division)

- o Complete Non-Administrative Procedures Act (APA) administrative penalty enforcement procedures. (Water Enforcement Division)

- o Continue work on Sentencing Guidelines for environmental offenses. (Office of Criminal Enforcement)

- o Continue support and participation in the Regional Criminal Enforcement Counsel (RCEC) workgroup, as part of Office of Criminal Enforcement's (OCE's) continuing effort to work with the regions and to define the role of RCECs. (Office of Criminal Enforcement)

Regional MOA Commitments:

Under Objective 2, Regions should include all proposed commitments for targeted measures under the former STARS system. Targeted measures are those for which Headquarters and the Regions negotiate up-front commitments for the coming fiscal year. For OECA purposes, these targeted measures are conducting inspections and addressing drinking water fixed base SNC/exceptions. Forms for these commitments have gone out either under media-specific MOA guidance or under separate memo (i.e. water program). Therefore, the only portion of section IV, The MOA Process, which applies to Objective 2 for reporting purposes is the reference to Regional Commitments. Please attach summary charts to this document or reference pages in your attached media-specific MOAs.

Objective 3: Using New Targeting Approaches

Description: A major purpose of the reorganization was to enhance strategic targeting of enforcement and compliance assurance activities. Innovative approaches to targeting -- such as those organized around multi-media, whole facilities, industrial sectors, and geographic areas -- offer at least two advantages. First, enforcement and compliance assurance resources can be oriented toward the full range of environmental requirements which apply to a facility, industry, or geographic area. Second, enforcement and compliance actions can be organized around environmental problems and broad patterns of noncompliance rather than around individual provisions of single statutes.

A successful enforcement and compliance assurance program identifies opportunities to address environmental problems and noncompliance patterns in industry sectors, geographic areas, and whole

facilities. These problems and patterns become targets to which the various enforcement and compliance assurance tools are applied.

Headquarters Support: To facilitate this element of a broad and innovative enforcement and compliance assurance program, the following activities are planned or underway at Headquarters:

- Work with Office of Compliance and Program Office(s) on provision of inspection targeting data in support of initiatives as needed by Regions. (Toxics and Pesticides Enforcement Division)

- Provide Superfund Accelerated Cleanup Model (SACM) coordination support to Regions 4 and 9. (Office of Site Remediation and Enforcement)

- Development of a model sector compliance strategy. (OC Sector Divisions)

- Development of an interagency Memorandum of Understanding (MOU), with Customs, the Securities Exchange Commission (SEC), and the Occupational Safety Health Administration (OSHA). (Enforcement, Planning, Targeting and Data Division)

- For industrial categories, develop national and region-specific rankings based on historical non-compliance patterns and Toxic Release Inventory data. These data will be used to review MOAs, Regional targeting, and set the baseline for measuring success. (Enforcement, Planning, Targeting and Data Division)

- Refine the Fortune 500 compliance and enforcement profile data and provide support to the Regions, OC Sector Divisions, and ORE in the interpretation and use of the data for targeting corporate-wide compliance and enforcement activities. Complete work with Dun & Bradstreet to establish reliable corporate data linkages through Integrated Data for Enforcement Analysis System (IDEA). (Enforcement Planning, Targeting and Data Division)

- Develop demographic and ecosystem targeting methods to support Environmental Justice activities and ecosystem-based efforts such as addressing posted stream segments/contaminated sediments. (Enforcement Planning, Targeting and Data Division)

- Deliver software and user guides to facilitate calculation of wastewater pollutant loadings from point sources. (Environmental Planning, Targeting and Data Division)

- Conduct assessment of current locational data in OECA databases to begin to improve our ability to map facilities. (Environmental Planning, Targeting and Data Division)

- Provide compliance profiles on industrial sectors to facilitate targeting. (Enforcement Planning, Targeting and Data Division/ Manufacturing, Energy and Transportation Division)

- Develop and implement a formal system for strengthening the participation of state, local, and tribal authorities in the development of OECA planning, priority setting, and policy development. (Enforcement Capacity and Outreach Office)

- Endangered Species Strategy (draft 30 days after Federal Register Notice). (Agriculture and Ecosystem Division)

- o Pilot training in environmental justice communities designed to provide information on basic statutory requirements. (Enforcement Capacity and Outreach Office)

- o Ecosystem workplan. (Agriculture and Ecosystem Division)

- o Review State Operating Permit program submittals under Part 71 of the Operating Permit Program; provide legal and technical support to regions, states and local offices on volatile organic compounds (VOCs). (Air Enforcement Division)

- o Implementation of the Investigative Discretion Guidance issued in FY 94 and priorities associated with it, including: data integrity, environmental justice. (Office of Criminal Enforcement)

Regional MOA Commitments:

Under Objective 3, Regions should provide a narrative discussion of their targeting methodologies. Innovative approaches to targeting include: multi-media; whole-facility; sector-oriented; place-based; risk-based; environmental justice; and pollution prevention. Regions should specifically discuss which of these innovative approaches they utilize and should provide detail for the strategies identified. Regions should refer to section IV, The MOA Process, for the format for completing this section. We recognize that this objective incorporates many of these new approaches for enforcement and compliance. Therefore, we are particularly interested in Regional involvement, including pilots, in any of these areas. For each identified area, Regions should describe activities they are undertaking to support this area, requests for Headquarters' support and any associated commitments or outputs.

Objective 4: Moving Toward Measuring Results and Impact

Description: EPA's enforcement and compliance assurance program has relied exclusively on counting activities (e.g., cases issued, and dollars collected) as the sole means of measuring success. Over the next two to three years the program should move toward a more balanced approach which uses result-based and impact-oriented measures to supplement more sophisticated and useful methods of counting activities.

A successful enforcement and compliance assurance program is one which contributes to the development of new national measures and aligns data collection and analysis efforts with those measures. Counting the full range of activities (e.g., enforcement actions and compliance assistance efforts), measuring outcomes (e.g., the actual results of these efforts, not just their initiation), and measuring impact (e.g., compliance rates, improvements in environmental conditions) will be crucial to having a successful enforcement and compliance assurance program. Our proposed approach involves four components, as follows:

1. **Emphasize environmental results in enforcement.** OECA recognizes the need to systematically collect data on environmental results (e.g., environmental conditions, loading reductions) and program impacts (e.g., value and nature of supplemental environmental projects (SEPs) and injunctive relief). To accomplish systematic data collection, we have recommended introduction of the judicial and administrative case completion data sheet. Work on the final data sheet is underway with involvement by staff from several Regions. Preparation of the data sheets will be new work for Regional office staff; however, it is the view of the work group that benefits gained from more systematic data collection (in terms of both data quality and a reduced need for most of the ad hoc end of year

information requests) outweigh any increase in workload. We anticipate piloting the case data sheets in two Regions in the first half of FY 1995, revising as needed and expanding to cover all Regions in the second half of FY 1995.

2. **Maintain current reporting on program measures.** Although the Office of Policy, Planning and Evaluation has announced the discontinuation of the STARS reporting system in FY 1995, continued reporting of core enforcement measures is critical to the mission of OECA. Therefore, we expect the Regions to continue to maintain and report this data. Regions should reference the FY 1994 Goals, Objectives, Commitments and Measures Guidance (Office of the Administrator, March 1994) which presents all Agency FY 94 STARS measures, noting that enforcement measures are identified with an "E" in the code. OECA commits to review the FY 1994 media enforcement measures this year for the purpose of determining which measures may be eliminated for FY 1996 reporting.

3. **Measure compliance as well as enforcement activities.** This re-engineering will be largely accomplished using existing data and applying newly-improved data linkages, SIC codes, and facility location information. The modifications that are planned (e.g., developing cross-media compliance profiles by industrial category) will generally be accomplished through new computer data integration and retrieval capabilities and will be carried out by Office of Compliance staff. We do not anticipate that these changes will add to existing Regional or State reporting burdens.

4. **Broaden measures of enforcement output through the implementation of an Enforcement Activity Index.** We are developing more comprehensive activity indicators to provide comparable visibility to criminal enforcement activities, significant administrative actions, and significant activities that address noncompliance at Federal facilities. These activity measures will also focus needed attention on case conclusions, which as activity measures better link to environmental benefits than case initiations. OECA is recommending a set of four indexes -- one each for civil judicial cases, criminal cases, significant administrative actions, and significant activities that address noncompliance at Federal facilities -- which when viewed together would constitute an enforcement "profile." The index is intended as an enforcement communication and management tool, not as a tool for resource allocation. We anticipate piloting the index in the second half of FY 1995 and that all Regions will be involved in FY 1996.

Headquarters Support: To facilitate this element of a broad and innovative enforcement and compliance assurance program, the following activities are planned or underway at Headquarters:

- Pilot test and implement the Case Completion Data Sheet. (Enforcement Planning, Targeting and Data Division)

- Complete the design and definition of the Enforcement Activity Index and develop guidance to assist the Regions in implementing reporting mechanisms. (Enforcement Planning, Targeting, and Data Division)

- Re-engineer reporting using existing data and measures of SNC and compliance status/rates to incorporate multi-media, sector, and environmental justice perspectives. (Enforcement Planning, Targeting and Data Division)

- Docket will be enhanced to incorporate data needed for OECA Measures of Success effort, and other user recommended changes. (Enforcement Planning, Targeting and Data Division)

- o Federal Facilities Tracking System (FFTS) User's Manual and Training. (Federal Facilities)

- o Annual A-106 Regional Review Guidance. (Federal Facilities)

- o Provide guidance on the compliance and enforcement use of enhanced and periodic monitoring data. (Manufacturing Energy and Transportation Division)

- o Permit Compliance System (PCS) enhancements – ability to switch from a two digit year code to a four digit year code to input a year greater than 2000 and ability to print on-line retrievals. (Enforcement Planning, Targeting and Data Division)

- o The IDEA system will be enhanced to have a Windows interface. Training on IDEA will continue. Regions will also continue to provide assistance to Regions on special projects. (Enforcement Planning, Targeting and Data Division)

- o Air Facility Subsystem (AFS) – a PC utility will be provided to assist in the calculation of source class from emission and attainment data. (Enforcement Planning, Targeting and Data Division)

- o Training on OECA enforcement and compliance databases will be scheduled for Regions as needed (including Docket, PCS, etc.) (Enforcement Planning, Targeting and Data Division)

- o Develop acid rain allowance tracking system. (Air Enforcement Division)

Regional MOA Commitments:

For Objective 4, Regions should describe the commitment it is prepared to make to: support development of improved or new measures of success; participate in efforts to collect information (e.g., the case completion data sheet) needed for new measures; and participate in pilot projects to actually implement new measures. Regions should follow the format provided in section IV, The MOA Process; however, the activity should cover whatever new measurement effort they have underway--either participating with Headquarters or independent Regional efforts--and then discuss where Headquarters support is needed and identify any commitments or completion dates if available.

The Region should also discuss its overall efforts to improve the quality of enforcement and compliance assurance data.

IV. THE MOA PROCESS

This section describes the schedule and format for submitting, reviewing, and completing the MOAs.

A. SCHEDULE FOR SUBMISSION/NEGOTIATION PROCESS

- o **The Regions will have until November 4, 1994 to submit their MOA proposals.** The Regions should follow the outline provided in this guidance and attach enforcement and compliance assurance sections of their FY 95 media specific MOAs. In FY 96 all enforcement and compliance activities will be consolidated within the OECA MOA guidance. Each Region should submit its MOA proposal to the Planning Branch, of the Enforcement

Planning, Targeting and Data Division within the Office of Compliance. The Planning Branch will coordinate this effort, consulting with other offices within OECA.

o The escalation process for addressing issues prior to MOA submittal will proceed as follows: Staff level discussions will occur early in the process to provide for understanding, clarification, and resolution of issues where possible and will frame the discussion of regional priorities and program tradeoffs as necessary. One contact person from the Region will work with a designated contact person within the Planning Branch of OECA. Where agreement is reached, no further action is required.

Those issues which cannot be resolved or require management decisions will be elevated to Branch Chiefs, Division Directors and Office Directors as needed. Most of the negotiation on program priorities and trade-offs will occur at this level. These negotiations should be done quickly, efficiently, and in a collegial manner. Our intent is to complete these discussions wherever possible prior to formal submittal.

Upon submission of the MOA proposals, communication on remaining unresolved MOA policy issues and negotiation of final commitments will be held only between the OECA Office Directors and Regional Division Directors, or a higher level if necessary, for those significant issues where agreement cannot be reached. The Assistant Administrator/Deputy Assistant Administrator in Headquarters will conduct conference calls with each Regional Administrator/Deputy Regional Administrator in the Region for the purpose of resolving issues and finalizing the Agreement for each Region.

o The negotiation process must be completed no later than January 13, 1995. Final signed MOAs will be transmitted immediately to the Regions.

B. REGIONAL DEVELOPMENT OF AN MOA PROPOSAL

I. Outli of Regional/Headquarters MOA

a. Transmittal and Highlights Memorandum (no more than 2 pages)

b. Regional Program (explained in more detail under Part II. of this section)

i. Description of OECA Objectives

In general, the Regional response to each OECA Objective should be described as follows:

Brief narrative describing, strategically, what the region is doing to meet the objective.

Where the Region is conducting a specific activity towards an objective, the following information should be provided.

Activity Description:
HQ Support:
Regional Commitments & Activities:

ii. **Regional Specific Issues - Optional**
iii. **Resource Utilization Summary (Including investments/ disinvestments)**

c. **Attachments**

- **Enforcement and Compliance Assurance components of the annual planning documents (i.e., MOA, RIP) developed through Media Specific Guidances**
- **Optional Supporting Regional Attachments**

II. Detailed Discussion of Regional Program (item b. from above outline)

The main objective within this section is to describe how compliance and enforcement activities will be directed to meet the OECA's strategic objectives for Enforcement and Compliance Assurance in as brief and concise a manner as possible, and to identify milestones and products to capture and monitor progress.

Regions should submit narrative descriptions for their planned activities unless specifically requested otherwise. Regions will be expected to identify the resources (FTEs and grant dollars) and measurable outputs allocated to each activity and program objective. The format below is designed to assist Regions in organizing this section of the report.

i. Description of OECA Objectives

This section should provide a brief narrative describing how the Region intends to meet the OECA objective. In addition, where appropriate, the Region should provide a more detailed description of work components (activities) that will be conducted to meet the objective. Each activity under each objective should be describe as follows:

Activity Description:

[Specific activity or related groups of activities under each objective]

HQ Support:

[As applicable, discuss needed guidance or other Headquarters actions that potentially may impact the achievement of the stated activity]

Regional Commitments & Activities:

[Specifically define the outputs or commitments that the Region agrees to meet and include appropriate timetables associated with the outputs. Where a Region is seeking flexibility to undertake a specific activity, the Region should discuss the rationale, the impact and identify the measurable results produced by this action.]

For Objective 1, each media priority (listed in Appendix 1) should be considered a work component. Where the Region feels that additional information beyond the media priorities is needed to adequately

cover their program, Regions should feel free to add details to provide a more complete discussion. [An example write-up for an activity under Objective #1 is provided in Figure 1].

The Region should also discuss its overall approach to meeting the objective using appropriate tools to achieve maximum compliance, highlighting in particular the use of compliance assistance in your Region's enforcement and compliance assurance program. At the end of this section, the Region should provide a specific list of compliance assistance activities they are undertaking in FY 95.

For Objective 2, Regions should include all proposed commitments for targeted measures (as described in section III.) under the former STARS. For reporting purposes, please attach summary charts or reference pages in attached enforcement and compliance assurance sections of the media specific annual planning documents (i.e., MOA, RIP).

For Objective 3, Regions should provide a brief narrative discussion of their targeting methodologies. Regions should specifically discuss which of these innovative approaches they utilize and should provide detail for the strategies identified. For each identified strategy, a more detailed description of work components (activities) that will be conducted to meet the objective should be included. [An example write-up for Objective #3 is provided in Figure 2.]

For Objective 4, Regions should provide a brief narrative discussion of their efforts to move toward measuring results and impacts. The Region should describe its commitment to develop their own measures projects; to support development of improved or new measures of success; to participate in efforts to collect information needed for new measures; and to participate in pilot projects to actually implement new measures. A more detailed description of activities that will be conducted to meet the objective should be included when appropriate.

ii. Regional Specific Issues - Optional

This section, which is optional, allows the Regions an opportunity to present management issues to Headquarters. It should include impediments that affect the ability of the Region to operate effectively in accomplishing its goals.

iii. Resource Utilization Summary – FTE and State Grant (Including investments/disinvestments)

We are requesting that the Regions provide summary information on utilization of enforcement and compliance assurance FTE and state grant funds.

For FTE, we need to know how many FTE, both federal and Senior Environmental Employees (SEEs), are allocated to four broad functional areas (compliance assistance/promotion, compliance monitoring, enforcement action, and program management) for each of the single-media and multi-media programs of the Region. We would like each Region to submit an FTE Utilization summary for each program area. Please designate separately the SEE and federal FTE. An explanation and example of the FTE Utilization Summary appears in Table I.

For each "Change in Level" indicated on the FTE Utilization Summary, we would like you to provide a summary explanation for the investment/disinvestment. An example of this explanation of investments/disinvestment is provided in Figure 3.

For state grant funds, we are requesting a breakout of grant funds by function, and the chart to be completed for each State is provided in Table II. We understand that FY 95 programs are already negotiated, and thus we are trying to capture a "snapshot" of grant fund allocation rather than shift funds at this late date. For each state, we are asking that you use your best professional judgment to allocate the enforcement portion of those state grants across four functional areas and also indicate the amount of the total grant (i.e., enforcement and non-enforcement).

C. REPORTING REQUIREMENTS

Regions are to submit concise reports at mid-year and end-of-year to reflect progress made and issues unresolved. Where an OECA Regional evaluation coincides with the timing of a mid-year or end-of-year report, Headquarters will discuss with the Region the need for any additional information beyond the Regional evaluation report.

A. Mid-Year Report

- The report should highlight their progress in shifting resources between investment/disinvestment areas.

- The report should discuss where media-specific priority commitment levels, initiatives, and MOA goals/objectives are either being significantly exceeded, or Region is experiencing great difficulty in meeting them.

  -Reasons for success/impediments should be clearly defined.

- This information should be provided in a narrative form, with separate headings for each commitment, initiative, or goal being addressed.

- Impediments, success stories, and investment/disinvestment updates should be provided in separate sections.

- Mid-year reports (not to exceed 15 pages) should be submitted to the Planning Branch, EPTDD, OC by May 1, 1995.

B. End-of-Year Report

- Detailed reporting guidance will be provided in the near future identifying time frames, format and required elements.

Example Description of OECA Objective #1 Write-up
(Taken from Toxics Priorities)

Activity:

EPCRA Section 313 non-reporters and data quality

HQ Support:

No additional support is required from HQ.

Regional Commitments & Activities:

Currently, the Region estimates that it will have conducted 34 - 38 inspections in FY 94, 4 of which were data quality (DQ) in conjunction with interdivisional multimedia inspections. This is an increase of 4 - 8 in the fourth quarter inspections made possible by the completion of training of our second TRI inspector. The data quality inspections have resulted in a high violation rate for that category. A pilot study with a new TRI data quality analysis technique targeting xylene releases was begun with state. This methodology has uncovered several major violations without the necessity of an initial on-site visit. Region _ conducts training to industry on the last Wednesday on each month and twice in June (13 total). An additional 14 training sessions were conducted in Region's states. In an effort to increase outreach to citizens, we expect to conduct a Train-the-Trainers workshop for Librarians on the availability and use of TRI data.

Due to the continued complexity of the Form, Region _ plans to maintain the current industry outreach effort and promote decentralization of the TRI outreach program to the States. We plan to expand Form R workshops to include Federal Facilities. We also plan to increase the inspections in FY 94 up to 50 inspections. We anticipate conducting 5 DQ inspections with an increase in DQ activities by application of our new DQ Analysis Method to the rest of Region 6 and other volatile organic compounds.

For FY 95 the Region will conduct monthly training to industry at the Regional office, 14 training sessions in the Region's States, and 50 inspections (5 of which will be DQ) evenly divided by quarter. Activities will be reported through STARS and EPCRA newsletters.

Figure 1 - Example Description of OECA Objective #1 Write-up

Example Description of OECA Objective #3 Write-up
(For Innovative Targeting Strategies)

Narrative Description:

The Region has begun to integrate several innovative targeting approaches into its enforcement and compliance assurance programs. First, all media programs in the Region will target 20% of its inspections using the IDEA System. The Region will target those facilities that have had significant noncompliance in any media and appear listed in more than one media database. The Region will concentrate this multi-media inspection activity within the sensitive ecosystem identified in our comparative risk project conducted with the state of _____.

Additionally, the Region established an environmental justice targeting task force. The task force has identified, by zipcode, sensitive populations in all the states of the Region. This information has been made available to all the states and the media compliance programs. For FY 95, the Region will begin to identify the predominant industrial sectors that operate within the environmental justice areas. It is anticipated that 10% of all inspection activities will be focused in those areas identified as having environmental justice concerns.

Activity:

Multi-media Inspection Targeting

HQ Support:

The Region will rely primarily on the IDEA System for its Multi-media Targeting. Headquarters must continue to update the system with the most accurate data. Headquarters will need to conduct one training course for Regional staff and provide assistance as needed.

Regional Commitments & Activities:

The Region will utilize the IDEA system to develop target lists for all its programs. The criteria that the Region will use is to target those facilities that are subject to more than one environmental statute and have been in significant non-compliance in the last five years. Although, a full blown multi-media inspection will not be conducted at each facility, the facilities will be chosen using multi-media data. These inspections will be concentrated in the _____ geographic area, as this was identified by the Region and xyz state as a sensitive ecosystem.

For FY 95, the Region will target 20 % of all its program inspections through the application of the IDEA system. In addition, these inspections will be targeted in the _____ geographic area. The Region will measure success of this targeting method by an increase in compliance rates within this area.

Figure 2 - Example of Description of OECA Objective # 3 Write-up

Example Description of OECA Objective #3 Write-up cont.
(For Innovative Targeting Strategies)

Activity:

Environmental Justice Inspection Targeting

HQ Support:

[identify needed support for Environmental Justice targeting here]

Regional Commitments and Activities:

[identify Regional activities and commitments to implement this activity; be as specific as possible; discuss flexibility here if appropriate]

Figure 2 - Example of Description of OECA Objective # 3 Write-up cont.

FTE UTILIZATION SUMMARY

Each Regional plan should identify the resources dedicated to the principal enforcement functions that meet the OECA's strategic enforcement objectives. The following format should be used for each single-media and multi-media program:

(Air) **Program**

FTE Utilization Summary

Functions	Resource Level FY 94	FY 95	Change in Level
At a minimum the Region is expected to address these areas and add more if needed to more fully explain their program.	*Please indicate the FY 94 resource level (FTE), both federal and Senior Environmental Employee (SEE), devoted to the identified function*	*Please indicate the expected FY 95 resource level (FTE), both federal and SEEs, devoted to the identified function*	*Please indicate amount of disinvestment/investment of resources. Please attach a detailed description of trade-offs.*
Compliance Assistance/ Promotion *(e.g., Outreach Activities[1], Voluntary Compliance[2])*			
Compliance Monitoring *(e.g., Inspections, Monitoring, and Sampling[3])*	*For Example:* 20 FTE 5 SEE	15 FTE 5 SEE	(5 FTE) 0
Enforcement Actions *(e.g., Case Development and Management[4])*			
Program Management *(e.g., Program Administration and Support, State Program Outreach and Oversight[5], Use/Maintain Enforcement Data Systems)*			

Clarification of Activities Under Each Function

1. Outreach Activities - Congress, State and local, Federal Agency, Public, Media, Regulated Community

2. Voluntary Compliance - Outreach/Education directed toward voluntary compliance; technical assistance to industry, pollution prevention; non-regulatory compliance incentives

3. Inspections, Monitoring, and Sampling - Inspection planning and coordination; Compliance inspections including state oversight; Monitoring, sampling and emissions testing; Lab support; Compliance monitoring and tracking

4. Case Development and management (Administrative and Judicial) - Technical and legal case developments; Case screening, precedent-setting cases; Enforcement Response selection; Criminal case development; Referral and filing; Litigation, discovery, motions practice; pre- or post-filing negotiations; Settlement finalization; Consent agreement/decree tracking; Case closure; PRP searches;

5. State Program Outreach and Oversight - State program delegation reviews; State program oversight; Grants administration; State program communication, joint planning and implementation activities.

Explanation of Disinvestments/Investments (as noted in Chart)

ACTIVITY: [Briefly describe the specific activity or related groups of activities invested or disinvested in as reflected on the Resource Utilization Summary Table] *Ex. The Region is shifting 5 FTE from the Air Inspection program to perform water inspections and case support within the Region's Water Enforcement Unit.*

OBJECTIVE: [Briefly describe the OECA objectives related to this activity.] *Ex. The Region is using a targeted approach for inspections to support high priority geographic initiatives.*

COMMITMENT: [Specifically define the outputs or commitments that the Region agrees to meet and include appropriate timetables associated with the outputs. In addition, describe the impact of the related disinvestment.] *Ex. The Region will perform 30 water inspections and will develop at least three significant water enforcement actions. This will result in a decrease in the air inspection outputs. We will reduce our air inspection commitments by 45 inspections.*

MEASURES: [Progress will be reported through traditional measures as well as new measure currently under development. All "trade-off" activities must have measures that measure the effectiveness of the activity. For those activities not monitored through established reporting systems, progress will be reported in Mid-year and/or End-of Year Reports] *Ex. The traditional measures of inspections and enforcement actions will be used to assess progress. Also, inspection data will direct enforcement action(s) where appropriate to protect high risk areas and sensitive ecosystems from further degradation. The data from the inspection will also contribute to our data integration and retrieval capabilities and allow expanded use of the data.*

Figure 3 - Explanation of Disinvestments/Investments

STATE GRANT CHART

The following chart will allocate Federal grant dollars across the common enforcement functions. Do not add in State match. Also, most of these grants are not 100% enforcement; therefore, please indicate how much per state is directed to enforcement out of the entire state grant, and then allocate that amount across functions. We anticipate that, depending upon the detail of state work programs, Regions will need to use their best professional judgement to crosswalk state work programs with this chart. We also understand that FY 95 work programs are already negotiated, so this chart will be a reporting mechanism, it is not intended to change/shift funding.

STATE: _____

ENFORCEMENT RELATED STATE GRANTS

FUNCTION	106	UIC	PWSS	RCRA	AIR	PEST.	TOXICS	OTHER
Compliance Assistance/ Promotion								
Compliance Monitoring								
Enforcement Actions								
Program Management								

ENFOR GRANT/
TOTAL GRANT* * indicate dollars in thousands please

APPENDIX 1

FY 95 MEDIA SPECIFIC PRIORITIES/INITIATIVES

The following section, drawn from media-specific guidances, identifies priorities and initiatives. In many instances, a brief description of the priority is provided. Regions should refer to the specific guidance document referenced to obtain more detailed information, and to ensure that other aspects of media-specific guidance is being followed. In FY 96, enforcement and compliance assurance guidance for all media will be covered in the OECA MOA guidance.

When developing the Regional MOA, Regions should consider the appropriate balance between base program activities and media priorities and initiatives, and discuss the rationale behind their choices. While we expect Regions to participate in these national initiatives, we also recognize that not all Regions will participate in all initiatives (for example, only certain Regions have a vested interest in the Mississippi River Initiative).

A. Water (also refer to Office of Water FY 94 Operating Guidance, dated March 1993)

Priorities

- Regions and states should target compliance and enforcement efforts to support the priority watershed approach, particularly those streams posted as unfit for fishing and swimming.
- Regions and States should pursue alternative approaches, using a mix of compliance assistance and enforcement, when dealing with nontraditional enforcement problems, such as stormwater, sludge, feedlots, combined sewer overflow (including dryweather flows) and small system compliance.
- Regions and states should target inspections, focus on accurate and complete reporting, and take enforcement actions against nonreporters and facilities reporting fraudulent or incorrect data.
- Regions and states should continue to identify noncompliance among pretreatment publicly owned treatment works (POTWs) and industrial users contributing toxic pollutants into public sewers.
- Regions and states should aggressively implement and enforce the Surface Water Treatment Rule to ensure that unfiltered systems are on an enforceable schedule to install filtration, and to ensure that filtered systems meet requirements.
- Regions should work with states to undertake increased underground injection control (UIC) enforcement efforts, particularly for shallow wells, including expediting remedial actions and obtaining higher penalties.
- Regions and states should implement and enforce the Lead and Copper Rule, with particular attention to issuing administrative orders (AOs) to large systems which are not implementing their corrosion control plans, and any systems where monitoring indicates noncompliance.

Initiative

- Development of Wetlands Enforcement Management System

Development of this system would involve incorporation of a penalty policy, a model litigation referral package, and a method for prioritizing noncompliance and determining the appropriate enforcement response for wetlands violations.

B. Federal Facilities (refer to OFFE's 1992 10-Point Strategic Plan)

Priorities - also refer to other media specific priorities/initiatives

- Enforcement Cases: Continued emphasis on enforcement casework and regulatory programs, especially RCRA and its Federal Facility Compliance Act Amendments.

- Enforcement Policy: Continued work on major policy efforts, including the Federal Facility Policy Group, the Federal Facilities Steering Committee, and Clean Water Act. Policy or statutory changes resulting from these efforts may require shifts in activities during the fiscal year.

- Multi-media Enforcement: Continued emphasis on multi-media inspections. During FY 95, results of the FY 93-94 multi-media initiative will be assessed and efforts made to institutionalize a continued federal facility component in multi-media enforcement activities.

- Environmental Stewardship: Continued efforts to assist federal agencies in complying with environmental requirements and becoming environmental justice leaders. For example, FY '95 will see implementation of the Civilian Federal Agency Compliance Program Improvement Strategy, and continued implementation of Executive Order 12856 including the Green Government Environmental Challenge Initiative, continued innovative technology programs, and the Federal Facilities Roundtable.

- Environmental Tracking, Monitoring, and Analysis. Continued implementation of the Federal Facilities Hazardous Waste Compliance Docket, progress in improving the A-106 budget process, and major implementation of the Federal Facilities Tracking System (FFTS).

C. **Air (refer to FY '95 Office of Air and Radiation Program-Specific Guidance, dated August 9, 1994, especially pgs. 67-79)**

Priorities

o Significant Violators (SV)/Timely and Appropriate (T&A) Implementation:

-implement guidance that defines timely and appropriate enforcement responses for significant violators.
-assist states in identifying, resolving, and prioritizing significant violations, using all available enforcement tools.

o Federal Enforcement Activity:

-prepare and track civil referrals and administrative cases.

o Compliance Monitoring Strategy:

-ensure states identify in Air Facility Subsystem (AFS) sources targeted for inspection.
-assist states in developing and implementing state inspection plans consistent with the strategy.

o Data Integrity:

-ensure states input into AFS and NARS inspection, compliance and enforcement information; track regional and state information.

o Pollution Prevention:

-take enforcement actions, provide compliance assistance and training to enhance pollution prevention activities, inclusion of pollution prevention/innovative technology into injunctive relief and SEPs as appropriate.

o Federal Programs:

Acid Rain Implementation

-review opt-in applications and issue permits
-assist states in developing their permit programs, ensure that acid rain requirements are incorporated in states' Title V permits.
-enforce acid rain permits and continuous emissions monitoring (CEM) certification requirements

Stratospheric Ozone Protection

-enforce servicing of motor vehicle air conditioners and the service, repair or disposal of class I substances used in appliances and industrial process refrigeration
-enforce ban on sale of nonessential products containing chlorofluorocarbons
-enforce restrictions on the importations of certain ozone depleting chemicals

o New Rules, Guidance and Review - Assist in the development and implementation of Agency policy on Enhanced Monitoring, Field Citations, Monetary Awards, Citizen Suits, accidental releases under the general duty clause, and enforcement of State Implementation Plans (SIP) and MACT Standards:

C. **Air (refer to FY '95 Office of Air and Radiation Program-Specific Guidance, dated August 9, 1994, especially pps. 67-79), continued**

Enforcement of MACT Standards

-begin to enforce the dry cleaning MACT, the Coke Oven MACT, and the Hazardous Organic NESHAPS MACT.

Operating Permit Approval

-review state and district operating permit program submittals to determine each program's compliance with requirements under Part 70

o Compliance Planning and Oversight Guidance/Enforcement Response Plan (ERP) - ensure states develop ERP'S consistent with guidance.

o Rule Effectiveness:

-submit commitments for studies, study protocols and final reports to Headquarters.
-submit post-study audits within one year of completion.

o Lead Enforcement:

-as part of the Lead National Ambient Air Quality Standards (NAAQS) Attainment Strategy of August 1990, EPA has determined to enforce current emission limitations for all strategy sources..

Initiatives

o National case development of particle board and plywood industries.
(carryover from FY 94)

o Industrial/Commercial Boilers Enforcement Initiative

To address serious compliance/enforcement problems with the New Source Performance Standards (NSPS) for boilers constructed after June 19, 1984, that have a heat input greater than 29MW (100mmBtu/hr), and boilers constructed after June 9, 1989, that have a heat input between 2.9MW and 29MW.

D. Toxics (refer to draft FY '95 MOA Guidance for Pesticides and Toxics, dated July 28, 1994)

Priorities

- Cooperative Agreements - emphasis on quality implementation, oversight, and evaluation for toxics.

- Emergency Planning and Community Right to Know Act (EPCRA) section 313 national priorities are data concerns and non-reporters. Other EPCRA non-313 violations should be pursued where appropriate.

- The national Core Toxics Substances Control Act (TSCA) priorities focus on pollution prevention and risk reduction and are as follows:

  -parties to 5(e) risk-based orders
  -companies which did not participate in the TSCA 8(e) compliance audit program (CAP)
  -non-submitters of Pre-manufacture Notices
  -parties subject to Significant New Use Rules

- Asbestos abatement and/or asbestos worker protection - highest priority for asbestos inspections.

- Polychlorinated Biphenyls (PCBs): high-risk, low compliance PCBs are of primary concern. Existing PCB compliance monitoring enforcement resources should be directed toward implementation of PCB 2000 strategy.

- PCB compliance monitoring priorities include:

  - inspections at disposal and commercial storage facilities.
  - participation in the PCB phaseout.

Initiatives

- TSCA section 5(e) worker exposure initiative.

- TSCA section 8(e) CAP Non-participant enforcement initiative.

- Imports/Exports Transboundary initiative - reduction of environmental and health risks created by transboundary shipments of chemicals in violation of TSCA, FIFRA, and international treaties.

E. Pesticides (refer to draft FY '95 MOA Guidance for Pesticides and Toxics, dated July 28, 1994)

Priorities

- Cooperative Agreements - emphasis on quality implementation, oversight, and evaluation for pesticides.
- Worker Protection - Regions should continue to emphasize inspector training, compliance assistance and outreach, and enforcement of worker protection standard label requirements and generic worker protection requirements.
- Special Action Chemicals - Regions should continue to provide necessary field support to follow up on specific cancellation/suspension orders which significantly change a product's labeling or use pattern.
- Pesticide Infrastructure - improvement of program implementation and effectiveness through enhancement of data systems, inspector training, and case development training.
- SEP's - incorporation of supplemental environmental projects in settlement of pesticide enforcement cases.

Initiatives

- Worker Protection Compliance Initiative - phase 1 focuses on enforcement of worker protection standard labeling requirements. Phase 2 focuses on use of worker protection products, both compliance assistance efforts and enforcement actions during the latter portion of FY '95 and the beginning of FY '96.
- Imports/Exports Transboundary Initiative - reduction of environmental and health risks created by transboundary shipments of chemicals in violation of FIFRA, TSCA and international treaties.

F. RCRA (refer to FY 94 and FY 95 RCRA Implementation Plans, dated April 2, 1993 and May 19, 1994, respectively)

Priorities

- Combustion - BIFs and Incinerators
- Waste Minimization Activities:

  -inclusion of waste minimization activities as supplemental environmental projects (SEPs) in case settlements, with a focus on environmental justice, where applicable.

- Statutory Compliance Priority Inspections:

  -federal Transport, Storage and Disposal Facilities (TSDFs)
  -Land Disposal Facilities (LDFs) not inspected in FY 94
  -commercial TSDFs

- Other Priority Inspections:

  -CME or O&M at all new or newly regulated LDFs
  -combustion facilities that were classified an high priority violator (HPV) in FY 94
  -combustion facilities that never received an in-depth inspection in FY 94.

- Federal Facilities Compliance Act - Federal Mandates
- Groundwater Monitoring Inspections
- Non-notifiers identified through tips, complaints, or investigations.
- Address facilities that have remained in significant non-compliance for extended periods of time.
- Land disposal facilities

Initiatives:

- RCRA's industry-specific initiative, based on recommendations of the RCRA enforcement targeting committee.
- RCRA's initiative to support the Administrator's waste minimization strategy.

G. **Remediation (Superfund, RCRA Corrective Action, Oil Pollution Act (OPA) & Underground Storage Tanks (UST)/Leaking Underground Storage Tanks (LUST)**

Priorities

- Cost Recovery Sites Addressed - In order to assure that Superfund dollars are returned to the trust fund, Regions must target all Statute of Limitations (SOL) cases expiring on or before 3/30/96 with costs greater than or equal to $200,000. Flexibility is available for SOL cases between 11/15/95 and 3/21/96 if non-settler or high dollar cases can be brought instead.

- De Minimis/De Micromis - To reduce third party litigation and reduce private party transition costs, early settlements with small volume contributors will continue to be a high priority.

- Enforcement First - In order to maximize the number of cleanups and reduce the number of cases requiring costly litigation, Regions are strongly encouraged to maximize Principal responsible party (PRP) participation upfront in both the removal and remedial programs (70% remedial, 30-35 removal). This will be a measure in FY 95. The key areas of emphasis are early initiation of PRP searches and negotiations with PRPs to maximize PRP conducted response actions.

- Cleanup Pace - In order to assure that the cleanups are conducted timely, negotiation completions will be targeted in FY 95.

- RCRA Corrective Action (refer to RCRA Implementation Plans cited in previous sections).

- Collect penalties for unauthorized discharges of oil or certain hazardous substances in violation of Section 311 (b) of the Oil Pollution Act.

- Remediate sites where there is an actual or threatened release of oil or a hazardous substance that may be an imminent and substantial threat to the public health or welfare.

- Remediate sites with leaking underground storage tanks (state lead).

- Negotiate federal facility IAGs pursuant to Comprehensive Environmental Response Compensation and Liability Act (CERCLA) Section 120.

Initiatives

Superfund Reforms:

- each site will be considered for ADR efficiencies
- state and federal mixed funding will continue to be piloted

- RCRA Corrective Action's Stabilization Initiative which involves focusing resources on interim actions to achieve near term environmental results at facilities with the most serious problems.

- Environmental Justice and Community Involvement - Citizens living near Superfund sites must receive equal protection under CERCLA. Accordingly, communities must be guaranteed early and effective ways to participate in the Superfund cleanup process.

H. Multi-media

Priorities

- Integrate and strengthen a cross-program/multi-media perspective and capacity into all stages of the compliance assurance and enforcement planning and decision-making process, including targeting, inspections, case-screening and development, and civil and administrative enforcement actions.

- Expand use of multi-media enforcement to address violations in more than one program at single companies with multiple facilities. This includes where facilities are located within a single Region, or working in cooperation with other Regions and headquarters, where the facilities are located in different Regions.

- Expand use of multi-media enforcement approaches to address ecosystem or geographical problems and environmental justice concerns (e.g., multiple and cumulative exposures in minority population and low-income populations).

- Conduct a minimum of 2 multi-media inspections at federal facility establishments, per the Federal Facilities Multi-Media Enforcement/Compliance initiative.

Initiatives

- National multi-media enforcement case initiative against large companies, such as Fortune 500 companies.

New Multi-media Initiatives

- Common Sense Initiative

The Common Sense Initiative represents the Administrator's desire to do business differently, by regulating on a sector basis instead of on a statute-specific basis. The anticipated result is that all EPA regulations affecting a particular sector will be consistent (i.e., no redundant or conflicting requirements) and pollution prevention opportunities may be surfaced.

- Mississippi River Initiative

In FY 1995 and in subsequent years, OECA intends to enlist the Regions in addressing noncompliance exhibited by facilities along or near the Mississippi River, and its tributaries, including the Missouri and Ohio rivers. A number of Assistant U.S. Attorneys in that area have recently expressed their interest in addressing such noncompliance, and the Agency will seek to work with them and with various other agencies and departments to coordinate enforcement efforts.

Through improved coordination and targeting, this effort should yield a large number of enforcement actions filed or issued in the area by the end of FY 1995, with compliance assurance efforts also increasing. In FY 1995, the Agency also hopes to participate in the development of an interagency agreement to improve coordination and communication regarding related enforcement and compliance efforts.

H. Multi-media, continued

o Compliance Assistance Center Initiative

OECA is pursuing funding through the Environmental Technology Initiative for the purpose of establishing National Compliance Assistance Centers to provide "one-stop shopping" for several industries characterized by small businesses facing substantial multi-media regulatory requirements (potential industries include dry cleaning, printing, metal finishing, etc.). These Centers would provide comprehensive assistance to its small business community. The Centers would develop consolidated, multi-media materials on compliance requirements, pollution prevention, etc. while also developing workshops, seminars and self-auditing methodologies.

I. Criminal

o Continue implementation and emphasis on environmental justice activities and issuing cases in environmental justice communities.

o Continue implementation of the Investigative Discretion Guidance issued in FY '94.

o Multimedia criminal enforcement activities.