# CLEAN AIR ACT COMPLIANCE/ ENFORCEMENT POLICY COMPENDIUM 1996

## Volume 2
## B-1 - B-29(1)

# SECTION B

## GENERAL CLEAN AIR ACT STATIONARY SOURCE POLICIES AND GUIDANCE

SECTION B DOCUMENT 1

**Issuance of Administrative Compliance Orders in Light of Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)**

**9/26/80**

Cardinal

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

AUG 26 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Issuance of Administrative Compliance Orders in light of Harrison v. PPG Industries, Inc.

FROM: Director
Division of Stationary Source Enforcement

TO: Enforcement Division Directors
Regions I-X

The Supreme Court recently ruled that NSPS applicability determinations are "final agency actions" and, as such, are reviewable only in the Court of Appeals for the appropriate circuit pursuant to Section 307(b) of the Clean Air Act, Harrison v. PPG Industries, Inc., ____US____, 48 USLW 4585 (1980), (copy attached). In holding that final actions are reviewable solely in the Court of Appeals, the Court's decision could have an impact on more enforcement related activities than just applicability determinations. The proper venue for the review of final actions is now settled, but the question of what is a final action for purposes of Section 307 will undoubtably be the subject of future litigation. This memorandum addresses the issue as it relates to administrative compliance orders under Sections 113(a) and 167 of the Clean Air Act (hereinafter referred to as immediate compliance orders).

Sections 113(a)(1) and 113(a)(3), when read in conjunction with sections 110(i), and 111(e) and 112(c) respectively, are designed to provide an administrative means for requiring a source to immediately comply with specified provisions of the Clean Air Act. The compliance date established by these orders must be no longer than 30 days from the effective date of the order. These orders have been used to require sources to correct relatively easily remedied violations, such as deficient operation and maintenance practices, inadequate reporting, or failure to conduct performance tests. Section 113(a)(3) orders are also used to require sources to satisfy Agency requests made under Section 114 of the Clean Air Act. Sections 113(a)(5) and 167 are designed to provide an administrative means of stopping the construction or modification of sources proceeding in violation of the Clean Air Act.

The Agency and the Department of Justice have taken the position that orders issued under Sections 113(a) and 167 are not final agency actions and, therefore, are not reviewable except as pertinent in defense of an action taken under Section 113(b) to enforce the order. Because of the specific notice provision of Section 113(d) of the Act, the issuance of or approval of Delayed Compliance Orders under Section 113(d) follow the informal rulemaking procedures of 5 USC 553, and are therefore considered to be final agency actions. This position protects the issuance of an immediate compliance order from legal challenge until the Agency brings an action in the district court to enforce the order. This avoids the problem of pre-enforcement review of Agency actions which may have the result of hampering further enforcement activities.

Thus, the Agency and Department are prepared to continue to argue that immediate compliance orders are not final agency actions. At least one Court of Appeals has upheld this position.[1] However, other sources are currently challenging,

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1/ Lloyd A. Fry Roofing Co. v. U.S.E.P.A. 554 F.2d 885, (8th Cir. 1977), (Judicial review of abatement order under Section 113(a)(1) on grounds of technological or economic feasibility is inconsistent with the enforcement mechanism of the Clean Air Act, and contrary to legislative history).

The following cases have also addressed the issue of pre-enforcement review under Title I of the Clean Air Act:

a. West Penn Power Co. v. Train, 552 F.2d 302 (3rd Cir. 1975), (Decision to enforce NOV is discretionary and hence unreviewable under the Administrative Procedure Act (APA), 5 USC 701(a)(2); issuance of NOV is not final agency action, hence unreviewable pursuant to APA, since it may or may not be followed by a compliance order or civil action, 5 USC 704). But see, West Penn Power Co. v. Train, 538 F.2d 1020 (3rd Cir. 1976), cert. den. 426 U.S. 947, reh. den. 429 U.S. 873 (Dictum: holding of West Penn I not dispositive of question of reviewability of compliance order).

b. Union Electric Co. v. E.P.A., 593 F.2d 299 (8th Cir. 1979), (NOV is procedural prerequisite to abatement order and not reviewable on motion for temporary stay of enforcement).

c. Philadelphia Electric Co. v. Costle, No. 78-4170, (E.D. Pa. 1978), (NOV reviewable on purely legal issue of effect of 1977 Clean Air Act Amendments on pre-existing consent order, pursuant to 28 USC §1331).

d. Chrysler Corporation v. E.P.A., No. IP 77-371-C, (S.D. Ind. 1979), (NOV is final agency action and reviewable on purely legal issue of applicability of regulations to source, pursuant to 28 USC §1331). Accord, Ashland Oil, Inc. v. McDonald, No. C79-338 (N.D. Ohio, order denying motion to dismiss dated June 11, 1980).

and can be expected to challenge, immediate compliance orders by asserting that they are final actions and seeking the jurisdiction of a Court of Appeals under the PPG decision. Thus, prior to the issuance of an immediate compliance order, the Regional Office should be sensitive to the possibility that a case raising this issue, and the merits of the order itself, will be initiated by the source.

Regardless of how a particular Court of Appeals decides the issue of whether the immediate compliance order is a final action and thus reviewable, the mere fact of the challenge can divert Agency resources from enforcement to the defense of a collateral action. This may hamper enforcement, especially if a subsequent enforcement action in the district court is stayed pending resolution by the Court of Appeals.

For this reason, while an order can be effective in appropriate circumstances, consideration should be given to alternative courses of action as well. An enforcement action in the district court, including the filing of a motion for a preliminary injunction, may be the most appropriate response in some cases, especially where a source is constructing in violation of new source requirements. The Department of Justice has committed to expedite its review of cases involving this type of violation, and to assist the Agency in insuring that delays in the filing of such actions are minimized.

A second enforcement tool that has been successfully used is the show cause conference. Under this procedure, a source is notified by letter that the Regional Office has evidence indicating that it is in violation of the Act, and offers the source an opportunity to meet with the Region in order to demonstrate why a judicial action should not be pursued against the source. This serves the purposes of informing the source of the Agency's position, and initiates a meeting where measures to remedy the violation can be discussed. If this procedure does not result in an agreement leading to prompt resolution of the violation, the Regional Office should proceed with a judicial enforcement action.

If, after considering the above factors, a Regional Office determines that an immediate compliance order is appropriate, I recommend that the Regional Office prepare for the possibility of a challenge in the Court of Appeals by carefully developing an administrative record supporting the action. An adequate administrative record will be important not only if the particular Court of Appeals rules that the order is a final agency action,

but also if a court postpones a decision on this issue pending review of the record supporting the order.[2] Thus, prior to the issuance of the order, the administrative record should contain evidence of each element of the applicability of the relevant statutory and regulatory requirements, and of the violation. Where the record contains some evidence favorable to the source, the record should also explain that the evidence was considered and why it was rejected, i.e., what evidence favorable to the Agency's position outweighs or refutes the evidence favorable to the source.

If you have any questions with regard to this issue, please feel free to contact me at 755-2550 or Edmund J. Gorman of my staff at 755-2570.

Edward E. Reich

Attachment

[2] In Hooker Chemical Co. v. E.P.A., No. 79-2194 and Tenneco Chemicals, Inc. v. Beck, No. 79-2567, the Court of Appeals for the Third Circuit referred the action to a merits panel to review the orders.

SECTION B DOCUMENT 2

**Issuance of Section 113(a) Orders to NSPS Sources for Failure to Conduct Performance Tests**

02/23/81

FEB 23 1981

MEMORANDUM

SUBJECT: Issuance of Section 113(a) Orders to NSPS Sources for Failure to Conduct Performance Tests

FROM: Director
Division of Stationary Source Enforcement

TO: Louise D. Jacobs
Director, Enforcement Division
Region VII

This office has received copies of the administrative orders issued by your office pursuant to Section 113(a) of the Clean Air Act (the Act) to the A. G. Sherwood Construction Co. of Independence, Kansas (Dec. 22, 1980), and the Beachner Construction Co., Inc. of St. Paul, Kansas (Nov. 26, 1980). Those orders required the companies to conduct performance tests within 30 days of the effective dates of the orders and to demonstrate compliance with the applicable New Source Performance Standard (NSPS), or to cease operation.

While the use of Section 113(a) orders to require performance tests is an effective enforcement tool, we believe that requiring shutdown as a sanction for failure to conduct the test should be judiciously applied. We believe that shutdowns should be required only in compelling circumstances because the burden of shutdown falls, inpart, on the employees of the company, who are not culpable in causing the violation. We recommend that the Regional Office take a hard look at the facts and equities in each case before ordering shutdown.

In determining whether requiring shutdown is appropriate the Regional Office should be sensitive to potentially mitigating circumstances. In addition to recognizing that the burden of shutdown falls in part on innocent employees, the Regional Office should consider the environmental impact of emissions from the source, both in terms of their nature and amount. In connection with this consideration, it may be appropriate to make a preliminary determination of the probable compliance status of the source with the applicable emission limitation. For example, it would be appropriate to compare the control equipment to be utilized (albeit, not tested) by the subject source with control equipment and strategies at similar sources which have (or, perhaps, have not) demonstrated compliance with the emission limitation.

We believe that it is also important to analyze the reasons for the source owner's failure to perform the required test. Although the NSPS regulations do not provide for an extension of the 180 day from startup limit for performance testing, some flexibility may be appropriate in certain circumstances, e.g., force majeure situations. Indeed, the Regional Office in the past has recognized the need to provide additional time in which to conduct the performance test. Thus, in Prairie States Construction Co. and Shilling and Aubel, Inc., the Region agreed to consent decrees rather than issue shutdown orders.

In sum, because shutdown is the strongest civil sanction available under the Act, EPA must be able to defend its use by reference to the factual and equitable circumstances in each case. Engaging in this analysis enables the Agency to defend more effectively its actions when charged with discriminatory applications of policy.

If you have any questions with respect to this issue, please do not hesitate to contact me at (FTS) 755-2550, or Edmund Gorman of my staff at (FTS) 755-2570.

Edward E. Reich

bcc: Ed Gorman
Myra Cypser

SECTION B DOCUMENT 3

**Definition of "Continuous Compliance" and Enforcement of O & M Violations**

06/21/82

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

OAA
B03

JUN 21 1982

OFFICE OF
AIR, NOISE AND RADIATION

MEMORANDUM

SUBJECT: Definition of "Continuous Compliance" and Enforcement of O&M Violations

FROM: Kathleen M. Bennett
Assistant Administrator for Air, Noise and Radiation

TO: Directors, Air and Waste Management Divisions
Regions I-IV, VI-VIII and X

Directors, Air Management Divisions
Regions V and IX

The purpose of this memo is to provide you with some general programmatic guidance as to the meaning of the term "continuous compliance" and the role of operation and maintenance (O&M) requirements in assuring that continuous compliance is maintained. Of course, source specific guidance on O&M measures which can assure continuous compliance is an essential part of this program and this memorandum is not intended to substitute for such guidance. As you know, DSSE has undertaken a number of initiatives related to the continuous compliance effort and we hope to discuss the progress of those efforts with you at the upcoming workshop at Southern Pines. DSSE will be forwarding to you an updated summary of those activities prior to the workshop. However, given the continuing attention being given to "continuous compliance," I think it would be helpful to have a common understanding of what that concept entails.

In the strict legal sense, sources are required to meet, without interruption, all applicable emission limitations and other control requirements, unless such limitations specifically provide otherwise. However, of primary concern to the Agency are those violations that could have been prevented, through the installation of proper control equipment and the operation and maintenance of that equipment in accordance with proper procedures. We believe the concept of continuous compliance is essentially the avoidance of preventable excess emissions over time as a result of the proper design, operation and maintenance of an air pollution source. This includes avoidance of preventable instances of excess emissions, minimization of

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emissions during such instances, and the expeditious termination of any instances which do occur.

In determining the appropriate enforcement response to a violation, one factor the Regions should consider is whether the source had in place an active program designed to maintain continuous compliance. Such a program would normally involve one or more of the following elements: continuous or periodic self-monitoring of emissions; monitoring of operating parameters such as scrubber pressure drop, incinerator combustion temperature or flow rates; maintenance of a spare parts inventory; maintenance of spare control device modules; and procedures designed to correct the types of violations that are most likely to occur. Evaluating a violator's O&M program is a necessary step in determining the type and degree of relief that an enforcement action could be expected to achieve.

Documentation of avoidable departures from proper procedures as just discussed may be used not only as supporting evidence in cases involving emission limit violations, but as primary evidence in cases involving violations of O&M requirements specified in permits and regulations. As the Agency continues to place more emphasis on O&M requirements in the context of national standards, and to encourage States to develop O&M requirements, the enforcement program must be adapted to address violations of these requirements. A violation of specified O&M requirements, even in the absence of documented emission limit violations, can be an appropriate trigger for EPA enforcement response.

In conclusion, evaluation of a source's continuing compliance program would be useful both in determining the appropriate Agency response to an emission limit violation, and in assessing the source's compliance with specified O&M requirements.

If my staff can be of assistance in evaluating specific cases, please feel free to call John Rasnic at 382-2826.

SECTION B DOCUMENT 4

Guidance on Use of Section 303 of the Clean air Act

09/15/83

CAA
B04

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

SEP 15 1983

MEMORANDUM

SUBJECT: Guidance on Use of Section 303 of the Clean Air Act

FROM: Edward E. Reich, Director
Stationary Source Compliance Division

Michael S. Alushin
Acting Associate Enforcement Counsel for Air

TO: Directors, Air Management Divisions
Regions I, V, and IX

Directors, Air and Waste Management Divisions
Regions II-IV, VI-VIII, and X

Regional Counsels
Regions I-X

Attached are two documents regarding procedures to be followed during emergency situations covered by Section 303 of the Clean Air Act. One is the final guideline explaining the statutory requirements of Section 303 and the relief available in a legal action taken under that section. The second is a manual outlining the services that can be provided through the contract mechanism of the Stationary Source Compliance Division of OANR providing technical support in any emergency episode that arises.

After we distributed draft versions of these documents to you last April, we received some comments and have tried to incorporate them into the final guidance being distributed today. Thank you for all the comments we received.

We hope that this guidance will encourage greater use of Section 303. If you have any questions about these materials, please contact Mark Antell at 382-2883 concerning the technical manual or Judy Katz at 382-2843 concerning the legal guidance.

Attachments

INITIATION OF ADMINISTRATIVE AND CIVIL ACTION
UNDER SECTION 303 OF THE CLEAN AIR ACT
DURING AIR POLLUTION EMERGENCIES

The purpose of this guideline is to explain the statutory requirements and resource needs which must be met in order to take action under Section 303 of the Clean Air Act[1]/ in the event of an air pollution emergency. This guideline is directed towards both meteorological episodes (e.g., thermal inversions)

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1/Section 303, as amended in 1977 and codified at 42 U.S.C. Section 7603, reads as follows:

(a) Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and that the appropriate State or local authorities have not acted to abate such sources, may bring suit on behalf of the United States in the appropriate United States District court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other actions as may be necessary. If it is not practicable to assure prompt protection of the health of persons solely by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources). Prior to taking any action under this section, the Administrator shall consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking. Such order shall be effective for a period of not more than twenty-four hours unless the Administrator begins an action under the first sentence of this subsection before the expiration of such period. Whenever the Administrator brings such an action within such period, such orders shall be effective for a period of forty-eight hours or such a longer period as may be authorized by the court pending litigation or thereafter.

(b) Any person who willfully violates, or fails or refuses to comply with, any order issued by the Administrator under subsection (a) of this section may, in an action brought in the appropriate United States District Court to enforce such order, be fined not more than $5,000 for each day during which such violation occurs or failure to comply continues.

involving dangerously high levels of criteria or non-criteria pollutants, situations in which chronic exposure to air pollution causes endangerment by cumulative effect, and incidents involving industrial accidents or malfunctions (e.g., breakdown of pollution control devices) resulting in the release of air pollutants in hazardous concentrations.

## STATUTORY PREQUISITES

### 1. An Imminent and Substantial Endangerment to Health

The threshold prerequisite is the existence of "evidence that a pollution source or combination of sources ( including moving sources) is presenting an imminent and substantial risk of harm. It should be emphasized that endangerment means a risk or threat to human health, and that EPA should not delay action until actual injury occurs. Such delay would thwart the express intent of the Clean Air Act to protect the nation's air quality in the interest of the public health. Section 303 is a precautionary provision, aimed at the avoidance of potential harm. This is best illustrated by the House Report on the Clean Act Amendments of 1977:

> In retaining the words "imminent and substantial endangerment to the health of persons", the committee intends that the authority of this section not be used where the risk of harm is completely speculative in nature or where the harm threatened is insubstantial. However,... the committee intends that this language be constructed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing.

H.R. Rep. No. 95-294, 95th Cong., Sess. 328 (1977) (emphasis added).

There is also some judicial opinion supporting an interpretation of the endangerment standard as being merely precautionary, and permitting remedial action prior to the occurrence of any actual harm. In Ethyl Corporation v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976), the Court ruled that EPA had properly acted to regulate lead in gasoline upon finding, under Section 211 of the Clean Air Act, that lead emissions would "endanger" as requiring only a finding only a finding that lead emissions presented a "significant risk" of injury to the public. There were no findings of the presence of actual harm. In upholding the Agency's view of the "endanger" standard in Section 211, the Court explained:

> When one is endangered, harm is threatened; no actual injury need ever occur.. A

> statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. Regulatory action may be taken before the threatened harm occurs; indeed, the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optiomally, prevent, the perceived threat.

541 F.2d at 13. In Reserve Mining Company v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975), the Court had similarly interpreted an endangerment standard in the Federal Water Pollution Control Act in a case involving asbestos discharges into Lake Superior. The court stated that "Congress used the term "endangering" in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term." 514 F.2d at 528.

An important question for purposes of Section 303 of the Clean Air Act, however, concerns the effect of the modifying phrase "imminent and substantial" upon the meaning of "endangerment." In Reserve Mining, the Court stated that the "term 'endangering'... connotes a lesser risk of harm than the phrase 'imminent and substantial endangerment to the health of persons.'" 514 F.2d at 528. Accord, Ethyl Corporation v. Environmental Protection Agency, 541 F.2d at 20 n.36. This issue is particularly important to EPA's ability under Section 303 to abate suspected carcinogens, the harm from which might take many years to manifest itself.

It is our position that in order to adequately safeguard public health by being in a position to preclude an air pollution emergency at its inception, the phrase "imminent and substantial endangerment" must be interpreted to refer to an imminent and substantial risk of harm, no matter how distant the manifestion of harm may be. If there exists a non-speculative risk of harm, the agency may properly act under Section 303. This is consistent with the legislative history quoted previously, and with the established definition of "endangerment" as referring to the risk of harm, not actual harm itself. This is also consistent with the 1970 Senate Report on Section 303, which states:

> The levels of concentration of air pollution agents or combination of agents which substantially endanger health are levels which should never be reached in any community. When the prediction can reasonably be made that such elevated levels could be reached even for a short period of time--that it is that they are imminent --an emergency action plan should be implemented...

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36 (1970). Thus, EPA may properly take action to abate air emissions when a substantial risk of harm is about to arise. This is several steps prior to the occurrence of any actual harm, but is appropriate in view of the precautionary nature of Section 303.[2]

This approach is also crucial to the Agency's ability to abate emissions which are believed to be but which are yet not confirmed as dangerous to human health. In United States v. Vertac Chemical Corporation, 489 F. Supp. 870 (E.D. Ark. 1980), the Court found the chemical dioxin, widely believed but not fully proven to be hazardous, to be presenting a "reasonable medical concern over public health" and to be thereby constituting an imminent and substantial endangerment to health under Section 7003 of the Resource Conservation and Recovery Act. Id. at 885. An Agency response under Section 303 of the Clean Air Act would be appropriate in the presence of pollutants reasonably believed to be dangerous to human health. As with regard to any pollutants sought to be abated under Section 303, EPA must be prepared to document the basis of its belief in the danger of these pollutants. If the Agency can show a "reasonable medical concern" created by the suspect emissions, it will have met the "imminent and substantial endangerment" test of Section 303.

Appendix L of the State Implementation Plan regulations (40 CFR Part 51) outlines a phased emission reduction program for air pollution emergencies involving criteria pollutants. In increasing degrees of seriousness, the levels are "alert", "warning", "emergency", and "significant harm to health." The "significant harm to health" levels are levels at which actual injury occurs and are levels that should never be reached. It is not consistent with the intent of the Act for the Regional Offices to wait until the levels of "significant harm to health," specified in 40 CFR 51.16(a), are reached prior to initiating a Section 303 action. The "emergency" level is intended to be the level at which action must be taken to avoid reaching levels of significant harm. Generally speaking, it is at these designated emergency levels that an imminent and substantial endangerment, i.e., an imminent and substantial risk to public health, is deemed to exist. The "warning" and "alert" levels specified in Appendix L are designed to ameliorate situations before the emergency stage by application of moderate controls.

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2/ This permits the Agency to act to seek abatement of emissions reasonably believed to be carcinogenic but for which a harmful level, and the time for harm from such emissions to become apparent, are both uncertain.

Under certain circumstances an imminent and substantial endangerment to health may exist even though the Appendix L emergency levels have not been reached. Accordingly, the concentrations outlined in Appendix L as the "emergency levels" are only to be considered as a guide in determining when an imminent and substantial endangerment to health exists. Flexibility is essential and appropriate action must be taken pursuant to Section 303 whenever it is necessary to prevent the significant harm to health levels from being reached. For example, if review of forecasted meteorological conditions indicate that a situation is likely to deteriorate so rapidly that any action started at the emergency level in Appendix L would come too late to be effective in preventing the significant harm to health level from being reached, the Agency should act at such earlier time as is necessary to allow for enforcement action to be effective. Moreover, emergency conditions can be present even if there is no clear prediction that specified endangerment levels will be reached. An imminent and substantial endangerment to health may exist, for example, where pollutant concentrations lower than established emergency levels occur or are predicted to occur for an extended period of time.

With regard to non-criteria pollutants, sources of information on dangerous concentrations may vary. Among these are standards established by the Occupational Safety and Health Administration (OSHA) for exposure to air pollutants inside the workplace. Although not directly related to ambient air, these standards might provide a starting point for assessing the risk to the public when such pollutants, e.g., various organics, become airborne in a community. Computerized health effects data bases, such as Toxline and Chemline, might also be helpful. (These data bases are run by the National Library of Medicine and may be accessed through the EPA Headquarters or regional office libraries.) It will be necessary to gather scientific and medical data, in addition to meterological data, in order to find an imminent and substantial endangerment to public health as a result of emissions of non-criteria pollutants. The role of experts for this purpose is discussed below.

2. <u>State or Local Authorities Have Not Acted to Abate Pollution Source(s).</u>

A second prequisite to initiating a Section 303 action is that the Administrator receive evidence "that appropriate State or local authorities have not acted to abate such sources." Section 51.16(a) of 40 CFR requires that each State Implementation

Plan for a Priority I region include a contingency plan which, as a minimum, provides for taking any emission control actions necessary to prevent ambient air pollutants concentrations of criteria pollutants from reaching levels which could cause significant harm to the health of persons. More specifically, the State Implementation Plans submitted to the Administrator were: (1) to specify two or more stages of episode criteria; (2) to provide for public announcements whenever any specific stage has been determined to exist; and (3) to specify emission control actions to be taken at each episode stage. (Section 51.16(g) of the Implementation Plan regulations requires that the State Implementation Plans for Priority II regions include, as a minimum, requirements (1) and (2);) Although Section 51.16 addresses only SIP contingency plans for criteria pollutants, the requirement of State or local failure to abate applies also to conditions involving non-criteria pollutants. The issue for purposes of implementing Section 303 is at what point it becomes the duty or the prerogative of EPA to act to abate an air pollution emergency.

Prevention and curtailment of an air pollution emergency is initially the responsibility of State and local governments. EPA has secondary responsibility for taking steps to avert emergency conditions. The Regional Office's initial duty, therefore, is to observe State and local abatement efforts (e.g., monitoring implementation of an emergency episode plan) and to render assistance should a State or locality request it. The Regional Office should take action under Section 303 only if State and local action is either unsuccessful or not forthcoming, as where a State lacks adequate abatement resources or simply refuses to attempt to abate the emergency. Under such circumstances, the Regional Office may assume primary responsibility for curtailing the emergency or, preferably, render technical assistance to the State's abatement efforts.

The time allowed for State and local government to take adequate action prior to EPA's assuming primary responsibility will obviously depend on the nature of the potential or actual emergency. The more the endangerment would be increased by delay, the shorter this lead-time should be. All that is required by Section 303, however, is that State or local action be insufficient to abate or preclude the emergency conditions, and that the appropriate State or local agency be consulted in order to determine what action it intends to take, and whether the information upon which EPA intends to act is accurate. The requirement of consultation should not be viewed as an obstacle to effective action by EPA. As explained in the House Report on the 1977 Clean Air Amendments:

> The consultation requirement is in furtherance of the committee's intent that the Administrator not supplant effective State or local emergency abatement action. However,... if State and local efforts are not forthcoming in timely fashion to abate the hazardous condition, this provision would permit prompt action by the Administrator.

H.R. Rep. 95-294, 95th Cong., 1st Sess. 328 (1977). The consultation requirement is therefore not a concurrence requirement, but rather one of notification and corroboration prior to taking action. The scope of action taken by EPA should be restricted to what is necessary as a supplement to any action taken by State or local authorities, as, e.g., where a State is able to implement only portions of its SIP emergency episode plan, yet further action is needed to curtail the episode.

## RELIEF AVAILABLE UNDER SECTION 303

The foregoing statutory prerequisites apply to both the initiation of a civil action to abate an air pollution emergency and to the issuance of an order by the Administrator directly to the source of the hazardous air emissions, demanding a curtailment of those emissions. These two forms of relief--the civil action for an injunction and the administrative order--are briefly discussed below.

### 1. Injunctive Relief

Section 303 permits the Administrator to seek injunctive relief in a federal district court "upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and that the appropriate State or local authorities have not acted to abate such sources..." Pursuant to the Memorandum of Understanding between EPA and the Department of Justice, codified in Section 305 of the Clean Air Act, the action would be filed on behalf of the Administrator by the United States Attorney for the appropriate federal court district. EPA Regional and Headquarters Offices, however, have the responsibility of providing all data and evidentiary material to the Department of Justice.

As will be discussed more fully below, it is essential to a successful civil action that expert testimony be elicited, either in the form of affidavits or through expert appearances at depositions or trial, regarding the risk of harmful effects to the health of persons from exposure to the relevant pollutant. This is especially so in the case of an emergency involving a non-criteria pollutant, the harmful levels or effects of which have not already been established by EPA or other agencies. A diligent effort should be made to obtain evidence, perhaps from citizen complaints or hospital records, that the particular emission sought to be controlled has in fact already caused adverse effects to the health of some individuals. Such evidence, while not essential to a Section 303 action, could be helpful in substantiating an imminent and substantial endangerment. Among the experts to be consulted concerning hazardous pollutants and the presence and extent of any adverse health effects are physicians, epidemiologists, and toxicologists.

In addition, expert meteorological testimony is needed in order to assess the magnitude of hazardous pollutant concentrations and to pinpoint the source of the dangerous emissions, if not already known (as in an area of numerous industrial point sources), and to ascertain the expected

geographical breadth of the emergency, based upon such parameters as current and forecasted wind speed, wind direction, atmospheric stability, temperature, and precipitation.[3/] The meteorological expert may also be able to predict the duration of an emergency episode by determining the time which will elapse before changed meteorological conditions might substantially improve the dispersion of the hazardous pollutant concentrations.

Also, experts in industrial processes and pollution controls will be needed in order to explain to a court the nature of the polluting process and what abatement options are available, e.g., plant shutdown versus reduced production. In any action for an injunction, a court can be expected to provide no more relief than is necessary, and place as light a burden as possible on the emitting source, in providing for effective curtailment of the air pollution emergency. The industrial expert will thus play a crucial role in the shaping of judicial relief in a Section 303 action.

This testimony--medical, scientific, meteorological, and technical--is essential to prevailing in a Section 303 suit. The burden of proof will be on the Government, which must show by a preponderance of the evidence that the defendant is the source of air pollutants which, by their very nature or because of existing meteorological conditions, have caused harm to individuals or are presenting an imminent and substantial risk of such harm. In order to assure the credibility of this testimony, sampling personnel should be prepared to testify to the reliability and quality assurance of the air samples evaluated by the experts.

The procedure for seeking an injunction are set forth in the Federal Rules of Civil Procedure, Rule 65 (copy attached). In the event that immediate relief is needed, Rule 65 provides for temporary injunctive relief in the form of a preliminary injunction which can be obtained from a federal district court, after a hearing, in order to reduce further emissions of the suspect pollutant below emergency levels until a full trial can be held. The government should be prepared to have its experts testify in court if preliminary or permanent injunction is sought.

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3/ Atomospheric stability refers the degree of turbulence in the atmosphere.

The following should be kept in mind as elements of proof necessary to obtaining a preliminary injunction:

1. Absent immediate injunctive relief, irreparable harm will be caused by the polluting source(s); 2) this harm would outweigh any harm to the source(s) from the granting of relief requiring the source(s) to abate emissions; 3) the risk to public health is sufficient to make success on the merits and the granting of a permanent injunction likely; and 4) the public interest necessitates immediate relief. See 7-pt. 2 Moores Federal Practice para, 65.04 (1980); See also United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138. 144 (N.D. Ind. 1980).

In addition, Rule 65 provides for injunctive relief in the form of ten-day temporary restraining order (TRO), which can be granted without a hearing while a motion for preliminary injunction is prepared.[4/] Expert testimony in the form of affidavit should suffice for the purpose of obtaining a TRO.

The proof necessary to obtain a TRO is that immediate and irreparable injury will occur if injunctive relief is withheld until the defendant can be given notice and an opportunity to appear. Rule 65 implies that a hearing on a motion for preliminary injunction should take place as soon as possible after the granting of a TRO. Id., Para. 65.05-65.08; see also 4 West's Federal Forms §5297 (1970).

2. Administrative Order

Prior to the 1977 Clean Air Act Amendments, the only method of enforcement provided in Section 303 was injunctive relief from a federal district court upon a showing of imminent and substantial endangerment from air pollutant emissions. The 1977 Amendments left this authority in place and added a provision authorizing the Administrator to issue an order to a source to take steps to curtail its emissions in the event "it is not practicable to assure prompt protection of the health of persons solely by commencement of... a civil action." Within twenty-four

4/ Only once has a TRO been requested under Section 303. The incident occurred in 1971, in Birmingham, Ala. After local efforts to curtail emissions from several sources failed, a TRO was requested and granted under Section 303, requiring various process modifications and cessations.

hours of issuing the order, however, the Administrator must file a suit for injunctive relief, or the order will expire. Upon such filing, the court may then extend the life of the order pending litigation. Violation of the order may be penalized up to $5,000 per day per violation. This penalty may be sought in a civil action brought to enforce the order.[5/] Also in such an action, a source may challenge the Administrator's basis for issuing the order.

This administrative order mechanism was intended by Congress to enhance EPA's emergency response capability even beyond that provided by the TRO process previously discussed. As explained in the 1977 House Report:

> Even more prompt action may be necessary where pollution levels exceed the never to be exceeded levels without prior forecast that this may occur... The committee bill reflects the committee's determination to confer completely adequate authority <u>to deal promptly</u> and effectively with emergency situations which jeopardize the health of persons. Thus, the section provides that if it is not practicable to assure prompt protection of health solely by commencement of a civil action, the Administrator may issue such orders as may be necessary for this purpose.

H.R. Rep. No.95-294, 95th Cong., 1st Sess. 327-28 (1977) (emphasis added). The administrative order is thus an available enforcement mechanism in those instances where even a TRO might be issued too late to effectively curtail an endangerment to public health. Such situations might be those involving emissions that are hazardous even in very limited duration of exposure, rendering a TRO too late to be fully effective, or situations which, although potentially quite harmful, are expected to be of very short duration, such that the emissions would cease before the TRO could issue (e.g., the demolition of an asbestos-lined building). In such situations, the time required to gather the expert evidence in support of a TRO might defeat efforts to avert adverse public health effects, absent a more immediate enforcement mechanism.

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5/ This is analagous to the provision in Section 113(b) of the Clean Air Act for a civil action to enforce, and seek penalties for violation of, an order issued under Section 113(a) to comply with emission limitations.

The administrative order is just such a mechanism. Expert testimony is not required for issuance of an administrative order. What is needed, however, is evidence which reasonably leads the Administrator to believe that certain air emissions from particular sources are creating an imminent and substantial endangerment to public health. This evidence might be in the form of emissions data combined with adverse meteorological reports and medical bulletins. Provided the informal consultation requirement has been met, the Administrator may issue an order calling for abatement of emissions by whatever means the Administrator determines are necessary under the circumstances of the case. Because of the potential adverse economic impact of such an order upon the source, the order should require no more than what is clearly necessary to curtailing hazardous emissions. The fact that the order may only last twenty-four hours, during which time a TRO application and civil suit can feasibly be filed, and that the basis of the order may be challenged by any source subject to it in a proceeding to enforce the order, are indicative of Congress' intent that the order be immediately available although not necessarily supported by the best possible expert credible evidence.

Note that the administrative order may also be used to require additional sampling or monitoring by the suspected source with a view towards abating its emissions. This additional data can then by utilized in a subsequent civil action, if such an action is necessary to abatement. Additional sampling and monitoring may also be required of a source through the use of Section 114 of the Clean Air Act Act. Section 113(a)(3) permits EPA to issue an order to a source if its fails to comply with a requirement of 114. Such an order is not effective until the person to whom it is issued has had an opportunity to confer with EPA.

Thus, Section 114 provides a mechanism for requiring source sampling and monitoring with a much lower standard of proof of violation than that required by Section 303. EPA may issue an order requiring sampling and monitoring under Section 114 for the purpose "(i) of developing or assisting in the development of any implementation plan under section 110 or 111(d), any standard of performance under section 111, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this Act..." This is contrasted with the requirement under section 303 that EPA have evidence that a source "is presenting an imminent and subtantial endangerment to the health of persons, and that appropriate State or local auhorities have not acted to abate such sources." However,

while the standard for issuing a 114 order is lower, a 114 testing order takes longer to enforce because it must be enforced by the issuance of a 113(a)(3) order after the source has been offered an opportunity to confer.

## Delegations for Issuing Administrative Orders and Judicial Complaints Under Section 303

### I. Administrative Orders

Pursuant to Delegation 7-49, authority to issue administrative orders under Section 303 rests with the Regional Administrators and the Assistant Administrator for Air, Noise, and Radiation. The Regional Administrators must consult with the Associate Enforcement Counsel for Air before issuing such orders. The Assistant Administrator for Air, Noise and Radiation must consult in advance with the Associate Enforcement Counsel for Air and notify any affected Regional Administrator or their designees before issuing orders. Because speed is of the essence in issuing administrative orders under Section 303, the Headquarters concurrences can be issued by telephone and followed up later in writing.

### II. Referral of Civil Actions for Injunctive Relief

Pursuant to Delegation 7-22-A, all referrals to the Department of Justice of requests for civil actions for emergency TRO's must be made by the Special Counsel for Enforcement. The Special Counsel for Enforcement must notify the Assistant Administrator for Air, Noise and Radiation and the appropriate Regional Administrator when a case is referred to the Department of Justice.

# FORMS FOR OBTAINING INJUNCTIVE RELIEF

MOTION FOR TEMPORARY RESTRAINING ORDER

The United States of America, by its undersigned attorneys, by authorization of the Attorney General and acting at the request of the Administrator of the Environmental Protection Agency, moves that this Court, in order to prevent irreparable injury to the United States and its citizens, enter immediately an order to restrain temporarily the defendatns set for thi n the compalint from discharging excessive (pollutant) into the ambient air pending action by this Court on te complaint filed this day by the United States in this cause, and in support of the motion, states:

Defendants are discharging from their plants and/or installations at (city, state) _____, substantial amounts of (pollutant) , into the ambient air. Such discharges (in combination with adverse weather conditions) have caused or are contributing to, concentrations of (pollutant), in the ambient air exceedings a level of (number) (units) of (pollutant . This level presents an imminent and substantial endangerment to the health of persons.

The appropriate state and local authorities have diligently attempted to decrease the level of contamination in the atmosphere. However, defendants continue to discharge (pollutant into the ambient atmosphere causing imminent and substantial endangerment to the health of persons.

The presense of such levels of (pollutant is a present and continuing danger to human health. Unless the discharges of (pollutant are immediately restrained, the health of people in the area will continue to suffer immediate and irreparable harm.

Plaintiff further moves for said Temporary Restraining Order to be issued forthwith and without notice, on the ground that the discharge constitute and imminent and substantial endangerment to the health of persons.

Therefore, in view of the immediate danger to public health that the defendants are contributing to by the release of (pollutants) into the ambient air, plaintiff prays that the Court enter a temporary restraining order immediately.

Respectfully submitted,

_____
Assistant Attorney General

_____
United States Attorney

By _____ (signature) _____

_____
Assistant United States Attorney

_____ (signature) _____

_____
Attorney
Department of Justice
Washington, D.C. 20530
Attorneys for Plaintiff

TEMPORARY RESTRAINING ORDER

This cause came to be heard on the motion of plaintiff, upon the complaint herein and affidavits attached thereto, for a temporary restraining order; and, it appearing to the court therefrom that immediate and irreparable injury, loss and damage will result to the plaintiff before notice can be given and the defendant or his attorney can be heard in opposition to the granting of a temporary restraining order for the reason that continued levels of pollution by (pollutant) will cause irreparble damage to the health of persons, it is

ORDERED, that defendants set out in the complaint filed herein, their agents, servants, employees and attorneys and all persons in active concert or participation with them are hereby restrained from causing or contributing the alledged pollution and each defendant separately must take the following action:

(List each defendant separately and state what immediate action that defendant must take).

ORDERED, that this order expire within 10 days after entry, unless within said time it is for good cause shown extended for a longer period, and it is further

ORDERED, that plaintiff's complaint be set for hearing on preliminary injunction on (date) at (time) of that day or as soon thereafter as counsel can be heard, in the United States District courtroom in the City of _____, State of _____.

This order issued at city, state, this _____ day of (month), (year).

_____
United States District Judge

COMPLAINT
(for Civil Action)

The United States of America, by its undersigned attorneys and by authority of the Attorney General alleges that:

1. This is a civil action to enjoin the above names defendant(s) from discharging any (pollutant) into the ambient atmosphere from their manufacturing operations in the (city, state) area. Such discharges contribute to the imminent and substantial endangerment to the health of persons as determined by the Administrator of the Environmental Protection Agency. Authority to bring this action is in the Department of Justice by 42 USC 7605.

2. This court has jurisdiction of the subject matter of this action pursuant to 28 USC 1345.

3. Defendant(s) are corporations doing business in (city,) state) within the _____ District of (Federal district court).

4. During normal operation of the defendants' plants the defendants discharge (pollutant) into the ambient air.

5. The Administrator of the Environmental Protection Agency has received evidence that a combination of pollution sources, including the defendant's plants, are presenting an imminent and substantial endangerment to the health of persons of discharging matter into the ambient air.

6. The appropriate State and local authorities have diligently attempted to decrease the level of contamination in the atmosphere. However, the various sources emitting (pollutant) in significant quantities, including the defendants plants, continue to discharge (pollutant)into the ambient atmosphere to levels that cause significant harm to the health of human beings.

7. The average (pollutant) level in the ambient air for the past forty-eight (48) hours is approximately (number) (units) Such levels for such periods of time are harmful to the health of human beings.

8. The discharges of matter by the defendants should be eliminated pursuant to Section 303 of the Clean Air act which provides:

> (a) Notwithstanding any other provisions of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and that appropriate State or local authorities have not acted at abate such sources, may bring
>
> on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of the health of persons solely by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources). Prior to taking any action under this section, the Administrator shall consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking. Such order shall be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period. Whenever the Administrator brings such an action within such period, such order shall be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter.
>
> (b) Any person who will fully violated or fails or refuses to comply with, any order issued by the Administrator under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5,000 for each day during which such violation occurs or failure to comply continues.

9. The continuous emission of (pollutant) into the ambient air by the defendants contributes to the present situation which, if allowed to continue, will cause significant harm to the health of persons in the <u>city</u> area.

10. The United States of America and its citizens will suffer immediate and irreparable harm to their health unless the defendants are immediately restrained from discharging (pollutant) into.

WHEREFORE, THE UNITED STATES PRAYS:

a. That the defendants, their officiers, directors, agents, servants, employees, attorneys, successors, and assigns, and each of them cease the discharge of (pollutant) into the ambient air in a manner prescribed by this Court and not discharge such matter thereafter unless pursuant to instruction to do so from this Court.

b. That costs and disbursements of this action be awarded to the plaintiff; and

c. That this Court grant such other and further relief as it seem just and proper.

(no signature necessary)
Assistant Attorney General

(no signature necessary)
United States Attorney

By _____
Assistant United States Attorney

_____
Attorney, Department of Justice
Washington, D.C. 20530

Attorneys for Plaintiff

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION

(Address)

| | | |
|---|---|---|
| IN THE MATTER OF<br>(source) | ) | DOCKET NO (_____) |
| PROCEEDINGS PURSUANT TO SECTION 303 OF THE CLEAN AIR ACT, AS AMENDED, 42 U.S.C. §7401 et seq., 42 U.S.C. §7603 | ) | |

The Regional Administrator for Region (___) of the United States Environmental Protection Agency (EPA) makes the following Findings of Fact, reaches the following Conclusion of Law and Issues the following Order:

FINDINGS OF FACT

1. The Administrator of EPA his delegated the authority vested in him by Section 303 of the Clean Air Act (the Act) as amended, 42 U.S.C. §7401 et seq., 42 U.S.C. §7603, to the Regional Administrator for Region (____).

2. Section 303 of the Act, 42 U.S.C. §7603 provides that, upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons and that appropriate State or local authorities have not acted to abate such sources, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source or sources.

3. Defendants are discharging from their plants and/or installations at (city/state), substantial amounts of (pollutant), into the ambient air. Such discharges (in combination with adverse weather conditions) have caused or are contributing to, concentrations of (pollutant)), in the ambient air exceeding a level of (number) (units) of (pollutant). This level presents an imminent and substantial endangerment to the health of persons.

4. (source) is a source which is presenting an imminent and substantial endangerment to the health of persons.

5. (state) and (local jurisdiction)) authorities have not acted to abate (list sources).

OR

(state) and (local jurisdiction )) authorities have dililently attempted to decrease the level of contamination in the atmosphere. However, defendants continue to discharge (pollutant) into the ambient atmosphere causing imminent and substantial endangerment to the health of persons.

## CONCLUSION OF LAW

1. The Regional Administrator for Region (_) (The Regional Administrator, is vested with the authority of the Administrator under Section 303 of the Act, 42 U.S.C. §7603.

2. (Source(s) have been found by the Regional Administrator to be presenting an imminent and substantial endangerment to the health of persons and to be an appropriate subject for the issuance of an order under Section 303 of the Act.

## ORDER

The Regional Administrator for Region (__) hereby orders that defendants set out in this order, their agents, servants, employees and attorneys and all persons in active concert or participation with them are hereby ordered to refrain from causing or contributing to levels of pollution that will cause irreparble damage to the health of persons and each defendant separately must take the following action:

1. (List each defendant separately and state what immediate action that defendant must take.)

2. This order shall be effective for a period of not more than twenty-four hours unless the Regional Administrator files a civil action on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other actions as may be necessary.

3. This Order is effective immediately upon receipt by defendants. The Regional Administrator for Region (___) hereby issues the above-identified Order which shall become effective as provided therein.

_____ date

_____ Regional Administrator

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# GUIDANCE ON SECTION 303 OF THE CLEAN AIR ACT
**April 1999**

## I. INTRODUCTION

Section 303 of the Clean Air Act (Act), 42 U.S.C. § 7603,[1] authorizes the Administrator of the Environmental Protection Agency (EPA) to bring an action for injunctive relief to abate imminent and substantial endangerments to public health, welfare, or the environment caused by emissions of air pollutants.[2] Section 303 allows EPA to initiate judicial action against, or issue an administrative order to, any person who is causing or contributing to the pollution to stop the emissions of the pollutants or to take other action as necessary. As discussed in this guidance, §303 is a "gap-filling" authority, providing a basis for injunctive relief for a wide range of endangerment scenarios, regardless of a pollution source's compliance or noncompliance with any provision of the Act. It also provides for injunctive relief when an air pollutant(s) is not otherwise regulated under the Act

On September 15, 1983, EPA issued a guidance document entitled *Initiation of Administrative and Civil Action under Section 303 of the Clean Air Act During Air Pollution Emergencies*. EPA is issuing this updated guidance in light of the 1990 Amendments to the Act

[1] Section 303, as amended in 1990, and codified at 42 U.S C § 7603, reads as follows:

Notwithstanding any other provisions of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period Whenever the Administrator brings an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought

[2] Section 302(g), Definitions, and codified at 42 U S C. §7602(g), reads as follows:

The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

which modified §303, and to account for more recent case law under similar Federal environmental statutes which informs EPA's authority to act under §303.[3] This guidance supercedes the 1983 guidance. It is intended to be used by EPA as internal guidance only and does not establish any substantive or procedural rights. EPA reserves the right to act at variance with this guidance and to change it without public notice.

The 1990 Amendments expanded the scope under which EPA may act pursuant to §303 from "imminent and substantial endangerment to the health of persons" to "imminent and substantial endangerment to public health or welfare, or the environment." The Amendments also eliminated the requirement for state or local inaction as a prerequisite to EPA initiating action under §303, and lengthened the duration of administrative orders pursuant to §303 from 24 hours to 60 days. In so doing, Congress greatly increased the utility of §303 However, as of the date of this guidance, EPA has exercised its new authority against a specific source only three times.[4] As discussed below, EPA does not believe that Congress restricted EPA's authority to act under §303 to situations where people are injured or other serious air pollution hazards are manifest. Rather, Congress also intended for EPA to use the authority to address risks before they caused harm. This guidance will help EPA carry out its authority as intended under the Act.[5]

In addition to initiating actions under §303, EPA has taken other emergency actions under statutes that have similar provisions, such as §106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) ["when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment"] and §7003 of the Resource Conservation and Recovery Act (RCRA) ["may

[3] Other statutes include "emergency power" provisions giving appropriate government officials the right to seek judicial relief, or to take other action to avert imminent and substantial threats to the environment or public health. In the case of United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D Minn 1982) suit was brought under RCRA Section 7003. The court considered the imminent hazard provisions of RCRA, Section 504 of the CWA, Section 106 of CERCLA, Section 303 of the CAA, and the SDWA and noted that the phrase "imminent and substantial endangerment" was intended to be treated similarly in each statute. EPA believes it is appropriate to interpret identical terms such as "imminent" and "endangerment" in a consistent manner

[4] See In Re Minerec Mining Chemicals, EPA Docket No. R9-94-34 (Clean Air Act Emergency Order, August 26, 1994), and In Re· Minerec Mining Chemicals, EPA Docket No. R9-94-34 (First Amended Clean Air Act Emergency Order, September 28, 1994); In Re: Shallow Water Refinery , EPA Docket No. VII-97-CAA-120 (June 12, 1997); and In Re: Trinity America Corporation, EPA Region IV, October 3, 1997 Prior to 1990, EPA used its §303 authority to address high particulate matter in North Birmingham, Alabama (1971), and to address an asbestos hazard at a mine in Globe, Arizona (1983).

[5] The Amendments also contain a provision similar to §303 under §112(r)(9), which pertains to accidental releases of a regulated substance as defined by §112(r)(3) The reader is encouraged to read EPA's guidance concerning the use of this section, published by EPA in an April 17, 1991 document entitled *Guidance on Using Order Authority under Section 112(r)(9) of the Clean Air Act, as Amended, and on Coordinated Use with Other Order and Enforcement Authorities*, and in Fed Reg Vol. 56, No. 104, p 24394, May 30, 1991.

present an imminent and substantial endangerment to health or the environment"]. This guidance is consistent with the case law and administrative practice under these other authorities, and the Amendments of 1990.[6] It is also consistent with other published guidelines for taking action under EPA's imminent and substantial endangerment authority.[7]

## II. LEGAL PREREQUISITES TO INITIATING ACTION UNDER SECTION 303

The basic prerequisites to initiating action against a party under §303 are that the Administrator has received evidence that: (1) a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment; and (2) the party to be restrained is causing or contributing to such alleged pollution. In addition, §303 requires the Administrator, prior to taking any action, to consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. The following discussion includes the definitions of key terms, the legislative history and case law, and the resources available to assist EPA staff as they address these prerequisites.

### A. Evidence Indicates that a Pollution Source or Combination of Sources (Including Moving Sources) is Presenting an Imminent and Substantial Endangerment to Public Health or Welfare, or the Environment

#### 1. The meaning of "imminent and substantial endangerment"

##### a. "Endangerment"

EPA interprets "endangerment" under §303 to mean threatened or potential harm, as well as actual harm. Therefore, EPA need not delay taking action under §303 until actual harm occurs. Such delay would thwart Congress' intent that EPA use §303 to protect the nation's air

[6] The legislative history of the 1990 Clean Air Act Amendments indicates that one reason for amending §303 was to make it similar to other endangerment authorities. The Senate Report on the 1990 Amendments states in relevant part:

> These changes are necessary to enable the Administrator to address air pollution emergencies in an adequate manner, and to conform the Administrator's emergency authority under the Act to emergency authorities under other environmental laws. See, TSCA section 208, CERCLA section 106, RCRA section 7003, and CWA section 504 Similarly, the deletion of the requirement that the Administrator may not bring suit unless State or local authorities have failed to act conforms the Act to other environmental laws [S Rep. No. 101-228, 101st Cong., 1st Sess 370 (1989)]

As discussed herein, key provisions of these authorities are similar. There should be no practical differences in the scope of EPA's authority between these similarly-worded statutes

[7] See 47 FR 20664, May 13, 1992; 56 FR 24393, May 30, 1991, and 59 FR 58970-71, November 15, 1994.

quality. As stated in the House Report on the Clean Air Act Amendments of 1977:

> In retaining the words "imminent and substantial endangerment...," the committee intends that the authority of this section not be used where the risk of harm is completely speculative in nature or where the harm threatened is insubstantial However, ... the committee intends that this language be constructed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing (emphasis added). [8]

The Senate Report on the 1990 Amendments to §303, which expanded the application of §303 to public welfare and the environment, expressly states that §303 applies to "threatened" harm. The Report says:

> These amendments to section 303 of the Act, as well as parellel (sic) amendments to section 113, have several purposes. the (sic) amendments broaden the Administratror's (sic) authority to issue emergency orders to abate threats to welfare and the environment, in addition to the authority to respond to threats to " the health of persons."
>
> Broadening section 301 (sic) to include harm to the environment is important to enable EPA to address emergency threats to ecosystems in instances where there is no readily demonstrable immediate threat to human health. For example, toxic emissions might be blowing downwind from a facility into an undeveloped natural area and threatening to impair that area's ecosystem.° This amendment will allow EPA to order the plant to take necessary steps to eliminate the threat to flora and fauna (emphasis added).[9]

Courts have interpreted "endangerment" to include threatened or potential harm under §211 of the Act (providing EPA the authority to regulate fuels) and other environmental statutes.[10] In Ethyl Corporation v. Environmental Protection Agency,[11] the Court interpreted the " endanger" standard under §211 as requiring only a finding that lead emissions presented a " significant risk" of injury to the public. In Ethyl, the question was whether EPA was justified in requiring the reduction of lead in gasoline when there was no finding of the presence of actual harm from exposure to airborne lead. The Court said:

[8] H R. Rep No 95-294, 95th Cong , 1st Sess. 328 (1977).

[9] S. Rep No 101-228, 101st Cong., 1st Sess. at 370 (1989).

[10] See discussion of endangerment in, e g., Dague v City of Burlington, 935 F.2d 1343, 1356 (2d Cir 1991) (RCRA § 7002); United States v Conservation Chemical Co , 619 F Supp. 162, 192 (W.D. Mo. 1985) (CERCLA § 106)

[11] 541 F 2d 1 (D.C Cir 1976).

> When one is endangered, harm is threatened; no actual injury need ever occur....A statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. Regulatory action may be taken before the threatened harm occurs, indeed, the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat (emphasis added).[12]

In Reserve Mining Co v. Environmental Protection Agency,[13] the court similarly interpreted the term "endangering" under §1160(g)(1) of the Federal Water Pollution Control Act[14] in a case involving asbestos discharges into Lake Superior. The Court stated that " Congress used the term 'endangering' in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term."[15] In Reserve, relief was based on "an acceptable but unproved medical theory" that ingestion of asbestos fibers might cause cancer.[16] The Court in Reserve, however, indicated that the term " endangering" under §1160(g)(1) connotes a "lesser risk of harm" than the phrase "imminent and substantial endangerment."[17] EPA, therefore, should determine that the threatened or potential harm is "imminent" and "substantial" before initiating action under §303

b. "Imminent"

EPA believes that an endangerment is "imminent" under §303 where present conditions indicate a threat of harm to the public health, welfare or the environment, no matter how distant the manifestation of actual harm may be, as well as where conditions indicate an immediate threat of harm. As the 1970 Senate Report on §303 states:

> The levels of concentration of air pollution agents or combination of agents which substantially endanger health are levels which should never be reached in any community. When the prediction can reasonably be made that such elevated levels could be reached even for a short period of time--that is that they are imminent--an emergency action plan should be implemented. . (emphasis added).[18]

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[12] Ethyl, 541 F 2d at 13 (D.C Cir. 1976)

[13] 514 F 2d at 492 (8th Cir 1975)

[14] The 1972 amendments to the Federal Water Pollution Control Act, known as the Clean Water Act, added §504, the present imminent and substantial endangerment standard for water pollution control

[15] Reserve, 514 F2d at 528 (8th Cir 1975)..

[16] Id., at 529

[17] Id., at 528

[18] S Rep No. 91-1196, 91st Cong., 2d Sess 36 (1970)

Courts have interpreted the term "imminent" under other environmental statutes to include situations where present conditions indicate there may be a risk to health or the environment,[19] even though the harm may not be realized for years.[20] It is not necessary for the endangerment to be immediate or tantamount to an "emergency" to be imminent and warrant relief.[21] The Court in Dague v. City of Burlington, for example, found an imminent endangerment in a RCRA case involving a municipal landfill that was leaking approximately 10% of its leachate containing low levels of lead into an adjacent cattail marsh. Lead in test wells surrounding the landfill was generally below the maximum contaminant level for drinking water, and no actual harm was shown to the marsh. There was evidence, however, that the leachate from the landfill was toxic to freshwater aquatic life, including at least one vertebrate in the food chain, and an expert testified that, in a system such as the cattail marsh where there is a high tolerance for toxic chemicals, signs of stress may appear only after a latent stage of deterioration.[22] The Court concluded that there was an imminent endangerment to the cattail marsh even though the harm would not become apparent until some time in the future

Thus, it is the risk of harm that must be "imminent." The actual harm itself may not eventuate or be fully manifest for a period of many years, if at all.[23] Moreover, even where the conditions giving rise to the risk have been present for some time, EPA is not precluded from addressing them as an imminent endangerment.[24] Contaminants that lead to chronic health effects, as well as acute health effects, may be considered to cause imminent endangerment.[25]

EPA, therefore, may properly take action to abate air emissions under §303 even though the harm itself may not be immediate, and the amount of time for harm from such emissions to become apparent is uncertain. This permits the Agency, for example, to act to seek abatement of emissions reasonably believed to be carcinogenic, even though it is uncertain how long it would take for the emissions to result in actual harm to individuals.

c. "Substantial"

Courts have found an endangerment to be "substantial" under other environmental

[19] See, e.g., Dague, 935 F 2d at 1356.

[20] See, e g , United States v Valentine, 856 F Supp 621, 626 (D Wyo. 1994), Conservation Chemical, 619 F Supp at 194.

[21] See, e g , Valentine, 856 F Supp. at 626 (citing United States v Waste Industries, Inc., 734 F.2d 159 (4th Cir 1984), but see, Outboard Marine Corporation v Thomas, 773 F.2d 883 (7th Cir. 1985) ("This grant of power [under CERCLA § 106], however, applies only in emergency situations.")

[22] Dague v City of Burlington, 732 F Supp. 458, 463-64; 468-69 (D Vt. 1989)

[23] See, e g , Conservation Chemical, 619 F. Supp at 193-194

[24] See In Re FCX, Inc , 96 B.R 49, 55 (Bkrtcy., E D.N.C 1989), interpreting CERCLA §106 (" even when there is an inordinate delay [by EPA], the court must find an immediate danger to public health if in fact one exists")

[25] Conservation Chemical, 619 F Supp. at 194.

[26] See, e g , Conservation Chemical Co., 619 F. Supp at 194

statutes where there is a reasonable cause for concern that health or the environment is at risk.[26] It is not necessary to quantify the endangerment for it to be considered substantial. For example, proof that a certain number of people will be exposed or that a certain number of deaths will occur is not required.[27] A number of factors, such as the quantities of the hazardous substances involved, the nature and degree of their hazards, or the potential for human or environmental exposure, may be considered in determining whether there is a reasonable cause for concern. In any given case, one or two factors may be so predominant as to be determinative of the issue.[28] For example, the Court in United States v. Conservation Chemical Co found a "substantial" endangerment under CERCLA §106, where numerous hazardous substances from chemical wastes were present and being released into the environment from a site, and there was a risk that humans or wildlife might venture onto the site and come into contact with the substances.[29] The Court in United States v. Vertac Chemical Corporation found the chemical dioxin to be presenting a "reasonable medical concern over public health," and thereby to be constituting an imminent and substantial endangerment to health under RCRA §7003, where the chemical was widely believed, but not fully proven, to be hazardous.[30] EPA interprets these decisions to mean that an endangerment is "substantial" under §303 where there is a reasonable cause for concern for public health, welfare or the environment if remedial action is not taken.

Thus, §303 provides authority to address threats to public health, welfare or the environment in a variety of circumstances, and is not limited to situations involving pollution concentrations associated with "emergency" levels or severe effects.[31] Section 303 should not be used where the risk of harm is completely speculative or where the threatened harm is insubstantial.[32] If, however, the Agency can show that the suspect emissions are creating a non-speculative "reasonable concern" that public health, welfare or the environment is at risk of harm, action under §303 is appropriate.

d. "Is presenting"

The prefatory language in §303 differs from that of RCRA §7003 and CERCLA §106. While §303 provides that EPA may act when a pollution source or combination of sources "is presenting" an imminent and substantial endangerment, RCRA §7003 and CERCLA §106 authorize EPA to act when conditions "may present,"or "there may be,"respectively, an imminent

[26] See, e g , Conservation Chemical Co., 619 F Supp at 194.

[27] Id .

[28] Id at 194-195.

[29] Id., at 195

[30] 489 F Supp 870, 885 (E D Ark 1980).

[31] See 59 FR 58958, 58970 (November 15, 1994) discussing the authority to use §303 to address situations where health-based, ambient air target or trigger levels are exceeded

[32] See H R Rep No. 95-294, 95th Cong , 1st Sess 328 (1977).

and substantial endangerment. In Dague and other decisions, the phrase "may present" has been interpreted as "expansive language" indicating the Congressional intent "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes."[33] Given the legislative history of this provision, as discussed earlier, it appears that Congress did not intend to create less protection for the public or the environment than under other environmental statutes, and therefore may not have intended any difference in meaning from the slight difference in text. At worst, one could argue that the difference in language may mean that the emissions that would pose the threat be either ongoing or reasonably predicted, as distinct from theoretically potential emissions. EPA does not believe that this difference in prefatory language or the judicial interpretation of "may present" undermines the application to §303 of established case law interpreting the phrase "imminent and substantial endangerment" under other statutes.

In either event, the "is presenting" requirement is clearly met when there are ongoing emissions that endanger public health, welfare, or the environment. The "is presenting" requirement can also be satisfied when the source is intermittent. For example, a source might operate a process that periodically emits a highly toxic air pollutant. It is not necessary for EPA to wait for the emissions to occur before issuing a §303 order to abate the endangerment. An endangerment can be present even if it is not on a continuous basis.

2. The meaning of "public health or welfare, or the environment"

As discussed above, the 1990 Amendments expanded the standard under §303 from " imminent and substantial endangerment to the health of persons" to "imminent and substantial endangerment to public health or welfare, or the environment." The use of the word "or" indicates that an endangerment to either public health, welfare, or the environment alone, will warrant relief under §303.[34]

The Senate Report on the 1990 Amendments states that broadening §303 to apply to harm to the environment "is important to enable EPA to address emergency threats to ecosystems in instances where there is no readily demonstrable immediate threat to human health "[35] The Report further states that, for example, where a facility is emitting pollutants that are threatening to impair an area's ecosystem, §303 will allow EPA to order the facility "to take necessary steps to eliminate the threat to flora and fauna." Congress, therefore, clearly intended the word " environment" to include plant and animal life and ecosystems generally, in the absence of threatened harm to human health Additionally, case law under RCRA defines "environment" to encompass the air, soil and water, including groundwater.[36]

[33] Dague v City of Burlington, 935 F.2d at 1355 (citing United States v Price, 688 F.2d 204, 2113 (3rd Cir. 1982)

[34] Conservation Chemical, 619 F Supp at 192

[35] S Rep No 101-228, 101st Cong , 1st Sess 370 (1989).

[36] Lincoln Properties, 23 Envtl L Rep at 20671-72.

The Senate Report does not address the expansion of §303 to welfare. The term "welfare" is defined in the Act, however. Section 302(h) states:

> All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion or combination with other air pollutants.

This statutory definition of "welfare" is broader than, and encompasses the elements of, " environment"as defined above. The court in Conservation Chemical also found under CERCLA that "[t]he term 'public welfare' is exceptionally broad, and encompasses 'health and safety, recreational, aesthetic, environmental and economic interests."[37] The court stated further that " [t]he expansive scope of the terms 'public welfare' and 'environment' mandates the conclusion that Congress intended injunctive relief to issue whenever any aspect of the nation's interest in a clean environment may be endangered imminently and substantially by a release."[38] EPA's authority under §303, therefore, may be used to abate imminent and substantial endangerments affecting a broad spectrum of concerns

B. Any Person Causing or Contributing to the Alleged Pollution

1. The meaning of "any person"

Section 303 provides that the Administrator may take action to restrain "any person" causing or contributing to pollution from a source or combination of sources that is presenting an imminent and substantial endangerment to public health or welfare, or the environment. Section 302(e) of the Act defines "person" to include "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." Thus, any entity specified in §302(e) that is causing or contributing to the alleged pollution may be subject to §303. Such a person could include, for example, corporate officers, the individuals who own or operate a polluting source, the lease holders or contractors of same, or the corporate entity itself. As discussed in the following section, this could also include past owners of a facility who caused or contributed to a present endangerment.[39]

2. The meaning of "causing or contributing to" the alleged pollution

[37] Conservation Chemical, 619 F. Supp. at 192.

[38] Id.

[39] EPA notes that in practice, §303 orders are usually issued to organizations, not individuals.

Section 303 may apply whenever there is evidence that "a pollution source or combination of sources" is presenting an imminent and substantial endangerment, and EPA may bring action to restrain "any person *causing or contributing to* the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution" (emphasis added).

*Causation*, in the air pollution context, is rooted in common law. In past decisions, the courts have recognized that air pollutants can be distributed over a large geographical area and pollution injuries may be the result of cumulative effects of several emissions from different sources.[40] This can sometimes make it difficult for a plaintiff to prove that a particular defendant was the source of the pollution that caused the injury In a typical common law negligence action, the plaintiff must show that it was an action or inaction of the defendant which caused the injury. This is causation-in-fact. However, the courts have recognized that it is often difficult to show causation-in-fact in tort cases involving toxic agents and have relaxed the requirement that the plaintiff must show cause in fact. Courts will usually find a defendant liable if defendant's conduct was a substantial factor in causing the alleged endangerment. Plaintiffs are also aided by the theory of joint and several liability which has been applied to independent discharges of air pollutants where the effects of each plant's pollution was impossible to determine.[41] EPA believes that the Agency may proceed with a §303 action when the person's conduct is a substantial factor in causing the alleged harm.

EPA may take action against any person who is *contributing* to the emissions of the air pollutants creating an endangerment, regardless of the extent of that person's overall contribution to the problem. For example, on November 18, 1971, the District Court for the Northern District of Alabama issued a temporary restraining order under §303 curtailing operations at 27 steel-making facilities near Birmingham, Alabama.[42] The average particulate matter levels in the preceding 48 hours was found to be 725 micrograms per cubic meter, levels which were considered harmful to human health. EPA's complaint did not allege the specific contribution of each facility to the overall particulate matter levels. It simply stated that "the Administrator of the Environmental Protection Agency has received evidence that *a combination of pollution sources, including the defendant's plants,* are presenting an imminent and substantial endangerment to the health of persons by discharging particulate matter into the air" [emphasis added].

EPA interprets the phrase "contributing to" under §303 to mean, as it was exercised in the

[40] Reitze, Arnold, *Overview and critique . a century of air pollution control law· what's worked, what's failed, what might work.* 21 Envtl Law 1549 (1991)

[41] Michie v. Great Lakes Steel, 495 F 2d 213 (6th Cir.), cert. denied, 419 U.S. 997 (1974)

[42] United States v U S Steel, No 71-104 (N.D Al, Nov 18, 1971) Meteorological conditions improved on November 19, 1971, and the order was vacated

[43] United States v Aceto Agricultural Chemical Corp , 872 F 2d 1373, 1384 (8th Cir 1989) Also, see Zands v Nelson, 779 F Supp 1254, 1264 (S D Cal 1991) (The Court held that a person who

above-referenced action and as judicially interpreted under RCRA, "to have a share in any act or effect "[43] It is not necessary for the person to be directly controlling the activities that are creating an imminent and substantial endangerment to issue an order or take other action under §303 [44] Nor is it necessary that a person be responsible for a specific share of the effect. A combination of air pollution sources may present imminent and substantial endangerment even though the emissions from a single source, if considered alone, may be of lesser concern. In some cases, it may be necessary to address an individual source under §303 even though the action would not completely eliminate the pollutant(s) of concern.

It may also not be necessary for the person to own the polluting source. The United States sought an injunction against the owners of a site under CERCLA §106, RCRA §7003, and CAA §303 to address endangerment from asbestos contamination. The defendants owned or operated an asbestos mill at the site until 1974. Prior to closing the mill, the owners used asbestos-containing mill tailings to grade the property for mobile home plots, and offered the lots for sale in 1973. Fifty lots were sold at a site of some 17 acres. The Court found that, under §303, the residential subdivision and a second, nearby mill that was still in operation were " pollution sources or a combination of sources" and that the past owners of the site "caused or are contributing to such pollution." The Court ordered the defendants, who included individuals and corporations that formerly owned the subdivided site, to abate the releases and threatened releases of asbestos in the area.[45]

Thus, EPA believes that under §303, that the Agency may take action to restrain any person(s) whose actions (or inactions) are responsible for creating emissions of air pollutants which are presenting the endangerment. This action may be taken even if such person(s) no longer own the pollution source.

C. <u>The Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based</u>

Section 303 requires EPA to consult with the State and local authorities before taking any action under that section and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. The legislative history states that this consultation is required "to protect State interests and to prevent duplication of effort."[46]

Prior to 1990, one of the prerequisites for taking action under §303 was that "the

operated equipment during the time that solid waste leaked from that equipment to be a "contributor")

[44] Id., at 1383 (The Court held that a person contributed to the handling and disposal of pesticide-related wastes because that person had (1) contracted with a company that formulates commercial grade pesticides through a process that inherently involves the generation of wastes, and (2) maintained ownership of those pesticides throughout the process).

[45] U S v Metate Asbestos Corp., 584 F Supp. 1143 (D.C. Az. 1984)

[46] S Rep. No 101-228, 101st Congress, 1st Sess , at 370

appropriate State or local authorities have not acted to abate such sources" (§303, as amended in 1977 and codified in 42 U.S.C. 7603). In removing this prerequisite from §303, Congress removed a requirement that had the potential to delay Federal action.[47] However, the present consultation requirement should not be viewed as an obstacle to effective action by EPA. It is not a concurrence requirement, but rather one of notification and corroboration prior to taking action. In consulting with the appropriate State or local authority, EPA should determine whether the information upon which EPA intends to act is accurate. In assessing the scope of action to be taken under §303, EPA may take into consideration any action taken by State or local authorities. However, the existence of state or local action does not bar EPA from proceeding under §303.

## III. WHEN AND HOW TO APPLY SECTION 303

### A. General Applicability

Action under §303 is appropriate when there is a reasonable cause for concern that public health, welfare, or the environment is endangered. The degree of endangerment or actual harm warranting action under §303 is a fact-specific evaluation that may be based on witness statements, medical reports, expert opinion, or other evidence. However, in no case is a formal risk assessment required. As discussed above, §303 is a precautionary authority, intended to be used without delay "upon receipt of evidence" that an endangerment exists. The courts have recognized that scientific proof of an endangerment does not always exist and have ruled in favor of the Agency when evidence created a sufficient inference of substantial risk or actual harm.[48]

EPA may rely on scientific studies, expert opinion, the conclusions drawn during the promulgation of National Ambient Air Quality Standards and other rules, the findings of other governmental agencies such as the Agency for Toxic Substances and Disease Registry (ATSDR) or state environmental or public health agencies and other credible evidence.[49] For example, if ATSDR issues a health consultation describing a public health threat posed by a particular facility, the issuance of that document is sufficient for a §303 action. EPA should also utilize witness statements such as affidavits from former or current employees or residents if the

[47] For further discussion on the effect of this pre-1990 provision, see pages 5, 6, and 7 of the EPA guidance document entitled *Initiation of Administrative and Civil Action Under Section 303 of the Clean Air Act During Air Pollution Emergencies*, September 15, 1983.

[48] In United States v. Vertac, 489 F Supp., 870, (E D. AR, 1980), the court ruled that the public was endangered by the release of dioxin, which at the time was considered toxic under acceptable but unproven medical theory. In Valentine, the court ruled that scientific proof of harm was not required rejecting an argument that EPA's failure to perform post-mortem analyses on each dead animal found at the site precluded inference as to the cause of death

[49] EPA discussed the possibility of establishing ambient thresholds that, if exceeded, would clearly trigger the ability to use §303 authority. See, e.g., 59 FR 58958 (November 1994), 60 FR 12492 (March 7, 1995), and 62 FR 210 (January 2, 1997). This would merely establish clearly-recognized thresholds, and would not preclude the use of §303 for lower ambient pollutant levels.

pollution source is located near a residential area Statements from credible witnesses that can be corroborated by ambient measurements or other information could provide a sufficient basis for the issuance of the §303 order

Section 303 applies to a broad range of endangerment scenarios. It applies regardless of whether a pollutant is regulated, or how it is regulated.[50] For example, endangerment from a power plant's emissions of sulfur dioxide could be addressed, even if the plant is in compliance with its regulatory emissions limits, or a hazardous air pollutant could be addressed, even if there are no applicable regulations controlling the emissions. Section 303 can also apply to mixtures of pollutants, even if a specific individual pollutant cannot be clearly associated with a potential or observed effect [51] For example, emissions of hydrogen sulfide, a gas that does not normally affect individuals with asthma, can oxidize into sulfur dioxide which aggravates the disease even at relatively low concentrations Section 303 may also be used in combination with §114 to require information from a source when, for example, the Agency is unable to characterize the type and level of pollutants, or engineering information is needed to consider the appropriate injunctive relief.

In addition to public health and environmental harm, it should be stressed that the section can also be used when there is an endangerment to the *public welfare*. As discussed above, the Act defines welfare broadly.

Action under §303 may also be taken notwithstanding the length of time an endangerment has persisted For example, action may be taken to address unacceptable emissions from a facility, even if that facility has been in operation for decades. A case in point is EPA's 1971 action to address particulate matter pollution from 27 steel mills in Alabama. The steel mills had been in operation for many years before action was taken. It was EPA's *receipt of evidence* (§303), i.e , the particulate matter data, that provided a reasonable cause for concern and allowed EPA to initiate the action. Conversely, EPA may also take action after harm has occurred to prevent a future recurrence. For example, EPA's action against Minerec Mining Company occurred after releases of hydrogen sulfide had sent people to the hospital. The action was a precautionary measure, intended to prevent further harm.

Taken as a whole, EPA may use its authority under §303 to address a broad spectrum of non-speculative adverse impacts, or diverse combinations of impacts, of air pollution. EPA may consider one or more of the following general factors (this list is not exhaustive)·

[50] An administrative order or civil action may be taken "notwithstanding any other provision" of the Act CAA Section 303

[51] Section 303 applies to emissions of "air pollutants," which is defined in §302 as " any air pollution agent or combination of such agents . [including] ..any precursors to the formation of any air pollutant "

- Toxicity and concentration of pollutant(s).
- Effects of mixtures of pollutants.
- Exposure pathway.
- Population sensitivity.
- Potential for acute exposure.
- Potential for chronic exposure
- Prevailing meteorological conditions and effect on potential exposure.
- Likelihood of endangerment, even if effects are not observed.
- Bioaccumulation of pollutant
- Visual signs of stress on vegetation.
- Sensitivity of birds, fish, and wildlife to pollutant.
- Effects on the public welfare, such as visibility impairment, crop damage, accumulation of toxic metals in soil, loss of fishery resource from a toxic pollutant, deterioration of property values, corrosion of structures, etc..

Examples of imminent and substantial endangerments under §303 could include, but are not limited to·

- A carcinogenic air pollutant from an industrial facility is found at concentrations of concern for chronic human exposure.
- Sulfur dioxide emissions from a source or combination of sources that could, under certain meteorological conditions common to the area, aggravate asthma in sensitive populations.
- A toxic metal is emitted to the air, threatening the flora and fauna of a nearby natural area.
- Pollution from a source results in damage to and deterioration of property.
- Insecticide spray often drifts into a nearby residential area
- A facility that is exempt from state implementation plan requirements emits high concentrations of particulate matter.
- Pollution from a "grand-fathered" oil refinery adversely affects down-wind residential areas.

Other authorities under the Act could also be applied in the above situations. The decision to use §303 should be based primarily on whether such other authorities will address an imminent and substantial endangerment in a timely manner.[52] Section 303 may also be necessary when there are practical impediments to the use of other authorities in specific situations. For

[52] The House Report on §108(k) of the Air Quality Act of 1967, the predecessor of §303, states that the provision "is not intended as a substitute procedure for chronic or generally recurring pollution problems, which should be dealt with under the other provisions of the act " H R. Rep No 728, 90th Cong , 1st Sess 119 (1967) In Reilly Tar & Chemical, the court noted that while Congress did not intent for EPA to use emergency powers authorities as a substitute for other statutory authorities, the " broad range of response authorities provided by Congress . suggests that it intended to provide EPA flexibility " in choosing the appropriate statutory response

example, §303 may be appropriate when a revision to a State Implementation Plan would take too long to address an endangerment, or emissions of HAPs present an endangerment even though the facility is in compliance with emissions requirements. Section 303 may also be appropriate when there are no regulatory requirements that are currently applicable to a particular source. The following discussion addresses some of these considerations.

B. Criteria Air Pollutants

Section 109 of the Clean Air Act directs EPA to promulgate regulations setting National Ambient Air Quality Standards (NAAQS) for six criteria air pollutants. These standards are intended to protect public health [the primary standards], and public welfare [the secondary standards]. EPA periodically reviews the effects of criteria air pollutants and may from time to time promulgate revised standards. Such revisions undergo notice and comment rulemaking. The final Federal Register notice is EPA's formal position on the effects of the relevant criteria pollutant. In addition to the notice, there may be information in the rulemaking docket which may be relevant to a specific situation

In addition, Subpart H and Appendix L of the State Implementation Plan regulations at 40 CFR Part 51 outline a phased emissions reduction program for air pollution "emergencies" involving criteria pollutants and the health of persons. This "emergency episodes program" was designed to supplement the NAAQS by providing additional protection in situations not effectively addressed by them. The episode criteria and associated abatement actions are preventative measures designed to ensure that certain pollution concentrations -- "significant harm levels" -- never occur. Specific action levels are prescribed for sulfur dioxide, particulate matter, carbon monoxide, ozone, and nitrogen dioxide. In increasing degrees of seriousness, the levels are "alert," "warning," and "emergency " The "warning" and "alert" levels are designed to ameliorate situations before the emergency state by application of moderate controls. The emergency levels are those at which "significant harm to health" is expected to occur if action is not taken to prevent air quality from deteriorating further. While the "emergency" level can be clearly construed to present an imminent and substantial risk to public health, abatement measures may be required at lower levels to prevent air quality from deteriorating further, or to avoid less serious health effects that can occur at those levels. Moreover, the emergency episodes program might not provide an effective response for sensitive populations, such as children, the elderly, or people with asthma.[53] Also, these levels are not intended to protect public welfare or the environment. Flexibility is essential and appropriate action should be taken pursuant to §303 whenever necessary to prevent the significant harm levels from being reached.

C. Hazardous Air Pollutants

[53] On January 2, 1997, EPA published a proposed "intervention level program" under the authority of §303 to address high 5-minute sulfur dioxide peak levels in certain areas of the country. The intent is to provide protection in addition to the ambient standards for asthmatic individuals [62 FR 210 - 222]

Section 112 of the Act requires EPA to establish regulatory standards for emissions from stationary sources that emit one or more of the hazardous air pollutants (HAPs) listed in the Act. The EPA Office of Air Quality Planning and Standards (OAQPS) promulgates technology-based (as opposed to risk-based) "maximum achievable control technology" (MACT) standards and " generally available control technology" (GACT) standards governing HAPs under §112(d). In addition, Congress provided for a means of future oversight to ensure that the desired protection from hazardous air pollutants was indeed occurring. Under §112 (f), Congress required EPA to promulgate more stringent risk-based standards within 8 years after promulgation of MACT standards if promulgation of such standards is necessary to provide an ample margin of safety to protect public health, or to prevent an adverse environmental effect.

OAQPS develops methodologies and procedures for determining residual risks to health and the environment. However, since this process might not lead to additional risk-based standards until 8 years after promulgation of a MACT standard, an imminent and substantial endangerment could arise even if a facility was in compliance with the current MACT or GACT standards. Section 303 would be an appropriate authority for addressing such risks.

In addition to the MACT standards, there are also efforts to address HAPs for specific objectives, such as the Urban Area Source Program and the Great Waters Program. As of this writing, there is a comprehensive effort underway to assess the risks posed by HAPs to urban populations. OAQPS should be consulted about the risk posed by HAPs and to determine the status of MACT, GACT, or risk-based standards before a §303 action is undertaken.

It should be noted that the criteria pollutants and HAPs listed in the Act or EPA regulations are not the only air pollutants for which action under §303 may be appropriate. As noted above, §302 defines "air pollutant" broadly. For example, a chemical that is used as a pesticide may also be an air pollutant, and a circumstance could arise where the pollutant presents an imminent and substantial endangerment. There may also be chemicals emanating from industrial or other sources that are not listed under §112 which pose a cause for concern.

Under Congressional mandate, ATSDR produces Toxicological Profiles for a large number of pollutants, including HAPs. Draft profiles undergo public comment and review before final profiles are issued. The profiles typically include a comprehensive analysis of the health effects from inhalation, oral intake, and dermal exposure, the mechanisms of action; interactions with other chemicals; identity of susceptible populations; adequacy of the data, and other information that may be pertinent to action under §303. Toxicological profiles are available from the National Technical Information Service (contact: 800-552-6847).

The Occupational Safety Health Administration (OSHA) establishes standards for exposure to air pollutants inside the workplace. Although not directly related to ambient air, these standards provide one point for assessing the risk to the public when such pollutants, e.g , various organics, become airborne in a community. Computerized health effects data bases, such as Toxline and Chemline, may also be useful. These data bases are run by the National Library of Medicine and may be accessed through the EPA Headquarters or regional office libraries.

## IV. RELIEF AVAILABLE UNDER SECTION 303

Section 303 authorizes EPA to "bring suit in the appropriate district court" to seek certain relief It also authorizes the Agency to issue administrative orders in the event that "it is not practicable to assure prompt protection...by commencement of such civil action... ." If the circumstances at a site require immediate action, an administrative order can be issued as soon as EPA has evidence satisfying the statutory criteria However, under §303, these orders "remain in effect for a period of not more than 60 days" unless EPA brings suit in district court prior to the expiration of an administrative order, after which time the order remains in effect for an additional 14 days or longer as may be authorized by the court. EPA coordinates closely with the U.S. Department of Justice when issuing administrative orders. Such coordination ensures that judicial action can follow in a timely manner if injunctive relief is required for more than 60 days.

The scope and nature of an investigation should be governed by the specific facts of the matter and the underlying policy for the inclusion of §303 authority, that is, protection of the public or the environment before any harm can occur. EPA presumes that, in reviewing a decision to act, the courts will consider whether the agency acted rationally given the facts available to it, and that the action was proportional to the endangerment presented. Thus, where an acute risk is present and may occur at any time, EPA anticipates that a decision will be needed quicker, and perhaps with less information, than in cases where the risk of harm is less acute or is not likely to occur until some certain future time.

While EPA and other authorities are mindful of the potential adverse economic and other impacts of a §303 order, the nature of this provision is such that where public health is at stake, it may not be appropriate to delay issuance of an order while definitive information is developed on such matters, or to wait until the cause, source, and extent of the risk is fully understood. Rather, it may be appropriate in some instances to use §303 to provide sufficient protection to the public or the environment while more information is developed and a permanent solution arises.

## A. Judicial Action

### 1. Referral of a judicial action to the Department of Justice

Any judicial action under §303 would be brought by the United States Department of Justice (DOJ) and requires referral of the action to DOJ. The form and length of a judicial referral often vary depending upon the need for expeditious intervention by the district court. For example, a "letter referral" that sets forth the critical information in a concise manner may be appropriate in emergency situations. EPA should also seek DOJ involvement during the information gathering and investigative process. DOJ's involvement prior to formal referral should facilitate the use of "letter referral" process or accommodate abbreviated judicial referrals.

Once an action is filed in district court, DOJ will take the lead in litigating the case in accordance with EPA policies and the EPA/DOJ Memorandum of Understanding, and in coordination with appropriate EPA participants.

As previously stated, administrative orders issued pursuant to §303 have a maximum 60- or 74-day duration dependent upon whether EPA is seeking subsequent judicial action. If EPA

and DOJ are unable to seek judicial relief upon immediate conclusion of the statutory time frame, EPA should obtain a tolling agreement or other similar written document from the pollution source to toll the 60 day clock The written agreement should also include a notification provision requiring the source to notify EPA of any operational changes For example, if a §303 order curtails operations at a manufacturing facility, EPA should obtain a tolling agreement extending the duration of the order and requesting that the pollution source provide notice to EPA if it intends to resume full production.

2. Judicial relief available

Section 303 authorizes the courts to issue injunctions restraining activities that may present an imminent and substantial endangerment or to take any action "as may be necessary." This implies that the judicial relief requested should be limited to that which is necessary to address the endangerment. While exercising its discretion to issue an injunction, a court may order either a specific action or a restraint from acting In addition, it may use its discretion to order all or part of the relief requested or to order other relief that it deems appropriate The means by which a court will order specific actions or restraints on action may include temporary restraining orders, preliminary injunctions, and permanent injunctions. A temporary restraining order is an order issued by a judge that prohibits specified activity or otherwise maintains the *status quo* until the court can hold a hearing on the issue. A preliminary injunction is a judicial order requiring a person to take or refrain from a specified action until the court can hold a trial on the issue. A permanent injunction is a final judicial order, which is reached after a trial on the merits, that requires a person to take or refrain from a specified action.

B. Administrative Orders

Section 303 confers upon EPA the authority to issue orders administratively without the need for civil judicial action. These administrative orders may not be subject to pre-enforcement judicial review.[54] An order can include any action as may be necessary to protect public health, welfare, or the environment. For example, an order may require specific tasks such as installing pollution control equipment, reducing production, modifying or shutting down process operations causing the pollution, or closing the facility. When the conditions at the site are not sufficiently defined to allow a concise description of the action required, an order may require the source to immediately abate the emissions and undertake any analysis and follow-up action that may be required to ensure that endangerment will not recur.[55] An order may also require the respondent(s) to meet emissions performance standards or limits, rather than dictating the specific remediation to be performed. Other actions may also be ordered as necessary. Administrative orders issued under §303 are enforceable by the Administrator under the §113

[54] See Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers, reprinted in Cong Rec. 516953, October 27, 1990.

[55] See *Trinity America Corporation, d/b/a Trinity Foam of Carolina, and Trinity Fibers of Carolina, Inc , Order Pursuant to Sections 114 and 303 of the Clean Air Act*, EPA Region IV, October 3, 1997.

provisions for administrative, civil judicial, and criminal penalties.

1. Record and content of administrative orders

EPA will establish an administrative record during the investigative phase to support the issuance of a §303 order. In exigent circumstances this record need not be extensive, but should be sufficient for a reviewing body to discern the reason for the action taken. Where time is of the essence, it may be appropriate to draft a short memorandum at the time of the action and follow that memorandum with a more detailed statement as time permits. The record should contain all of the evidence EPA relied on in determining whether there is an imminent and substantial endangerment, including (but not limited to) eye witness accounts, medical reports, scientific findings concerning exposure effects, and other evidence as described above.

An Administrative Order under §303 should include the following elements.

- A statement of jurisdiction -- This statement should set forth EPA's authority under §303 to issue the order and cite the delegation of this authority to the Agency official signing the order.

- Findings of fact -- These should include the facts that demonstrate that the legal requirements for issuing a §303 order have been met and that the actions ordered are necessary to protect public health, welfare, or the environment.

- Conclusions of law -- This section will include conclusions that the legal requirements for a §303 order have been met. In orders issued to more than one person, the order may include a statement that each respondent is required to carry out each obligation of the order and that failure of one or more respondents to comply does not affect the obligation of the other(s) to perform.

- Order -- The order should identify the actions to be performed and when they are to be completed.

- Enforcement -- The order should identify the potential sanctions for non-compliance. This is not required but may encourage the respondent(s) to comply.

2. Standard and scope of review of administrative orders

As discussed above, EPA believes that administrative orders are not subject to pre-enforcement judicial review However, if review is granted in the context of an enforcement action, courts will overturn an agency order if it is deemed "arbitrary and capricious." The arbitrary and capricious standard gives administrative agencies broad discretion in deciding how to administer the law.

In addition, courts will generally examine whether proper procedures were followed, and will also consider due process concerns. Due process does not necessarily mandate an evidentiary hearing prior to issuance or enforcement of the order Rather, the requirement is

flexible and requires that respondents have an opportunity to comment on the evidence "at a meaningful time, in a meaningful manner."[56] Although there does not appear to be a clear standard for how much process is enough, EPA should provide the respondent an opportunity to comment on the order, and to confer with the Agency regarding compliance with the order, unless there is reasonable cause for concern that procedural delays could result in harm.

[56] *Mathews v Eldridge*, 424 U.S. 319, 333 (1976); *United States v Seymour Recycling Corp*, 679 F Supp 859, 864 (S D Ind 1987) (citation omitted)

**SECTION B DOCUMENT 5**

**Compliance Strategy for Stationary Sources of Air Pollution**

**11/14/83**

CAA
B05

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

November 14, 1983

OFFICE OF
AIR, NOISE AND RADIATION

SUBJECT: Compliance Strategy for Stationary Sources of Air Pollution

FROM: Sheldon Meyers for Joseph A. Cannon, Acting Assistant Administrator for Air and Radiation

TO: Alvin Alm, Deputy Administrator

Attached for your consideration is the final compliance strategy for stationary sources of air pollution. This document was developed by OAR's Stationary Source Compliance Division, working closely with the Office of Enforcement Counsel and with review and input by other Headquarters offices, Regional Offices, and selected State officials.

The strategy brings together in one document all of the major thrusts of the stationary source compliance program, with continued emphasis on resolution of those violating sources meeting the definition of a "significant violator". I believe there is a general consensus that the present program is sound and should continue to serve us well in the future. However, the strategy suggests three major changes for the immediate future: more flexibility for States in carrying out their inspection programs, increased use of continuous emission monitoring and similar techniques in the Agency's regulatory and enforcement programs, and increased focus on sources violating volatile organic compound (VOC) provisions in SIPs to reduce both ozone levels and air toxicants.

The major point of disagreement arising during the preparation of the strategy was the proposed revision to the inspection guidance to States. Present guidance requires annual inspection of major (Class A1) sources and biennial inspection of certain smaller sources (Class A2 sources). The draft strategy suggested allowing States to develop alternative inspection priority schemes whereby the resources otherwise required to inspect Class A2 sources could be redirected to inspection of any combination of Class A1, Class A2, and other regulated sources, as air quality needs warranted. Regional Offices were substantially divided

on the extent to which present guidance should be revised. After a careful consideration of all the comments, we believe that the revision contained in the strategy strikes a reasonable balance between EPA's need for a nationally-consistent data base to monitor and evaluate the effectiveness of the program and the needs of State and local agencies to make optimal use of limited resources to address their most serious air quality problems.

The strategy identifies our plans to provide supplementary detailed guidance for selected subjects to enhance the long-term effectiveness of the strategy. Attached is an identification of guidance documents to be produced and anticipated completion dates.

As agreed in our October 12 briefing for you, the major subject area needing further exploration is the problem of assuring continuous compliance by air sources. The strategy already identifies certain approaches worth pursuing (e.g., greater use of continuous emission monitoring and better targeting of inspections) but we intend to do a separate, more extensive continuous compliance strategy as a follow-up to the general strategy. Because of the complexity of this issue, the continuous compliance strategy cannot hope to present "the answer" to the problem but will provide a comprehensive program for developing answers. We are targeting to complete the continuous compliance strategy by February 27, 1984, and we are proceeding to add a commitment along these lines to the Action Tracking System.

I thank you for your support in the development of this strategy and look forward to your support in its implementation.

Attachments

## IDENTIFICATION OF ADDITIONAL GUIDANCE TO BE PREPARED

(1) enforcement of VOC standards - guidance on improving the VOC inventory projected for completion by January 30, 1984. Additional guidance as needed.

(2) use of unannounced inspections by EPA - projected for completion by September 30, 1984.

(3) use of continuous emissions monitoring excess emissions data in the compliance program - projected for completion by July 31, 1984.

(4) enforcement of asbestos demolition standards - projected for completion by July 31, 1984.

(5) enforcement of PSD requirements - projected for completion by November 30, 1983.

(6) enforcement of benzene, arsenic, and radionuclides NESHAPs - as necessary prior to promulgation.

SECTION B DOCUMENT 6

**Decision in United States v. Kaiser Steel Corp., No. CV-82-2623-IH (C.D. Cal. Feb. 8, 1984)**
**NOTE: Contains interim guidance on application of Method 9 to enforce SIP opacity standards.**
03/27/84

CAA
B06

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

MAR 27 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Decision in United States v. Kaiser Steel Corporation, No. CV-82-2623 IH (C.D. Cal. Jan. 26, 1984)

FROM: Michael S. Alushin
Associate Enforcement Counsel
Air Enforcement Division

Edward E. Reich, Director
Stationary Source Compliance Division

TO: Regional Counsels, Regions I-X

Directors, Air Management Divisions, Regions I, III, V and IX

Directors, Air and Waste Management Divisions Regions II, IV, VI-VIII and X

The purpose of this memorandum is to apprise you of the recent decision in the Kaiser case. This decision may affect the case development of other opacity cases where the facts are similar. This memorandum also contains suggested guidance to deal with similar fact patterns.

On January 26, 1984, Judge Hill of the U.S. District Court for the Central District of California ruled from the Bench to assess a civil penalty of $825,000 against Kaiser Steel Corporation and impose injunctive relief requiring the Corporation's one remaining blast furnace to achieve and demonstrate compliance with the applicable requirements if and when operations are resumed. The United States as the prevailing party will also receive the ordinary costs of litigating this case provided for under Rule 54 of the Federal Rules of Civil Procedure. A copy of the Judgment entered on February 8, 1984 and relevant portions of the transcript are attached.

The complaint in this action was filed on May 26, 1982 and alleged violations of the California State Implementation Plan requirement for visible emissions at Kaiser's blast furnace cast houses located in Fontana, California.[1] The Judge assessed a civil penalty of $825,000 for 33 individual violations by Kaiser of the California SIP. In assessing the maximum civil penalty under the Clean Air Act the Judge found that "[a]ll in all, the evidence indicates to me cavalier conduct on the part of defendant for which it must pay the price."

## Summary of Decision

The government argued that the appropriate manner in which to prove a violation of Rule 50-A was to aggregate[2] the 15 second readings to determine if opacities of equal to or greater than 20% were present for more than 3 minutes in an hour. In so arguing it was the government's contention that 40 CFR 52.12(c),

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1/ Rule 50-A, the visible emission standard to which Kaiser was subject in this case, is a time exemption standard that prohibits emissions of 20% or greater opacity for more than 3 minutes in any hour. No test method was prescribed for in the California SIP.

2/ The terms "aggregate" or "aggregation" as used in this memorandum refer to a way of analyzing opacity readings made at the plant to determine compliance with the time exemption standard. Momentary visible emission readings are made and recorded at 15 second intervals by a trained field observer. The first step of data analysis is to identify all readings that exceed the allowable opacity limit (i.e., Rule 50-A, opacity equal to or greater than 20% occuring within an hour). The second step is to count the number of individual readings that exceed the allowable opacity limitation in the SIP. The third step is to multiply the number of readings that exceed the allowable opacity limit by 15-seconds, the time period representing each reading, (i.e., 13 readings exceed standard X 15-seconds = 3 minutes, 15 seconds). The last step is to compare the amount of time in which the actual opacities exceeded the allowable standard and the time exemption period in the SIP. Under the time exemption period in the Kaiser case (i.e., 3 minutes in any hour), the casthouses were alleged to be in violation if opacity of equal to or greater than 20% exceeded the time exemption period of 3 minutes in any hour.

The term "averaging" is used in this memorandum in reference to the data analysis procedures prescribed in Method 9 Section 2.5 (40 CFR Part 60, Appendix A, Method 9 - Visual Determination of the opacity of Emissions From Stationary Sources). Opacity is determined by an average of 24 consecutive observations recorded at 15-second intervals. The average is computed by summing the opacity of the 24 observations and dividing by 24.

portion of the regulations applicable for federal enforcement of SIPs without test methods, required the use of only the "appropriate" procedures within a Part 60 test method. The government further argued that, in this case, only the certification and field procedures of Method 9 were "appropriate" because the data analysis procedure in Method 9 of six minute averaging was incompatible with a time exemption standard of Rule 50-A which limited opacity levels to less than 20% except for three minutes in an hour.

Judge Hill strictly construed the provisions of the regulation at 40 CFR 52.12(c). He found that 40 CFR 52.12 directed EPA to use a test method in Part 60 when no method was included in the SIP, and in this case that meant Method 9. He concluded that all procedures of Method 9,3/ including the data analysis requirements, must be complied with in order to establish a violation under this test method. The Judge noted that this case was "...different from Donner Hanna, where the government did not bring itself and agreed that it didn't bring itself within the literal requirements of Method 9, asserting instead a power to disregard Method 9 and prove violations in some other way." Given his construction of Method 9, he found that a violation of Rule 50-A could be established only if all procedures of Method 9 were followed.

The Judge ruled that the emissions at the Kaiser blast furnace casthouse were continuous because they lasted for more than six minutes in duration. The Judge also ruled that the Preamble to the Federal Register publication which in part discussed the inapplicability of Method 9 to intermittent emissions with a time exemption standard was not binding on the government as an authoritative interpretation of existing law and regulations, but even if it were it would not be persuasive here because the Kaiser emissions were continuous in duration.4/

The government recomputed its visible emission observation sheets using six minute averaging and was able to show that 33 of the 41 Method 9 observations were greater than 27.5% opacity.

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3/ Method 9 is chiefly composed of 3 main sections - certification proceedures for visible emission observers, field procedures for viewing emissions and the data reduction or averaging procedures.

4/ The 1974 preamble to Method 9 states: "EPA recognizes that certain types of opacity violations that are intermittent in nature require a different approach in applying the opacity standards then this revision to Method 9."

Judge Hill rejected the government's arguments that the potential maximum positive error of 7.5% should not be automatically substracted from the opacity readings, given that Method 9 specifically states that the accuracy of the method must be taken into account when determining possible violations of appliable opacity standards and the potential maximum positive error is the only accuracy benchmark listed.

The Judge further concluded, based on his prior rulings of strictly construing 40 CFR 52.12(c) and Method 9, that admissions by Kaiser and expert testimony about inability to comply were incompetent evidence[5/] for purposes of proving a violation, but could be used as corroborative evidence of an alleged violation otherwise provable under Method 9. Expert testimony and admissions, according to Judge Hill, could not be used to prove that Kaiser continuously violated the SIP.

The defendant raised the affirmative defense of technological and economic infeasibility. The government successfully argued based on the precedent of the Friends of the Earth v. Potomac Electric Power Co., 419 F. Supp. 528 (D.D.C. 1976) and the Supreme Court decision in Union Electric Co. v. EPA, 427 U.S. 246 (1976) that these were not total defenses to a civil action brought under the Clean Air Act. The Judge made an alternative holding and finding that even if these were total defenses the burden is on the defendant and it had not carried the burden by a preponderance of evidence.

In considering the penalty portion of the case the Judge ruled that each blast furnace casthouse was a separate source of emissions each subject to a maximum of $25,000 per day of violation. He based his rulings on the language of Rule 50-A which applies to "...any single source..." and Section 113(b)(2) which authorizes a civil penalty for any person who violates "...any requirement of an implementation plan... ."

The government requested costs of litigation pursuant to Section 113(b). Judge Hill found this provision of the statute to be absolutely unintelligible as a basis for awarding costs to the government "I would not and I could not, use such an irrational and unintelligible sentence as the basis for sanctioning or punishing anybody."

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5/ "Incompetent evidence" refers to the legal relevance of the evidence in terms of admissability.

## Interim Guidance Procedure

This guidance on the use of Method 9 should be followed for those cases involving the enforcement of a visible emission time exemption standard in a SIP which does not contain a specific test method and where, for federal enforcement purposes, Method 9 is used based on the direction of 40 CFR 52.12(c). This guidance is not intended to suggest that the government should abandon the positions argued in the Kaiser case. Its purpose is to preserve the ability to prevail on alternative grounds should a judge in another case follow the same analysis as Judge Hill. A technical guideline on alternative opacity data reduction procedures for use with time exemption opacity rules is being developed by the Office of Air and Radiation and when published will supercede this interim guidance.

Visible emission observers should not reduce the data they collect in the field. They should forward the standard visible emission observation sheets to the appropriate officials in the Region. An observer should be instructed to record opacities for at least one hour, or in the alternative, to record opacities for a complete cycle of the emissive operation being observed, such as a casting operation at a blast furnace casthouse.

The attorneys and technical personnel reviewing the visible emission observation sheets should first aggregate all the 15 second opacity readings that equal or exceed the allowable levels to determine compliance with the time exemption period in the SIP. Where the 15 second opacity readings show a violation when aggregated, all 6 minute blocks of 24 consecutive observations containing such readings should be averaged as prescribed under Method 9. The strongest case possible for sustaining a violation, given the Donner Hanna and Kaiser decisions, would be when both the aggregation and averaging of the data show a violation. This period would consist of any 24 consecutive observations that contain opacities, when averaged or aggregated, would exceed the opacity level in the standard. A set of observations may contain one or more data gaps or interferences for which no opacity is recorded. In the Kaiser case the attorneys gave a 0% opacity value to those 15-second opacity blocks that had no opacity record because of interference obstructing a clear line of sight. Using a 0% opacity in the averaging of the set of observations is very supportable given that the bias is in favor of the source being observed. Additionally the data gap could be filled by a statistical procedure such as regrouping of data or substitution of a derived value (outlier test), but such proof may require the use of an expert or lay expert in statistics to testify about the validity of such practices.

The Regional legal and technical personnel should be aware of the potential evidentiary problems associated with litigating an opacity case with facts like the Kaiser case when opacity readings do not show a violation of the applicable standard by both the averaging and aggregating data reduction techniques. For this reason, we recommend that the Region review the visible emission observations of each case presenting a factual situation similar to Kaiser to determine whether the violation can be proved by both the aggregating and averaging data reduction procedures.

Attorneys in opacity cases should not concede the issue of whether 7.5% error should be subtracted from each 6 minute average. The attorneys, if the facts warrant such action, should provide in the form of an exhibit to be followed by testimony of an opacity expert the analysis of the Method 9 data base, thus demonstrating the range of potential maximum positive and negative errors.[6]

The Agency is currently working to evaluate the need for test methods for time exemption standards, but in the interim it is essential that a vigorous enforcement effort continue to ensure compliance with visible emission standards. This memo is not intended to set out a complete guideline or provide answers to all potential questions raised by the Kaiser decision but rather to bring some of the more pertinent points to the attention of other EPA staff involved in similar cases.

If you have any questions regarding the Kaiser case or this interim guidance, please contact Richard Ostrov of the Air Enforcement Division of the Office of Enforcement and Compliance Monitoring at 382-2868.

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6/ The government's expert witness on opacity, in the Kaiser case, testified based on his work with the Method 9 data base, that at a 99% confidence level the positive bias of a 6 minute average was 7.5%, as published, but the negative bias was even greater (13%). Further, he stated that at the 95% confidence level the positive bias was 5%, as published, but again the negative bias was, at 9.4%, greater. Finally, he testified that the confidence level at 51%, or at a civil standard of proof, was -.6%. In other words, the expert witness testified that there is a net negative bias inherent in Method 9. The type of testing presented by the expert along with an exhibit demonstrating the analysis is perhaps the best way of presenting this factual issue.

SECTION B DOCUMENT 7



# Guidance on Complying with the Notification Requirements in Section 113(a)(1) and 113(a)(4) of the Clean Air Act

06/28/85

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

CBA
B7

JUN 28 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Guidance on Complying with the Notification Requirements on Section 113(a)(1) and 113(a)(4) of the Clean Air Act

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

TO: Regional Counsels
Regions I-X

Air Management Division Directors
Regions I, III, V, IX

Air & Waste Management Division Directors
Regions II and VI

Air, Pesticides & Toxics Management Division Director
Region IV

Air & Toxics Division Directors
Regions VII, VIII and X

This memorandum provides you with guidance on implementing the notification provisions contained in Sections 113(a)(1) and 113(a)(4) of the Clean Air Act. It is intended to emphasize the requirement of Section 113(a)(4) to issue, in the case of corporations, a copy of the notification to the "appropriate corporate officers." The guidance recommends procedures for issuing notices of violation under Section 113(a)(1) and for implementing the copying provision in Section 113(a)(4).

The notice provisions in Section 113 are general in nature, giving EPA a great deal of latitude. This guidance is, therefore, not intended to set inflexible standards, but rather to suggest practices that might encourage expeditious resolution of violations and to suggest practices that might avoid challenges to enforcement actions based on alleged notice deficiencies. Thus, although the recommendations are based upon an analysis of existing law in this area, the specific procedures suggested

are not necessarily compelled by the Act or judicial decisions. By recommending specific procedures this guidance is not meant to imply the existence of jurisdictional or due process limitations on EPA's enforcement authority. This guidance does not address issues regarding EPA's enforcement discretion once an NOV has been issued.

Summary

This guidance recommends that the notification requirements of Section 113(a)(1) be met by the issuance of a written notice of violation (NOV), and that the NOV be sent to the highest ranking officer or employee at the violating facility known to EPA. It recommends that the notice copying requirement of Section 113(a)(4) be met by sending copies of the NOV to specified corporate officers, or in the case of a foreign corporation (i.e., one not incorporated in the state), by sending the notice to the registered agent of record and preferably also to appropriate officers in the corporate headquarters. The guidance clarifies that issuance of an NOV should not be delayed because of difficulties in implementing the Section 113(a)(4) copying procedures. The guidance recommends that the NOV specify the State implementation plan (SIP) provision(s) violated, advise the source of the opportunity to confer with EPA, describe the emission points in violation, and indicate by a "cc." notation that copies of the NOV were sent to the State, and, in the case of a corporation, to appropriate officers.

## I. Effect of the Notice

### A. Section 113(a)(1) Notice

Section 113(a)(1) of the Clean Air Act (CAA or the Act), 42 U.S.C. §7410(a)(1), requires EPA to notify any person found by the Administrator to be in violation of a SIP. Specifically, Section 113(a)(1) provides:

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. [emphasis added]

EPA has interpreted the mandatory requirement to give notice as triggered only after a discretionary finding has been made by the Administrator that a violation exists. The courts have upheld the Agency's interpretation. City of Seabrook v. Costle, 659 F.2d 1371, 1374 (5th Cir. 1981) [obligation to make a finding not mandatory]; see, Wisconsin Environmental Decade, Inc. v. Wisconsin Power and Light Co., 395 F.Supp. 313, 317-320 (W.D. Wis. 1975); West Penn Power Co. v. Train, 522 F.2d 302 (3d Cir. 1975); United

States v. Lehigh Portland Cement Co., C.A. No. 84-3030, slip opinion at 6 n.4 (N.D. Iowa December 12, 1984) [Order Denying Defendant's Motion to Dismiss] (Attachment 1); United States v. Chevron, C.A. No. EP-80-CA-265, slip opinon at 3 (W.D. Tex. June 10, 1983) [Order Denying Defendant's Motion to Dismiss or for Abstention] (Attachment 2).

Notification under Section 113(a)(1) is referenced in Section 113(b)(2), which provides in relevant part that:

> The Administrator shall in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action . . . whenever such person -- . . .
>
> (2) violates any requirement of an applicable implementation plan . . . (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement[.] [emphasis added]

Notice is also referenced in Sections 113(a) and 113(d) (relating to the issuance of administrative orders), and Section 113(c)(1)(A) (relating to the initiation of a criminal action). Issuance of a notice and the lapse of 30 days is not, however, always required prior to the initiation of an action to address SIP violations. See 42 U.S.C. §7603 [Emergency Powers]; see also, 42 U.S.C. §7413(b)(3) [Section 112(e) (NESHAPs) and Section 111(e) (NSPS) violations].

B. Section 113(a)(4) Notice

Section 113(a)(4) of the Clean Air Act, 42 U.S.C. §7413(a)(4), requires in the case of a corporate violator that copies of the Section 113(a)(1) notice "be issued to appropriate corporate officers." The issue of whether the 113(a)(4) notice copying requirement is a jurisdictional prerequisite to a Section 113(b)(2) civil action was raised by the defendant in United States v. Lehigh Portland Cement Co., supra (Attachment 1). In Lehigh the defendant sought a dismissal arguing that EPA's NOV was insufficient in that it was served only on the plant manager who, defendant argued, is not an "appropriate corporate officer" within the meaning of Section 113(a)(4). In support of its argument defendant cited 40 C.F.R §122.22, "Signatories to CWA NPDES Permit Applications," which defines the term "responsible corporate officers" in part as a president, secretary or treasurer.

The Court in Lehigh found the CWA regulation inapposite, and denied defendant's Motion to Dismiss holding that a plant manager is an appropriate corporate officer within the meaning of Section 113(a)(4). In addition the Court stated in dicta that the

Section 113(a)(4) notice copying requirement was not a jurisdictional prerequisite to a civil action pursuant to Section 113(b)(2).

## II. Recommended NOV Procedures

### A. Written Notice

There is case law supporting the position that the Section 113(a)(1) notice requirement can be met where a source has received substantial or constructive notice from EPA of a violation. Nevertheless, as a general practice the Regions should issue written notices. Moreover, when read together, Sections 113(a)(1) and 113(a)(4) imply that the notification should be issued in writing in the case of corporate sources in order to comply with the copying requirement in Section 113(a)(4).[1] While substantial or constructive notice may be sufficient, written notice clearly establishes the authority to proceed administratively and provides evidence of when the 30-day period provided for in Sections 113(a)(1) and 113(b)(2) begins to run. This guidance, therefore, recommends that all notices be given in writing in the form of an NOV.

### B. Contents of the NOV

The Act requires the Administrator to notify the violator and the State of a finding of violation of any requirement of a SIP. What a finding consists of and what degree of specificity might be required in the notice is unclear, [2] but the the language of the Act suggests that at a minimum EPA should identify

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[1] Written notice of a violation is not explicitly required by Section 113(a)(1). Cf., Sections 126(a)(1) [Interstate pollution abatement], 161(b)(1)(B) [State notice to redesignate PSD areas].

[2] EPA has promulgated regulations at 40 C.F.R §54.3(b), that specify in detail the contents required for citizen suit notices. Specifically, the regulations require that the notice include:

> sufficient information to permit the recipient [i.e., the Administrator, the State and the alleged violator] to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsibile for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.

It is recommended that this provision be used as guidance in drafting NOVs. This degree of detail is, however, not required for EPA notices, but applies only to citizen suit notices. This

the violated provision(s) of the SIP. The legislative history on Section 113(a)(1) is no more specific.

Some indication of what should be contained in an NOV can be gleaned from the purpose of the Section 113 notice requirement. The Third Circuit Court of Appeals discussing this issue stated that the notice requirement is intended to "make the recipient aware that the 'definitive' regulations are not being met and to trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures." West Penn Power Co. v. Train, 522 D.2d 302, 311 (3d Cir. 1975). Thus, in addition to citing the SIP provision violated, the NOV should afford the source an opportunity to confer if an administrative order is contemplated.3/

In addition, it is recommended that the notice describe the emission points in violation of the SIP standard. Such information might assist the source in responding to the NOV and coming into compliance expeditiously. The notice need not, however, describe the violation with specificity. Requiring a complex

(footnote 2 continued)
is due to the unique purposes citizen suit notices are intended to serve. Specifically, Congress intended the citizen suit provision of the Clean Air Act to provide a limited waiver of sovereign immunity. Moreover, since citizen suits might force EPA to act, the notice requirement was intended to be strictly construed in order to ensure the opportunity of Agency resolution prior to the commencement of litigation. NRDC v. Train, 510 F.2d 692 700, 724 (D.C. Cir. 1974), as modified (1975); People of the State of Calfornia v. Dept. of the Navy, 431 F.Supp. 1271, 1278 (N.D. Cal. 1977); City of Highland Park v. Train, 519 F.2d 681, 690 (7th Cir. 1975); NRDC v. Callaway, 524 F.2d 79, 84 n.4 (2d Cir. 1975).

3/ The Act does not require that an opportunity to confer be given before the Agency can initiate an enforcement action pursuant to Section 113(b)(2). An opportunity to confer is only required under Section 113(a)(4) before an administrative order can take effect. A statement in the NOV offering an opportunity to confer fulfills the Section 113(a)(4) prerequisite, even if the administrative order is not issued until after a conference takes place. Nor is the opportunity to confer restricted to the 30-day period after the notice has been given. Holding the conference earlier rather than later is, however, to the advantage of EPA since such meetings often facilitate EPA's ability to obtain information as well as early resolution of the violation. Some Regions include a statement in their NOVs limiting the opportunity to confer to a specified number of days, e.g. 10 days of receipt of the NOV.

notice would only cause delays in enforcement in contravention of the Congressional intent to expedite enforcement.[4]

Finally, in the case of corporate violators, the notice should name the corporate officers who are sent copies of the NOV. This might promote expeditious correction of the violations. It would also help document compliance with Section 113(a)(4). (See discussion below.)

C. Persons Who Should Receive the Notice

Section 113(a)(1) requires that notice be given to any "person" found to be in violation of a SIP. The term "person" is defined broadly in Section 302(e) of the CAA as including "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent or employee thereof." 42 U.S.C. §7602(e) [emphasis added].

The wording of the Act, therefore, implies that a Section 113(a)(1) notice is technically sufficient if it is given to any known officer, agent or employee of the source. See, U.S. v. Lehigh Portland Cement Co., supra (Attachment 1). This is important since, as a practical matter, it may be difficult for EPA to identify the senior executive officer of a source with specificity. It is recommended, however, that NOVs be issued to the highest ranking officer, agent, or employee at the violating facility known to EPA. This will increase the likelihood of the violation being corrected by the source expeditiously.

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4/ By analogy to the citizen suit notice provision it appears that the courts take a pragmatic approach in ascertaining the sufficiency of a notice. Baughman v. Bradford Coal Co., 471 F.Supp. 488, 490 (W.D. Pa. 1977), aff'd 592 F.2d 215; People of the State of California v. Dept. of the Navy, supra; see Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F.2d 1089 (D.C. Cir. 1975), rev'd on other grounds 511 F.2d 809 (D.C. Cir. 1975); Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231 (3d Cor. 1980), cert. denied 449 U.S. 1096 (1981); NRDC v. Callaway, supra; but see City of Highland Park v. Train, supra; Massachusetts v. U.S. Veterans Administration, 541 F.2d 119 (1st Cir. 1976). The Court in South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118 (D.S.C. 1978), indicated that deficiencies in the notice that did not interfere with the purposes of the notice requirement would not bar a citizen suit. 457 F.Supp. at 123. Similarly, in People of the State of California v. Department of the Navy, 431 F.Supp. at 1278, the Court upheld a deficient citizen suit notice since the recipients were effectively informed "of the violations alleged, the standards violated, the locations of the violations, etc."

Similarily, although the requirement in Section 113(a)(4) to issue copies of the notice to appropriate corporate officers is not a jurisdictional prerequisite to a civil action, care should be taken to comply with this requirement. Regions should be able to identify the corporate officers through formal (e.g. Section 114) or informal contacts with the source, by contacting the State environmental agency, by checking corporate directories, or by calling or writing to the State office responsible for corporate registrations. (The State corporate registration office is typically identified in the State corporate code.) In cases involving domestic corporations Regions are urged to send copies of the NOV to the corporate president, to any vice-president identified as responsible for environmental matters, to the general counsel of the corporation, and, in cases where the plant manager is the highest corporate officer, to the registered agent. In the case of a foreign corporation (i.e. one not incorporated in the State), a copy of the NOV should be sent to the registered agent of record at the State corporate registration office, and to any other corporate officers you can identify as suggested above. The original NOV should show a "cc." for all persons copied.

Although the Court in United States v. Lehigh Portland Cement Co., supra, held that the notice copying requirement in Section 113(a)(4) was satisfied in that case by giving the NOV to the plant manager, following the additional steps recommended above may assist in expediting a corporation's response to the NOV. For the same reason the copies of the NOV should ideally be issued to the corporate officers at the same time the NOV is given to the source. Regions should not, however, delay issuing the NOV if you cannot readily identify the appropriate corporate officers.

D. How to send the Notice

Section 113(a)(1) provides that, once the Administrator makes a finding that a violation exists, EPA shall give notice to the person in violation of the plan and to the state. In addition, Section 113(a)(4) requires the Administrator to issue copies of the notice to appropriate corporate officers. The Act does not, however, specify a procedure for issuing the notice.5/ Nevertheless, we recommend that NOVs be sent by Certified Mail Return

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5/ Compare Section 113(a)(2) of the Act which requires "public" notice when the Administrator makes a finding that a State has failed to effectively enforce a SIP. Similarily Section 115(a) requires that the Administrator give States "formal" notices of SIP deficiencies to correct international air pollution. The absence of a public or formal notice requirement in Sections 113(a)(1) and 113(a)(4) of the Act is, therefore, apparently not the result of omission. Nor is personal service of process such

Receipt Requested, to help establish evidence that the notice was given.

## III. Conclusion

Please call Rachel Hopp (FTS) 382-2859 for any explanations of this guidance, to discuss issues raised, or if you want additional information or examples.

Attachments

(footnote 5 continued)
as is provided for in Rule 4, Fed.R.Civ.P., required for a notice to comply with Sections 113(a)(1) and 113(a)(4) of the Act. Rule 4 service of the complaint would be required in any event if the Agency initiated a civil action.

**ATTACHMENT I**

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FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA

DEC 12 1984
8:47
WILLIAM J. KANAK - Clerk
By J. S. Loemir
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | NO. C 84-3030 |
| vs. | ) | ORDER |
| LEHIGH PORTLAND CEMENT COMPANY, Defendant. | ) | |

RECEIVED
DEC 12 1984
U.S. ATTORNEY
NO. DIS. OF IOWA

This matter comes before the Court on defendant's motion to dismiss. A hearing was held on August 9, 1984, in Fort Dodge, Iowa. After carefully considering the briefs and arguments of both parties, this Court denies defendant's motion to dismiss.

This action involves the implementation of the Clean Air Act. Under this Act, a state is to adopt a State Implementation Plan (SIP) which would require the state to satisfy the Act's National Ambient Air Quality Standards (NAAQS). The Act provides for both federal and state enforcement of the SIPs. This action arises from the federal enforcement of the Iowa SIP.

Defendant is a cement manufacturing company with its corporate headquarters in Allentown, Pennsylvania. One of its thirteen plants is located in Mason City, Iowa and is the plant which is the subject of this suit. On March 16, 1983, plaintiff notified the Iowa Department of Environmental Quality and the plant manager of defendant's Mason City plant of violations of SIP fugitive dust regulations. Plaintiff brought this action on

April 4, 1984. Previous to plaintiff's notice, the Iowa Department of Environmental Quality had given notice to defend- of SIP fugitive dust regulations violations and on March 5, 1 the Department and defendant entered into a consent order concerning the violations.

Defendant's motion to dismiss is directed at plaintiff's first claim for relief (¶¶13-17 of plaintiff's Complaint), which allege fugitive dust violations. Defendant stated in a letter to this Court dated August 27, 1984 that it does not contend that plaintiff's second claim for relief (¶¶18-19 of its Complaint), which alleges violation of new source performance standards, is subject to dismissal.

In its motion to dismiss, defendant presents three arguments. First, defendant claims that the copy of a notice of violation to appropriate corporate officers, required by 42 U.S.C. §7413(a is a condition precedent to the bringing of an action under 42 U.S.C. §7413(b)(2), and the notice given by plaintiff was defective and constituted insufficient process and insufficient service of process on defendant. Second, defendant claims that the doctrine of abstention applies, and the Court therefore lacks jurisdiction. Finally, defendant argues that the Iowa Department of Environmental Quality's consent order precludes plaintiff from bringing this action because of issue and claim preclusion. Defendant also originally argued that plaintiff lacked standing to bring this action, but conceded this argument at the hearing.

I.

In support of its argument that plaintiff failed to give defendant adequate notice, defendant relies on 42 U.S.C. §7413(a)(4), which states that when there is a corporate violator, a copy of the notice of violation shall be issued to appropriate corporate officers. Defendant argues that because only defendant' Mason City plant manager received notice, and the plant manager is not a corporate officer, plaintiff failed to sufficiently serve defendant notice. In support of its argument, defendant also cites a regulation of plaintiff's[1] that defines "responsible corporate officers" as including only president, vice-president, secretary and treasurer, and prior case law, which has found the failure to give notice of violation a jurisdictional defect in private citizen actions brought under the Clean Air Act.

In response to defendant's argument, plaintiff first states that it complied with the statute by giving notice to the plant manager because there is only a requirement for the EPA to "notify the person in violation" which is found in §7413(a),[2] and "person"

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[1] 40 C.F.R. §122.22.

[2] 42 U.S.C. §7413(a)(1) states: "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

may be any officer, agent, or employee thereof.[3] According to plaintiff, subparagraph (a)(4), the section that states a copy the notice of violation shall be issued to a corporate office is not jurisdictional because §7413(b), which sets out the enforcement procedures, states that the EPA may bring suit against a "person" more than thirty days after being notified under (a)(1) and makes no mention of (a)(4). Secondly, plaintiff claims that even if (a)(4) is a jurisdictional requirement, it has met the requirement of issuing notice to appropriate corporate officers when it gave notice to the Mason City plant manager because the ordinary meaning of a corporate officer includes a plant manager. Thirdly, plaintiff argues that if the Court does not accept the position that a plant manager is a corporate officer, plaintiff satisfied the (a)(4) requirement by issuing a notice of violation to the defendant's corporate headquarters in Pennsylvania on August 1984 (twelve days after this Court held a hearing on this matter), since no prejudice resulted. Finally, plaintiff argues that the cases defendant relies upon in arguing that there was a defective notice are inapplicable because they deal with a different section which involves citizen's suits in which no notice of any kind was given.

It is evident from the arguments presented by both parties that several questions arise when considering the sufficiency of the notice to the defendant. A major question is whether a plant manager is an "appropriate corporate officer" under §7413(a)(4).

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[3] 42 U.S.C. §7602(e).

If this Court were to find that a plant manager is an "appropriate corporate officer," plaintiff would have satisfied the notice requirements of §7413, since defendant's plant manager did receive a notice of violation. In determining this question, the Court could find no statutory language nor legislative history which excluded a plant manager from the category of "appropriate corporate officers." The Court further notes that the general definition of a (corporate) officer would include a plant manager because an officer is one who holds an office of authority or trust. Websters New Collegiate Dictionary (1979). As the head of the Mason City plant, defendant's manager certainly held a position of authority or trust. With regard to the EPA regulation, which definition of "responsible corporate officer" fails to include plant managers, this Court is unpersuaded such a definition applies here or should exclude a plant manager. First, it was not formulated by Congress but rather by the EPA to be applied to the National Pollutant Discharge Elimination System Program pursuant to the Clean Water Act, which is unrelated to the statutory section in question here. Moreover, its definition is more limited because it defines "responsible" corporate officers as opposed to "appropriate" corporate officers. Although the Court thinks that plaintiff might have been more cautious in issuing a copy of the notice to the "appropriate corporate officers," its service of notice to defendant's Mason City plant manager was sufficient because the plant manager was an "appropriat corporate officer." By finding that plaintiff issued a copy of the notice of violation to an "appropriate corporate officer,"

there is no need to determine the other questions raised by the parties relating to the sufficiency of notice, because they are premised on the assumption that the Mason City plant manager was not a corporate officer.[4]

II.

In its argument that the Court should abstain from hearing this case, the defendant finds the factual situation before this Court to be similar to that of other cases in which courts have abstained. In rejecting defendant's claim, plaintiff relies on the applicable statutory sections, the statute's legislative history, and case law.

In its reading of the statute, which gives both federal and state courts jurisdiction to enforce provisions of a state SIP this Court finds no limitation on the EPA (or any other federal government agencies) in bringing an action when there is or was already a parallel state proceeding. This Court notes as indicative of Congress' intent to avoid any bars on federal agencies in bringing an action the repeal of a statutory section

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[4]Although this Court does not need to decide if the §7413(a)(4) requirement of issuing a copy of a notice of violation to the appropriate corporate officers is a jurisdictional requirement, it notes that in United States v. Chevron, No. EP-80-CA-265 (W.D.Tex. June 10, 1983), the Court found that the only requirement for bringing an action under §7413 were (1) notice to the alleged violator, and (2) a lapse of thirty days. Accordingly, under Chevron, which appears to be the only case to address the §7413 jurisdictional requirements, the (a)(4) requirement is not jurisdictional.

which stated that federal enforcement was permitted only when violations resulted from a state's failure to take responsible grounds to enforce its standards. Air Quality Act of 1967, 81 Stat. 453, 493. The case law also supports plaintiff's position. In United States v. Chevron, No. ~~DF~~ EP-80-CA-265 (W.D.Tex. June 10, 1983), the District Court of the Western District of Texas ruled against defendant's motion to abstain from hearing the case due to the pendency in state court of a prior lawsuit involving similar issues. The Court found that since there did not exist a situation where (1) a constitutional issue might be mooted or placed in a different posture by a state court decision as to the applicable state law, (2) a federal court's exercise of jurisdiction would substantially interfere with the state's effort to enforce a system of purely state regulation, or (3) a federal court is asked to refrain from state criminal proceedings, nuisance actions antecedent to criminal proceedings or state suits to collect taxes, the court would not abstain. This Court, when considering the above factors, cannot find that it should abstain either.

Moreover, this Court finds the case which the defendant relies upon, United States v. Cargill, Inc., 508 F.Supp. 734 (D.Del. 1981), to be distinguishable. In Cargill, the EPA sued under the Clean Water Act to have a corporation enjoined from further violation of a wastewater discharge permit and to impose civil penalties for past violations. The defendant moved to have the court dismiss, abate or stay the action or to abstain from assuming jurisdiction over the action because of a still pending

suit filed by the State Department of Natural Resources and Environmental Control in the state court seeking identical relief. The district court found that the doctrine of abstention did apply. However, it did allow for a stay. The court, which gave several reasons for the stay, noted the most important reason to be that the federal action had caused the defendant to halt construction efforts to prevent water pollution, the principal goal of the Clean Water Act. Since the district court in Cargill found that the abstention did not apply, the case does not support defendant's position in arguing that this Court should abstain. Furthermore, in terms of granting a stay, this Court agrees with plaintiff that the most important reason for such a stay under Cargill, the prevention of pollution, would not be thwarted by this action, since the EPA seeks to augment and not disrupt defendant's fugitive dust control measures.

III.

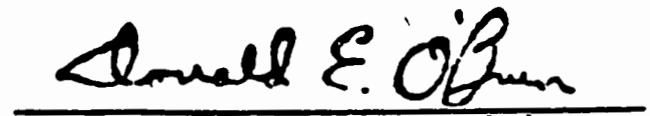
In arguing that the doctrines of issue and claim preclusion apply, defendant states that it had begun negotiations with the State prior to receiving any notice from the EPA and the consent order between the defendant and the State was only entered into after the EPA was given notice of an opportunity to request a public hearing or make a public comment. According to defendant, since the EPA had this chance to argue for compliance with its own regulations, the doctrines of issue and claim preclusion apply, and plaintiff is therefore barred from bringing this action,

which, if allowed, might unfairly lead to double penalties being imposed on defendant.

This Court finds defendant's argument to be similar to its argument concerning abstention in that it is another attempt to bar this federal action. As a result, many of the reasons given by the Court in rejecting defendant's argument for abstention are also applicable here. Again, this Court can find no statutory support for defendant's position in a statute that clearly contemplates enforcement on the federal level as well as the state level. This Court also finds the major cases defendant cites distinguishable from the case before us. In United States v. ITT Rayonier, Inc., where the Ninth Circuit Court of Appeals ruled that the EPA was barred under the doctrines of issue and claim preclusion from bringing an enforcement action pursuant to the Clean Water Act, the previous action ended with a decision rendered by a state supreme court. In the case before this Court, however, there was no previous state court action, but rather a consent decree issued by a state agency. Moreover, since no penalties were assessed by the state, defendant is not subject to double penalties.

IT IS THEREFORE ORDERED that defendant's motion for dismissal be denied.

December 10, 1984.



Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

**ATTACHEMENT II**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SEP 22 1983
CHARLES W. VAGNER
By
RECEIVED
SEP 23 1983

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| v. | ) | EP-80-CA-265 |
| CHEVRON U.S.A., INC., Defendant. | ) | |

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT

This is a civil action for injunctive relief and civil penalties pursuant to Section 113(b) of the Federal Clean Air Act, 42 U.S.C. § 7413(b). The suit was filed by Attorneys of the United States Department of Justice in the name of the United States of America as Plaintiff. Defendant now moves to dismiss the complaint, contending that only the Administrator of the Environmental Protection Agency is authorized by the statute to bring this action.

The language of Section 7413(b) literally provides that the Administrator shall commence a civil action for injunctive relief or civil penalties when the law or regulations have been violated. The Plaintiff contends that the United States, acting through its Department of Justice, and in cooperation with the Administrator of the Environmental Protection Agency, is also authorized to bring a civil action. The parties have cited only three cases dealing with this question, and they are divided in result. In United States v. Associated Electric Cooperatives, Inc., 503 F.Supp. 92 (E.D. Mo. 1980), the case

relied upon by the Defendant, the court held that the statute did not empower the Attorney General to bring a civil action on behalf of or in the name of the United States. The othe two cases, upon which the Plaintiff relies, held that the United States may bring an action under 42 U.S.C. § 7413(b). United States v. Packaging Corporation of America, No G81-289 CA 7 (W.D. Mich. 1982) (unreported opinion); United States v. Texaco, 16 ERC 1142 (N.D. Ill. 1980).

Section 7605 mandates that the Administrator of the Environmental Protection Agency and the Attorney General work together in the enforcement of the Clean Air Act. It appears to adopt and ratify a Memorandum of Understanding between the Attorney General and the Environmental Protection Agency, dated June 13, 1977, which provides in substance that the Department of Justice will control civil litigation brought enforce the provisions of the Act. The Affidavit of Courtney Price, Special Counsel for Enforcement of the Environmental Protection Agency, establishes that the Administrator of the Environmental Protection Agency requested the Department of Justice to file the complaint in the instant case, and that the two agencies have cooperated at all stages of the proceeding. It is, therefore, unlikely that the interests of the Environmental Protection Agency will be compromised by any action taken by the Department of Justice, a fear expressed by the District Court in United States v. Associated Electrical Cooperatives, Inc., supra. at 94. Furthermore, the Defendant

has failed to show any prejudice arising from the filing of the suit in the name of the United States of America rather tha the Administrator of the Environmental Protection Agency.

The United States is generally entitled to maintain action to effectuate its programs and policies even in the absence of specific statutory authority or pecuniary interest. In re Debs 158 U.S. 564, 586 (1894); United States v. LeMay, 322 F.2d 100, 103 (5th Cir. 1963); United States v. Arlington County, Va., 326 F.2d 929, 932 (4th Cir. 1964). Nothing in Section 7413(b) explicitly precludes the United States from bringing this suit in its own name to enforce the Clean Air Act. The Defendant's motion to dismiss the complaint should be denied.

It is therefore ORDERED that the Defendant's motion to dismiss the complaint in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 22nd day of September, 1983.

Harry Lee Hudspeth

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

SECTION B DOCUMENT 8

**Enforcement Policy Respecting Sources Complying with Clean Air Act Requirements by Shutdown**

11/17/85

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

CAA B8

NOV 27 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Enforcement Policy Respecting Sources Complying With Clean Air Act Requirements By Shutdown

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

TO: Air and Waste Management Division Directors
Regions II, VI, VII, and VIII

Air Management Division Directors
Region I, III, V, and IX

Air, Pesticides, and Toxics Management Division Directors
Regions IV and X

Regional Counsels
Regions I-X

Attached is a memorandum providing guidance for your use in addressing sources that intend to comply with Clean Air Act requirements by shutting down. The relationship of this policy statement to previous policy statements on the same subject is as follows.

On June 18, 1979, the Administrator established an enforcement policy under the Clean Air and Clean Water Acts respecting sources intending to come into compliance by shutting down. (See Administrator's Memorandum of June 18, 1979, "Limited Life Facilities--Policy Statement.") On September 20, 1982 and January 12, 1983, EPA affirmed that the "Limited Life Facilities" policy would apply beyond the end of 1982 under the Clean Air Act for noncomplying sources in primary nonattainment areas where attainment was to have been achieved by the end of 1982. (See the Administrator's Memorandum of September 20, 1982,

"Enforcement Action Against Stationary Air Sources Which Will Not Be In Compliance by December 31, 1982," and the January 12, 1983 Memorandum, "Guidance on Implementation of the 1982 Deadline Enforcement Policy Issued September 20, 1982," issued jointly by the Associate Administrator and General Counsel and the Assistant Administrator for Air, Noise and Radiation.)

For Clean Air Act sources, the present policy, "Clean Air Act Enforcement Policy Respecting Sources Complying By Shutdown," supersedes the enforcement policy issued by the Administrator on June 18, 1979 entitled "Limited Life Facilities-Policy Statement." A memorandum amending relevant portions of the September 20, 1982 and January 12, 1983 memoranda to make them consistent with today's policy statement is being issued along with this memorandum.

Attachment

# ENFORCEMENT POLICY RESPECTING SOURCES C .PLYING WITH CLEAN AIR ACT REQUIREMENTS BY SHUTDOWN

NOTE: THE POLICIES ESTABLISHED IN THIS DOCUMENT ARE INTENDED SOLELY FOR THE GUIDANCE OF GOVERNMENT PERSONNEL AND ARE NOT INTENDED TO CREATE ANY RIGHTS, SUBSTANTIVE OR PROCEDURAL, ENFORCEABLE BY A PARTY IN LITIGATION WITH THE UNITED STATES. THE AGENCY RESERVES THE RIGHT TO ACT AT VARIANCE WITH THESE POLICIES AND TO CHANGE THEM AT ANY TIME WITHOUT PUBLIC NOTICE.

## I. Applicability

This policy applies to all sources which are in violation of Clean Air Act SIP, NSPS, or NESHAP's requirements, where the owner intends to achieve compliance by shutting down the source rather than by installing controls.[1] The policy applies to sources in all air quality regions, regardless of attainment status.

## II. Enforcement Policy For Sources Complying by Shutdown

Section 113 of the Clean Air Act authorizes EPA to seek injunctions against sources in violation of Clean Air Act requirements. When applying to the court for a compliance schedule or when negotiating one with a defendant, EPA has consistently interpreted the Act as requiring compliance as expeditiously as practicable.

In cases where the owner intends to achieve compliance by shutting down the source, the question arises as to what constitutes an expeditious compliance schedule. EPA believes that there are two fundamental types of shutdown situations, with a different treatment being appropriate for each.

### A. NESHAP Sources, NSPS Sources, and SIP Sources Not Being Replaced

Where a source is violating NESHAP or NSPS requirements, or is violating SIP requirements and is not to be expeditiously replaced (as discussed below), EPA believes that the Clean

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[1] As used herein, the phrase "install controls" includes: (1) the replacement, or upgrading, of inadequate previously-installed controls; and (2) process changes involving significant developmental costs. An example of the latter class of cases would be product reformulation in the case of VOC sources. Where developmental costs can be recouped at other sources owned by the source owner, Section II.B will not be applicable, however.

Air Act requires an expeditious shutdown of the violating source. Allowing sources violating NESHAP, NSPS, PSD or NSR requirements to operate more than a minimal amount of time without controls would subvert the environmental purposes behind the Act's requirements pertaining to such sources. Moreover, allowing such sources or any other SIP sources which will not be controlled more than a minimal period of uncontrolled operation would merely afford the owner an opportunity to maximize profits at the expense of the environment.

How expeditiously sources falling into the above categories must shut down is to be determined on a case-by-case basis. The most important factors to be considered are legal restraints on closing, such as union agreements and bankruptcy court orders. As necesary in appropriate cases, EPA should apply to the relevant legal authorities for removal of any such constraints. In NESHAPs cases or in any other cases involving a significant public health risk, violating sources must be shut down as quickly as possible.

For sources subject to this Subsection (II.A), the period within which expeditious shutdown must occur runs from the time at which it is determined that the owner intends to comply by shutdown. EPA should apply to the appropriate court for injunctive relief if an acceptable expeditious shutdown schedule cannot be speedily negotiated. Any negotiated schedule should be memorialized in a judicially enforceable consent agreement and lodged with the appropriate court.

B. Possible Extensions for Noncomplying SIP Sources Which Will Be Replaced

If the owner intends to replace a source violating a SIP requirement by transferring the production to some other facility in the same geographical area[2], and the replacement source is not yet constructed and/or operable, EPA may exercise its enforcement discretion to delay shutdown of the violating source until the replacement facility is constructed and operable. The factors that EPA will take into account in determining whether to exercise such discretion will include:

1. The attainment status of the air quality region in which the source is located, including whether the region's deadline for achieving the NAAQS has passed,

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[2]If the replacement source were not located in the same area as the violating source, the benefits of the extended shutdown schedule would be reaped by some community other than the one carrying the environmental burden of the extended period of noncomplying operation.

2. The impact of the violating source's excess emissions on the air quality of the region,

3. The time elapsed since the source was required to have achieved compliance, and the efforts which the source owner has made to achieve compliance,

4. The impact on workers and the company of any disruption in production which might be occasioned by a shutdown prior to the replacement source's being operable, and

5. The owner's record of compliance with all environmental regulations at the affected facility, and at other facilities owned by the same owner.

6. Shutdown of the violating source need not consist of physically destroying or dismantling the source. However, in cases where the source owner does not wish to destroy or dismantle the source, a responsible official of the source owner must submit an affidavit specifying that the owner does not, at the time the affidavit is given, intend to resume operating the source within at least three years following shutdown.

The replacement facility need not be a one-for-one replication of the violating facility but it must involve some substantial construction necessary to permit the transfer of production to the replacement facility. The replacement facility need not emit the same pollutant as the violating source. The replacement facility may include a pre-existing source, provided some substantial construction is necessary to make the transfer of production feasible. Finally, for the purposes of this paragraph, the installation or upgrading of controls at the replacement facility may constitute construction provided the installation or upgrading is necessary for the replacement facility to achieve or maintain compliance after the production is transferred.

In cases where EPA decides to exercise its enforcement discretion to delay shutdown until the replacement of the violating source, the owner must enter into a judicially enforceable consent decree providing as follows:

1. The consent decree must require shutdown of the violating source by a date certain. This date must be no later than the earliest date by which the replacement facility can be constructed and rendered operable on an

expeditious schedule, as measured from the time when it is determined that the owner of the source intends to achieve compliance by shutdown.

2. The decree must require the posting of a surety bond or equivalent mechanism providing for an automatic forfeiture in the event shutdown does not occur by the agreed-upon date. The bond should be in an amount representing the cost of installing adequate controls on the violating source.

3. Notwithstanding the provision of a bond, the decree must contain a clause reserving the government's right to seek other relief in the event the source fails to be timely shut down.

4. The decree must contain a stipulated penalty provision setting a daily penalty for any operation of the violating source beyond the shutdown date. The amount of this penalty should be sufficient to, at a minimum, recapture any economic benefit attributable to the noncomplying operation, above and beyond the capital cost of controls forfeitable pursuant to the bond required by Subparagraph 2 above.

5. The consent decree must provide that the violating source will be either demolished or dismantled, or that, upon any reactivation for a business reason arising after the shutdown, the source would constitute a new source under applicable federal regulations including, where applicable, new source review regulations.

6. All agreements regarding shutdown must be made binding on all successors-in-interest to the owner.

7. The consent decree must require a schedule of construction for the replacement facility with appropriate interim dates and stipulated penalties for any violations of the construction schedule.

8. The decree must require the owner to demonstrate and maintain compliance with all emission standards applicable to all emission points at the replacement facility which are associated with the transferred production. The compliance demonstration should, if feasible, occur prior to the transfer of production. An exception can be made in cases where a brief shakedown period is required, or where conditions prior to the transfer of production would not constitute representative operating conditions. The decree should provide that compliance shall be maintained at the replacement facility until

the termination of the decree, if that date occurs later than the date of the required compliance demonstration.

9. The decree should provide that the company shall comply with the terms and conditions of any state, local, or federal permits applicable to the sources associated with the transferred production at the replacement facility.

10. The decree must require implementation of appropriate interim measures at the violating facility to minimize the impact of continued noncomplying operation on the environment. If the violating source is uncontrolled, the decree must require implementation of whatever operation and maintenance practices are appropriate. If the source already has controls, the decree must at a minimum require the best practicable operation and maintenance of those controls until the time of shutdown.[3] In cases where an appropriate limit can be set, the decree must require compliance with interim emissions limits, as a tool for ensuring compliance with interim operation and maintenance procedures, and must provide for stipulated penalties for violations of such interim emission limits.

11. The decree must contain reporting requirements regarding such matters as increments of progress in compliance schedules, implementation of interim control measures, and compliance with interim emissions levels.

12. The decree must provide, in accordance with the applicable civil penalty policy, for the payment of a civil penalty respecting the violations at the violating source, and respecting any violations at the replacement source. The penalty must cover the period beginning at the date of the earliest provable violation to the date that compliance will be achieved. The end of this period for the violating source being closed down will be the date of shutdown. The end date with respect to any noncomplying replacement source is the date that a successful compliance demonstration is conducted.

13. The termination clause of the decree must provide that the jurisdiction of the court will continue until the later of the shutdown of the violating facility or the compliance demonstration at the replacement facility.

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[3]There have been occasions when control equipment was available on a rental basis. In any such cases, use of the rental equipment should be required.

C. Avoiding Abuse of This Policy

Experience has shown that some source owners may seek to obtain shutdown schedules longer than otherwise allowed under this policy by delaying to acknowledge that shutdown is contemplated for a source which has become the subject of an enforcement action. In order to avoid such abuse of the shutdown policy, the following procedures should be employed:

1. At the time of EPA's initial contact with the source owner subsequent to issuance of an N.O.V., EPA should routinely advise the source owner of the policy respecting sources complying by shutdown.

2. If the owner acknowledges in a timely fashion that shutdown is a possibility for the source, but indicates that the shutdown decision has not been finalized, EPA may, in appropriate cases, exercise its discretion to afford the owner a brief period to complete any decision-making regarding whether the source will be shut down and, if so, whether it will be replaced within the meaning of Section II.B. The amount of time afforded should be the absolute minimum procedurally necessary for authorized officials of the source's owner to make the relevant decisions.

III. Effective Date

This policy applies to all cases referred to Headquarters or, in the case of direct referrals, to DOJ, subsequent to December 15, 1985.

SECTION B DOCUMENT 9

**Issues #3(e) & #5 of the VOC Issue Resolution Process: Establishing Proof of VOC Emissions Violations and Bubbles in Consent Decrees Resolving Civil Actions Under §113(b) of the Clean Air Act**

9

01/17/86

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

JAN 17 1986

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Issues #3(e) and #5 of the VOC Issue Resolution Process: Establishing Proof of VOC Emissions Violations, and Bubbles in Consent Decrees Resolving Civil Actions Under Section 113(b) of the Clean Air Act

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

TO: Regional Counsels
Regions I-X

Air Management Division Directors
Region I, III, V and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxic Management Division Directors,
Region IV and VI

Air and Toxics Division Directors
Regions VII, VIII and X

In the attached memoranda, I am answering two questions that you identified as important issues in our Clean Air Act enforcement effort to reduce emissions of volatile organic compounds ("VOC"). Specifically, this guidance responds to issues #3(e), and #5 of the nineteen issues listed in a May 20, 1985 memorandum titled "Results of May 3 VOC meeting."

The issues addressed by this guidance concern how to establish proof of VOC emission violations (issue #3(e)) and the relationship between pending or potential bubble applications and consent decrees (issue 5). The main theme of the guidance on issue #3(e) is to encourage the use of Section 114 of the Clean Air Act to obtain information where data is not otherwise available to prove violations under the applicable test method. The principle point of the guidance on issue #5 is to emphasize that the current SIP governs until any am ments are fedc lly effectivc

This guidance is part of an Agency-wide effort to address VOC enforcement issues and should be considered in conjunction with the responses to the other VOC issues, which will be distributed by the responsible EPA offices as they are developed.

One major comment regarding issue 3(e) was repeated by several commentors during the second round of review and is worth mentioning briefly here. The comments suggested that rather than attempting to fix recordkeeping problems through §114 requests, EPA should work towards incorporating better recordkeeping requirements in the state implementation plans. For example, EPA could issue SIP deficiency notices where the SIP does not provide for recordkeeping requirements adequate to determine if the source is in compliance with the SIP.

Our response to issue 3(e) is designed to deal with those interim problems concerning recordkeeping which arise prior to the resolution of the more fundamental concern of poorly drafted SIP recordkeeping requirements. The issue of how to improve the SIP's is being addressed by the Control Programs Development Division. The attached guidance is intended to advise you of the tools available to obtain better evidence of violations, and my office's policy concerning the use of those tools, until such time as they may become unnecessary because of corrective SIP revisions.

I appreciate the efforts of the Regions in commenting on the various drafts of the two following documents and hope that you find them helpful in resolving some of the issues concerning VOC enforcement.

Attachments

ISSUE NUMBER 3(e): How are VOC emissions to be calculated over a chosen averaging time when a company is not required to, or does not, maintain records directly pertinent to that unit of time?

RESPONSE: This issue is presented when the period for assessing compliance under the SIP with the VOC emission limitation (e.g., a source must meet a percent VOC limitation over a 24 hour period or instantaneously) does not correspond to the records maintained by the source (e.g., records of VOC usage are kept by the source only on a monthly basis). The issue is also presented in other contexts. For example, a SIP may require line-by-line compliance while the source records are maintained only on a plant wide basis. The issue is important because compliance determinations for many types of VOC sources rely upon the records of VOC usage kept by the individual company.

Where the SIP itself requires records to be maintained that correspond to the SIP emission limitations, corrective action can be taken under Section 113 of the Clean Air Act to require the source to keep the proper records. This action can consist of the issuance of an administrative order under Section 113(a), or the initiation of a judicial action under 113(b). The remainder of this memorandum addresses the situation where the SIP does not contain such a record keeping requirement.

There are four recommended techniques available to determine source compliance with VOC SIP emission limitations in the absence of a SIP record keeping requirement for source records which correspond to the SIP emission limitations. These four different techniques are primarily useful in four different contexts.

The first technique consists of the use of mathematical algorithms. A description of two different types of available algorithms is attached (attachment 1). Both apply various mathematical computations to monthly or yearly data to produce a figure representing the minimum number of days that a source had to be out of compliance with the SIP emission limit. This calculation is statistically based and does not identify the particular days that a source was in violation. Use of the algorithms may be helpful in settlement discussions with the source and in determining a settlement penalty.

Use of the results of the algorithms in a different context, to prove violations at a trial or hearing, presents several issues. Defendants can be expected to argue that the Government may prove violations only through the use of the appropriate test method, which would be the method specified

in the federally-approved SIP, or if there is none, the appropriate EPA test method in 40 CFR Part 60 (see 40 CFR §52.12(c)). To overcome this point, the Government would have to argue that violations can also be proven through expert opinion testimony under the Federal Rules of Evidence, Rule 702 (Testimony by Experts), 703 (Basis of Opinion Testimony by Experts), and 704 (Opinion on Ultimate Issue). In order to use the results of the algorithms as evidence of violations at a trial, the Government should be prepared to prove the statistical validity of the algorithms through expert testimony, and to show through the opinion of an expert, based upon the results of the algorithms, that the source had to be in violation for a given number of days. The Government would not be able to prove precisely which days a company was out of compliance nor which lines (or how many lines) were out of compliance. The Government would be able to show, based on the source's total VOC output and the restrictions provided in SIP, that at least one of the lines at the source was out of compliance for a certain minimum period of time. Sole reliance on algorithms has the negative effect of calculating violations on an averaging basis in what may be the absence of any SIP provision authorizing averaging.

Because of these potential issues of proof and the effect of averaging out some violations by using algorithms, steps should be taken to obtain the data necessary to calculate emissions under the applicable test method. Thus, the second recommended technique to determine source VOC compliance is to use Section 114 of the Clean Air Act to request currently existing source records which can be used to develop the data necessary to make compliance determinations under the applicable test method. Items such as sales slips, invoices, production records, solvent orders, etc., may be available and useful in developing the necessary data for the test method calculations. Once a case has been filed discovery can also be used to supplement the information obtained under Section 114.

The third recommended technique to determine source VOC current and future compliance is the issuance of a request under Section 114 requiring the source to prospectively keep the necessary records. This technique is the most straightforward of the three and the one that should generally be pursued. It may be the only option in the case where sources have not kept records in a form which can be used, directly or indirectly, to determine compliance under the applicable test method. It may also be the only realistic option where the use of existing records to develop the necessary data for the test method calculations would be unduly time-consuming and burdensome for the Agency.

Under the authority of Section 114, EPA may require a source to establish and maintain records reasonably required to determine compliance with the SIP (Section 114(a)(1)(A) and (B)). By issuing such a request, EPA would impose an obligation on a source to keep and maintain those records which are necessary to calculate compliance determinations under the applicable test method. The requested record keeping should be in a format consistent with the SIP emission requirements. Thus, if the SIP requires compliance on a line-by-line basis and on a 24 hour average, the records should be kept on the basis of individual lines using no more than 24 hour averaging. Also, the required measurements as to VOC content should be consistent with applicable EPA test methods. For example, EPA should require in the Section 114 request that data on the VOC content of a particular coating or ink is produced through a measuring process identical to EPA's method 24 or 24 A in 40 C.F.R. §60 App. A.

As a fourth technique, Section 114 may also be used to require a source to sample emissions in accordance with the methods prescribed by EPA (Section 114(a)(1)(D)). Thus, Section 114 may be used to require a source to conduct an emissions test in accordance with the applicable test methods. This type of Section 114 request would probably be the most appropriate where compliance determinations are made on the basis of emissions testing as opposed to an analysis of the VOC content of the individual coatings used. In certain situations where it is unclear whether the coating or ink supplier is using proper test methods, EPA may want to require the user of those coatings to run tests for VOC content using EPA's approved test methods.

In conclusion, algorithms exist and are available to estimate the minimum number of days a company was out of compliance with SIP VOC emission limitations in the absence of company records which are necessary to make compliance determinations under the applicable test method. The results of the algorithms are primarily useful for purposes of settlement discussions or for identifying sources which should be required to submit information under §114. While this guidance does not preclude using algorithms and expert opinion testimony to prove violations at a trial, the Government should be prepared to prove at least some days of violation through the applicable test method in the event that expert opinion evidence is rejected by the judge. The records necessary to develop this proof under the applicable test method can be sought through a Section 114 request for information where the company has data which can be used

to develop the necessary records. Such records can also be developed on a prospective basis through a requirement imposed under the authority of Section 114 requiring the source to maintain the necessary records. Finally, Section 114 can also be used to require source testing of emissions.

Future litigation reports based upon VOC SIP emission limitation violations should, if at all possible, either contain proof of violations using the applicable test method covering at least part of the period of time the source is alleged to be in violation of the emission limitation or should contain a cause of action based upon a source's failure to comply with a previous request issued under Section 114 for source records or testing. Prior to the referral of a report, the authority granted EPA under Section 114 should be used, where necessary, to obtain the data needed to establish some days of violation under the applicable test method. Through the use of Section 114, the Government should either have the evidence needed to prove specific violations, or, if a source fails to comply with the Section 114 request, a basis to proceed under Section 113(b)(4) for violation of Section 114. Litigation reports relying solely upon algorithms to evidence violations are appropriate only if, after diligent effort to obtain more detailed data, statistical proof through the use of algorithms remains the only available technique.

If you have any questions concerning this guidance, please contact Burton Gray at FTS 382-2868.

Courtney M. Price
Assistant Administrator

JAN 17 1986

ISSUE NUMBER 5: How Can EPA Include A Bubble In The Context Of A Consent Decree?

RESPONSE: EPA cannot endorse a consent decree which contains a schedule for compliance with a bubble until EPA has promulgated final approval of the particular bubble as a SIP revision (or until the bubble has been approved by the State if the bubble is granted under a generic bubble provision). This position is supported by existing Agency policy ("Guidance for Drafting Judicial Consent Decrees" issued on October 19, 1983), Section 113 of the Clean Air Act and case law.

A consent decree must require final compliance with the currently applicable SIP. The Agency's "Guidance For Drafting Judicial Consent Decrees," states that consent decrees must require final compliance with applicable statutes or regulations. Other than interim standards, a decree should not set a standard less stringent than that required by applicable law or regulation, because a decree is not a substitute for regulatory or statutory change. (See page 11 of the Guidance.)

Section 113(b)(2) of the Act, 42 U.S.C. 7413(b)(2), provides EPA with the authority to initiate civil actions to obtain injunctive relief to correct source violations of the SIP. A settlement of such an action must include a requirement to comply with the SIP provisions that formed the basis of the request for injunctive relief. The settlement cannot require final compliance with a provision not yet a part of the federally approved SIP.

Case law also supports the proposition that the SIP may only be changed through certain specific procedures and that absent those procedures, no change can be effected to the original SIP emission levels. Train v. Natural Resources Defense Council, 421 U.S. 60 (1975). The SIP, as approved through a formal mechanism by EPA, sets the official emission limits and remains the federally enforceable limit until changed. Ohio Environmental Council v. U.S. District Court, Southern District of Ohio, Eastern Division, 565 F.2d 393 (6th Cir. 1977).

A decree may contain a general provision recognizing that either party may petition the court to modify the decree if the relevant regulation is modified, as would be the case with a bubble. The following language is an example of such a reopener clause where EPA approval of the individual bubble is required.

> If EPA promulgates final approval of a revision to the applicable regulations under the State Implementation Plan, either party may, after the effective date of the revision, petition the Court for a modification of this decree.

If a federally approved generic procedure is applicable, the reopener clause should be modified to reflect the particular generic procedures.

If a SIP revision that affects a decree's compliance schedule is finally approved, decree language, as indicated above, may permit the source to petition the court for a modification of the schedule. A source is relieved from its obligation to meet the existing schedule only upon final approval by EPA, or by the state if under a federally approved generic bubble regulation, of the SIP revision and only upon a modification of the decree. The consent decree may not contain a clause which would automatically incorporate any future bubble.

It is important to note in the above context that consent decree compliance schedules must be as expeditious as practicable in terms of implementing a control strategy to achieve compliance with the existing SIP and may not add in extra time to provide for final EPA action on a request for a SIP revision. The "Guidance for Drafting Judicial Consent Decrees" states on page 12 that, "The decree should specify timetables or schedules for achieving compliance requiring the greatest degree of remedial action as quickly as possible." The concept of expeditiousness was taken from §113(d)(1) (applicable to compliance schedules in Delayed Compliance Orders) which was added to the Clean Air Act by the Amendments of 1977. The principle was incorporated into Agency guidance issued shortly after the 1977 amendments pertaining to compliance schedules in judicial consent decrees, e.g., "Enforcement Against Major Source Violators of Air and Water Acts" - April 11, 1978 (see pg. 4), and "Section 113(d) (12) of the Clean Air Act" - August 9, 1978 (see pg. 2).

If you have any questions concerning this guidance please contact Burton Gray of AED at FTS 382-2868.

Courtney M. Price
Assistant Administrator

JAN 17 ...

SECTION B DOCUMENT 10

**Responses to Two VOC Questions Raised by the Regional Offices**

10

01/31/86

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

CAA
B/O

JAN 31 1986

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Responses to Two VOC Questions Raised by the Regional Offices

FROM: Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Air Management Division Directors
Regions I, III, V and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxics Management Division Directors
Region IV and VI

Air and Toxics, Division Directors
Regions VII, VIII and X

Attached to this memorandum are responses to two issues identified by the Regional Offices and DOJ through the VOC Compliance Workgroup. As you may know, nineteen VOC issues were being presented as current impediments to Regional and State efforts in returning VOC violators to compliance. In the process of preparing these responses, it became evident that they could not all be issued under one cover. Some required briefings for the AA for OAR and OECM while others, like the attached two, dealt with internal, essentially administrative issues and this justified a response from SSCD.

On June 27, 1985, the first draft of the attached two responses, as well as draft responses to many of the other nineteen issues, were circulated for comment. On August 21 and 22, 1985 various Regional and Headquarters representatives met to discuss these first drafts. A second draft of these issues was circulated on December 12. The attached responses incorporates the various comments received.

I appreciate your efforts in commenting on the various drafts of these two issues, as well as the others. With this memorandum and OECM's memorandum of January 17, 1986 entitled "Issues #3(e) and #5 of the VOC Issue Resolution Process: Establishing Proof of VOC Emissions Violations, and Bubbles in Consent Decrees Resolving Civil Actions under Section 113(b) of the Clean Air Act," four issues have now been addressed. We expect an additional five issues to be addressed by final guidance within the next two weeks and are working to expedite the remaining responses.

If you have any questions, please call Steve Hitte at 382-2829.

Edward E. Reich

Attachments

cc: VOC Compliance Workgroup
Regional Counsels, Regions I-X

Issue: At the present time all Class A1 and A2 VOC sources in the New York City (NYC) Metropolitan AQCR have been identified and verified, and those which are out of compliance have been placed on the significant violator list. Region II would like to have all Class B VOC sources which have an ERP > 50 TPY and are out of compliance, placed on the significant violator list. By doing this the Region would be able to more accurately reflect its continuing enforcement effort in the NYC Metropolitan area, currently non-attainment for VOCs.

Response:

As noted in the Agency Operating Guidance for FY 1986-1987, SSCD will be developing a strategy that addresses Class B VOC violators in ozone non-attainment areas where control of such sources is essential to attainment. This strategy will become operational in FY 1987 (see attached for initial thinking on the elements of this strategy). One issue to be considered is the possibility of expanding the significant violator definition in FY 1987 to include selected Class B sources.

Edward E. Reich, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

JAN 31 1986

## G. Class B VOC Sources

Develop general and area-specific strategies for dealing with Class B VOC sources. Elements of the strategies would have to include:

(1) identification of which source categories with substantial numbers of Class B sources are significant contributors to nonattainment in the areas of concern

(2) analysis of relative amounts of reductions likely to be obtainable from such source categories, to determine the most cost-effective areas of focus, nationally and in each geographic area

(3) identification of the status of regulation of such source categories in areas where they are important and additional regulatory actions possible

(4) inventorying Class B sources (or at least the larger Class B sources) in the source categories of concern to each area

(5) determining compliance status of Class B sources of concern in each area

(6) initiation of appropriate enforcement actions to resolve violations

From a national perspective, strategy development would have to consider:

(1) compliance determination approaches for large numbers of small sources

(2) expansion of "t and a" and significant violator concepts to selected Class B VOC sources

(3) mechanisms for obtaining compliance less resource-intensive than traditional approaches

(4) penalty policies and methods of assessment

(5) public and industry education programs to enhance voluntary compliance

(6) mechanisms for handling compliance data and any necessary modifications to CDS guidance

To begin to address the Class B VOC problem:

(1) SSCD has committed to develop during FY 1986 a strategy (or strategies) for dealing with Class B VOC sources in areas where their control is important for attainment

(2) The FY 1986 grants allocation targets $1 million for States to develop and refine Class B VOC inventories

(3) The draft FY 1987 budget contemplates expanded efforts to address Class B sources, as well as implementation of a Reasonable Efforts P-ogram

Issue: It has become apparent that EPA is taking a tougher enforcement stance on the round II CTG's than was evident in round I. Notice of this change came through the August 17, 1984 Lillquist letter which was an attachment to the October 2, 1984 memorandum on coordinating key issues in VOC cases from Micheal Alushin, Associate Enforcement Counsel. Although Region III generally supports this change in policy, we are extremely concerned about the method and timing of disseminating this policy.

This tougher stance on compliance represents a significant shift in policy. The novel distribution approach of attaching it to a memorandum which appears to have been intended for limited distribution leaves much to be desired. States have been negotiating schedules over the past year which reflect EPA's more laissezfaire enforcement posture taken on the round I CTG's. This change in policy is coming to them (and us) about one year late. As a result, it will disrupt the processing of orders and SIP's negotiated by States under our previous enforcement posture and strain EPA/State relations.

Region III suggests that Headquarters reassess its method of policy distribution. If EPA is to ensure the timeliness and appropriateness of State enforcement activities, we must inform the States of the rules of the game in a timely and appropriate manner.

Response:

Traditionally, it is SSCD's approach to issue guidance or policy documents to the Regional Offices with ongoing staff support to respond to questions or provide clarification. Subsequently, it is incumbent upon the Regional Office to disseminate this information to its States in any manner it choses.

In the VOC area, a Regional-Headquarters compliance workgroup was established to be a focal point for VOC issues and subsequent policy or guidance. SSCD chairs this workgroup and has distributed numerous VOC articles and policy memoranda through the workgroup members. The August 17, 1984 Lillquist letter cited in the issue was distributed to the Air Branch Chiefs on August 29, 1984, with copies to the Workgroup members (see attached).

In order to assure that all SSCD policy and guidance memoranda are being seen by the Regional Office staff, SSCD will institute a process of listing quarterly all policy and guidance memorandum that have been issued. This list will be sent to the Air Branch or Compliance Branch Chiefs. Where a memorandum on this list has not been seen by the Region, a request can be made for a copy. It will be incumbent upon the Region to assure that appropriate memoranda are distributed to the States and locals. The process of providing this listing will commence at the end of the first quarter FY 1986.

Edward E. Reich, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

SECTION B DOCUMENT 11

**Responses to Four VOC Issued Raised by the Regional Offices and DOJ**

02/28/86

11

CAA Compliance
B11

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

OFFICE OF
GENERAL COUNSEL

DEC 06 1993

MEMORANDUM

SUBJECT: Opinion of the General Counsel on Discretionary Sanctions under Section 110(m) of the Clean Air Act

FROM: Alan W. Eckert
Associate General Counsel
Air and Radiation Division (2344)

TO: Regional Counsels, Regions I-X

Enclosed for your information is a copy of a Legal Opinion issued by the General Counsel on November 23, 1993. It concludes: (1) that EPA has independent authority under section 110(m) of the Clean Air Act to impose discretionary sanctions on states prior to the 18-month period specified in section 179(a); and (2) that EPA may propose the imposition of sanctions under section 110(m) prior to the time a final finding has been made pursuant to section 179(a). The Opinion also responds to an opinion issued by the Comptroller General reaching contrary conclusions on these two issues.

If you have any questions concerning this opinion, please call me (202-260-7606), Rich Ossias (703-235-5327), or Jan Tierney (703-235-5334).

Enclosure

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

NOV 23 1993

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Response to Comptroller General's Opinion of October 21, 1993, Concerning the Imposition of Sanctions Under Section 110(m) of the Clean Air Act

FROM: Jean C. Nelson
General Counsel

TO: The Administrator

In response to a letter from House Energy and Commerce Committee Chairman Dingell forwarding an Opinion of the Comptroller General, you asked that we reexamine the issues discussed in the Opinion. This memorandum responds to your request. Based on the analysis set forth below, we conclude (i) that EPA has the legal authority under section 110(m) to impose sanctions prior to the expiration of the 18-month period provided under section 179(a), and (ii) that EPA may propose discretionary sanctions under section 110(m) prior to the time a final finding has been issued.

QUESTIONS PRESENTED

A. May EPA impose sanctions under section 110(m) prior to the expiration of the 18-month period provided in section 179(a)?

B. May EPA propose the imposition of sanctions under section 110(m) prior to the time EPA has made a final finding pursuant to section 179(a)(1)-(4)?

BRIEF ANSWERS

A. Yes. The plain language of section 110(m) gives EPA authority to impose sanctions prior to the expiration of the 18-month period provided in section 179(a). The parallel structure of other comparable sanctions provisions in the statute confirms that Congress intended this reading. The legislative history does not provide express support for this interpretation, but also does not directly contradict

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it. Given the plain language of section 110(m) and the ease with which section 179(a) can be read in harmony with it, we must conclude that this interpretation reflects Congressional intent. Even if this intent were not clear, this interpretation is permissible because it reflects a reasonable accommodation with the language of section 110(m), the comparable structure of sanctions in analogous sections, and the purpose of these provisions.

B. Yes. EPA may propose sanctions under section 110(m) prior to the time EPA makes a final finding under section 179(a) because the Administrative Procedure Act, the Clean Air Act and EPA's internal procedures do not preclude such action and because the information necessary for the public to analyze and assess EPA's proposal may be sufficiently noticed for comment in the proposed action.

## I. BACKGROUND

### A. Events Leading Up to this Opinion

By letter dated May 20, 1993, Martin E. Sloan, Assistant General Counsel with the General Accounting Office (the "GAO"), requested an explanation of EPA's position on two issues. First, GAO asked for an explanation of the relationship between the 18-month period prior to the mandatory imposition of sanctions under section 179(a) of the Clean Air Act, as amended in 1990, ("CAA," or "the Act") and the provision of section 110(m) of the Act authorizing the Agency to impose such sanctions "at any time (or at any time after)" EPA makes one of the findings listed in section 179(a) of the Act. Second, GAO requested an explanation of the legal basis for proposing sanctions pursuant to section 110(m) prior to the time that the Agency has made a final finding pursuant to section 179(a) triggering the sanctions authorities of sections 110(m) and 179(a). Mr. Sloan's request was made in order for GAO to respond to a Congressional inquiry regarding these two subjects.

On August 6, 1993, Alan W. Eckert, Associate General Counsel for Air and Radiation, responded to the GAO request, stating (i) that sections 110(m) and 179 establish two separate means for the imposition of sanctions, one mandatory and the other discretionary, and (ii) that EPA may propose sanctions under section 110(m) prior to a final finding of deficiency because EPA can properly take comment on all relevant issues regarding the deficiency and the proposed imposition of sanctions before making a final finding (the "Eckert Letter").

In an opinion dated October 21, 1993, the Comptroller General responded to the Congressional inquiry, disagreeing with EPA's position on both issues as expressed in the Eckert Letter (the "GAO Opinion"). Chairman Dingell forwarded the opinion to EPA with the request that it be included in the docket of EPA's proposed rulemaking under section 110(m) of the Act establishing criteria to determine when a political subdivision is principally responsible for the deficiency on which section 110(m) sanctions are based. 57 Fed. Reg. 44,534 (Sept. 28, 1992).

The immediate occasion for the Chairman's request, and the GAO opinion, was a letter signed on April 13, 1993, by you and Secretary of Transportation Frederick Peña notifying California Governor Pete Wilson that EPA would impose sanctions against the State of California if the state failed to enact legislation necessary to create an enhanced vehicle inspection and maintenance program as part of the state's SIP. Furthermore, Governor Wilson was notified that EPA planned to impose sanctions before the expiration of the 18-month period contemplated in section 179(a).

B. Standard of Review

A court reviewing an agency's action must "hold unlawful and set aside agency action, findings, and conclusions found to be ... (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedures required by law." 5 U.S.C. § 706.

The relevant standard for review of EPA's interpretation of the Act was set forth by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Under the Chevron analysis, a court reviewing the construction of a statute by the agency empowered to administer that statute looks first to whether "Congress has directly spoken to the precise question at issue." Id. In assessing the question of intent, a court must look primarily to the particular statutory language at issue and the language and design of the statute as a whole and, if necessary, to the legislative history surrounding the statute. Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 822 F.2d 104, 111 (D.C. Cir. 1987). If the statutory language is clear on its face, it is normally unnecessary to resort to legislative history because reliance on legislative history is "fraught with difficulty" and "much to be avoided." Id. at 113; see Burlington Northern R. R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987). If Congress has spoken directly to the issue, i.e., if Congress's intent is clear, then "that is the end of the matter; for the

court as well as the agency must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43.

In the event of an ambiguous statute, however, the Chevron court recognized that the agency must still formulate rules to implement the statute. When asked to review an agency's interpretation of a statute where Congressional intent is not clear, the Chevron court reasoned that:

> the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. The court stated explicitly that the agency's interpretation need not be the only one possible, or the one that the court might prefer. Thus, a court is not to "substitute its own construction" for a "reasonable interpretation" made by the agency. Id. Subsequent courts have recognized that there can be a "range" of permissible interpretations and that an implementing agency's interpretation need only be within that range. Office of Consumer's Counsel, State of Ohio v. Federal Energy Regulatory Comm'n, 783 F.2d 206, 218 (D.C. Cir. 1986). More recently, the Supreme Court has held that a given agency interpretation in a regulation was permissible because it "reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress's expressed intent." Rust v. Sullivan, 111 S. Ct. 1759, 1762 (1991) (emphasis added). In addition, the Chevron court reiterated the long-held principle of judicial deference to administrative interpretations regarding the meaning or reach of a statute. 467 U.S. at 844. In short, an agency's reasonable interpretation of an ambiguous statute is to receive judicial deference and should be upheld unless contrary to Congressional intent as discernible from the statute or its legislative history.

In addition, when taking rulemaking action under a statutory grant of authority, an agency must comply with the relevant procedural requirements. In reviewing whether an agency has complied with the relevant procedural requirements, the court will examine whether the agency followed the requirements of the Administrative Procedure Act (the "APA"), other relevant statutes and the agency's own internal procedures. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978) (The adequacy of the record in a proceeding is based on "whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes"); Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 713 (8th Cir. 1979) (During the course of procedural

review of an administrative action, the reviewing court must determine whether the agency followed the procedural requirements of the APA and also whether its actions conformed to its own internal procedures). Therefore, in determining whether EPA followed the correct procedures in proposing and imposing a sanction, a reviewing court would need to examine the requirements of the APA, the Clean Air Act and any relevant internal procedures of the Agency.

C. Statutory Text

The Act contains two provisions regarding the imposition of sanctions under Title I. Congress added both provisions in the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7671 (1991)).

Section 110(m) provides:

> The Administrator may apply any of the sanctions listed in section 179(b) at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 179(a) in relation to any plan or plan item (as that term is defined by the Administrator) required under this Act, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this Act relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 179(a) to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 179(a), such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

Section 179(a) provides:

> For any implementation plan or plan revision required under this part (or required in response to a finding of substantial inadequacy as described in section 110(k)(5)), if the Administrator--
>
> (1) finds that a State has failed, for an area designated nonattainment under section 107(d), to submit a plan, or to submit 1 or more of the elements (as determined by the Administrator) required by the provisions of this Act applicable to such an area, or has failed to make a submission for such an area that

satisfies the minimum criteria established in relation to any such element under section 110(k),

(2) disapproves a submission under section 110(k), for an area designated as nonattainment under section 107, based on the submission's failure to meet one or more of the elements required by the provisions of this Act applicable to such an area,

(3)(A) determines that a State has failed to make any submission as may be required under this Act, other than one described under paragraph (1) or (2), including an adequate maintenance plan, or has failed to make any submission, as may be required under this Act, other than one described under paragraph (1) or (2), that satisfies the minimum criteria established in relation to such submission under section 110(k)(1)(A), or

(B) disapproves in whole or in part a submission described under subparagraph (A), or

(4) finds that any requirement of an approved plan (or approved part of a plan) is not being implemented,

unless such deficiency has been corrected within 18 months after the finding, disapproval, or determination referred to in paragraphs (1), (2), (3), and (4), one of the sanctions referred to in subsection (b) shall apply, as selected by the Administrator, until the Administrator determines that the State has come into compliance, except that if the Administrator finds a lack of good faith, sanctions under both paragraph (1) and paragraph (2) of subsection (b) shall apply until the Administrator determines that the State has come into compliance. If the Administrator has selected one of such sanctions and the deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of subsection (b) shall apply until the Administrator determines that the State has come into compliance. In addition to any other sanction applicable as provided in this section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under section 105.

## II. DISCUSSION

### A. May EPA impose sanctions under section 110(m) prior to the expiration of the 18-month period provided in section 179(a)?

#### 1. Analysis of Whether Congressional Intent is Clear

In accordance with the method of analysis set forth in Chevron, the first question must be whether the intent of Congress is clear upon review of the face of the statute, the language and design of the statute as a whole, and, if necessary, the legislative history of the statute.

##### a. Statutory Language

We first address the express language of sections 110(m) and 179(a). Three key distinctions between sections 110(m) and 179(a) shed light upon the proper interpretation of these provisions: (i) the use of "may" versus "shall;" (ii) the description of the timing of sanctions; and (iii) the restrictions on the timing for statewide sanctions.

The first distinction is that between discretionary and nondiscretionary sanctioning power granted under sections 110(m) and 179, respectively. The first sentence of section 110(m) states unequivocally that the Administrator "may apply any of the sanctions listed in section 179(b) ... ." (Emphasis added.) By contrast, the power to sanction granted in section 179(a) is mandatory. The latter section provides expressly that upon certain events and barring subsequent compliance, the sanctions listed in section 179(b) "shall apply as selected by the Administrator." (Emphasis added.) Courts have long recognized that Congress intentionally uses "may" and "shall" in statutes to distinguish when an agency does and does not have discretion regarding whether to act. See generally, N. Singer, Sutherland Stat. Const. § 57.03 (5th ed. 1992). Although not conclusive where there is clear evidence of Congressional intent to the contrary, the use of "shall" creates a presumption of mandatory obligation. Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650, 656 (D.C. Cir. 1983). The use of "may" in section 110(m) and "shall" in section 179(a) thus signals Congressional intent to give EPA authority to sanction at certain times but the obligation to sanction at others. Were the Agency's discretionary power to sanction coterminous with its obligation to sanction, Congress presumably would not have seen the need to provide two sections under which EPA is authorized to impose the same sanctions. To read the provisions otherwise requires the conclusion that either "may" should mean "shall" or that "shall" should mean "may." Such a reading would be in contravention of

the general principle of statutory construction that where a reasonable construction of a statute will give effect to all provisions, a court will not condone a reading that "renders one part a mere redundancy." Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307-08 (1961); see also United States v. Menasche, 348 U.S. 528, 538-39 (1955) (rejecting reading that would "emasculate an entire section" of statute).

The second and, for the issue at hand, most important distinction between the language of section 110(m) and section 179(a) pertains to the timing of sanctions. The first sentence of section 110(m) provides that the Administrator "may apply any of the sanctions ... at any time (or at any time after) the Administrator makes a finding." (Emphasis added.) Section 179(a) provides that "unless such deficiency has been corrected within 18 months ... one of the sanctions referred to in subsection (b) shall apply." (Emphasis added.) A plain reading of the two sections compels the conclusion that Congress must have intended two distinct, yet compatible, sanctioning authorities. Section 110(m) gives EPA discretionary power to impose sanctions at certain times. More specifically, the straightforward meaning of the words "at any time" in conjunction with the parenthetical "(or at any time after) the Administrator makes a finding" is that EPA has discretionary authority to impose sanctions at the very time the Agency makes such a finding and throughout the subsequent period during which the finding is still effective. Section 179(a) then explicitly orders EPA to impose sanctions after 18 months if the offending state has not corrected the deficiency. Significantly, section 179(a) is worded to require sanctions after 18 months, not to prohibit sanctions prior to 18 months.

Thus, these two provisions on their face are perfectly consistent in that one (section 110(m)) provides EPA with discretionary authority to impose sanctions on or after the date it makes a finding, while the other (section 179(a)) states that EPA's discretionary authority converts to a requirement to impose sanctions 18 months from the time a finding is made. Whenever possible, courts construe statutory provisions to be consistent with one another. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 163 (1982); see also Jarecki, 367 U.S. at 307-08. To allow the two provisions to operate consistently requires merely a recognition of the obvious distinction between discretionary and mandatory sanctions.

Finally, the restriction on the timing for imposition of statewide sanctions in section 110(m) further suggests the Agency's power to impose sanctions prior to the expiration of the

18-month period applicable to mandatory sanctions under section 179. The second sentence of section 110(m) instructs the EPA to:

> establish criteria for exercising ... [the sanctioning] authority under the previous sentence with respect to any deficiency referred to in section 179(a) to ensure that, <u>during the 24-month period</u> following the finding, disapproval, or determination ... such sanctions are not applied on a statewide basis.

(Emphasis added.) The combination of the "at any time" language discussed above, the use of the phrase "during the 24-month period," and the absence here of any restriction to the period between the 18th and the 24th months connotes that EPA may use this sanctions authority on less than a statewide basis at any time within the 24-month period following the finding of deficiency. Furthermore, if EPA determines that a state is "principally responsible" for a deficiency, the plain language of this sentence empowers EPA to impose statewide sanctions during the same 24-month period.

b. Statutory Structure

Further evidence of Congressional intent with respect to a given statutory provision is sometimes manifested in the use of comparable language or similar design elsewhere in the statute. Such an example appears in Title V of the Act. Congress invested EPA with authority to sanction in section 502, which requires states to submit operating permit programs to the Agency for approval or disapproval by a certain date. Section 502(d)(2)(B) of the Act regarding permit programs provides:

> [i]f the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months after the date required for such submittal or the date of such disapproval ... the Administrator <u>shall apply sanctions</u> under section 179(b) ....

(Emphasis added.) Immediately prior to this mandatory sanctions provision, section 502(d)(2)(A) provides that:

> [i]f the Governor does not submit a program as required under paragraph (1) or if the Administrator disapproves a program submitted by the Governor under paragraph (1), in whole or in part, the Administrator <u>may, prior to the expiration of the 18-month period referred to in subparagraph (B), in the Administrator's discretion, apply any of the sanctions</u> specified in section 179(b).

(Emphasis added.) Comparable provisions appear in section 502(i) of the Act.

Thus, there is at least one other example in which Congress created a dichotomy between discretionary and mandatory sanctions in the Act, by enacting a set of provisions allowing EPA to impose sanctions prior to the time at which it must do so. Although this formulation of the distinction between discretionary and mandatory sanctions is more explicit than the provisions of sections 110(m) and 179(a), the provisions set out a structure that parallels sections 110(m) and 179(a).

Moreover, the apparent intent behind the companion provisions of sections 502 would logically fit the language of sections 110(m) and 179(a). Section 502 does not require EPA to impose sanctions immediately upon issuing a finding of deficiency, and thus creates an incentive for states to comply by offering a period during which EPA can refrain from issuing sanctions if the state is working to comply. Section 502 demonstrates that, in drafting the Clean Air Act Amendments of 1990, Congress did not intend to create 18-month periods that function as de facto 18-month extensions for states regardless of their efforts or lack of efforts to comply with requirements established for operating permit programs. That approach would fit as logically into the scheme for ensuring timely submission of SIPs. Indeed, Congress's antipathy towards failure to comply and desire to encourage quick compliance with the SIP requirements can be inferred in section 179(a), where one or both sanctions are imposed automatically after 18 months. If the 18-month period were indeed a guaranty of 18 additional months before EPA could impose sanctions, then there would be little incentive for states to make efforts toward adoption and implementation of politically difficult SIP rules and regulations by the established statutory deadlines.

In sum, both the parallel structure and similar purposes of the Title V and Title I sanction provisions shed light on Congress's intent in designing the Title I provisions. Congress's clear intent to grant EPA discretion to impose sanctions early under section 502 for failure to submit or enforce a permit program provides confirmation that Congress intended to grant similar power under the plain meaning of the language in section 110(m).

c. Legislative History

Courts are generally loath to enter into the realm of legislative history where the language of a statute is clear on its face. As noted by the Supreme Court, "we look first to the statutory language and then to the legislative history if the statutory language is unclear." Blum v. Stenson, 465 U.S. 886, 896 (1984); see also Toibb v. Radloff, 111 S. Ct. 2197, 2200

(1991) (rejecting reliance on legislative history when statutory language is clear).

Thus, if the statutory language is clear on its face, it is normally unnecessary to resort to legislative history. As described above, the language of section 110(m) is clear and its straightforward meaning fits consistently with section 179(a). Moreover, the parallel structure and purposes of section 502 tend to confirm that Congress meant what it said in section 110(m). For these reasons, there is no need to resort to the legislative history to determine Congress's intent in enacting section 110(m).[1] In any case, we discuss the legislative history below in the context of a consideration of GAO's analysis, and conclude that it is entirely consistent with the conclusions that flow from the statutory language and structure.

d. Summary

Examination and comparison of the precise wording of sections 110(m) and 179(a) indicate that Congress intended both to give EPA discretionary authority to impose sanctions in certain circumstances and to establish a requirement that EPA impose sanctions in other circumstances. In addition, the express wording of the provisions indicates that under section 110(m) the discretionary power to sanction arises prior to the mandatory requirement to do so set forth in section 179(a). Read literally, section 110(m) provides that EPA may impose sanctions at any time or at any time after a deficiency finding. By contrast, section 179(a) provides that EPA must impose sanctions 18 months after such a finding absent correction of the

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[1] Even if a court resorts to legislative history, its relative significance must be gauged in light of the statutory language itself: "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania Inc., 447 U.S. 102, 108 (1980). Thus, even assuming arguendo that Congress' intent is not clear from the plain language and design of section 110(m) and the other provisions, the legislative history of those provisions cannot override the words of the statute unless it clearly expresses an intent contrary to those words, and even in such a case would have to appear in such a context as to indicate the clear intent of the Congress as a whole. We examine the legislative history in section A.2. of this memorandum in an analysis of the specific points raised in the GAO Opinion. As explained in that analysis, the available legislative history for sections 110(m) and 179 is not inconsistent with the expression of Congressional intent conveyed by the language of sections 110(m) and 179(a) and the general statutory structure for sanctions evidenced in section 502.

deficiency. Rather than creating a conflict, the above interpretation of the wording of the statute renders the two provisions consistent and logical.

In addition to the precise wording of the individual provisions, the language and design of the Act as a whole provide further evidence of Congressional intent to give EPA both a discretionary authority and a mandatory obligation to sanction. A structure consisting of an obligation to impose sanctions at 18 months after a finding coupled with the authority to impose sanctions sooner, appears in section 502(d)(2)(A) and (B) and comparable provisions in section 502(i). No other provisions of the Act give states a guaranteed extension of time before EPA can impose sanctions. Congress's clear intent to permit sanctions prior to the expiration of an 18-month deadline for imposition of sanctions in these comparable sections is evidence of its intent to do the same in sections 110(m) and 179(a). Congress evidently sought to provide an incentive for compliance and such an intent would be frustrated by interpreting the 18-month period of section 179(a) as a guaranteed extension of the deadline.

In sum, the plain language of section 110(m) and the ease with which it can be read in harmony with section 179(a) (and the comparable provisions of section 502) reveal that Congress spoke directly to this issue and clearly intended to authorize EPA to impose sanctions under section 110(m) before the Agency is required to do so under section 179(a). Under Chevron and subsequent cases, that is the end of the inquiry.

2. Analysis of GAO's Arguments

The GAO Opinion concludes that section 110(m) does not grant EPA authority to impose sanctions prior to the expiration of the 18-month period provided in section 179(a). In reaching this conclusion, GAO analyzed the express language of sections 110(m) and 179(a) and the extant legislative history for those provisions.

a. Statutory Language

The essential thrust of GAO's argument is that the express language of sections 110(m) and 179(a) is "in conflict" and cannot be reconciled in such a manner as to give full meaning to each provision. By GAO's reasoning, section 179(a) guarantees noncomplying states 18 months before EPA shall impose sanctions and the express power of EPA to impose sanctions "at any time" under section 110(m) is simply an inconsistency or statutory aberration. GAO believes that if section 110(m) creates discretionary authority to sanction, then the 18-month period provided by section 179(a) is "rendered a nullity." GAO Opinion at 6.

This argument ignores the plain reading of the two statutory provisions as described above. Section 110(m) expressly provides that the Agency "may" impose sanctions "at any time" covering any portion of the state the Administrator deems "reasonable and appropriate" for the purpose of encouraging compliance. By contrast, section 179(a) provides that upon a finding of deficiency, "unless such deficiency has been corrected within 18 months," sanctions "shall apply." Far from rendering the 18-month period a nullity, section 110(m) provides EPA with broader authority to ensure compliance with the Act. If read as GAO urges, section 179(a) merely gives a state a guaranteed extension of at least 18 months before it need worry about repercussions of failure to act. If, however, section 110(m) provides discretionary sanctioning authority to EPA, then EPA has authority to use sanctions during the 18-month period as an incentive for states to comply before EPA is required to impose sanctions. Read in this fashion, both sections 110(m) and 179(a) have full effect. Courts are guided by the "well-settled rule that all parts of a statute, if possible, are to be given effect." American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 513 (1981); accord, Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 163. It is only GAO's reading that entirely fails to give effect to one of the statutory provisions.

As GAO correctly points out, this is the very same dual system of discretionary and mandatory sanctions set forth in sections 502(d)(2)(A) and (B) and sections 502(i)(1) and (2) of the Act. GAO dismisses this similarity by arguing that Congress would not have worded sections 110(m) and 179(a) differently from the analogous provisions of section 502 if it intended to allow the same discretionary sanctioning. This position ignores the plain reading of sections 110(m) and 179(a), even if the sections are worded differently from section 502, and ignores the overall scheme for sanctions evidently intended by Congress. In light of Congress's clear intent, as evidenced by the statutory language, to grant EPA discretionary sanctions power and a mandatory deadline for imposition of sanctions in the analogous provisions of section 502, adopting the parallel reading conveyed by the plain reading of sections 110(m) and 179(a) would appear more appropriate than GAO's solution, which is simply to excise one of the statutory provisions.

As further evidence of statutory conflict, GAO points to the 24-month clock provided in the second sentence of section 110(m). That sentence requires the Agency to develop rules governing when it may impose sanctions on a statewide basis. Specifically, the Agency is to limit sanctions so that:

> during the 24-month period following the finding ... referred to in section 179(a), such sanctions are not applied on a statewide basis where one or more

> political subdivisions covered by the applicable plan are principally responsible for such deficiency.

Based upon this provision, GAO reasons:

> In light of this 24-month clock, EPA's construction of section 110(m) would apparently produce an incongruous or inexplicable result. The state would be guaranteed a full 24 months to correct deficiencies before sanctions could be imposed, if its political subdivisions were principally responsible, but no time at all if the state itself were responsible.

GAO Opinion at 7. A straightforward reading of the provision demonstrates that there is nothing either "incongruous" or "inexplicable." The 24-month clock in section 110(m) merely governs the timing with respect to the geographic scope of discretionary sanctions. It is a different clock, measuring not when sanctions must be imposed but rather the period during which they must not be imposed statewide if a political subdivision is principally responsible for the deficiency. The 24-month period in section 110(m) does not affect the 18-month period of section 179(a). For example, if a political subdivision is not principally responsible for a section 179(a) deficiency, then EPA (i) may impose sanctions on the state immediately, whether to all or only a portion of the state as EPA determines reasonable and appropriate, and (ii) must impose sanctions on at least portions of the state after 18 months. If a political subdivision is principally responsible for that deficiency, then EPA (i) may impose sanctions immediately on less than a statewide basis but may not do so on a statewide basis for 24 months, and (ii) must impose sanctions on at least portions of the state after 18 months. Under either scenario, EPA may choose not to impose sanctions earlier than 18 months after the finding, if appropriate, but if EPA chooses to exercise its discretionary authority, the availability of statewide sanctions earlier than 24 months after the finding is limited by whether a political subdivision of the state is principally responsible for the deficiency. This combined reading of sections 110(m) and 179(a) results in no incongruity and the provisions are not in conflict.

GAO's key statutory argument is that the explicit phrase in the first sentence of section 110(m) authorizing EPA to impose sanctions "at any time (or at any time after)" a finding is inoperative. This position clearly contravenes the cardinal rule of statutory construction that "all parts of a statute, if at all possible, are to be given effect." Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633 (1973) (rejecting interpretation of Federal Food, Drug, and Cosmetic Act that rendered one clause superfluous). Particularly relevant here is "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative . . .."

Colautti v. Franklin, 439 U.S. 379, 392 (1979); see also Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249-50 (1985) (rejecting interpretation of Pueblo Lands Act that would "nullify" one of its provisions).

On rare occasions, a court will decline to give effect to the express words of a statute. See generally, N. Singer, Sutherland Stat. Const. § 46.07 (5th Ed.). GAO cites as an example J.C. Penney Co. v. Commissioner of Internal Revenue, in which the court refused to give literal effect to statutory language when it produced absurd or unreasonable results inconsistent with the purposes of the statute. 312 F.2d 65 (2d Cir. 1962). The court reasoned:

> When the "plain meaning" of statutory language "has led to absurd or futile results," the Supreme Court has "looked beyond the words to the purpose of the act"; "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole'" the Court has followed that purpose rather than the literal words.

Id. at 68 (quoting United States v. American Trucking Ass'n., 310 U.S. 534, 543 (1940)). The J.C. Penney court was able to determine that the interpretation of the language in question as urged by one of the parties would result in a meaning "directly counter to the declared purpose of Congress and the statutory scheme." Id., at 72. This case simply does not apply here because the literal interpretation of "at any time" in section 110(m) does not result in an "absurd" or "futile" result counter to the purpose and scheme of the Act as a whole. See Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 293-94 (2nd Cir. 1986) (in distinguishing its earlier decision in J.C. Penney, the court provides that uncertain legislative history is not sufficient to override the literal words of the statute where those words are consistent with the structure and purpose of the statute as a whole). It is neither absurd nor futile for Congress to grant EPA discretionary authority to sanction immediately after a finding, coupled with a mandatory obligation to do so after 18 months. To the contrary, GAO's reading of the statutory provisions appears counter to the purpose and scheme of the Act because it would create a guaranteed 18-month extension beyond statutorily mandated deadlines rather than providing an incentive for states to make diligent efforts toward timely compliance throughout the 18-month period. As discussed above, a plain reading of sections 110(m) and 179(a) renders the provisions consistent and creates a structure of discretionary and mandatory sanctions mirrored elsewhere in the Act.

b. Legislative History

As described above, review of legislative history is normally unnecessary where the statutory language is clear. Moreover, even where courts have looked to the legislative history of a clearly worded statute, they have concluded that the history cannot override the plain meaning unless it clearly expresses an intent contrary to the statutory language. To support its conclusion that sections 110(m) and 179(a) are in conflict, GAO turns to the legislative history of the relevant provisions. In reviewing the legislative history, GAO focuses primarily on three things: (i) statements surrounding the introduction of the Administration bill; (ii) statements of the House Energy and Commerce Committee; and (iii) statements of the House Public Works and Transportation Committee. The express language of sections 110(m) and 179(a) appears to reflect a clear Congressional intent to authorize EPA to impose sanctions prior to 18 months, but a review of the legislative history is helpful to show that it is consistent with this reading of the statute.

In assessing the role of sanctions in the initial Administration bill, GAO cites statements made by a spokesman representing EPA in hearings before a House subcommittee. With regard to the timing of sanctions, the spokesman stated:

> There have been some questions in the past about when and how sanctions should be applied. The Administration's bill clarifies this matter by explicitly stating that sanctions should be used "for the purposes of encouraging the state to undertake reasonable efforts and preventing further deterioration of the state's air quality."
>
> Under the President's bill, if an incomplete State Implementation Plan is submitted or if the SIP ... is disapproved, and if EPA finds that the State is not making reasonable efforts to correct the deficiency, EPA must propose one of four discretionary sanctions.
>
> ...
>
> If a state does not correct a deficiency within six months after the sanctions have been proposed, EPA must promulgate one or more of the sanctions, which would take effect within 60 days of promulgation.

States would, therefore, have about eight months to correct any deficiency following EPA's initial proposal of sanctions.[2]

To view these comments in context, one must examine the precise wording of the provisions regarding sanctions in the Administration's bill. On the date of these comments, November 9, 1989, the precursor to section 110(m) in the Administration's bill provided:

> The Administrator may apply any of the sanctions listed in section 179(b), or promulgate a Federal implementation plan, at any time (or at any time after), he [makes any one of four sets of findings of state failure]. The Administrator may apply such sanction or sanctions, or promulgate a Federal implementation plan, with respect to any portion of the State he determines reasonable and appropriate for the purpose of ensuring that the requirements of this Act relating to such plan or plan revision are met.

H.R. 3030, 101st Cong., 1st sess., as introduced, July 27, 1989, § 101 (emphasis added). The contemporaneous version of section 179(a) provided:

> For any implementation plan or plan revision required under this part (or required in response to a finding of substantial inadequacy as described in section 110(e)(4)), at such time as the Administrator -- [makes one of four findings], he shall (and at any other time the Administrator may) publish in the Federal Register a proposed determination of whether the State is making reasonable efforts to cure the relevant failure. If the Administrator proposes to determine that the State is not making reasonable efforts to cure the failure, he shall simultaneously propose to apply, with respect to the relevant area within such State, at least one of the sanctions specified in subsection (b) (for the purpose of encouraging the State to undertake reasonable efforts and preventing further deterioration of the State's air quality) and describe why application of such sanction or sanctions is appropriate under the circumstances. The Administrator

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[2] See, generally, The Impact of Air Quality Regulation on Federal Highway and Transit Programs, and on Fuel Tax Collections: Hearing Before the House Committee on Public Works and Transportation, Subcommittee on Investigations and Oversight, 101st Cong., 1st Sess. 16 (Nov. 9, 1989) (statement of Richard D. Wilson, Director, Office of Mobile Sources, U.S. Environmental Protection Agency).

> shall take final action on these proposals no later than six months after the date such proposals are published. If the Administrator makes a final determination that the State is not making reasonable efforts, he shall simultaneously apply at least one of the sanctions listed in subsection (b), to take effect no later than 60 days following final action. ...

Id. § 102(g) (emphasis added).

Initially, we note that there are obvious problems with reliance on the statements of the Administration spokesman: (i) the position or intent of the Administration does not necessarily reflect the intent of Congress, and (ii) the comments address an early form of the bill before significant modifications made by Congress. For just such reasons, courts refuse to give weight to statements made in hearings by those who are not members of Congress unless such statements are included in official House or Senate Reports. See, e.g., Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986) (declining "to accord any significance to" comments in the hearings and the Bankruptcy Laws Commission Report where "none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports").

Nevertheless, examination of the comments of the spokesman in light of the actual language of the Administration bill is very illuminating. Rather than providing a guaranteed six months for correction of deficiencies as intimated by the spokesman, the language of the provision stated that EPA had to take final action to impose sanctions "no later than six months" after its sanctions proposal. Upon making a final determination that the state was not making reasonable efforts to comply, the Administrator was ordered "simultaneously" to apply sanctions to take effect "no later than 60 days following" the final determination. Thus, the statement by the Administration spokesman that states would have "about eight months to correct any deficiency following EPA's initial proposal of sanctions" has to be read in light of the bill's language, i.e., a state would receive up to eight months to correct its deficiency if EPA chose not to impose sanctions more promptly. Moreover, the alacrity with which EPA was to impose sanctions was to be tied directly to a determination of whether the state was making reasonable efforts.

In short, the comments of the EPA official on the language of the Administration's original bill do not support GAO's conclusion with respect to Congress's intent regarding the enacted legislation. The comments are not persuasive that the Administration's original bill gave states an 8-month guaranteed period before the imposition of sanctions and they are certainly not persuasive that different provisions in the enacted

legislation were intended to provide an 18-month guaranteed extension.[3]

The statements made by the House Committee on Energy and Commerce are far more probative of Congressional intent regarding the timing of sanctions, but likewise fail to support GAO's conclusions. In explaining a much-amended version of section 179(a), the Committee stated:

> Section 179(a) outlines the State failures which are sanctionable once the EPA Administrator makes the finding or determination or takes a disapproval action .... If the State has not corrected such deficiency within 18 months from the Administrator's finding, determination, or disapproval, one of the two listed sanctions in section 179(b) ... is to apply immediately upon expiration of such 18-month period. If the deficiency is not corrected within an additional six months, the second sanction from section 179(b) is similarly to apply immediately. Both sanctions are to apply at the expiration of the original 18-month period if the Administrator finds that the State is not making a good faith effort.

H.R. Rep. No. 490, Part 1, 101st Cong., 2d Sess. at 227-28. The GAO Opinion cites this passage in support of its interpretation. However, this description only sets forth the internal requirements of section 179(a), as enacted. As previously discussed, these requirements are not inconsistent with EPA's interpretation of section 110(m). Nothing in the cited language contradicts EPA's interpretation of section 110(m) as granting discretionary authority to impose the sanctions identified in

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[3] The GAO also cites the later statements of the same spokesman regarding amendments to the Administration bill: "The Committee bill significantly increases the time from six to eighteen months that States have to correct deficiencies to avoid sanctions." Provisions of H.R. 3030, The Clean Air Act Amendments of 1989, that Fall Within the Jurisdiction of the Committee on Public Works and Transportation: Hearing Before the House Committee on Public Works and Transportation, 101st Cong., 2d Sess. 45 (April 19, 1990) (statement of Richard D. Wilson, Director, Office of Mobile Sources, U.S. Environmental Protection Agency). This statement likewise has to be read in light of what the Administration bill and the sections as enacted actually provided, i.e., a period of time up to six or 18 months for compliance before EPA must impose sanctions, not a guaranteed extension of time across the board. Thus the spokesman's statements appear to pertain only to the period of time before mandatory imposition of sanctions regardless of a state's efforts to comply.

section 179(b) prior to the expiration of the 18-month period provided in section 179(a).

Significantly, GAO also quotes the Committee's statement that:

> [t]o give States operating in good faith an opportunity to correct their failures, 18 months is provided for States to correct deficiencies before sanctions apply.

Id. at 228. The statement clarifies that the 18-month period is intended for states acting in good faith and, by negative implication, EPA must have the authority to provide less time to states not correcting deficiencies in good faith. The express statement tying the 18-month period to good faith thus suggests that Congress could not have intended to give a blanket extension to all noncomplying states and, most importantly, that the 18-month period was not guaranteed. At bottom, the Committee's statement appears to pertain only to section 179, but to the extent relevant to section 110(m), indicates that EPA has the authority to cut short the 18-month period.

With regard to section 110(m) itself, the Committee stated in the same report:

> New Clean Air Act section 110(m) authorizes the Administrator to apply the sanctions provided in section 179. If the Administrator makes a ... [finding of SIP deficiency under section 179], a sanction applies as provided in section 179. The sanction may be applied to any portion of a State, subject to criteria established by rule from EPA.

Id. at 221. From this language, GAO concludes that the Committee did not view section 110(m) as an alternate means for EPA to impose sanctions separate and apart from that of section 179. GAO Opinion at 10. This statement contains one item of legislative history seemingly supportive of GAO's interpretation of the statute, i.e., the statement that in section 110(m) "a sanction applies as provided in section 179." The use of "as provided in" is susceptible to two interpretations; either it refers to the sanctions as described in section 179 or it refers to the imposition of sanctions as limited by the terms of section 179. Assuming that Congress intended the latter meaning, however, it is uncertain whether the reference was to the 18-month period or to some other limitation within section 179 such as the limitation of the termination of highway funds to only certain types of projects or the setting of offsets at certain ratios. It is simply unclear from the report what portion of section 179 Congress intended to reference. It is probable and consistent with the plain meaning of section 110(m) that the references to section 179 within section 110(m) are only for the

purpose of identifying the available sanctions as set forth in section 179. In any case, the quoted language does not directly contradict the portion of section 110(m) which permits the imposition of sanctions "at any time." A stronger statement of contrary Congressional intent should be necessary to overcome the express statutory language.

Similarly, the comments of the House Public Works and Transportation Committee do not precisely address the issue of the timing of EPA discretionary sanctions power under section 110(m) except with respect to statewide sanctions. As GAO notes in its opinion, this Committee was most concerned with the geographic scope of sanctions. As stated by the Committee:

> Although [EPA] is empowered to apply sanctions to any portion of a state under the Energy and Commerce Committee version of H.R. 3030, the Committee sees a need to clarify the circumstances under which areas other than the nonattainment areas should be sanctioned. To the extent that the EPA Administrator must impose sanctions, they should be applied [to the] governmental entity [that] is primarily responsible for the failure to achieve compliance. The past failure of state legislatures to approve inspection and maintenance programs required by a SIP can be cited as an appropriate circumstance where statewide sanctions were appropriate.

H.R. Rep. No.490, Part 3, at 5. Because of this concern, the Public Works and Transportation Committee amended the precursor to section 110(m):

> ... to prohibit the Administrator from applying sanctions on a statewide basis, during the 24-month period following a finding of a SIP deficiency, when one or more political subdivisions covered by the applicable implementation plan is principally responsible for such deficiency.

Id. at 10.

The GAO Opinion cites these passages to demonstrate that this Committee did not intend section 110(m) "to provide an alternative timetable for the imposition of statewide sanctions, different from that of section 179." GAO Opinion at 12. Significantly, however, the same report cited by GAO specifically stated that: "H.R. 3030 provides discretionary authority for the EPA Administrator to impose sanctions ...." H.R. Rep. No. 490, Part 3, at 5 (emphasis added). This suggests that at the time of the Public Works and Transportation Committee's comments, it considered EPA's authority to sanction under section 110(m) to be discretionary. Thus these statements signal the Committee's view

that EPA has sanctioning authority separate from the mandatory authority of section 179. In addition, given that the sanctions set forth in section 179(b) apply primarily to nonattainment areas, the Committee's concern over the possibility of statewide sanctions provides at least circumstantial evidence that the Committee recognized that section 110(m) granted EPA a separate sanctioning power on a statewide basis and felt the need to restrict its use within section 110(m) itself.[4] Given that the Committee appears to have acknowledged a separate sanctioning authority, it does not necessarily follow that the discretionary authority under section 110(m) and the mandatory obligation to impose sanctions under section 179(a) are governed by the same timetable.

To support its contention that the power to sanction under section 110(m) is limited by the 18-month period of section 179(a), the GAO cites the comments of Chairman Anderson of the House Public Works and Transportation Committee explaining the effect of the Committee's amendment:

> on the issue of sanctions, ... after 18 months, the sanction cannot be statewide if a political subdivision of a State is principally responsible for the noncompliance. In an additional 6 months, EPA may extend sanctions statewide. This gives a State, after the initial 18 months, 6 additional months to remedy the failure of a region to come into compliance before there is any threat of a statewide sanction.

136 Cong. Rec. H2579 (May 21, 1990).

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[4] The sanctions set forth in section 179 specifically pertain to nonattainment areas of a state. The initial sentence of section 179(a) provides that the EPA must impose sanctions for a failure with respect to "any implementation plan or plan revision required under this part." The part referenced is part D of Title I, which contains nonattainment area requirements. Although some part D requirements apply to attainment areas in certain circumstances, the primary focus of part D is nonattainment areas. In addition, the sanctions in section 179(b), as applied under section 179(a), are almost exclusively linked to nonattainment areas by their express language. The highway funding sanction provided in section 179(b)(1)(A) is expressly restricted to nonattainment areas. The emissions offset sanction provided in section 179(b)(1)(B) requires new or modified sources to increase their offsets to comply with section 173, and typically, only sources in nonattainment areas must comply with section 173. Therefore, the mandatory sanctions listed under section 179(b) would primarily affect nonattainment areas.

These comments are useful to understand Congress's intent with regard to qualifying EPA's authority to impose statewide sanctions, but they do not conflict with the Agency's basic discretionary authority to impose sanctions prior to 18 months on a localized basis or on a statewide basis where a political subdivision is not principally responsible. The comments may easily refer only to the situation where EPA determines to use its section 110(m) authority to broaden the geographic scope of sanctions, but relies on section 179(a) for the timing. In this circumstance it is correct that sanctions could not be statewide for 24 months, assuming that a political subdivision is principally responsible for the deficiency. Hence Chairman Anderson's statement that the statute "gives a State, after the initial 18 months, 6 additional months to remedy the failure of a region to come into compliance before there is any threat of a statewide sanction." (Emphasis added.) In this case, EPA must impose mandatory sanctions on at least portions of the state 18 months after a finding, in accordance with the mandate of section 179(a), but cannot impose statewide sanctions for 24 months based on the restrictions of section 110(m).

Alternatively, as urged by the GAO, these comments may reflect the Congressman's understanding that States would always have 18 months to remedy deficiencies before EPA could impose any sanctions. This reading places the emphasis on different phrases of the same sentence: "gives a State, after the initial 18 months, 6 additional months to remedy the failure of a region to come into compliance before there is any threat of a statewide sanction." (Emphasis added.) Following the GAO's reading, the phrase "gives a State" 18 months must be read as "guarantees" a state 18 months. Likewise following this reasoning, the phrase "before there is any threat of statewide sanction" must be read as "threat of any sanction" and must disregard the references to the responsibility of a political subdivision or region for the noncompliance. Contrary to the GAO's intimation, Chairman Anderson's comments simply do not explicitly say that states must always receive 18 months before EPA can impose sanctions. At best, these comments are ambiguous. Chairman Anderson's statements do not directly contradict the portion of section 110(m) which permits the imposition of sanctions "at any time" except to qualify the timing of statewide sanctions in a situation in which EPA determines not to impose early sanctions. The statements certainly provide no basis for disregarding the express statutory language of section 110(m).

c. Summary

In sum, GAO's interpretation of the statutory language does not account for the plain meaning of the words and is counter to the purpose and scheme of the Act as a whole. The legislative history of sections 110(m) and 179(a) does not provide clear evidence of Congressional intent that directly conflicts with the

express language of those sections. The legislative history of these provisions cannot override the express words of the statute unless it clearly demonstrates an intent contrary to those words: "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n, 447 U.S. at 108. The statements of the Administration spokesman, the House Energy and Commerce Committee, and the House Public Works and Transportation Committee do not directly address the imposition of sanctions prior to the expiration of the 18-month period specified in section 179(a). To the extent that the history addresses this issue even indirectly, however, the various statements do not conflict with a plain reading of the statutory provisions. Nothing in the history directly contradicts the express grant of discretionary authority in section 110(m) to impose sanctions prior to the expiration of the 18-month period, or more specifically, "at any time (or at any time after)" a finding of deficiency.

B. May EPA propose the imposition of sanctions under section 110(m) prior to the time EPA has made a final finding under section 179(a)(1)-(4)?

The second question raised by GAO is whether EPA has the authority to propose section 110(m) sanctions prior to the Agency's making a final finding of state failure pursuant to section 179(a). In the Eckert letter, EPA responded that it does have authority to propose the imposition of sanctions under section 110(m) prior to making a final finding pursuant to section 179(a). GAO concludes that EPA does not have such authority, arguing on two levels. First, GAO reaches its conclusion even while assuming that EPA does have independent sanctioning authority under section 110(m). Second, GAO reaches the same conclusion assuming that the only sanctions process provided under the Act is the mandatory process of section 179(a). Since EPA's approach rests on the view that section 110(m) provides discretionary authority to impose sanctions under section 110(m), and only speaks to the proposal of sanctions under that provision, we will only address GAO's first set of arguments.[5]

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[5] Under section 179, notice-and-comment rulemaking on whether to impose a sanction on the specified deadlines is not necessary. Rather, the only issue subject to notice-and-comment rulemaking is the order in which the two sanctions will automatically be imposed 18-months after a finding is made and 6 months following the first sanction. In addition, when EPA believes both sanctions should be imposed immediately at 18 months because of a lack of good faith, EPA's finding that the

1. Analysis of Whether the Action is Precluded under the Administrative Procedure Act or the Clean Air Act

a. The Clean Air Act

As mentioned in the discussion of the applicable standard of review, a court reviewing an agency action must set aside the action if, among other things, it is found to be "without observance of procedure required by law ...," 5 U.S.C. § 706. The procedures an agency must follow in a rulemaking action are those established by the APA unless the implementing statute sets forth overriding procedures. Cf. Vermont Yankee, 435 U.S. at 545-47 (The APA sets forth the minimum procedural requirements which may be expanded upon by other relevant statutes or the agency itself).

In section 307(d), the CAA sets forth rulemaking procedures that apply to various actions taken pursuant to the Act. Actions to impose sanctions are not subject to these requirements. See section 307(d)(1). Section 110(m) provides that a sanction may be imposed "at any time (or at any time after)" a finding is made. It is, of course, quite clear from this language that EPA may not impose sanctions until it has made one of the deficiency determinations authorized under section 179(a). However, section 110(m) is silent on the issue of when sanctions may be proposed. Congress authorized EPA to impose sanctions at any time (or at any time after) EPA makes the finding. That authorization necessarily implies that EPA has the authority to propose those sanctions before EPA issues the final finding. Without such a capability, EPA would never be able to impose sanctions "at any time" a finding is made. Finally, EPA has not established any internal procedures that create a more restrictive process than that set forth under the APA.

b. The Administrative Procedure Act

Absent any further guidance under the CAA on the applicable procedural requirements for proposing and imposing sanctions under section 110(m), the rulemaking requirements to be followed for the imposition of sanctions under that provision are those established in the APA, 5 U.S.C. § 553. The specific provision relevant here establishes the requirements of a proposed rule:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served

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State was not acting in good faith would be subject to notice-and-comment rulemaking.

or otherwise have actual notice thereof in accordance with law. The notice shall include --

> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b). Although this provision establishes the general requirements for a proposed rulemaking action, it provides little guidance as to the substantive requirements of the notice itself.

In interpreting this provision, courts have used broad language to establish principles regarding adequate notice. One common test is "whether the notice would fairly apprise interested persons of the subjects and issues the agency was considering." American Transfer & Storage Co. v. I.C.C., 719 F.2d 1283, 1303 (5th Cir. 1983); accord United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981). On a similar note, a proposed rule must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989). Finally, in reviewing a final rule, the courts have held that if the final rule is a logical outgrowth of the proposed rule, then the agency has not abused its discretion in adopting that final rule. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983).

Neither we nor GAO have discovered any case law addressing the precise question of whether an agency may propose an action that would take place upon the occurrence of a specific event prior to the time that event occurs. Neither the APA itself nor the case law interpreting it prohibits such advance proposals. However, the Supreme Court has made it unmistakably clear that, so long as an agency does not contravene any specific statutory requirement, it is free to fashion its own procedures without interference from the courts. See Vermont Yankee, 435 U.S. at 542-45 ("Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."'") (citations omitted). Here, where Congress has not proscribed such a procedure in any statute, it seems clear that EPA may propose an action that will occur based

on a future event if such a proposal meets the APA's general requirement to provide adequate notice to affected parties. Moreover, EPA will not be barred from taking final action on that proposal if the final action is a logical outgrowth of the proposed action.

In proposing the imposition of section 110(m) sanctions before a final finding occurs under section 179(a), EPA can act consistent with the requirement for providing sufficient notice. As described above, under EPA's interpretation, section 110(m) provides EPA with the discretion to impose either or both the highway funding or 2 to 1 offset sanctions at any time after EPA makes a finding pursuant to section 179(a). EPA may impose those sanctions on any area of the State for which EPA determines imposing sanctions is reasonable and appropriate, but not statewide during the 24 months following a finding if a political subdivision of the State is principally responsible for the deficiency that triggered the finding. In summary, section 110(m) provides EPA with discretion as to three things: (1) the timing of the sanction or sanctions; (2) the selection of sanctions; and (3) the extent of the geographic scope for imposition. A fourth item, the finding that triggers EPA's discretion, may play a role in EPA's choices with respect to the three discretionary items, but is not an issue in and of itself in the action proposing section 110(m) sanctions.[6]

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[6] Under section 110(m), the findings that trigger EPA's discretionary sanctions authority are the four findings listed in section 179(a): (1) a finding of failure to submit a required submittal; (2) a finding that a submittal is incomplete; (3) a disapproval of a submittal; and (4) a finding of failure to implement an approved measure. EPA ordinarily must go through notice-and-comment rulemaking to disapprove or to find a failure to implement an approved plan item. The opportunity to comment on the correctness of EPA's disapproval action or finding of failure to implement will be in the rulemaking action taking such action. As to the first two findings, Congress evidenced an intent that EPA was not required to take rulemaking action on the findings themselves. Under the pre-amended Act, EPA established the procedure for determining completeness of a State submittal by a letter to the State. In adopting EPA's pre-enactment process into the amended Act, Congress evidenced its intent that rulemaking was unnecessary in two ways. First, Congress codified the process for determining completeness without expressly requiring rulemaking action and by explicitly limiting the time for completeness review; such action indicates Congress's tacit approval of EPA's established process. See United States v. Board of Comm'rs of Sheffield, Alabama, 435 U.S. 110, 134-35 (1978) ("When a Congress that reenacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is

A proposal of sanctions under section 110(m) based on an anticipated State failure can provide the public with adequate notice of the subjects and issues involved. Certainly, no one would take issue if EPA proposed the imposition of sanctions at the same time that EPA proposed a disapproval of the State's submittal. In such a case, the proposed disapproval is a proposed finding; therefore, EPA's proposed imposition of sanctions would occur prior to the time the finding was made final. In such a circumstance, there would be no restriction on when EPA proposed the sanction, but EPA would be unable to take final action imposing the sanction prior to final action on the disapproval.

The specific example that prompted GAO's inquiry gives even less grounds for concern, because the proposal to impose sanctions will be made after the proposed disapproval action. In that case, the State of California submitted as a SIP revision a commitment to adopt the required enhanced vehicle I/M program by November 15, 1993. Upon learning that the State was having difficulty enacting legislation for this program, EPA notified the State that it planned to impose sanctions under section 110(m) if the State failed to adopt legislative authority for an enhanced I/M program by the end of its 1993 legislative session. The basis for such sanctions would be EPA's disapproval of the State's commitment to adopt and submit authorizing legislation

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bound thereby."). Second, under section 110(k)(1), Congress provided EPA with a 60-day period in which to determine whether a submittal is complete. This time is inadequate to complete a notice-and-comment rulemaking process. See Republic Steel Corp. v. Costle, 621 F.2d 797, 803-04 (6th Cir. 1980); United States Steel Corp. v. U.S. Environmental Protection Agency, 605 F.2d 283 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980), reh'g denied, 445 U.S. 939 (both courts holding that the requirement to designate areas under the 1977 Clean Air Act within 180 days, did not provide sufficient time for rulemaking action). But see State of New Jersey v. U.S. Environmental Protection Agency, 626 F.2d 1038, 1045-49 (D.C. Cir. 1980) (holding that under the designation provision of the 1977 Clean Air Act the Agency must follow rulemaking procedures). Moreover, before EPA can make a determination of whether a submittal is complete, EPA must first determine that it received a submittal from the State; therefore, a finding of failure to submit would also need to be made within that 60-day time frame and, for the reasons that apply to the completeness determination, rulemaking is not required.

and regulations for an enhanced I/M program by November 15, 1993, because the State would be unable to meet the commitment. EPA laid the groundwork for that action on June 28, 1993, when it proposed to disapprove the California committal SIP.[7]

Based on this anticipated failure, it is apparent that EPA can provide the public with all relevant information on which to comment in a proposal to impose sanctions under section 110(m) prior to the Agency's final disapproval of the State's I/M commitment. EPA can provide adequate notice and opportunity to comment on the Agency's proposal and reasoning with regard to the timing of the sanctions; the geographic scope of the sanctions; and the sanctions to be imposed. The public would be apprised that the anticipated basis for these sanctions is the State's failure to adopt legislative authority for the enhanced I/M program as provided in the commitment and that EPA would be disapproving the State's committal SIP on that basis. Therefore, in such a sanctions proposal, the public would be able to comment on the appropriateness of the timing, geographic scope and the type and number of sanctions in light of the anticipated failure. The public has already had an opportunity, during the period for public comment on EPA's proposal to disapprove the State's I/M commitment, to comment on whether the finding itself -- EPA's disapproval of the commitment -- is appropriate. Moreover, if any new facts or issues were to arise after EPA's proposal on either the disapproval or the section 110(m) sanctions, EPA might well need to supplement its proposals or otherwise change course in one or both actions to account for such new information. Finally, the disapproval itself must be made final before any imposition of sanctions could occur.

c. Summary

Nothing in the APA, the Clean Air Act, or EPA's internal procedures expressly precludes EPA from proposing the imposition of section 110(m) sanctions prior to making a final finding that would trigger the Agency's authority to impose those sanctions. Since EPA will be able to comply with the requirements of the APA, and neither the Clean Air Act nor internal procedures establish stricter requirements, EPA may follow this procedure.

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[7] 58 Fed. Reg. 34,553. In this action, EPA proposed to approve the California committal SIP (based on the assumption that the State would meet the commitment) and, in the alternative, proposed to disapprove the committal SIP if the State failed to adopt legislative authority or to meet other interim milestones such that it would be impossible for the State to meet its commitment.

2. Analysis of GAO's Arguments

a. The Clean Air Act

As an initial matter, GAO states that both sections 179(a) and 110(m) clearly contemplate a multi-step process for imposition of sanctions. GAO then proceeds to identify these steps as: (1) The State submits a SIP or SIP revision; (2) EPA's evaluation of the State submittal; (3) EPA makes a finding under section 179(a); (4) EPA proposes the imposition of sanctions; and (5) EPA issues a final rule imposing the sanctions. GAO Opinion at 16-17.

While GAO establishes one reasonable approach to making findings, proposing and then imposing sanctions, this process is not established anywhere within either section 110(m) or 179. In fact, these provisions do not address in any way the notice-and-comment rulemaking procedures. Sections 110(m) and 179(a) merely provide that at certain times when or after EPA has made a finding EPA must (section 179) or may (section 110(m)) "apply" sanctions. In other words, these provisions simply make clear that the finding must be made before authority to impose the sanctions is triggered. No reference is made to when EPA may propose the imposition of sanctions. If anything, as stated previously, section 110(m)'s authorization for EPA to apply sanctions "at any time (or at any time after)" EPA has made a finding implies that, in at least some circumstances, the sanctions proposal could precede the final finding, since otherwise sanctions could never be imposed at the same time that EPA makes the finding. In any event, since the CAA establishes no express rulemaking procedure for imposing sanctions under section 110(m), EPA must follow the rulemaking procedures under the APA.

b. The Administrative Procedure Act

GAO contends that the only type of action EPA may take before proposing sanctions is an "informal and cautionary" action. GAO asserts that a proposed rulemaking does not fit within that context. GAO Opinion at 17. GAO does not establish any authority for this assertion. In the absence of any statutory prohibition of a proposal in anticipation of events supporting a final action, EPA's compliance with the APA rulemaking process is all that is required. See Vermont Yankee, 435 U.S. at 542-45.

GAO next contends that the notice EPA has indicated it will give would not satisfy the notice-and-comment procedures of the APA because it provides no notice at all. GAO Opinion at 17. It appears that GAO is asserting that since the failure on which a finding is based has not yet occurred, the public will not be

provided with adequate notice or opportunity for comment. However, as elaborated above, the issues subject to notice and comment in the sanctions rulemaking will be evident and fully addressed in the proposal. The public will have sufficient opportunity to comment on all issues pertinent to the imposition of sanctions under section 110(m) in the proposed action.

GAO asserts that proposing sanctions prior to the actual finding would place the State in the position of having to defend a SIP it had not yet submitted. GAO Opinion at 17-18. As noted previously, EPA's proposed imposition of sanctions in no way affects the State's or the public's ability to comment on the finding itself. If rulemaking action is required on the finding, the State and the public will be provided ample opportunity in that rulemaking action to question EPA's proposed action. Therefore, the State and the public are not forced to raise those issues in the action proposing sanctions. Furthermore, there is no relevant issue here about defending a SIP that California has not yet submitted or one that EPA has not yet found deficient. The substantive issue in EPA's final action disapproving the California committal SIP is whether the State failed to meet its commitment to enact and submit legislative authority and whether that deficiency made California unable to meet its commitment to submit I/M legislation and regulations by November 15, 1993. The issue in the sanctions rulemaking is whether and to what extent EPA should impose sanctions assuming that EPA issues a final disapproval of the California I/M commitment. Clearly, if California submitted an I/M SIP during these rulemakings and a finding on that submittal raises issues that require new notice and comment, EPA would need to provide such further notice and comment before EPA imposed sanctions under section 110(m).

c. Summary

GAO's arguments do not undermine EPA's view that the Clean Air Act and the Administrative Procedure Act do not bar proposal of section 110(m) sanctions prior to the time EPA makes a formal finding of failure under section 179(a)(1)-(4). Because EPA can propose adequate notice in its proposal to impose sanctions, such action will comply with the requirements of the APA.

## III. CONCLUSION

Under the standard of review set forth by the Supreme Court in Chevron and subsequent cases, an agency must interpret statutes in accordance with Congressional intent. Where that intent is clear on the face of the statute or, if necessary, by resort to analysis of the statutory scheme or the legislative history, the agency must act in accordance with that intent. In the case of sections 110(m) and 179(a) of the Act, the express language of the statute authorizes discretionary imposition of sanctions "at any time" and requires the imposition of sanctions

18-months after a finding of deficiency, if not sooner imposed. Only this reading of the sections gives effect to all the statutory language. Given the plain language of section 110(m) and the ease with which 179 can be read to be consistent with it, the language of the sections reflects a clear Congressional intent to provide EPA discretion in imposition of sanctions whereas GAO's interpretation conflicts with express statutory language.

Assuming arguendo that Congress's intent is not clear and unambiguous, any challenge to an interpretation duly adopted by the Administrator must establish that such an interpretation of the statute is unreasonable to the point of overcoming the deference due to the Agency under the Chevron standard. Nothing in the purposes or history of these sections indicates that the interpretation set out above, which follows the plain language of the statute, is unreasonable or impermissible. Indeed, that interpretation is consistent with the language of the statute, the scheme set up for sanctions in other analogous sections, and the limited legislative history. More importantly, EPA's interpretation is consistent with the goals of the Act to attain the national air ambient air quality standards in a timely manner, the overall intent of Congress in any provision of Title I of the Act.

Furthermore, an agency must, at a minimum, follow the procedural requirements of the APA in taking any administrative action. However, other relevant statutes or the agency's own internal procedures may impose more burdensome requirements on the agency. See Vermont Yankee, 435 U.S. at 542-47; Oglala Sioux Tribe of Indians, 603 F.2d at 713. Neither the Clean Air Act nor EPA's own internal procedures establish procedures more stringent than those established by the APA for imposing sanctions under section 110(m). The specific rulemaking procedures under section 307(d) of the Act do not reference section 110(m) as a provision subject to those more structured procedural requirements. Moreover, section 110(m) itself does not establish any procedural requirements. EPA may comply with the terms of the APA by proposing the imposition of sanctions under section 110(m) prior to the time a final finding is made under section 179(a) because EPA may "apprise interested persons of the subjects and issues [EPA is] considering." American Transfer & Storage Co., 719 F.2d at 1303. More specifically, when proposing sanctions under section 110(m) prior to the time a final finding is made under 179(a), EPA may adequately take comment on (1) the timing of the sanction or sanctions; (2) the selection of sanctions; and (3) the geographic scope for imposition of sanctions.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

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28 FEB 1986

MEMORANDUM

SUBJECT: Responses to Four VOC Issues Raised by the Regional Offices and Department of Justice

FROM: Gerald A. Emison, Director
Office of Air Quality Planning and Standards

TO: Air Management Division Directors
Regions I, III, V and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxics Management Division Directors
Region IV and VI

Air and Toxics Division Directors
Regions VII, VIII and X

In the attachments, I am transmitting responses to four VOC issues identified by the Regional Offices and DOJ through the VOC Compliance Workgroup. As you may know, absence of policy addressing these VOC issues was being presented as an impediment to Regional and State efforts in returning VOC violators to compliance.

On June 27, 1985, the first draft of the attached responses, as well as draft responses to many other VOC issues, were circulated for comment. On August 21 and 22, various Regional and Headquarters representatives met to discuss these first drafts. A second draft of each issue was circulated to the Regional Offices under two separate memoranda, dated October 25 and December 12. The attached responses incorporate the various comments received.

Under previous correspondence issued January 31, 1986 from SSCD and January 17, 1986 from OECM, four other responses have been transmitted to you. Therefore, eight issues have been addressed to date. Many of the remaining proposed responses raise significant policy issues which need to be addressed. We are working to expedite these responses and to assure any necessary coordination with the work of the Ozone Task Force.

I appreciate the efforts of the Regions in commenting on the various drafts of the attached four issues and hope that you find them helpful in resolving some of the issues concerning VOC enforcement.

Attachments

cc: VOC Compliance Workgroup
Regional Counsel, Regions I-X

Issue

What is the Agency's enforcement response for sources subject to pending bubbles, specifically for bubbles in areas lacking an approved attainment demonstration?

Response

The June 28, 1984 guidance on "timely and appropriate" enforcement response for significant air violators addressed the situation of timely enforcement for sources subject to SIP revisions. The guidance states that EPA will routinely issue NOVs, if not already issued, 120 days following the violation (or shortly after) if the violation is not resolved in accordance with the guidance. Follow up to the NOV is warranted unless EPA determines, in consultation with the State, that continued deferral to the State activity will produce timely compliance.

Where the State activity is a SIP revision (bubbles are SIP revisions), the revision must, by day 120, at least have been scheduled for a State hearing and EPA staff-level review shows it likely to be approved. Where the SIP revision is unlikely to be approved, EPA is obligated under the "timely and appropriate" guidance to issue a NOV on day 120 and follow up with its own enforcement action as appropriate.

Sources subject to SIP revisions in areas that are classified as attainment are not subject to the "timely and appropriate" guidance unless a specific State-EPA agreement addresses such sources. However, such sources remain subject to enforcement by EPA. The criteria for deferral outlined in the "timely and appropriate" guidance may be useful for addressing such situations even though the timelines may not be applicable.

Gerald A. Emison, Director
Office of Air Quality Planning and Standards

28 FEB 1986
Date Signed

Issue: Are there any site-specific RACT limits being set?

Response: Site-specific RACT determinations are required for > 100 T/yr stationary sources not covered by a CTG where (1) sources are located in urbanized areas that did not attain by 1982 and (2) for urbanized areas that have requested an extension until 1987. In addition, case-by-case RACT determinations are allowable where the CTG suggested limit has been found to be technologically or economically infeasible. These case-by-case RACT determinations must be approved by EPA as source-specific SIP revisions.

Site-specific RACT determinations have been made for a number of > 100 T/yr stationary source categories not covered by CTG's. Examples of this are Region IV RACT determinations for aluminum foil plants, woodworking plants, etc. Region I reportedly is making RACT determinations for a large number of sources. For example, more than 30 site-specific non-CTG RACT determinations in the State of Massachusetts will be submitted as SIP revisions to EPA in the near future. Also, a number of case-by-case RACT determinations have been made for CTG site-specific sources in Massachusetts in the past.

Case-by-case RACT determinations are allowable under EPA policy for both CTG and non-CTG source categories where appropriate.

The VOC RACT Clearinghouse is available and should be used for ensuring Regional consistency in RACT determinations for similar site-specific source categories.

Gerald A. Emison, Director
Office of Air Quality Planning and Standards

28 FEB 1982

Issue

What baseline year should be used for determining VOC percent emissions reductions as per State SIP regulations?

Response

° There is no one particular year that can be considered to be the baseline year for compliance purposes for all source categories. The baseline year is generally considered to be the effective date of the emission control regulation for the source category.

° The SIP itself, however, should be checked to determine if it contains language affecting baseline year determinations. It is possible that in approving the SIP either EPA or the State commented on this issue, thus providing guidance to sources. If there is no contrary guidance in the SIP, the general rule stated above should take effect.

° The stated issue and response relate to individual source compliance rather than to a SIP planning baseline or emissions trading issue. SIP baselines are defined in current policy and the issue of baselines relative to trading is covered in the various Agency policy documents on trading.

° The issue is only applicable to "percent reduction" types of regulations. A regulation based strictly on "VOC content" (e.g., lbs VOC/gal coating or percent solvent regulations, etc.) or add-on control equipment percent requirements, would not require a baseline date as compliance would be based only on a comparison against the SIP emission limits.

° The "percent reduction" requirement applies to the emission rate as expressed in terms of VOC content, not to total VOC emissions. That is, the percent reduction applies against the pre-control coatings/inks formulations, not to the emissions in mass per unit of time. This is consistent with the intent of the CTG's. The pre-control coatings/inks formulations used as the baseline in determining percent reductions must be representative of the coatings/inks in use at the time the regulation became effective.

Gerald A. Emison, Director
Office of Air Quality Planning
and Standards

28 F.

Date Signed

ISSUE

Is an exemption for use of incinerators in non-ozone season appropriate? How can we justify suing sources for failure to utilize controls during non-ozone season in SIPs where there is no exemption?

RESPONSE

The origin of the policy on seasonal controls began when EPA issued guidance on July 28, 1976 which authorized procedures for the approval of SIP revisions allowing seasonal operation of certain gas-fired afterburners. Such revisions could be accomplished without a detailed, time-consuming analysis of air quality impact so long as the seasonal shutdown period was consistent with that delineated in a staff study ("Oxidant Air Quality and Meteorology," February 6, 1976) and if the existing air quality showed no past violations in the months during which the afterburners were shut down.

On December 1, 1980, in a memorandum to the Regional Offices titled "Revised Seasonal Afterburner Policy" (attachment 1), EPA further stated that any plan revision which provided for afterburner shutdown in the period of November through March outside of southern California and the Gulf Coast should be proposed for approval.

It is important to note that the policy applies to gas-fired afterburners installed to control emissions of volatile organic compounds (VOCs) for the purpose of reducing ambient ozone concentrations. It does not apply to flares (which do not use natural gas as an auxiliary fuel), VOCs vented to boilers, afterburners operated principally for odor control, or afterburners operated to control toxic or hazardous substances. It is also important to note that the policy on seasonal control of afterburners can only be implemented through the SIP process. The EPA does not have a general exemption regarding seasonal controls of VOC gas-fired afterburners.

A second category of sources to which seasonal controls can be applied through the SIP process are cutback asphalt facilities. In some SIPs, control of these facilities is required only during the summer months.

In 1984, EPA, through the Office of Air and Radiation considered whether to expand the categories of sources to which such seasonal policies could apply. ("Seasonal Volatile Organic Compound (VOC) Control and Phillips Petroleum," dated September 21, 1984 (attachment 2)) The decision was made not to expand the scope of the policy primarily because:

- Only a relatively small additional cost savings could be expected from any expansion of the policy.

- Exposure to toxic emissions might increase.

- Pursuing such an initiative could disrupt VOC control efforts at a time of uncertain implementation.

- Scarce resources might have to be diverted from current programs to prepare the necessary administrative actions.

- The control flexibility in the program already available might be jeopardized since Section 302(K) of the Clean Air Act, passed subsequent to EPA's seasonal afterburner policy, requires controls on a "continuous basis."

It was for the above reasons that the recommendation was made to implement the existing policy as presently written.

Thus, the policy concerning seasonal control of afterburners can be implemented only if a State submits, and EPA approves, a SIP provision providing for seasonal operation. In the absence of such a provision, sources are obligated under State and federal law to continuously operate afterburners as necessary to meet applicable emission limits. EPA expects sources to meet their legal obligations, and is directed by Sections 113 and 120 of the Clean Air Act to take corrective enforcement action if a source fails to do so. The justification for enforcing SIP requirements providing for the continuous operation of afterburners rests with this directive in the Clean Air Act. SIP standards are initially developed by the States and can be more stringent than required by the Clean Air Act and EPA policy. Once federally effective, the SIP requirements are to be met by sources and enforced by the States and EPA.

Gerald A. Emison, Director
Office of Air Quality Planning
and Standards

28 FEB 1986

Date Signed

PII-172-80-12-1-033

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

DATE: DEC 0 1 1980

SUBJECT: Revised Seasonal Afterburner Policy

FROM: Walter C. Barber, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air and Hazardous Materials Division
Regions I-X

On July 28, 1976, the Agency issued its policy on the "Seasonal Operation of Natural Gas-Fired Afterburners." This policy authorized the approval of SIP revisions without a detailed, time-consuming analysis of air quality impact if the seasonal shutdown period was consistent with that delineated in a staff study ("Oxidant Air Quality and Meteorology," February 6, 1976) and if existing air quality showed no past violations in the months during which the afterburners were shut down. Because of the nation's continuing need to conserve energy resources and because of the revision to the national ambient air quality standard for ozone, we have reconsidered a portion of this policy.

An analysis of available ambient air quality data concluded that exceedances of the revised national ambient air quality standard for ozone do not occur in the November through March period, except for areas of southern California and the Gulf Coast. As a result of this analysis, it is appropriate at this time to modify the "seasonal afterburner policy" to state that any plan revisions which provide for afterburner shutdown in the period of November through March outside of southern California and the Gulf Coast should be proposed for approval. All other portions of the original policy remain unchanged, namely:

(1) The policy applies to gas-fired afterburners installed to control emissions of volatile organic compounds (VOCs) for the purpose of reducing ambient ozone concentrations. It does <u>not</u> apply to flares (which do not use natural gas as an auxiliary fuel), VOCs vented to boilers, afterburners operated principally for odor control, or afterburners operated to control toxic or hazardous substances; and

(2) A policy to seasonally control afterburners can only be implemented through the SIP process. The attached staff report, supported by air quality data, should be adequate technical support for approving a SIP revision allowing for seasonal shutdown of afterburners in a given location.

It is recommended that you notify the State agencies in your Region that EPA supports a policy which permits sources to shut off afterburners during the months of November through March except for areas of southern California and the Gulf Coast. Should you have any questions in this regard, please contact Mr. Richard G. Rhoads, Director, Control Programs Development Division, Office of Air Quality Planning and Standards at FTS 629-5251.

Attachment

cc: Chief, Air Programs Branch, Regions I-X

MEMORANDUM

SUBJECT: Seasonal Volatile Organic Compound (VOC) Control
~~and Phillips Petroleum~~
Joseph A. Cannon

FROM: Joseph A. Cannon, Assistant Administrator
for Air and Radiation (ANR-443)

TO: Milton Russell, Assistant Administrator
for Policy, Planning, and Evaluation (PM-219)

This is with regard to your memorandum of June 15, 1984, discussing seasonal VOC control and the Phillips Petroleum Federal Register notice. Your memorandum suggests that expanding seasonal VOC control beyond the existing afterburner policy offers significant promise as a control cost-savings initiative. You also expressed concern that the Office of Air and Radiation (OAR) was attempting to revoke the existing seasonal afterburner exemption in the Phillips Petroleum package. I would like to address these two issues separately.

SEASONAL CONTROL

We can understand your perspective regarding expanded seasonal VOC control since intuitively it is quite appealing to not control pollutants if they clearly are not causing an air pollution problem. However, such a seemingly simple approach has a number of potential pitfalls which need to be considered prior to pursuing such an initiative. The Office of Air Quality Planning and Standards' (OAQPS') review of your recommendations has reached the following conclusions:

- Substantial control flexibility already exists under the current policy in the area of greatest payoff; hence, only relatively small additional cost savings can be expected from an expansion.

- Exposure to toxic emissions may increase.

- The basis for no further control in several listing decisions under Section 112 may be undermined.

- Pursuing such an initiative at this time may disrupt VOC control efforts at a time of uncertain transition to implementation.

- Resources in State, local, Regional, and Headquarters Offices may need to be diverted away from current programs to prepare the necessary administrative actions.

- The substantial control flexibility already available under the current policy may be jeopardized.

Our basis for these conclusions is discussed below.

No Major Payoff Can Be Expected

The VOC emissions can be reduced through incineration, other add-on controls, or low-solvent technology. While a few individual sources may still realize significant savings through an expanded seasonal VOC control policy, the bulk of the savings available has been addressed through the existing seasonal afterburner exemption. The consultant study prepared by your staff confirms our initial conclusions regarding the limited potential for cost savings from expanding this policy. The following is taken from that analysis:

> Twenty-three (23) RACT source categories were examined to determine whether any of them could be major beneficiaries from an extended seasonal control policy. This examination indicates that most sources within these categories are unlikely to have major savings directly attributable to discontinuance of existing VOC control measures under such a policy extension due to the following reasons:
>
> - They employ control measures which are integral to the process equipment (e.g., submerged fill pipes, floating roofs, etc.) and which cannot be disabled.
>
> - RACT consists of switches to inherently low polluting processes (e.g., substitution of solvent-based to low- or no-solvent coatings). Such sources are unlikely to switch back because: (a) there is little financial incentive to do so, (b) the quality of product using low or no solvent coatings is acceptable, and (c) there will be costs associated with a changeover.
>
> - Several sources have no add-on or other controls and, therefore, are unable to benefit from an extended SCP because they currently use bubbles as an effective method of complying with RACT. This attests to the success of the bubble policy.
>
> - Many sources that can benefit from a seasonal control policy already do so since they are equipped with natural gas fired incinerators. These are exempt from wintertime operation under

the current SCP. However, it should be noted that not all incinerators are able to use the current exemption from natual gas fired incinerators because: (a) some incinerators have dual fuel capability and may, therefore, be ineligible for exemption in certain jurisdictions, (b) some sources seem to be unaware of the exemption, (c) other sources have integrated their incinerator into the general process and/or winter space heating system so that the recovered heat from the incinerator is now indispensible, and (d) as is their prerogative under Section 116 of the Clean Air Act, several State and local agencies do not provide exemptions for natural gas fired afterburners on a routine basis.

- For many sources, savings due to recovery of VOCs are sufficiently high so that they have no incentive to disable controls.

Major beneficiaries from any shutdown of controls resulting from an extended seasonal control policy will be those sources that use (or will use) end-of-pipe control devices for RACT and can neither use, sale nor burn recovered (i.e., collected) VOCs. Based on this observation, the categories most likely to benefit are: graphic arts (especially flexography) and paper coating.

With regard to flexographic and paper coaters, only those who install incinerators without heat recovery could realistically expect to benefit from the policy (very few have), and they have already been addressed through the existing policy.

Toxic Emissions May Increase

The most visible adverse impact to the public will be the potential increase in toxic emissions. The Agency has maintained that significant reductions in toxic emissions will accrue through VOC control for ozone. The majority of the chemicals being studied for toxicity as air pollutants are VOC. Table I illustrates that 29 of the 37 substances under assessment exist as VOC. Further, in some cases, it is not the primary constituent of the VOC but simply one of many constituents. For example, gasoline vapor is a major source of benzene. Also, coatings are formulated with solvents composed of many compounds which can and are changed. Hence it is not a simple task to determine whether a particular source has an adverse toxics impact or whether in the future it will continue to have an adverse impact. Given this complexity, toxic emissions may likely be emitted from sources in increased quantities if the policy is expanded indiscriminately. Even if this were not true, the perception of its possiblity would require greater reporting requirements and/or technical support before the Agency could responsioly take such a general step.

## Basis for Section 112 Decisions Will be Undermined

Decisions regarding controlling or not controlling toxic chemicals under Section 112 often hinge on the incremental environmental impact of additional control requirements. The baseline considers the existing SIP and whether there is a SIP requirement to provide some control. Expansion of seasonal afterburners will undermine this basis. As an example, bulk terminals are a significant source of gasoline vapor and benzene emissions. Lifetime risk of cancer due to high exposure to gasoline in the vicinity of uncontrolled terminals has a plausible upper bound of 1.2 X 10-3. This is the highest-risk source category in the gasoline marketing chain for benzene and gasoline vapors. While the Agency has yet to decide to control bulk terminals for benzene, the existence of SIP requirements obviously mitigates the risk. This analysis using the SIP baseline would be suspect if the Agency announced expansion of the seasonal VOC policy allowing exemption periods for VOC. This same problem will reoccur in a number of listing decisions presently being made.

## Disruption of Present VOC Control Efforts

The less quantifiable but potentially greater adverse impact is the additional disruption such a policy may cause State agencies. States presently feel overwhelmed by the demands the VOC program has placed on them. To add an additional requirement to an already complex regulatory program may adversely affect SIP approvals and compliance.

Further, most of these regulations are to be implemented soon. Final compliance dates have either passed or will pass in 1985. To provide sources with a potential new vehicle to argue that compliance requirements should be deferred may undermine the present Agency initiatives to move away from planning and into implementation. This initiative runs the risk of being the straw that breaks the proverbial camel's back.

## Diversion of Resources

The administrative burden of preparing an expanded seasonal VOC policy is not inconsequential. Rulemaking which could be as extensive as that which is presently underway for the emission trading policy will be necessary to formally promulgate the policy. Following issuance of the policy, States will have to undergo individual rulemaking activity to provide for seasonal controls in their plans. Subsequently, individual Federal rulemaking will be required to incorporate the State rules into the Federal SIP. Therefore, even presuming no litigation, a significant fraction of what we, the States and local agencies are presently expending in the SIP planning exercises may have to be expanded on adopting and implementing this initiative. This can only be accomplished by diverting activity away from areas where environmental improvement is being accomplished (e.g., inspections, compliance activity, Group III CTG adoption). Once the policy is issued, processing SIP revisions is a nondiscretionary duty. Significant allocations of resources will be necessary to address what is a major administrative task.

While the administrative burden is not insurmountable, it is real and could adversely affect compliance. It will take an investment on the part of States and EPA to surmount these administrative demands. The available resources are limited. Given the lack of identified benefits, it does not seem to be worth the effort.

Jeopardizing the Present Policy

Proposing an expansion of the seasonal VOC policy for notice and comment is not without risk. As it now stands the present policy provides significant flexibility to those who most can use it--users of gas-fired afterburners. Reopening the policy introduces the risk of a challenge to the entire policy. The present exemption for gas-fired afterburners was adopted as a narrow exercise of administrative discretion. The primary basis for approval was the natural gas supply shortage which existed in the mid-1970's. The energy availability situation has changed significantly since that time. Hence, this basis may no longer be available if this policy were reopened. Moreover, efforts were made in the initial policy to distinguish this from intermittent control systems previously used by sulfur dioxide sources. Since this policy was initially issued, the Clean Air Act Amendments of 1977 added Sections 123 and 302(k) to expressly require continuous controls. While neither development necessarily invalidates the present policy, both result in additional complexities. As your staff noted, there are those who would like to see the present policy rescinded. By opening the issues, you may provide them a vehicle to accomplish the very opposite goal you seek.

For these reasons, I recommend we continue to implement the existing policy on seasonal control as it is presently written. For all its warts, the present policy works. It provides significant flexibility for those who can most use it, has been accepted, and can continue to be implemented without significant additional rulemaking or resource burdens. The most prudent course of action appears to be to leave the policy alone.

PHILLIPS PETROLEUM

The Office of Air and Radiation (OAR) had no intention of revoking the existing seasonal afterburner policy in the notice. The original wording of this Federal Register notice explained in some detail why the seasonal afterburner policy did not apply in this instance, and did not place the policy into its statutory context, even though the original wording provided an adequate basis for disapproving this particular application. Given the Office of Management and Budget's (OMB's) tendency to ask for a statutory basis for EPA disapprovals when a policy is cited, I think it is prudent to modify the disapproval language to reflect the statute rather than explain why the afterburner policy does not apply in hopes of avoiding extensive interplay with OMB on this package.

I do not believe it has any precedential value for any future exemptions the Agency might wish to pursue since we would have to take notice and comment on any policy change to expand the use of seasonal controls. It is not clear what you mean by narrowing our basis for disapproval since there is no policy to ever approve such an action.

Further, given the benzene/gasoline vapor toxicity issue discussed above, using this action as a vehicle to announce consideration of expanding the seasonal VOC policy seems ill advised. Based on the discussion above, I have concurred on the disapproval package and have forwarded it to OMB.

Attachment

cc: Indur Goklany, RRS
Michael Levin, RRS
William Pedersen, OGC
Ed Reich, OAQPS
Gerald Emison, OAQPS
Darryl Tyler, OAQPS
Barbara Bankoff, OAR
Paul Stolpman, OAR

Table 1

37 Potentially Toxic Substances Under EPA Assessment

A. Substances that exist in the ambient air primarily as particles (8)

| | |
|---|---|
| Beryllium | Maleic Anhydride* |
| Cadmium | Manganese |
| Coke oven emissions | Nickel |
| Dioxin (2, 3, 7, 8-TCDD)* | Polychlorinated Biphenyls* |

B. Substances that exist in the ambient air primarily as volatile organic compounds (29)

| | |
|---|---|
| Acetaldehyde | Formaldehyde |
| Acrolein | Hexachlorocyclopentadiene |
| Acrylonitrile | Methyl Chloroform |
| Allyl Chloride | Methylene Chloride |
| Benzyl Chloride | Nitrobenzene |
| Carbon Tetrachloride | Nitrosomorpholine |
| Chloroenzene | Perchloroethylene |
| Chloroform | Phenol |
| Chloroprene | Phosgene |
| Cresol | Propylene Oxide |
| p-Dichlorobenzene | Toulene |
| Dimethyl Nitrosamine | Trichloroethylene |
| Epichlorohydrin | Vinylidene Chloride |
| Ethylene Dichloride | Xylene |
| Ethylene Oxide | |

* Although these organic compounds can exist in the ambient air as either particles or gases, these substances will be considered particles for the purposes of this analysis.

SECTION B DOCUMENT 12

**Guidance: Enforcement Applications of Continuous Emissions Monitoring System Data**

12

04/22/86

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

CAA B12

APR 22 1986

MEMORANDUM

SUBJECT: Guidance: Enforcement Applications of Continuous Emission Monitoring System Data

FROM: Edward E. Reich, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

Michael S. Alushin
Associate Enforcement Counsel
Air Enforcement Division

TO: Addressees

## I. Purpose and Application

The purpose of this guidance is to increase the use of continuous emission monitoring system ("CEMS") data in the Agency's compliance and enforcement program.1/ EPA intends in this way to strengthen its efforts to ensure that sources comply with applicable law on a continuous basis and to enforce against those that do not.

This document addresses the following three enforcement applications for CEMS data:

1) the governing regulation specifies CEMS as the official compliance test method ("Compliance Method"), e.g., the Reference Method for the Standards of Performance for New Stationary Sources (NSPS);

2) the governing regulation specifies some method other than CEMS as the Compliance Method; and

---

1/ "CEMS" as used in this guidance principally means instrumental or manual continuous emission monitoring systems. Furthermore, as with any other data, "CEMS" as used in this guidance assumes that EPA confirms that the specific data, normally available from the source, are reasonably accurate and precise. This information includes data such as those acquired during Performance Tests, Performance Specification Tests, and periodic calibrations of the CEMS. For additional information see 6/.

3) the governing regulation concerns proper operation and maintenance, recordkeeping, and other requirements where no test method would be specified.

This guidance applies to any Federally-enforceable regulation or other requirement governing emissions, operations and maintenance ("O&M"), and monitoring and reporting procedures for stationary sources of air pollution. It should be read together with the attached document entitled "Guidance Concerning EPA's Use of Continuous Emission Monitoring Data" (August 12, 1982).2/

## II. Conclusion

EPA can put CEMS data to a variety of important enforcement uses, irrespective of whether the legal requirement being enforced specifies CEMS as the Compliance Method. For example, EPA can rely on CEMS data alone to issue Findings of Violation ("FOVs") and Notices of Violation ("NOVs").

However, the legal requirement must specify CEMS as the Compliance Method in order for EPA to rely on CEMS data alone to refer a case to the Department of Justice ("DOJ"), to prove a violation of an emission limitation in Federal district court, or to issue a Notice of Noncompliance ("NON") under §120. The same is true if EPA is to rely on CEMS data alone to issue an administrative order respecting emissions violations under §113(a).

On technical grounds, CEMS data typically are at least comparable to Compliance Method and inspection data derived from equally well-executed and quality-assured monitoring. CEMS data certainly are more representative of actual continuous emissions than are some traditional sources of compliance data, such as emission factors and engineering calculations.

## III. Discussion

### A. Where the Governing Regulation Specifies CEMS as the Compliance Method

CEMS is the Compliance Method in NSPS Subparts Da (covering new electric steam generators), P, Q and R (covering new nonferrous smelters), and in certain SIP provisions, Federally-

---

2/ The 1982 guidance clarifies, among other things, the circumstances under which CEMS constitutes the applicable Compliance Method and the role played by CEMS under State Implementation Plans ("SIPs") which do not identify any Compliance Method.

enforceable compliance orders and permits. For sources covered by these provisions, EPA can rely on CEMS data alone to take all of the following enforcement actions:

1. Devise a priority list for inspections and other investigative activities;

2. Issue NOVs to SIP sources, or FOVs to non-SIP sources;3/

3. Document that a violation has continued 30 days beyond the date of the NOV in SIP cases;

4. Quantify the severity of violations for penalty calculation purposes, in negotiation or litigation;

5. Issue an administrative order under §113(a);

6. Issue a §120 NON;

7. Formally refer a case to the DOJ for filing as a civil or criminal action; and

8. Prove a violation in civil or criminal litigation in Federal district court.

B. Where the Governing Regulation Specifies Some Method Other Than CEMS as the Compliance Method

Here, CEMS data still can be very useful in initiating and supporting cases alleging emission violations. The Agency can rely on CEMS data alone to take any of the first four enforcement actions listed at Section III(A) above.

For example, EPA can use CEMS data standing alone as the basis for issuing an NOV or FOV for violation of an emission limitation.4/ Proof of the existance of a violation of an emission limit for purposes of a compliance order or litigation virtually always must be based on Compliance Method data. However, issuance of an NOV or FOV requires a less rigorous evidentiary showing.

---

3/ While some Regional Offices do issue FOVs, it should be noted that EPA has no legal obligation to do so.

4/ The Clean Air Act expressly permits the Administrator to issue an NOV "on the basis of any information available to him ... that any person is in violation of any requirement of an applicable implementation plan". 42 USC §7413(a)(1).

If after issuance, the source fails to come into compliance with the emission regulation, EPA normally must acquire Compliance Method evidence before it takes any of the last four enforcement actions listed at Section III(A) above.5/ However, a second NOV is not necessary under these circumstances, assuming that there is evidence that a sufficient relationship exists between the CEMS data and the Compliance Method data.

In addition, CEMS data also can be used in support of emission violation cases to quantify emission levels and to document that a violation continued 30 days beyond the NOV issuance date. While EPA is frequently prepared to argue that any particular day should be considered a day of violation in the absence of emission data per se, CEMS data should serve to strengthen the government's case.

We believe that courts will generally accept non-Compliance Method CEMS data as an indicator of the magnitude and duration of emission violations because they represent emissions comparably to Compliance Method data.6/

---

5/ However, in most circumstances a Regional Office may rely on non-Compliance Method CEMS data alone to support a referral where it constitutes a pre-negotiated settlement agreement, referred for the single purpose of lodging with the court. The exception would be in situations where adverse public comments on the decree may be expected, and that could lead the government not to request the court to enter the decree. In such exceptional circumstances, the referral must be based upon Compliance Method data.

6/ We assume that CEMS and Compliance Method data will be reliable and comparable to each other. This assumption is based principally upon three facts. First, the Agency requires sources to acquire and report reliable data (whether CEMS or Compliance Method). With respect to CEMS, this is accomplished by requiring sources to: (a) purchase, install and operate the CEMS in accordance with specific location criteria and performance standards; (b) demonstrate achievement of the Performance Specifications by comparing the CEMS and the Compliance Method results; (c) implement (at least daily) calibrations and O&M procedures; and (d) operate the CEMS during all Performance Tests. (If doubts remain, EPA can require additional comparative tests using §114.)

Second, the Agency has acquired data from numerous sources. Such data document the fact that sources are able to, and generally do report reliable and comparable data to agencies. Such documentation includes data acquired: (a) during the
(footnote 6/ continued on page 5)

Finally, of course, CEMS data provide an altogether appropriate basis upon which to issue a §114 request for Compliance Method data.

C. Where No Compliance Method Is Specified by the Governing Regulation

This Section applies exclusively to requirements which govern violations of other than emission regulations. Here, the Agency may rely upon CEMS data alone to enforce directly various O&M, monitoring, recordkeeping and reporting requirements set out in NSPS regulations, SIPs, and Federally-enforceable orders and permits.

For example, Section 60.11(d) of the NSPS regulations establishes a general "good practices" O&M requirement. This requirement identifies no specific compliance method. Rather, it states that the "determination of whether acceptable ... procedures are being used will be based on information ... which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source." (Emphasis added.) Similar language is contained in many SIPs. CEMS data alone are sufficient to prove violations of such O&M requirements.

IV. Recommendations

CEMS provides a very useful and versatile source of enforcement data. EPA can use such data to take many traditional enforcement actions, often even when CEMS is not specified as the Compliance Method. Therefore, we encourage Regional Offices to use CEMS data consistent with the aforementioned paragraphs.

In addition, we encourage Regional Offices to:

A. Make CEMS data acquisition and evaluation a standard operating procedure;

(continuation of footnote 6/)
development of the CEMS Performance Specifications and (Proposed) Appendix F of Part 60 (Quality Assurance Requirements for $SO_2$ CEMS); (b) by receipt of hundreds of Performance Specification Test Results; and (c) while performing quality assurance and compliance audits of CEMS. (See, e.g., EPA publications entitled "Summary of Opacity and Gas CEMS Audit Programs" (EPA-340/1-84-016, September 1984); and "A Compilation of $SO_2$ and $NO_x$ Continuous Emission Monitor Reliability Information" (EPA-340/1-83-012, January 1983).)

Third, all certifications of visible emission observers are based upon quantitative comparisons between observers and "smoke schools'" opacity CEMS.

B. Cite CEMS data as supplementary evidence of violations in each NOV or §113(a) administrative order issued whenever the CEMS data substantiate the primary evidence; and

C. Incorporate CEMS into ongoing enforcement actions (e.g., (1) consider requiring chronic violators to install and use CEMS; (2) cite CEMS procedural violations whenever they exist; and (3) cite the source for failure to properly operate and maintain its facility, based upon CEMS data).

Attachment

Addressees

Regional Counsels
Region I - X

Air Management Division Directors
Region I, III, V and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxics Management Division Directors
Region IV and VI

Air and Toxics Division Directors
Region VII, VIII and X

Air Branch Chiefs
Region I - X

Air Compliance Branch Chiefs
Region II, III, IV, V, VI and IX

CEMS Enforcement Workgroup
Jerry Emison, OAQPS
Jack Farmer, ESED
George Walsh, ESED
Roger Shigehara, ESED
Darryl Tyler, CPDD
Rodney Midgett, EMSL/RTP
Darryl von Lehmden, EMSL/RTP
Earl Salo, OGC
Joseph Lees, DOJ
Reed Neuman, DOJ

SECTION B DOCUMENT 13

**Policy on the Availability of Low Solvent Technology Scheduled in Clean Air Act Enforcement Actions**

**08/07/86**

13

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

CAA B13

AUG - 7 1986

MEMORANDUM

SUBJECT: Policy on the Availability of Low-Solvent Technology Schedules in Clean Air Act Enforcement Actions

FROM: J. Craig Potter
Assistant Administrator
for Air and Radiation (ANR-443)

Richard D. Mays
Acting Assistant Administrator
for Enforcement and Compliance Monitoring

TO: Regional Administrators
Regions I-X

Your staffs have requested resolution of the issue of when low-solvent technology (LST) schedules can be considered as an available method of compliance in cases brought to abate emissions of volatile organic compounds (VOC). They also asked for guidance on what period of time should be given in a compliance schedule. In response, we have determined the following Agency policy.

Background

In earlier guidance addressing options for VOC control, EPA encouraged the low solvent (reformulation) approach. Though compliance dates in the SIPs were generally December 31, 1982, EPA recognized when the earlier guidance was issued that it could take longer than December 31, 1982 for sources to develop and implement complying coatings. Through surveillance and enforcement activities by the States and EPA in recent years, it became evident that many sources had not made serious efforts to find complying coatings or, in some instances, efforts directed toward complying coatings failed to yield desirable results. Often, sources were not vigorously pursuing the alternative of installing add-on controls. As a result we now face extended non-compliance, increased VOC enforcement activity,

and a need to issue specific guidance on what is an acceptable schedule for VOC violators where pursuit of LST is being considered. It must be emphasized that more than five years have passed since the VOC regulations were first adopted by the States. With the ozone attainment dates already past in many areas and less than two years away in extension areas, it is critically important to assure compliance in an expeditious manner.

Policy

LST schedules may be used in EPA enforcement actions as long as the following five conditions are met:

1. The schedule must be expeditious. It can provide no more than three-months from the date of filing of the complaint (or equivalent State action in cases where the State is pursuing the enforcement action) for a source to demonstrate compliance using complying coatings.

2. Add-on controls must be part of the schedule with a commitment to implementation should the LST program fail. The add-on control program can extend up to an additional twelve months. It must begin at the end of the three-month (or shorter) LST schedule and have increments of progress encompassing: commencing engineering studies, ordering control equipment, commencing installation of control equipment, completing installation, and demonstrating compliance.

3. Final compliance cannot extend beyond December 1987.

4. Stipulated penalties must be part of the schedule for failure to meet incremental dates of the add-on control program.

5. Civil penalties must be obtained. (This requirement is established by previous policies such as the September 20, 1982 Post-1982 Enforcement Policy and the June 28, 1984 "timely and appropriate" guidance for the air program. These policies are located at Sections V.R. and I.I. respectively in the Clean Air Act Policy Compendium.) Penalties assessed by EPA must be consistent with the September 12, 1984 CAA Stationary Source Civil Penalty Policy, as amended, and penalties assessed by States must be consistent with the June 26, 1984 guidance by the Deputy Administrator entitled "Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement Agreements." These policies are located at

Sections V.Y. of the Clean Air Act Policy Compendium and Tab GM-41 of the General Enforcement Policy Compendium, respectively.

Schedules resolving State enforcement actions will be evaluated in light of this policy to determine the appropriateness of EPA deferring to the State resolution. A State enforcement resolution should include at least conditions (1), (2), (3) and (5) of those required in EPA actions.

This policy is effective on the date of this memorandum, except for the following limited situation. To allow for a smooth transition, ongoing State settlement negotiations where greater than three-month LST schedules are being considered will be accepted as long as the other elements of this policy for a State enforcement resolution are satisfied. This limited exception will terminate ninety days from the date of this guidance.

This policy is not applicable to schedules issued pursuant to Section 113(d). Approvability of those schedules is dependent upon meeting the requirements of Section 113(d). However, in making a determination of expeditiousness for a DCO, the concepts outlined in conditions (1) and (2) of this guidance should be followed.

If you have any questions on this policy, please call your Regional liaison contact in OAQPS's Stationary Source Compliance Division or OECM's Air Enforcement Division.

cc: Air Division Director, Regions I-X
Regional Counsel, Regions I-X

SECTION B DOCUMENT 14

**Application of August 7, 1986 Policy on LST Scheduled in Consent Decrees**

12/05/86

14

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

CAA B14

OFFICE OF AIR AND RADIATION

DEC - 5 1986

MEMORANDUM

SUBJECT: Application of August 7, 1986 Policy on LST Schedules in Consent Decrees

FROM: Steve Hitte, Chief
Regional Programs Section

TO: VOC Compliance Workgroup

I would like to share with you an example of how the August 7 LST policy was applied to a recent Region V consent decree. A source that coats the inside of metal drums plans to comply with the VOC SIP by using low solvent coatings in combination with a new application process. The proposed consent decree schedule allows more than three months to install and adjust the new application equipment.

The source has two coating lines which have been in violation of the standard. EPA issued a notice of violation on July 29, 1983 and filed the complaint against the source on August 19, 1985. In July 1986 the source installed paint heaters and new applicators on one coating line and conducted tests which demonstrated that this technology could be used to apply low solvent coatings to the drum interiors. However, it took more than three months to complete the installation of the new equipment and make the necessary adjustments. The source has proposed a schedule for installing the paint heaters and new applicators on the second coating line which would bring the second coating line into compliance by February 28, 1986. The question presented was whether this proposed schedule violates the August 7 LST Policy.

The August 7 LST Policy states that LST schedules can provide no more than three months from the date of filing of the complaint for a source to demonstrate compliance using complying coatings. The intent of the policy is to include the time to make process changes within the three months allowed to find and use complying coatings. As you will recall, we reaffirmed this intent at our recent Atlanta meeting.

However, given the facts of this case, SSCD and OECM-AED management decided that the proposed longer compliance schedule would be acceptable, provided that it contains interim milestones and stipulated penalties for failure to meet them. The decisive fact which led to this result was that the source had already demonstrated that the process changes, in conjunction with the low solvent coatings, would work and would allow the source to comply with the applicable SIP limit.

In this case, the source has conclusively demonstrated that it can comply with the SIP by using LST and a process change both sooner and at less cost than by installing pollution control equipment. Under these circumstances, it would be unreasonable for EPA to insist that the source install incinerators or carbon adsorption systems instead of installing paint heaters and associated new coating application equipment. Such a position would be indefensible at trial.

This result is consistent with the primary purpose of the LST policy which is to require sources to comply as expeditiously as possible by the use of demonstrated technology.

If you have any questions please call me at 382-2829 or Tracy Gipson in OECM-AED at 382-2842. Please share this memorandum with your management and Regional Counsel.

cc: John Rasnic, SSCD
Mike Alushin, OECM-AED
Tracy Gipson, OECM-AED

SECTION B DOCUMENT 15

**Guidance on Inclusion of Environmental Auditing Provisions in Clean Air Act Settlements**

01/27/89

15

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

CAA B15

JAN 27 1989

MEMORANDUM

SUBJECT: Guidance on Inclusion of Environmental Auditing Provisions in Clean Air Act Settlements

FROM: Terrell E. Hunt
Associate Enforcement Counsel
Air Enforcement Division

John S. Seitz, Director
Stationary Source Compliance Division
Office of Air Quality Planning & Standards

TO: Addressees

Attached is the new "Guidance on Inclusion of Environmental Auditing Provisions in Clean Air Act Settlements." This guidance supplements the "EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements," issued by Tom Adams on November 14, 1986. A draft of this guidance was distributed to the Regions and DOJ for comment on June 30, 1987.

As you can see from the attached summary of comments submitted by the Regions (DOJ asked that their comments remain confidential), considerable effort has been invested in this project. We attempted to incorporate every comment submitted.

The Geppert Bros. consent decree was the best example of an asbestos case with environmental auditing that was available when this guidance was sent out for comment. Several suggestions for improvements in the Geppert Bros. consent decree were received. Those improvements plus more recent consent decrees that have been entered with the courts are available upon request. The best example currently is U.S. v. City of Ottumwa, which is appended to this guidance, but it too will certainly be surpassed in time. To stay abreast of the latest developments in this and other dynamic areas, we recommend that you utilize the clearinghouse function provided by the lead regional attorney concept in addition to the resources we offer at Headquarters. Presently, the lead regional attorney for environmental auditing is Randye Stein, Region II (FTS 264-3277).

We appreciate the considerable efforts which you have made to comment on the draft guidance and to include environmental auditing in your programs. Please continue to emphasize this valuable enforcement tool.

Questions regarding this guidance should be addressed to Charles Garlow of OECM at FTS 475-7088.

Attachments

Addressees:

Regional Counsels
Regions I-X

Regional Counsel Air Contacts
Regions I-X

Air and Waste Management Division Director
Region II

Air Management Division Directors
Regions I, III, and IX

Air and Radiation Management Division Director
Region V

Air, Pesticides, and Toxics Management Division Directors
Regions IV and VI

Air and Toxics Division Directors
Regions VII, VIII, and X

David Buente, Chief
Environmental Enforcement Section
Department of Justice

Robert Van Heuvelen, Assistant Chief
Environmental Enforcement Section
Department of Justice

Justina Fugh
EDRS Coordinator
OECM-Air

# INCLUSION OF ENVIRONMENTAL AUDITING PROVISIONS IN CLEAN AIR ACT SETTLEMENTS

This document sets forth guidance for inclusion of environmental auditing provisions in settlement of Clean Air Act enforcement actions. EPA policy encourages the use of environmental auditing to enable regulated entities to achieve and maintain compliance with environmental laws and regulations. EPA maintains that effective environmental auditing promotes higher levels of compliance and reduces risks to human health and the environment. 51 Fed. Reg. 25004 (July 9, 1986). This policy is based on the statutory authority of Section 114 of the Clean Air Act, 42 U.S.C., §7414 and the information gathering provisions of other environmental statutes.[1/]

The Clean Air Act environmental auditing guidance supplements the "EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements," issued on November 14, 1986 ("EPA Policy"). That policy establishes a general framework, applicable to enforcement under all environmental statutes, for the use of environmental auditing provisions in settlement agreements. This guidance addresses the application of the general policy to air pollution cases.

## Appropriateness of Environmental Auditing Provisions

As stated in the general policy, environmental auditing provisions are appropriate to propose in settlement negotiations in instances in which: 1) a pattern of violations results, at least partially, from the absence of an effective environmental management system; or 2) the nature of the violations indicates a likelihood that similar noncompliance may occur at other parts of the same facility or at other facilities owned by the same entity. The need for environmental auditing is most likely to apply to the owner or operator of extensive or multiple facilities, but may in some circumstances apply to a single-facility company as well. See EPA Policy at p. 2.

In the stationary source program, the most likely candidates to benefit from environmental auditing would include:

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1/Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9604 *et seq.*; Section 308 of the Clean Water Act, as amended, 33 U.S.C. §1318 *et seq.*; Sections 3007 and 3013 of the Resource Conservation and Recovery Act, 42 U.S.C. §§6927 and 6933; Section 1423(c)(8) of the Safe Drinking Water Act, 42 U.S.C. §300h-2(c)(8); and Section 11(c) of the Toxic Substances Control Act, 15 U.S.C. §2610(c).

1) National demolition/renovation companies engaged in activities subject to the National Emission Standard for Asbestos. This is a unique category of air pollution sources, since a company does not typically own and operate a fixed universe of facilities but instead is involved in the operation of a constantly changing group of transient activities. EPA has learned in enforcing the asbestos regulations that large demolition companies may have a corporate awareness of the applicable requirements but lack an effective environmental management system to assure compliance with the law. The need for such a system is particularly acute due to the very nature of the business, which involves an itinerant work force and sometimes relies on temporary employees. Establishing a means of managing the activity of demolition or renovation crews is an appropriate element of a consent decree designed to enjoin future noncompliance with asbestos control requirements. Such a system should involve accountability for environmental compliance at each work site involving asbestos, training of workers, and enhanced corporate oversight of the activities of the work crews. As an example of model provisions applicable to a demolition contractor see the consent decree in U.S. v. City of Ottumwa, et al. (S.D. Iowa), attached.

Common characteristics of recent asbestos consent decrees include:

- Training for all asbestos workers with tests to ensure understanding.
- Enhanced training for supervisors/managers.
- Instruction brochures for each employee to keep permanently as a reference.
- Ensuring the presence of trained supervisors at work sites.
- Checklist for proper equipment, notice, training certificates.

2) Owners/operators of multiple volatile organic compound (VOC) sources. Companies that own several facilities, such as can-coating or automobile-coating plants, may benefit from environmental auditing. In such instances, a compliance audit may identify common problems at similar facilities, and the same or similar remedies at one facility may be applicable to the company's other plants. Environmental auditing would be particularly appropriate where EPA or a State has cited more than one facility for VOC violations.

Consequently, mobility of the source can result in an evasion of enforcement. Environmental auditing of such sources would give enforcement personnel data that would help in identifying similar violations of plant owners. Owners often have several other facilities and an audit would reveal the locations of the plants. Likely auditing provisions in this category could include:

- Making available to the auditor and EPA a list of all plants owned within the last five years, a list of those currently owned and the various states in which they have been located.

- Providing to the auditor and EPA any and all evidence that these plants have been and are in compliance with applicable SIPs.

- Conducting a thorough compliance audit of all facilities.

- Having the auditor prepare a plan (training, management procedures) to ensure compliance, which plan would be an enforceable provision of the decree.

5) Multi-media sources. Facilities that are likely to have water pollution or waste management problems in addition to being a source of air pollution may also benefit from environmental auditing. A compliance audit in such circumstances would enable the company to develop a comprehensive approach to its environmental responsibilities. Environmental auditing would be particularly appropriate where EPA or a State has cited violations by the facility under more than one statute.

A multi-media audit would at least include:

- A review of current management practices and procedures used to ensure compliance with various environmental requirements.

- An in-depth compliance audit to determine how well these procedures are being utilized.

- An analysis of additional management procedures needed to track compliance.

- Employee and supervisor training in the law and regulations affecting the facility and in the new protocol to be implemented.

- Certification by the source that it is in compliance with all environmental requirements.

Suggested provisions for VOC environmental auditing include:

- Improved checklists to log all coatings with a certification that they are in compliance with the relevant requirements.

- Establishment of procedure for periodic maintenance of VOC incinerators and other control equipment.

- Training for supervisors and other employees on recognizing the occurrence of abnormal operating conditions.

3) Volatile hazardous air pollutant (VHAP) sources. The National Emission Standard for Hazardous Air Pollutants regulates fugitive emissions of VHAPs at 40 CFR Part 61, Subpart V. The regulations require that a source institute specified leak detection and repair procedures addressing potentially hundreds of pumps, valves, and other pieces of equipment at a facility. The standard requires monitoring, reporting, and recordkeeping, rather than installation of control equipment. Compliance with the VHAP regulations demands particular diligence and attention to detail. Our limited enforcement experience to date indicates that companies have not completely identified the equipment subject to the standard and have not established adequate systems to assure that the required procedures are followed. Due to the nature of the VHAP standard, a compliance audit would be appropriate to enable corporate management to identify violations and to put management systems in place to ensure that the requirements are followed. An example of such a VHAP auditing requirement is attached. (Consent decree, U.S. v. Texaco Refining & Marketing, Inc. (D. Del.)).

The major provisions in the Texaco environmental auditing decree are:

- Selection of EPA approved independent contractor.

- Delivery of detailed schematics identifying all equipment in benzene service to EPA and auditor.

- Thorough compliance audit.

- Compliance report with schedule for corrections to be undertaken and training to be conducted.

4) Asphalt Concrete Plants are likely candidates for the auditing provisions because these air pollution sources, which have a high turnover in ownership, can be easily relocated. They, therefore, can be subject to differing emission limits because of the various state implementation plan provisions.

The consent decree should include clearly specified and enforceable schedules, timetables and requirements for completion of the audit. In the case of demolition/renovation contractors, the audit will be an ongoing requirement that will accompany the performance of work at facilities containing friable asbestos, and will not be subject to a schedule for completion.

EPA assumes that any and all information submitted to EPA pursuant to these audit provisions is not automatically considered to be confidential business information (CBI). However, a business may submit such information with a request that the information be treated as CBI, subject to appropriate statutory and regulatory restrictions (cf. 5 U.S.C. §552, 40 C.F.R. Part 2, Subpart B).

The consent decree should specify that the Agency is entitled to copies of all information developed during the audit, including not only final audit reports, but also copies of all underlying audit data as well as draft audit reports, whether developed by the employees or contractors of the defendant. Though entitled to this information, the Agency need not always demand access to the data.

Consequences of Audit

For an audit to benefit the company and the environment, the consent decree should require that, upon completion of the audit, the company implement its recommendations provided, however, that some procedure should be included for the Agency to review and approve the audit's conclusions and for the company to dispute the findings/recommendations of the audit. The consent decree may require the company simply to certify that it has remedied any problems uncovered by the audit, or it may require full disclosure to EPA of the audit results. The decree may also require the party to submit a compliance or environmental management plan, or both, with an enforceable schedule for completion.

Additionally, the consent decree should address the enforcement of audit-discovered violations. In particular, the consent decree may provide for stipulated penalties for violations that can be predicted and are promptly remedied. See EPA Policy at p. 5. See also the City of Ottumwa consent decree for an example of stipulated penalties for violations of the audit provisions.

Impact of Audit Provisions on Civil Penalties

If a source, by agreeing to implement an environmental audit, exhibits an extraordinary degree of cooperation, it may be appropriate to consider that cooperation in adjusting the gravity component, but not the economic benefit of noncompliance, downward. See EPA Policy at p.6. An audit would not be a credit towards paying the bottom line penalty.

We suggest these categories of sources as likely candidates to benefit from environmental auditing, but they are not intended to limit in any way the universe of sources for which auditing is appropriate. The case development or litigation team should be alert to indications that a company has an environmental management problem or that similar violations are likely to occur at other parts of the same facility or at other facilities. An example of such a management problem would be a continuing series of violations blamed on operator error. This management problem could be addressed by better required operator training courses complemented by periodic refresher courses. The litigation team should routinely review the case docket to determine if the company has had environmental problems in other regions or other media. Where such indications exist, EPA should probe the need for auditing with a site inspection, in a Section 114 letter or in a discovery request. An example of such a Section 114 letter is attached.

Contents of Audit Provisions

The consent decree provisions should clearly identify the type of audit to be performed. A compliance audit is an independent assessment of the current status of the party's compliance with environmental requirements. A management audit is an independent evaluation of the party's environmental compliance policies, practices, and controls. The nature of each type of audit is described in greater detail in the EPA Policy at p. 3.

Both a compliance audit and a management audit should be encouraged. The nature of the case will determine which type of audit is more appropriate. The audit provisions appropriate for demolition and renovation contractors are unique but fit more closely within the ambit of a management audit. Its focus is t assure centralized management controls over the decentralized functions of the company. VOC sources are most likely to benefit from a compliance audit, which may identify recurring problems at similar facilities. VHAP sources may be candidates for a hybrid of the two. Violating VHAP sources typically have not even determined what equipment is subject to the standard and consequently are not fully aware of their compliance status. In addition, VHAP sources have a particular need for operation and maintenance programs, monitoring, recordkeeping, and reporting systems, and other management controls to assure compliance with the standard.

The consent decree provisions should identify the party conducting an audit. The auditors may be a consultant or an in-house person or team. In any event, the auditors should be independent of the persons and activities to be audited, although in-house auditors are often not as "independent" as outside auditors. See EPA Policy at p. 4. EPA and the State should be provided with advance notice of the audit and an opportunity to participate in the audit.

Summary of Regional Comments on Draft Guidance on the Inclusion of Environmental Auditing Provisions in Clean Air Act Enforcement Cases

Region I: In-house auditors are not likely to be "independent."
EPA and States should get advance notice of audit and an opportunity to participate in audit.
Audit results should always be fully disclosed.
Several comments on improving the Geppert Bros. Consent Decree were offered.

Region III: Regions should remain free to determine when auditing is appropriate.
It is good that no additional decree requirements are mandated.

Region V: Asphalt/concrete plants are good examples of candidates for auditing.
There should be due process for companies by including an opportunity to dispute the findings of the audit.
Agency should review & approve audit findings before the company is required to implement the recommendation.

Region VI: In-house auditors are not very independent.
Difficult to determine how much to adjust penalties if auditing done.

Adjustments to the gravity component should only be made in compelling circumstances in cases in which the gravity component is a major portion of the penalty. Appendix III of the Civil Penalty Policy, pertaining to asbestos cases, establis a scheme for the gravity component which recognizes that asbesto is a hazardous air pollutant and explicitly punishes repeat violators more than first-time violators. EPA should assure that the penalty in any asbestos case meets these objectives. In most such asbestos cases, the gravity component of the penalty is much higher than the benefit component. Similarly, the benefit component in VHAP cases is likely to be smaller than the gravity component. Therefore, in both instances, the gravity component should not be adjusted unless the bottom line penalty is still sufficient to deter future violations.

Attachments

ATTACHMENT I

NOTICE OF

ASBESTOS REMOVAL ACTIVITIES

DEMOLITION AND/OR RENOVATION

ASBESTOS NESHAP'S CONTACT DATE: _____

AIR MANAGEMENT DIVISION

USEPA

_____

_____

Dear _____,

FACILITY TO BE DEMOLISHED OR RENOVATED

_____

Name, address and phone number of facility:

_____

_____

_____

_____

Name, address and phone number of owner:

_____

_____

_____

_____

Description, size, age and prior use of facility:

_____

_____

_____

_____

Demolition or renovation methods to be used:

_____

_____

_____

_____

Name, title and authority of state or local government representative who has ordered the demolition (if applicable) ___

_____

_____

_____

ASBESTOS NOTIFICATION

**ASBESTOS INFORMATION**

Site Asbestos Coordinator: _____

Site-Asbestos-Foreman (if applicable): _____

Start date: _____ Completion date: _____

Quantity of friable asbestos containing material on pipes: _____

linear ft.(required) _____

cubic ft.(optional) _____

ATTACHMENT II

# ASBESTOS REMOVAL PROJECT
# DAILY CHECK LIST

PROJECT LOCATION: _____

ASBESTOS SITE COORDINATOR: _____

JOB NUMBER: _____ DAY: _____ DATE: _____

ASBESTOS SITE COORDINATOR, TIME AT SITE _____TIME LEFT SITE ____

| | YES | NO | |
|---|---|---|---|
| 1. | ( ) | ( ) | COPY OF ALL NOTIFICATIONS AND WORKER TRAINING RECORDS AT SITE |
| 2. | ( ) | ( ) | ALL ASBESTOS WORKERS TRAINED AND TESTED AND RECORDS CERTIFYING TRAINING ARE COMPLETE |
| 3. | ( ) | ( ) | MEDICALS PERFORMED ON ALL ASBESTOS WORKERS BEFORE JOB BEGAN |
| 4. | ( ) | ( ) | WORK AREA ISOLATED BEFORE JOB BEGAN |
| 5. | ( ) | ( ) | WARNING SIGNS POSTED BEFORE JOB BEGAN |
| 6. | ( ) | ( ) | DECONTAMINATION UNIT INSTALLED AND OPERATING |
| 7. | ( ) | ( ) | PROTECTIVE CLOTHING USED BY ALL WORKERS DURING ENTIRE WORKDAY<br>( ) coveralls ( ) respirators<br>( ) hoods ( ) spare filters<br>( ) boots ( ) gloves |
| 8. | ( ) | ( ) | WATER AVAILABLE AT SITE AND USED FOR ASBESTOS REMOVAL AND SHOWERS |
| 9. | ( ) | ( ) | AIRLESS SPRAYER/BETTER WETTER ON SITE AND USED IN WETTING OPERATION |
| 10. | ( ) | ( ) | NEGATIVE AIR MACHINES USED ENTIRE WORKDAY |
| 11. | ( ) | ( ) | HEPA VACUUM USED ENTIRE WORKDAY (NO: _____ |
| 12. | ( ) | ( ) | VACU-LOADER USED ENTIRE WORKDAY (NO: _____ |
| 13. | ( ) | ( ) | ALL ASBESTOS CONTAINING MATERIALS (ACM) HANDLED WET |
| 14. | ( ) | ( ) | AFTER WETTING, ALL ASBESTOS CONTAINING MATERIALS PLACED IN PROPERLY LABELED LEAK TIGHT CONTAINERS |

- number of containers used _____
- type of containers used _____
- size of containers used _____

15. ( ). ( ) ALL ACM REMOVED BEFORE ANY DISMANTLING OR DEMOLITION STARTED

16. ( ) ( ) VISIBLE EMISSIONS TO OUTSIDE AIR PREVENTED

17. ( ) ( ) ALL ACM DISPOSED OF IN AN APPROVED LANDFILL

18. ( ) ( ) MANIFESTS COMPLETE (OWNER SIGNATURE)

19. ( ) ( ) VISITORS ON SITE: _____

_____

_____

_____

Asbestos-Site-Supervisor

COMMENTS:

ATTACHMENT III

## EMPLOYEE'S ACKNOWLEDGEMENT OF ASBESTOS TRAINING

In accordance with applicable law, Cleveland Wrecking Company is required to provide proper safety training to all employees whose job responsibilities involve (or will involve) the removal, handling, transportation or disposal of materials containing asbestos.

If you have received asbestos training, please read paragraph 1, below, and decide if it accurately describes the training you received. By signing your name at the bottom of this sheet, you will be acknowledging (1) that you received the training described; and (2) that you understand that review of the training materials by the United States Environmental Protection Agency does not assure that your job site is free from all health and safety risks.

### ACKNOWLEDGMENT

1. I have completed at least eight hours of training on the dangers of asbestos, and the proper procedures for removing, handling, transporting, and disposing of materials containing asbestos. I took an examination following the training course, and was informed that I had passed that examination. I will keep on my person proof of my training.

2. I have received and read a copy of the Cleveland Wrecking Company's Asbestos Training Pamphlet.

3. I understand that although the Environmental Protection Agency reviewed the materials employed by the Cleveland Wrecking Company in training me, the Environmental

Protection Agency's approval of those materials was not intended as a guarantee or assurance to me that my workplace is free of all health and safety risks, or that Cleveland Wrecking is in compliance with regulations and laws enforced by EPA or other agencies such as the Occupational Safety and Health Administration.

Signature of Employee _____

Printed Name of Employee _____

**WITNESS**

I witnessed the named employee's signature.

[_] I certify that the employee can read English.

OR

[_] The employee cannot read, or cannot read English. I read this document to him before he signed it and he acknowledged understanding its contents.

Signature of Witness _____

Printed Name of Witness _____

Quantity of friable asbestos-containing material on other facility components:

_____

square ft.(required) _____

cubic ft.(optional) _____

If less than 260 linear feet on pipes and less than 160 square feet on other facility components, explain techniques of estimation _____

_____

Description of Asbestos-Containing Materials _____

Location of Asbestos-Containing Materials: _____

Person who made the identification: _____

Method of identification: _____

(Attach the results of any laboratory analysis of suspected asbestos-containing material to this form.)

Emission Control Procedures and other procedures to be used to comply with 40 C.F.R. Part 61 Subpart M: _____

_____

_____

ASBESTOS NOTIFICATION

**ASBESTOS DISPOSAL INFORMATION**

Type of leak tight containers to be used: _____

Waste handling emission control procedures and other procedures to be used to comply with 40 C.F.R. Part 61, Subpart M: _____

_____

_____

Transporter: name, address and phone number; _____

_____

_____

Disposal Site: name, address and phone number; _____

_____

_____

Sincerely,

Asbestos Program Manager

cc: Appropriate State or Local
Air Pollution Control Agency

SECTION B DOCUMENT 16

**Revised Guidance Concerning Compliance By Use of Low Solvent Technology in VOC Enforcement Cases**

02/08/89

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

FEB 8 1989

CAA B 16

MEMORANDUM

SUBJECT: Attached Revised Guidance Concerning Compliance By Use of Low Solvent Technology in VOC Enforcement Cases

FROM: Terrell E. Hunt
Associate Enforcement Counsel
Air Enforcement Division

John S. Seitz, Director
Stationary Source Compliance Division

TO: Air Management Division Directors
Regions I, III and IX

Air and Waste Management Division Director
Region II

Air, Pesticides and Toxics Management Division Directors
Regions IV and VI

Air and Radiation Division Director
Region V

Air and Toxics Division Directors
Regions VII, VIII and X

Regional Counsels
Regions I-X

Attached is a memorandum revising existing guidance regarding the terms and conditions under which case development teams may agree to consent decree language affording sources the option to comply by means of Low Solvent Technology ("LST"), where such compliance would not be achieved within the ninety-day period otherwise required in the August 7, 1986 policy on the availability of LST schedules in VOC enforcement cases. This guidance memorandum supersedes a memorandum on this subject issued by AED and SSCD on November 21, 1986.

Background

On August 7, 1986, the Office of Enforcement and Compliance Monitoring and the Office of Air and Radiation jointly published a policy concerning the availability of schedules for LST in VOC enforcement actions. This policy provided that, provided certain conditions were met, such schedules could be obtained. The policy stated, however, that any such schedule could not allow for final compliance to be achieved later than ninety days after the filing of EPA's enforcement complaint.

On November 21, 1986, recognizing that the environment would be equally served if a source came into compliance by LST prior to the final compliance deadline of an expeditious schedule for add-on controls, though after the ninety-day limit, AED and SSCD distributed guidance clarifying the August 7, 1986 policy. This guidance stated that a consent decree containing a schedule for add-on controls could provide that compliance be achieved by some alternate means prior to the final compliance date for add-on controls. The memo went on to specify, however, that any such decrees could not contain provisions excusing accrued stipulated penalties for missed interim dates in the add-on control schedule, even if the source complied by LST prior to the add-on control schedule end date. This restriction was based on the belief that forgiving interim date stipulated penalties might encourage sources to unrealistically attempt to comply by LST.

Upon further consideration, it appears that the policy of precluding forgiveness of stipulated penalties might be counterproductive in some cases. It is particularly true in the case where a defendant might be capable of complying by LST as quickly or more quickly than by installing add-on controls - although not within a ninety-day period - and where unforgiven stipulated penalties would be very costly. In such circumstances, the source might view litigation as more attractive than signing a consent decree providing for unforgivable interim date stipulated penalties. To avoid forcing costly and environmentally unnecessary litigation in such situations, AED and SSCD have developed the modification to the November 21, 1986 guidance set out in the attached revised guidance.

Revisions

The revised guidance continues the availability of "alternate means" clauses as provided in the memorandum of November 21, 1986. However, a defendant seeking such a clause

must agree to either of two preconditions designed to ensure that the defendant is not embarking on a speculative LST scheme. The defendant may agree to escrow stipulated penalties which accrue for violations of interim milestones in the schedule for add-on controls. In such cases, the decree may provide for the forgiveness of such penalties if the source complies by the schedule end date. Alternatively, the defendant may agree to post an appropriate up-front performance bond in lieu of being subject to interim date stipulated penalties. Should the source comply by LST prior to the end date, the escrowed penalties or the performance bond are returned to the defendant.

This revision does not affect other aspects of the August 7, 1986 policy, which remain in effect.

Attachments (August 7, 1986 Policy and November 21, 1986 Guidance; Revised Guidance)

cc: Air Division Branch Chiefs

ORC Air Branch Chiefs

David Buente, Chief
Environmental Enforcement Section
Department of Justice

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

FEB 8 1989

MEMORANDUM

SUBJECT: Revised Guidance Concerning Compliance By Use of Low Solvent Technology in VOC Enforcement Cases

FROM: Terrell E. Hunt
Associate Enforcement Counsel
Air Enforcement Division

John Seitz, Director
Stationary Source Compliance Division

TO: Air Management Division Directors
Regions I, III and IX

Air and Waste Management Division Director
Region II

Air, Pesticides and Toxics Management Division Directors
Regions IV and VI

Air and Radiation Division Director
Region V

Air and Toxics Division Directors
Regions VII, VIII and X

Regional Counsels
Regions I-X

This guidance specifies the terms and conditions under which case development teams may agree to consent decree language affording sources the option of achieving compliance by means of Low Solvent Technology ("LST"), where such compliance would not be achieved within the ninety-day period otherwise required in the August 7, 1986 policy on the availability of LST schedules in VOC enforcement cases. This memorandum supersedes a memorandum on this subject issued by AED and SSCD on November 21, 1986.

Background

On August 7, 1986, the Office of Enforcement and Compliance Monitoring and the Office of Air and Radiation jointly published a policy concerning the availability of schedules for LST in VOC enforcement actions. This policy provided that if certain conditions were met, such schedules could be obtained. The policy provided, however, that any such schedule could not allow for final compliance to be achieved later than ninety days after the filing of EPA's enforcement complaint.

On November 21, 1986, recognizing that the environment would be equally served if a source came into compliance by LST prior to the final compliance deadline of an expeditious schedule for add-on controls, though after the ninety-day limit, AED and SSCD distributed guidance clarifying the August 7, 1986 policy. This guidance provided that a consent decree containing a schedule for add-on controls could provide that compliance could be achieved by some alternate means at an earlier date than the final compliance date for add-ons. The memo went on to specify, however, that any such decrees could not contain provisions excusing accrued stipulated penalties for missed interim dates in the add-on control schedule, even if the source complied by LST prior to the add-on control schedule end date. The reason for this restriction was the belief that holding out the promise that interim date stipulated penalties would be forgiven might unduly encourage sources to attempt to comply by LST.

Upon further consideration, it appears that there are alternatives to precluding forgiveness of stipulated penalties which would equally ensure that defendants proposing to comply by LST in longer than 90 days are not embarking on speculative LST schemes. The revised guidance expressed in this memorandum continues the availability of "alternate means" clauses as provided in the November 21, 1986 memorandum. It requires a defendant seeking inclusion of such a clause in a consent decree to agree to either of two preconditions for ensuring that the defendant is not embarking on a speculative LST scheme, however. The defendant may agree to escrow stipulated penalties which accrue for violations of interim milestones in the schedule for add-on controls. In such cases, the decree may provide for the forgiveness of such penalties if compliance occurs by the schedule end-date. Alternatively, the defendant may agree to post an appropriate up-front performance bond in lieu of being subject to interim date stipulated penalties.

Revised Guidance Concerning the August 7, 1986 Policy on LST Schedules in VOC Enforcement Actions

If during negotiations a source offers to comply by LST as soon as, or sooner than, it would comply pursuant to an expeditious schedule for add-on controls - although not within a ninety day period from the filing of EPA's complaint - and the case team determines that there is an adequate basis for believing that the source can and will so comply, the case team may negotiate a consent decree affording the source the option of complying by LST, provided the following are met:

1. The consent decree must contain a schedule providing for expeditious compliance through the installation of add-on controls. (In keeping with the August 7, 1986 policy on LST schedules, the maximum length of any such schedule will be twelve months from the date of entry of the consent decree.) The decree may provide that compliance may alternatively be accomplished by the use of complying coatings, so long as compliance occurs within the time period specified for compliance by add-on controls.

2. As a precondition for EPA's agreement to such an "alternate means" clause, a defendant must agree to either:

   A. Escrow, on at least a monthly basis, any stipulated penalties which would accrue for failures to meet interim deadlines specified in the schedule for add-on controls, in which case the decree may provide that such stipulated penalties will be forgiven if the source achieves compliance by the final deadline for complying by add-on controls.

      The penalty amounts placed in escrow would be in addition to stipulated penalties for the add-on control schedule end date, which would still be required if the source fails to meet the scheduled final compliance date.

      The amount of stipulated penalties for missed add-on control schedule interim dates for sources seeking alternate means clauses pursuant to this guidance shall be determined on a case-by-case basis, depending on such factors as the degree of excess emissions associated with the source's noncompliance, air quality in the affected area, etc., but shall in no case be less than the amounts specified below:

| Violator's Net Worth | Minimum Interim Date Stipulated Penalty Amount |
|---|---|
| Up to $250,000 | $250/day |
| $250,000 to $1,000,000 | $500/day |
| $1,000,001 to $20,000,000 | $1,000/day |
| $20,000,001 to $50,000,000 | $2,000/day |
| Over $50,000,000 | $2,500/day |

The case team may demand higher stipulated penalty amounts, and may consider amounts that escalate as the time of violation increases. The team should also consider establishing a timeframe during which the source must place the accruing amounts into escrow, e.g., within fifteen (15) days following the date the penalties accrued.

B. A defendant may post a third-party performance bond providing for absolute, non-contingent forfeiture of the face amount in the event compliance is not achieved by the add-on control schedule end date. The face amount must be at least equal to the total amount of interim date stipulated penalties which could possibly accrue and have to be escrowed assuming the approach specified in Subsection A, above, were utilized and defendant were to miss all interim schedule dates. Such a bond would be in lieu of stipulated penalties for add-on control schedule interim dates, but would be in addition to stipulated penalties for the add-on control schedule end date, which would still be required.

Example: A defendant with $5,000,000 net worth desires the option of complying by LST in greater than 90 days. If convinced that defendant can and will so comply, the case development team may agree to the inclusion of a clause affording such an option, providing either:

> The defendant agrees to stipulated penalties for the add-on control schedule interim milestones required by the August 7, 1986 policy in the minimum amount of $1,000 per day. The decree may provide that such penalties will be forgiven if compliance is achieved by the add-on control schedule end date, provided defendant agrees to escrow accrued penalties on at least a monthly basis; or

The defendant agrees to post an up-front performance bond in an amount equal to $1,000 per day times the number of days between the add-on control schedule's first interim milestone and the schedule end date, such bond to be forfeited if compliance is not achieved by the end date and to be in addition to whatever stipulated penalties are provided for failure to meet the schedule end date.

Attachments (August 7, 1986 and November 21, 1986 Policy Statements)

cc: Air Division Branch Chiefs

ORC Air Branch Chiefs

David Buente, Chief
Environmental Enforcement Section
Department of Justice

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

CAA B16

NOV 21 1988

MEMORANDUM

SUBJECT: Early Compliance And Stipulated Penalties in VOC Enforcement Cases

FROM: John B. Rasnic, Acting Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

Michael S. Alushin
Associate Enforcement Counsel
Air Enforcement Division

TO: Air Management Division Directors
Regions I, III, V and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxics Management Division Directors
Regions IV and VI

Air and Toxics Division Directors
Regions VII, VIII and X

Regional Counsels
Regions I-X

In an August 7, 1986 policy issued by Craig Potter and Richard Mays ("Policy on the Availability of LST Schedules In CAA Enforcement Actions"), EPA disallowed any compliance schedules in consent decrees which gave the source more than three months after the filing of the complaint to reach compliance through the application of low solvent technology. Two issues have arisen concerning the application of this policy which we hope to answer below.

First, consent decrees may contain a clause providing for compliance through a means other than add-on controls prior to the compliance date for add-on controls. Such a clause could read "(Source) agrees to attain final compliance by (date of add-on controls) through the following schedule for controls, or by some other means at an earlier date." The language should be general in order to keep EPA from committing itself to a compliance plan other than the add-on control schedule.

Second, even if the source achieves early compliance through low solvent technology, EPA will not forgive stipulated penalties which have been incurred as the result of missed milestones in the schedule for installing add-on controls. However, we will not require stipulated penalties for the milestones which come after the date that the source achieved compliance through low solvent technology. The rationale for this position is that we view the add-on schedule to be the "real" one in these cases, and in order for sources to take that schedule seriously, we need to collect stipulated penalties until the time compliance actually occurs. Including a clause allowing complete forgiveness of stipulated penalties would encourage sources to continue to gamble on the possible success of low-solvent technology, precisely the situation that we hoped to end by issuing the August 7, 1986 policy.

cc: VOC Workgroup Members

**SECTION B DOCUMENT 17**

**Model Notice of Violation**

**03/05/91**

17

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

CAA
B17

OFFICE OF ENFORCEMENT

MAR 5 1991

MEMORANDUM

SUBJECT: Model Notice of Violation

FROM: Michael S. Alushin M.S. Alushin
Associate Enforcement Counsel

TO: Regional Counsels
Regions I-X

Regional Air Division Directors
Region I-X

The attached is an interim draft model notice of violation ("NOV"), that includes changes and additions from the Clean Air Act Amendments. NOVs being issued should now reflect the fact that there is no continuing violation requirement and that the source may have the burden in an enforcement proceeding to prove compliance after the date of the notice. This model can be adapted to the particular format already in use in the Region. Please use this model on an interim basis to accomodate changes which are presently effective under the Clean Air Act Amendments.

The use of the language describing the presumption of noncompliance is not limited to NOVs for SIP violations. Section 113(e)(2), for purposes of determining the number of days of violation, allows EPA to benefit from a presumption of a continuing violation "where the Administrator or an air pollution control agency has notified the source of the violation...". Thus, Section 113(e)(2) also presents the opportunity for the Agency to use this presumption in administrative orders or finding of violation notices. An order or a document containing a finding of violation by the Agency constitutes "notice" such that from the date of the document's issuance, the presumption of noncompliance begins to run and a source can be considered to be in violation until it establishes continuous compliance.

Because the presumption exists only where EPA "makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice...", the Region should be aware that, at some point, a

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demonstration that the violation is continuing or recurring in nature will be required. An order should include language, like that in the NOV, notifying the source that EPA considers the source to be in violation until it establishes continuous compliance. It should also include the "Penalty Assessment Criteria" section from the NOV that contains the language creating a presumption of noncompliance.

This model can be used now, though language regarding administrative penalty orders should only be used after the implementing Part 22 hearing procedures are promulgated. Promulgation is expected by September, 1991.

Please submit comments on this draft to Alexandra Callam by April 1, 1991. In addition, please let me know of any developing cases that could serve as a test of the new presumption of noncompliance, i.e. cases that have favorable facts for determining the extent to which EPA must show that a violation is continuing and for determining the nature of defendant's burden to prove compliance. We are available to assist you with the initial cases where the issue is presented.

Attachment

cc: Regional Counsel
Air Contacts

John Rasnic, Acting Director
Stationary Source Compliance Division

MODEL NOTICE OF VIOLATION

CAA B17

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION __

| | |
|---|---|
| In the Matter of:<br><br>Company Name<br>City, State | Notice Of Violation<br>Index No.000000 |

STATUTORY AUTHORITY

THIS NOTICE OF VIOLATION (NOV) is issued to Company Name ("Respondent"), for violations at its facility located at Company Address, pursuant to Section 113(a)(1) of the Clean Air Act (the Act), 42 U.S.C. Section 7413(a)(1), as amended on November 15, 1990 by P.L. 101-549. Section 113(a)(1) requires the Administrator of the United States Environmental Protection Agency (EPA) to notify a person in violation of a state implementation plan or permit of the violation. The authority to issue NOVs has been delegated to the Division Director, Branch, EPA, Region .

FINDINGS

1. The state administrative code, Section 010, provides that no person shall cause, suffer, allow, or permit volatile organic compounds ("VOC") to be emitted into the outdoor atmosphere from a source operation under Section 020, in excess of the emission rate as determined in accordance with Table 030.

2. Section 010 is a part of the federally-approved and federally-enforceable state implementation plan (see 40 CFR 52.___).

3. Company name manufactures drugs and vitamins in capsules. Company name uses a granulation drying process to evaporate solvent used in washing the capsules. The drying oven used by Respondent is a source operation listed under Section 020.

4. On date, duly authorized EPA inspectors conducted an unannounced inspection of the company name facilities at address in accordance with Section 114 of the Act. The inspectors observed the operation of the drying oven and found that there were no devices to control the VOC emissions from the drying oven.

5. On date, EPA performed a stack test to measure the emissions from the drying oven to the outside atmosphere. The results of the stack test showed that the drying oven emitted solvent at emission rate.

6. Information provided by company name to the EPA pursuant to a Section 114 information request indicates that Respondent operates the drying oven at full capacity 14 hours per day, 6 days per week.

7. Under Section 010, the allowable emission rate for Respondent's drying oven, as determined by Table 030, is emission rate. Respondent emits % # amount, in excess of allowable emission rate.

8. Therefore, Respondent is in violation, and is considered to be in violation until it establishes continuous compliance, of state administrative code, Section 010. **[Respondent has been in violation of state administrative code, Section 010 since date. (Use if there are facts indicating the date noncompliance began prior to NOV issuance.)]**

ENFORCEMENT

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this Notice, the Regional Administrator (delegated?) may, without regard to the period of violation,

> -issue an order requiring compliance with the requirements of the state implementation plan or permit, or
>
> [-issue an administrative penalty order pursuant to Section 113(d) for civil administrative penalties of up to $25,000 per day of violation] **(to be used after administrative penalty regulations are issued),**
>
> -bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than $25,000 per day for each violation.

Furthermore, for any person who knowingly violates any plan or permit requirement more than 30 days after the date of the issuance of this Notice, Section 113(c) provides for criminal penalties or imprisonment, or both.

In addition, under Section 306(a), the regulations promulgated thereunder (40 CFR Part 15), and Executive Order 11738, facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant thereto. Violation of the Act may result in

the subject facility being declared ineligible for participation in any federal contract, grant, or loan.

## PENALTY ASSESSMENT CRITERIA

Section 113(e)(1) of the Act states that the court, as appropriate, shall, in determining the amount of penalty to be assessed, take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

Section 113(e)(2) of the Act allows the court to assess a penalty for each day of violation. For purposes of determining the number of days of violation, where the EPA(plaintiff) (or the relevant air pollution control agency) makes a prima facie showing that the conduct or events giving rise to this violation are likely to have continued or recurred past the date of this NOV (or a previously issued air pollution control agency NOV for the same violation), the days of violation shall be presumed to include the date of this NOV (or the previous NOV) and each and every day thereafter until Respondent establishes that continuous compliance has been achieved, except to the extent that Respondent can prove by the preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

## OPPORTUNITY FOR CONFERENCE

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within # days of receipt of this NOV. The request for a conference or other inquiries concerning the NOV should be made in writing to :

ORC Attorney

## EFFECTIVE DATE

This NOV shall be effective immediately upon receipt.

SECTION B DOCUMENT 18

Enforcement Role in the 33/50 Program (Industrial Toxics Project)

05/15/91

18

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

MAY 15

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Enforcement Role in the 33/50 Program (Industrial Toxics Project)

FROM: Raymond B. Ludwiszewski
Acting Assistant Administrator
Office of Enforcement

TO: Regional Administrators
Assistant Administrators
Associate Assistant Administrators
General Counsel
Inspector General

Vigorous enforcement of existing requirements and a new focus on prevention of pollution at its source have been and will continue to be two of the highest priorities of the Agency. The two objectives are mutually reinforcing. A strong enforcement program can do much to foster pollution prevention by creating general incentives for the regulated community to eliminate or significantly reduce pollutants to avoid liability, reduce costs of compliance, and reduce the possibility of incurring penalties for failure to comply with applicable requirements.

The attached paper on the "Enforcement Role in the 33/50 Program (Industrial Toxics Project)" clarifies how the Agency plans to reconcile the relationship between strong enforcement of existing requirements with the voluntary nature of the 33/50 Program. In summary, no company or facility will be singled out for enforcement because of its participation or decision not to participate in the 33/50 Program. Conversely, vigorous enforcement will proceed, regardless of participation in the 33/50 Program where we have discovered violations of environmental requirements. The companies from which EPA is seeking voluntary reductions in the 17 chemicals are also being apprised that participation in the Program will not shield them from any regulatory or enforcement action or risk-based targeted enforcement initiatives.

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We also will be implementing our recently issued "Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements". This policy encourages enforcement personnel to favor pollution prevention and recycling as a means of correcting violations or as supplemental environmental projects agreed upon during settlement negotiations.

If you have any questions or concerns about this matter, please feel free to contact Cheryl Wasserman, Chief, Compliance Policy and Planning at (202) 382-7550.

Attachment

cc: Deputy Assistant Administrators
Headquarters Compliance Office Directors
OE Managers
Daniel Esty

3/21/91

**ENFORCEMENT ROLE IN THE 33/50 PROGRAM (INDUSTRIAL TOXICS PROJECT)**

This paper describes how the Agency's enforcement authorities can foster the goals of the 33/50 Program (Industrial Toxics Project) and steps that EPA Headquarters and Regional personnel should take to ensure that implementation of the project is consistent with Agency compliance and enforcement goals.

The 33/50 Program (Industrial Toxics Project) is a non-regulatory Agency-wide effort to achieve, voluntarily, overall reductions in a group of seventeen toxic chemicals reported in the Toxics Release Inventory (TRI). Individual facilities are not singled out for reductions, nor are specific pollutants per se. Rather, the Administrator is seeking commitments from the contributors of these pollutants to achieve reductions of at least fifty percent of the pollutants, as a group, nation-wide over the next five years. This Program is a pilot program to determine what can be achieved cooperatively, and perhaps in a more expeditious manner than through reliance only on regulation and permitting of pollutants or individual facilities respectively.

**First, the Agency will continue efforts to regulate, permit, and enforce reductions for the targeted chemicals, where appropriate.** Nothing in the 33/50 Program (Industrial Toxics Project) is intended to impede or interfere with existing regulatory and enforcement activities at facilities which are releasing these substances or otherwise violating the law. The project is designed to add to, not detract from, these ongoing programs. To the extent that releases of the listed pollutants are regulated at particular facilities, EPA and the States will continue to closely monitor adherence to reductions which are enforceable requirements under regulatory permits or enforcement settlements. For example, EPA's lead enforcement initiative which focuses on violations of existing requirements, and regulatory clusters will proceed as planned, as will other efforts designed to reduce these chemicals based upon health and environmental factors generally or at particular sites.

**Second, enforcement can play an important role in project integrity by creating consequences for and deterring false or inaccurate reporting. Enforcement can provide some assurance:**

**1) that those that are releasing these chemicals have, in fact, reported the releases; and**

Ongoing EPA efforts to identify and pursue enforcement against those who have failed to report, or failed to report releases of particular toxic chemicals, under the Toxics Release Inventory will continue. In particular, industrial sources which are likely contributors of the seventeen high priority pollutants but have not reported under the TRI are

candidates under the neutral inspection scheme for inspection. Such facilities may be screened by EPA Regional staff in cooperation with the States during planned inspections at such facilities for other purposes to determine if the absence of reporting appears appropriate.

**2) that claims of reductions by facilities and companies are accurate.**

Data quality audits, now a routine part of the compliance program for the Toxics Release Inventory, will be used to ensure proper reporting of baseline TRI releases and overall reported levels following reductions. The program should continue to explore opportunities to coordinate such reviews with other Agency inspections.

**Third, enforcement can provide a further impetus for voluntary reductions through enforcement settlement negotiations.** The Agency plans to use the opportunity presented by settlement negotiations for related violations to encourage consideration of changes to existing operations and processes which would either eliminate or reduce these and other pollutants. EPA will use its enforcement case screening process to identify current violators who are potential candidates for such pollution prevention conditions in federal enforcement settlements to achieve desired reductions.

**Fourth, the conduct of the Agency's enforcement program will be entirely consistent with the voluntary nature of the 33/50 Program.** The credibility of the 33/50 Program (Industrial Toxics Project) will depend upon on number of factors, particularly the ability to maintain its voluntary nature.

**1) Companies and facilities which choose <u>not</u> to participate in the 33/50 Program will not be singled out for inspections or other enforcement activities because of their non-participation.**

**2) Companies and facilities that <u>do</u> make commitments to the 33/50 Program will not be subject to special data quality audit activities based on that commitment.**

Company facilities participating in the 33/50 Program may be subject to inspections to corroborate the quality of report under the Toxics Release Inventory (as noted in Principle 3.2 above) only to the same extent as any other facilities might be inspected, but will not be subject to inspections specifically for the purposes of the 33/50 Program such as to review their baseline commitments, reduction plans proposed, or achievement of reduction goals.

One exception to this will be voluntary participation of companies who would like to be considered for the Agency's award and recognition program. The recognition system will

include an activity to insure the credibility of the company's application for the award.

Finally, in implementing the 33/50 Program we must follow three principles to ensure that a clear and consistent message is conveyed that we will continue to pursue vigorous enforcement and regulatory action against such facilities or pollutants where appropriate, that voluntary agreements cannot shield signatories from enforcement and regulatory requirements and approaches, and that opportunities to use pollution prevention conditions in enforcement settlement agreements are not foreclosed. To do this:

1) 33/50 Program correspondence to companies, States, and facilities should include a caveat that nothing in the implementation of this project in any way substitutes for compliance with existing State, local and Federal regulatory and permit requirements, nor would it define future enforceable levels of control required of the companies by States, localities or the Federal government to address concerns about toxic releases.

2) Any 33/50 Program activity at the facility level should be preceded by careful review of the status of any pending regulatory and enforcement actions at the site. Involved personnel at the Federal, state and local levels should be identified and consulted as to the merits of pursuing facility-specific voluntary reduction agreements before proceeding. Regions should specifically cross-reference the list of facilities on the 33/50 Program list with those who are current violators under any of the statutes and subject to enforcement before contact at the facility level.

3) The purpose(s) of the voluntary commitments should be clearly articulated and distinguished from traditional requirements to reduce toxic releases through permits and enforcement actions.

**SECTION B DOCUMENT 19**

**Clean Air Act Stationary Source Civil Penalty Policy**
**NOTE: Includes "Clarification to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy", added 1/17/92.**

19

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

JAN 17 1992

MEMORANDUM

SUBJECT: Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy

FROM: John B. Rasnic, Director
Stationary Source Compliance Division
Office of Air and Radiation

Michael S. Alushin, Enforcement Counsel
Air Enforcement Division
Office of Enforcement

TO: Addressees

As a result of the many comments and suggestions received during the Administrative Enforcement Training in Chicago on November 5-6, 1991, we would like to clarify several issues regarding the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy. In addition to the addressees, we are distributing this clarification memorandum to all those who attended the training in Chicago.

We would like to clarify that the toxicity of pollutant and sensitivity of the environment figures of the gravity component apply only to violations of emissions standards and to work practice or technology standards that are serving as emissions standards. In addition, the length of violation figure of the gravity component is based on the number of actual days of violation, not calendar months. The number of actual days of violation should be counted and divided by thirty to determine the number of months. Any portion of a thirty day period should be counted as another month. In addition, any days over a calendar year should be counted as another month (i.e., 368 days should be counted as 13 months).

Several Regions questioned which enforcement forum would be appropriate where a portion of the violation occurred over twelve months from the initiation of the enforcement action. In determining whether the action may be pursued administratively, EPA may never drop viable causes of action. However, if some portion of the alleged violations occurred over 12 months prior to filing of the complaint, the portion of those violations which occurred over 12 months prior to filing of the complaint may be

disregarded and the case may be pursued administratively with the following qualification. This can only bé done where no causes of action are dropped and the resulting preliminary deterrence amount (PDA) is at least 90% of the PDA calculated with the entire length of all violations included.

One Region suggested that Headquarters adopt an air-specific Supplemental Environmental Projects (SEP) policy. Both the Stationary Source Compliance Division (SSCD) and Air Enforcement Division (AED) will work next year to develop such a policy which will include examples of appropriate air SEPs. Supplemental Environmental Projects which are appropriate under the current Office of Enforcement guidance may be included in consent agreements and final orders (CAFOs) in administrative actions. As one Region suggested, this could be done by conditionally remitting a portion of an assessed penalty by requiring in the CAFO that the defendant pay that portion offset by the SEP unless all the actions required by the SEP are performed by a certain date. The burden is always on the defendant to establish that the SEP has been fully complied with. Actions which the respondent must take to come into compliance can not be addressed in the CAFO but must be addressed through 113(a) administrative compliance orders or a civil judicial action under 113(b) in accordance with the October 29, 1991 "Guidance on Choosing the Appropriate Forum in Clean Air Act Stationary Source Civil Enforcement."

The penalty policy requires that members of the litigation team are responsible for ensuring their management agrees with any adjustment to the PDA. We would like to emphasize that each member of the litigation team must keep formal documentation of management concurrence in his or her case file. The documentation of management concurrence must include a signature on the penalty calculation worksheet (or similar document) by the first line supervisor of the team members.

Finally, attached are three replacement pages which correct Example 3. The original example incorrectly left out a length of violation figure for the work practice violation. The appropriate length of violation figure should always be assessed for each violation.

Several suggestions which were made have not yet been adopted but are under consideration. We will evaluate the implementation of the revised penalty policy after one year. To the extent changes in the policy are warranted, we will reconsider the unincorporated suggestions at that time.

Several Regions disagreed with Example 1 in the policy because it only calculates the gravity component once even though the emissions standard applies to each individual boiler and was violated at several boilers at the same facility. The Regions

believed the gravity component should be calculated separately for each violation at each boiler. SSCD and AED have decided to maintain the position that in instances where a particular regulation applies to each individual emissions unit and the standard is violated at several emissions units, the gravity component is calculated only once for the entire facility. The main reason for this is a concern that calculating for each emissions unit separately would lead to unrealistically high penalties. Nonetheless, several factors will result in a higher penalty for these multiple unit violations. The economic benefit as calculated by BEN should be significantly higher if the standard is being violated at more than one emissions unit. The level of violation figure of the gravity component will also generally be higher if the standard is being violated at more than one emissions unit. Of course, the violation at each boiler would be separately alleged in the complaint.

One Region suggested that the policy should allow the litigation team to mitigate the gravity component by as much as 15% for degree of cooperation anytime the defendant is willing to settle. The penalty policy still takes the position that EPA expects every source to negotiate in good faith and come into compliance expeditiously and doing so does not justify mitigation. The litigation team still has room to negotiate under the policy. The penalty plead in the administrative complaint is generally the unmitigated preliminary deterrence amount. Therefore, any mitigation justified under the policy may take place during negotiations to reach a settlement. Also, the penalty plead in the administrative complaint is to be based on the most aggressive assumptions supported by the facts available at that time concerning such factors as length of violation and level of violation. These factors may be recalculated if defendants demonstrate that they are inaccurate.

If you have any questions about these changes, please contact us or Scott Throwe in SSCD at FTS 678-8699 or (703) 308-8699 or Elise Hoerath in AED at FTS 260-2843 or (202) 260-2843.

Attachment

Addressees: Regional Administrators, Regions I - X

Regional Counsels, Regions I - X

Air Management Division Director
Region I

Air and Waste Management Division Director
Region II

Air, Toxics and Radiation Management Division
Director
Region III

Air, Pesticides, and Toxics Management Division
Director
Region IV

Air and Radiation Division Director
Region V

Air, Pesticides, and Toxics Division Director
Region VI

Air and Toxics Division Director
Regions VII, VIII, IX and X

Bruce Rothrock, OCAPO

Robert Heiss, OCAPO

Jonathan Libber, OCAPO

John Cruden, Chief
Environmental Enforcement Section
U.S. Department of Justice

Bill Becker
STAPPA-ALAPCO

cc: Scott S. Fulton
Acting Deputy Assistant Administrator
Office of Enforcement

Robert Van Huevelen
Acting Director of Civil Enforcement

John Seitz, Director
Office of Air Quality Planning and Standards

# CLEAN AIR ACT

# STATIONARY SOURCE

# CIVIL PENALTY POLICY

October 25, 1991

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# CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY

## I. INTRODUCTION

Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), provides the Administrator of EPA with the authority to commence a civil action against certain violators to recover a civil penalty of up to $25,000 per day per violation. Since July 8, 1980, EPA has sought the assessment of civil penalties for Clean Air Act violations under Section 113(b) based on the considerations listed in the statute and the guidance provided in the Civil Penalty Policy issued on that date.

On February 16, 1984, EPA issued the Policy on Civil Penalties (GM-21) and a Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). The Policy focuses on the general philosophy behind the penalty program. The Framework provides guidance to each program on how to develop medium-specific penalty policies. The Air Enforcement program followed the Policy and the Framework in drafting the Clean Air Act Stationary Source Civil Penalty Policy, which was issued on September 12, 1984, and revised March 25, 1987. This policy amends the March 25, 1987 revision, incorporating EPA's further experience in calculating and negotiating penalties. This guidance document governs only stationary source violations of the Clean Air Act. All violations of Title II of the Act are governed by separate guidance.

The Act was amended on November 15, 1990, providing the Administrator with the authority to issue administrative penalty orders in Section 113(d), 42 U.S.C. § 7413(d). These penalty orders may assess penalties of up to $25,000 per day of violation and are generally authorized in cases where the penalty sought is not over $200,000 and the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action. In an effort to provide consistent application of the Agency's civil penalty authorities, this penalty policy will serve as the civil penalty guidance used in calculating administrative penalties under Section 113(d) of the Act and will be used in calculating a minimum settlement amount in civil judicial cases brought under Section 113(b) of the Act.

In calculating the penalty amount which should be sought in an administrative complaint, the economic benefit of noncompliance and a gravity component should be calculated under this penalty policy using the most aggressive assumptions supportable. Pleadings will always include the full economic benefit component. As a general rule, the gravity component of the penalty plead in administrative complaints may not be mitigated. However, the gravity component portion of the plead penalty may be mitigated by up to ten per cent solely for degree of cooperation. Any mitigation for this factor must be justified under Section II.B.4.b. of this Policy. The total mitigation for good faith efforts to comply for purpose of

determining a settlement amount may never exceed thirty per cent. Applicable adjustment factors which aggravate the penalty must be included in the amount plead in the administrative complaint. Where key financial or cost figures are not available, for example those costs involved in calculating the BEN calculation, the highest figures supportable should be used.

This policy will ensure the penalty plead in the complaint is never lower than any revised penalty calculated later based on more detailed information. It will also encourage sources to provide the litigation team with the more accurate cost or financial information. The penalty may then be recalculated during negotiations where justified under this policy to reflect any appropriate adjustment factors. In administrative cases, where the penalty is recalculated based upon information received in negotiations or the prehearing exchange, the administrative complaint must be amended to reflect the new amount if the case is going to or expected to go to hearing. This will ensure the complaint reflects the amount the government is prepared to justify at the hearing. This pleading policy also fulfills the obligation of 40 C.F.R. § 22.14(a)(5) that all administrative complaints include "a statement explaining the reasoning behind the proposed penalty."

This policy reflects the factors enumerated in Section 113(e) that the court (in Section 113(b) actions) and the Administrator (in Section 113(d) actions) shall take into consideration in the assessment of any penalty. These factors include: the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation and such other factors as justice may require.

This document is not meant to control the penalty amount requested in judicial actions to enforce existing consent decrees.[1] In judicial cases, the use of this guidance is limited to pre-trial settlement of enforcement actions. In a trial, government attorneys may find it relevant and helpful to introduce a penalty calculated under this policy, as a point of reference in a demand for penalties. However, once a case goes to trial, government attorneys should demand a larger penalty than the minimum settlement figure as calculated under the policy.

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[1] In these actions, EPA will normally seek the penalty amount dictated by the stipulated penalty provisions of the consent decree. If a consent decree contains no stipulated penalty provisions, the case development team should propose penalties suitable to vindicate the authority of the Court.

The general policy applies to most Clean Air Act violations. There are some types of violations, however, that have characteristics which make the use of the general policy inappropriate. These are treated in separate guidance, included as appendices. Appendix I covers violations of PSD/NSR permit requirements. Appendix II deals with the gravity component for vinyl chloride NESHAP violations. Appendix III covers the economic benefit and gravity components for asbestos NESHAP demolition and renovation violations. The general policy applies to violations of volatile organic compound regulations where the method of compliance involves installation of control equipment. Separate guidance is provided for VOC violators which comply through reformulation (Appendix IV). Appendix VI deals with the gravity component for volatile hazardous air pollutants violations. Appendix VII covers violations of the residential wood heaters NSPS regulations. Violations of the regulations to protect stratospheric ozone are covered in Appendix VIII. These appendixes specify how the gravity component and/or economic benefit components will be calculated for these types of violations. Adjustment, aggravation or mitigation, of penalties calculated under any of the appendixes is governed by this general penalty policy.

This penalty policy contains two components. First, it describes how to achieve the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. Second, it discusses adjustment factors applied so that a fair and equitable penalty will result. The litigation team[2] should calculate the full economic benefit and gravity components and then decide whether any of the adjustment factors applicable to either component are appropriate. The final penalty obtained should never be lower than the penalty calculated under this policy taking into account all appropriate adjustment factors including litigation risk and inability to pay.

All consent agreements should state that penalties paid pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f).

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[2] With respect to civil judicial cases, the litigation team will consist of the Assistant Regional Counsel, the Office of Enforcement attorney, the Assistant United States Attorney, the Department of Justice attorney from the Environmental Enforcement Section, and EPA technical professionals assigned to the case. With respect to administrative cases, the litigation team will generally consist of the EPA technical professional and Assistant Regional Counsel assigned to the case. The recommendation of the litigation team must be unanimous. If a unanimous position cannot be reached, the matter should be escalated and a decision made by EPA and the Department of Justice managers, as required.

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

This penalty policy is effective immediately with respect to all cases in which the first penalty offer has not yet been transmitted to the opposing party.

## II. THE PRELIMINARY DETERRENCE AMOUNT

The February 16, 1984, Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it says that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance. In addition, it should include an amount beyond recovery of the economic benefit to reflect the seriousness of the violation. That portion of the penalty which recovers the economic benefit of noncompliance is referred to as the "economic benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section provides guidelines for calculating the economic benefit component and the gravity component. It will also discuss the limited circumstances which justify adjusting either component.

### A. THE ECONOMIC BENEFIT COMPONENT

In order to ensure that penalties recover any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the economic benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues to be considered when computing the economic benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. The section concludes with a discussion of the limited circumstances where the economic benefit component may be mitigated.

#### 1. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which

fails to install a scrubber will eventually have to spend the money needed to install the scrubber in order to achieve compliance. But, by deferring these capital costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which may result in savings from deferred cost are the following:

- Failure to install equipment needed to meet emission control standards.
- Failure to effect process changes needed to reduce pollution.
- Failure to test where the test still must be performed.
- Failure to install required monitoring equipment.

The economic benefit of delayed compliance should be computed using the "Methodology for Computing the Economic Benefit of Noncompliance," which is Technical Appendix A of the BEN User's Manual. This document provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method is a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and the Clean Air Act. BEN is a computer program available to the Regions for performing the analysis. Questions concerning the BEN model should be directed to the Program Development and Training Branch in the Office of Enforcement, FTS 475-6777.

2. Benefit from avoided costs

Many types of violations enable a violator to avoid permanently certain costs associated with compliance. These include cost savings for:

- Disconnecting or failing to properly operate and maintain existing pollution control equipment (or other equipment if it affects pollution control).
- Failure to employ a sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Removal of pollution equipment resulting in process, operational, or maintenance savings.
- Failure to conduct a test which is no longer required.

- Disconnecting or failing to properly operate and maintain required monitoring equipment.

- Operation and maintenance of equipment that the violator failed to install.

The benefit from avoided costs must also be computed using methodology in Technical Appendix A of the BEN User's Manual.

The benefit from delayed and avoided costs is calculated together, using the BEN computer program, to arrive at an amount equal to the economic benefit of noncompliance for the period from the first provable date of violation until the date of compliance.

As noted above, the BEN model may be used to calculate only the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of the Clean Air Act and its implementing regulations. There are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Agency to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the BEN methodology.

In some instances this may include calculating and including in the economic benefit component profits from illegal activities. An example would be a source operating without a preconstruction review permit under PSD/NSR regulations or without an operating permit under Title V. In such a case, an additional calculation would be performed to determine the present value of these illegal profits which would be added to the BEN calculation for the total economic benefit component. Care must be taken to account for the preassessed delayed or avoided costs included in the BEN calculation when calculating illegal profits. Otherwise, these costs could be assessed twice. The delayed or avoided costs already accounted for in the BEN calculation should be subtracted from any calculation of illegal profits.

### 3. Adjusting the Economic Benefit Component

As noted above, settling for an amount which does not recover the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to adjust or mitigate this amount. There are three general circumstances (described below) in which mitigating the economic benefit component may be appropriate. However, in any individual case where the Agency decides to mitigate the economic benefit component, the litigation team must detail those reasons in the case file and in any memoranda accompanying the settlement.

Following are the limited circumstances in which EPA can mitigate the economic benefit component of the penalty:

a. Economic benefit component involves insignificant amount

Assessing the economic benefit component and subsequent negotiations will often represent a substantial commitment of resources. Such a commitment may not be warranted in cases where the magnitude of the economic benefit component is not likely to be significant because it is not likely to have substantial financial impact on the violator. For this reason, the litigation team has the discretion not to seek the economic benefit component where it is less than $5,000. In exercising that discretion, the litigation team should consider the following factors:

- Impact on violator: The likelihood that assessing the economic benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by itself, to achieve the goals of this policy. In situations like this, the litigation team should insist on including the economic benefit component in order to develop an adequate penalty.

b. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider mitigating the economic benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlement might be appropriate where the following circumstances occur:

- The economic benefit component may be mitigated where recovery would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business. Alternative payment plans, such as installment payments with interest, should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where

there is a likelihood of continued harmful noncompliance.

- The economic benefit component may also be mitigated in enforcement actions against nonprofit public entities, such as municipalities and publicly-owned utilities, where assessment threatens to disrupt continued provision of essential public services.

c. Concurrent Section 120 administrative action

EPA will not usually seek to recover the economic benefit of noncompliance from one violation under both a Section 113(b) civil judicial action or 113(d) civil administrative action and a Section 120 action. Therefore, if a Section 120 administrative action is pending or has been concluded against a source for a particular violation and an administrative or judicial penalty settlement amount is being calculated for the same violation, the economic benefit component need not include the period of noncompliance covered by the Section 120 administrative action.

In these cases, although the Agency will not usually seek double recovery, the litigation team should not automatically mitigate the economic benefit component by the amount assessed in the Section 120 administrative action. The Clean Air Act allows dual recovery of the economic benefit, and so each case must be considered on its individual merits. The Agency may mitigate the economic benefit component in the administrative or judicial action if the litigation team determines such a settlement is equitable and justifiable. The litigation team should consider in making this decision primarily whether the penalty calculated without the Section 120 noncompliance penalty is a sufficient deterrent.

B. THE GRAVITY COMPONENT

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should recover any economic benefit of noncompliance, and should also include an amount reflecting the seriousness of the violation. Section 113(e) instructs courts to take into consideration in setting the appropriate penalty amount several factors including the size of the business, the duration of the violation, and the seriousness of the violation. These factors are reflected in the "gravity component." This section of the policy establishes an approach to quantifying the gravity component.

Assigning a dollar figure to represent the gravity of the violation is a process which must, of necessity, involve the consideration of a variety of factors and circumstances. Linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way. These

objective factors are designed to reflect those listed in Section 113(e) of the Act.

The specific objective factors in this civil penalty policy designed to measure the seriousness of the violation and reflect the considerations listed in the Clean Air Act are as follows:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. For example, the NSPS regulations require owners and operators of new sources to conduct emissions testing and report the results within a certain time after start-up. If a source owner or operator does not report the test results, EPA would have no way of knowing whether that source is complying with NSPS emissions limits.

- Size of violator: The gravity component should be increased, in proportion to the size of the violator's business.

The assessment of the first gravity component factor listed above, actual or possible harm arising from a violation, is a complex matter. For purposes of determining how serious a given violation is, it is possible to distinguish violations based on certain considerations, including the following:

- Amount of pollutant: Adjustments based on the amount of the pollutant emitted are appropriate.

- Sensitivity of the environment: This factor focuses on where the violation occurred. For example, excessive emissions in a nonattainment area are usually more serious than excessive emissions in an attainment area.

- Toxicity of the pollutant: Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.

- The length of time a violation continues: Generally, the longer a violation continues uncorrected, the greater the risk of harm.

- Size of violator: A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.

The following dollar amounts assigned to each factor should be added together to arrive at the total gravity component:

1. Actual or possible harm

   a. Level of violation

| Percent Above Standard[3] | Dollar Amount |
|---|---|
| 1 - 30% | $ 5,000 |
| 31 - 60% | 10,000 |
| 61 - 90% | 15,000 |
| 91 - 120% | 20,000 |
| 121 - 150% | 25,000 |
| 151 - 180% | 30,000 |
| 181 - 210% | 35,000 |
| 211 - 240% | 40,000 |
| 241 - 270% | 45,000 |
| 271 - 300% | 50,000 |
| over 300% | 50,000 + $5,000 for each 30% or fraction of 30% increment above the standard |

This factor should be used only for violations of emissions standards. Ordinarily the highest documented level of violation should be used. If that level, in the opinion of the litigation team, is not representative of the period of violation, then a more representative level of violation may be used. This figure should be assessed for each emissions violation. For example, if a source which emits particulate matter is subject to both an opacity standard and a mass emission standard and is in violation of both standards, this figure should be assessed for both violations.

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[3] Compliance is equivalent to 0% above the emission standard.

b. Toxicity of the pollutant

Violations of NESHAPs emission standards not handled by a separate appendix and non-NESHAP emission violations involving pollutants listed in Section 112(b)(1) of the Clean Air Act Amendments of 1990[4]: $15,000 for each hazardous air pollutant for which there is a violation.

c. Sensitivity of environment (for SIP and NSPS cases only).

The penalty amount selected should be based on the status of the air quality control district in question with respect to the pollutant involved in the violation.

1. Nonattainment Areas

i. Ozone:

| | |
|---|---|
| Extreme | $18,000 |
| Severe | 16,000 |
| Serious | 14,000 |
| Moderate | 12,000 |
| Marginal | 10,000 |

ii. Carbon Monoxide and Particulate Matter:

| | |
|---|---|
| Serious | $14,000 |
| Moderate | 12,000 |

iii. All Other Criteria Pollutants: $10,000

2. Attainment area PSD Class I: $ 10,000

3. Attainment area PSD Class II or III: $ 5,000

d. Length of time of violation

To determine the length of time of violation for purposes of calculating a penalty under this policy, violations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance if there have been no significant process or operational changes. If the source has affirmative evidence, such as continuous emission monitoring data,

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[4] An example of a non-NESHAP violation involving a hazardous air pollutant would be a violation of a volatile organic compound (VOC) standard in a State Implementation Plan involving a VOC contained in the Section 112(b)(1) list of pollutants for which no NESHAP has yet been promulgated.

to show that the violation was not continuous, appropriate adjustments should be made. In determining the length of violation, the litigation team should take full advantage of the presumption regarding continuous violation in Section 113(e)(2). This figure should be assessed separately for each violation, including procedural violations such as monitoring, recordkeeping and reporting violations. For example, if a source violated an emissions standard, a testing requirement, and a reporting requirement, three separate length of violation figures should be assessed, one for each of the three violations based on how long each was violated.

| Months | Dollars |
|---|---|
| 0 - 1 | $ 5,000 |
| 2 - 3 | 8,000 |
| 4 - 6 | 12,000 |
| 7 - 12 | 15,000 |
| 13 - 18 | 20,000 |
| 19 - 24 | 25,000 |
| 25 - 30 | 30,000 |
| 31 - 36 | 35,000 |
| 37 - 42 | 40,000 |
| 43 - 48 | 45,000 |
| 49 - 54 | 50,000 |
| 55 - 60 | 55,000 |

2. Importance to the regulatory scheme

The following violations are also very significant in the regulatory scheme and therefore require the assessment of the following penalties:

**Work Practice Standard Violations:**
- failure to perform a work practice requirement: $10,000-15,000
  (See Appendix III for Asbestos NESHAP violations.)

**Reporting and Notification Violations:**
- failure to report or notify: $15,000
- late report or notice: $5,000
- incomplete report or notice: $5,000 - $15,000

(See Appendix III for Asbestos NESHAP violations.)

**Recordkeeping Violations:**
- failure to keep required records: $15,000
- incomplete records: $5,000 - $15,000

**Testing Violations:**

- failure to conduct required performance testing or testing using an improper test method: $15,000
- late performance test or performing a required test method using an incorrect procedure: $5,000

**Permitting Violations:**

- failure to obtain an operating permit: $15,000
- failure to pay permit fee: See Section 502(b)(3)(C)(ii) of the Act

**Emission Control Equipment Violations:**

- failure to operate and maintain control equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- intermittent or improper operation or maintenance of control equipment: $5,000-15,000

**Monitoring Violations:**

- failure to install monitoring equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- late installation of required monitoring equipment: $5,000
- failure to operate and maintain required monitoring equipment: $15,000

**Violations of Administrative Orders[5]: $15,000**

**Section 114 Requests for Information Violations:**

- failure to respond: $15,000
- incomplete response: $5,000 - $15,000

**Compliance Certification Violations:**

- failure to submit a certification: $15,000
- late certifications: $5,000
- incomplete certifications: $5,000 - $15,000

**Violations of Permit Schedules of Compliance:**

- failure to meet interim deadlines: $5,000
- failure to submit progress reports: $15,000
- incomplete progress reports: $5,000 - $15,000
- late progress reports: $5,000

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[5] This figure should be assessed even if the violation of the administrative order is also a violation of another requirement of the Act, for example a NESHAP or NSPS requirement. In this situation, the figure for violation of the administrative order is in addition to appropriate penalties for violating the other requirement of the Act.

A penalty range is provided for work practice violations to allow Regions some discretion depending on the severity of the violation. Complete disregard of work practice requirements should be assessed the full $15,000 penalty. Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status, this omission should be treated as a failure to meet the requirement and assessed $15,000.

A late notice, report or test should be considered a failure to notify, report or test if the notice or report is submitted or the test is performed after the objective of the requirement is no longer served. For example, if a source is required to submit a notice of a test so that EPA may observe the test, a notice received after the test is performed would be considered a failure to notify.

Each separate violation under this section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at startup and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed $15,000 under this section for each violation. In addition, a length of violation figure should be assessed for each violation based on how long each has been violated. Also, a figure reflecting the size of the violator should be assessed once for the case as a whole. If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one $15,000 penalty under this section for failure to submit a report. In addition, a length of violation figure of $15,000 for 12 months of violation and a size of the violator figure should be assessed.

3. Size of the violator

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

| | |
|---|---|
| Under $100,000 | $2,000 |
| $100,001 - $1,000,000 | 5,000 |
| 1,000,001 - 5,000,000 | 10,000 |
| 5,000,001 - 20,000,000 | 20,000 |
| 20,000,001 - 40,000,000 | 35,000 |
| 40,000,001 - 70,000,000 | 50,000 |
| 70,000,001 - 100,000,000 | 70,000 |
| Over 100,000,000 | 70,000 + $25,000 for every additional $30,000,000 or fraction thereof |

In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

The process by which the gravity component was computed must be memorialized in the case file. Combining the economic benefit component with the gravity component yields the preliminary deterrence amount.

4. Adjusting the Gravity Component

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the economic benefit component discussed above in a civil penalty assessment. This approach prevents violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce consistent enough results to ensure similarly-situated violators are treated similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the gravity component amount when those facts occur. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. It sets guidelines for adjusting the gravity component which account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of

cooperation as specified in II.B.4.b. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

a. Degree of Willfulness or Negligence

This factor may be used only to raise a penalty. The Clean Air Act is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, this does not render the violator's willfulness or negligence irrelevant in assessing an appropriate penalty. Knowing or willful violations can give rise to criminal liability, and the lack of any negligence or willfulness would indicate that no addition to the penalty based on this factor is appropriate. Between these two extremes, the willfulness or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness or negligence, all of the following points should be considered:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
- The extent to which the violator in fact knew of the legal requirement which was violated.

b. Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the

gravity component because the source is not making efforts to come into compliance and is negotiating with the agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance

The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.

2. Prompt correction of environmental problems

The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.

3. Cooperation during pre-filing investigation

Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

c. History of Noncompliance

This factor may be used only to raise a penalty. Evidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous governmental enforcement response. Unless one of the violations was caused by factors entirely out of the control of the violator, the penalty should be increased. The litigation team should check for and consider prior violations under all environmental statutes enforced by the Agency in determining the amount of the adjustment to be made under this factor.

In determining the size of this adjustment, the litigation team should consider the following points:

- Similarity of the violation in question to prior violations.

- Time elapsed since the prior violation.
- The number of prior violations.
- Violator's response to prior violation(s) with regard to correcting the previous problem and attempts to avoid future violations.
- The extent to which the gravity component has already been increased due to a repeat violation. (For example, under the Asbestos Demolition and Renovation Penalty Policy in Appendix III.)

A violation should generally be considered "similar" if a previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts indicating a "similar violation" are:

- Violation of the same permit.
- Violation of the same emissions standard.
- Violation at the same process points of a source.
- Violation of the same statutory or regulatory provision.
- A similar act or omission.

For purposes of this section, a "prior violation" includes any act or omission resulting in a State, local, or federal enforcement response (e.g., notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Agency unless subsequently dismissed or withdrawn on the grounds that the party was not liable. It also includes any act or omission for which the violator has previously been given written notification, however informal, that the regulating agency believes a violation exists. In researching a defendant's compliance history, the litigation team should check to see if the defendant has been listed pursuant to Section 306 of the Act.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a prior violation by the parent corporation should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the litigation team should ascertain who in the organization exercised or had authority to exercise control or oversight responsibility over the violative conduct. Where the parent corporation exercised or had authority to exercise control over the violative conduct,

the parent corporation's prior violations should be considered part of the subsidiary or division's compliance history.

In general, the litigation team should begin with the assumption that if the same corporation was involved, the adjustment for history of noncompliance should apply. In addition, the team should be wary of a party changing operations or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating corporate facilities are under totally independent control.

d. Environmental Damage

Although the gravity component already reflects the amount of environmental damage a violation causes, the litigation team may further increase the gravity component based on severe environmental damage. As calculated, the gravity component takes into account such factors as the toxicity of the pollutant, the attainment status of the area of violation, the length of time the violation continues, and the degree to which the source has exceeded an emission limit. However, there may be cases where the environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

## III. LITIGATION RISK

The preliminary deterrence amount, both economic benefit and gravity components, may be mitigated in appropriate circumstances based on litigation risk. Several types of litigation risk may be considered. For example, regardless of the type of violations a defendant has committed or a particular defendant's reprehensible conduct, EPA can never demand more in civil penalties than the statutory maximum (twenty-five thousand dollars per day per violation). In calculating the statutory maximum, the litigation team should assume continuous noncompliance from the first date of provable violation (taking into account the five year statute of limitations) to the final date of compliance where appropriate, fully utilizing the presumption of Section 113(e)(2). When the penalty policy yields an amount over the statutory maximum, the litigation team should propose an alternative penalty which must be concurred on by their respective management just like any other penalty.

Other examples of litigation risks would be evidentiary problems, or an indication from the court, mediator, or Administrative Law Judge during settlement negotiations that he or she is prepared to recommend a penalty below the minimum settlement amount. Mitigation based on these concerns should consider the specific facts, equities, evidentiary issues or legal problems pertaining to a particular case as well as the credibility of government witnesses.

Adverse legal precedent which the defendant argues is indistinguishable from the current enforcement action is also a valid litigation risk. Cases raising legal issues of first impression should be carefully chosen to present the issue fairly in a factual context the Agency is prepared to litigate. Consequently in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. If an issue of first impression is litigated and EPA's position is upheld by the court, the mitigation was not justified. If EPA's position is not upheld, it is generally better that the issue be decided than to avoid resolution by accepting a low penalty. Mitigation based on litigation risk should be carefully documented and explained in particular detail. In judicial cases this should be done in coordination with the Department of Justice.

## IV. ABILITY TO PAY

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary deterrence amount, both gravity component and economic benefit component. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The litigation team should assess this factor after commencement of negotiations only if the source raises it as an issue and only if the source provides the necessary financial information to evaluate the source's claim. The source's ability to pay should be determined according to the December 16, 1986 Guidance on Determining a Violator's Ability to Pay a Civil Penalty (GM-56) along with any other appropriate means.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any other mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the litigation team should disregard this factor in adjusting the penalty. The Office of Enforcement Policy has developed the capability to assist the Regions in determining a firm's ability to pay. This is done through the computer program, ABEL. If ABEL indicates that the source may have an inability to pay, a more detailed financial analysis verifying the ABEL results should be done prior to mitigating the penalty.

Consider delayed payment schedule with interest: When EPA determines that a violator cannot afford the penalty prescribed by this policy, the next step is to consider a delayed payment schedule with interest. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. EPA's computer program, ABEL, can calculate a delayed payment amount for up to five years.

Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the litigation team's conclusion as to the size of the necessary reduction should be carefully documented in the case file.[6]

Consider joinder of a corporate violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances. Joinder is not legally possible for SIP cases unless the prerequisite of Section 113 of the Clean Air Act has been met -- issuance of an NOV to the person.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is always expected to comply with the law.

## V. OFFSETTING PENALTIES PAID TO STATE AND LOCAL GOVERNMENTS OR CITIZEN GROUPS FOR THE SAME VIOLATIONS

Under Section 113(e)(1), the court in a civil judicial action or the Administrator in a civil administrative action must consider in assessing a penalty "payment by the violator of penalties previously assessed for the same violation." While EPA will not automatically subtract any penalty amount paid by a source to a State or local agency in an enforcement action or to a citizen

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[6] If a firm fails to pay the agreed to penalty in a final administrative or judicial order, then the Agency must follow the procedures outlined in the February 6, 1990 Manual on Monitoring and Enforcing Administrative and Judicial Orders for collecting the penalty amount.

group in a citizen suit for the same violation that is the basis for EPA's enforcement action, the litigation team may do so if circumstances suggest that it is appropriate. The litigation team should consider primarily whether the remaining penalty is a sufficient deterrent.

## VI. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements must be followed when reducing a penalty for such a project in any Clean Air Act settlement.

## VII. CALCULATING A PENALTY IN CASES WITH MORE THAN ONE TYPE OF VIOLATION

EPA often takes an enforcement action against a stationary source for more than one type of violation of the Clean Air Act. The economic benefit of noncompliance with all requirements violated should be calculated. Next, the gravity component factors under actual or possible harm and importance to the regulatory scheme which are applicable should be calculated separately for each violation. The size of the violator factor should be figured only once for all violations.

For example, consider the case of a plant which makes laminated particle board. The particle board plant is found to emit particulates in violation of the SIP particulate emission limit and the laminating line which laminates the particle board with a vinyl covering is found to emit volatile organic compounds in violation of the SIP VOC emission limit. The penalty for the particulate violation should be calculated figuring the economic benefit of not complying with that limit (capital cost of particulate control, etc., determined by running the BEN computer model), and then the gravity component for this violation should be calculated using all the factors in the penalty policy. After the particulate violation penalty is determined, the VOC violation should be calculated as follows: the economic benefit should be calculated if additional measures need to be taken to comply with the VOC limit. In addition, a gravity component should be calculated for the VOC violation using all the applicable factors under actual or possible harm and importance to the regulatory scheme. The size of the violator factor should be figured only once for both violations.

Another example would be a case where, pursuant to Section 114, EPA issues a request for information to a source which emits $SO_2$, such as a coal-burning boiler. The source does not respond. Two months later, EPA issues an order under Section 113(a) requiring the source to comply with the Section 114 letter. The source does not respond. Three months later, EPA inspects the source and determines that the source is violating the SIP $SO_2$ emission limit.

In this case, separate economic benefits should be calculated, if applicable. Thus, if the source obtained any economic benefit from not responding to the Section 114 letter or obeying the Section 113(a) order, that should be calculated. If not, only the economic benefit from the $SO_2$ emission violation should be calculated using the BEN computer model. In determining the gravity component, the penalty should be calculated as follows:

1. Actual or possible harm

   a. level of violation - calculate for the emission violation only

   b. toxicity of pollutant - applicable to the emission violation only

   c. sensitivity of environment - applicable to the emission violation only

   d. length of time of violation - separately calculate the time for all three violations. Note the Section 114 violation continues to run even after the Section 113(a) order is issued until the Section 114 requirements are satisfied.

2. Importance to regulatory scheme

   Section 114 request for information violation - $15,000
   Section 113 administrative order violation - $15,000

3. Size of violator

   a. One figure based on the source's assets.

## VIII. APPORTIONMENT OF THE PENALTY AMONG MULTIPLE DEFENDANTS

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, there may be more than one defendant. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the defendants allocate among themselves. Civil

violations of the Clean Air Act are strict liability violations and it is generally not in the government's interest to get into discussions of the relative fault of the individual defendants. The government should therefore adopt a single settlement figure for the case and should not reject a settlement consistent with the bottom line settlement figure because of the way the penalty is allocated.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or aggravation due to prior violations), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. If the case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants.

There are limited circumstances where the Government may try to influence apportionment of the penalty. For example, if one party has a history of prior violations, the Government may try to assure that party pays the amount the gravity component has been aggravated due to the prior violations. Also, if one party is known to have realized all or most of the economic benefit, that party may be asked to pay that amount.

## IX. EXAMPLES

### Example 1

I. Facts:

Company A runs its manufacturing operations with power produced by its own coal-fired boilers[7]. The boilers are major sources of sulfur dioxide. The State Implementation Plan has a sulfur dioxide emission limitation for each boiler of .68 lbs. per million B.T.U. The boilers were inspected by EPA on March 19, 1989, and the $SO_2$ emission rate was 3.15 lbs. per million B.T.U for each boiler. A NOV was issued for the $SO_2$ violations on April 10, 1989. EPA again inspected Company A on June 2, 1989 and found the

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[7] Note that a penalty is assessed for the entire facility and not for each emission unit. In this example, the source has several boilers. However, the penalty figures are not multiplied by the number of boilers. The penalty is based on the violations at the facility as a whole, specifically the amount of pollutant factor and length of violation factor are assessed once based on the amount of excess emissions at the facility from all the boilers.

$SO_2$ emission rate to be unchanged. Company A had never installed any pollution control equipment on its boilers, even though personnel from the state pollution control agency had contacted Company A and informed it that the company was subject to state air pollution regulations. The state had issued an administrative order on September 1, 1988 for $SO_2$ emission violations at the same boilers. The order required compliance with applicable regulations, but Company A had never complied with the state order. Company A is located in a nonattainment area for sulfur oxides. Company A has net current assets of $760,000. Company A's response to an EPA Section 114 request for information documented the first provable day of violation of the emission standard as July 1, 1988.

II. Computation of penalty

A. Economic benefit component

EPA used the BEN computer model in the standard mode to calculate the economic benefit component. The economic benefit component calculated by the computer model was $243,500.

B. Gravity component

1. Actual or possible harm

a. Amount of pollutant: between 360-390% above standard - $65,000

b. Toxicity of pollutant: not applicable.

c. Sensitivity of the environment: nonattainment - $10,000

d. Length of time of violation: Measured from the date of first provable violation, July 1, 1988 to the date of final compliance under a consent decree, hypothetically December 1, 1991. (If consent decree or judgment order is filed at a later date, this element, as well as elements in the economic benefit component must be recalculated.) 41 mos. - $40,000

2. Importance to regulatory scheme.

No applicable violations.

3. Size of violator: net assets of $760,000 - $5,000.

$243,500 economic benefit component
+120,000 gravity component
$363,500 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

Because Company A was on notice of its violations and, moreover, disregarded the state administrative order to comply with applicable regulations, the gravity component in this example should be aggravated by some percentage based on this factor.

2. Degree of Cooperation

No adjustments were made in the category because Company A did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by some percentage for this factor because Company A violated the state order issued for the same violation.

Initial penalty figure: $353,500 preliminary deterrence amount plus adjustments for history of noncompliance and degree of willfulness or negligence.

Example 2:

I. Facts:

Company C, located in a serious nonattainment area for particulate matter, commenced construction in January 1988. It began its operations in April 1989. It runs a hot mix asphalt plant subject to the NSPS regulations at 40 C.F.R. Part 60, Subpart I. Subpart I requires that emissions of particulates not exceed 90 mg/dscm (.04 gr/dscf) nor exhibit 20% opacity or greater. General NSPS regulations require that a source owner or operator subject to a NSPS fulfill certain notification and recordkeeping functions (40 C.F.R. § 60.7), and conduct performance tests and submit a report of the test results (40 C.F.R. § 60.8).

Company C failed to notify EPA of: the date it commenced construction within 30 days after such date (February 1988)(40

C.F.R. § 60.7(a)(1)); the date of anticipated start-up between 30-60 days prior to such date (March, 1989)(40 C.F.R. § 60.7(a)(2)); or the date of actual start-up within 15 days after such date (April, 1989) (40 C.F.R. § 60.7(a)(3). Company C was required under 40 C.F.R. § 60.8(a) to test within 180 days of start-up, or by October 1989. The company finally conducted the required performance test in September 1990. The test showed the plant to be emitting 120 mg/dscm of particulates and to exhibit 30% opacity.

Company C did submit the required notices in November 1989 in response to a letter from EPA informing it that it was subject to NSPS requirements. It did negotiate with EPA after the complaint was filed in September 1991, and agreed to a consent decree requiring compliance by December 1, 1991. Company C has assets of $7,000,000.

II. Computation of penalty

A. Benefit component

The Region determined after calculation that the economic benefit component was $90,000 for violation of the emissions standard according to the BEN computer calculation. The litigation team determined that the economic benefit from the notice and testing requirement was less than $5,000. Therefore, the litigation team has discretion not to include this amount in the penalty consistent with the discussion at II.A.3.a.

B. Gravity component

1. Actual or possible harm

a. Amount of pollutant:

i. mass emission standard:
33% above standard - $10,000
ii. opacity standard:
50% over standard - $10,000

b. Toxicity of pollutant: not applicable

c. Sensitivity of the environment:
serious nonattainment - $14,000

d. Length of time of violation

1) Performance testing: October, 1989 - September 1990: 12 months - $15,000

2) Failure to report commencement of construction: February 1988 - November 1989: 21 months (date of EPA's first letter to Company) - $25,000

3) Failure to report actual start-up: April, 1989 - November 1989: 7 months - $15,000

4) Failure to report date of anticipated startup between 30-60 days prior to such date: March, 1989 - November 1989: 8 months - $15,000

5) Mass Emission Standard Violation: September 1990 - December 1991: 15 months - $20,000

6) Opacity Violation: September 1990 - December 1991: 15 months - $20,000

2. Importance to regulatory scheme:

Failure to notify 40 C.F.R. § 60.7(a)(1) - $15,000
Failure to notify 40 C.F.R. § 60.7(a)(2) - $15,000
Failure to notify 40 C.F.R. § 60.7(a)(3) - $15,000
Failure to conduct required performance test 40 C.F.R. § 60.8(a) - $15,000

3. Size of violator: Net current Assets - $7,000,000 - $20,000

$ 90,000 economic benefit component
224,000 gravity component
$314,000 preliminary deterrence amount

C. Adjustment factors

1. Degree of willfulness/negligence

No adjustments were made based on willfulness in this category because there was no evidence that Company C knew of the requirements prior to receiving the letter from EPA. Specific evidence may suggest that the company's violations were due to negligence justifying an aggravation of the penalty on that basis.

2. Degree of Cooperation

No adjustments were made in this category because Company C did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by an amount agreed to by the litigation team for this factor because the source ignored two letters from EPA informing them of the requirements.

Example 3:

I. Facts

Chemical Inc. operates a mercury cell chlor-alkali plant which produces chlorine gas. The plant is subject to regulations under the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for mercury, 40 C.F.R. Part 61, Subpart E. On September 9, 1990, EPA inspectors conducted an inspection of the facility, and EPA required the source to conduct a stack test pursuant to Section 114. The stack test showed emissions at a rate of 3000 grams of mercury per 24-hour period. The mercury NESHAP states that emissions from mercury cell chlor-alkali plants shall not exceed 2300 grams per 24-hour period. The facility has been in operation since June 1989.

In addition under 40 C.F.R. § 61.53, Chemical Inc. either had to test emissions from the cell room ventilation system within 90 days of the effective date of the NESHAP or follow specified approved design, maintenance and housekeeping practices. Chemical Inc. has never tested emissions. Therefore, it has committed itself to following the housekeeping requirements. At the inspection, EPA personnel noted the floors of the facility were badly cracked and mercury droplets were found in several of the cracks. The inspectors noted that the mercury in the floor cracks was caused by leaks from the hydrogen seal pots and compressor seals which housekeeping practices require be collected and confined for further processing to collect mercury. A follow up inspection was conducted on September 30, 1990 and showed that all of the housekeeping requirements were being observed.

Chemical Inc. will have to install control equipment to come into compliance with the emissions standard. A complaint was filed in June 1991. The equipment was installed and operational by June 1992. A consent decree was entered and penalty paid in February 1992. Chemical Inc. has a net corporate worth of $2,000,000.

II. Calculation of Penalty

A. Economic Benefit Component

The delay in installing necessary control equipment from June 1989 to June 1992 as calculated using the BEN computer model resulted in an economic benefit to Chemical Inc. of $35,000.

B. Gravity Component

1. Actual or possible harm

a. Amount of pollutant: 30 % above the standard - $5,000

b. Toxicity of pollutant : $15,000 for violations involving a NESHAP

c. Sensitivity of the environment: not applicable

d. Length of time of violation:

1) Emissions violation: 22 mos. - $25,000

2) Work Practice violation: 1 mo. - $5,000

2. Importance to regulatory scheme.

Failure to perform work practice requirements - $15,000

3. Size of Violator: net worth of $2,000,000 - $10,000

$35,000 economic benefit component
+75,000 gravity component
$110,000 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

It is unlikely Chemical Inc. would not be aware of the NESHAP requirements. Therefore, an adjustment should probably be made for this factor.

2. Degree of Cooperation

No adjustments made because Chemical Inc. did not meet the criteria.

3. History of Compliance

No adjustments were made because Chemical Inc. had no prior violations.

## X. CONCLUSION

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial amount prior to beginning settlement negotiations or an adjusted amount after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed as required by the August 9. 1990 Guidance on Documenting Penalty Calculations and Justifications in EPA Enforcement Actions. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each other's experience and promote the fairness required by the Policy on Civil Penalties.

**Appendix I: Penalty Policy for Violations of Permit Requirements**
**NOTE: See also "Clarification on Use of Appendix I" at Section B, No. 28 below.**

**revised 03/25/87**

APPENDIX I

Penalty Policy for Violations of Certain Clean Air Act Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution

## I. Introduction

EPA's Clean Air Act Stationary Source Civil Penalty Policy applies generally to stationary sources of air pollution which violate requirements enforceable under Section 113 of the Clean Air Act when such violations are the result of a failure to make capital expenditures and/or failure to employ operation and maintenance procedures which are necessary to achieve compliance. The general policy does not, however, specifically address violations of permit requirements related to the construction or modification of major stationary sources under the prevention of significant deterioration (PSD) program and the nonattainment area new source review progam.

This document outlines a penalty policy which applies to certain permit-related violations of the Clean Air Act and provides a method of calculating a minimum settlement amount for such violations. This "Permit Penalty Policy" was originally issued in February 1981 to deal with a subject area not covered by the 1980 penalty policy. It has been revised for inclusion in the 1987 policy to reflect more realistic penalty amounts.

As illustrated by the examples, a source may have violated a new source requirement which makes it subject to this Permit Penalty Policy, and, in addition, violated a regulation subject to the general policy or another appendix. If this is the case, the Permit Penalty Policy should be used to find the minimum settlement figure for the permit violation(s) and the general policy or applicable appendix should be used to establish a penalty amount for the other violation(s). These two figures should be added together to produce an appropriate overall settlement amount. It is also important to note that the policy outlined in this document, like the general stationary source civil penalty policy, is used to set a minimum settlement figure. Therefore, the penalty actually negotiated for can always be higher than the figure derived through use of this Permit Penalty Policy.

## II. The Permit Penalty Policy

The Permit Penalty Policy covers cases involving sources which begin construction or operation without first obtaining the required PSD or nonattainment new source permit, as well as those which construct or operate in violation of such valid permits. Construction proceeding in compliance with an invalid permit is considered to be, in the context of this penalty policy, construction without a permit.

In these cases, when the source is operating and has enjoyed an economic benefit from noncompliance, that benefit should be calculated as directed in the general stationary source civil penalty policy. As directed by the general policy, however, the Regional Office may decide not to calculate the economic benefit if that office decides that the economic benefit is likely to be below $5,000. The gravity component is then calculated based on the matrix contained in this permit penalty policy. Construction in the absence of a permit or in violation of a permit has been assigned a scale of dollar values on a matrix. The matrix also provides for the assessment of an additional penalty for certain specified violations of substantive permit preconditions or requirements. The appropriate dollar value for a violation is dependent on an estimate of the total cost of air pollution control at those facilities of the source for which the permit is required.[1/] This value is then multiplied by the number of months of violation.[2/] When there are multiple permit-related

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1/ "Total cost of air pollution control" should include, where relevant, pollution control equipment costs, design costs, operation and maintenance costs, differential cost of complying fuel v. noncomplying fuel, and other costs pertaining to adequate control of the new source. Total cost is to be determined by examination of what would have been required as BACT (for a PSD violation) or LAER (in the case of an Offset Policy or Part D violation). When construction is done in phases, the operative amount is the total cost of air pollution controls for the entire project. If a source has installed partial control before the enforcement action commenced, that part of the cost can be subtracted from the total costs.

2/ Month-by-month accrual of penalties was selected for purposes of convenience and for consistency with the general policy. Any fraction of a month in violation is counted as a full month of violation unless circumstances present a case for mitigation of this rule.

violations, a penalty figure is calculated for each violation and the individual penalty figures are added together to produce one minimum settlement figure. In those cases where a source subject to a valid permit violates only the requirements of Section 173(1) and/or Section 173(3) (requirements for construction permits in nonattainment areas), the appropriate penalty amount is determined by reference only to the matrix column(s) citing the violation(s).

The economic benefit component and the gravity component are added together to determine the preliminary deterrence amount. This initial amount should then be adjusted, using the general stationary source civil penalty policy factors which take into consideration individual equitable considerations (Part III of the general policy.) This will yield the initial penalty figure.

The period of civil penalty liability will, of course, depend upon the nature and circumstances of the violation. For example, if a source has begun actual construction without a required permit or under an invalid permit, the penalty period begins on the date the source began construction and continues either until the source obtains a valid permit, notifies the State or EPA that it has permanently ceased construction and the project has been abandoned, or the State issues a federally enforceable construction permit containing operating restrictions which keep the source below the new source review applicability threshold.[3/] A temporary cessation in construction does not toll the running of the penalty period. The Agency may, however, consider mitigation of the calculated civil penalty if a source ceases construction within a reasonable time after being notified of the violtion and does not resume construction until a valid permit is issued. If a source violates a permit condition, the period of penalty liability for purposes of calculating a settlement figure begins on the first date the violation can be documented and will cease when the violation is corrected.

EPA realizes that in certain cases, it is highly unlikely that the Agency will be able to obtain the full amount of the initial penalty figure in litigation. This may be due to applicable precedent, competing public interest considerations,

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[3/]The period of liability is not be be confused with the period of continuing violation for Section 113 notice of violation (NOV) purposes. A source which constructs without a valid permit is in continuing violation of the Clean Air Act for NOV purposes until it receives a valid permit or it dismantles the new construction.

or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty settlement which it could not achieve through litigation. The litigation team must receive the approval of the Associate Enforcement Counsel for Air in order to propose settling for less than the minimum penalty amount from the matrix because of litigation practicalities.

# PERMIT PENALTY POLICY MATRIX
## MINIMUM SETTLEMENT FIGURES
(per month of violation)

### PSD SOURCES

| TOTAL COST OF AIR POLLUTON CONTROL FOR NEW OR MODIFIED SOURCE ($ THOUSANDS) | CONSTRUCTION OR OPERATION WITHOUT A PERMIT OR IN VIOLATION OF A VALID PERMIT | INCREMENT EXCEEDED |
|---|---|---|
| less than 50 | $ 2,000 | $ 7,000 |
| 50-150 | 4,000 | 11,000 |
| 150-500 | 7,000 | 16,000 |
| 500-1,500 | 11,000 | 18,000 |
| 1,500-5,000 | 16,000 | 21,000 |
| 5,000-15,000 | 22,000 | 25,000 |
| 15,000-50,000 | 29,000 | 31,000 |
| over 50,000 | 37,000 | 39,000 |

### PART D AND OFFSET INTERPRETATIVE RULING SOURCES

| TOTAL COST OF AIR POLLUTION CONTROL FOR NEW OR MODIFIED SOURCE ($ THOUSANDS) | CONSTRUCTION OR OPERATION WITHOUT A PERMIT OR IN VIOLATION OF A VALID PERMIT | FAILURE TO SATISFY §173(1) OR OBTAIN OFFSETS | VIOLATION OF SECTION 173(3) OR CONDITION 2 |
|---|---|---|---|
| less than 50 | $ 2,000 | $ 3,000 | $ 2,000 |
| 50-150 | 4,000 | 4,000 | 3,000 |
| 150-500 | 7,000 | 6,000 | 4,000 |
| 500-1,500 | 11,000 | 9,000 | 4,000 |
| 1,500-5,000 | 16,000 | 11,000 | 5,000 |
| 5,000-15,000 | 22,000 | 13,000 | 7,000 |
| 15,000-50,000 | 29,000 | 15,000 | 11,000 |
| over 50,000 | 37,000 | 17,000 | 12,000 |

(Add numbers when multiple categories apply)

## EXAMPLE CASES

The following hypothetical cases illustrate how the matrix is used to calculate a minimum settlement figure.

### PSD SOURCE

I. Facts

On July 1, 1985, an existing major source began construction of a modification to its plywood manufacturing plant. The modification will result in a significant net emission increase of particulate matter. The source had not obtained or filed for a PSD permit as of the date construction began.

On July 2, 1985, EPA investigators discovered the construction during a routine inspection of the plywood plant. The EPA Regional Office determined that the modification was subject to PSD review and issued a Notice of Violation on August 1, 1985. The NOV cited the PSD regulations and outlined possible enforcement alternatives.

The source received the NOV on August 5, 1985, and contacted the Regional Office on August 10, 1985. On August 30, 1985, the Region and the source held a conference at which the source stated that it had been aware of the need for PSD review and permitting prior to construction. The source also stated that it would file an application for a permit but that it would not cease construction during the review process.

On October 1, 1985, the source filed a PSD application. During the review process the Region discovered that the source had no plans to install pollution control devices. The Region also determined that without BACT, the modification's particulate emissions would result in an exceedance of the particulate matter increment in the source's area of impact. The source, when informed of the BACT problem, indicated it would install the necessary controls.

However, throughout the review process the source continued construction of the modification. On December 1, 1985, the source began operation of the modified source without the required permit and without controls.

On January 15, 1986, the source was issued a PSD permit. On February 28, 1986, the source ceased operation of the plywood plant to connect the pollution control equipment called for in the PSD permit. The source resumed operation on March 15, 1986, in a manner consistent with the PSD permit conditions.

## II. Computation of Penalty

### A. Benefit Component

The penalty calculation begins with a calculation of the economic benefit of noncompliance (using the BEN model) for the period of operation without a permit (December 1, 1985 - January 15, 1986). BEN calculated a penalty of $6,400.

### B. Gravity Component

This component of the penalty is calculated by initially assessing the total cost of air pollution control equipment at the modification. For purposes of this example, assume BACT costs $140,000.

Next, the PSD Matrix must be consulted and the type and number of matrix categories determined. In this example the source (1) began construction without a permit, (2) operated the plant without a PSD permit and (3) exceeded the growth increment for particulate matter. Therefore, this source is subject to both of the columns of dollar values under the heading "PSD Sources."

Once the type, number and dollar values of the penalty are determined, these figures are multiplied by the number of months in violation. The sums are then added together to produce the matrix penalty amount.

In this example, the source's period of construction without a permit runs from July 1, 1985, until operations began on December 1,1985 (5 months). The period of operation without a permit runs from the time the source began operation (December 1, 1985) to the date the source received a permit (January 15, 1986) (2 months). The source also exceeded the area growth increment for particulate matter during the period of operation from December 1, 1985, to February 28, 1986 (3 months).[4/]

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4/ It is important to note that some aspects of the matrix do not necessarily track the statutory provisions regarding violations. For example, there is no Clean Air Act provision which makes increment exceedance, in and of itself, a violation by an individual source. (The SIP must protect the increment. The method used is PSD review with permit conditions such as BACT, fuel use limitations, etc.) However, as a portion of the gravity component, considering the seriousness of the violation if a source operates and thereby violates the increment due to failure to go through PSD review as required, an added penalty in appropriate.

The matrix penalty figure for this source's PSD related violations, based on a $140,000 total cost of control estimate, is:

- for the 5 month period of construction without a permit, 5 x $4,000 = $20,000

- for the 2 month period of operation without a permit, 2 x $4,000 = $8,000

- for the 3 month period of operation during which the increment was exceeded, 3 x $11,000 = $33,000

- matrix penalty figure = $20,000 + $8,000 + $33,000 = $61,000

This is added to the economic benefit component

| | |
|---|---|
| $ 6,400 | economic benefit |
| 61,000 | gravity |
| $67,400 | preliminary deterrence amount. |

C. Adjustment Factors

1. Degree of willfulness/negligence

Because the source knew it needed a PSD permit and commenced construction without applying for a PSD permit, the gravity component is increased 10%

10% of $61,000 = $6,100

2. Degree of cooperation

No adjustment

3. History of noncompliance

No past history of noncompliance

4. Ability to pay

No adjustment here because the source did not provide EPA with financial information indicating inability to pay.

Total Penalty

| | |
|---|---|
| $67,400 | preliminary deterrence amount |
| + 6,100 | adjustment |
| $73,500 | initial minimum penalty figure |

The source paid the U.S. Treasury $73,500.

Section 173 and Offset Policy Sources

I. Facts

On December 1, 1984, a plywood manufacturing company began operation of a modification at its plant which is located in a nonattainment area for particulate matter. The modification is subject to new source review permitting and, in fact, the source has obtained a valid NSR permit from the State. The permit specifies 1) that the applicant has demonstrated that all other major stationary sources owned or operated by the applicant in the State are in compliance with the Act, 2) what constitutes required LAER, and 3) what offsets (internal)[5/] would be required to be obtained prior to start-up or commencement of operation. (These requirements are found in Section 173 of the Clean Air Act.)

In March of 1985, the Regional Office learned that the source did not install controls on a certain piece of process equipment and therefore did not have LAER as specified in the State permit. On April 1, 1985, the Region issued an NOV for failure to comply with the terms of the permit by not installing LAER prior to start-up. At an April 15, 1985, conference between EPA and the source, the source agreed to meet the terms of its permit and to demonstrate compliance. On November 15, 1985, the equipment had been installed and a performance demonstration showed that the source was in compliance with the LAER limit specified in the permit.

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5/ In light of the Supreme Court decision in Chevron U.S.A. Inc. v. NRDC, ___ U.S. ___, 104 S. Ct. 2778 (1984), a state may choose to adopt a plant-wide definition of source in nonattainment areas. In such instances, sources obtaining internal offsets may be exempt from nonattainment new source review requirements.

II. Computation of penalty

A. Benefit Component

The BEN model determined that the economic benefit from operating without LAER controls from December 1, 1984 until November 15, 1985 was $63,400.

B. Gravity Component

First the cost of the pollution control equipment must be determined. In this case, LAER costs $110,000. Since the plant operated from December 1, 1984 until November 15, 1985 without LAER, the period of violation is 12 months. The matrix yields a gravity component of 12 x 4,000 = $48,000. The other two categories of the NSR matrix need not be used because there were no violations in these categories.

The gravity component is added to the economic benefit component

| | |
|---|---|
| $63,000 | economic benefit |
| + 48,000 | gravity |
| $111,400 | preliminary deterrence amount |

C. Adjustment factors

1. Degree of willfulness

No adjustment here. At the NOV conference, EPA learned that the company had had serious, but temporary economic reverses that prevented it from installing the control equipment.

2. Degree of cooperation

No adjustments here.

3. History of compliance

No past history of noncompliance.

4. Ability to pay

No adjustment here because the company had reversed its financial losses and was currently financially healthy.

Total penalty - initial penalty target figure same as preliminary deterrence amount.

Because the State had intervened in the case and had gathered the evidence of violation, the U.S. split the penalty with the State.

The Company paid $55,700 to the U.S. treasury and $55,700 to the State.

# Appendix II: Vinyl Chloride Civil Penalty Policy

revised 02/08/85

APPENDIX II

## Vinyl Chloride Civil Penalty Policy

The attached chart shall be used to determine the gravity component of the civil penalty settlement amount for cases enforcing the National Emission Standard for Vinyl Chloride. It is to be used in lieu of the scheme for determining the gravity component set forth in the general Clean Air Act Stationary Source Civil Penalty Policy.

The settlement penalty for vinyl chloride cases, as for other Clean Air Act cases, consists of a gravity component and an economic benefit component. Adjustments for degree of willfulness or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, "other unique factors," and litigation practicalities should be made, if appropriate, in accordance with the Stationary Source Civil Penalty Policy.

The gravity component of the penalty reflects the seriousness of the violation. A separate scheme was developed for vinyl chloride cases because several of the factors in the general policy, such as length of time of violation, whether the area is primary non-attainment, and level of violation as a percentage above the standard largely do not apply to vinyl chloride cases. Also, the hazardous nature of the pollutant and the difficulty in determining economic benefit are reflected by establishing a substantial gravity component.

The vinyl chloride gravity component is therefore tied to the amount of vinyl chloride released in a given incident, which is used as a measure of the seriousness of each violation. Also, for relief valve discharges, manual vent valve discharges, and 10 ppm violations, an adjustment factor is to be used to account for excessive frequency of discharges in a given time, which is a reflection of poor performance regardless of the amount of vinyl chloride discharged to the atmosphere. The frequency adjustment factor differs from the adjustment factor for history of noncompliance, which reflects violations occurring prior to those which are the subject of the current enforcement action.

The chart is to be applied as follows: For each violation, assign a dollar amount based on the type and magnitude of violation as described in the chart. Relief valve discharges, manual vent valve discharges and violations of 10 ppm standards should then be grouped by calendar years. If the number of these violations is three or more in any calendar year, the total penalty for that period should be multiplied by the appropriate "frequency adjustment factor." The total gravity component for the case is

the sum of the penalty numbers for each violation, adjusted where appropriate to account for excessive frequency. The settlement penalty for the case as a whole cannot exceed the statutory maximum of $25,000 per day per violation. Sample calculations are attached to this policy.

The economic benefit component may be impractical to determine in vinyl chloride cases, depending on the nature of the violations. The benefit component should be determined if feasible, e.g., where a pattern of violations indicates a need for specific technology, equipment, or procedures, or where the defendant has chosen a "fix" to address a series of violations.

This revised policy shall apply to all pending and future vinyl chloride cases.

Relief Valve Discharges, Manual Vent Valve Discharges, Violations of 10 ppm Standards

Emissions

| Pounds of VC released | Penalty |
|---|---|
| 0 - 100 | $ 1000 |
| >100 - 2000 | 2000 |
| >2000 - 5000 | 5000 |
| >5000 - 7500 | 10,000 |
| >7500 - 10,000 | 15,000 |
| over 10,000 | 25,000 |

Frequency Adjustment Factors

| # Of Violations in Calendar Year | Multiplier |
|---|---|
| 3 | 1.5 |
| 4+ | 2 |

Failure to Report

| Size of Release Not Reported (lbs.) | Penalty |
|---|---|
| 0-100 | $ 2000 |
| 100-500 | 5000 |
| 500-1000 | 10,000 |
| 1000-2000 | 20,000 |
| over 2000 | 25,000 |

Graduated scale for late reporting (if not in response to direct request from State or EPA) - 10-day discharge reports (as percentage of penalty for failure to report)

| | |
|---|---|
| Within 2 months (from discharge) | 25% of penalty |
| 2-4 months | 50% " " |
| 4-6 months | 75% " " |
| over 6 months | 100% " " |

## Stripping Violations and Reactor Opening Loss Violations

### Stripping

| Magnitude of Violation | | Penalty |
|---|---|---|
| Suspension/Latex | Dispersion | |
| 400-500 ppm | 2000-2500 ppm | $ 1000 |
| 500-600 | 2500-3000 | 2000 |
| 600-700 | 3000-3500 | 3000 |
| 700-800 | 3500-4000 | 4000 |
| 800-900 | 4000-4500 | 5000 |
| 900-1200 | 4500-6000 | 10000 |
| 1200-1400 | 6000-7000 | 15000 |
| 1400-1600 | 7000-8000 | 20000 |
| over 1600 | over 8000 | 25000 |

### Reactor Opening Loss

Penalty = $1000/violation (for each reactor)

### Failure to Measure

Penalty = Maximum penalty amount for each type of violation
= $25000 (stripping)
= $1000 (reactor opening loss)

### Failure to Submit Complete Semiannual Report

Penalty = $25000

Graduated scale for late semiannual report (if not in response to direct request from State to EPA)

| | |
|---|---|
| Within 2 months | $ 6,250 |
| 2-4 months | 12,500 |
| 4-6 months | 18,750 |
| Over 6 months | 25,000 |

Example 1

ABC Chemical Corporation owns a polyvinyl chloride plant in Louisiana. The United States has filed an enforcement action alleging relief valve discharge violations, failure to report relief valve discharges, reactor opening violations, and stripping violations. The settlement penalty is determined as follows:

Gravity Component

| Relief Valve Discharges | | Penalty/Discharge | | |
|---|---|---|---|---|
| July 6, 1981 | 446 lbs. | $2,000 | x 1.5 = | $7,500 |
| August 15, 1981 | 1250 lbs. | $ 2,000 | | |
| November 30, 1981 | 46 lbs. | $1,000 | | |
| March 17, 1982 | 127 lbs. | $2,000 | x 1 = | $12,000 |
| July 15, 1982 | 6271 lbs. | $10,000 | | |
| Subtotal for Relief Valve Discharges | | | | $19,500 |

Failure to Report

| | | |
|---|---|---|
| Failed to report July 6, 1981 discharge | $5,000 | |
| Report August 15, 1981 discharge 1 month late - 25% x $20,000 | 5,000 | |
| Subtotal for reporting | $10,000 | |
| **Reactor Opening Loss Violations** | | |
| 77 reactor opening loss violations | $77,000 | |
| **Stripping Violations (Suspension)** | | |
| January 17, 1982 556 ppm | $2,000 | |
| July 10, 1982 421 ppm | $1,000 | |
| August 19, 1982 494 ppm | $1,000 | |
| Subtotal for stripping | $4,000 | |
| Total Gravity Component | | $110,500 |

| | |
|---|---|
| Benefit Component | |
| None determined | |
| Preliminary deterrence amount | $110,500 |
| Adjustments | |
| Negligence | |
| Add 30% of gravity component - emission violations generally due to repetition of same cause + 30% (110,500) | + $ 33,150 |
| Minimum penalty settlement amount | $143,650 |

Example 2

Polynesian Polymers, Inc., owns a polyvinyl chloride plant in Texas. The United States has filed an enforcement action alleging relief valve and manual vent valve discharge violations, reporting violations, and reactor opening loss violations. The settlement penalty is determined as follows:

Gravity Component

Relief Valve and Manual Vent Valve Discharges

| | | Penalty/Discharge | | |
|---|---|---|---|---|
| July 6, 1983 | 271 lbs. | $ 2,000 | x 2 = | 32,000 |
| July 15, 1983 | 621 lbs. | 2,000 | | |
| August 21, 1983 | 710 lbs. | 2,000 | | |
| November 1, 1983 | 6,221 lbs. | 10,000 | | |
| January 17, 1984 | 7,721 lbs. | 15,000 | x 1 = | 17,000 |
| November 30, 1984 | 526 lbs. | 2,000 | | |
| January 14, 1985 | 2,771 lbs. | 5,000 | x 1.5 = | 12,000 |
| July 19, 1985 | 4 lbs. | 1,000 | | |
| December 21, 1985 | 172 lbs. | 2,000 | | |

Subtotal for Relief Valve Discharges $ 61,000

Failure to Report

| | | |
|---|---|---|
| Failed to report Nov. 1, 1984 discharge | $25,000 | |
| Failed to report Nov. 30, 1984 discharge | 10,000 | |
| Subtotal for reporting | | $ 35,000 |

Reactor Opening Loss Violations

| | |
|---|---|
| 214 reactor opening loss violations | $214,000 |
| Total Gravity Component | $310,000 |

Benefit Component

| | |
|---|---|
| Economic benefit of delay in installing "clean reactor" technology-deemed necessary to comply with reactor opening loss standard (BEN calculation) | $100,000 |
| Preliminary deterrence amount | $410,000 |

Adjustments

History of Noncompliance

| | |
|---|---|
| Add 30% of subtotal for reporting violations; cited for similar violations at this plant in action under the Clean Water Act | + 10,500 |

No other adjustments

| | |
|---|---|
| Minimum penalty settlement amount | $420,500 |

## Appendix III: Final Revisions to the Asbestos Demolition and Renovation Civil Penalty Policy, dated 08/22/89

**revised 05/11/92**

## APPENDIX III

ASBESTOS DEMOLITION AND RENOVATION CIVIL PENALTY POLICY
Revised: May 5, 1992

The Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil judicial actions under Section 113 (b) of the Clean Air Act ("the Act"). In addition, the General Penalty Policy is used by the Agency in determining an appropriate penalty in administrative penalty actions brought under Section 113 (d)(1) of the Act. Due to certain unique aspects of asbestos demolition and renovation cases, this Appendix provides separate guidance for determining the gravity and economic benefit components of the penalty. Adjustment factors should be treated in accordance with the General Penalty Policy.

This Appendix is to be used for settlement purposes in civil judicial cases involving asbestos NESHAP demolition and renovation violations, but the Agency retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the Appendix is to be used in conjunction with the General Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. If the Region is referring a civil action under Section 113(b) against a demolition or renovation source, it should recommend a minimum civil penalty settlement amount in the referral. For administrative penalty cases under Section 113 (d)(1), the Region will plead the calculated penalty in its complaint. In both instances, consistent with the General Penalty Policy, the Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence, history of noncompliance,[1] ability to pay, and litigation risk.

The "gravity" component should account for statutory criteria such as the environmental harm resulting from the violation, the importance of the requirement to the regulatory

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[1] As discussed in the General Penalty Policy, history of noncompliance takes into account prior violations of all environmental statutes. In addition, the litigation team should consider the extent to which the gravity component has already been increased for prior violations by application of this Appendix.

scheme, the duration of the violation, and the size of the violator. Since asbestos is a hazardous air pollutant, the penalty policy generates an appropriately high gravity factor associated with substantive violations (i.e., failure to adhere to work practices or to prevent visible emissions from waste disposal). Also, since notification is essential to Agency enforcement, a notification violation may also warrant a high gravity component, except for minor violations as set forth in the chart for notification violations on page 15.

## I. GRAVITY COMPONENT

The chart on pages 15-16 sets forth penalty amounts to be assessed for notification and waste shipment violations as part of the gravity component of the penalty settlement figure. The chart on page 17 sets forth a matrix for calculating penalties for work-practice, emission and other violations of the asbestos NESHAP.

### A. Notice Violations

#### 1. No Notice

The figures in the first line of the Notification and Waste Shipment Violations chart (pp. 15-16) apply as a general rule to failure to notify, including those situations in which substantive violations occurred and those instances in which EPA has been unable to determine if substantive violations occurred.

If EPA does not know whether substantive violations occurred, additional information, such as confirmation of the amount of asbestos in the facility obtained from owners, operators, or unsuccessful bidders, may be obtained by using section 114 requests for information or administrative subpoenas. If there has been a recent purchase of the facility, there may have been a pre-sale audit of environmental liabilities that might prove useful. Failure to respond to such a request should be assessed an additional penalty in accordance with the General Penalty Policy. The reduced amounts in the second line of the chart apply only if the Agency can conclude, from its own inspection, a State inspection, or other reliable information, that the source probably achieved compliance with all substantive requirements.

#### 2. Late, Incomplete or Inaccurate Notice

Where notification is late, incomplete or inaccurate, the Region should use the figures in the chart, but has discretion to insert appropriate figures in circumstances not addressed in the matrix. The important factor is the impact the company's action has on the Agency's ability to monitor substantive compliance.

B. Work-Practice, Emission and Other Violations

Penalties for work-practice, emissions and other violations are based on the particular regulatory requirements violated. The figures on the chart (page 17) are for each day of documented violations, and each additional day of violation in the case of continuing violations. The total figure is the sum of the penalty assigned to a violation of each requirement. Apply the matrix for each distinct violation of sub-paragraphs of the regulation that would constitute a separate claim for relief if applicable (e.g.,§ 61.145(c)(6)(i), (ii), and (iii)).

The gravity component also depends on the amount of asbestos involved in the operation, which relates to the potential for environmental harm associated with improper removal and disposal. There are three categories based on the amount of asbestos, expressed in "units," a unit being the threshold for applicability of the substantive requirements.[2] If a job involves friable asbestos on pipes and other facility components, the amounts of linear feet and square feet should each be separately converted to units, and the numbers of units should be added together to arrive at a total. Where the only information on the amount of asbestos involved in a particular demolition or renovation is in cubic dimensions (volume), 35 cubic feet is the applicability limit which is specified in § 61.145(a)(1)(ii).

Where the facility has been reduced to rubble prior to the inspection, information on the amount of asbestos can be sought from the notice, the contract for removal or demolition, unsuccessful bidders, depositions of the owners and operators or maintenance personnel, or from blueprints if available. The Region may also make use of § 114 requests and § 307 subpoenas to gather information regarding the amount of asbestos at the facility. If the Region is unable to obtain specific information on the amount of asbestos involved at the site from the source, the Region should use the maximum unit range for which it has adequate evidence.

Where there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal or handling, the Region may calculate the number of units based upon the amount of asbestos reasonably related to such improper practice. For example, if improper

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[2] This applicability threshold is prescribed in 61.145(a)(1) as the combined amount of regulated-asbestos containing material (RACM) on at least 80 linear meters (260 linear feet) of pipes, or at least 15 square meters (160 square feet) on other facility components, or at least 1 cubic meter (35 cubic feet) off facility components.

removal is observed in one room of a facility, but it is apparent that the removal activities in the remainder of the facility are done in full compliance with the NESHAP, the Region may calculate the number of units for the room, rather than the entire facility.

C. Gravity Component Adjustments

1. Second and Subsequent Violations

Gravity components are adjusted based on whether the violation is a first, second, or subsequent (i.e., third, fourth, fifth, etc.) offense.[3] A "second" or "subsequent" violation should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated. This prior notification could range from simply an oral or written warning to the filing of a judicial enforcement action. Such prior notification of a violation is sufficient to trigger treatment of any future violations as second or subsequent violations; there is no need to have an admission or judicial determination of liability.

Violations should be treated as second or subsequent offenses only if the new violations occur at a different time and/or a different jobsite. Escalation of the penalty to the second or subsequent category should not occur within the context of a single demolition or renovation project unless the project is accomplished in distinct phases or is unusually long in duration. Escalation of the violation to the second or subsequent category is required, even if the first violation is deemed to be "minor".

A violation of a § 113(a) administrative order (AO) will generally be considered a "second violation" given the length of time usually taken before issuing an AO and should be assessed a separate penalty in accordance with the General Penalty Policy.

If the case involves multiple potential defendants and any one of them is involved in a second or subsequent offense, the penalty should be derived based on the second or subsequent offense. In such instance, the Government should try to get the prior-offending party to pay the extra penalties attributable to this factor. (See discussion below on apportionment of the penalty).

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[3] Continuing violations are treated differently than second or subsequent violations. See, Duration of Violation, below.

2. Duration of the Violation

The Region should enhance the gravity component of the penalty according to the chart (p. 17) to reflect the duration of the violation. Where the Region has evidence of the duration of a violation or can invoke the benefit of the presumption of continuing violation pursuant to Section 113(e)(2) of the Act, the gravity component of the penalty should be increased by the number of additional days of violation multiplied by the corresponding number on the chart.

In order for the presumption of continuing noncompliance to apply, the Act requires that the owner or operator has been notified of the violation by EPA or a state pollution control agency and that a prima facie showing can be made that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice. When these requirements have been met, the length of violation should include the date of notice and each day thereafter until the violator establishes the date upon which continuous compliance was achieved.

When there is evidence of an ongoing violation and facts do not indicate when compliance was achieved, presume the longest period of noncompliance for which there is any credible evidence and calculate the duration of the violation based on that date. This period should include any violations which occurred prior to the notification date if there is evidence to support such violations. However, if the violations are based upon the statutory presumption of continuing violation, only those dates after notification may be included. When the presumption of continuing noncompliance can be invoked and there is no evidence of compliance, the date of completion of the demolition or renovation should be used as the date of compliance. (U.S. v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013 (D.N.J. 1988))[4] Where there has been no compliance and the demolition or renovation activities are ongoing, the penalty should be calculated as of the date of the referral and revised upon a completion date or the date upon which correction of the violation occurs.

Successive violations exist at the same facility when there is evidence of violations on separate days, but no evidence (or presumption) that the violations were continuing during the

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[4] The court in Tzavah held that for purposes of asbestos NESHAP requirements, a demolition or renovation project has not been completed until the NESHAP has been complied with and all asbestos waste has been properly disposed. 696 F. Supp. at 1019.

intervening days. For example, where there has been more than one inspection and no evidence of a continuing violation, violations uncovered at each inspection should be calculated as separate successive violations. As discussed in Section C (1) above, successive violations occurring at a single demolition or renovation project will each be treated as first violations, unless they are initially treated as second or subsequent violations based upon a finding of prior violations at a different jobsite or because they warrant escalation based upon the fact that the current job is done in distinct phases or is unusually long in duration. The chart on page 16 reflects that additional days of violation for which there is inspection evidence are assessed the full substantive penalty amount while additional days based upon the presumption of continuing violation are assessed only ten percent of the substantive penalty per day.

Since asbestos projects are usually short-lived, any correction of substantive violations must be prompt to be effective. Therefore, EPA expects that work practice violations brought to the attention of an owner or operator will be corrected promptly, thus ending the presumption of continuing violation. This correction should not be a mitigating factor, rather this policy recognizes that the failure to promptly correct the environmental harm and the attendant human health risk implicitly increases the gravity of the violation. In particularly egregious cases the Region should consider enhancing the penalty based on the factors set forth in the General Penalty Policy.

3. Size of the Violator

An increase in the gravity component based upon the size of the violator's business should be calculated in accordance with the General Penalty Policy. Where there are multiple defendants, the Region has discretion to base the size of the violator calculation on any one or all of the defendants' assets. The Region may choose to use the size of the more culpable defendant if such determination is warranted by the facts of the case or it may choose to calculate each defendant's size separately and apportion this part of the penalty (see discussion of apportionment below).

## II. ECONOMIC BENEFIT COMPONENT

This component is a measure of the economic benefit accruing to the operator (usually a contractor), the facility owner, or both, as a result of noncompliance with the asbestos regulations. Information on actual economic benefit should be used if available. It is difficult to determine actual economic benefit,

but a comparison of unsuccessful bids with the successful bid may provide an initial point of departure. A comparison of the operator's actual expenses with the contract price is another indicator. In the absence of reliable information regarding a defendant's actual expenses, the attached chart provides figures which may be used as a "rule of thumb" to determine the costs of stripping, removing, disposing of and handling asbestos in compliance with § 61.145(c) and §61.150. The figures are based on rough cost estimates of asbestos removal nationwide. If any portion of the job is done in compliance, the economic benefit should be based only on the asbestos improperly handled. It should be assumed, unless there is convincing evidence to the contrary, that all stripping, removal, disposal and handling was done improperly if such improper practices are observed by the inspector.

## III. APPORTIONMENT OF THE PENALTY

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, more than one contractor and/or the facility owner will be named as defendants. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the multiple defendants can allocate among themselves as they wish. On the other hand, if one party is particularly deserving of punishment so as to deter future violations, separate settlements may ensure that the offending party pays the appropriate penalty.

It is not necessary in applying this penalty policy to allocate the economic benefit to each of the parties precisely. The total benefit accruing to the parties should be used for this component. Depending on the circumstances, the economic benefit may actually be split among the parties in any combination. For example, if the contractor charges the owner fair market value for compliance with asbestos removal requirements and fails to comply, the contractor has derived an economic benefit and the owner has not. If the contractor underbids because it does not factor in compliance with asbestos requirements, the facility owner has realized the full amount of the financial savings. (In such an instance, the contractor may have also received a benefit which is harder to quantify - obtaining the contract by virtue of the low bid.)

There are circumstances in which the Government may try to influence apportionment of the penalty. For example, if one party is a second offender, the Government may try to assure that such party pays the portion of the penalty attributable to the second offense. If one party is known to have realized all or most of the economic benefit, that party may be asked to pay for

that amount. Other circumstances may arise in which one party appears more culpable than others. We realize, however, that it may be impractical to dictate allocation of the penalties in negotiating a settlement with multiple defendants. The Government should therefore adopt a single "bottom line" sum for the case and should not reject a settlement which meets the bottom line because of the way the amount is apportioned.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the Government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or second offense), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. However, the Government should also be flexible enough to mitigate the penalty for cooperativeness in accordance with the General Penalty Policy. If a case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole should be sought from the remaining defendants. This remainder can be adjusted upward, in accordance with the general Civil Penalty Policy, if the circumstances warrant it. Of course, the case can also be litigated against the remaining defendants for the maximum attainable penalty. In order to assure that the full penalty amount can be collected from separate settlements, it is recommended that the litigation team use ABEL calculations, tax returns, audited financial statements and other reliable financial documents for all defendants prior to making settlement offers.

## IV. OTHER CONSIDERATIONS

The policy seeks substantial penalties for substantive violations and repeat violations. Penalties should generally be sought for all violations which fit these categories. If a company knowingly violates the regulations, particularly if the violations are severe or the company has a prior history of violations, the Region should consider initiating a criminal enforcement action.

The best way to prevent future violations of notice and work practice requirements is to ensure that management procedures and training programs are in place to maintain compliance. Such injunctive relief, in the nature of environmental auditing and compliance certification or internal asbestos control programs, are desirable provisions to include in consent decrees settling asbestos violations.

## 7. EXAMPLES

Following are two examples of application of this policy[5].

Example 1 (This example illustrates calculations involving proof of continuing violations based on the inferences drawn from the evidence)

XYZ Associates hires America's Best Demolition Contractors to demolish a dilapidated abandoned building containing 1300 linear feet of pipe covered with friable asbestos, and 1600 square feet of siding and roofing sprayed with asbestos. Neither company notifies EPA or State officials prior to commencing demolition of the building on November 1. Tipped off by a citizen complaint, EPA inspects the site on November 5 and finds that the contractor has not been wetting the suspected asbestos removed from the building, in violation of 40 C.F.R. § 61.145(c)(3). In addition, the contractor has piled dry asbestos waste material on a plastic sheet in the work area pending its disposal, in violation of 40 C.F.R § 61.145(c)(6)(i). There is no evidence of any visible emissions from this pile. During the inspection, the site supervisor professes complete ignorance of asbestos NESHAP requirements. An employee tells the inspector that workers were never told the material on-site contained asbestos and states "since this job began we've just been scraping the pipe coverings off with our hammers." The inspector observes there is no water at the site. The inspector takes samples and sends them to an EPA approved lab which later confirms that the material is asbestos. Work is stopped until the next day when a water tank truck is brought to the facility for use in wetting during removal and storage.

On November 12 the inspector returns to the site only to find that the workers are dry stripping the siding and roofing because the water supply had been exhausted and the tank truck removed. A worker reports that the water supply had lasted four days before it ran out at the close of the November 9 work day. The inspector observes a new pile of dry asbestos containing debris in tall grass at the back of the property. Unlike the pile observed inside the facility during the first inspection, this pile is presumed to have produced visible emissions. At the time of the second inspection 75% of the asbestos had been removed from the building 50% of which is deemed to have been

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[5] The examples are intended to illustrate application of the civil penalty policy. For purposes of this policy, any criminal conduct that may be implied in the examples has been ignored. Of course, in appropriate cases, prosecution for criminal violations should be pursued through appropriate channels.

improperly removed[6]. After discussion with EPA officials, work is halted at the site and XYZ Associates hires another contractor to properly dispose of the asbestos wastes and to remove the remaining 25% of the asbestos in compliance with the asbestos NESHAP. The new contractor completes disposal of the illegal waste pile on November 18.

Neither XYZ Associates nor America's Best Demolition Contractors has ever been cited for asbestos violations by EPA or the State. Both companies have assets of approximately $5,000,000.00 and have sufficient resources to pay a substantial penalty.

The defendants committed the following violations: one violation of the notice provision (§ 61.145(b)(1)); one violation for failure to wet during stripping (§ 61.145(c)(3)) and failure to keep wet until disposal (§ 61.145(c)(6)(i)), each detected at the first inspection and lasting a duration of five days (Nov. 1-5); a second separate dry stripping violation (§ 61.145(c)(3)), observed at the second inspection and lasting for three days (Nov. 10-12); an improper disposal violation (§ 61.150(b)), discovered during the second inspection, lasting a duration of nine days (the violation began on November 10 and continued to November 18 per Tzavah) and a visible emissions violation (§61.150(a)) discovered during the second inspection, lasting a duration of seven days (Nov. 12-18). Thus, the defendants are liable for a statutory maximum of $750,000 (29 days of work practice violations x $25,000 (statutory maximum penalty per day of each separate substantive violation) + $25,000[7] for the notice violation = $750,000).

The penalty is computed as follows:

Gravity Component

| | |
|---|---|
| Notice violation, § 61.145(b) (first time) | $15,000 |

---

[6] America's Best completed 75% of the work over a 12 day period. For 4 of the 12 days (Nov.6-9) there is evidence that water was used and asbestos properly handled. Assume that equal amounts of asbestos were removed each day. Thus, 50% of the asbestos was properly removed (25% by America's Best, 25% by the new contractor.

[7] Arguably, for purposes of calculating the statutory maximum, the notice violation can be construed to have lasted at least until the EPA has actual notice of the demolition (or renovation, as the case may be).

-- First Inspection Violations

| | | |
|---|---|---|
| Violation of § 61.145(c)(3) (10 + 5 = 15 units of asbestos) (1 x $10,000) | $10,000 | |
| Additional days of violation ($1,000 x 4 days of violations) | $ 4,000 | |
| Violation of § 61.145(c)(6)(i) (1 x $10,000) | $10,000 | |
| Additional days of violation ($1,000 x 4 days of violations) | $ 4,000 | |

-- Second Inspection Violations

| | | |
|---|---|---|
| New violation of § 61.145(c)(3) (1 x $10,000) | $10,000 | |
| Additional days of violation ($1,000 x 2 days of violations) | $ 2,000 | |
| Violation of §61.150(a) (1 x $10,000) | $10,000 | |
| Additional days of violation ($1,000 x 6 days of violations) | $ 6,000 | |
| Violation of § 61.150(b) (1 x $10,000) | $10,000 | |
| Additional days of violation ($1,000 x 8 days of violations) | $ 8,000 | |
| | $109,000 | |
| -- Size of Violator (size of both defendants combined) | $20,000 | |
| Total Gravity Component | | $129,000 |

Economic Benefit Component

| | |
|---|---|
| $20/sq. foot x 1600 sq. feet + | $32,000 |
| $20/linear foot x 1300 linear feet | + 26,000 |
| | $58,000 |

| | |
|---|---|
| $58,000 x 50% (% of asbestos improperly handled) | $ 29,000 |
| Preliminary Deterrence Amount | $158,000 |
| Adjustment factors - No adjustment for prompt correction of environmental problem because that is what the defendant is supposed to do. | |
| Minimum penalty settlement amount | $158,000 |

NOTE: If the statutory maximum had been smaller than this sum, then the minimum penalty would have to be adjusted accordingly. Also, for the dry stripping violations, no additional days were added for the period between the two inspections because there was no evidence that the dry stripping had continued in the interim period.

Example 2 (This example illustrates calculations involving proof of continuing violations based on the statutory inference drawn from the notice of violation)

Consolidated Conglomerates, Inc. hires Bert and Ernie's Trucking Company to demolish a building which contains 1,000 linear feet of friable asbestos on pipes. Neither party gives notice to EPA or to the state prior to commencement of demolition. An EPA inspector acting on a tip, visits the site on April 1, the first day of the building demolition. During the inspection he observes workers removing pipe coverings dry. Further inquiry reveals there is no water available on site. He also finds a large uncontained pile of what appears to be dry asbestos-containing waste material at the bottom of an embankment behind the building. He takes samples and issues an oral notice of violation citing to 40 C.F.R. §§ 61.145(c)(3) (dry removal), 61.145(c)(6)(i) (failure to keep wet until disposal), and 61.150(a) (visible emissions)[8], and gives the job supervisor a copy of the asbestos NESHAP. Test results confirm the samples contain a substantial percentage of asbestos.

On April 12, the inspector receives information from a

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[8] Regardless of whether the inspector observes emissions of asbestos during a site inspection, where there is circumstantial evidence (such as uncontained, dry asbestos piles outside), that supports a conclusion that visible emissions were present, the Region has discretion to include this violation.

reliable source that the pile of dry asbestos debris has not been properly disposed of and there is still no access to water at the facility. This information supports a new violation of §61.150(b) (improper disposal). The inspector revisits the site on April 22 and determines that the waste pile has been removed. A representative of Consolidated Conglomerates, Inc. gives the inspector documents showing that actual work at the demolition site concluded on April 17, but the contractor cannot document when the debris pile was removed. Thus, there are at least 61 days of violation (17 days of dry removal in violation of § 61.145(c)(3) 22 days of failure to keep wet until disposal in violation of §61.145(c)(6)(i), 11 days of visible emissions in violation of §61.150(a) and 11 days of improper disposal in violation of § 61.150(b)) times $25,000 per day, plus $25,000 for the notice violation[9], or a statutory maximum of $1,550,000.

Consolidated Conglomerates is a corporation with assets of over $100 million and annual sales in excess of $10 million. Bert and Ernie's Trucking is a limited partnership of two brothers who own tow trucks and have less than $25,000 worth of business each year. This contract was for $50,000. Bert and Ernie's was once previously cited by the State Department of Environmental Quality for violations of asbestos regulations. As a result, all violations are deemed to be second violations.

The penalty is computed as follows:

<u>Gravity Component</u>

| | |
|---|---|
| No notice (2nd violation) | $ 20,000 |
| Violation of §61.145(c)(3) (approx. 3.85 units) (second violation) | $ 15,000 |
| Additional days of violation (per presumption) (16 x $1,500) | $ 24,000 |
| Violation of §61.145(c)(6)(i) (second violation) | $ 15,000 |
| Additional days of violation (per presumption) (21 x $1,500) | $ 31,500 |
| Violation of §61.150(a) | $ 15,000 |

[9] See footnote 3.

| | | |
|---|---|---|
| (second violation) | | |
| Additional days of violation (per presumption) (10 x $1,500) | $ 15,000 | |
| Violation of §61.150(b) (second violation) | $ 15,000 | |
| Additional days of violation (per presumption) (10 x $1,500) | $ 15,000 | |
| | $180,500 | |
| Size of Violator (based on Bert and Ernie's size only) | $ 2,000 | |
| Total Gravity Component | $182,500 | |
| Economic Benefit Component | | |
| $20/linear foot x 1,000 linear feet | $ 20,000 | |
| Preliminary Deterrence Amount | | $202,500 |
| Adjustment factors - 10% increase for willfulness | $ 18,250 | |
| Minimum Settlement Penalty Amount | | $220,750 |

NOTE: Since this example assumes there was a proper factual basis for invoking the statutory presumption of continuing noncompliance, the duration of the §61.150(a) visible emissions and § 61.150(b) disposal violation runs to April 21 and the § 61.145(c)(3) dry removal violation runs to April 17, the longest periods for which noncompliance can be presumed.

Apportionment of the Penalty

The calculation of the gravity component of the penalty in this case reflects a $5,000 increase in the notice penalty and a $48,500 increase in the penalty for substantive violations because it involves a second violation by the contractor. Ordinarily, the Government should try to get Bert and Ernie's to pay at least these additional penalty amounts. However, Consolidated Conglomerate's financial size compared to the contractor's may dictate that Consolidated pay most of the penalty.

Notification and Waste Shipment Record Violations

| Notification Violations | 1st Violation | 2nd Violation | Subsequent |
|---|---|---|---|
| No notice | $15,000 | $20,000 | $25,000 |
| No notice but probable substantive compliance | $ 5,000 | $15,000 | $25,000 |

Late, Incomplete or Inaccurate notice.

For each notice, select the single largest dollar figure that applies from the following table. These violations are assessed a one-time penalty except for waste shipment vehicle marking which should be assessed a penalty per day of shipment. Add the dollar figures for each notice or waste shipment violation:

| | |
|---|---|
| Notice submitted after asbestos removal completed tantamount to no notice. | $15,000 |
| Notice lacks both job location and asbestos removal starting and completion dates. | 4,000 |
| Notice submitted while asbestos removal is in progress. | 2,000 |
| Notice lacks either job location or asbestos removal starting and completion dates. | 2,000 |
| Failure to update notice when amount of asbestos changes by at least 20% | 2,000 |
| Failure to provide telephone and written notice when start date changes | 2,000 |
| Notice lacks either asbestos removal starting or completion dates, but not both. | 1,000 |
| Amount of asbestos in notice is missing, improperly dimensioned, or for multiple facilities. | 500 |
| Notice lacks any other required information. | 200 |
| Notice submitted late, but still prior to asbestos removal starting date. | 200 |

Waste Shipment Violations

| | |
|---|---|
| Failure to maintain records which precludes discovery of waste disposal activity | 2,000 |
| Failure to maintain records but other information regarding waste disposal available | 1,000 |
| Failure to mark waste transport vehicles during loading and unloading (assess for each day of shipment) | 1,000 |

## Work-practice, Emission and Other Violations

### Gravity Component

| Total amount of asbestos involved in the operation | First violation | Each add. day of violation | Second violation | Each add. day of violation | Subsequent violations | Each add. day of violation |
|---|---|---|---|---|---|---|
| ≤ 10 units | $ 5,000 | $ 500 | $15,000 | $ 1,500 | $25,000 | $ 2,500 |
| > 10 units but ≤ 50 units | $10,000 | $ 1,000 | $20,000 | $ 2,000 | $25,000 | $ 2,500 |
| > 50 units | $15,000 | $ 1,500 | $25,000 | $ 2,500 | $25,000 | $ 2,500 |

Unit = 260 linear feet, 160 square feet or 35 cubic feet - if more than one is involved, convert each amount to units and add together

Apply matrix separately to each violation of §61.145(a) and each sub-paragraph of § 61.145(c) and § 61.150, except §61.150(d) (waste shipment records) which is treated as a one time violation and § 61.150(c) (vehicle marking) (see chart on pages 15-16); calculate additional days of violation, when applicable, for each sub-paragraph - add together

### Benefit Component

For asbestos on pipes or other facility components:

$20 per linear, square or cubic foot of asbestos for any substantive violation.

## Appendix IV: Volatile Organix Compounds Penalty Policy

revised 03/25/87

APPENDIX IV

# CLEAN AIR ACT PENALTY POLICY AS APPLIED TO STATIONARY SOURCES OF VOLATILE ORGANIC COMPOUNDS WHERE REFORMULATION TO LOW SOLVENT TECHNOLOGY IS THE APPLICABLE METHOD OF COMPLIANCE

## Introduction

This addendum provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of district court enforcement actions, pursuant to Title I of the Clean Air Act (CAA), against sources of volatile organic compounds (VOC's) in violation of State Implementation Plan emission limitations, where low solvent technology (LST) is an acceptable control strategy for achieving compliance. If compliance using LST is the control strategy chosen by the source and if it can be implemented expeditiously, the penalty analysis methodology set forth in this appendix must be used. If compliance using LST is not the compliance strategy chosen by the source, or if LST cannot be accomplished expeditiously or is not available, the penalty must be calculated according to the general Clean Air Act Stationary Source Civil Penalty Policy, (hereinafter CAA Penalty Policy), based on the costs of add-on controls.

A separate policy for arriving at a penalty figure in VOC cases where LST is an acceptable control strategy is necessary because penalties calculated pursuant to the general CAA Penalty Policy in such instances are insufficient to deter violations.[1] The general CAA Penalty Policy focuses upon recapturing

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1/ Penalties must be high enough to have the desired specific and general deterrent effects. They must also be, to the extent possible, objective in order to ensure fairness. The general CAA Penalty Policy, relying on the cost of pollution control equipment, does not provide such penalties in the case of VOC sources using LST. Indeed VOC penalties have been much smaller than the penalties collected in other CAA cases. A sample of VOC sources, with total sales in the $10,000,000 range, have had civil penalties ranging from $2,000 to $45,000. By comparison, a company cited for TSP violations, with sales in 1983 of $4,656,000, will be asked to pay a minimum of $75,000 in penalties.

the economic savings of non-compliance based upon the typically substantial capital expenditures and operation and maintenance costs of the necessary pollution control equipment. The capital costs of implementing LST are by comparison relatively small, and in many cases LST actually results in a net economic savings.2/

This guidance, therefore, sets forth an objective methodology for arriving at a substantial cash penalty figure in cases not requiring the expenses associated with add-on technology. Specifically, in all VOC cases including those where a source may choose to come into compliance using LST as a control option, Regions must base their pre-negotiation penalty calculations for the Economic Benefit Component on the cost of add-on controls. Once negotiations begin, the Region may recalculate the penalty figure using the alternative methodology in this Appendix where applicable based on information to be supplied by the source. The Economic Benefit Component will be re-calculated based on the cost of LST as a control option. An additional penalty component (hereinafter referred to as the Production Component) must thereafter be calculated by multiplying the dollar amount of sales on the non-complying lines as reported by the source, by the average return on sales for the industry, to be supplied by NEIC. The average return on sales is the norm for the industry for net profits after taxes divided by total sales. Industry-specific average return on sales multipliers are available from the Information Services Office at NEIC in Denver, FTS 776-5124 (contact Charlene Swibas). NEIC will require the following information from the Region to calculate the average return on sales multiplier for an individual source: (1) type of VOC source, (2) total assets or number of employees, and (3) dollar amount of sales produced on the non-complying lines by year. In this regard, EPA should advise sources that it is to their benefit

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2/ Although substantial capital expenditures are required for VOC sources using add-on technology to come into compliance, sources having the option of using low solvent or water-based technology derive economic savings by coming into compliance. For example, reformulation to LST generally involves only minor mechanical and process modifications costing less than $10,000. (See note 4 infra.) These small outlays are recaptured by subsequent cost savings. For example, water-based coatings are usually less expensive. Similarly, high solid emulsion-LSTs, although perhaps more expensive on a volume basis, are more efficient when properly applied, requiring fewer coatings. Reduced VOC emissions result in further indirect savings in the form of lower employee health problems and absenteism, reduction in the cost and amount of OSHA-required ventilation, and lower fire insurance rates. Finally, the vast majority of VOC sources having LST as a readily available option for compliance make only small investments in R&D, expenditures which are, moreover, fully tax deductible.

to supply EPA with detailed information such as a plant specific breakdown of assets rather than company-wide reports, and line-by-line sales figures. This will help ensure that the penalty is limited to sales from production on their non-complying lines as opposed to their total sales. When verifiable line-by-line production information is not available, the Regions must base their estimates on sources' total sales as reported in company books and annual reports. In addition, the Production Component figure may be adjusted to reflect the source's actual return on sales where this figure can be established from reliable information.

The total of the Production and Economic Benefit Components should be compared to the penalty that would have been imposed were the source coming into compliance using add-on controls. In no event should the total of the Economic Benefit and Production Components exceed the penalty amount based solely on the cost of add-on controls.

This policy may be used in all situations involving LST as an acceptable compliance option, including those where the source is granted an expeditious schedule to continue development of LST, but may ultimately have to comply using add-on controls. In those situations where the source will comply through a combination of LST and add-on controls, the penalty may be adjusted in accordance with this Appendix only to the extent the two compliance options and the source's financial data are segregable on a line-by-line basis.

No other adjustments to the Economic Benefit and Production Components may be made other than as contemplated in the general CAA Penalty Policy. These adjustments are described in Section II.A.3. of the general policy. In addition, in all cases the Gravity Component should be estimated in accordance with the general CAA Penalty Policy. This policy is based upon the principles established by the CAA Penalty Policy and general Agency policies.

The Production Component formula produces penalties which automatically account for the size of the source and correlate with the emissions volume from non-complying lines. Moreover, attaching a source's after tax net profits on noncomplying production helps to ensure a meaningful penalty without impinging on employee salaries, necessary operating costs, or tax deductions for good faith pollution control expenditures such as R & D on LST.

Removing the profitability of non-complying production is particularly appropriate in cases where LST is an acceptable control strategy due to the ease with which many such sources could have come into compliance, as well as the competitive advantage some VOC sources obtain from non-compliance. For example, many paper coating concerns have continued to use high solvent coatings due to the versatility such solutions afford in meeting customer preferences such as color brightness. Such VOC sources are, thus, probably able to capture a larger share of the market due to their noncompliance. Similarly, metal furniture coaters have had high solid emulsion-LSTs available for many years. Many sources have, however, delayed the minimal costs and process changes necessary to come into compliance, perhaps enabling these businesses, in the short run, to offer their products at a slightly reduced price.3/

What follows is the specific methodology to be applied in calculating civil penalty settlement amounts in actions against sources of VOC where LST is an acceptable control strategy.

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3/ Use of high solid emulsion-LST requires installation of a $5-7,000 emulsion heater, retraining of employess to apply the thicker emulsion, and installation of a larger or more efficient metal washing system to prevent pitting. As is noted above, however, these costs are in the long run recaptured by the economic savings associated with high solid emulsion-LST. (See note 2 supra.)

Alternative Methodology for Calculating VOC Penalties Where LST is the Applicable Method of Compliance

ECONOMIC BENEFIT COMPONENT*

+

PRODUCTION COMPONENT
total sales from production on non-complying lines
x industry norm return on sales

Compare this figure to the penalty based on the cost of add-on controls as the control option. Use the lower of the two figures.

±

Settlement Adjustments to Production Component**
substitute the source's actual return on sales
for the average industry return on sales

±

GRAVITY COMPONENT*

±

Settlement Adjustments to Gravity Component*

ADJUSTED MINIMUM PENALTY FIGURE

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* See, Clean Air Act Civil Penalty Policy for the procedures to follow in making these calculations. Note, however, that the CAA Penalty Policy permits Regions in their discretion not to seek to recover the Benefit Component when it is likely to be less than $5,000. This Appendix contemplates including the Economic Benefit Component along with the Production Component even where the Economic Benefit is estimated to be less than $5,000. If the combination of both the Economic Benefit and Production Components is estimated to be less than $5,000, it is not necessary for the case development team to include either one in the minimum settlement penalty amount.

** Note that the considerations described in Section II.A.3 of the general policy may also be applied in adjusting the Production Component, as well as the Economic Benefit Component.

**Appendix V: Air Civil Penalty Worksheet**

**revised 03/25/87**

APPENDIX V

Air Civil Penalty Worksheet

A. Benefit Component: _____
(enter from computer calculation)

B. Gravity Component:

1. Actual or possible harm

a. Amount above standard: _____
b. Toxicity of pollutant: _____
c. Sensitivity of environment _____
d. Length of time of violation _____
2. Importance to regulatory scheme: _____

3. Size of violator: _____

Total gravity component: _____

Preliminary deterrence amount: _____
(sum of benefit and gravity components)

C. Flexibility-Adjustment Factors:

1. Degree of willfulness or negligence:

total gravity component x any augmentation percentage _____

2. Degree of cooperation:

total gravity component x any mitigation percentage _____

3. History of noncompliance:

total gravity component x any augmentation percentage _____

4. Ability to pay:

any mitigation amount _____

5. Other unique factors:

total gravity component x any mitigation or augmentation percentage _____

All augmentation (+) and mitigation (-) amounts added: (if negative, cannot exceed total gravity component) _____

D. Initial Minimum Settlement Amount:
Preliminary Deterrence Amount + or -
Sum of Flexibility Adjustment Factors: _____

# Appendix VI: Volatile Hazardous Air Pollutant Penalty Policy

added 03/02/88

new appendix added 03/02/88

# APPENDIX VI

## Volatile Hazardous Air Pollutant Civil Penalty Policy

This policy shall be used to determine the gravity component of the civil penalty settlement amount for cases enforcing the National Emission Standard for Equipment Leaks (Fugitive Emission Sources), 40 C.F.R. Part 61, Subpart V, which applies to volatile hazardous air pollutants (VHAP) and the general reporting requirements of Subpart A. It is to be used in lieu of the scheme for determining the gravity component set forth in the general Clean Air Act Stationary Source Civil Penalty Policy. It is intended as a supplement to the Vinyl Chloride Civil Penalty Policy for vinyl chloride cases. In those vinyl chloride cases in which the vinyl chloride and VHAP civil penalty policies are inconsistent (such as the $25,000 penalty for failure to timely submit a complete semi-annual report under the vinyl chloride policy versus the $15,000 penalty for the same violation under the VHAP policy) the vinyl chloride penalty policy should be applied.

The preliminary deterrence amount for VHAP cases, as for other stationary source cases, consists of a gravity component and a benefit component. Adjustments for degree of willfulness or negligence, degree of cooperation, history of noncompliance, ability to pay, litigation practicalities, and "other unique factors" should be made, if appropriate, in accordance with the Stationary Source Civil Penalty Policy. Additionally, adjustments may be considered because a company's VHAP/VOC emissions or potential emissions are more serious in a nonattainment area for ozone. Reporting penalties could be adjusted depending on the number of VHAP sources, that is, whether a plant has few or numerous valves and pumps.

The gravity component of the penalty reflects the seriousness of the violation. A separate scheme has been developed for VHAP cases partly because the economic benefit component may be difficult to determine, although if the economic benefit can be calculated, it should be. In addition, several factors in the general policy, such as the level of violation as a percentage above the standard, do not directly apply to VHAP cases. The hazardous nature of VHAPs is reflected in establishing a substantial gravity component.

The attached chart addresses six major types of requirements in the VHAP standard:

1) Reporting. A source is required to submit initial and semiannual reports which include, among other things, a listing of equipment in VHAP service, records of leaks from certain pieces of equipment and repairs of leaks, and results of performance tests.

2) Monitoring, inspection, and testing. The standard includes four types of such requirements: annual testing, such as testing from certain requirements, under §61.242-2(e)(3); monthly monitoring, such as monitoring of valves under §61.242-7(a); weekly inspection, such as visual inspection of a pump under §61.242-2(a)(2); and daily checking, such as checking a sensor on a compressor seal system under §61.242-3(e)(1).

3) Repair of leaks. The standard generally requires that a source, upon detection of a leak from regulated equipment, make a first attempt at repair within 5 calendar days of detection and complete the repair as soon as practicable but not later than 15 calendar days after detection. Since violations of these requirements appear to present the greatest potential for emissions of VHAPs, the associated penalties are substantial.

4) Equipment standards. Certain pieces of equipment must comply with requirements that specify that they be equipped with certain devices, sometimes as an alternative to another standard. For example, a compressor must be equipped with a seal system that includes a barrier fluid system and that prevents leakage of process fluid to the atmosphere, with certain exceptions, in accordance with §61.242-3(a). One allowable alternative is that the compressor be equipped with a closed-vent system capable of capturing and transporting any leakage to a control device, in accordance with §61.242-3(h). Another example is open-ended valves which must be capped or otherwise secured.

5) Recordkeeping. A source must keep records of a number of items, including leaks and attempts to repair leaks, design parameters of certain equipment, and dates of startups and shutdowns of closed-vent systems and control devices.

6) Marking equipment - Equipment in VHAP service must be tagged and leaking equipment must be separately or additionally tagged.

The chart assigns a gravity component for each violation. For equipment standards, noncompliance with respect to each piece of affected equipment (e.g., pump, compressor, etc.) constitutes a separate violation for purposes of this policy. For monitoring, inspection, and testing provisions, noncompliance with respect to each requirement (e.g., monthly monitoring of pumps, monthly monitoring of valves) constitutes a separate violation. Do not count each pump or valve as a separate violation if not monitored. The gravity component for the case as a whole is the sum of the numbers associated with all the violations in the case.

| Type of Volation | Penalty |
|---|---|
| REPORTING | |
| Initial Report | |
| Failure to submit initial report for new or existing source | $25,000 |
| Late submission of initial report | $500/day up to $25,000 |
| On-time but incomplete initial report. Estimate percentage of information missing. If missing information submitted without prompting $400/day, up to the figure calculated above | $25,000 x % of information missing |
| Semi-annual Reports | |
| Failure to submit semiannual report | $15,000 per report |
| Late submission of semiannual report [If submitted only in response to prompting by EPA or delegated agency, regard as failure to submit report] | $150/day up to 15,000 per report |
| On-time but incomplete semiannual report - estimate percentage of information missing. If missing information submitted without prompting by the government $125/day up to the figure calculated above. | $15,000 x % of information missing |

| Type of Violation | Penalty |
|---|---|
| **Non-response** | |
| Failure to respond to prompting (written requests) regarding reports | $25,000 |
| **MONITORING, INSPECTION, AND TESTING** | |
| Annual requirement | $10,000 + $250/day up to $25,000 total |
| Monthly requirement | $5,000 + $250/day (up to $7500 total for missed month) |
| Weekly requirement | $500 + $150/day up to $1500 total for missed week |
| Daily requirement | $100/day for each day missed for first 10 daily inspections missed.<br>$500/day for each daily inspection missed thereafter. |
| For any monitoring, inspection or testing timely performed, but performed incorrectly, assess 50% of the above penalties | |
| **REPAIR OF LEAKS** | |
| Failure to make first attempt at repair within specified time | $5000/day up to $25,000 per leak |
| Failure to complete repair within specified time | $5000/day up to $25,000 per leak |
| Violations of alternative standards for valves in VHAP service pursuant to 40 CFR §61.243 | $5000/day up to $25,000 |

| Type of Violation | Penalty |
|---|---|
| **EQUIPMENT STANDARDS** | |
| Failure to equip with required device | $15,000 per item inadequately equipped |
| **RECORDKEEPING** | |
| Failure to keep records in logs pursuant to 40 C.F.R. §61.246 for period associated with semiannual report | $25,000 per semiannual period |
| Incomplete records - estimate percentage of information missing | $25,000 per semiannual period x % of information missing |
| **FAILURE TO MARK (TAG) EQUIPMENT** | |
| Mark equipment in VHAP service | $100/day per piece of equipment up to $5,000 |
| Mark leaking equipment | $500/day per piece of equipment up to $5,000 |

# Appendix VII: Penalty Policy for New Residential Wood Heaters

added 09/14/89

## CLEAN AIR ACT STATIONARY SOURCE PENALTY POLICY
## APPENDIX VII

### RESIDENTIAL WOOD HEATERS
### 40 C.F.R. PART 60, SUBPART AAA

The Clean Air Act Stationary Source Civil Penalty Policy ("the CAA penalty policy" or "the general penalty policy") provides the basis for determining the minimum civil penalty U.S. EPA will accept in settlement of enforcement actions taken pursuant to Title I of the Clean Air Act. The CAA penalty policy provides guidance to pre-trial settlement of initial enforcement actions in district courts.

The New Source Performance Standard for Residential Wood Heaters, 40 C.F.R. Part 60, Subpart AAA, warrants a penalty scheme related to the CAA penalty policy, but adjusted to reflect certain unique features of the wood heater industry. Unlike other NSPS programs, for example, the wood heater[1] standard regulates a mass-produced consumer product marketed nationally and is directed at manufacturers as well as retailers and distributors. In addition, management of the wood stove enforcement program will be centralized at Headquarters rather than delegated to the Regions.

This appendix should be used in conjunction with the general penalty policy to determine the preliminary deterrence amount, which is the sum of the economic benefit[2] accruing from noncompliance and the gravity component reflecting the seriousness of the violation.[3] This appendix retains in full the concept of adjusting the gravity component to provide equitable treatment of the regulated community. The penalty adjustments may be based upon consideration of the violator's: (1) degree of willfulness or negligence, (2) degree of cooperation, including prompt reporting of noncompliance and prompt correction

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1/ For the purpose of this penalty policy, the following terms will be used interchangeably and regarded as synonymous: "residential wood heater," "residential wood stove," "wood heater," "wood stove."

2/ The economic benefit gained by a violator due to delayed or avoided costs will be determined using the BEN computer model. In certain instances, the government may settle a case for an amount less than the calculated economic benefit after evaluating the factors mentioned in the general penalty policy.

3/ In determining of the amount of civil penalty, Section 113 of the CAA lists three considerations, <u>inter alia</u>: (1) size of the business, (2) economic impact of the penalty on the business, and (3) seriousness of the violation.

of environmental problems, (3) history of noncompliance, (4) ability to pay, and (5) other unique factors.

The wood stove penalty policy details most of the violations articulated in the regulations and assesses a basic penalty for each. Of the factors set forth in the general penalty policy only the size of the violator matrix and the adjustment factors are retained completely. The matrix for length of time of violation has been revised. All other factors are inapplicable to the wood stove penalty policy.

Every gravity component calculation will be based on a case-by-case examination of the facts underlying the enforcement action. In developing the penalty values for these violations, we evaluated the relative importance of each respective requirement to the regulatory scheme. In certain instances, U.S. EPA may find that a deviation from a requirement is tantamount to a complete violation and hold the violator liable for the full amount of the assessed penalty. In other instances, however, U.S. EPA may believe that the deviation is minor and therefore assess a reduced penalty. As an example, consider the §60.538(b) violation, offering for sale a stove without a permanent label. If the stove has no label at all, the full penalty will be levied. If, on the other hand, the permanent label is merely deficient, not conforming to the requirements under §60.536(a)(1)(2), then the penalty amount assessed will likely be less than the full amount. The following violations fall into this "none/deficient" category:

| | |
|---|---|
| - 60.533(o)(2) | parameter quality assurance program |
| - 60.533(o)(3) | emission test QA program |
| - 60.536(a)(1),(2) | permanent label |
| - 60.537(a)(1),(2) | maintain record of certification test |
| - 60.537(a)(1),(3) | maintain record of parameter QA program |
| - 60.537(a)(1),(4) | maintain record of emission test QA program |
| - 60.537(a)(1),(5) | maintain record of sales |
| - 60.537(c) | maintain/produce sealed stove |
| - 60.537(e)(1),(4) | apply for small manufacturer exemption |
| - 60.537(e)(2) | report number of exempted stoves manufactured |
| - 60.537(e)(3) | maintain record of production |
| - 60.537(f) | report biennially on certified model lines |
| - 60.537(g) | maintain record of exempted stoves |
| - 60.537(h) | maintain record of used stoves |
| - 60.537(i) | maintain records for five years |
| - 60.538(a) | operation of stove without permanent label |
| - 60.538(b) | offer for sale a stove w/o permanent label |
| - 60.538(d)(1),(2) | offer for sale a stove w/o temporary label |
| - 60.538(d)(1)(ii) | offer for sale a stove w/o owner's manual |

For the other violations contained in pages 3 to 6 of this penalty policy, U.S. EPA intends to assess the full amount.

## CALCULATION OF GRAVITY COMPONENT

**SIZE OF THE VIOLATOR** (calculate once per violator)

Net worth of corporation or
net current assets of partnership:

| | |
|---|---|
| Under $100,000 | $1,000 |
| $100,001 - $1,000,000 | 2,000 |
| $1,000,001 - $5,000,000 | 8,000 |
| $5,000,001 - $20,000,000 | 12,000 |
| $20,000,001 - $40,000,000 | 20,000 |
| $41,000,001 - $70,000,000 | 40,000 |
| Over $70,000,000 | 65,000 |

**LENGTH OF TIME OF VIOLATION** (calculate for each violation)

| | |
|---|---|
| 0 to 6 months | $ 500 |
| 7 to 12 months | 1,000 |
| 13 to 18 months | 1,500 |
| over 19 months | 2,000 |

**VIOLATIONS OF 40 C.F.R PART 60, SUBPART AAA**

| | |
|---|---|
| 60.530(c)(2)<br>Sale of Oregon exempted stove after July 1, 1992 | $5,000 per model line and $500 per unit |
| 60.530(c)(3)<br>Failure to notify of any modification to Oregon certification | $500 per unit |
| 60.533(n)<br>Failure to perform certification testing | $5,000 per model line and $500 per unit |
| 60.533(o)(2)<br>Failure to conduct adequate parameter QA inspection | $500 per unit not tested as required |

| | |
|---|---|
| 60.533(o)(3)<br>Failure to conduct emission test QA program | $500 per unit not tested as required |
| 60.536(a)(1), (2)<br>Failure to have permanent label on stove manufactured after July 1, 1988 (related to 60.538(b), but we can bring both in an enforcement action) | $2,000 per model line and $2 per unit |
| 60.536(i), (j)<br>Failure to have temporary label on a stove with a permanent label | $1,000 per model line and $2 per unit |
| 60.536(k)<br>(please see 60.538(d)(1)(ii)) | |
| 60.537(a)(1), (2)<br>Failure to maintain record of certification test | $100 per model line |
| 60.537(a)(1), (3)<br>Failure to maintain record of parameter QA program | $1,000 per model line |
| 60.537(a)(1), (4)<br>Failure to maintain record of emission test QA program | $1,000 per model line |
| 60.537(a)(1), (5)<br>Failure to maintain record of sales | $1,000 |
| 60.537(c)<br>Failure to maintain or produce sealed stove | $750 per sealed stove required |
| 60.537(e)(1), (4)<br>Failure to apply for small manufacturer's exemption | $250 |
| 60.537(e)(2)<br>Failure to report number of exempted heaters manufactured between 7/1/88 and 6/30/89 | $500 |
| 60.537(e)(3)<br>Failure to maintain wood heater production records for 7/1/87 to 7/1/89 | $1,000 |

| | |
|---|---|
| **60.537(f)**<br>Failure to report biennially on certified model line | $100 per model line |
| **60.537(g)**<br>Failure to maintain record of R&D exempted stoves | $500 |
| **60.537(h)**<br>Failure to maintain record of used stoves | $500 |
| **60.537(i)**<br>Failure to maintain records for five years | $500 |
| **60.538(a)**<br>Operation of affected facility without a permanent label | $500 per unit |
| **60.538(b)**<br>Offer for sale a stove without certification test or permanent label | $2,000 per model line and $2 per unit |
| **60.538(c)**<br>Offer for domestic sale of export stove | $1,000 per unit |
| Sale of stove without a permanent label after July 1, 1990 | $1,000 per unit |
| **60.538(d)(1)(i), (2)**<br>Offer for sale a stove with a permanent label but not temporary label | $1,000 per model line and $2 per unit |
| **60.538(d)(1)(ii)**<br>Offer for sale a stove with a permanent label but no owner's manual (encompasses 60.536(k)) | $500 per unit |
| **60.538(d)(1)(iii)**<br>Offer for sale a stove with a permanent label but without a catalyst warranty | $1,000 per model line and $2 per unit |
| **60.538(e)**<br>Sale of stove after notice of certification revocation | $5,000 per unit |
| **60.538(f)**<br>Installation or operation of stove inconsistent with label or owner's manual | $2,000 per unit |

| | |
|---|---|
| 60.538(g)<br>Operation of stove with deactivated or removed catalyst | $2,000 per unit |
| 60.538(h)<br>Operation of altered stove | $5,000 per unit |
| 60.538(i)<br>Alteration or removal of permanent label | $1,000 per unit |

**EXAMPLE**

An inspector files a violation report against Blockbuster Manufacturing, which produces the Blue Flame and Heat Jet model lines. The report, dated November 8, 1988, states that the temporary label on the Blue Flame model line is deficient and that the company failed to conduct certification testing on the Heat Jet model line. In addition, the Heat Jet model line lacks permanent and temporary labels as well as owner's manuals. Blue Flame production since July 1, 1988 totalled 464 units with sales of 223 units, while Heat Jet production since July 1, 1988 totalled 108 units with sales of 36 units. Blockbuster's net worth is estimated at $800,000.

The initial assessment of Blockbuster's violations indicates the following violations by model line:

Blue Flame
- attaching deficient temporary-label
- selling unit with deficient temporary label

Heat Jet
- failure to conduct certification testing
- failure to attach permanent label
- selling unit without permanent label

(NOTE: the temporary label and owner's manuals violations are inapplicable for the Heat Jet model line because the units were not permanently labeled)

U.S. EPA issues a Finding of Violation to Blockbuster which includes both the Blue Flame and Heat Jet violations. In addition, an Administrative Order is issued to correct these violations. Blockbuster does correct all the Blue Flame violations by the stated deadline, but does not take any action toward correcting the Heat Jet violations. When contacted by EPA personnel after the deadline, Blockbuster says it feels no obligation to correct the Heat Jet violations. At this point, EPA decides to bring a civil action against Blockbuster concerning the Heat Jet model line only.

The preliminary deterrence amount is calculated by adding the economic benefit and gravity components. The economic benefit component is subdivided into two categories: capital investments, or one-time costs, and annual expenses. For this example, current capital investments are $9,000 for a full test series and $4,000 for model line labels and manuals. Current annual expenses include $3,067 for emissions and parameter inspection quality assurance and $1,400 for research and development. EPA personnel run the BEN1 model assuming compliance in April 1989 and the payment of penalty in March 1989. The BEN1 model shows an economic benefit of $3,252. A

copy of the BEN1 printout is attached for reference. The gravity component of $66,788 is calculated as shown below:

| Violation | Basic Rate | Per Unit | Length of Time | Size of Violator |
|---|---|---|---|---|
| No certification test 60.533(n) | $5,000 | $500(108) | $500 | $2,000 |
| Not attaching permanent label 60.536(a)(1), (2) | 2,000 | 2(108) | 500 | |
| Selling unit without permanent label 60.538(b) | 2,000 | 2(36) | 500 | |

In light of Blockbuster's lack of cooperation in correcting the Heat Jet violations, EPA decides to increase the gravity component by 25%. The gravity component becomes $66,788(1.25) = $83,485. The bottom line amount for the purposes of settlement is $3,252 (the economic benefit) + $83,485 (the adjusted gravity component) = $86,737.

**Appendix VIII: Penalty Policy For Production or Imporatation in Violation of 40 C.F.R. Part 82 of Substances that Deplete the Stratospheric Ozone**

**revised 11/02/90**

APPENDIX VIII

APPENDIX VIII

# CLEAN AIR ACT CIVIL PENALTY POLICY APPLICABLE TO PERSONS WHO MANUFACTURE OR IMPORT CONTROLLED SUBSTANCES IN AMOUNTS EXCEEDING ALLOWANCES PROPERLY HELD UNDER 40 C.F.R. PART 82: PROTECTION OF THE STRATOSPHERIC OZONE

## Introduction

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of district court enforcement actions, pursuant to Title I of the Clean Air Act ("CAA"), against persons who manufacture or import controlled substances in amounts exceeding allowances properly held under 40 C.F.R. Part 82, Protection of the Stratospheric Ozone ("the Rule").[1] Settlement of violations of the recordkeeping and reporting provisions of the Rule need not, for purposes of penalty assessment, be treated differently from any other CAA recordkeeping and reporting violation. See Clean Air Act Stationary Source Civil Penalty Policy, p. 11.

The Rule designates bulk quantities of the chemicals named in Appendix A as "controlled substances" on the basis of the demonstrated capacity of these chemicals to attack and destroy ozone in the stratosphere. Manufacturers and importers of the controlled substances who responded to EPA's request for baseline data are apportioned yearly production and consumption allowances which limit the amounts of controlled substances that person or corporate entity may introduce for use into the United States during a twelve month control period.[2]

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[1] The Rule was promulgated in accordance with the Agency's authority under CAA Part B--Ozone Protection, 42 U.S.C. 150-159 ("Part B"), and with the Montreal Protocol (an agreement signed by most industrial nations in 1987), to protect the stratospheric ozone layer, a thin blanket of triatomic oxygen fifteen miles above the surface of the earth that blocks harmful ultraviolet radiation emitted by the sun. Section 113 of the CAA references Part B, expressly providing that the 113(b) civil and the 113(c) criminal remedies are available for violations of regulations promulgated under that Part.

[2] EPA restricted production and consumption of five chlorofluorocarbons (CFCs) to 1986 levels beginning July 1, 1989. Additional restrictions on production and consumption of CFCs, and and other controlled substances were in development at this writing.

copy of the BEN1 printout is attached for reference. The gravity component of $66,788 is calculated as shown below:

| Violation | Basic Rate | Per Unit | Length of Time | Size of Violator |
|---|---|---|---|---|
| No certification test 60.533(n) | $5,000 | $500(108) | $500 | $2,000 |
| Not attaching permanent label 60.536(a)(1), (2) | 2,000 | 2(108) | 500 | |
| Selling unit without permanent label 60.538(b) | 2,000 | 2(36) | 500 | |

In light of Blockbuster's lack of cooperation in correcting the Heat Jet violations, EPA decides to increase the gravity component by 25%. The gravity component becomes $66,788(1.25) = $83,485. The bottom line amount for the purposes of settlement is $3,252 (the economic benefit) + $83,485 (the adjusted gravity component) = $86,737.

To assist EPA in monitoring compliance with production and consumption limits, the Rule requires manufacturers of controlled substances to keep daily records and submit quarterly reports to EPA. Importers must submit information to EPA regarding the quantity of controlled substances brought into the United States and the country of their origin.

Production and consumption allowances may be traded, but such transactions are invalid if not reported to EPA. If Agency records indicate that the seller of allowances holds a sufficient quantity unexpended, EPA will issue a notice of no objection, and enter the transfer in its records. If EPA initially does not object to an allowance trade, but later finds reason to disapprove, the Agency will rescind the earlier transfer and correct its records. For the purposes of the Rule, ownership of the allowances that were the subject of the rescinded transfer never shifted from the seller to the buyer.

The Penalty for Excess Amounts

The Rule states that each kilogram of controlled substances ıufactured or imported in excess of allowances is a separate ›lation.[3] Each excess kilogram, therefore, creates potential liability in the violator for a penalty of up to the statutory maximum of $25,000. To promote judicial economy and to conserve Agency resources, EPA will be willing to accept substantially less in settlement.

The relative amount of stratospheric ozone that will be destroyed by a given quantity of a controlled substance is called that substance's ozone depletion weight, and varies from chemical to chemical.[4] Allowances are allocated on the basis of a calculated level, i.e., the total ozone depletion effect of all controlled substances produced and imported, a value that is expressed in kilograms. The holder of allowances is free to produce or import any combination of controlled substances during the control period so long as the calculated level of its activity does not exceed the calculated level of the allowances it holds. When the Rule states that each kilogram in excess of allowances is a separate violation, the reference is to kilograms in the sense of a calculated level. Therefore, the statutory maximum penalty is $25,000 per kilogram of calculated level manufactured or imported in excess of properly held allowances.

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[3] 40 C.F.R. 82.4(a) and (b).

[4] The ozone depletion weights for the controlled substances can be found in Appendix A of 40 C.F.R. Part 82.

Calculating a Penalty

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for manufacturing or importing excess quantities of controlled substances will be the sum of an economic benefit component and a gravity component.

Economic Benefit

Determining the actual economic benefit accruing to the violator will be difficult, if not impossible. Some allowance holders produce a variety of controlled substances at different locations across the country. Rather than attempt to distinguish what amount of which chemical produced at each of several continuously operating facilities was responsible for how many kilograms of excess calculated level, EPA will instead rely on an economic benefit rule of thumb. On the basis of financial information currently available, EPA will assume an economic benefit (profit margin) of $1.50 per kilogram of calculated level for both the manufacture and importation of controlled substances. EPA may supplant this amount by reference to price lists appearing in industry journals or to any other source which the Agency believes is a reliable indicator. Because the Agency's economic benefit rule of thumb is subject to change, in situations where the Region is applying this penalty policy, Regional staff should consult with EPA Headquarters before attempting to assess the violator's economic benefit of noncompliance.

The violator's economic benefit may be offset by amounts paid for allowances purchased during the same control period to cure excess production or imports, as such purchases clearly lessen the economic benefit of noncompliance.

The economic benefit component may be omitted entirely if an allowance-apportioned violator agrees in the next control period to a reduction of its current allowances in amounts equal to the calculated level of its earlier violations. The economic benefit component will not be assessed against violators who are not apportioned allowances if such violators obtain in the next control period and hold unexpended allowances in amounts equal to the calculated level of their earlier violations. The Montreal Protocol does not permit member nations to meet their national limits by applying allowances left unexpended in one control period to negate excess quantities of controlled substances manufactured or imported in any other control period. EPA, however, can acknowledge the financial impact on importers of a reduction of current allowances and adjust the penalty assessment accordingly in order to provide importers with an incentive to

consent to injunctive relief mandating such reductions. In this way, EPA can help avert the potential environmental harm resulting from the violator's actions.

Gravity

Even if the violator demonstrates that its purchase of additional allowances or its voluntary reduction of current allowances eliminates its economic benefit, it still must pay the gravity component of the penalty. The gravity component is the measure of the seriousness of the violation. Accordingly, this component is linked both to the integrity of the regulatory system and to the ozone-depleting effect of the violator's actions. The Rule states that each kilogram of controlled substance manufactured or imported in excess of allowances is a separate violation.

To protect the integrity of the Rule, EPA will assess a penalty of $15,000 against all violators. An additional $0.50 for each kilogram of calculated level manufactured or imported in excess of allowances held at the time of manufacture or importation will be assessed against first time violators, or $1.00 for each kilogram against repeat offenders.

So that the penalty will reflect the seriousness of the environmental harm resulting from the violations and to provide violators with an incentive to cure their violations completely, EPA will assess a penalty of $15,000 against violators who leave any amount of their violations, no matter how small, uncured. EPA will assess an additional penalty of $.50 for each kilogram of calculated level left uncured at the end of the control period in question. In the event that the violator expeditiously and fully cures its violations in the next control period following its violations, EPA will assess this integrity of the regulation factor at $5,000, instead of $15,000, and the kilograms of calculated level left uncured will be assessed at $0.10 for each kilogram.

A violator can cure the potential environmental harm by purchasing allowances, by chemically transforming the controlled substances into other substances not regulated by the Rule, by proper exportation, or by any combination of these means. In keeping with the matrix provided by the general stationary source civil penalty policy, p. 11, EPA will assess an additional amount to scale the penalty to the size of the violator.

Adjustments to the gravity component must be made in accordance with the provisions of the general stationary source civil penalty policy, pp. 12-18, taking into account such factors degree of willfulness or negligence, degree of cooperation, and history of noncompliance. EPA construes these adjustment factors strictly, with a bias toward upward adjustment. Downward

adjustments to the gravity component will be effected only in rare instances where the defendant manifests extreme cooperation by agreeing to perform environmentally beneficial actions not required by law that are directly related to repairing the environmental harm potentially resulting from its violations.

Mitigating Penalty Amounts

Application of this policy significantly compromises the penalty amount EPA is authorized to pursue under both the CAA and the Rule. Penalty amounts calculated in accordance with this policy represent the minimum penalty that EPA can accept in settlement of cases of this nature. Reductions from this amount are acceptable only on the basis of the violator's demonstrated inability to pay the full amount (substantiated by the ABEL computer model) or other unique factors. A proposed penalty reduction, accompanied by a justification memorandum, must be submitted to the Associate Enforcement Counsel for Air for his approval.

Examples of Penalty Calculations

Following are four examples of application of this policy. Adjustments to the gravity component are made in accordance with the general stationary source civil penalty policy.

Example 1

Due to inadequate communications between its seven facilities for the production of controlled substances, Chemical Co. overshoots its production and consumption allowances of 147,000,000 kg of calculated level by 250,000 kg before ceasing all production on May 20. On June 5, Chemical Co. manages to purchase 200,000 kg of calculated level in additional allowances at a cost of $200,000.

Assuming that Chemical Co. does nothing more to cure its violations, the penalty is computed as follows:

Economic Benefit Component

| | |
|---|---|
| Profit on sale of wrongfully produced controlled substances (250,000 kg at $1.50/kg*) | $375,000 |
| Offset by actual expenditure of $200,000 to purchase additional allowances | -200,000 |
| | $175,000 |

Gravity Component

| | |
|---|---|
| Integrity of Regulation | $15,000 |
| 250,000 kg of calculated level wrongfully produced (at $0.5/kg) | 125,000 |
| Integrity of Regulation (amounts left uncured) | 15,000 |
| 50,000 kg of calculated level left uncured at close of control period (at $0.5/kg) | 25,000 |
| Size of violator (worth in excess of $70,000,000) | +65,000 |
| | $245,000 |

Preliminary deterrence amount

| | |
|---|---|
| Economic Benefit Component | $175,000 |
| Gravity Component | +245,000 |
| | $410,000 |

Adjustment factors

| | |
|---|---|
| 20% upward adjustment to the gravity component to reflect defendant's negligence | +$49,000 |

Minimum penalty settlement amount

$459,000

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* The economic benefit rule of thumb is subject to change. egional offices using this guidance should consult with Head- uarters to insure that they use the appropriate number.

If, in the next control period prior to settlement, Chemical Co. obtains and holds unexpended sufficient consumption allowances to avert the environmental harm potentially resulting from the uncured portion of its wrongful production, the penalty would be calculated as follows:

| | |
|---|---|
| <u>Economic Benefit Component</u> | |
| Because Chemical Co. has obtained consumption allowances in an amount equal to the total amount of its violations, there were no costs averted, and there is no remaining economic benefit. | $0 |
| <u>Gravity Component</u> | |
| Integrity of Regulation | $15,000 |
| 250,000 kg of calculated level wrongfully produced (at $0.5/kg) | 125,000 |
| Integrity of Regulation (amounts left uncured, but environmental harm averted) | 5,000 |
| 50,000 kg of calculated level left uncured, but environmental harm averted (at $0.1/kg) | 5,000 |
| Size of violator (worth in excess of $70,000,000) | +65,000 |
| | $215,000 |
| <u>Preliminary deterrence amount</u> | |
| Economic Benefit Component | $0 |
| Gravity Component | $215,000 |
| | $215,000 |
| <u>Adjustment factors</u> | |
| 20% upward adjustment to the gravity component to reflect defendant's negligence | +$43,000 |
| <u>Minimum penalty settlement amount</u> | |
| | $258,000 |

Example 2

Commodities, Inc., which does not normally deal in chloroflurocarbons (CFCs), works toward buying up the unexpended consumption allowances it needs to permit its purchase of 1,000,000 kg of calculated level of a controlled substance from a seller in Country A at a price of $1,500,000. The shipment of cheap CFCs is offloaded at the American port of entry while Commodities, Inc. is still negotiating with Company Z to buy the last block of 300,000 kg of calculated level of allowances. In Country B, a major industrial accident virtually destroys that country's largest producer of CFCs, suddenly creating a huge demand in that country for Commodities, Inc.'s CFCs. Commodities, Inc. immediately breaks off negotiations with Company Z and exports its entire stock of 1,000,000 kg of calculated level to Country B for a selling price of $3 million. Commodities, Inc. provides proof to the EPA of its export and receives consumption allowances in the amount of 1,000,000 kg of calculated level, which it then sells on the bullish CFC market at $2.00 per kilogram of calculated level.

During settlement negotiations with EPA, Commodities, Inc. produces records showing that it purchased 700,000 kg of calculated level of consumption allowances for $0.75 per kilogram and argues that this amount should be used to calculate its economic benefit.

The penalty is computed as follows (for the purposes of this exercise, we assume that Commodities, Inc. bore none of the shipping expenses):

Economic Benefit Component

| | |
|---|---|
| Cost averted by not purchasing allowances (300,000 kg at $1.50/kg*) | $450,000 |
| Profit on export sale of wrongfully imported controlled substances (300,000 kg at $1.50/kg) | 450,000 |
| Profit on sale of wrongfully obtained consumption rights (300,000 kg at $2.00/kg) | +600,000 |
| | $1,500,000 |

* The economic benefit rule of thumb is subject to change. Regional offices using this guidance should consult with Headquarters to insure that they use the appropriate number.

In computing Commodities, Inc.'s economic benefit, EPA would not use $0.75/kg as the cost averted by not purchasing allowances because Company Z, apparently, was unwilling to sell at the price Commodities, Inc. was offering. EPA would not use Commodities, Inc.'s later selling price, $2.00/kg, because that amount does not necessarily reflect the market rate at the time Commodities, Inc. was attempting to buy. In the absence of a more reliable figure, EPA will use the $1.50/kg rule of thumb. The profit on the sale of wrongfully imported controlled substances is simply the difference between the selling price and the defendant's purchase price ($3.00/kg - $1.50/kg = $1.50/kg) as there were no allowance costs for these 300,000 kilograms. The profit on the sale of the wrongfully obtained consumption allowances is the full selling price because the defendant never properly held consumption allowances for those 300,000 kilograms.

Gravity Component

| | |
|---|---|
| Integrity of Regulation | $15,000 |
| 300,000 kg of calculated level wrongfully imported (at $0.5/kg) | 150,000 |
| Integrity of Regulation (amounts left uncured) | 15,000 |
| 300,000 kg of calculated level left uncured at close of control period (at $0.5/kg) | 150,000 |
| Reporting violation - one incorrect report See general CAA penalty policy at 11. (Although Commodities, Inc. did export 1,000,000 kg of calculated level of a controlled substance, only 700,000 kg of that amount had entered the country legally. Therefore, Commodities, Inc.'s transfer request could not properly claim ownership of the entire 1,000,000 kg of calculated level.) | 15,000 |
| Size of violator (worth between $20-40 million) | +20,000 |
| | $365,000 |

Preliminary Deterrence Amount

| | |
|---|---|
| Economic Benefit Component | $1,500,000 |
| Gravity Component | +365,000 |
| | $1,865,000 |

Adjustment Factors

| | |
|---|---|
| Degree of willfulness or negligence (20% of the gravity component) | +$73,000 |
| Minimum settlement penalty amount | |
| | $1,938,000 |

If, in the next control period prior to settlement, Commodities, Inc. had obtained and held unexpended the 300,000 kilograms of calculated level of consumption allowances necessary to avert the potential environmental harm resulting from its wrongful importation, the penalty would be calculated as follows:

Economic Benefit Component

| | |
|---|---|
| Profit on export sale of wrongfully imported controlled substances (300,000 kg at $1.50/kg) | 450,000 |
| Profit on sale of wrongfully obtained consumption rights (300,000 kg at $2.00/kg) | +600,000 |
| | $1,050,000 |

Gravity Component

| | |
|---|---|
| Integrity of Regulation | $15,000 |
| 300,000 kg of calculated level wrongfully imported (at $0.5/kg) | 150,000 |
| Integrity of Regulation (amounts left uncured, but environmental harm averted) | 5,000 |
| 300,000 kg of calculated level left uncured, but environmental harm averted (at $0.1/kg) | 30,000 |
| Reporting violation - one incorrect report | 15,000 |
| Size of violator (worth between $20-40 million) | +20,000 |
| | $235,000 |

Preliminary Deterrence Amount

| | |
|---|---|
| Economic Benefit Component | $1,050,000 |
| Gravity Component | +235,000 |
| | $1,285,000 |

Adjustment Factors

| | |
|---|---|
| Degree of willfulness or negligence (20% of the gravity component) | +$47,000 |
| Minimum settlement penalty amount | $1,332,000 |

Example 3

During the fourth quarter of the control period, Importers International contracts to sell 40,000 kg of calculated level of consumption allowances to CFCs, Inc., a producer and importer of CFCs, at $1.25/kg, despite the fact that Importers International has recently exhausted all of its 250,000 kg allowance. Importers International submits a transfer request to EPA for which the Agency issues a no objection notice. (EPA's determination is based on information contained in Importers International's previous quarterly report.) Upon receipt of EPA's notice of no objection, CFCs, Inc. purchases the allowances from Importers International for $50,000 and imports 40,000 kg of calculated level of controlled substances. EPA discovers during its review of Importers International's fourth quarter report that the company did not hold unexpended allowances at the time of the trade, rescinds the transfer, and notifies both parties to the transaction.

Importers International's action appears to be a fraudulent transfer in knowing violation of consumption limitations, and this matter should be referred to OE's Office of Criminal Enforcement. Importers International is probably subject to fines and imprisonment under 113(c) of the Clean Air Act, 18 U.S.C. 1001 (supplying false information to the federal government), and possibly 18 U.S.C. 1341 (fraudulent use of the mails).[5]

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[5] EPA's election to pursue a criminal enforcement action must hinge on its evaluation of the strength of the evidence of knowing violation and also of the adequacy of available civil relief. Where a defendant exceeds its production or consumption allowances and submits inaccurate information in a transfer request, EPA may find it difficult to show a knowing violation, but large civil penalties are available. If the defendant stays within the limits of its allowances but transfers allowances it does not hold, the available civil relief would be based on a single reporting violation, but EPA can more likely demonstrate that the violation was knowing. It is important also to remember that buyers of large amounts of allowances will be aware of the financial risk associated with wrongful production or importation and will purchase only from reputable sellers.

CFCs, Inc., which purchased Importers International's purported allowances at risk, held other consumption allowances at the time it imported the 40,000 kg of calculated level. These other consumption allowances, in part, offset that import. After analyzing CFCs, Inc.'s final quarter reports, EPA determines that CFCs, Inc. is liable for the importation of only 15,000 kg of calculated level of controlled substances for which it did not hold proper consumption allowances. After receiving notification from EPA, CFCs, Inc. agrees to reduce its current-year production and consumption allowances by that amount.

The penalty for CFC, Inc. is computed as follows:

Economic Benefit Component[6]

| | |
|---|---|
| Profit on sale of wrongfully produced CFCs (15,000 kg at $1.50/kg*) | $22,500 |
| Offset by reduction of current-year allowances by 15,000 kg of calculated level | -22,500 |
| | 0 |

Gravity Component

| | |
|---|---|
| Integrity of Regulation | $15,000 |
| 15,000 kg of calculated level wrongfully imported (at $0.5/kg) | 7,500 |
| Integrity of Regulation (amounts left uncured, but environmental harm averted) | 5,000 |
| 15,000 kg of calculated level left uncured, but environmental harm averted(at $0.10/kg) | 1,500 |
| Size of violator (worth more that $70 million) | +65,000 |
| | $94,000 |

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* The economic benefit rule of thumb is subject to change. Regional offices using this guidance should consult with Headquarters to insure that they use the appropriate number.

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[6] CFCs, Inc.'s economic benefit would not be offset by the amount it paid to Importers International for the purported allowances. Only those transactions which result in a transfer of valid consumption allowances to the violator can be counted against its economic benefit.

Preliminary Deterrence Amount

| | |
|---|---|
| Economic Benefit Component | $0 |
| Gravity Component | +94,000 |
| | $94,000 |

Adjustment Factors

No adjustment of gravity

Minimum Settlement Penalty Amount

$94,000

Example 4

Small Brokerage Co., an import broker located in a minor port city, imports 200 kg of calculated level of CFC-113 for Company X, a manufacturer of airplane parts. Company X intends to use the CFC-113 to degrease precision metal parts prior to assembly. Neither company holds consumption allowances. EPA discovers the violation during its review of the computer printout of Customs Entry Summary forms provided to EPA by the U.S. Census Bureau.

Upon receipt of a Section 114 letter from EPA requesting more information about its imports of controlled substances, Small Brokerage Co. contacts EPA to explain that neither it nor Company X was aware of the Rule's prohibition on importing controlled substances without consumption allowances. Small Brokerage Co. fully responds to the Section 114 request, but points out that its imports were in one liter canisters, and asserts exemption under the "one-gallon rule of thumb."

The one-gallon rule of thumb exempts from regulation imports of controlled substances in containers of one gallon or smaller only if the eventual use of the container is not known and cannot be determined with reasonable efforts. (See GUIDANCE FOR THE STRATOSPHERIC OZONE PROTECTION PROGRAM, pp. 4-5.) Here, EPA investigates the process Company X uses to degrease small metal parts and determines that Company X pours CFC-113 from the one liter canister into a basin containing the parts to be cleaned. Therefore, the eventual use of the imported canister is known, and the canister is not part of a "use system." EPA informs Small Brokerage Co. that its imports are subject to regulation. Before the end of the control period, Small Brokerage Co. obtains from another company a sufficient amount of unexpended consumption allowances to cure its violations.

The penalty is calculated as follows:

Economic Benefit Component

| | |
|---|---|
| Because Small Brokerage Co. obtained consumption allowances in an amount equal to the total amount of its violations, there were no costs averted, and there was no economic benefit. | $0 |

Gravity Component

| | |
|---|---|
| Integrity of Regulation | $15,000 |
| 200 kg of calculated level wrongfully imported (at $0.5/kg) | 100 |
| Size of violator (worth between $100,001 and $1,000,000) | $2,000 |
| | $17,100 |

Preliminary Deterrence Amount

| | |
|---|---|
| Economic Benefit Component | $0 |
| Gravity Component | $17,000 |
| | $17,000 |

Adjustment Factors

| | |
|---|---|
| Degree of willfulness or negligence (20% of the gravity component) | +$3,400 |

Minimum Penalty Amount

| | |
|---|---|
| | $20,400 |

**Appendix IX: Penalty Policy Applicable to Persons who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82**

**added 07/19/93**

APPENDIX IX

# CLEAN AIR ACT CIVIL PENALTY POLICY APPLICABLE TO PERSONS WHO PERFORM SERVICE FOR CONSIDERATION ON A MOTOR VEHICLE AIR CONDITIONER INVOLVING THE REFRIGERANT OR WHO SELL SMALL CONTAINERS OF REFRIGERANT IN VIOLATION OF 40 C.F.R. PART 82, PROTECTION OF THE STRATOSPHERIC OZONE, SUBPART B: SERVICING OF MOTOR VEHICLE AIR CONDITIONERS

July 19, 1993

## Introduction

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of judicial enforcement actions, as well as the pleading and settlement of administrative enforcement actions, pursuant to Sections 113(b) and (d) and Section 609 of the Clean Air Act ("CAA"), as amended, and 40 C.F.R. Part 82, Subpart B against persons who perform service for consideration on motor vehicle air conditioners involving the refrigerant or who sell small containers of refrigerant. Settlement of violations of the recordkeeping and reporting provisions of the regulations should not, for purposes of penalty assessment, be treated differently from any other CAA recordkeeping and reporting violation. See Clean Air Act Stationary Source Civil Penalty Policy, p. 12.

This appendix is to be used for settlement purposes in civil judicial cases, but EPA retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the appendix is to be used in conjunction with the Stationary Source Civil Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases.

To assist EPA in monitoring compliance, the regulations require persons who perform service for consideration on motor vehicle air conditioners involving the refrigerant to report one time and to keep records; persons who certify technicians must report once every two years; and persons who sell small cans of refrigerant must keep records and post a sign.

## The Penalties for Violating Regulations

Section 113 of the Clean Air Act allows EPA to seek penalties of up to $25,000 per day per violation. Each time a motor vehicle air conditioner is serviced without properly using approved refrigerant recycling or recovery equipment or is serviced by an uncertified technician, each container of refrigerant containing less than 20 pounds is sold to a

person who is not a certified technician or who does not certify to the retail establishment that the container was purchased for resale, and each time a technician is certified by a technician training program which has not been approved by the EPA Administrator constitutes a separate violation (each with a statutory maximum of $25,000).

EPA may in appropriate cases accept less than the statutory maximum in settlement. The penalty assessments contained in this policy (this appendix read with the Stationary Source Civil Penalty Policy) reflect reductions from the statutory maximum which can be made based on the statutory penalty assessment criteria found in Section 113(e) of the Act. This policy takes into account the size of the violator's business, the violator's full compliance history, the economic benefit of noncompliance, and the seriousness of the violation. The other factors in Section 113(e) such as the economic impact of the penalty on the business and any good faith efforts to comply should be taken into account in determining whether the penalty should be reduced, but the burden is on the defendant to raise those factors.

Penalties for violations are based on the particular regulatory requirements violated. The minimum settlement penalty amount is the sum of the penalties assigned to each violation of a requirement.

Calculating a Penalty

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for performing any service for consideration on a motor vehicle air conditioner involving the refrigerant or selling small containers of refrigerant will be the sum of an economic benefit component and a gravity component.

Economic Benefit

This component is a measure of the economic benefit accruing to the facility as a result of noncompliance with the Act. To determine the actual economic benefit to a person[1] who performs

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[1] "Person" includes the technician who actually works on the motor vehicle air conditioner and the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician. For the purpose of calculating the penalty under this policy, it was assumed that Regions would generally take enforcement actions against service facilities rather than individual technicians. Both technicians and service facilities, however, are legally

service for consideration on motor vehicle air conditioners involving the refrigerant, EPA will rely on the matrix which follows to determine the economic benefit from delayed costs (failure to purchase approved recycling or recovery equipment) and avoided costs (failure to properly operate and maintain such equipment).

Economic Benefit From Servicing Motor Vehicle Air Conditioners Without Properly Using Approved Refrigerant Recovery Equipment:

| Number of Months since August 13, 1992/Economic Benefit | | | | | |
|---|---|---|---|---|---|
| # of Months | Economic Benefit | # of Months | Economic Benefit | # of Months | Economic Benefit |
| 1-3 | $115 | 22-24 | $1103 | 43-45 | $2494 |
| 4-6 | $236 | 25-27 | $1274 | 46-48 | $2733 |
| 7-9 | $363 | 28-30 | $1454 | 49-51 | $2984 |
| 10-12 | $496 | 31-33 | $1642 | 52-54 | $3247 |
| 13-15 | $637 | 34-36 | $1840 | 55-57 | $3523 |
| 16-18 | $785 | 37-39 | $2048 | 58-60 | $3811 |
| 19-21 | $940 | 40-42 | $2266 | | |

The matrix reflects that the service facility should have purchased one piece of recovery equipment. The matrix was calculated using August 13, 1992 as the date noncompliance began. The date of compliance (the date equipment is acquired) and the date that the penalty is paid are the same. Because the matrix reflects that enforcement actions will be taken against the service facility and because many technicians will be personally responsible for the cost of getting trained and certified, the matrix does not include the cost of technician certification. In addition, it is difficult to predict how many uncertified technicians a service facility might employ to perform service for consideration on motor vehicle air conditioners involving the refrigerant. If the Regions find that service facilities usually pay for technician training, then they should include the cost of technician training and certification in their economic benefit calculations. In any enforcement action against an individual uncertified technician, the Regions should include the cost of training and certification in the economic benefit calculation. The matrix is based on the BEN computer model. If the litigation team determines that the matrix does not reflect the defendant's actual economic benefit in a particular enforcement action, the

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responsible for complying with 40 C.F.R. Part 82, Subpart B.

litigation team may calculate the benefit using the BEN model with inputs specific to the action.

The economic benefit to the person[2] who sells cans of refrigerant containing less than 20 pounds is the profit on each can. The profit will vary depending on how much the person paid to purchase the cans and at what price the cans are sold. The amount of profit averages $1.50 per 12 ounce can.

EPA policy requires the removal of the violator's economic benefit in every enforcement action, unless the factors in Section 113(e) or litigation risks suggest that a reduction is appropriate. Although the Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than $5,000 (see p. 7), Regions should assess the economic benefit component in Section 609 enforcement actions. Given that the economic benefit component in Section 609 enforcement actions will likely always be small (less than $5,000), if the general rule from the Stationary Source Civil Penalty Policy were to apply, the economic benefit component would rarely be included in the penalty calculation. Therefore, Regions should assess an economic benefit component in all Section 609 cases.

Gravity

In addition to economic benefit, the violator must pay the gravity component of the penalty. The gravity component is the measure of the seriousness of the violation. The seriousness of the violation has two components: the importance to the regulatory scheme and the potential environmental harm (ozone-depleting effect of the violator's actions) resulting from the violations.

The following violations can defeat the purpose of Section 609 by permitting the release of substances that degrade the stratospheric ozone layer. Their importance to the regulatory scheme, therefore, includes the assessment of the following

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[2] "Person" includes the employee who actually sells the small can and the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the employee. For the purpose of calculating the penalty under this policy, it was assumed that Regions would generally take enforcement actions against retail facilities rather than individual employees. Both employees and retail facilities, however, are legally responsible for complying with 40 C.F.R. Part 82, Subpart B.

penalties:

A penalty of $10,000 against any person who performs services for consideration on motor vehicle air conditioners involving the refrigerant without properly using approved refrigerant recycling or recovery equipment;

A penalty of $15,000 against each person who performs services for consideration on motor vehicle air conditioners involving the refrigerant without properly using approved refrigerant recycling or recovery equipment and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

A penalty of $5,000 against any person who performs services for consideration on motor vehicle air conditioners involving the refrigerant for each person who performs such service who is not properly trained and certified by a technician certification program approved by the EPA Administrator;

A penalty of $2,000 against any person who sells a container of refrigerant (suitable for use in a motor vehicle air conditioner) containing less than 20 pounds to a person who is not a certified technician or who does not certify to the seller that the container was purchased for resale;

A penalty of $5,000 against any person who sells a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the seller that the container was purchased for resale and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

A penalty of $5,000 for each certificate issued after the effective date of the regulation against any technician training program that has not received approval from the Administrator of EPA;

A penalty of $1,000 against any retail establishment that sells or offers for sale the refrigerant suitable for use in a motor vehicle air conditioner in containers of less than 20 pounds and fails to post a sign that meets the requirements of 40 C.F.R. §82.42(c). This amount should be assessed regardless of how many (if any) small cans are actually sold after November 15, 1992, as long as they are offered for sale. This amount is in addition to the $2,000 assessment described above against the retail establishment for the sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified

technician or who does not certify to the retail establishment that it is purchased for resale;

A penalty of $2,500 against any retail establishment that sells or offers for sale the refrigerant suitable for use in a motor vehicle air conditioner in containers of less than 20 pounds and fails to post a sign that meets the requirements of 40 C.F.R. §82.42(c) and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

EPA acknowledges that multiple violations of the Section 609 requirements may significantly increase the potential environmental harm (ozone-depleting effect of the violator's actions) resulting from the violations. The Agency, therefore, will assess the following additional amounts for each separate violation to ensure that the total penalty assessed appropriately reflects the seriousness of the defendant's violations:

EPA will assess $40[3] against any person for each motor vehicle air conditioner serviced without properly using approved refrigerant recycling or recovery equipment, or $50 against any person who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order) for each motor vehicle air conditioner serviced without properly using approved refrigerant recycling equipment; and

EPA will assess $18[4] per pound against any person for each sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale and $25 against any person that has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order) for each sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale.

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[3] EPA estimates that the benefit to be obtained from avoiding the release of 1 kilogram of ozone depleting substance ranges from $13-$53/kg. For the purposes of this penalty policy, the benefit should be calculated at $40/kg. See Regulatory Impact Analysis for Section 608, Chapter 5 (March 25, 1993).

[4] See fn. 3.

EPA will assess reporting violations pursuant to the Clean Air Act Stationary Source Civil Penalty Policy, October 25, 1991, page 12. However, this assessment shall not include a length of time violation component.

EPA will assess an additional amount to scale the penalty to the size of the violator using the following matrix:

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

| | |
|---|---|
| Under $100,000 | $0 |
| $100,001 - $500,000 | $1,000 |
| $500,001 - $1,000,000 | $2,500 |
| 1,000,001 - 5,000,000 | $5,000 |
| 5,000,001 - 20,000,000 | $10,000 |
| 20,000,001 - 40,000,000 | $15,000 |
| 40,000,001 and above | $20,000 |

Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

Adjustments to the gravity component must be made in accordance with the provisions of the Stationary Source Civil Penalty Policy, pp. 15-19.

Mitigating Penalty Amounts

Application of this policy significantly compromises the penalty amount EPA is authorized to pursue under the CAA. Penalty amounts calculated in accordance with this policy represent the minimum penalty that EPA can accept in settlement of cases of this nature. Reductions from this amount are acceptable only on the basis of the violator's demonstrated inability to pay the full amount (substantiated in accordance with Agency policy) or other unique factors. In civil judicial actions, a proposed penalty reduction from the amount calculated under this policy must be approved by the Enforcement Counsel for the Air Enforcement Division. If the litigation team believes that reduction of the penalty is appropriate, the case file should contain both a memorandum justifying the reduction and documentation that the penalty reduction was approved. In administrative enforcement actions, Regional Administrators or their designees must submit penalty justification documentation within 20 days of issuance or signing of consent agreements to the Director of the Stationary Source Compliance Division in the Office of Air Quality Planning and Standards and the Enforcement Counsel for Air in the Office of Enforcement.

Examples of Penalty Calculations

Following are examples of the application of this policy. Adjustments to the gravity component are made in accordance with the Stationary Source Civil Penalty Policy.

Example 1

Ace Automotive Air-Conditioning Service, Incorporated (ACE) services motor vehicle air conditioners. Despite a significant outreach effort by the Region (acquainting the regulated community with Section 609's requirements), Ace did not submit the required owner certification to EPA and failed to purchase recovery or recycling equipment. A search of Ace's records indicates that Ace has serviced 60 motor vehicle air conditioners since the effective date of the rule. The facility performed 150 service jobs in 1990 and 1991. None of the three technicians who regularly service motor vehicle air conditioners are trained and certified. EPA inspected the facility on March 13, 1993.

Economic Benefit Component

| | |
|---|---|
| The economic benefit of delaying the purchase of equipment for seven months + avoided costs of operating equipment | $363 |

Gravity Component

| | |
|---|---|
| Importance to regulatory scheme (servicing without equipment) | $10,000 |
| 60 motor vehicle air conditioners (at $40 per vehicle) | 2,400 |
| Reporting violation (failure to certify to EPA that person performing service is using approved recycling equipment and that such person is properly trained and certified) (from Stationary Source Civil Penalty Policy, page 12) | 15,000 |
| 3 Uncertified technicians performing service (at $5,000 per technician) | 15,000 |
| Size of violator (Net Worth is approx. $2,000,000) | +5,000 |
| Total Gravity | $47,400 |

| | |
|---|---|
| Preliminary deterrence amount | |
| Economic Benefit Component | $363 |
| Gravity Component | +47,763 |
| Adjustment factors | |
| 20% upward adjustment to the gravity component - Ace should have been aware of Section 609's requirements | + 9,552.60 |
| Minimum penalty settlement amount | $57,315.60 |

Example 2

Diamond Auto Parts sells CFCs in canisters containing 14 ounces. On May 16, 1993, an EPA inspector purchased two 14 ounce cans of refrigerant. He was not asked to show his technician training certificate which he claimed to have. In addition, the inspector noted there was no sign in the check out area notifying customers that the sale of such cans is prohibited unless the purchaser is a trained technician. The inspector asked the owner whether the sign was posted on or after November 15, 1992. The owner responded that he never posted the sign.

Economic Benefit Component

| | |
|---|---|
| 2 cans of refrigerant (at $1.50 per 12 ounce can) | $3.50 |

Gravity Component

| | |
|---|---|
| Importance to regulatory scheme (Sale of small can of refrigerant) | $2,000 |
| 2 - 14 ounce cans of refrigerant (at $18 per pound) | 31.50 |
| Importance to regulatory scheme (Failing to post sign) | 1,000 |
| Size of violator (Net Worth is approx. $6,000,000) | +3,031.50 |
| Total Gravity | $ 6,063.00 |

Preliminary deterrence amount

| | |
|---|---|
| Economic Benefit Component | $3.50 |
| Gravity Component | +6,063.00 |

Minimum Settlement Penalty Amount

$6,066.50

Summary

| Type of violation | Penalty amount |
|---|---|
| Servicing without equipment | 1st violation - $10,000 |
| | 2nd violation - $15,000 |
| | $40/per motor vehicle |
| Failing to certify | $15,000 |
| Uncertified technicians | $5,000/per technician |
| Sale of Small Cans to Non-Technician | 1st violation - $2,000 |
| | 2nd violation - $5,000 |
| | $18/per pound |
| Uncertified Training Program | $5,000/certificate |
| Failure to Post Sign | 1st violation - 1,000 |
| | 2nd violation - 2,500 |

**Appendix X: Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair and Diposal of Appliances Containing Refrigerant**

**added 06/01/94**

**APPENDIX X**

CLEAN AIR ACT CIVIL PENALTY POLICY FOR VIOLATIONS OF 40 C.F.R. PART 82, SUBPART F: MAINTENANCE, SERVICE, REPAIR, AND DISPOSAL OF APPLIANCES CONTAINING REFRIGERANT
June 1, 1994

**INTRODUCTION**

Purpose

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of judicial enforcement actions, as well as the pleading and settlement of administrative enforcement actions.

Scope

This appendix is to be used pursuant to Sections 113(b) and (d) for violations of Section 608 of the Clean Air Act ("Act" or "CAA"), as amended, and 40 C.F.R. Part 82, Subpart F.

Usage

This appendix should be used in conjunction with the Stationary Source Civil Penalty Policy to determine a preliminary deterrence amount, which is the sum of the economic benefit accruing from noncompliance and the gravity component reflecting the seriousness of the violation.

This appendix is to be used for settlement purposes in civil judicial cases involving violations of Section 608, but EPA retains the discretion to seek the full statutory maximum penalty in all civil judicial cases that do not settle. In addition, for administrative penalty cases, the appendix is to be used in conjunction with the Stationary Source Civil Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. As the Stationary Source Civil Penalty Policy indicates, for administrative penalty cases under Section 113(d)(1), the Region should plead the penalty calculated under this policy, using the most aggressive assumptions supportable, in its complaint.

Persons Liable

Any "person" as defined in the Act and in the Section 608 regulations may be held liable for violations of Section 608. For example, all "persons" owning and/or operating a facility subject to the provisions of the Act, and any employees of such a facility, are legally responsible for complying with Section 608

and with 40 C.F.R. Part 82, Subpart F. For the purpose of seeking penalties for violations, EPA will often bring enforcement actions against the owners and/or operators of such facilities, rather than against individual employees. However, for the purpose of Section 608 violations, "person" includes the technician who services an appliance and the employee who sells refrigerant, as well as the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician or employee. Person also includes owners of appliances, disposal facilities, manufacturers and importers of recycling or recovery equipment, technician certification programs, reclaimers, and equipment testing organizations. Matters involving possible criminal behavior by individuals or organizations should be referred to the Regional Criminal Enforcement Counsel.

**PENALTIES FOR VIOLATING THE ACT AND THE REGULATIONS**

Section 113 of the Clean Air Act allows EPA to seek penalties of up to $25,000 per day for each violation. EPA may in appropriate cases accept less than the statutory maximum in settlement. The penalty assessments contained in this policy (this appendix read with the Stationary Source Civil Penalty Policy) reflect the statutory penalty assessment criteria found in Section 113(e) of the Act. This policy takes into account the size of the violator's business, the violator's full compliance history, duration of the violation as established by any credible evidence, the economic benefit of noncompliance, and the seriousness of the violation. The other penalty assessment factors in Section 113(e) should be taken into account in determining an appropriate penalty (the economic impact of the penalty on the business, good faith efforts to comply, and payment by the violator of penalties previously assessed for the same violation). However, reliable information on these factors is rarely available to EPA when a penalty is proposed. Accordingly, these factors will be considered if raised and properly documented during settlement. Respondents have the burden of persuasion on these factors, which are in the nature of affirmative defenses.

**CALCULATING A PENALTY**

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for violations of Section 608 and the implementing regulations, 40 C.F.R. Part 82, Subpart F, will be the sum of an economic benefit component and a gravity component.

Economic Benefit

This component is a measure of the economic benefit gained by the violator as a result of noncompliance with the Act. The economic benefit gained by a person due to delayed or avoided costs will be determined in accordance with the Stationary Source Civil Penalty Policy using, as appropriate, the BEN computer model. Economic benefit should be calculated from the earliest provable date of violation until the date that the violation is corrected.

BEN is not appropriate in addressing the sales restriction imposed by the regulations. In this case, the economic benefit to the person who sells class I or II substances for use as a refrigerant is the profit on each sale. The profit will vary depending on how much the person paid to purchase the refrigerant and at what price the refrigerant is sold.

Although the Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than $5,000 (see p. 7 of the general policy), Regions should assess an economic benefit component for the entire matter in Section 608 enforcement actions unless it is less than $500. Given that the economic benefit component in Section 608 enforcement actions will likely always be small (less than $5,000), if the general rule from the Stationary Source Civil Penalty Policy were to apply, the economic benefit component would rarely be included in the penalty calculation. Since EPA policy requires the removal of the violator's economic benefit in every enforcement action, except for very limited circumstances, Regions should assess an economic benefit component in all Section 608 cases where it is greater than $500.

Gravity

The gravity component, which is assessed in addition to economic benefit, is the measure of the seriousness of the violation. The gravity component should be determined by examining three factors: the potential environmental harm (ozone-depleting effect of the violator's actions) resulting from the violations, the extent of deviation from the statutory or regulatory scheme, and the size of violator.

1. Potential Environmental Harm

The Section 608 regulations were promulgated to prevent harm to human health and the environment by preventing the release of substances that degrade the stratospheric ozone layer.

Noncompliance with the requirements of the regulations, therefore, can result in harm to human health or the environment. Accordingly, the portion of the penalty calculation reflecting the potential environmental harm of the violation should be based on two factors:

1) the risk of or actual loss of refrigerant to the environment
2) the importance of compliance to the statutory or regulatory scheme

Risk of or actual loss

The risk of or actual loss presented by a given violation depends on both the likelihood of loss to the environment and the seriousness of the loss, which would include both the amount of refrigerant lost and its ozone depletion potential. A penalty should reflect the probability that the violation could have resulted in, or has resulted in, a loss of refrigerant to the environment. A larger penalty is appropriate for class I chemicals because of the greater ozone depletion potential than for class II chemicals. The greater the potential, the more ozone that may be destroyed in the stratosphere. In most cases, an actual loss would result in higher penalties than a potential loss.

One factor enforcement personnel should evaluate in determining whether the potential for harm is major, moderate, or minor in a particular situation is the risk of loss. The degree of risk of loss represented by each category is defined as:

MAJOR: the violation poses or may pose a substantial risk of or actual loss of refrigerant to the environment

MODERATE: the violation poses or may pose a significant risk of or actual loss of refrigerant to the environment

MINOR: the violation poses or may pose a relatively low risk of or actual loss of refrigerant to the environment

In determining the degree of the risk of loss of refrigerant to the environment, Regions should consider: how much refrigerant is normally in the system (e.g. 20,000 pounds or 2 pounds) and how likely was the activity in question to result in a release (e.g. changing a filter or changing the compressor).

For example, changing the compressor on a system containing 20,000 pounds of CFC-12 without having removed the refrigerant prior to repair would fall into the category of Substantial risk of or actual loss. Changing the filter on the same system

without having removed the refrigerant prior to repair would fall into the category of Significant risk of or actual loss. Changing the filter on a system containing 2 pounds of HCFC-22 without having removed the refrigerant prior to repair would fall into the category of Relatively Low risk of or actual loss. This assumes that filter changes can be accomplished quickly and with a smaller loss of refrigerant.

Importance of compliance to statutory or regulatory scheme

A second factor enforcement personnel should evaluate in determining whether the potential for harm is major, moderate, or minor in a particular situation is the importance of compliance to the statutory or regulatory scheme. The degree of importance of compliance to the statutory or regulatory scheme represented by each category is defined as:

MAJOR: the actions have or may have a substantial adverse effect on the statutory or regulatory scheme

MODERATE: the actions have or may have a significant adverse effect on the statutory or regulatory scheme

MINOR: the actions have or may have a small adverse effect on the statutory or regulatory scheme

In determining the importance of compliance to the statutory or regulatory scheme, Regions should use the categorizations on the following list unless unusual circumstances suggest the these categories are inappropriate:

Major

1. Knowing Venting
2. Not using recycling/recovery equipment
3. Not repairing leaks (for equipment 50 lbs and over)
4. Accepting signed statement pursuant to § 82.156(f)(2) if the person knew or had reason to know that such a signed statement is false
5. Failure to follow required practices in §82.156

Moderate

1. Technicians not properly trained and certified
2. Recovery/Recycling equipment not properly maintained/does not pull specified vacuum
3. Not using equipment certified for the type of appliance
4. Manufacture or import of recycling or recovery equipment that is not certified

5. Altering design of certified refrigerant recycling or recovery equipment
6. Unapproved technician training or testing programs issuing certificates
7. Sale and distribution of refrigerants to persons who are not certified technicians after November 1994, unless for resale

Minor

1. Recordkeeping requirements not properly followed
2. Training certificate not available on request
3. Sale of unreclaimed refrigerant
4. Sale of refrigerant reclaimed by uncertified reclaimer
5. Release of more than 1.5% by reclaimer
6. Sale of equipment that does not have servicing aperture or process stub
7. Failure of owner or reclaimer to certify

If, in the Region's analysis, the two factors constituting potential for harm result in two different designations, the more serious designation should be used. For example, the actions have or may have a substantial adverse effect on the statutory or regulatory scheme, but the violation poses or may pose a relatively low risk of loss of refrigerant to the environment. In this example, the potential for harm would be designated major.

2. Extent of Deviation

The extent of deviation from Section 608 and the implementing regulations relates to the degree to which the violation defeats the requirement violated. In any situation, a range of potential noncompliance with each requirement exists. In other words, a violator may be substantially in compliance with the provisions of a requirement or it may have totally disregarded a requirement. In determining the extent of deviation, the following categories should be used:

MAJOR: the violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met, resulting in substantial noncompliance. For example, the owner certification is not submitted.

MODERATE: the violator significantly deviates from the requirements of the regulation or statute, but some of the requirements are implemented as intended. For example, the owner certification is submitted six months late and includes only the name and address of the purchaser and the name and address of the establishment where each piece of equipment is located.

MINOR: the violator deviates somewhat from the regulation or statutory requirements but most, if not all important aspects of the requirements are met. For example, the owner certification is submitted one month late and does not include the number of service trucks used.

Each of the above factors, potential for harm and extent of deviation from a requirement, forms one of the axes of the penalty assessment matrix. The specific cell is chosen after determining which category (major, moderate, minor) is appropriate for the potential for harm factor and which category is appropriate for the extent of deviation factor. The complete matrix is:

Matrix 1:

EXTENT OF DEVIATION FROM REQUIREMENT

| POTENTIAL FOR HARM | Major | Moderate | Minor |
|---|---|---|---|
| Major | $15,000 | $12,000 | $10,000 |
| Moderate | $9,000 | $7,000 | $4,000 |
| Minor | $3,000 | $1,500 | $750 |

For violations by a person who has previously been the subject of a Section 608 enforcement response (e.g. notice of violation, warning letter, or administrative or judicial order), the amounts in Matrix 1 should be increased by a minimum of 30% for the first violation after an enforcement response and by a minimum of 50% for the first violation after the second or subsequent enforcement responses. These percentages may be increased at the Regions' discretion.

Multiple Violations

EPA acknowledges that multiple violations of the same requirement by the same company of the Section 608 requirements may significantly increase the actual or potential environmental harm resulting from the violations. The Agency, therefore, will assess additional amounts against a company for each repeated violation of the same requirement to ensure that the total penalty assessed appropriately reflects the seriousness of the defendant's violations. After the base gravity component has been determined from Matrix 1 for the violation of a particular requirement, the multi-incident component of the settlement penalty is calculated as follows:

1) Using the same gravity-based designations for the violations as were used in Matrix 1, locate the corresponding cell in Matrix 2. If the potential for harm of the initial violation (e.g., venting of 20 pounds of HCFC-22) is significantly different than the subsequent violations (e.g., venting 20 pounds of CFC-12), Regions may use a different potential for harm cell in Matrix 2 that the one used in Matrix 1.

2) Multiply the dollar amount selected from the appropriate cell in Matrix 2 by the number of violations (e.g., number of additional appliances serviced).

Matrix 2:

EXTENT OF DEVIATION FROM REQUIREMENT

| POTENTIAL FOR HARM | Major | Moderate | Minor |
|---|---|---|---|
| Major | $3,000 | $2,500 | $2,000 |
| Moderate | $1,800 | $1,200 | $800 |
| Minor | $600 | $300 | $100 |

For violations by a person who has previously been the subject of a Section 608 enforcement response (e.g., notice of violation, warning letter, or administrative or judicial order), Regions should also assess an aggravated amount from Matrix 2 (i.e., increased by the same percentage as Matrix 1). The aggravated amount should be multiplied by the number of repeat violations of the same requirement. If the Region believes that this penalty amount is insufficient for deterrent effect, it may apply Matrix 1 to all repeat violations.

### 3. Size of violator

EPA will scale the penalty to the size of the violator (calculate only once per violator). Size of violator is determined from an individual's or a company's net worth. In the case of a company with more than one facility, the size of the violator figure is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. If the Region is unable to determine net worth, it may determine size of violator based on gross

revenues from all revenue sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the prior three years may be used. The gravity component will be scaled for size of violator using a multiplier. If a business has a net worth of $300,000 (or gross revenues of $1,000,000), the appropriate amount from the matrix (or matrices) above should be multiplied by 1. For businesses with net worth of less than or more than $300,000 (or gross revenues of less than or more than $1,000,000), Regions should divide the net worth by $300,000 (or the gross revenues by $1,000,000) to determine the multiplier. Generally, the size of violator component should not be more than 50% of the penalty (i.e., no multiplier greater than 2 would be used). The penalty for environmental harm/importance to the regulatory scheme multiplied by the size of violator factor becomes the adjusted gravity component. If EPA is unable to obtain information about either net worth or gross revenues, than the Region should use an aggressive assumption for the size of violator, and adjust it downward if proof of a lower number is presented during negotiations.

Mitigating Penalty Amounts

The penalty amount calculated in accordance with this policy represents the minimum penalty that EPA can accept in settlement of cases of this nature, unless reductions from this amount are made in accordance with the provisions of the Stationary Source Civil Penalty Policy, pp. 15-19 (dated October 25, 1991). In civil judicial actions, a proposed penalty reduction from the amount calculated under this policy must be approved by the Air Enforcement Division. If the litigation team believes that reduction of the penalty is appropriate, the case file should contain both a memorandum justifying the reduction and documentation that the penalty reduction was approved. In administrative enforcement actions, Regional Administrators or their designees must submit penalty justification documentation within 20 days of issuance or signing of consent agreements to the Director of the Stationary Source Compliance Division in the Office of Air Quality Planning and Standards and the Enforcement Counsel for Air in the Office of Enforcement.

Examples of Penalty Calculations

Following are examples of the application of this policy. Adjustments to the gravity component are made in accordance with the Stationary Source Civil Penalty Policy.

Example 1

Grady's Heating and Air-conditioning Service services home and office air conditioning systems. Hotel A, located in Miami, Florida, is having problems with its air conditioning system. It does not seem to be cooling properly. In October 1993, Hotel A hires Grady's to fix the system. One of Hotel A's employees, Grace, notices that the service person is not carrying recovery or recycling equipment. She follows him to where the chiller is located. The unit contains 230 kilograms of CFC-12. She observes him vent the entire charge from the system. Grace reports her observation to EPA. An inspection by EPA of Grady's facility reveals that the company owns recovery equipment and has apparently properly serviced all other appliances using the equipment. Grady's net worth is $330,000.

Economic Benefit Component

| | |
|---|---|
| The economic benefit of not using the equipment for this job and avoided labor cost (less than $500) | $0 |

Gravity Component

| | |
|---|---|
| Knowing venting (from major-major cell) | $15,000 |

Analysis: The violator's actions resulted in Major potential for harm because there was an actual loss of a substantial amount of CFC-12, which is relatively more ozone depleting than HCFCs, and because a knowing release is prohibited during servicing unless it is de minimis. The violator's actions were a Major deviation from the requirement because the company did not comply at all with the requirement that persons not knowingly release refrigerant.

| | |
|---|---|
| Size of violator (Business' net worth is approximately $330,000) (330,000/300,000 = | * 1.1 |
| | $16,500 |

Preliminary deterrence amount

| | |
|---|---|
| Economic Benefit Component | 0 |
| Gravity Component | +16,500 |
| Minimum penalty settlement amount | $16,500 |

One year later, the Agency receives a tip that Grady's has hired a new certified technician who is not always using recovery equipment when it is needed. After investigating the tip, the Agency concludes that on three occasions, Grady's has violated the venting prohibition.

Economic Benefit Component

| | | |
|---|---|---|
| The economic benefit of not using the equipment for this job and avoided labor cost (less than $500) | | $0 |

Gravity Component

| | | |
|---|---|---|
| Knowing venting (from major-major cell) | $15,000 | |
| aggravated by 30% (15,000 *.30) because violation occurred after an enforcement response | + 4,500 | |
| | 19,500 | |
| | | 19,500 |

Analysis: The violator's actions resulted in Major potential for harm because there was an actual loss of a substantial amount of CFC-12, which is relatively more ozone depleting than HCFCs, and because a knowing release is prohibited during servicing unless it is de minimis. The violator's actions were a Major deviation from the requirement because the company did not comply at all with the requirement that persons not knowingly release refrigerant.

| | | |
|---|---|---|
| Multi-incident assessment (# of additional violations multiplied by major-major cell amount) 2 * $3000 | 6,000 | |
| aggravated by 30% (6,000 *.30) because violations occurred after an enforcement response | + 1,800 | |
| | 7,800 | |
| | | + 7,800 |
| | | 27,300 |
| Size of violator (Business' net worth is approximately $330,000) (330,000/300,000 = | | * 1.1 |
| | | $30,030 |

Preliminary deterrence amount

| | |
|---|---|
| Economic Benefit Component | 0 |
| Gravity Component | +30,030 |
| Minimum penalty settlement amount | $30,030 |

Example 2

Joe, owner of Joe's Repair, has been manufacturing refrigerant recovery devices for small appliances in his spare time. Joe has not had the devices tested or certified by an approved equipment testing organization. Since November 15, 1993, Joe has manufactured seven units and is using them at his shop. When EPA tested the units, it determined that the equipment could recover 50% of the refrigerant in a small appliance. Joe's net worth is $180,000.

Economic Benefit Component

| | |
|---|---|
| The economic benefit of delaying the cost of testing + cost of building equipment that meets standards or purchasing approved equipment | $ amount from BEN |

Gravity Component

| | |
|---|---|
| Manufacturing uncertified equipment (from moderate-moderate cell) | $7,000 |

Analysis: The violator's actions resulted in a Moderate potential for harm because there was an actual loss of a significant amount of refrigerant (the equipment can only recover 50%) and because his equipment does not meet the minimum standard for recovery. The violator's actions involve a Moderate deviation from the requirements because although Joe is using some equipment, i.e, he is not simply venting, he did not have his equipment tested and certified.

| | |
|---|---|
| Multi-incident assessment (# of additional violations multiplied by moderate-moderate cell amount) 6 * $1200 = | $7,200 |
| | $14,200 |
| Size of violator (Business' net worth is approximately $180,000) 180,000/300,000 = | * .6 |
| | $8,520 |

Preliminary deterrence amount

| | |
|---|---|
| Economic Benefit Component | ?? |
| Gravity Component | + 8,520 |
| Minimum penalty settlement amount | $ |

Example 3

Dave, a building manager for an office complex in Tacoma, Washington, uses passive recovery equipment when he or his crew (two people) work on the rooftop chiller that contains 30 pounds of R-22. Dave decided not to purchase the appropriate (and more expensive) recovery equipment for the building or get himself or his crew trained and certified. During a routine inspection in January 1994, an EPA inspector discovers that the building does not have the required recovery equipment, nor did Dave or the building owner ever submit a certification indicating that certified equipment had been acquired. The inspector also reviews the building's repair log which shows 5 repairs when the passive equipment was used. The building owner's net worth is $1,500,000.

Economic Benefit Component

| | |
|---|---|
| The economic benefit of delaying the purchase of equipment + cost of operation and maintenance + cost of certifying technicians | $ amount from BEN |

Gravity Component

| | |
|---|---|
| Servicing without using certified equipment (from moderate-moderate cell) | $7,000 |

Analysis: The violator's actions resulted in a Moderate potential for harm because there was an actual loss of a significant amount of refrigerant (passive equipment can only recover a small percentage of the actual charge) and because Dave is not using equipment that is appropriate for the appliance serviced. The violator's actions involve a Moderate deviation from the requirements because although Dave is using some equipment, i.e, he is not simply venting, he is not using the equipment required by the regulations for this type of appliance.

| | |
|---|---|
| Multi-incident<br>(# of additional violations multiplied by major-moderate cell amount)<br>(4 * $1200) | 4,800 |
| Technicians not certified<br>(from moderate-major cell) | 9,000 |

Analysis: The violator's actions resulted in a Moderate potential for harm because the risk of loss due to untrained technicians improperly using recovery equipment is significant. The violator's actions involve a Major deviation from the requirements because the technicians did not comply with any of the technician certification requirements.

| | |
|---|---|
| Multi-incident<br>(# of additional violations multiplied by moderate-moderate cell amount)<br>(2 * $1200) | 2,400 |
| Failure to submit certification<br>(from minor-major cell) | 3,000 |

Analysis: The violator's actions resulted in a Minor potential for environmental harm because failure of an owner to certify undermines the Agency's ability to determine compliance with the regulations. The violator's actions involve a Major deviation from the requirements because the owner did not comply with any of the certification requirements.

| | |
|---|---|
| | 26,200 |
| Size of violator (Business' net worth is approximately $1,500,000)<br>(1,500,000/300,000 = 5) | |
| Because generally the size of violator should be no more than 50% of the preliminary deterrence amount, the multiplier is reduced to 2) | * 2 |
| | $52,400 |

<u>Preliminary deterrence amount</u>

| | |
|---|---|
| Economic Benefit Component | ?? |
| Gravity Component | +52,400 |
| <u>Minimum penalty settlement amount</u> | $ |

**SECTION B DOCUMENT 20**

**Guidance on Chosing the Appropriate Forum in Clean Air Act Stationary Source Civil Enforcement Actions**
**NOTE: Confidential cover memo is included in Section I below.**

**10/29/91**

SECTION B DOCUMENT 21

**Supplemental Environmental Projects in EPA Settlements Involving Early Reductions under the Clean Air Act**

11/01/91

Meg.
Orig: Ent
cc RA
Dir
Sr. Staff
OAA
B21

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

NOV 15 1991

OFFICE OF
REGIONAL ADMINISTRATOR

NOV 1 1991

OFFICE OF ENFORCEMENT

**MEMORANDUM**

SUBJECT: Supplemental Environmental Projects in EPA Settlements Involving Early Reductions under the Clean Air Act

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Addressees

This memorandum supplements the articulation of the Agency's policy entitled "Policy on the Use of Supplemental Enforcement Projects in EPA Settlements", dated February 12, 1991. This discussion of the policy is prompted by questions that have arisen when noncomplying sources or EPA enforcement personnel have proposed a supplemental environmental project (SEP) as part of a settlement agreement in an enforcement action which, if approved, may also qualify under the Early Reductions Program (ERP) being implemented pursuant to the authority of Clean Air Act Section 112(i)(5).

The central issue here concerns the propriety of approving an otherwise valid proposed SEP which will both reduce a civil penalty in an enforcement action and qualify as a project for the ERP under Clean Air Act Section 112(i)(5). That section provides that if a source achieves an early reduction of 90% in air toxic emissions (95% in the case of particulate air toxics), the source will receive a six year extension of compliance with the otherwise applicable maximum achievable control technology (MACT) standard. The question, then, is whether a source should be allowed to use an approved SEP both to reduce a monetary penalty and to obtain a six year MACT extension under the ERP.

The fact that a project may ultimately have a value to the source beyond penalty mitigation does not necessarily render a project unacceptable as a SEP. The SEP policy thus provides that pollution prevention projects which offer significant long-term environmental and health benefits may qualify as SEPs even though the project may represent a "sound business practice" and the benefits of the project may ultimately inure to the source. Because early MACT reductions will often be in the nature of pollution prevention, we are comfortable treating these projects

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as SEPs where they are offered as part of a settlement of enforcement claims. The extent of the mitigation in a given case should be determined by application of the SEP policy.

We note in this regard that, to be appropriate for penalty mitigation, the SEP should ordinarily be inspired, at least in part, by an enforcement case or the prospect of an enforcement case. Because the basic premise for mitigation is that we are getting relief beyond that which would otherwise occur, projects already underway entirely disconnected from the prospect of enforcement will not ordinarily qualify for penalty mitigation.

Nonetheless, there may be supplemental value to the government in converting a previously voluntary undertaking to <u>an enforceable commitment</u> under a consent agreement where the undertaking represents an important gain for the environment. Recognizing the significant environmental benefits associated with early reductions of toxic emissions, and that early reductions efforts designed to extend MACT deadlines are not guaranteed to achieve the desired reductions, the conversion of an early reduction effort to an enforceable commitment in the context of an enforcement settlement can be considered for purposes of penalty mitigation. In this setting, however, mitigation should not, in view of the independent thrust behind the project, be based on the full value of the project.

Additionally, projects which are continued (beyond the point at which they would otherwise be concluded) or expanded as a result of enforcement may qualify for mitigation.

I hope that you find this of value in devising your early reduction strategy. For further information, please contact Joanne Berman at FTS 260-6224, or Charlie Garlow at FTS 260-1088.

Addressees:

Regional Administrators
Regions I-X

Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Air Management Division Directors
Regions I, III, and IX

Air and Waste Management Division Director
Region II

**SECTION B DOCUMENT 22**

**Guidance on the Timely and Appropriate (T&A) Enforcement Response to Significant Air Pollution Violators (Svs)**
**NOTE: Includes cover memorandum**
**02/07/92**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

FEB - 7 1992

MEMORANDUM

SUBJECT: Issuance of Guidance on the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators"

FROM: John S. Seitz, Director
Office of Air Quality Planning & Standards

Robert Van Heuvelen
Robert Van Heuvelen
Acting Director of Civil Enforcement

TO: Air, Pesticides and Toxics Management Division Directors
Regions I and IV

Air and Waste Management Division Director
Region II

Air, Radiation and Toxics Division Director
Region III

Air and Radiation Division Director
Region V

Air, Pesticides and Toxics Division Director
Region VI

Air and Toxics Division Directors
Regions VII, VIII, IX and X

Regional Counsels
Regions I - X

In June of 1989, the Agency recognized the need for making a substantial revision to the Agency's Significant Violator and Timely and Appropriate Guidances. A workgroup was formed consisting of Branch Chiefs from Regions II, III, V, VII, and IX and representatives from SSCD and AED to develop a revised guidance document (Attachment I). The Penalties Section, which establishes a new standard for Federal overfiling, was developed by the State/Federal Penalties Workgroup chaired by the Air Enforcement Division (AED) with representatives from STAPPA/ALAPCO and EPA Regions and Headquarters. This document has been

thoroughly reviewed and commented upon by representatives of other Regional Offices, STAPPA and ALAPCO. A summary of these comments and responses is presented in Attachment II.

The subject guidance supersedes and consolidates previous Clean Air Act guidance related to Significant Violators (SVs), Timely and Appropriate (T&A), and Federally Reportable Violations (FRV). Specifically, this document supersedes all previous guidances on the three subjects.

This guidance applies to all "major" (as defined by the CAAA) stationary sources of air pollution which are in violation of a Federally-enforceable regulation. Note that a revision of the definition of SV was necessitated by the new emphasis placed by the CAAA upon continuous compliance by all major sources. Thus the new SV universe includes all of the present significant violators and other environmentally significant violators of concern to the EPA or State agencies. 1 We recognize that this may represent a substantial increase in the number of SVs over the number that would have resulted from the previous definition of Significant Violator, but this revision was necessary to address significant air quality concerns of the new Act.

This guidance is being revised largely to encourage a greater degree of team-building and cooperative resolution of Significant Violators by all responsible agencies, to encourage agencies to give priority attention to those violators which they believe are most environmentally important, and to permit an increased degree of agency flexibility in identifying and resolving SVs.

This guidance is designed to foster the development of a more complete and accurate compliance picture, regardless of the short-term resource implications. It is EPA's position that by portraying a more complete and accurate compliance picture, agencies will be more likely to address the most environmentally important violators first, and will have a better opportunity to receive appropriate resources to complete the task.

Further, this guidance has been revised to more accurately reflect the time and resources necessary to bring major sources into a state of continuous compliance. To that end, the timeline for addressing a SV has been lengthened by 30 days (to 150 days), and an optional prioritization procedure has been added to help agencies focus their resources upon the most environmentally

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1 "State" as used throughout this paper also refers to local agencies where they have enforcement authority.

significant SVs. A prioritization procedure must be used in all instances where an agency is unable to address all of its SVs in a "timely and appropriate" manner, and at any other times when it so chooses. The Agency recognizes that some of the highest priority SVs may require substantially more time and resources to resolve than a routine SV. Situations where this guidance will not be met should be noted qualitatively in the routine quarterly reports to EPA Headquarters.

This guidance, by agreement of the parties, will be implemented starting at the beginning of the third quarter of FY 1992. During the remainder of the first and second quarters, each agency should compare all of the currently outstanding SVs (not including any SVs for which the agency has already initiated action) with this revised guidance. On the basis of this review, each agency should report a "revised SV list" to SSCD, and revise its AFS database accordingly.

Please feel free to contact John Rasnic of the Stationary Source Compliance Division or Michael Alushin of the Air Enforcement Division if you have any questions or comments on this document. John may be reached at (703) 308-8600 commercial or FTS 678-8600. Mike may be reached at FTS 260-2820.

Attachments

cc: S. William Becker, Executive Director
STAPPA/ALAPCO

John Calcagni, Director
Air Quality Management Division

Bruce Jordan, Director
Emission Standards Division

Bill Laxton, Director
Technical Support Division

John Rasnic, Director
Stationary Source Compliance Division

Michael Alushin, Enforcement Counsel Air
Office of Enforcement

Air Compliance Branch Chiefs

Regional Counsel Air Branch Chiefs

ATTACHMENT I

# GUIDANCE ON THE TIMELY AND APPROPRIATE (T&A) ENFORCEMENT RESPONSE TO SIGNIFICANT AIR POLLUTION VIOLATORS (SVs)

## I. SCOPE AND SUMMARY OF GUIDANCE

### A. Applicability

This guidance supersedes and consolidates previous guidance documents related to Significant Violators (SV), Timely and Appropriate (T&A), and Federally Reportable Violations (FRV). Specifically, this document supersedes the following guidance documents: (1) Definition of SV Contained in "EPA Accountability System -- OANR Policy Guidance", dated December 29, 1981; (2) "Significant Violators", dated June 24, 1982; (3) "Definition of Significant Violator for PM10", dated September 23, 1988; (4) "Timely and Appropriate Enforcement Response Guidance", dated April 11, 1986; and (5) "Guidance on Federally-Reportable Violations for Stationary Air Sources", dated April 11, 1986.

### B. Summary of Guidance

This guidance applies to all "major" (as defined by the Clean Air Act Amendments of 1990 (CAAA)) stationary sources of air pollution which are in violation of a Federally-enforceable regulation. Note that the guidance also applies to emergency episodes or sources which construct without a valid permit. However, the timelines for resolution of such violations are substantially shorter than specified in this document. Similarly, this guidance applies to violators of asbestos demolition and renovation (D&R) regulations. However, the specific definition of SV, prioritization criteria and timelines for resolution of such violations will be found in a future Attachment to be incorporated into this document.

Once a violator is detected, the agencies shall take the following five actions:

1. The "finding" agency shall determine whether or not the source is a Significant Violator.

2. A NOV/FOV shall be issued (preferably by the State) to each SV within 45 days of such determination. [1]

3. The EPA and State shall <u>jointly</u> determine which has the initial lead in addressing the SV.

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1 "State" as used throughout this paper also refers to local agencies where they have enforcement authority.

4. The lead agency shall routinely address each SV as it is identified. However, if the agency is unable or unwilling to do so in a manner consistent with the timelines section of this guidance, the lead agency shall use the following optional approach. It shall first prioritize all of the SVs as outlined in Appendix A prior to initiating action against the highest priority SV. (However, to the extent the available timeframe for using Administrative Penalty authority is running out for a particular SV, the EPA may move against that SV in order to avail itself of the advantages of an administrative action.)

5. EPA shall add the newly designated SV to the SV list.

This guidance recognizes the importance of addressing the significance of penalties when resolving SV cases. Consistent with the recommendations from the "State/Federal Penalties Workgroup", EPA expects that agencies will obtain an "appropriate" penalty (including one to offset the source's economic gain) whenever it resolves a SV.

C. General Information about the Guidance

1. While EPA expects that States will address violations of air pollution regulations within their jurisdictions, except for non-delegated Federal standards, by focusing on a limited group of violators (e.g., those targeted by this guidance), this guidance is not intended to detract from the importance of addressing other violators and the right and responsibilities of the States and EPA for doing so.

2. This guidance articulates the mutual expectations of the respective parties of the Federal - State partnership in the enforcement of air pollution control requirements for stationary sources. It is fully expected that this guidance will be modified and expanded in future years to reflect experiences in its implementation and the evolution of the air program itself.

3. In accordance with the Deputy Administrator's memorandum of April 9, 1984 on Forging an Effective State/Federal Enforcement Relationship, this national guidance will serve as the framework for State specific agreements reflecting the parties' mutual expectations. As that memorandum states, "the Regions will have to accommodate differences among States, for example, where their administrative procedures require different timelines for enforcement action."

## II. PHILOSOPHY OF GUIDANCE - DEFINITION OF SV

Agency Significant Violator activities shall be designed to identify and to expeditiously return to compliance those violating sources which the agency believes are environmentally most important, namely the SVs. Although this guidance requires agencies to address all Significant Violators, EPA recognizes that agencies may be unable to address all of them immediately. Each agency shall return all SVs to compliance in accordance with the Timely and Appropriate section of this guidance. Optionally the agency may utilize a quantitative targeting and prioritization procedure (similar to the one shown in Appendix A) whenever there are more SVs than there are resources available to address them consistent with the T&A section of this guidance.

### A. Definition of a Significant Violator (SV)

Agencies shall deem a source to be a Significant Violator if it is:

1. A "Major" source (as defined by the CAAA, except for asbestos D&R NESHAP), and it violates any one or more of the following:

   a. SIP emission, monitoring or substantial procedural requirements, regardless of pollutant designation status.

   b. NSPS emission, monitoring or substantial procedural requirements.

   c. NESHAP emission, monitoring or substantial procedural requirements for existing NESHAP standards and promulgated MACT requirements.

   d. SIP, NSPS or NESHAP emission, procedural or monitoring requirements violated repeatedly or chronically (e.g., exceeds emission limit or gets no continuous monitoring data for 5% or more of the time in a calendar quarter).

   e. Any provision of a Federal Consent Decree or Federal Administrative Order.

   f. Any substantive provision of a State Judicial Order or a State Administrative Order which was issued for an underlying SIP violation.

   g. Any requirement of Part C or Part D of Title I of the CAAA (e.g., new construction of a major source, major modification of a major source).

2. Any synthetic minor source, and it is in violation of any one or more of the following:

a. Avoiding PSD while violating an emission limit or permit condition which affects the PSD status.

b. Exceeding its permitted emission standard above the amount that would classify the source as a nonattainment area major source.

With respect to emergency episodes or sources which construct without a valid PSD or Part D permit (where one is required), the timelines delineated below do not pertain. In the case of emergency episodes, the seriousness of the violation would normally require expedited action. In the case of a source constructed without a required PSD or Part D permit, options for obtaining relief may be foreclosed by allowing the source to continue to construct and, therefore, expedited action may be essential.

## III. PROCESSING OF SIGNIFICANT VIOLATORS

### A. Agency Communications Concerning SVs

As soon as possible (at least within one month) after an agency initially detects a violation at a potential significant violator, that agency shall communicate the compliance status of that source to all other agencies which are responsible for bringing and maintaining that source into continuous compliance (e.g., State to EPA, or EPA to State). Such communications shall be performed to:

1. Develop and maintain a common, agreed upon list of SVs;

2. Determine, on a case by case basis, which agency is best suited to take the initial lead in addressing this SV; 2

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2 Determining which agency will "take the initial lead" should be through mutual agreement between the agencies, on a case-by-case basis. Examples of the criteria which may be used in making the determination include, but are not limited to: agency authority and policies, particularly with respect to penalties; agency expertise with the specific process, controls, or monitors; whether or not the violator's characteristics meet those highlighted by a national/State "initiative"; and availability of resources. Normally the State agency will be given the initial lead.

3. Ensure that the SVs are returned to compliance, consistent with the T&A section of this guidance; and

4. Foster a cooperative "team-building" spirit among all of the involved agencies.

B. Processing of Significant Violators

Once a violation is detected, the agencies shall take the following five actions:

1. The "finding" agency shall compare the source's characteristics with the definition of SV contained in this guidance. To the extent that the violator fits one or more of the elements of the definition, it shall be designated as a "Significant Violator" and is subject to the Timely and Appropriate section of this guidance.

2. Within forty five (45) days after designation of the violator as a SV, a NOV or FOV shall be issued (by the State preferably) to each SV, regardless of which agency has the lead.

3. The State agency and the EPA Regional Office shall jointly decide which agency will take the lead in resolving the SV.

4. As resources become available, the lead agency shall routinely address each SV as it is identified. However, if it is unable or unwilling to do so in a manner consistent with the T&A section of this guidance, the lead agency shall use the following optional approach. It shall first prioritize all of the SVs prior to initiating action against the highest priority SV. The agency shall use a prioritization procedure similar to the "Table of Criteria and Environmental Weighting Factors" (Appendix A) to determine its priority relative to other outstanding SVs. As resources become available, the highest priority (at that time) SV shall be addressed. Once the agency initiates any type of enforcement activity related to a SV, it shall not interrupt this activity, even if a higher ranked SV is subsequently identified. Note that the prioritization step is not related to EPA assumption of responsibility for a State's SV; it is simply a means of ensuring that the most environmentally important SVs are addressed in a timely and appropriate manner.

5. EPA shall add the source to its SV list for agency tracking and reporting.

C. EPA Maintains Enforcement Authority

The Clean Air Act vests responsiblity for enforcement of the law in EPA. Therefore, EPA may move independently with respect to designation of a violator as a "Significant Violator", and EPA shall assume the lead in cases when it becomes apparent that the State is unable or unwilling to act in accordance with this guidance to resolve a violation in a timely and appropriate manner.

IV. T&A TIMELINES FOR ENFORCEMENT ACTION

All SVs, except emergency episodes and sources which construct without a valid PSD or Part D permit (where one is required), are subject to the following timelines and penalty requirements (see section V below). The timeline for enforcement actions is generally the same for significant violators discovered by EPA as for those discovered by a State, regardless of which agency takes the initial lead. The only exception is for the unusual situation in which EPA assumes the lead from a State. If EPA does take over the lead, it receives up to an additional 100 days to address the SV. 3

A separate (new) timeline will be established for any additional violations discovered at an existing SV before it has been fully resolved.

A. Day Zero

The clock starts (i.e., day zero) 30 days after the discovering agency first receives information concerning a Federally enforceable violation (e.g., date of inspection, stack test or continuous emission monitoring system report). If, during this 30-day period, the enforcement agency decides that additional monitoring or analysis is required to determine or confirm the violation, the clock does not start until the earlier of the date of receipt of such additional data or on the 90th day after the

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3 This guidance provides EPA Regional Offices up to 100 additional days to address a SV after it assumes the lead from a State. It should not need 150 days like it would in a normal situation. This is based upon the assumptions that EPA has closely tracked the State enforcement activity and data gathering, and will be able to rely upon the fact that the State's NOV started the penalty clock. (As stipulated in the CAAA of 1990, taking formal action, e.g., issuing an NOV/FOV, shifts the burden of proof of continuous compliance to the source, and "starts the penalty clock".)

violation was initially discovered. This additional period (up to 60 days) provides sufficient time for agency evaluation of the data to determine if a Federally enforceable violation occurred.

B. Day 45 - Routine Issuance of NOV/FOV and EPA Tracking

Unless the State agency requests that EPA issue the notice, by Day 45 the State agency shall routinely issue a NOV (if required for SIP sources), or a FOV (for non SIP sources) to the source. 4

If the State has not taken such action, EPA shall immediately issue an appropriate notice. 5

Any EPA-issued NOV or FOV, in a case where the State has the lead, will indicate that EPA is still looking to the State to resolve the matter, and further EPA action will be required only in the absence of an acceptable, prompt resolution by the State.

The issuing office will transmit a copy of any NOVs or FOVs it issues to other agencies in whose jurisdiction the source is located. If the violation clearly impacts upon the air quality of an adjacent State, EPA will also transmit a copy of the NOV or FOV to that State as well.

Also, EPA should add this source to its list of SVs for Agency tracking and reporting purposes.

C. Day 90 - Possible EPA Case Action

If the State has the initial lead, and none of the actions specified in E (below) have occurred by Day 90, EPA will discuss with the State the status of the State's actions and its expectations. If discussions with the State suggest that the State is close to addressing or resolving the violation or that further deferral is otherwise appropriate, EPA will continue to defer to enable the State to complete its action. If EPA determines that further deferral is not justified, it will proceed with its own action at this point.

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4 "Routine issuance of a NOV/FOV" is required here because this starts the penalty clock against the violator, and shifts the burden of proof, to demonstrate continuous compliance, to the source, (42 U.S.C.Section 7413(e)(2)).

5 "Routine EPA issuance of a NOV/FOV" is specified here, not as an indication, in any way, that State agencies are incapable of getting the job done. This requirement is placed upon EPA Regional Offices because it has been noted that many sources do not seriously work to resolve their violations until after EPA puts them on formal notice and starts the penalty clock.

D. EPA Responsibilities After It Assumes the Lead

After EPA assumes the lead in a case, it will have up to an additional 100 days to get the source into compliance, onto a schedule, issue a Section 113(a) administrative order (including administrative remedies), a Section 113(d) administrative enforcement action, or subject the source to a Section 120 action or judicial referral. EPA will encourage continued State participation even in situations where EPA takes over the lead. The possibility of a joint action should be considered as an alternative to a unilateral EPA action where feasible.

E. Day 150 (no lead change), or Day 190 (lead change)

By Day 150 (or 190 with lead change), the source shall either be in compliance (RESOLVED), or ADDRESSED i.e., on a legally-enforceable and expeditious administrative or judicial order, or be subject to a referral to the (State) attorney general or (Federal) Department of Justice for an adjudicatory enforcement hearing or judicial action.

F. Resolved versus Addressed

As indicated above, the term RESOLVED shall mean that the source is returned to COMPLIANCE. Thus after the case has been addressed as per Part E (above), EPA and the State will continue to track the source. Note that the source remains on the SV list (but not carried in STARS) until it is returned to compliance (RESOLVED). Follow-up may be required in one of the following outcomes once the case has been addressed: if a schedule is established, the State will monitor compliance with that schedule and report on progress in accordance with established reporting requirements; if a referral is made, EPA will continue to monitor the progress of the case to and after filing; and if a case becomes unduly delayed, EPA will discuss this with the State and may choose to initiate a parallel Federal action. No formal timelines are being established for this stage of the enforcement process, however.

V. PENALTIES

EPA's national goal is to have all federal, State and local enforcement actions for Clean Air Act violations assess a penalty sufficient to achieve effective deterrence for the source subject to enforcement and for the regulated community as a whole. EPA assesses penalties in federal Clean Air Act actions pursuant to the Clean Air Act Stationary Source Civil Penalty Policy. Under the EPA penalty policy, both the economic benefit of noncompliance and a gravity component reflecting the seriousness of the violation are calculated. This calculated penalty may then be adjusted where appropriate for several factors including the

risks involved in litigating the enforcement action and the violator's ability to pay a penalty.

All State and local agency enforcement actions should also assess civil penalties of sufficient magnitude to maintain a credible deterrent effect. To accomplish this goal, State and local enforcement agencies should calculate (where possible) and assess the economic benefit of noncompliance. In some cases, the risks involved in litigating the case or the violator's inability to pay a penalty may justify not assessing a penalty which recaptures the full economic benefit. Legitimate litigation risks include adverse legal precedent and evidentiary problems. The inability of a violator to pay a penalty must be demonstrated by the violator through financial information analyzed by State or local environmental enforcement personnel.

An additional amount reflecting the seriousness of the violation should also be assessed. This is especially important for violations which may not have a readily calculated economic benefit but which are critical to program integrity, such as monitoring, reporting, recordkeeping and testing violations. In some cases, this additional amount may be adjusted to reflect the violator's history of compliance with air pollution laws and regulations, and the source's good faith efforts to comply. All penalty calculations in State and local enforcement actions must be documented in the appropriate case file.

EPA will consider overfiling when State or local penalties fail to meet these criteria, taking into account available federal resources and enforcement priorities.

State and local enforcement agencies are strongly encouraged to increase the statutory maximum civil penalty authorized by State or local law to at least $10,000 per day per violation as required by Title V of the Clean Air Act, as amended, for an approved operating permits program. States and municipalities with penalty authority of less than $10,000 per day per violation will be subject to more intensive EPA oversight and potential overfiling.

State and local enforcement agencies are also strongly encouraged to develop a penalty policy implementing these general penalty criteria. EPA will then review and evaluate, but not formally approve, these penalty policies for consistency with the general penalty criteria. A State or local enforcement agency which adopts a sound penalty policy implementing these penalty criteria and demonstrates a pattern of adherence to it will receive less case-specific EPA oversight. A State or local enforcement agency which chooses not to develop a penalty policy or which has a penalty policy that is not consistent with these penalty criteria will continue to be subject to significantly more

intensive case-specific EPA review of State and local penalties and to potential overfiling.

State and local enforcement agencies are also encouraged to use the BEN computer model developed by EPA to calculate the economic benefit of noncompliance. State and local enforcement agencies which use the BEN computer model or a similar model to calculate economic benefit will receive less intensive EPA case-specific oversight.

## VI. CONSULTATION AND DATA TRANSFER

### A. Informal Consultation

EPA and States should conduct frequent (at least monthly) informal consultations to discuss compliance efforts. During these discussions, information exchange relative to obtaining compliance and penalties should occur. This exchange should include at least the following items:

1. The State and EPA would each identify any newly-found violators subject to this guidance.

2. The State and EPA would each identify sources notified of noncompliance during the month.

3. The State and EPA would each identify violators where action had been taken.

4. The State would discuss the status of other enforcement actions pending or in progress, if requested by EPA.

5. EPA would identify sources for which it had completed action and provide the status for other sources where action is pending or in progress.

6. EPA would identify any sources it had found in violation and confer with the State as required above.

### B. Updating EPA's Compliance Databases

The AIRS Facility (and/or NARS, as appropriate) databases will be updated by EPA and/or the State on a monthly basis to reflect:

1. Compliance status changes for newly-identified violators which are in violation on the last day of the month prior to the consultation, and which were (or are expected to be) in that status for 7 days or more.

2. Sources notified of noncompliance.

3. Sources with completed enforcement actions, including any schedules and incremental dates for returning to compliance.

4. Sources found to be in compliance with final limits.

C. Provide Inspection Results

Inspection results other than those affected by the above will be provided in accordance with current practices and EPA accountability system requirements.

D. Sharing of Data

EPA and the State will share inspection results and other monitoring reports (e.g., stack tests, CEMS) for use in enforcement proceedings to the extent practicable. State personnel should be encouraged to provide evidence, including testimony, for Federal proceedings. Federal personnel should similarly support State enforcement proceedings.

## APPENDIX A
## TABLE OF CRITERIA AND ENVIRONMENTAL WEIGHTING FACTORS *

| | Criteria | Environmental Weight Factor/Vio. |
|---|---|---|
| 1) | At least one unit at a source is (or has been) in violation of a SIP, NSPS, or NESHAPS emission, monitoring, or procedural requirement, except for asbestos D&R NESHAP | 10 per unit |
| 2) | Violation of permitting requirements (PSD, Part D, or synthetic minor) | 10 |
| 3) | Violation of a Federal Consent Decree or Administrative Order, or of State Order w/emission viol. | 10 |
| 4) | Emission violation (1 time based on reference method; or >5% of quarter based on "indicator" CEMS; or >5% no data; except for opacity, use weight of 5) | 10<br>5 |
| | Add: a) Amount of excess emission (known): | |
| | o over 250 TPY | 10 |
| | o 100 - 250 TPY | 6 |
| | o 25 - 100 TPY | 4 |
| | o 10 - 25 TPY | 2 |
| | b) If excess emissions are not known, use size of emission point: | |
| | o over 250 TPY | 10 |
| | o 100 -250 TPY | 6 |
| | o 25 - 100 TPY | 4 |
| | o 10 - 25 TPY | 2 |
| | c) Source is in a non-attainment area | 5 |
| | d) Source is a repeat violator: | |
| | o same emission unit or cause | 7 |
| | o unrelated repeat violator | 3 |
| | e) Hazardous emissions under Title III | 10 |
| | f) Multi-media violator | 10 |
| | g) Source is part of national initiative | 5 |
| 5) | Source is in violation of minor procedural requir'mt. | (-)5 |
| 6) | ** Problem source (as determined by State/EPA) | 1 to 10** |
| 7) | Emiss. viol'ts which occur on a 1-time or infrequent basis, AND <10 lbs/day or <2% of allowable emiss's | (-)50% of total |

**APPENDIX A (continued)**

* Regardless of a SV's relative priority, if the agency desires to use a preferred remedy (e.g., Federal Administrative Penalty authority with its one year "look-back" provision), and the time to do so is running out, the agency may move it up to the "head of the line".

** A "problem source" may include such actions as a source which fails to test, report, or install a monitoring system at all, or one which is totally uncooperative.

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Examples based on Table (key parameters are underlined):

1) A major SIP source, which has 300 TPY excess emissions, is a repeat emission $SO_2$ and monitoring violator, has been in violation for 5 months, and is violating a Federal Consent Decree. Its total environmental weighting factor is calculated as follows:
[(#1=10)+[#3=10]+[#4=10+10]+[#4a=10]=50 total

2) A NSPS source, 100 TPY in potential emissions, fails to test within the timeline (1 month late) established by NSPS, and it is a first time violator. Its total environmental weighting factor is calculated as follows:
[(#1=10]-[#5=5]=5 total

3) An asbestos manufacturing source repeatedly fails to notify an agency about its plans to conduct compliance tests, its latest test report is totally unacceptable, and the agency considers the source to be uncooperative. Its total environmental weighting factor is calculated as follows:
[#1=10]+[#4=10]+[#4d=7]+[#6=7]=34 total

Clearly, the first and third violators are the worst SVs, and the first one should be ranked the highest SV, and the second one should be ranked lowest. Thus, assuming that these were the only three SVs for which no follow-up action had been started, the SIP source (in the first example) should be the next SV which the agency should initiate action against.

## ATTACHMENT II

## SUMMARY AND RESPONSE TO COMMENTS

COMPLEXITY & BURDEN ISSUES:

o Cost/benefit of the ranking procedure is not favorable; e.g., too complex, subject to duplication and subject to confusion among the different agencies using it (STAPPA/ALAPCO).

Response:

- It is important to have "joint" decisions throughout the process (e.g., promotion of dialogue and team-building, and case-by-case determination of which agency takes the lead makes the most effective use of agency resources, expertise and national priorities).

- Prioritization and ranking activity was simplified (e.g., agencies which are able to address all SVs consistent with the T&A requirements, can opt out of using any prioritization procedure).

o Virtually all violations will be rated as "major" and thus subject to the guidance (STAPPA/ALAPCO).

Response:

- The question suggests a little confusion about the language contained in the document. Whether a source is "major" or not is established by the CAAA of 1990. Therefore, by definition, all SVs must first be a "major" source. Subjecting all "major" sources with violations to this guidance is consistent with the mandate expressed in the CAAA of 1990. All other violators will be addressed, as they have in the past, in the most expeditious manner possible.

- SSCD, with assistance from the Regional Offices and STAPPA/ALAPCO, has taken the impact of this revision upon agencies into account as we revised it. It was our goal to establish criteria in a manner which fosters agency reporting of the complete and accurate picture of the compliance status of major stationary sources, and which forms a quantitative basis for agency resource consideration.

o Development of mutually agreeable definitions of SVs obviates the need for the weighting scheme; retain the present T&A Guidance with minor adjustments (STAPPA/ALAPCO).

Response:

- The use of a "fixed", nationally consistent definition for SVs although expanded to include a larger number of sources and additional emphasis on continuous compliance (both consistent with the CAAA of 1990), has been retained to a large degree in this revision.

TABLE, EXAMPLES & SV THRESHOLD VALUE ISSUES:

o Clarify that agencies may use either the attached "Table" (or a "comparable" one) to prioritize and rank their SVs (Regional Offices).

Response:

- SSCD, after much consideration, agreed to permit this level of flexibility. However, it is incumbent upon all agencies to take steps to ensure that all environmentally significant SVs are addressed in a timely and appropriate manner.

o Making miscellaneous "adjustments" (e.g., additional categories, different weights, changing actual excess emissions to estimated emission rates, possibly providing factors for violators in non-attainment areas) to the Table of Criteria and the SV designation threshold are necessary (Regional Offices).

Response:

- The revised text addresses the flexibility of using a comparable table.

o Clarify and expand the "Examples" in the Attachment (Regional Offices).

Response:

- SSCD revised the text.

ENFORCEMENT ISSUES:

o Specify what a "Violation" is, e.g., similar to that on pages 3 and 4 of the earlier "Federally Reportable" document (Regional Offices).

Response:

- SSCD considered this possibility and decided the text was sufficiently clear.

- Insufficient emphasis was placed upon penalties required by agencies to try to offset economic gain resulting from delayed compliance (Air Enforcement Division of EPA).

  Response:

  - This revision incorporated the specific recommendations made by the "State/Federal Penalties Workgroup".

- Insufficient emphasis was placed upon the advisability and desirability of issuing a NOV/FOV at the earliest possible date (Regional Offices).

  Response:

  - SSCD revised the text to reflect the relevant provisions contained in the CAAA of 1990, specifically the shifting of the burden of proof from an agency to the violating source.

- Emphasize the importance of properly protecting case-related and other confidential information (Regional Offices).

  Response:

  This is an important point. However, it is not germane to the subject of this document.

- Clarify how one should address sources which drift into and out of violation during the month. (Regional Offices).

  Response:

  - In addition to the line item in the Table (#5 - "chronic violator"), the text was revised to use language similar to that contained in the old "Federally Reportable Guidance."

- Clarify that once an agency initiates any action on a SV, it should complete it regardless if a higher ranked SV is subsequently identified before the first one is resolved (Regional Offices).

  Response:

  - SSCD revised the text accordingly.

- Emphasis upon "consultation" implies that EPA does not retain the ultimate responsibility and authority to make decisions relevant to federal enforcement (Regional Offices).

Response:

- SSCD revised the text to reflect the fact that EPA retains the ultimate responsibility to insure compliance with federally enforceable requirements (e.g., determining that a violator is a SV).

o Clarify the difference between "addressed" and "resolved" as it pertains to sources which come into compliance before they are addressed (Regional Offices).

Response:

- SSCD revised the text.

o Clarify which violations require a penalty as part of its resolution, e.g., PSVs versus SVs only (Regional Offices).

Response:

- SSCD revised the text. (Note, the PSV concept (potentially significant violators) was dropped.)

COMPATIBILITY WITH OTHER GUIDANCES ISSUES:

o The "ranking factors" listed in this document should be totally comparable with those delineated in the CMS (Regional Offices).

Response:

- Conceptually perhaps they should be, and over time the two sets of factors will likely converge. The final "example" table contains the concensus of all commenters.

o Clarify the relationship between this guidance and field citations (Regional Offices).

Response:

- Other than being one form of administrative penalties, there is no direct relationship. However, as such it could be one of the ways SVs are resolved in the future.

GENERAL CLARIFICATION ISSUES:

o Clarify how many days EPA has to address an SV after it takes it over from a State (Regional Offices).

Response:

- SSCD revised the text as necessary.

o Delineate which source categories are designated "major" in this guidance. How this relates to: (1) "affected facilities" in Title IV; and (2) Title III area sources? (Regional Offices)

Response:

- All sources affected by Title IV and "major" sources under Title III are considered "major" for purposes of this guidance. "Area sources" under Title III are not major sources by definition in the CAAA.

o Adequately support this guidance's implementation, including: (1) scheduling Regional workshops performed by SSCD; (2) designation of Regional and HQ "SV/T&A Coordinators"; and (3) scheduling periodic teleconferences (Regional Offices).

Response:

- SSCD recognizes the importance of providing sufficient and timely support when we "launch" this revised guidance. We are contemplating how to most effectively do this. During the last workgroup discussion, many good suggestions were made. SSCD intends to implement many of these.

SECTION B DOCUMENT 23

New Criminal Enforcement Responsibilities Under 1990 Clean Air Act Amendments

04/19/93

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

CAA B23

OFFICE OF ENFORCEMENT

APR 19 1992

**MEMORANDUM**

**SUBJECT:** New Criminal Enforcement Responsibilities Under 1990 Clean Air Act Amendments

**FROM:** Kathleen A. Hughes, Acting Director
Criminal Enforcement Counsel Division
Kathleen A. Hughes

**TO:** Regional Criminal Enforcement Counsels, I - X
Dale Boll, Director, CID

## I. INTRODUCTION

The 1990 Clean Air Act Amendments (Pub.L. 101-549, November 15, 1990, 104 Stat. 2399), which became effective on November 15, 1990, will have a significant impact upon the number and types of Clean Air Act criminal investigations. The primary focus of criminal cases under the prior CAA was upon violations of the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations governing asbestos removal procedures.

Regulations pursuant to the 1990 Clean Air Act Amendments (the 1990 Act) are now final as to certain aspects of this legislation. Others will likely be emerging from the regulatory pipeline in an accelerated pace. CAA criminal cases will inevitably extend beyond the present realm of asbestos violations and involve groundbreaking and challenging investigations and prosecutions of new statutory provisions and their progeny regulations. The CAA was, and indisputably remains, the most complex of the environmental statutes administered by the Agency. A detailed understanding of the CAA regulatory schemes may only be required in the context of specific investigations. Nonetheless, it is imperative that those involved in the criminal enforcement program be conceptually aware of these regulatory developments in order to identify new areas appropriate for criminal enforcement. Networking with air program personnel is essential to facilitate expanded criminal enforcement in this area.

## II. ENHANCED CAA CRIMINAL ENFORCEMENT PROVISIONS

The enhanced criminal enforcement provisions of the 1990 Act are summarized below. (The United States Code and CAA cite

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for the enforcement provision of the CAA is CAA § 113, 42 U.S.C. § 7413 et seq. A copy of this section is attached. Subsequent CAA cites are found in the end notes.)

(1) The 1990 Act added a felony, punishable by up to five years of imprisonment, for various knowing violations, including violations of NESHAP standards, state implementation plans, new source performance standards, stratospheric ozoneprotection, and acid rain control requirements, emergency orders, and any rule or permit issued pursuant to the CAA.[1]

(2) The 1990 Act added a felony, punishable by up to two years imprisonment, for knowing falsification of records or failure to report, or tampering with monitoring equipment.[2] The legislative history indicates that this provision is not intended to penalize "inadvertent errors". For criminal sanctions to apply, a source owner or operator must be on notice of the record-keeping, information, or monitoring requirements in question, 1990 Cong. & Admin. News 3867.

(3) The 1990 Act added a felony punishable by up to fifteen years of imprisonment for the knowing release of certain hazardous air pollutants that knowingly endangers a person.[3]

(4) The 1990 Act added a misdemeanor, punishable by up to one year of imprisonment, for the negligent release into the ambient air of either CAA enumerated hazardous air pollutants or hazardous substances designated pursuant to Section 302 of the Emergency Planning and Community Right-To-Know Act (42 U.S.C. § 11002) that negligently endangers a person.[4]

(5) The 1990 Act added a misdemeanor, punishable by up to one year imprisonment, for knowingly failing to pay a fee owed the U.S. under the CAA.[5]

(6) Lastly, the 1990 Act added a citizen award provision for information leading to a criminal conviction, a judicial or administrative civil penalty.[6]

## III. THE ELEMENT OF CRIMINAL INTENT

Some nuances of these 1990 Act provisions warrant special mention, raising issues which counsel and Special Agents need to consider. First, new language concerning the definition of "operator" affects criminal liability.[7] Owners and operators of stationary sources are assigned specific compliance responsibilities with regard to certain CAA provisions, such as

hazardous air pollutants and new stationary source standards of performance.[8] Congress wanted criminal responsibility of an owner or operator to be limited to senior management and corporate officers, except in instances where the criminal violation was of a "knowing and willful" magnitude of intent. Accordingly, the term "operator" was clarified to explicitly include senior management personnel and corporate officers. Excluded as "operators", except in those instances of "willful and knowing" violations, are lesser employees who are:

(1) stationary engineers or technicians responsible for the operation, maintenance, repair, or monitoring of equipment and facilities, and

(2) who often have supervisory and training duties, but who are not senior management or a corporate officer.

New language in CAA § 113(h), 42 U.S.C. § 7413(h), qualifies the general CAA definition of "person" for purposes of criminal enforcement.[9] First, the section provides that only for purposes of the CAA negligent endangerment offense, a person cannot be convicted for a violation if:

(1) it occurred as part of the employee's (undefined) "normal activities" as an employee; and

(2) the employee was not a part of senior management or a corporate officer.

For purposes of all other CAA criminal subsections, an employee cannot be convicted unless the government can prove;

(1) the criminal violation was either committed "knowingly and willfully"; OR

(2) if the violation was committed only "knowingly," the defendant can avoid conviction if it is established:

(a) that the violation occurred as part of his "normal activities"; and

(b) that he was "acting under orders from the employer."[10]

The statutory history of the 1990 CAA addressed the matter of knowledge derived from self-audits. House Conference Report No. 101-952 recommended that the CAA criminal penalties not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. It stated, "Knowledge gained by an individual solely in conducting an audit or while attempting to correct any deficiencies identified in the audit or the audit

report itself should not ordinarily form the basis of the intent which results in criminal penalties." 1990 Cong. & Admin. News 3879.

## IV. STATUS OF IMPLEMENTING THE 1990 CAA AMENDMENTS

It is more effective in understanding the criminal enforcement aspects of the 1990 Act to focus on the amendments in the context of the pertinent subject matters as addressed by the CAA:

Subchapter I, Part A, which concerns air quality and emission limitations;
Subchapter II, which governs mobile sources;
Subchapter IV, which concerns acid rain;
Subchapter V, which sets out the permit program; and
Subchapter VI, which concerns stratospheric ozone protection.[11]

### A. SUBCHAPTER I: Air Quality Standards

The CAA Subchapter, Part A (Title I), entitled: "Air Quality and Emission Limitations" warrants special criminal enforcement attention.[12] There are three important subject covered here: state implementation plans, standards of performance for stationary sources, and hazardous air pollutants.

1. State Implementation Plans: The 1990 Act allows EPA to define the boundaries of "nonattainment" areas and classify them according to the severity of the geographical area's air pollution problems. States must establish state implementation programs (SIPs) toward the attainment of National Ambient Air Quality Standards (NAAQS) for the state's nonattainment areas. Note that the CAA provides that any SIP requirement in effect as of November 15, 1990 remains in effect until revised.[13] Congress indicated an awareness that the 30-day notice of SIP violation requirement should be inapplicable to criminal actions since such notice would provide an opportunity for violators to frustrate the purposes of the Act, for example, by leaving the jurisdiction or by destroying evidence, 1990 Cong. & Admin. News 3747. Nonetheless, the notice language remained in the conference committee bill and ultimately in the CAA as enacted.[14]

2. Standards for Stationary Sources: The most immediate impact of the 1990 Act as to criminal enforcement in this area is the five-year felony penalty provided for violations of new stationary source standards of performance where formerly only misdemeanor sanctions were available[15]

Although EPA may delegate authority to the states to enforce performance standards, the EPA retains concurrent authority to enforce these standards.[16] Regulations governing specific

stationary sources (over 70 different types of economic activity have standards of performance), are set out at 40 C.F.R. Part 60. Congress enacted a new provision mandating that performance standards be set for solid waste incinerators and that such standards be incorporated into their operating permits.[17] Of equal importance is the two-year felony now available for knowing falsification of required compliance monitoring data and tampering with monitoring equipment since self-reporting will be a large part of CAA compliance monitoring.[18]

3. Hazardous Air Pollutants: Title III of the 1990 Act specifically named 189 hazardous air pollutants ("HAPs"), which will be the subject of national emission standards (NESHAPs).[19] Extensive regulations dealing with source categories of these pollutants are in the process of being issued and finalized.[20] Note that although states may seek delegation of authority to enforce these type of federal requirements, EPA also retains clear authority to federally enforce HAP emission standards.[21] States may implement their own programs, but they must be at least as stringent as federal requirements.

The objective of the HAP regulations is to identify maximum achievable control technology (MACT) through a process of regulatory development involving the regulated and environmental community and the Agency. If EPA judges that it is not feasible to prescribe or enforce an emission standard for a designated HAP, EPA may require, akin to the asbestos work practice regulations, a work practice standard involving a specified design, equipment, work practice, or operational standard or some combination thereof.[22] This further clarifies the government's basis to enforce work practice standards in lieu of emissions standards, which had been an issue of contention in asbestos NESHAP enforcement cases.

B. SUBCHAPTER II: Motor Vehicles and Fuels

CAA Subchapter II (Title II), titled, "Emission Standards For Moving Vehicles," deals with motor vehicles (mobile sources) and fuels.[23] Although the focus is primarily on motor vehicles, EPA is authorized to also issue regulations governing emissions from nonroad engines and vehicles such as chain saws, dirt motorcycles, and lawn mowers.[24]

The 1990 Act continued the exclusion of Subchapter II violations from criminal penalties.[25] However, related violations may warrant criminal enforcement consideration. For instance, the 1990 Act set stringent requirements for the sulphur content of motor vehicle diesel fuels and the benzene content of motor vehicle gasoline.[26] Refiners and blenders will be required to certify that their fuels meet such standards. Previously, falsifications of such certifications were prosecuted as violations of the general false statement criminal provision of

Title 18.[27] Now, they can be prosecuted on the basis of the enhanced (a two year felony versus the old maximum of six months imprisonment) false certification provision, which applies to all CAA reporting and recordkeeping requirements.[28]

Automobile dealer or repair shop tampering with automotive air emission systems still can not be prosecuted criminally under the CAA since the mobile source regulations impose various compliance certification responsibilities only on automobile manufacturers and not on the dealers.[29] But note that dealers and repair shops can be prosecuted, as discussed below, for failing to comply with the new CFC air conditioning regulations.

C. SUBCHAPTER IV: Acid Rain

The 1990 Act added a new Subchapter IV (Title IV) concerning the acid rain problem titled, "Acid Deposition Control." [30] Through a system of allowances for the sulfur dioxide emissions from utilities, as well as requirements intended to reduce nitrous oxide emissions from boilers, the 1990 Act was designed to rectify the acid rain problem. An eventual overall national limit (8.90 million tons) for the emission of sulfur dioxide is set by statute.[31]

Each utility is issued an annual allotment of allowances and has the option of either lowering their sulphur emissions for covered plants to meet their limit or of purchasing additional "allowances" (one allowance equals authority to emit one ton of sulfur dioxide) to cover emissions in excess of what is allotted for the plant. Starting in 1995, 261 power plant units will be covered and by the year 2000, smaller power plants, and other sources will be covered. Not holding allowances for any excess will cost a source $2,000 per ton of excess emission. If a utility emits lower emissions than it is allotted, it can either bank the difference between its allotment and its actual emissions in order to cover future excesses or can sell these earned allowances on the open market. The authority to auction allowances, starting in March 1993, has been officially delegated by EPA to the Chicago Board of Trade. The final acid deposition control regulations were published in the Federal Register on January 11, 1993.

The financial incentive for falsification of emission and other data under this new scheme is clearly heightened. Such fraudulent violations are within the CAA felony prohibition against knowingly making any false material statement or omitting material information from any CAA document required by EPA or a state to be maintained or filed.[32]

D. SUBCHAPTER V: Operating Permits

A major change in the CAA were the 1990 amendments adding

the new CAA Subchapter V (Title V), "Permits," which established an operating permits program to incorporate all applicable CAA regulatory requirements.[33] The CAA's permitting program will be similar to the CWA's NPDES permitting program, which has been the source of many good criminal cases. A CAA permit may incorporate HAP emission, as well as acid rain and NAAQS SIP requirements. Air pollution sources subject to the program must obtain five-year permits from the state permitting authority and will have to provide compliance certifications signed by "a responsible official".[34] The certifications will state that "based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete."[35]

Enforcement focus will shift from the SIPs to violations of specific permit conditions by permit holders since the permit will collect in one document all of a source's obligations under the CAA. The final regulations prescribing the structure and procedures for delegated state permit programs have been finalized. They were published in the Federal Register on July 21, 1992 and will be codified in 40 CFR Part 70. The states are now in the process of establishing permit programs. They have until November 15, 1993 to submit their programs for EPA approval and EPA is allowed a one year review period.[36] When these programs become operational, more extensive guidance on their enforcement implications will be issued.

As noted above, a 30-day notice of violation to the state and person is a prerequisite for criminal enforcement of a violation of a SIP. However, since such notice is not required for criminal enforcement of a permit condition, a violation of a SIP requirement can be criminally prosecuted without such notice if it is incorporated as a condition of the permit. In contrast, a notice of a violation is required to bring an administrative or civil enforcement action for a violation any permit condition.[37]

E. SUBCHAPTER VI: Stratospheric Ozone Protection

The last major section of the CAA added in 1990 was designed to deal with remedying the depletion of the stratospheric ozone layer. The objective of this Subchapter VI (Title VI) is to phase out use and production of ozone depleting substances, including chlorofluorocarbons (CFCs) and any other substances that the Administrator finds causes significant harmful effects on the stratospheric ozone layer.[38] The CFC regulatory program will be akin to the TSCA regulatory program to eliminate PCBs from the environment. There are CFC labeling regulations (published in the Federal Register on February 11, 1993), regulations for recycling motor vehicle CFCs (issued on July 14, 1992), and for residential and commercial appliances (to be issued by the end of April 1993), and safe disposal regulations are in the process of being finalized by the Agency.[39]

CAA § 608, 42 U.S.C. § 7671g, governs the release of regulated refrigerants in the course of maintenance, service, repair, or disposal of appliances or industrial process refrigeration. Proposed regulations implementing Section 608 were published on December 10, 1992. The first step of what is designated the National Recycling and Emission Reduction Program is the statutory prohibition, as of July 1, 1992, of the knowing venting of ozone depleting refrigerants from appliances and industrial process refrigeration systems into the environment.[40] The Interim Enforcement Guidance on this prohibition, which is attached, sets out factors in identifying possible knowing violations of CAA Section 608(c). Although this section prohibits the disposal of CFCs "in a manner which permits such substance to enter the environment," the disposal of refrigerators or other appliances containing ozone depleting refrigerants will not be the subject of enforcement actions until appropriate regulations are issued.

Motor vehicle air conditioners are addressed by a separate CAA provision.[41] As part of this statutory scheme, regulations have been issued governing the servicing of automotive air conditioners.[42] The object of the regulations is to prevent the release to the environment of refrigerants used in motor vehicle air conditioners (MVACs) that contain CFCs in either a liquid or gaseous state. Accordingly, the regulations require all persons who are paid to perform service ("do-it-yourself" repairs are excluded) on MVACs to use EPA approved recovery equipment so that the refrigerant can be contained and can be sent off-site for reclamation or recycled on-site. Technicians working on MVACs are required to be trained and certified as to the proper use of approved refrigerant recycling equipment. Each MVAC facility will have to certify to EPA that their training and equipment meets applicable regulatory standards.

cc: Earl E. Devaney, Director, OCE
OE Air Enforcement Division Attorneys
John B. Rasnic, Director, OAR
Stationary Source Compliance Division

ENDNOTES:

1. CAA § 113(c)(1), 42 U.S.C. § 7413 (c)(1).

2. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

3. CAA § 113(c)(5), 42 U.S.C. § 7413(c)(5).

4. CAA § 113(c)(4), 42 U.S.C. § 7413(c)(4).

5. CAA § 113(c)(3), 42 U.S.C. § 7413(c)(3). See also CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1), which makes it a felony offense to knowingly violate a requirement for the payment of any fee owed the U.S. under the CAA.

6. CAA § 113(f), 42 U.S.C. § 7413(f).

7. CAA § 113(h), 42 U.S.C. § 7413(h).

8. CAA § 112, 42 U.S.C. § 7412, which includes NESHAPs and CAA § 111, 42 U.S.C. § 7411, which deals with stationary sources.

9. CAA § 302(e), 42 U.S.C. § 7602(e).

10. In other words, if the government can prove the violation was knowing and willful, it does not have to negate either of these two elements. But if proof shows only a knowing violation, then a factual issue arises involving whether the commission of the crime was pursuant to company orders <u>and</u> whether such environmental misconduct was part of the defendant's normal work routine.

    It has not been uncommon for defendants to offer such arguments to justify environmental wrongdoing. The 1990 Act represents an instance where Congress gave statutory recognition to such issues. The practical effect of this new language will have to await judicial interpretation since the terms "knowing" and "knowing and willful" are not defined in the United States criminal code, but are distinguished through extensive case law.
    The terms "knowing and willful" have been interpreted in the context of other federal statutes (for instance, the odometer tampering statute, 15 U.S.C. § 1990(a)) and the Presidential threat statute, 18 U.S.C. § 871, as meaning an intentional violation of a known legal duty, <u>United States v. Studna</u>, 713 F.2d 416, 418 (8th Cir. 1983). The Supreme Court interpreted the term "willfully" alone as requiring the government to prove actual knowledge of the pertinent legal duty and to negate a defendant's claim of a good faith belief that he was not violating the law due to a misunderstanding of its requirements,
    <u>Cheek v. United States</u>, 498 U.S. ___, 112 L.Ed.2d 617, 111 S.Ct. 604 (1991). Although the holding was limited to criminal tax violations because the proliferation of tax law and regulations has made it difficult for the average citizen to know and comprehend the extent and duties imposed by tax laws, a similar argument might be made with reference to environmental statutes and regulations.

11. Since agents and attorneys most often rely on the CAA as codified in the United States Code, in particular as published by the West Publishing Company, the sections of

the CAA are referred to by the code headings, e.g., the CAA is Chapter 85 of the code and the different subject areas are addressed in subchapters, rather than the statutory headings, e.g., titles.

12. CAA §§ 101 - 131, 42 U.S.C. §§ 7401 - 7431.

13. CAA § 110(n), 42 U.S.C. § 7410(n).

14. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1).

15. CAA § 111, 42 U.S.C. § 7411.

16. CAA § 111(c), 42 U.S.C. § 7411(c).

17. CAA § 129, 42 U.S.C. § 7429.

18. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

19. CAA § 112(b), 42 U.S.C. § 7412(b).

20. For example one type of HAP (Perchorethylene) generated by one source category (dry cleaning facilities) are the subject of this type of regulation. Other forthcoming regulations have a broader focus such as emissions of several hazardous air pollutants by the entire chemical manufacturing industry, which will added to Part 63 of 40 C.F.R.

21. CAA § 112(l)(1), 42 U.S.C. § 7412(l)(1) provides delegated state enforcement authority. CAA § 112(l)(7), 42 U.S.C. § 7412(l)(7) provides concurrent federal enforcement authority.

22. CAA § 112(h)(1), 42 U.S.C. § 7412(h)(1).

23. CAA §§ 202 - 250, 42 U.S.C. §§ 7521 - 7590.

24. CAA § 213, 42 U.S.C. § 7547.

25. CAA § 202, 42 U.S.C. § 7521, is not among the sections enumerated as being covered by the CAA criminal provision, CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1).

26. CAA § 211(i),(k), 42 U.S.C. § 7545(i),(k).

27. 18 U.S.C. § 1001.

28. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

29. 40 C.F.R. § 86 et seq.

30. CAA §§ 401 - 416, 42 U.S.C. §§ 7651 - 7651o

31. CAA § 403(a)(1), 42 U.S.C. § 7651b(1)

32. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

33. CAA §§ 501 - 507, 42 U.S.C. §§ 7661 - 7661f.

34. 40 C.F.R. § 70.6(c)(1).

35. 40 C.F.R. § 70.5(d).

36. States agencies administering EPA approved CAA permit programs are required to have adequate enforcement authority. Acceptable state criminal penalties can be as little as a maximum $10,000 fine, however, with no imprisonment, 40 C.F.R. § 70.11.

37. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1).

38. CAA §§ 601 - 618, 42 U.S.C. §§ 7671 -7671q.

39. Pursuant to CAA § 602(c), 42 U.S.C. § 7671a(c), the EPA Administrator on January 18, 1993 added methyl bromide to the list of Class I ozone-depleting chemicals. This chemical substance is the principal ingredient of a extensively used pesticide. Its production and importation will be phased out by the year 2000. Indicative of the multi-media approach to environmental protection, the use of this pesticide will be phased out under the CAA rather than canceling its registration because of its adverse effects on the environment under FIFRA § 6(b), 7 U.S.C. § 136d(b).

40. CAA § 608(c), 42 U.S.C. § 7671g(c).

41. CAA § 609, 42 U.S.C. § 7671h.

42. 40 C.F.R. Part 82.

SECTION B DOCUMENT 24

**Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)**

**01/25/95**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

OAA B24

JAN 25 1995

MEMORANDUM

SUBJECT: Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement (2241)

TO: Director, Air, Pesticides and Toxics Management Division, Regions I and IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air, Pesticides and Toxics Division, Region VI
Director, Air and Toxics Division, Regions VII, VIII, IX, and X

Many stationary source requirements of the Act apply only to "major" sources. Major sources are those sources whose emissions of air pollutants exceed threshold emissions levels specified in the Act. For instance, section 112 requirements such as MACT and section 112(g) and title V operating permit requirements largely apply only to sources with emissions that exceed specified levels and are thus major. To determine whether a source is major, the Act focuses not only on a source's actual emissions, but also on its potential emissions. Thus, a source that has maintained actual emissions at levels below the major source threshold could still be subject to major source requirements if it has the potential to emit major amounts of air pollutants. However, in situations where unrestricted operation of a source would result in a potential to emit above major-source levels, such sources may legally avoid program requirements by taking federally-enforceable permit conditions which limit emissions to levels below the applicable major source threshold. Federally-enforceable permit conditions, if violated, are subject to enforcement by the Environmental Protection Agency (EPA) or by

citizens in addition to the State or Local agency.

As the deadlines for complying with MACT standards and title V operating permits approach, industry and State and local air pollution agencies have become increasingly focused on the need to adopt and implement federally-enforceable mechanisms to limit emissions from sources that desire to limit potential emissions to below major source levels. In fact, there are numerous options available which can be tailored by the States to provide such sources with simple and effective ways to qualify as minor sources. Because there appears to be some confusion and questions regarding how potential to emit limits may be established, EPA has decided to: (1) outline the available approaches to establishing potential to emit limitations, (2) describe developments related to the implementation of these various approaches, and (3) implement a transition policy that will allow certain sources to be treated as minor for a period of time sufficient for these sources to obtain a federally-enforceable limit.

Federal enforceability is an essential element of establishing limitations on a source's potential to emit. Federal enforceability ensures the conditions placed on emissions to limit a source's potential to emit are enforceable by EPA and citizens as a legal and practical matter, thereby providing the public with credible assurances that otherwise major sources are not avoiding applicable requirements of the Act. In order to ensure compliance with the Act, any approaches developed to allow sources to avoid the major source requirements must be supported by the Federal authorities granted to citizens and EPA. In addition, Federal enforceability provides source owners and operators with assurances that limitations they have obtained from a State or local agency will be recognized by EPA.

The concept of federal enforceability incorporates two separate fundamental elements that must be present in all limitations on a source's potential to emit. First, EPA must have a direct right to enforce restrictions and limitations imposed on a source to limit its exposure to Act programs. This requirement is based both on EPA's general interest in having the power to enforce "all relevant features of SIP's that are necessary for attainment and maintenance of NAAQS and PSD increments" (see 54 FR 27275, citing 48 FR 38748, August 25, 1983) as well as the specific goal of using national enforcement to ensure that the requirements of the Act are uniformly implemented throughout the nation (see 54 FR 27277). Second, limitations must be enforceable as a practical matter.

It is important to recognize that there are shared responsibilities on the part of EPA, State, and local agencies, and on source owners to create and implement approaches to creating acceptable limitations on potential emissions. The lead

responsibility for developing limitations on potential emissions rests primarily with source owners and State and local agencies. At the same time, EPA must work together with interested parties, including industry and States to ensure that clear guidance is established and that timely Federal input, including Federal approval actions, is provided where appropriate. The guidance in this memorandum is aimed towards continuing and improving this partnership.

Available Approaches for Creating Federally-enforceable Limitations on the Potential to Emit

There is no single "one size fits all" mechanism that would be appropriate for creating federally-enforceable limitations on potential emissions for all sources in all situations. The spectrum of available mechanisms should, however, ensure that State and local agencies can create federally-enforceable limitations without undue administrative burden to sources or the agency. With this in mind, EPA views the following types of programs, if submitted to and approved by EPA, as available to agencies seeking to establish federally-enforceable potential to emit limits:[1]

1. Federally-enforceable State operating permit programs (FESOPs) (non-title V). For complex sources with numerous and varying emission points, case-by-case permitting is generally needed for the establishment of limitations on the source's potential to emit. Such case-by-case permitting is often accomplished through a non-title V federally-enforceable State operating permit program. This type of permit program, and its basic elements, are described in guidance published in the Federal Register on June 28, 1989 (54 FR 27274). In short, the program must: (a) be approved into the SIP, (b) impose legal obligations to conform to the permit limitations, (c) provide for limits that are enforceable as a practical matter, (d) be issued in a process that provides for review and an opportunity for comment by the public and by EPA, and (e) ensure that there is no relaxation of otherwise applicable Federal requirements. The EPA believes that these type of programs can be used for both criteria pollutants and hazardous air pollutants, as described in the memorandum, "Approaches to Creating Federally-Enforceable Emissions Limits," November 3, 1993. This memorandum (referred to below as the November 1993 memorandum) is included for your information as Attachment 1. There are a number of important clarifications with respect to hazardous air pollutants subsequent to the November 1993 memorandum which are discussed

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[1]This is not an exhaustive list of considerations affecting potential to emit. Other federally-enforceable limits can be used, for example, source-specific SIP revisions. For brevity, we have included those which have the widest applicability.

below (see section entitled "Limitations on Hazardous Air Pollutants").

2. Limitations established by rules. For less complex plant sites, and for source categories involving relatively few operations that are relatively similar in nature, case-by-case permitting may not be the most administratively efficient approach to establishing federally-enforceable restrictions. One approach that has been used is to establish a general rule which creates federally-enforceable restrictions at one time for many sources (these rules have been referred to as "exclusionary" rules and by some permitting agencies as "prohibitory" rules). A specific suggested approach for volatile organic compounds (VOC) limits by rule was described in EPA's memorandum dated October 15, 1993 entitled "Guidance for State Rules for Optional Federally-Enforceable Emissions Limits Based Upon Volatile Organic Compound (VOC) Use." An example of such an exclusionary rule is a model rule developed for use in California. (The California model rule is attached, along with a discussion of its applicability to other situations--see Attachment 2). Exclusionary rules are included in a State's SIP and generally become effective upon approval by EPA.

3. General permits. A concept similar to the exclusionary rule is the establishment of a general permit for a given source type. A general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit provides for conditions limiting potential to emit in a one-time permitting process, and thus avoids the need to issue separate permits for each source within the covered source type or category. Although this concept is generally thought of as an element of a title V permit program, there is no reason that a State or local agency could not submit a general permit program as a SIP submittal aimed at creating potential to emit limits for groups of sources. Additionally, general permits can be issued under the auspices of a SIP-approved FESOP. The advantage of a general permit, when compared to an exclusionary rule, is that upon approval by EPA of the State's permit program, a general permit could be written for one or more additional source types without triggering the need for the formal SIP revision process.

4. Construction permits. Another type of case-by-case permit is a construction permit. These permits generally cover new and modified sources, and States have developed such permit programs as an element of their SIP's. As described in the November 1993 memorandum, these State major and minor new source review (NSR) construction permits can provide for federally-enforceable limitations on a source's potential to emit. Further discussion of the use of minor source NSR programs is contained in EPA's letter to Jason Grumet, NESCAUM, dated November 2, 1994,

which is contained in Attachment 3. As noted in this letter, the usefulness of minor NSR programs for the creation of potential to emit limitations can vary from State to State, and is somewhat dependent on the scope of a State's program.

5. Title V permits. Operating permits issued under the Federal title V operating permits program can, in some cases, provide a convenient and readily available mechanism to create federally-enforceable limits. Although the applicability date for part 70 permit programs is generally the driving force for most of the current concerns with respect to potential to emit, there are other programs, such as the section 112 air toxics program, for which title V permits may themselves be a useful mechanism for creating potential to emit limits. For example, many sources will be considered to be major by virtue of combustion emissions of nitrogen oxides or sulfur dioxide, and will be required to obtain part 70 permits. Such permits could be used to establish federally-enforceable limitations that could ensure that the source is not considered a major source of hazardous air pollutants.

Practicable Enforceability

If limitations--whether imposed by SIP rules or through individual or general permits--are incomplete or vague or unsupported by appropriate compliance records, enforcement by the States, citizens and EPA would not be effective. Consequently, in all cases, limitations and restrictions must be of sufficient quality and quantity to ensure accountability (see 54 FR 27283).

The EPA has issued several guidance documents explaining the requirements of practicable enforceability (e.g., "Guidance on Limiting Potential to Emit in New Source Permitting," June 13, 1989; memorandum from John Rasnic entitled "Policy Determination on Limiting Potential to Emit for Koch Refining Company's Clean Fuels Project," March 13, 1992). In general, practicable enforceability for a source-specific permit means that the permit's provisions must specify: (1) A technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting. For rules and general permits that apply to categories of sources, practicable enforceability additionally requires that the provisions: (1) identify the types or categories of sources that are covered by the rule; (2) where coverage is optional, provide for notice to the permitting authority of the source's election to be covered by the rule; and (3) specify the enforcement consequences relevant to the rule. More specific guidance on these enforceability principles as they apply to rules and general permits is provided in Attachment 4.

Limitations on Hazardous Air Pollutants (HAP)

There are a number of important points to recognize with respect to the ability of existing State and local programs to create limitations for the 189 HAP listed in (or pursuant to) section 112(b) of the Act, consistent with the definitions of "potential to emit" and "federally-enforceable" in 40 CFR 63.2 (promulgated March 16, 1994, 59 FR 12408 in the part 63 General Provisions). The EPA believes that most State and local programs should have broad capabilities to handle the great majority of situations for which a potential to emit limitation on HAP is needed.

First, it is useful to note that the definition of potential to emit for the Federal air toxics program (see the subpart A "general provisions," section 63.2) considers, for purposes of controlling HAP emissions, federally-enforceable limitations on criteria pollutant emissions if "the effect such limitations would have on "[hazardous air pollutant] . . . emissions" is federally-enforceable (emphasis added). There are many examples of such criteria pollutant emission limits that are present in federally-enforceable State and local permits and rules. Examples would include a limitation constraining an operation to one (time limit specified) shift per day or limitations that effectively limit operations to 2000 hours per year. Other examples would include limitations on the amount of material used, for example a permit limitation constraining an operation to using no more than 100 gallons of paint per month. Additionally, federally-enforceable permit terms that, for example, required an incinerator to be operated and maintained at no less than 1600 degrees would have an obvious "effect" on the HAP present in the inlet stream.

Another federally-enforceable way criteria pollutant limitations affect HAP can be described as a "nested" HAP limit within a permit containing conditions limiting criteria pollutants. For example, the particular VOC's within a given operation may include toluene and xylene, which are also HAP. If the VOC-limiting permit has established limitations on the amount of toluene and xylene used as the means to reduce VOC, those limitations would have an obvious "effect" on HAP as well.

In cases as described above, the "effect" of criteria pollutant limits will be straightforward. In other cases, information may be needed on the nature of the HAP stream present. For example, a limit on VOC that ensured total VOC's of 20 tons per year may not ensure that each HAP present is less than 10 tons per year without further investigation. While the EPA intends to develop further technical guidance on situations for which additional permit terms and conditions may be needed to ensure that the "effect" is enforceable as a practical matter, the EPA intends to rely on State and local agencies to employ

care in drafting enforceable requirements which recognize obvious environmental and health concerns.

There are, of course, a few important pollutants which are HAP but are not criteria pollutants. Example of these would include methylene chloride and other pollutants which are considered nonreactive and therefore exempt from coverage as VOC's. Especially in cases where such pollutants are the only pollutants present, criteria pollutant emission limitations may not be sufficient to limit HAP. For such cases, the State or local agency will need to seek program approval under section 112(l) of the Act.

Section 112(l) provides a clear mechanism for approval of State and local air toxics programs for purposes of establishing HAP-specific PTE limits. The EPA intends, where appropriate, that in approving permitting programs into the SIP, to add appropriate language citing approval pursuant to section 112(l) as well. An example illustrating section 112(l) approval is the approval of the State of Ohio's program for limiting potential to emit (see 59 FR 53587, October 25, 1994). In this notice, EPA granted approval under section 112(l) for hazardous air pollutants aspects of a State program for limiting potential to emit. Such language can be added to any federally-enforceable State operating permit program, exclusionary rule, or NSR program update SIP approval notice so long as the State or local program has the authority to regulate HAP and meets other section 112(l) approval criteria. Transition issues related to such section 112(l) approvals are discussed below.

Determination of Maximum Capacity

While EPA and States have been calculating potential to emit for a number of years, EPA believes that it is important at this time to provide some clarification on what is meant in the definition of potential to emit by the "maximum capacity of a stationary source to emit under its physical and operational design." Clearly, there are sources for which inherent physical limitations for the operation restrict the potential emissions of individual emission units. Where such inherent limitations can be documented by a source and confirmed by the permitting agency, EPA believes that States have the authority to make such judgements and factor them into estimates of a stationary source's potential to emit.

The EPA believes that the most straightforward examples of such inherent limitations is for single-emission unit type operations. For example, EPA does not believe that the "maximum capacity" language requires that owner of a paint spray booth at a small auto body shop must assume that (even if the source could be in operation year-round) spray equipment is operated 8760 hours per year in cases where there are inherent physical

limitations on the number of cars that can be painted within any given period of time. For larger sources involving multiple emissions units and complex operations, EPA believes it can be more problematic to identify the inherent limitations that may exist.

The EPA intends, within its resource constraints, to issue technical assistance in this area by providing information on the type of operational limits that may be considered acceptable to limit the potential to emit for certain individual small source categories.

Transition Guidance for Section 112 and Title V Applicability

Most, if not all, States have recognized the need to develop options for limiting the potential emissions of sources and are moving forward with one or more of the strategies described in the preceding sections in conjunction with the submission and implementation of their part 70 permit programs. However, EPA is aware of the concern of States and sources that title V or section 112 implementation will move ahead of the development and implementation of these options, leaving sources with actual emissions clearly below the major source thresholds potentially subject to part 70 and other major source requirements. Gaps could theoretically occur during the time period it takes for a State program to be designed and administratively adopted by the State, approved into the SIP by EPA, and implemented as needed to cover individual sources.

The EPA is committed to aiding all States in developing and implementing adequate, streamlined, and cost-effective vehicles for creating federally-enforceable limits on a source's potential emissions by the time that section 112 or title V requirements become effective. To help bridge any gaps, EPA will expedite its reviews of State exclusionary rules and operating permit rules by, among other things, coordinating the approval of these rules with the approval of the State's part 70 program and by using expeditious approval approaches such as "direct final" Federal Register notices to ensure that approval of these programs does not lag behind approval of the part 70 program.

In addition, in such approval notices EPA will affirm any limits established under the State's program since its adoption by the State but prior to Federal approval if such limits were established in accordance with the procedures and requirements of the approved program. An example of language affirming such limits was recently used in approving an Illinois SIP revision (see 57 FR 59931, included as Attachment 5).

The EPA remains concerned that even with expedited approvals and other strategies, sources may face gaps in the ability to acquire federally-enforceable potential to emit limits due to

delays in State adoption or EPA approval of programs or in their implementation. In order to ensure that such gaps do not create adverse consequences for States or for sources, EPA is announcing a transition policy for a period up to two years from the date of this memorandum. The EPA intends to make this transition policy available at the discretion of the State or local agency to the extent there are sources which the State believes can benefit from such a transition policy. The transition period will extend from now until the gaps in program implementation are filled, but no later than January 1997. Today's guidance, which EPA intends to codify through a notice and comment rulemaking, provides States discretion to use the following options for satisfying potential to emit requirements during this transition period.

1. Sources maintaining emissions below 50 percent of all applicable major source requirements. For sources that typically and consistently maintain emissions significantly below major source levels, relatively few benefits would be gained by making such sources subject to major source requirements under the Act. For this reason, many States are developing exclusionary rules and general permits to create simple, streamlined means to ensure that these sources are not considered major sources. To ease the burden on States' implementation of title V, and to ensure that delays in EPA's approval of these types of programs will not cause an administrative burden on the States, EPA is providing a 2-year transition period for sources that maintain their actual emissions, for every consecutive 12-month period (beginning with the 12 months immediately preceding the date of this memorandum), at levels that do not exceed 50 percent of any and all of the major stationary source thresholds applicable to that source. A source that exceeds the 50 percent threshold, without complying with major source requirements of the Act (or without otherwise limiting its potential to emit), could be subject to enforcement. For this 2-year period, such sources would not be treated as major sources and would not be required to obtain a permit that limits their potential to emit. To qualify under this transition policy, sources must maintain adequate records on site to demonstrate that emissions are maintained below these thresholds for the entire as major sources and would not be required to obtain a permit that limits their potential to emit that would be considered to be adequate during this transition period. Consistent with the California approach, EPA believes it is appropriate for the amount of recordkeeping to vary according to the level of emissions (see paragraphs 1.2 and 4.2 of the attached rule).

2. Larger sources with State limits. For the 2-year transition period, restrictions contained in State permits issued to sources above the 50 percent threshold would be treated by EPA as acceptable limits on potential to emit, provided: (a) the permit is enforceable as a practical matter; (b) the source owner submits a written certification to EPA that it will comply with

the limits as a restriction on its potential to emit; and (c) the source owner, in the certification, accepts Federal and citizen enforcement of the limits (this is appropriate given that the limits are being taken to avoid otherwise applicable Federal requirements). Such limits will be valid for purposes of limiting potential to emit from the date the certification is received by EPA until the end of the transition period. States interested in making use of this portion of the transition policy should work with their Regional Office to develop an appropriate certification process.

3. Limits for noncriteria HAP. For noncriteria HAP for which no existing federally-approved program is available for the creation of federally-enforceable limits, the 2-year transition period provides for sufficient time to gain approval pursuant to section 112(l). For the 2-year transition period, State restrictions on such noncriteria pollutants issued to sources with emissions above the 50 percent threshold would be treated by EPA as limiting a source's potential to emit, provided that: (a) the restrictions are enforceable as a practical matter; (b) the source owner submits a written certification to EPA that it will comply with the limits as a restriction on its potential to emit; and (c) the source owner, in the certification, accepts Federal and citizen enforcement of the limits. Such limits will be valid for purposes of limiting potential to emit from the date the certification is received by EPA until the end of the transition period.

The Regional Offices should send this memorandum, including the attachments, to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. Regional Office staff may contact Timothy Smith of the Integrated Implementation Group at 919-541-4718, or Clara Poffenberger with the Air Enforcement Division at 202-564-8709.

Attachments

cc: Air Branch Chief, Region I-X
Regional Counsels

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CAA
B24A

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

JAN 22 1996

MEMORANDUM

SUBJECT: Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)
Office of Air and Radiation

Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement (2241A)
Office of Enforcement and Compliance Assurance

TO: Regional Office Addressees (see below):

The purpose of this memorandum is to notify you that the Agency is today releasing detailed guidance (referred to below as the "Interim Policy") clarifying the immediate impacts of two recent decisions by the U.S. Court of Appeals for the D.C. Circuit regarding EPA regulations requiring federal enforceability of limitations on a source's potential to emit ("PTE") under certain CAA programs. This cover memorandum briefly summarizes the court decisions, and briefly summarizes the immediate impacts of the decisions on current regulations. A more detailed discussion of the impacts of the two court decisions is attached. The policy will remain in place until January 1997, but may be extended if necessary to coincide with the promulgation of revised regulations.

The Court Decisions

In National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. 1995), the court addressed hazardous air pollutant programs under section 112. The court found that EPA had not adequately explained why only federally enforceable measures should be considered as limits on a source's potential to emit. Accordingly, the court remanded the section 112 General Provisions regulation to EPA for further proceedings. EPA must either provide a better explanation as to why federal enforceability promotes the effectiveness of state controls, or remove the exclusive federal enforceability requirement. The court did not vacate the section 112 regulations, that is, the court did not declare the regulations null and void. The regulations remain in effect pending completion of new rulemaking.

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In Chemical Manufacturers Ass'n v. EPA, No. 89-1514 (D.C. Cir. Sept. 15, 1995), the court, in light of National Mining, remanded the PTE definition in the PSD and NSR regulations to EPA. The court also vacated the federal enforceability requirement of the PTE definitions in the PSD and NSR regulations.

Summary of Immediate Impacts of the Court Decisions

EPA plans to propose rulemaking amendments in spring 1996 that would address the federal enforceability issue as it relates to section 112, title V, and Prevention of Significant Deterioration & New Source Review ("PSD/NSR") regulations. Pending this rulemaking, the immediate impacts are as follows:

Effects on Section 112. Because the court did not vacate the rule, the current part 63 regulations, requiring federal enforceability, remain in effect.

Effects on title V. Although neither court case addressed the title V regulations, industry challenges to the part 70 requirements are pending. Because the federal enforceability provision of the title V regulations are closely related to the regulations addressed in the two decided cases, EPA will ask the court to leave part 70 in place as the rulemaking amendments are being developed.

Effects on PSD/NSR. Because the court vacated the rules, the requirements in the nationwide rules for PSD and major source NSR concerning federal enforceability are not in effect. In many cases, however, individual State rules implementing these programs have been individually approved in the State Implementation Plan (SIP). The court did not vacate any requirements for federal enforceability in these individual State rules, and these requirements remain in place. As discussed in detail in the Interim Policy, the immediate practical impacts on the PSD/NSR programs are not substantial for newly constructed major sources. Greater impacts may exist for existing major sources seeking to avoid review by demonstrating a net emissions decrease.

Effects on January 25, 1995 Transition Policy. The transition policy remains in effect with one change. For sources emitting more than 50% of the major source threshold, and holding State-enforceable limits, EPA is no longer requiring that the source submit a certification to EPA.

Distribution/Further Information

The Regional Offices should send this memorandum to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. Regional Office staff may contact Tim Smith of the Integrated Implementation Group at 919-541-4718, Adan Schwartz of the Office of General Counsel at 202-260-7632, or Julie Domike of the Office of Enforcement and Compliance Assurance at 202-564-6577. The document is also available on the technology transfer network (TTN) bulletin board, under "Clean Air Act, Title V, Policy Guidance Memos." (Readers unfamiliar with this bulletin board may obtain access by calling the TTN help line at 919-541-5384).

Attachment

Addressees:

Director, Office of Ecosystem Protection, Region I
Director, Air and Waste Management Division, Region II
Director, Air, Radiation, and Toxics Division, Region III
Director, Air, Pesticides, and Toxics Management Division, Region IV
Director, Air and Radiation Division, Region V
Director, Multimedia Planning and Permitting Division, Region VI
Director, Air, RCRA, and TSCA Division, Region VII
Assistant Regional Administrator, Office of Pollution Prevention, State and Tribal Assistance, Region VIII
Director, Air and Toxics Division, Region IX
Director, Office of Air, Region X

Regional Counsels, Regions I-X

Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Enforcement Coordination Office, Region III
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Enforcement Coordination Office, Region VII
Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Enforcement Coordinator, Office of Regional Enforcement Coordination, Region IX

# EPA INTERIM POLICY ON FEDERAL ENFORCEABILITY REQUIREMENT FOR LIMITATIONS ON POTENTIAL TO EMIT
January 1996

This document provides guidance clarifying the immediate impacts of recent court decisions related to federal enforceability of limitations on a source's potential to emit ("PTE"). In brief, most current regulatory requirements and policies regarding PTE, including the interim policy recognizing state-enforceable limits under section 112 and Title V in some circumstances, remain in effect while EPA conducts expedited rulemaking to address these issues in detail. However, at present, certain netting transactions involving PTE limits under new source review programs may now take place without federal enforceability. Today's guidance will be superseded upon completion of the new rulemaking.

## Background

Several important Clean Air Act programs apply to only major sources, i.e., those that "emit or have the potential to emit" amounts exceeding major source thresholds listed in the Act. The EPA has promulgated regulations defining the term "potential to emit" for most of these programs. In particular, five sets of regulations are in place implementing the major source prevention of significant deterioration (PSD) and nonattainment area new source review (NSR) permitting programs (40 CFR 51.166, 40 CFR 52.21, 40 CFR 51.165, Appendix S of 40 CFR Part 51, and 40 CFR 52.24). Regulations governing approvability of state operating permit programs under Title V of the CAA are contained in 40 CFR Part 70, and EPA has proposed regulations implementing a federal operating permits program that are to be promulgated at 40 CFR Part 71. Regulations implementing the requirements of section 112 of the Act related to major sources of hazardous air pollutants are contained in 40 CFR Part 63, subpart A.

For each of the above Clean Air Act programs, the EPA regulations provide that "controls" (i.e., both pollution control equipment and operational restrictions) that limit a source's maximum capacity to emit a pollutant may be considered in determining its potential to emit. Historically, large numbers of new or modified sources that otherwise would be subject to PSD and NSR permitting requirements have limited their PTE in order to obtain "synthetic minor" status and thereby avoid major source requirements. With the advent of operating permit programs under Title V and the MACT program under section 112, many sources that otherwise would be subject to these new requirements under the Clean Air Act Amendments of 1990 also have obtained, or plan to obtain, PTE limits to avoid coverage. For each of these programs, EPA regulations have required that PTE limits be

"federally enforceable" in order to be considered in determining PTE.

These federal enforceability requirements were the subject of two recent decisions of the D.C. Circuit Court of Appeals. The first decision, National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. July 21, 1995), dealt with the potential to emit definition under the hazardous air pollutant programs promulgated pursuant to CAA section 112. In this decision, the Court implicitly accepted EPA's argument that only "effective" state-issued controls should be cognizable in limiting potential to emit. In addition, the court did not question the validity of current federally enforceable mechanisms in limiting PTE. However, the court found that EPA had not adequately explained why only federally enforceable measures should be considered in assessing the effectiveness of state-issued controls. Accordingly, the Court remanded the section 112 General Provisions regulation to EPA for further proceedings. Thus, EPA must either provide a better explanation as to why federal enforceability promotes the effectiveness of state controls, or remove the exclusive federal enforceability requirement. The court did not vacate the section 112 regulations, and they remain in effect pending completion of EPA rulemaking proceedings in response to the court's remand.

The second decision, Chemical Manufacturers Ass'n v. EPA, No. 89-1514 (D.C. Cir. Sept. 15, 1995), dealt with the potential to emit definition in the PSD and NSR programs. Specifically, this case challenged the June 1989 rulemaking in which the EPA reaffirmed the requirement for federal enforceability of PTE limits taken to avoid major source permitting requirements in these programs. In a briefly worded judgment, the court, in light of National Mining, remanded the PSD and NSR regulations to EPA. In addition, in contrast to its disposition of the section 112 regulations in National Mining, the court in Chemical Manufacturers vacated the federal enforceability requirement of the PTE definitions in the PSD and NSR regulations.

In a third set of cases, industry challenges to the federal enforceability requirements in Part 70 are pending before the D.C. Circuit. The Title V cases have not been briefed. However, since the federal enforceability provisions of these Title V regulations are closely related to the regulations addressed in the two decided cases, EPA plans to ask the court to remand the regulations to EPA for further rulemaking, and to leave Part 70 in place during the new rulemaking.

Plans for Rulemaking Amendments

EPA plans to hold discussions with stakeholders and propose rulemaking amendments by spring 1996, and to issue final rules by spring 1997, that would address the court decisions impacting

regulations promulgated pursuant to section 112 and the PSD/NSR regulations. At the same time, EPA will propose a parallel approach to cognizable PTE limits for major sources subject to title V. EPA currently plans to address the following options, after discussions with stakeholders:

(a) An approach that would recognize "effective" State-enforceable limits as an alternative to federally enforceable limits on a source's potential to emit. Under this option, a source whose maximum capacity to emit without pollution controls or operational limitations exceeds relevant major source thresholds may take a State or local limit on its potential to emit. In such circumstances, the source must be able to demonstrate that the State-enforceable limits are (1) enforceable as a practical matter, and (2) being regularly complied with by the facility.

(b) An approach under which the EPA would continue to require federal enforceability of limits on a source's potential to emit. Under this approach, in response to specific issues raised by the court in National Mining, EPA would present further explanation regarding why the federal enforceability requirement promotes effective controls. Under this approach, EPA would propose simplifying changes to the administrative provisions of the current federal enforceability regulations.

The remainder of this guidance memorandum addresses the immediate impacts of the court decisions on each of the three programs, in light of the upcoming rulemaking.

Effects on PSD/NSR

EPA interprets the court's decision to vacate the PSD/NSR federal enforceability requirement in the Chemical Manufacturers case as causing an immediate change in how EPA regulations should be read, although EPA expects that the effect of this change will be limited. Specifically, provisions of the definitions of "potential to emit" and related definitions requiring that physical or operational changes or limitations be "federally enforceable" to be taken into account in determining PSD/NSR applicability, the term "federally enforceable" should now be read to mean "federally enforceable **or legally and practicably enforceable by a state or local air pollution control agency.**"[1]

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[1]Both National Mining and Chemical Manufacturers directly addressed only the definition of potential to emit, and not related definitions that also employ the federal enforceability requirement, in particular, those related to netting. (See, e.g., 40 CFR § 52.21(b)(3)(vi)(b) providing that an emissions

For the reasons discussed below, however, the practical effects of the vacatur will be limited during the period prior to completion of new EPA rulemaking on this issue. During this interim period, federal enforceability is still required to create "synthetic minor" new and modified sources in most circumstances pending completion of EPA's rulemaking.

First, EPA interprets the order vacating certain provisions of EPA regulations as not affecting the provisions of any current SIP, or of any permit issued under any current SIP. Thus, previously issued federally enforceable permits, such as permits issued under federally enforceable state operating permit programs under Title I ("FESOPPs") remain in effect. Likewise, EPA-approved state PSD and NSR SIP rules requiring that all pollution controls or operational restrictions limiting potential to emit be federally enforceable remain in place, even though such provisions may have been based on the now-vacated terms of EPA regulations.[2]

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decrease is creditable only if it is "federally enforceable.") The court's concerns regarding the adequacy of EPA's rationale, however, appear to extend to these netting provisions; consequently, EPA interprets the vacatur as extending to them as well. Conversely, EPA reads the vacatur as not extending to aspects of the PTE definition other than the federal enforceability provision. Such other aspects (e.g., determining a source's "maximum capacity" to emit in the absence of controls) were not at issue in the litigation and not addressed by the court decisions. In addition, EPA interprets Chemical Manufacturers as not addressing the regulatory requirements for federal enforceability of offsets used to comply with NSR requirements. CAA § 173(a) expressly requires that any emissions reductions required as a precondition to the issuance of a nonattainment NSR permit to be "federally enforceable" before the permit may be issued. This requirement is not affected by the court decisions.

[2]The situation is somewhat different in the several states lacking approved PSD programs, which are governed instead by the federal PSD program at 40 CFR § 52.21. (In most instances, these states have been delegated authority to issue PSD permits under the federal program pursuant to § 52.21(u).) Since these states do not have an EPA-approved PSD program, their SIPs presumably also lack state rules containing a blanket requirement that new or modified sources use only federally enforceable limits on PTE when seeking synthetic minor status to avoid PSD. Rather, sources in these states have been subject to the federal enforceability requirements of § 52.21. As noted above, Chemical Manufacturers vacated the requirements in § 52.21 that physical or operational changes be "federally enforceable" to be taken

Second, a new or modified source that seeks to lawfully avoid compliance with the "major" source requirements of either PSD or nonattainment NSR by limiting its potential to emit to achieve synthetic minor status must still obtain a general or "minor" NSR preconstruction permit under section 110(a)(2)(C) of the Act and 40 C.F.R. § 51.160-164. Every SIP contains a minor NSR program that applies generally to new or modified sources of air pollutants, without regard to whether those sources are "major." Permits under such programs are, like all other SIP measures, federally enforceable. See CAA section 113(b)(1); 40 CFR § 52.23.[3] The requirement under section 110(a)(2)(C) to obtain a federally enforceable minor NSR permit was not at issue in the Chemical Manufacturers case, and is unaffected by the court's ruling.

As noted above, the court's action does not affect FESOPPs that many states have adopted as an additional mechanism for avoiding PSD/NSR or for creating an emissions reduction credit that may be tradeable to another source. Permits issued under such programs continue to be valid for purposes of limiting PTE. States are free to submit SIP revisions to remove such provisions in light of the vacatur, and to substitute mechanisms that are legally and practicably enforceable by the state for limiting potential to emit in some circumstances under the PSD/NSR program. However, we expect few states to do so pending the

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into account in determining the applicability of PSD to a proposed new source or modification. Accordingly, in states governed by § 52.21, a limit that is either "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency" may now be used in determining PSD applicability in some circumstances. The effect of the vacatur in these states is limited, however, because as discussed below, new and modified sources in these states are still subject to the requirement to obtain federally enforceable minor source permits.

[3]Consider, for example, an existing source in a moderate ozone nonattainment area that plans to add a new emissions unit that would have the potential to emit 100 tons per year ("TPY") of VOC if uncontrolled, and would therefore be considered a major modification subject to major NSR requirements, including a requirement to install pollution controls representing LAER that would reduce emissions in this instance by 90%. The source may instead seek to avoid major NSR by installing cheaper controls that reduce emissions by 61% and thereby limit the emissions increase to 39 TPY -- just below the "major" modification threshold. Such a source would still need to obtain a minor NSR permit to construct the new unit, and that permit would be federally enforceable.

outcome of new EPA rulemaking on the broader federal enforceability issue.

Likewise, states conceivably might now seek to reduce the scope of SIP-approved minor NSR programs where they are presently broader than minimum federal requirements (e.g., to no longer cover changes at existing emissions units that reduce emissions to create a netting credit or tradeable emission reduction credit), and to substitute state-enforceable mechanisms. Here also, however, EPA does not expect states to seek such changes pending the outcome of EPA rulemaking. In addition, regarding the minimum scope of minor NSR programs, section 110(a)(2)(C) provides that state minor NSR programs must regulate all new or modified sources "as necessary" to insure consistency with air quality planning goals. Given the central role of new and modified synthetic minor sources in the overall PSD/NSR regulatory scheme, and the adverse environmental consequences if controls were not effective in limiting PTE, it is unlikely that states would have the legal ability to exclude from such programs transactions that are intrinsic to the avoidance of major NSR permitting requirements.

The principal immediate impact of the vacatur of the PSD/NSR federal enforceability regulations likely will occur in cases involving "netting" exercises at existing sources, where a source seeks to internally offset an emissions increase at a new or modified emissions unit by installing pollution controls or accepting operational limitations at <u>another</u> unit within the plant. For the reasons discussed above, in such cases the new or modified unit would still need to obtain a federally enforceable minor NSR permit. In contrast, the vacatur ordered by the court may allow the unit that is limiting its emissions to rely in some circumstances on controls that are legally and practicably enforceable by the state.[4] Note, however, that under the terms of many state minor NSR programs, the unit undergoing an

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[4]Consider, for example, an existing source like the one addressed above in Footnote 3, that also plans to install a new unit that would have the potential to emit 100 tons per year of VOC per year if uncontrolled. In contrast to the earlier example, however, this source plans to avoid major NSR not by controlling the new unit, but instead by installing controls at another emissions unit at the plant whose baseline emissions are 100 TPY that will reduce actual emissions by 61 TPY. The overall result of this netting transaction is the same as in the earlier example: a net emissions increase of 39 TPY at the plant. The new unit would still need to obtain a minor NSR permit, and that permit would still be federally enforceable. In light of the vacatur in <u>Chemical Manufacturers</u>, however, the existing unit that is adding controls now may be able to limit its PTE using a state-enforceable permit.

emissions reduction would still need to be included in the minor NSR permit. Also, if the state's SIP has a general requirement that PTE limits be federally enforceable, the unit reducing emissions would still need a federally enforceable limit. Such programs would not be affected by the court's ruling. In sum, the precise impact of the vacatur on PSD/NSR applicability in any state can be definitively established only by reviewing the provisions of a particular SIP.

Effects on Section 112 and Title V

The National Mining decision did not vacate the current definition of a major source under section 112 program in the General Provisions to Part 63, and neither of the court decisions addressed the definition of a major source for the title V program in 40 CFR part 70. Both of these current definitions, therefore, remain in effect. As discussed above, however, these regulations will be affected by the rulemaking EPA is conducting in response to the court decisions.

EPA today reiterates that independent from the decision in National Mining, current EPA policy already recognizes State-enforceable PTE limits under section 112 and Title V in many circumstances under a transition policy intended to provide for orderly implementation of these new programs under the Clean Air Act Amendments of 1990. This policy is set forth in a memorandum, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act" (January 25, 1995). The transition policy is summarized below; as noted, EPA is now making one significant change in that policy in light of National Mining.

In recognition of the absence in some states of suitable federally enforceable mechanisms to limit PTE applicable to sources that might otherwise be subject to section 112 or Title V, EPA's policy provides for the consideration of State-enforceable limits as a gap-filling measure during a transition period that extends until January 1997.[5] Under this policy, for the 2-year transition period, restrictions contained in State permits issued to sources that actually emit more than 50 percent, but less than 100 percent, of a relevant major source threshold are treated by EPA as acceptable limits on potential to emit, provided: (a) the permit and the restriction in particular are enforceable as a practical matter; (b) the source owner submits a written certification to EPA accepting EPA and citizen enforcement. In light of National Mining, EPA believes that the

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[5]Since PSD and nonattainment NSR are mature programs, minor NSR permits to limit PTE were available in all states well prior to enactment of the Clean Air Act Amendments of 1990. Hence, EPA's transition policy does not extend to those programs.

certification requirement is no longer appropriate as part of this policy. Accordingly, **EPA hereby amends the January 1995 transition policy by deleting the certification requirement.**

In addition, under the transition policy, sources with consistently low levels of actual emissions relative to major source thresholds can avoid major source requirements even absent any permit or other enforceable limit on PTE. Specifically, the policy provides that sources which maintain their emissions at levels that do not exceed 50 percent of any applicable major source threshold are not treated as major sources and do not need a permit to limit PTE, so long as they maintain adequate records to demonstrate that the 50 percent level is not exceeded.

Under the terms of EPA's transition policy, the transition period is to end in January 1997. In addition, completion of EPA's rulemaking in response to the recent court decisions, which EPA anticipates will occur by early 1997, may render the transition policy unnecessary after that time. However, in conjunction with the rulemaking, EPA will consider whether it is appropriate to extend the transition period beyond January 1997.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK NC 27711

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

SEP 6 1995

MEMORANDUM

SUBJECT: Calculating Potential to Emit (PTE) for Emergency Generators

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air, Pesticides and Toxics Management Division, Regions I and IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air, Pesticides and Toxics Division, Region VI
Director, Air and Toxics Division, Regions VII, VIII, IX, and X

The purpose of this guidance is to address the determination of PTE for emergency electrical generators.

Background

In a memorandum dated January 25, 1995, the Environmental Protection Agency (EPA) addressed a number of issues related to the determination of a source's PTE under section 112 and title V of the Clean Air Act (Act). One of the issues discussed in the memorandum was the term "maximum capacity of a stationary source to emit under its physical and operational design," which is part of the definition of "potential to emit." The memorandum clarified that inherent physical limitations, and operational design features which restrict the potential emissions of individual emission units, can be taken into account. This clarification was intended to address facilities for which the theoretical use of equipment is much higher than could ever actually occur in practice. For such facilities, if their physical limitations or operational design features are not taken

into account, the potential emissions could be overestimated and consequently the source owner could be subject to the Act requirements affecting major sources. Although such source owners could in most cases readily accept enforceable limitations restricting the operation to its designed level, EPA believes this administrative requirement for such sources to be unnecessary and burdensome.

On the topic of "physical and operational design," the January 25 memorandum provided a general discussion. In addition, EPA committed to providing technical assistance on the type of inherent physical and operational design features that may be considered acceptable in determining the potential to emit for certain individual small source categories. The EPA is currently conducting category-specific analyses in support of this effort, and hopes as a result of these analyses to generate more general guidance on this issue as well.

The purpose of this memorandum is to address the issue of PTE as it relates specifically to emergency generators. There is a significant level of interest in this source category because there are many thousands of locations for which an emergency generator is the only emitting source. Moreover, based on a review of this source category, there exists a readily identifiable constraint on the operational design of emergency generators. Hence, the EPA believes it would be useful to provide today's guidance before the entire effort is complete.

The policies set forth in this memorandum are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

Guidance for Emergency Generators

For purposes of today's guidance, an "emergency generator" means a generator whose sole function is to provide back-up power when electric power from the local utility is interrupted. The emission source for such generators is typically a gasoline or diesel-fired engine, but can in some cases include a small gas turbine. Emissions consist primarily of carbon monoxide and nitrogen oxides. Other criteria pollutants, and hazardous air pollutants, are also emitted, but at much lower levels. Emissions occur only during emergency situations (i.e., where electric power from the local utility is interrupted), and for a very short time to perform maintenance checks and operator training.

The EPA believes that generators devoted to emergency uses are clearly constrained in their operation, in the sense that, by definition and design, they are used only during periods where electric power from public utilities is unavailable. Two factors

indicate that this constraint is in fact "inherent." First, while the combined period for such power outages during any one year will vary somewhat, an upper bound can be estimated which would never be expected to be exceeded absent extraordinary circumstances. Second, the duration of these outages are entirely beyond the control of the source, and when they do occur (except in the case of a major catastrophe) rarely last more than a day.

For emergency generators, EPA has determined that a reasonable and realistic "worst-case" estimate of the number of hours that power would be expected to be unavailable from the local utility may be considered in identifying the "maximum capacity" of such generators for the purpose of estimating their PTE. Consequently, EPA does not recommend the use of 8760 hours per year (i.e., full-year operation) for calculating the PTE for emergency generators. Instead, EPA recommends that the potential to emit be determined based upon an estimate of the maximum amount of hours the generator could operate, taking into account (1) the number of hours power would be expected to be unavailable and (2) the number of hours for maintenance activities.

The EPA believes that 500 hours is an appropriate default assumption for estimating the number of hours that an emergency generator could be expected to operate under worst-case conditions. Alternative estimates can be made on a case-by-case basis where justified by the source owner or permitting authority (for example, if historical data on local power outages indicate that a larger or smaller number would be appropriate). Using the 500 hour default assumption, EPA has performed a number of calculations for some typically-sized emergency generators. These calculations indicate that these generators, in and of themselves, rarely emit at major source levels. (Of course, there may be unusual circumstances where these calculations would not be representative, for example where many generators are present that could operate simultaneously).

Cautions

Today's guidance is only meant to address emergency generators as described. Specifically, the guidance does not address: (1) peaking units at electric utilities; (2) generators at industrial facilities that typically operate at low rates, but are not confined to emergency purposes; and (3) any standby generator that is used during time periods when power is available from the utility. This guidance is also not intended to discourage permitting authorities from establishing operational limitations in construction permits when such limitations are deemed appropriate or necessary. Additionally, this memorandum is not intended to be used as the basis to rescind any such restrictions already in place.

Distribution/Further Information

The Regional Offices should send this memorandum, including the attachment, to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. Regional Office staff may contact Tim Smith of the Integrated Implementation Group at 919-541-4718. The document is also available on the technology transfer network (TTN) bulletin board, under "Clean Air Act" - "Title V" - "Policy Guidance Memos". (Readers unfamiliar with this bulletin board may obtain access by calling the TTN help line at 919-541-5384).

Attachments

cc: Air Branch Chief, Region I-X
Regional Air Counsels, Region I-X
Adan Schwartz (2344)
Tim Smith (MD-12)

CNA B24b

United States
Environmental Protection Agency

October 1995

# Superfund Administrative Reforms Overview

## A. *Make smarter cleanup choices that protect public health at less cost.*

### 1. Control Remedy Costs and Promote Cost-Effectiveness

- **Establish Cost-Effectiveness Thresholds and New "Rules of Thumb"**
Establish a new EPA National Remedy Review Board, composed of senior Agency experts, to review proposed high cost remedies at specific sites to ensure that costs are not disproportionate to cleanup benefits. EPA will develop additional "Rules of Thumb" to further ensure the appropriate review of the cost-effectiveness of remedies.

- **Update Remedy Decisions at Select Sites**
Revisit remedy decisions at certain sites where significant new scientific information or technological advancement will achieve the same level of protectiveness of human health and the environment.

- **Clarify the Role of Cost Throughout the Remedy Development Process**
Clarify the role of costs in developing cleanup options and selecting remedies, and promote consistent use of policies and guidances on land use, ground water, and presumptive remedies to assure cost-effectiveness.

- **Clarify Information Regarding Remedy Selection Decisions**
Require a summary sheet clearly demonstrating the basis for remedy selection at each site The summary will present the relationship between site risks and response actions, including the costs and benefits of cleanup alternatives.

### 2. Ensure All Risk Assessments are Grounded in Reality

- **Institute New Role for Stakeholders in Designing Reasonable Risk Assessments**
Solicit early stakeholder input to identify and make consistent use of current information about the site and site inhabitants Reaffirm EPA's commitment to allow parties at a site to perform risk assessments under the proper circumstances.

- **Ensure Reasonable and Consistent Risk Assessments**
Standardize those components of the risk assessment process that vary little from site to site, and issue national criteria to the Regions for the review, approval, and reporting of Superfund risk assessments Utilize Expert Workgroups on specific contaminants to ensure application of developing risk information

### 3. Foster Integration of Overlapping Cleanup Programs

- Establish a lead regulator at each site undergoing cleanup activities under competing Federal and State authorities to eliminate overlap and duplication.

### 4. Reform Listing and Deletion Policies

- Ensure that response actions that have been taken up to the time of listing are considered when listing sites on the National Priorities List.

- Delete "clean" parcels of certain Superfund sites from the National Priorities List.

5. **Conduct National Risk-Based Priority Setting**

• Establish formal national priority-setting systems for funding federal facility and Superfund cleanups based on the principle of "worst problems first." These systems would incorporate input from States and other stakeholders in determining the appropriate priority.

## B. *Reduce litigation by achieving common ground instead of conflict.*

1. **Increase Fairness in the Enforcement Process**

• **Compensate Settlors for a Portion of Orphan Share**
Seek to compensate parties for a portion of the costs attributable to insolvent parties (orphan share) at sites where parties agree to perform the cleanup, subject to the adequacy of funding for the cleanup program.

• **Ensure Settlement Funds are Dedicated to Specific Sites**
Direct settlement funds designated for future site costs to be placed in site-specific accounts.

• **Issue Cleanup Orders to Parties in an Equitable Manner**
Ensure that issuance of cleanup orders is not limited to a few responsible parties but includes all appropriate parties where there is a sufficient basis to include them

2. **Reduce Transaction Costs**

• **Increase Number of Protected Small Contributors**
EPA will not seek costs from thousands of additional small volume contributors (de micromis parties) by, at a minimum, doubling the level previously identified for small party protection. If a party is threatened with litigation by private parties, EPA will settle with that party for one dollar.

• **Adopt Allocations Proposed by Parties at a Site**
Adopt private party allocations, including those that identify an orphan share, as the basis for settlement, where such allocations are approved by EPA. Compensation for a portion of the orphan share may be provided, subject to the adequacy of funding for the cleanup program.

• **Reduce Oversight for Cooperative Parties**
Reward parties at sites that consistently perform high quality work by significantly reducing or tiering oversight.

## C. *Ensure that States and communities stay more informed and involved in cleanup decisions.*

1. **Establish Greater Stakeholder Role in Remedy Selection**

• **Shift Remedy Selection Process to Selected States**
Implement a process whereby qualified States and Tribes (at Tribal sites) would select remedies at certain Superfund sites, consistent with applicable law and regulations governing cleanups.

• **Pilot New Community-Based Remedy Selection Process**
Assist community groups, site parties, local governments and other stakeholders in achieving consensus to propose protective remedies at select sites

2. **Provide a Meaningful Forum for Stakeholder Concerns**

• Establish an Ombudsman in each Region to serve as a point of contact to facilitate resolution of stakeholder concerns at the Regional level

• Use tools such as electronic bulletin boards and private and educational institutions to improve communication between all Superfund stakeholders

# SUPERFUND ADMINISTRATIVE REFORMS: REFORM INITIATIVES

## A. *Make smarter cleanup choices that protect public health at less cost.*

### 1. Control Remedy Costs and Promote Cost-Effectiveness

EPA believes significant cost savings can be obtained through the institution of a combination of management and policy measures without jeopardizing a remedy's reliability or protection of human health and the environment.

- **Establish Cost-Effectiveness Thresholds and New "Rules of Thumb"**

EPA will establish a National Remedy Review Board to help control costs of future remedy decisions. Composed of senior experts from EPA's Headquarters and Regional offices, the Board would review proposed cleanup actions at sites where: (1) estimated costs for the preferred alternative are over $30M; or (2) proposed remedy costs are over $10M and 50% greater than the costs of the least-costly, protective, ARAR-compliant remedy (i.e., choosing among remedies that meet statutory requirements for Superfund remedy selection). This 50% "cost-effectiveness yardstick" will reflect the Agency's desire to select remedies that fall within this cost-control measure. The Board would consider the nature of the site, the accuracy of the cost estimate, the risk posed by the site, and additional relevant factors. The Board would make recommendations of an advisory nature, although Regional decisionmakers will be expected to give the Board's recommendations substantial weight in making their final remedy selection decisions following public comment. Additional measures ("rules of thumb") will be developed by EPA during the winter and spring of 1996 to highlight potentially "controversial" cleanup decisions for senior management review to ensure that the preferred option is not disproportionately costly to other proposed options.

- **Update Remedy Decisions at Select Sites**

Cleanup decisions made in the early years of the Superfund program were based on the "state-of-the-knowledge-and-practice" available at that time. Though these cleanup decisions were designed to provide appropriate levels of protection of human health and the environment, new technologies are making their way into the market that allow for more efficient and cost-effective cleanups, while achieving the same level of protection for human health and the environment. As such, some cleanup systems that were selected and constructed in the past might not be the cleanup method EPA would propose today under similar circumstances. Accordingly, the Agency intends to

entertain requests by parties to update earlier decisions such as those discussed below where significant new scientific information or technological advancement will achieve the same level of protectiveness.

EPA has seen the most dramatic increase in understanding of the factors affecting cleanup decisions in the field of ground water restoration. By the early 1990s, experience indicated that sites contaminated with dense nonaqueous phase liquids (DNAPLs) could require an inordinate amount of time to restore the ground water to drinking water levels using conventional pump and treat technology alone. Updating these older decisions could incorporate current policy for dealing with sites with DNAPLs (current policy is to isolate and contain the DNAPL source, removing that source only to the degree practicable). Updates to these remedies to allow for more attainable cleanup goals will occur only where the same level of protectiveness of human health and the environment will be achieved. In less common instances, new technologies may now also be available that could greatly improve the cost-effectiveness of ground water source control cleanups. In addition, EPA may consider changes in technology for source control cleanups in limited cases.

- **Clarify the Role of Cost Throughout the Remedy Development Process**

This year, EPA will issue two new directives aimed at ensuring rigorous attention to cost throughout the formulation of cleanup alternatives. The first directive will highlight the role of cost and cost-effectiveness in the remedy selection process as established in the Superfund law and the National Contingency Plan. This directive will outline how cost factors into the screening of alternative remedies as well as how cost factors into the balancing of tradeoffs among options in remedy selection. The directive will also describe how selected remedies must be determined to be "cost-effective," as required by statute, and emphasize how disproportionately costly remedies are to be avoided.

The second directive will promote consistency among EPA Regional offices in the application of current national policies and technical guidance. These include policies on land use that encourage early community involvement (including local land use authorities) in the development of assumptions about what future land use may be reasonable to anticipate. These assumptions should provide a practical foundation for the baseline risk assessment, the development of cleanup alternatives and the detailed analysis of those alternatives. Also, recent ground water guidance calls for the evaluation of the restoration potential of contaminated ground water prior to establishing final cleanup objectives, which may involve combinations of containment and

restoration. In addition, the directive will foster use of presumptive remedy guidances that identify frequently selected, proven effective and cost-effective response actions for common categories of sites (e.g., municipal landfills) and are powerful tools which dramatically improve the efficiency of the remedy selection process and the cost-effectiveness of the remedies resulting from it.

- **Clarify Information Regarding Remedy Selection Decisions**

Summary sheets for Records of Decision (RODs) will accompany each ROD and will provide, in a standardized format, the nature of the threats encountered and the cleanup actions taken to address these threats. This brief, easily understandable "summary" would be developed to describe clearly and concisely the tradeoffs that were balanced in choosing the selected remedy from available options, i.e., the judgments that were made to link the risk posed by the site to the remedy EPA selected. The summary sheet will be designed to foster greater transparency in EPA's remedy selection decisions and to facilitate the input of data into the technical data base that will become part of CERCLIS III, EPA's national Superfund data system.

## 2. Ensure All Risk Assessments are Grounded in Reality

The following projects are designed to ensure that both the design and conduct of all Superfund risk assessments are sound and consistent by making good use of "real world" information about the site and site inhabitants. Ultimately, stakeholder input on the likelihood that people may be exposed to hazardous substances can ensure a more realistic context for decision making.

- **Institute New Role for Stakeholders in Designing Reasonable Risk Assessments**

Two projects will be conducted to empower stakeholders to participate in the design and implementation of Superfund site risk assessments. The first involves piloting a process that solicits early stakeholder input on land use assumptions, (e.g., for homes, retail stores, parking lots, playgrounds), reasonable exposure pathways, (e.g, drinking water from a well, eating fish from the stream), and characteristics of affected populations (e.g., workers, young children at play). For Superfund risk assessments scheduled this fiscal year (FY '96), the site manager would seek input up front on which exposure pathways are most likely to occur and which human behaviors and activities are most reasonably expected (or are not expected) at this site. This up-front discussion provides both the "blueprint" for conducting the risk assessment, and a realistic foundation on which to build cleanup options. The second

project will reaffirm EPA's commitment to allowing PRPs to conduct risk assessments under proper circumstances as part of the overall site study (RI/FS).

- **Ensure Reasonable and Consistent Risk Assessments**

There will be three initiatives aimed at developing reasonable exposure pathways and assumptions on a consistent basis. The first project will establish, in FY 96, national criteria for the Regions to review, approve, and report Superfund risk assessments which promote consistency, transparency, clarity, and reasonableness. Standard review practices, checklists, and formal sign off by appropriate Agency personnel will ensure that unlikely exposure scenarios are eliminated from consideration. Standard reporting requirements will facilitate review of assessments for consistency and reasonableness at the national level.

The second project seeks to standardize those "pieces" of the risk assessment process that vary little from site to site (e.g., exposure models or assumptions that may be appropriate for most sites). This longer term project includes developing reasonable default assumptions about expected pathways and routes of human exposure for different types of land uses or activities. Other parts of the risk assessment for a site will require the collection and use of site-specific information from that site.

The third project utilizes an expert workgroup to ensure application of consistent approaches for lead-contaminated Superfund sites. Lead is one of the most commonly occurring contaminants at Superfund sites. It is also a contaminant of great concern because of its potential to affect neurological development in children, and its prevalence in economically disadvantaged and minority-populated areas. This project employs an inter-Agency workgroup of experts in lead toxicity and exposure assessment to provide timely and consistent analyses, reviews or advice to Regional staff on the most current methods for assessing lead health risks. The Workgroup is available now to provide information and advice on a wide range of issues, though it will generally focus on sites with complex or nationally-precedent-setting lead issues.

## 3. Foster Integration of Overlapping Cleanup Programs

- **Establish a lead regulator at each site undergoing cleanup activities under competing Federal and State authorities to eliminate overlap and duplication**

Some cleanups, particularly those at federal facilities, are often subject to multiple regulatory authorities such as Superfund or RCRA Corrective Action, as well as State laws. This is more often true for Federal agencies due to EPA's policy to continue listing Federal Facilities on the National Priorities List, regardless of their RCRA status. Although the end goal of the various regulatory authorities is to achieve protectiveness, the specifics of achieving that end may be slightly different. Clearly identifying the roles of the various regulators should help simplify the required cleanup process as well as provide for more efficient staffing.

The Agency is developing a guidance, targeted for issuance in early 1996, that will specify roles and outline the general principles and guidelines that the Federal and State partners should assume in regulating cleanup responses that are being undertaken under multiple legal authorities. The guidance will be developed by an interagency workgroup chaired by EPA, including States as co-implementers.

## 4. Reform Listing and Deletion Policies

- **Ensure that response actions that have been taken up to the time of listing are considered when listing sites on the National Priorities List**

Current policy established a "cutoff date" for information used to evaluate sites for the Superfund National Priorities List (data from the EPA/State site investigation is used to score and rank NPL candidates). Revising the guidance by early 1996 would allow EPA to take current or recent response actions into consideration when determining whether a site should be placed on the National Priorities List. EPA would determine a site's status based on whether site contamination after such response action is at a level protective of human health and the environment. EPA would consult with the State, tribe (where appropriate), ATSDR, and the potentially affected community in making this decision. EPA expects that this will have a positive effect by providing incentives for voluntary cleanup, and encouraging reuse or redevelopment of the property.

- **Delete "clean" parcels of certain Superfund sites from the National Priorities List**

As part of efforts to encourage redevelopment of contaminated sites (EPA's Brownfields Initiative) and in support of the President's Five Point Plan, the EPA NPL Partial Deletion Workgroup is developing a pilot program to delete "clean" portions of sites on the NPL. Presently, EPA's policy is to delete entire sites from the NPL when no further CERCLA response is appropriate at the entire site. This pilot program will begin in 1995 in response to the concerns of some potential homeowners, investors or developers who may be reluctant to undertake economic activity at a site on the NPL. EPA believes that remediated portions of closing military bases may make excellent candidates for a partial deletion program.

## 5. Conduct National Risk-Based Priority Setting

- **Establish formal national priority systems for funding federal facility and Superfund cleanups based on the principle of "worst problems first." These systems would incorporate input from States and other stakeholders in determining the appropriate priority.**

Federal agencies are encountering resource limitations in their cleanup budgets. Until recently, no systematic tool for comparing risks across large numbers of sites and facilities existed to help in the process of building an Agency budget and distributing available funding appropriately. EPA will issue guidance to the EPA Regions affirming the use of federal agency-developed risk-based priority setting systems to evaluate federal agency cleanup sites. The guidance will address the use of risk-based priority setting for determining federal facility cleanup milestones. It also will discuss the role of regulators and stakeholders in identifying the priority projects.

As to non-federal facility sites, individual Regions have established the relative priority of their cleanup projects and Headquarters has issued Superfund monies to each Region's highest priorities on a first-come, first-served basis. In the face of significant budget shortfalls, this initiative will ensure that available funds in FY '96 are directed to the highest priority response projects on a national basis. The national priority of projects will be assessed by an expert panel of senior HQ/Regional program managers in consideration of documented information on five criteria: (1) Risks to Humans, (2) Ecological Risks, (3) (In)Stability of Contaminants, (4) Contaminant Characteristics, and (5) Economic, Social and Program Management considerations.

## B. *Reduce litigation by achieving common ground instead of conflict.*

### 1. Increase Fairness in the Enforcement Process

- **Compensate Settlors for a Portion of Orphan Share**

To promote a fairer distribution of the cost of cleanups that parties agree to perform, EPA will seek to compensate performing parties for a limited portion of the known shares attributable to nonviable parties (orphan share) in future cleanup negotiations. This compensation may be in the form of forgiveness of past costs, provision of proceeds from other settlements at the site, or a reduction in oversight costs. Any such compensation will necessarily be subject to the adequacy of funding for the cleanup program.

Where these mechanisms are not available at a site, EPA will look to what limited funds may be available to provide payments to the parties performing the work (mixed funding) or to perform some severable portion of the work (mixed work). EPA's mixed funding policy and regulations will be revised to appropriately reflect the priority of this initiative. EPA will commit to providing additional orphan share funding in the event Congress specifically appropriates additional dedicated funds for orphan share funding. EPA may provide limited compensation for some portion of the orphan share at other appropriate sites, depending on the availability of resources for cleanup, size of the orphan share, the degree of cooperation shown by the parties, and other relevant factors.

- **Ensure Settlement Funds are Dedicated to Specific Sites**

At some sites, parties have criticized EPA's practice of placing settlement proceeds for future work received from certain parties at the site, such as settlements with small volume contributors (*de minimis* parties), into the general Superfund. Although these settlement proceeds are intended for use in future cleanup activities at the site, there is no guarantee that the funds will not be expended from the Superfund at another site. To remedy this situation, EPA plans to utilize site-specific special accounts, in which all settlement funds designated for future costs will be placed. EPA is in final discussion with the Department of Treasury and the Office of Management and Budget to ensure that these accounts will be interest-bearing. These monies will then be available exclusively at that site.

- **Issue Cleanup Orders to Parties in an Equitable Manner**

There has been much criticism by industry that EPA routinely issues cleanup orders under section 106 (unilateral administrative orders or UAOs) only to a subset of the parties that have been identified for a particular site. EPA's 1990 guidance on orders ("Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions" (OSWER Directive No. 9833.0-1a)) explicitly directs enforcement staff to issue orders to the largest manageable number of parties following consideration of the adequacy of evidence of the party's liability, the party's financial viability, and the party's contribution to the site. EPA believes that, consistent with this guidance, order issuance generally has been reasonable and fair and that decisions not to include parties at a site have related to legitimate matters of enforceability. EPA recognizes, however, that at some sites, order issuance may have not been to the "largest manageable number" due to resource constraints.

EPA is committed to ensuring that orders are issued to all appropriate parties (other than small volume contributors such as *de minimis* and *de micromis*), where there is a sufficient basis to include them. EPA will identify, for internal management review purposes only, parties excluded from any order proposed to be issued. Enforcement staff in the Region will ensure that information sufficient for the regional decisionmaker to review the issuance decision is placed in the package sent to him or her for approval. Specifically, enforcement staff will identify the total number of parties EPA has discovered at a site. Where enforcement staff recommend that an order not include certain parties, they will include an explanation of the basis for such exclusion in the package.

## 2. Reduce Transaction Costs

- **Increase Number of Protected Small Contributors**

In previous administrative reforms, EPA issued policies providing that EPA will not bring enforcement actions against the smallest waste contributors for response costs, and will enter into settlements with these parties -- commonly referred to as *de micromis* parties -- if they are threatened with litigation by other private parties. This policy resulted in the avoidance of hundreds of small volume contributors being brought into the Superfund process by private parties. Building on this success, EPA plans to increase this cut-off to protect thousands of additional parties. At a minimum, EPA will double the level

previously identified for small waste contributor protection and will continue to explore other potential levels. If any of these parties are threatened by private parties with litigation, EPA will settle with these parties for one dollar to protect them from such suits.

- **Adopt Allocations Proposed by Parties at a Site**

In some instances, parties at sites have taken the initiative in conducting an allocation of the shares that can be attributed to each party at a site. EPA seeks to reward the initiative of such parties by adopting allocations that meet certain standards as the basis for settlement. EPA will review private party allocations that have attributed shares to all participating parties, including an identified "orphan share," (i.e., the known shares of insolvent parties) looking at factors such as methodology, inclusion of all parties, and fairness. If EPA accepts the private party allocation, the Agency will try to provide compensation for a portion of the orphan share, through the same mechanisms considered in compensating parties at future cleanup negotiations, subject to the adequacy of funding for the cleanup program.

- **Reduce Oversight for Cooperative Parties**

As the Superfund program has matured, parties have developed a considerable body of experience in conducting response activities at sites. Some not only have used this experience to perform high quality work but have acted cooperatively with EPA throughout the cleanup and enforcement processes. In recognition of this development, and to promote further cooperativeness, EPA will reward such parties by significantly reducing or tiering oversight while continuing to exercise sufficient oversight to ensure that the work is performed properly and in a timely manner. Reduction of such oversight will result in decreased transaction costs for EPA and cooperating parties.

## C. *Ensure that States and communities stay more informed and involved in cleanup decisions.*

### 1. <u>Establish Greater Stakeholder Role in Remedy Selection</u>

- **Shift Remedy Selection Process to Selected States**

EPA and selected, qualified States would enter into agreements during FY '96 through which those States would conduct the remedy selection process, consistent with applicable law and regulations (the National Contingency Plan), at certain National Priorities List sites. Participating States would supervise

the entire remedy selection process with minimal EPA oversight or involvement, giving the State significantly more control than usual over NPL site cleanups.

- **Pilot New Community-Based Remedy Selection Process**

EPA and States have had a variety of experiences in recent years empowering local citizens and other stakeholders to arrive at their own mutually acceptable proposals for aspects of remedy selection decisions. EPA would like to build on these experiments to bring meaningful community and stakeholder involvement to life at select additional site through similar or related techniques. Guidelines would be developed during the first-half of FY '96 presenting various options for empowering affected parties to play a direct role in finding a protective, cost-effective remedy at their sites that meets statutory requirements and makes common sense. Under CERCLA, EPA will retain ultimate decisionmaking authority for remedy decisions. However, the Agency would hope to equip participants in consensus-based decision pilots with a clear understanding of statutory, regulatory and policy objectives such that EPA would expect to be able and willing to select a stakeholder supported remedy.

## 2. Provide a Meaningful Forum for Stakeholder Concerns

- **Establish an Ombudsman in each Region to serve as a point of contact to facilitate resolution of stakeholder concerns at the Regional level**

EPA will establish a facilitator in each Region during the first-half of FY '96 to serve as a direct point of contact to address stakeholder concerns which reside at the Regional level. The Ombudsman would report to a top regional management official, e.g., Regional Administrator or Deputy Regional Administrator, and would facilitate resolution of these concerns which cannot be resolved between Regional personnel and the stakeholder through informal means. The Ombudsman also could serve as a repository for information related to recurring Superfund concerns.

- **Use tools such as electronic bulletin boards and private and educational institutions to improve communication among all Superfund stakeholders**

This reform would create, during the first-half of FY '96, a bulletin board via the Internet to allow communication among all Superfund stakeholders. The bulletin board would also include an easily accessible guide to current State

and Federal guidances. The bulletin board would promote consistency among site cleanup decisions, and provide access to information for organizations that maintain site information repositories and administrative records within communities. Entities such as universities and the Hazardous Substance Research Centers may be utilized to provide additional information, technical expertise, and support to communities located close to Superfund sites.

United States
Environmental Protection
Agency

Communications, Education,
And Public Affairs
(1703)

CAA B246

# EPA Environmental News

MONDAY, OCTOBER 2, 1995

## 20 NEW REFORMS CAP TWO-YEAR EFFORT TO REFORM SUPERFUND; EPA ADMINISTRATOR CALLS FOR LEGISLATIVE CHANGES

Gwen Brown 202-260-1384

Twenty new "common sense" administrative reforms to the Superfund toxic waste cleanup program were announced today by U.S. Environmental Protection Agency Administrator Carol M Browner, culminating the Clinton Administration's two-year effort to fundamentally redirect Superfund to make it faster, fairer and more efficient. Browner called on Congress to complete the reform of Superfund through legislative changes, noting that these administrative improvements represent the final changes that can be made without new reauthorizing legislation.

Today's reforms -- the third round of Clinton Administration reforms -- intend to assist state and local governments, communities, and industries involved in Superfund cleanups to more easily: 1) make cost-effective cleanup choices that protect public health and the environment, 2) reduce litigation so more time can be spent on cleanup and less on lawyers; and 3) help communities become more informed and involved so that cleanup decisions make the most sense at the community level.

"The Clinton Administration believes that Superfund is broken and needs to be fixed -- that's why we've worked for two years on administrative reforms to make Superfund faster, fairer and more efficient," Browner said. "But administrative reforms can only do so much. Ultimately, Congress must change the law if we are to protect public health and the environment for the one in four Americans who live near a toxic waste dump."

Browner added, "We believe Congressional reforms must include three principles: First, polluters, not taxpayers, must pay for cleanup. Second, we must speed cleanups and lower costs to return more property to communities for their productive use. And third, communities should have a role in selecting cleanup plans that protect public health and make economic and environmental sense."

Some of the new reforms will aim to control costs while protecting public health by assuring more consistency, streamline processes to save time and money, create new choices for cost-effective cleanup options, and encourage economic redevelopment. Among these reforms will be the establishment of cost-effectiveness "rules of thumb" and an EPA National Remedy Review Board that will ensure costs are appropriate to cleanup needs; setting criteria for reopening remedy decisions at select sites where new and better science will achieve the same level of protection with potential cost savings; directives to ensure rigorous attention to costs in the development of cleanup options and remedy selection; and national risk-based priority setting to select sites for funding based on the principle of cleanup of "worst sites first."

The cost-effectiveness reforms also include specific efforts to ensure appropriate health protection in the decisionmaking process, through involving stakeholders in designing accurate, site-specific risk assessments. To make Superfund sites more attractive for economic redevelopment, the reforms include an effort to pilot the deletion of "clean" parcels of Superfund sites and establishing guidance to ensure that all cleanup actions are considered when listing sites on the Superfund National Priorities List -- which is expected to keep some sites off the list, a factor that will help make them more attractive for redevelopment.

Reforms that aim to reduce litigation and reduce both costs and conflict delays include efforts to increase fairness in the enforcement process by compensating settling parties for a portion of the "orphan shares," or cleanup costs that are attributable to insolvent parties; and efforts to reduce transaction costs by doubling the number of "small party" entities -- typically small businesses and individuals whose contribution to pollution at Superfund sites is small -- who are protected from lawsuits. To provide a positive incentive to reduce litigation, EPA also will reward cooperative parties at sites that consistently perform high quality work by significantly reducing EPA oversight.

A third set of reforms aims to provide more and better information and opportunities for involvement to citizens, state and local governments, and industry in cleanup decisions, to encourage responsible cleanup choices that reflect local needs and preferences. Among these reforms will be efforts to establish greater roles for states and tribes in remedy selection; providing clearer information on remedy selection decisions through simple summary sheets; promoting pilot efforts to create consensus on cleanup options in communities; and providing forums for stakeholder concerns by establishing an ombudsman in each Region to help resolve stakeholder concerns and increasing use of tools such as electronic bulletin boards to improve communications among stakeholders.

As a followup to previously announced reforms, EPA also has issued a new policy that adopts as guidance the provisions of the lender liability rule; and issued model de minimis settlement agreements designed to further streamline the de minimis settlement process.

R-178 ###

# NEW COMMON-SENSE REFORMS MAKE SUPERFUND PROGRAM FASTER, FAIRER AND MORE EFFICIENT

Continuing its commitment to make the Superfund program faster, fairer and more efficient for the one in four Americans who live near a toxic waste site, the Clinton Administration is announcing a package of 20 new, common-sense administrative reforms. These reforms culminate the Clinton Administration's EPA's two-year effort to fundamentally redirect the Superfund program under the current law. These new reforms will help governments, communities and industry in three important ways:

***1) Make common-sense, cost-effective cleanup choices that protect public health and the environment.*** Lowering the costs of cleanup makes both economic and environmental sense for communities, state and local governments, and businesses involved in cleanup settlements. The new reforms will assure consistency; streamline processes to save time and money; create new opportunities for choosing cost-effective cleanup options; and do more to protect public health and encourage economic redevelopment, including plans to:

- ***Control Remedy Costs and Promote Cost-Effectiveness*** by establishing cost-effectiveness "rules of thumb" and establishing an EPA National Remedy Review Board to ensure that costs are appropriate to the cleanup needs; revisiting remedy decisions at select sites where new and better science will achieve the same level of protection, with potential cost savings; issuing directives to ensure rigorous attention to costs in developing cleanup options and selecting remedies; and promoting consistent use of the most up-to-date policies and guidance to assure cost effectiveness.

- ***Ensure Risk Assessments are Grounded in Reality*** by soliciting stakeholder input in designing accurate, consistent site-specific assessments, including reasonable exposure pathways, and reaffirming EPA's commitment to allow parties at a site to perform risk assessments under the proper circumstances.

- ***Conduct National Risk-Based Priority Setting*** by establishing formal priority-setting systems for funding federal facility and Superfund cleanups based on the principle of "worst sites first," and involving States and other stakeholders in setting those priorities; and issuing guidance to promote risk-based priority setting in determining federal facility cleanup milestones.

- ***Reform Listing and Deletion Policies*** by piloting the deletion of "clean" parcels of certain Superfund sites; and establishing guidance to ensure that all cleanup actions that have been taken up to the time of a listing decision are considered when listing sites on the Superfund National Priorities List -- with the result that some sites will not warrant listing, helping to make them more attractive for redevelopment.

***2) Reduce litigation through reforms so that more time is spent on cleanups and less on lawyers.*** In thousands of communities, toxic waste cleanups have prompted litigation as some of those responsible for pollution at a site have sued or threatened to sue many small businesses and individual citizens over even the smallest possibility of involvement. In other cases, responsible parties argue over "orphan shares" of responsibility -- cleanup obligations of companies responsible for past pollution who are insolvent. The new reforms will expedite cleanups by providing solutions to these and other common conflicts, including commitments to

- ***Increase Fairness in the Enforcement Process*** by compensating settling parties for a portion of "orphan shares," the costs that are attributable to insolvent parties; ensuring that settlement funds are dedicated to specific sites by placing them in site-specific accounts; and, where settlement can't be reached, working with regions to ensure that cleanup orders are issued to all appropriate parties (but not to parties whose contribution to the pollution at the site is small -- *de minimis* and *de micromis* parties) where there is a sufficient basis to direct them to conduct a cleanup.

- ***Reduce Transaction Costs*** by adopting private party cost allocations, including those identifying an orphan share, as the basis for a settlement after EPA review and approval; increasing by thousands the number of parties who contribute very small volumes of waste that will be protected -- at a minimum, doubling the level previously identified for small party protection; and rewarding cooperative parties at sites that consistently perform high quality work by significantly reducing EPA oversight.

***3) Help governments, communities, and industry become more informed and involved so that cleanup decisions make the most sense at the community level.*** EPA is committed to making Superfund work better for the communities that rely on it to cleanup the toxic waste sites threatening their public health and economic well-being. A lack of good information about site conditions and cleanup options has often led to cynicism and distrust of the Superfund program. These reforms will harness the power of information to take full advantage of the willingness of all involved at a site to arrive at responsible cleanup decisions.

- ***Establish Greater State/Tribal Role in Remedy Selection*** by implementing a process allowing States and Tribes (at Tribal sites) to select remedies at certain Superfund sites, consistent with applicable law and regulations governing cleanups.

- ***Provide Clear Information on Remedy Selection Decisions*** through a simple summary sheet explaining the cleanup plan and the relationship between risk, cost, and other tradeoffs that were balanced in selecting a remedy from among the available options.

- ***Promote Consensus in Choosing Cleanup Options*** by developing and initiating pilot projects in which EPA empowers and assists citizens, PRPs, and other stakeholders in devising a mutually acceptable, protective cleanup plan.

- ***Provide a Meaningful Forum for Stakeholder Concerns*** by establishing an Ombudsman in each Region to facilitate resolution of stakeholder concerns at the Regional level; and using tools such as electronic bulletin boards and grants to private and educational institutions to improve communication among all Superfund stakeholders.

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# UPDATE ON EPA'S PREVIOUS ADMINISTRATIVE REFORM EFFORTS

**October 2, 1995**

EPA initiated two prior rounds of initiatives (June 1993 and February 1995) focused on fundamentally reforming the Superfund program by maximizing and refining the use of the authorities that exist in the current law

**Promoting Economic Development**

• EPA has awarded 18 Brownfields pilots and plans to award 50 pilots, at up to $200,000 each by the end of 1996. In February of this year, EPA gave a boost to property owners, bankers, developers and others concerned that their property was a potential Superfund by removing 24,000 or about two-thirds of the sites from the CERCLIS inventory to help clarify that the Agency has no further interest in these sites.

• EPA issued a revised policy and a model settlement agreement in May of 1995 aimed at providing protection from lawsuits to parties planning on purchasing Superfund properties. Today, EPA announces the issuance of a new policy that adopts the provisions of the previously-promulgated "Lender Liability Rule "

**Protecting Small Volume Contributors**

• EPA has protected well over 10,000 small volume contributors of hazardous waste at approximately 162 Superfund sites by entering into *de minimis* settlements. EPA indirectly provided relief to untold numbers of even smaller contributors (*de micromis* parties) by issuing a guidance in July 1993 clearly stating EPA's intention not to pursue such parties. In addition, EPA is today issuing Model *De Minimis* settlement agreements designed to further streamline the de minimis settlement process

**Streamlining Remedy Selection**

• EPA drastically streamlined the remedy selection process by issuing "presumptive remedy" guidances for municipal landfill sites and sites with volatile organic compounds in soil. To address concerns that remedy selection consider "reasonably" anticipated future land uses at sites, EPA has established a policy to solicit early community involvement in determining the future uses of the properties to be cleaned up. In September 1993, EPA issued guidance for evaluating technical impracticability for ground water restoration and, in January 1995, issued guidance for consistent implementation.

**Promoting the Use of Allocations**

• In the second round of reforms, EPA is 'test-driving' an allocation process outlined in last year's legislation to reauthorize Superfund in which a neutral party will conduct a streamlined out-of-court allocation and will assign shares of responsibility for cleanup costs among all the parties at a site.

**Increasing the Role of the States**

• EPA instituted pilots that deferred 22 sites to States for appropriate response activity under the first round of administrative reforms. In May 1995, EPA issued guidance for deferring the consideration of sites for listing on the NPL while qualified States and Tribes oversee PRP response actions.

**Fostering Community Involvement and Environmental Justice**

• The Agency for Toxic Substances and Disease Registry (ATSDR) is funding the Del Amo medical assistance project in Torrance, California, which is a pilot program for providing health services assistance to citizens in proximity to Superfund sites.

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Department of Justice

U.S. Environmental Protection Agency

September 29, 1995

MEMORANDUM

SUBJECT: Issuance of "Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs" and "Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs"

FROM: Jerry Clifford, Director
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

Bruce S. Gelber, Acting Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Regional Counsel, Regions I - X
Regional Waste Management Division Directors, Regions I - X
Financial Management Officers, Regions I - X
Assistant Chiefs, Environmental Enforcement Section

We are pleased to issue the final versions of two model CERCLA cost recovery settlement documents: 1) "Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs" ("Model CD"); and 2) "Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs" ("Model Agreement"). The Model CD is to be used as guidance for EPA and DOJ staff when negotiating CERCLA Section 107 judicial consent decrees for recovery of past response costs. The Model Agreement is to be used as guidance for EPA and DOJ staff when negotiating CERCLA Section 122(h) administrative agreements for recovery of past response costs. Both models are designed for resolution of purely past cost claims and are not intended to be used to resolve claims for future work or payment of future response costs ("cashout" settlements). Cashout settlement terms will be provided in subsequent models.

We encourage our staffs to adhere as closely as possible to the terms of these models, subject to modifications needed to reflect site-specific circumstances. We believe use of these models will reduce negotiation timeframes, achieve nationally consistent settlements, promote compliance with current

settlement practices and procedures, and increase the speed of management review and approval. When seeking approval of any settlement based upon one of these models, staff should identify any significant deviation from the relevant model and the basis for the departure. For DOJ staff, these models are available electronically on the Section's work product directory, EESINDEX, as N:\NET\SS52\UDD\EESINDEX\CERMODEL\PASTCOST.CD or PASTCOST.AOC.

We would like to thank all EPA and DOJ staff who assisted in the development of these models. If you have any questions about these models, please contact Janice Linett of the Regional Support Division at (703) 978-3057 or Tom Mariani of the Environmental Enforcement Section at (202) 514-4620.

Attachments

cc: Lawrence E. Starfield, Acting Associate General Counsel, Solid Waste and Emergency Response Division,
Stephen D. Luftig, Director, Office of Emergency and Remedial Response
Jack L. Shipley, Director, Financial Management Division
Letitia Grishaw, Chief, Environmental Defense Section

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

U.S. Department of Justice
Washington, D C 20530

SEP 2 2 1995

MEMORANDUM

SUBJECT: Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily

FROM: Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Lois J. Schiffer, Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

TO: Regional Administrators, Regions I - X, EPA
Regional Counsel, Regions I - X, EPA
Waste Management Division Directors, Region I - X, EPA
Chief, Environmental Enforcement Section, DOJ
Assistant Section Chiefs, Environmental Enforcement Section, DOJ

This memorandum sets forth the Environmental Protection Agency's ("EPA") and the Department of Justice's ("DOJ") policy regarding the government's enforcement of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against lenders and against government entities that acquire property involuntarily. As an enforcement policy, EPA and DOJ intend to apply as guidance the provisions of the "Lender Liability Rule" promulgated in 1992, thereby endorsing the interpretations and rationales announced in the Rule. *See* "Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18,344 (April 29, 1992).[1] (This rule has been vacated by a court, as described below in the "Background" section).

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[1] This guidance does not address lender liability under any statutory or regulatory authority, rule, regulation, policy, or guidance, other than CERCLA. Specifically, this guidance does not cover lender liability determinations as they relate to the Resource Conservation and Recovery Act ("RCRA") and RCRA's Underground Storage Tank program.



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**ADDRESSES** Additional copies of this policy statement can be obtained from the Superfund Docket, located at Room 2427 at the U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 (telephone number 202-260-3046) between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday, excluding Federal holidays. As provided in 40 C.F.R. Part 2, a reasonable fee may be charged for copying services. Paper copies of this document may also be ordered from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number PB95-234498. For telephone orders or further information on placing an order, call NTIS at 703-487-4650 for regular service or 800-553-NTIS for rush service. For orders via email/Internet send to the following address: orders@ntis.fedworld.gov.

**FOR FURTHER INFORMATION CONTACT:** Lisa E. Comer, Office of Site Remediation Enforcement (2273-G), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 (703-603-8900), or the RCRA/Superfund Hotline at 800-424-9346 (in the Washington, D.C. area at 703-412-9810).

I Background

This policy guidance establishes EPA's and DOJ's position regarding possible enforcement actions against lenders and government entities who are associated with property that may be subject to a CERCLA response action. EPA and DOJ recognize CERCLA's unintended effects on lenders and government entities and the relative concern from these parties regarding the consequences of potential enforcement. In light of these concerns, lenders may refuse to lend money to an owner or developer of a contaminated or potentially contaminated property or they may hesitate in exercising their rights as secured parties if such loans are made. Additionally, government entities that involuntarily acquire property may be reluctant to perform certain actions related to contaminated or potentially contaminated property.

The language of Section 101(20)(A) leaves lenders and other interested parties uncertain as to which types of actions -- such as monitoring vessel or facility operations, requiring compliance with applicable laws, and refinancing or undertaking loan workouts -- they may take to protect their security interests without risking EPA enforcement under CERCLA. Courts have not always agreed on when a lender's actions are "primarily to protect a security interest," and what degree of "participation in the management" of the property will forfeit the lender's eligibility for the exemption. This uncertainty was heightened by dicta in the

Fleet Factors[2] opinion, where the circuit court suggested that a lender participating in the management of a vessel or facility "to a degree indicating a capacity to influence the corporation's treatment of hazardous waste" could be considered liable under CERCLA.[3]

The lack of legislative history on and consistent court treatment of the CERCLA Section 101(20)(A) security interest exemption prompted EPA to address potential lender liability for cleanup costs at CERCLA sites in the Lender Liability Rule, which was promulgated in April 1992.

Regarding the exemption for government entities, neither the legislative history of CERCLA Sections 101(20)(D) and 101(35)(A) nor the case law provide sufficient explanation of when a property acquisition or transfer is considered involuntary. Thus, in the Rule, EPA also clarified the language of these sections, describing when a government entity was exempted from CERCLA enforcement as an owner or operator or was protected from third party actions.

However, in Kelley v. EPA,[4] the Circuit Court of Appeals for the District of Columbia vacated the Rul on the ground that EPA lacked authority to issue the Rule as a binding regulation. Nevertheless, the Kelley decision did not preclude EPA and DOJ from following the provisions of the Rule as enforcement policy, and the agencies have generally done so.

II. Policy Statement

This memorandum reaffirms EPA's and DOJ's intentions to follow the provisions of the Lender Liability Rule as enforcement policy. EPA and DOJ endorse the interpretations and rationales announced in the Rule and its preamble. The purpose of this memorandum is to provide guidance within EPA and DOJ on the exercise of enforcement discretion in determining whether particular lenders and government entities that acquire property involuntarily may be subject to CERCLA enforcement actions. In making such determinations, EPA and DOJ personnel should consult both the regulatory text of the Rule and the accompanying preamble language in exercising their

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[2] United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

[3] Fleet, 901 F.2d at 1557.

[4] 15 F.3d 1100 (D.C . Cir. 1994), *reh. denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, American Bankers Ass'n v. Kelly, 115 S.Ct. 900 (1995).

enforcement discretion under CERCLA as to lenders and government entities that acquire property involuntarily.[5]

After the promulgation of the Lender Liability Rule, but prior to its invalidation, several district and circuit courts adhered to the terms of the Rule or interpreted the statute in a manner consistent with the Rule.[6] Moreover, notwithstanding the Rule's invalidation in Kelley, since that decision several courts have also interpreted the statute in a way that is consistent with the Rule.[7] EPA and DOJ believe that this case law is further evidence of the reasonableness of the agencies' interpretation of the statute, as embodied formerly in the Rule and now in this policy statement.

III. Use of This Policy

The policies and procedures established in this document and any internal procedures adopted for its implementation are intended solely as guidance for employees of EPA and DOJ. They do not constitute rulemaking and may not be relied on to create a right or benefit, substantive or procedural, enforceable at law, or in equity, by any person. EPA and DOJ reserve the right to act at variance with this guidance or its internal implementing procedures.

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[5] *See* 57 Fed. Reg. 18,344 (April 29, 1992) (text and preamble).

[6] *See* Northeast Doran, Inc. v. Key Bank of Maine, 15 F.3rd 1 (1st Cir. 1994); United States v. McLamb, 5 F.3d 69 (4th Cir. 1993); Waterville Indus., Inc. v. Finance Authority of Maine, 984 F. 2d 549 (1st Cir. 1993); United States v. Fleet Factors, 901 F.2d 1150 (11th Cir. 1990), on remand, 821 F. Supp. 07 (S.D. Ga. 1993); Kelley v. Tiscornia, 810 F. Supp. 901 (W.D. Mich. 1993); Grantors to the Silresim Site Trust v. State Street Bank & Trust Co., 23 ELR 20428 (D. Mass. Nov. 24, 1992).

[7] *See* Z & Z Leasing, Inc. v. Graying Reel, Inc., 873 F.Supp. 51 (E.D. Mich. 1995); Kemp Industries, Inc. v. Safety Light Corp., 857 F.Supp. 373 (D.N.J. 1994).

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# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES DEPARTMENT OF JUSTICE MODEL CERCLA SECTION 107 CONSENT DECREE FOR RECOVERY OF PAST RESPONSE COSTS

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Department of Justice and the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Department or Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department or Agency may take action at variance with this model or its internal implementing procedures.

**MODEL CERCLA SECTION 107 CONSENT DECREE**
**FOR RECOVERY OF PAST RESPONSE COSTS**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [_____]
[_____] DIVISION[1]

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>[and<br>THE STATE OF _____]<br>Plaintiff[s],<br>v.<br>[DEFENDANTS]<br>Defendants. | Civil Action No. _____<br>Judge _____ |

**CONSENT DECREE**

**[NOTE: If the complaint includes causes of action which are not resolved by this consent decree, or names defendants who are not signatories to this consent decree, the title should be "Partial Consent Decree.]**

## I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred and to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the [insert Site Name] in [insert City, County, State] ("the Site").

[[__. The State of _____ (the "State") also filed a complaint against the defendants in this Court alleging that the defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [list State laws cited in the State's complaint]. The State in its complaint seeks [insert relief

[1] Follow local rules for caption format.

sought].]]

B. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].[2]

C. The United States and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Settling Defendants consent to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree is binding upon the United States [and the State], and upon Settling Defendants and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

## IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

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[2] In situations where the court has entered summary judgment as to liability, we normally should preserve that result in a subsequent settlement by deleting this Paragraph B and replacing it with one that describes the summary judgment decision.

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).[3]

[[__. "Owner Settling Defendants" shall mean [insert names].]][4]

h. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

i. "Parties" shall mean the United States[, the State of _____,] and the Settling Defendants.

---

[3] The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

[4] This definition is needed if the optional paragraph on Notice of Obligations to Successors-in-Title is used. See infra p. 14.

j. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has paid at or in connection with the Site through [insert date], plus accrued Interest on all such costs through such date.[5]

[[__. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the [Site or ___ Operable Unit at the Site] signed on [insert date] by the Regional Administrator, EPA Region __, or his/her delegatee, and all attachments thereto.]]

k. "Plaintiff[s]" shall mean the United States [and the State].

l. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

m. "Settling Defendants" shall mean [insert names of settling parties, or only if very numerous, "those parties identified in Appendix A."]

n. "Site" shall mean the _____ Superfund site, encompassing approximately ____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either "depicted more clearly on the map included in

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[5] If the past costs settlement is partial, it may be necessary to continue the definition with a brief description of the past response action(s) which are being paid for or compromised, such as: ". . . for the response action described in the Record of Decision for the First Operable Unit at the Site dated _____" or "for the removal action described in the action memorandum for the Site dated _____." Exercise care in describing the activities covered, as this description may affect the scope of the covenant not to sue and contribution protection. For clarity, the description of the past response action may need to indicate which response actions are not included within the definition of Past Response Costs. Check to be sure that the date used in the definition of Past Response Costs does not inadvertently include costs that are outside the scope of the definition. In some cases, it may be useful to attach a standard, Regionally-prepared cost summary listing the costs that are within the scope of the definition. This may be done: 1) to be sure that no confusion arises as to which costs are being compromised; or 2) to indicate which outstanding past cost claims are being resolved through the settlement, i.e., to indicate that the recovered costs are to be applied to particular portions of the debt.

Appendix B" or "designated by the following property description: _____."]

[__. "State" shall mean the State [or Commonwealth] of _____.]

[[__. "State Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, together with accrued interest, that the State of _____ has paid through [insert date] in response to the release or threatened release of hazardous substances at or in connection with the Site, but not including amounts reimbursed to the State by EPA.]]

o. "United States" shall mean the United States of America, including it departments, agencies and instrumentalities.

## V. REIMBURSEMENT OF RESPONSE COSTS

**[NOTE: If the amount to be paid is $10,000 or greater, payment should be made by electronic funds transfer using the following Paragraph 4.]**

4. Payment of Past Response Costs to the EPA Hazardous Substance Superfund. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund $_____ in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment.[6] Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number _____, the EPA Region and Site Spill ID Number _____ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], and DOJ Case Number _____. Payment shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the District of _____ following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00

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[6] As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, settling defendants may agree to place the amount agreed upon into an interest-bearing escrow account to be disbursed to EPA upon entry of the consent decree. If this method is used, accrued interest from the Past Response Costs date through the date the escrow account is created should be calculated and included in the escrow deposit.

p.m. Eastern Time shall be credited on the next business day. Settling Defendants shall send notice to EPA and DOJ that payment has been made in accordance with Section XI (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

**[NOTE: If the amount to be paid is less than $10,000, payment should be made by check using the following alternative Paragraph 4.]**

4. Payment of Past Response Costs to the EPA Hazardous Substance Superfund. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund $_____ in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment. Payment shall be made by certified check or checks or cashier's check or checks made payable to "U.S. Department of Justice," referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number _____ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], USAO File Number _____, and DOJ Case Number _____. Settling Defendants shall send the check[s] to:

[Insert address of Financial Litigation Unit of U.S. Attorney's Office for the District in which the Consent Decree will be entered]

Settling Defendants shall send notice that such payment has been made to EPA and DOJ in accordance with Section XI (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

**[NOTE: If payment is to be made to a State, insert the following optional paragraph.]**

[[__. Payment of Past Response Costs to the State. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the State $_____, in the form of a certified check or checks or cashier's check or checks, in reimbursement of State Past Response Costs. The check[s] shall be made payable to _____ and shall reference [insert name of case]. Settling Defendants shall send the check[s] to:

[Insert address provided by State]]

## VI. FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT DECREE

5. Interest on Late Payments. In the event that any payment[s] required by Section V (Reimbursement of Response Costs) or Section VI, Paragraph 6 (Stipulated Penalty), are not received when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

6. Stipulated Penalty.

a. If any amounts due to EPA [or to the State] under this Consent Decree are not paid by the required date, Settling Defendants shall pay to EPA [, or to the State if the delayed payment is for State Past Response Costs,] as a stipulated penalty, in addition to the Interest required by Paragraph 5, $_____ per violation per day that such payment is late.

[[__. If Settling Defendants do not comply with Section ___ (Site Access), Section ___ (Access to Information), or Section ___ [insert cross-reference to any other non-payment requirements for which a stipulated penalty applies], Settling Defendants shall pay to EPA, as a stipulated penalty, $_____ per violation per day of such noncompliance.]]

**[NOTE: Escalating payment schedules may be used in Paragraph 6(a) and in the optional paragraph immediately above concerning stipulated penalties for violations of non-payment requirements of the consent decree.]**

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA [or the State]. All payments to EPA under this Paragraph shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund" and shall be sent to:

[Insert Regional Lockbox number and address]

All payments shall indicate that the payment is for stipulated penalties and shall reference the name and address of the party making payment, the EPA Region and Site Spill ID Number _____ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], USAO File Number _____, and DOJ Case Number _____. Copies of check[s] paid pursuant to this Paragraph, and any accompanying transmittal letter[s], shall be sent to EPA and DOJ as provided in Section XI (Notices and Submissions) and to [insert title and address of Regional Financial Management Officer and any other receiving official at EPA].

**[NOTE: If applicable, insert State payment instructions for stipulated penalties for failure to pay State Past Response**

**Costs.]**

c. Penalties shall accrue as provided in this Paragraph regardless of whether EPA [or the State] has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

7. If the United States [or the State] brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States [and the State] for all costs of such action, including but not limited to costs of attorney time.

8. Payments made under Paragraphs 5-7 shall be in addition to any other remedies or sanctions available to Plaintiff[s] by virtue of Settling Defendants' failure to comply with the requirements of this Consent Decree.

9. The obligations of Settling Defendants to pay amounts owed the United States [and the State] under this Consent Decree are joint and several. In the event of the failure of any one or more Settling Defendants to make the payments required under this Consent Decree, the remaining Settling Defendants shall be responsible for such payments.

10. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree.

## VII. COVENANT NOT TO SUE BY PLAINTIFF[S]

11. Covenant Not to Sue by United States. Except as specifically provided in Paragraph 12 (Reservation of Rights by United States), the United States covenants not to sue Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Past Response Costs to the United States) and Section VI, Paragraphs 5 (Interest on Late Payments) and 6(a) (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

12. Reservation of Rights by United States. The covenant not to sue set forth in Paragraph 11 does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to:

a. liability for failure of Settling Defendants to meet a requirement of this Consent Decree;

b. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

c. criminal liability;

d. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 6906; and

e. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs.

**[NOTE: If the State is a co-plaintiff, insert separate paragraphs for the State's covenant not to sue settling defendants and reservation of rights.]**

## VIII. COVENANT NOT TO SUE BY SETTLING DEFENDANTS

13. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States [or the State], or its [their] contractors or employees, with respect to Past Response Costs [and State Response Costs] or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at the Site for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.[7]

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[7] The settlement should, wherever possible, release or resolve any claims by settling defendants against the United

(continued...)

14. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

## IX. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

15. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

16. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs.[8]

17. Each Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ [and the State] within 10 days of service or receipt of any Motion for Summary

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[7](...continued)
States related to the site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

[8] In exceptional situations, different coverage may apply.

Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

18. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff[s] set forth in Section VII.

## [__. SITE ACCESS][9]

[[__. Commencing upon the date of lodging of this Consent Decree, Settling Defendants agree to provide the United States [, the State,] and its [their] representatives, including EPA and its contractors, access at all reasonable times to the Site and to any other property owned or controlled by Settling Defendants to which access is determined by EPA [or the State] to be required for the implementation of this Consent Decree, or for the purpose of conducting any response activity related to the Site, including but not limited to:

a. Monitoring of investigation, removal, remedial or other activities at the Site;

b. Verifying any data or information submitted to the United States [or the State];

c. Conducting investigations relating to contamination at or near the Site;

d. Obtaining samples;

e. Assessing the need for, planning, or implementing

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[9] Include this section if 1) access to the site is needed and 2) the site owner is a settling defendant or other settling defendants control access to the site or to any other property to which access is needed. Renumber sections and paragraphs as necessary. If any of the settling defendants will need to provide institutional controls as part of any response action, include such a provision within this section and change the name of this section to Site Access/Institutional Controls.

response actions at or near the Site; [and]

f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section ___ (Access to Information).

**[NOTE: If institutional controls or any other provisions requiring monitoring are included in the decree, also include the following subparagraph g.]**

[g. Assessing Settling Defendants' compliance with this Consent Decree.]

__. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Resource Conservation and Recovery Act, 42 U.S.C. § 6927, and any other applicable statutes or regulations.

__. Notice of Obligations to Successors-in-Title.

a. Within 15 days after entry of this Consent Decree, [Owner Settling Defendants] shall record [insert either "a certified copy of this Consent Decree" or "a notice of the entry of this Consent Decree"] with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____.[10] Thereafter, each deed, title, or other instrument conveying an interest in the property included in the Site shall contain a notice stating that the property is subject to this Consent Decree [and any lien retained by the United States] and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

b. The obligations of each [Owner Settling Defendant] with respect to the provision of access under Section ___ (Site Access) [and the implementation of institutional controls under Paragraph ___] shall be binding upon any and all Settling Defendants and upon any and all persons who subsequently acquire any such interest or portion thereof (hereinafter "Successors-in-Title"). Within 15 days after the entry of this Consent Decree, each [Owner Settling Defendant] shall record at the

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[10] If an institutional controls provision is included in this section, this paragraph should be amended to require the owner settling defendants to record in the chain of title a restrictive covenant that specifies the institutional controls. The institutional controls to be implemented should be described in an appendix to this decree.

Recorder's Office [or Registry of Deeds or other appropriate office where land ownership and transfer records are maintainted for the property] a notice of obligation to provide access under Section ___ (Site Access) and related covenants, if any. Each subsequent instrument conveying an interest to any such property included in the Site shall reference the recorded location of such notice and covenants applicable to the property.

c. Any [Owner Settling Defendant] and any Successor-in-Title shall, at least 30 days prior to the conveyance of any such interest, give written notice of this Consent Decree to the grantee and written notice to EPA [and the State] of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree was given to the grantee. In the event of any such conveyance, the Settling Defendants' obligations under this Consent Decree, including their obligation to provide or secure access pursuant to Section ___ (Site Access), shall continue to be met by Settling Defendants. In no event shall the conveyance of an interest in property that includes, or is a portion of, the Site release or otherwise affect the liability of Settling Defendants to comply with this Consent Decree.]]

[__. **ACCESS TO INFORMATION**[11] ]

[[__. Settling Defendants shall provide to EPA [and the State], upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site [or to the implementation of this Consent Decree], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

__. Confidential Business Information and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff[s] under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Documents or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R.

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[11] Include this section only if settling defendants have been or will be involved in cleanup efforts at the site or if they may possess information which may assist the Agency in its cleanup or enforcement efforts.

Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

b. Settling Defendants may assert that certain documents, records or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege in lieu of providing documents, they shall provide Plaintiff[s] with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports or other information created or generated pursuant to the requirements of this or any other consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff[s] in redacted form to mask the privileged information only. Settling Defendants shall retain all records and documents that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor.

__. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]]

## X. RETENTION OF RECORDS[12]

19. Until __ years after the entry of this Consent Decree, each Settling Defendant shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

20. After the conclusion of the document retention period

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[12] Renumber this section and all following section headings and paragraph numbers if either of the optional sections on Site Access or Access to Information is included.

in the preceding paragraph, Settling Defendants shall notify EPA and DOJ [and the State] at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or DOJ [or the State], Settling Defendants shall deliver any such records or documents to EPA [or the State]. Settling Defendants may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they shall provide Plaintiff[s] with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff[s] in redacted form to mask the privileged information only. Settling Defendants shall retain all records and documents that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor.

21. By signing this Consent Decree, each Settling Defendant certifies individually that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against the Settling Defendant regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) [insert, if applicable, ", and Section 3007 of RCRA, 42 U.S.C. § 6927"].

## XI. NOTICES AND SUBMISSIONS

22. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, [the State,] and Settling Defendants, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # _____)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:

[Insert names and addresses of EPA Regional contacts, usually the ORC attorney and the RPM or Project Coordinator]

[As to the State:

Insert name and address of State contact if the State is a party to the Consent Decree]

As to Settling Defendants:

[Insert name of one person who will serve as the contact for all Settling Defendants]

## XII. RETENTION OF JURISDICTION

23. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

## XIII. INTEGRATION[/APPENDICES]

24. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the

settlement other than those expressly contained in this Consent Decree. [The following appendices are attached to and incorporated into this Consent Decree: "Appendix A" is the complete list of Settling Defendants; and "Appendix B" is the map of the Site.]

## XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

25. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

26. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

## XV. EFFECTIVE DATE

27. The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

## XVI. SIGNATORIES/SERVICE

28. Each undersigned representative of a Settling Defendant to this Consent Decree and the [Assistant Attorney General for the Environment and Natural Resources Division][13] of the United States Department of Justice [insert State official] certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

29. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

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[13] Substitute Chief, Environmental Enforcement Section, where the case involves less than $1 million and at least $500,000 is being recovered by settlement. Note also that Associate Attorney General approval is required if the difference between the total amount of the claim and the amount of the settlement exceeds $2 million or 15% of claim (whichever is greater). See 28 CFR 0.160.

30. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

SO ORDERED THIS _____ DAY OF _____, 19__.

_____
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

_____
[Name]
Assistant Attorney General[14]
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

_____
[NAME]
United States Attorney
[Address]

_____
[NAME]
Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

---

[14] See supra n. 13.

[Name][15]
Assistant Administrator for
Enforcement and Compliance
Assurance
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

[Name]
Regional Administrator, Region [ ]
U.S. Environmental Protection
Agency
[Address]

[Name]
Assistant Regional Counsel
U.S. Environmental Protection
Agency
[Address]

[15] Include AA-OECA signature block only if he or she has a concurrence role under Delegation No. 14-13-B.

[[THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE STATE OF [ ]

Date: _____

_____
[Names and addresses of State signatories]]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR DEFENDANT [ ]

Date: _____

_____
[Names and address of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: _____

Title: _____

Address: _____

CAA
B24b

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**MODEL CERCLA SECTION 122(h)(1) AGREEMENT**
**FOR RECOVERY OF PAST RESPONSE COSTS**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

**MODEL CERCLA SECTION 122(h)(1) AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS**

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**MODEL CERCLA SECTION 122(h)(1) AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS**

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| IN THE MATTER OF: | ) | AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS |
| [Site Name]<br>[City, County, State] | ) | U.S. EPA Region ____<br>CERCLA Docket No. ____ |
| [Names of Settling Parties]<br>SETTLING PARTIES | ) | PROCEEDING UNDER SECTION 122(h)(1) OF CERCLA 42 U.S.C. § 9622(h)(1) |

## I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 6922(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D. **[NOTE: Also reference any internal Regional redelegations of authority under 14-14-D.]**

2. This Agreement is made and entered into by EPA and the [insert names or reference attached appendix listing settling parties] ("Settling Parties"). Each Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms.

## II. BACKGROUND

3. This Agreement concerns the [insert Site name] ("Site") located in [insert Site location]. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. **[NOTE: A brief description of the release or threatened release and of the response actions undertaken may be included.]**

5. In performing this response action, EPA incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred at or in connection with the Site.

**[NOTE: If Attorney General approval is not required for this settlement because total past and projected response costs of the United States at the site are not expected to exceed $500,000, excluding interest, insert the following paragraph and renumber all subsequent paragraphs.]**

[__. The Regional Administrator of EPA Region ____, or his/her delegatee, has determined that the total past and projected response costs of the United States at or in connection with the Site will not exceed $500,000, excluding interest.]

7. EPA and Settling Parties desire to resolve Settling Parties' alleged civil liability for Past Response Costs without litigation and without the admission or adjudication of any issue of fact or law.

## III. PARTIES BOUND

8. This Agreement shall be binding upon EPA and upon Settling Parties and their [heirs], successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

## IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).[1]

f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and the Settling Parties.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through [insert date], plus accrued Interest on all such costs through such date.[2]

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[1] The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

[2] If the past costs settlement is partial, it may be necessary to continue the definition with a brief description of the past response action(s) which are being paid for or compromised, such as: ". . . for the response action described in the Record of Decision for the First Operable Unit at the Site dated _____" or "for the removal action described in the action memorandum for the Site dated _____." Exercise care in describing the activities covered, as this description may affect the scope of the covenant not to sue and contribution protection. For clarity, the description of the past response action may need to indicate which response actions are not included within the definition of Past Response Costs. Check to be sure that the date used in the definition of Past Response Costs does not inadvertently include costs that are outside the scope of the definition. In some cases, it may be useful to attach a standard, Regionally-prepared cost summary listing the costs that are within the scope of the definition. This may be done: 1) to be sure that no confusion arises as to which costs are being compromised; or 2) to indicate which outstanding past cost claims are being resolved through the settlement, i.e., to indicate that the recovered costs are to be applied to particular portions of the debt.

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "Settling Parties" shall mean [insert names of settling parties, or if very numerous, "those parties identified in Appendix __."]

k. "Site" shall mean the _____ Superfund site, encompassing approximately ____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either "depicted more clearly on the map included in Appendix __" or "designated by the following property description: _____."]

l. "United States" shall mean the United States of America, including it departments, agencies and instrumentalities.

## V. REIMBURSEMENT OF RESPONSE COSTS

10. Within 30 days of the effective date of this Agreement, the Settling Parties shall pay to the EPA Hazardous Substance Superfund $_____ in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment.[3]

11. Payments shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check shall reference the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number _____ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

12. At the time of payment, each Settling Party shall send notice that such payment has been made to:

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[3] As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, settling parties may agree to place the amount agreed upon into an interest-bearing escrow account to be disbursed to EPA upon the effective date of the Agreement. If this method is used, accrued interest from the Past Response Costs date through the date the escrow account is created should be calculated and included in the escrow deposit.

[Insert name and address of Regional Attorney and/or Remedial Project Manager]

## VI. FAILURE TO COMPLY WITH AGREEMENT

13. In the event that any payment required by Paragraph 10 is not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. If any amounts due to EPA under Paragraph 10 are not paid by the required date, Settling Parties shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 13, $____ per violation per day that such payment is late.

**[[[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, "If Settling Parties do not comply with [reference sections containing non-payment obligations], Settling Parties shall pay to EPA, as a stipulated penalty, $____ per violation per day of such noncompliance." Escalating penalty payment schedules may be used for payment or non-payment obligations.]]**

15. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall made in accordance with Paragraphs 11 and 12.

16. Penalties shall accrue as provided above regardless of whether EPA has notified the Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after performance is due, or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

17. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

18. The obligations of Settling Parties to pay amounts owed

to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

19. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement.

## VII. COVENANT NOT TO SUE BY EPA

20. Except as specifically provided in Paragraph 21 (Reservations of Rights by EPA), EPA covenants not to sue Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Reimbursement of Response Costs) and Section VI, Paragraphs 13 (Interest on Late Payments) and 14 (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

## VIII. RESERVATIONS OF RIGHTS BY EPA

21. The covenant not to sue by EPA set forth in Paragraph 20 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all other matters, including but not limited to:

a. liability for failure of Settling Parties to meet a requirement of this Agreement;

b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

22. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial,

civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

## IX. COVENANT NOT TO SUE BY SETTLING PARTIES

23. Settling Parties agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.[4]

24. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

## X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA and Settling Parties each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site

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[4] The settlement should, wherever possible, release or resolve any claims by settling parties against the United States related to the site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

against any person not a Party hereto.

26. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

27. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

28. Each Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

29. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Paragraph 20.

## XI. RETENTION OF RECORDS

30. Until __ years after the effective date of this Agreement, each Settling Party shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the

contrary.

31. After the conclusion of the document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Settling Parties shall deliver any such records or documents to EPA. Settling Parties may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records and documents that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor.

32. By signing this Agreement, each Settling Party certifies individually that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against the Settling Party regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) [insert, if applicable, ", and Section 3007 of the Resource, Conservation and

Recovery Act, 42 U.S.C. § 6927."]

## XII. NOTICES AND SUBMISSIONS

33. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

[Insert names and addresses of EPA Regional contacts, usually the ORC attorney and the RPM or Project Coordinator]

As to Settling Parties:

[Insert name of one person who will serve as the contact for all Settling Parties]

## XIII. INTEGRATION[/APPENDICES]

34. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. [The following appendices are attached to and incorporated into this Agreement: "Appendix A is _____; etc."]

## XIV. PUBLIC COMMENT

35. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

## __. ATTORNEY GENERAL APPROVAL

**[NOTE: This section should be used if Attorney General approval is required for this settlement because total past and projected response costs at the site will exceed $500,000, excluding interest, and the agreement compromises a claim (i.e., recovers**

**less than 100% of past costs, including accrued interest). If Attorney General approval is required, the Region should consult with DOJ during the negotiations process and should obtain written DOJ approval of the settlement before publishing notice of the proposed agreement in the Federal Register pursuant to Section 122(i) of CERCLA. The Region should discuss with DOJ any significant comments received during the public comment period. If the Region believes that the agreement should be modified based upon public comment, the Region should discuss with the DOJ attorney assigned to the case whether the proposed change will require formal re-approval by DOJ. If this section is used, renumber the Effective Date section and paragraph.]**

[[__. The Attorney General or [his/her] designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).]]

## XV. EFFECTIVE DATE

36. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 35 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: _____ _____
[Name] [Date]
Regional Administrator, Region __

**[NOTE: If the Regional Adminstrator has redelegated authority to enter into Section 122(h) settlements, insert name and title of delegated official.]**

THE UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of [insert U.S. EPA docket number], relating to the [insert site name and location]:

FOR SETTLING PARTY: _____
[Name]

_____
[Address]

By: _____ _____
[Name] [Date]

ENERGY

**SECTION B DOCUMENT 25**

**Memorandum of Understanding Between the U.S. EPA and the U.S. Department of ~~Justice~~ concerning the Clean Air Act Emission Standards for Radionuclides, 40 CFR Part 61 Including Subparts H, I, Q & T**

04/05/95

# MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE U.S. DEPARTMENT OF ENERGY

concerning

# THE CLEAN AIR ACT EMISSION STANDARDS FOR RADIONUCLIDES 40 CFR PART 61 INCLUDING SUBPARTS H, I, Q & T

The U. S. Environmental Protection Agency (EPA) and the U.S. Department of Energy (DOE) are engaged in a mutual effort to clarify provisions of 40 CFR Part 61, Subpart H, I, Q, and T, National Emission Standards for Hazardous Air Pollutants (NESHAP) promulgated under the Clean Air Act (CAA) for radionuclide emissions from DOE facilities. This effort has been undertaken to assure uniform and consistent interpretation of the NESHAP provisions for radionuclides at DOE facilities and EPA regional offices. DOE and EPA have reached an accord on certain issues and have signed this Memorandum of Understanding (MOU). The terms and language of this MOU are in accordance with the applicable definitions found in the CAA and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the implementing regulations. The MOU is not intended to supersede or replace applicable statutes, regulations, compliance agreements or orders reached between DOE field offices and EPA regional offices. Nothing in this MOU is intended to restrict EPA's authority under applicable statute or regulation to take an enforcement action where appropriate.

1. Monitoring Requirements:

1a. **DOE facilities with emission points that are subject to the continuous monitoring requirements of 40 CFR Section 61.93(b), but are not in compliance with these requirements, should reach agreement as soon as possible with the relevant EPA regional office on actions necessary to attain compliance.**

The emission monitoring requirements set forth in Subpart H at 40 CFR Section 61.93(b) include the use of reference methods for continuous monitoring at major release points (those with the potential for emissions that exceed 1% of the standard, assuming normal operations but with no effluent controls in place); the establishment of a periodic confirmatory measurement program for all other release points, in accordance with Section 61.93(b)(4); and the implementation of a Quality Assurance (QA) program where appropriate that meets the requirements described in 40 CFR Part 61, Appendix B, Method 114. The continuous monitoring requirements present technical and procedural difficulties which in many instances will require significant effort and resources to resolve. Where DOE facilities are not in compliance with the continuous monitoring requirements, the DOE facility and the cognizant EPA regional office shall determine the most efficient DOE actions needed to bring the facilities into compliance including consideration of alternate monitoring methods under Section 61.93(b)(3). Commitments by DOE should include a plan and schedule that will result in compliance with the emission monitoring requirements including those for continuous monitoring, periodic confirmatory measurements, and QA program.

1b. **Engineering calculations and/or representative measurements may be used to comply with periodic confirmatory measurement requirements.**

The protocol for periodic confirmatory measurements which is required by 40 CFR Section 61.93(b)(4) is not specified in the regulations. EPA and DOE recognize that some DOE facilities have large numbers of minor release points that have similar emissions and controls. Therefore, confirmatory measurements of these types of releases would result in a large number of redundant measurements. Development of periodic confirmatory measurement programs is the responsibility of the facility. For each category of release points that the facility classifies as minor because uncontrolled emissions will not exceed 1% of the standard, periodic confirmatory measurements should be designed to confirm that individual release points remain properly categorized. The facility owner or operator should use best professional judgement, knowledge of the

radionuclides and quantities being used in plant operations, and the potential for their release to determine when representative measurements should be made and/or engineering calculations should be utilized. A protocol for periodic confirmatory measurements for each DOE facility must be provided by DOE to the appropriate EPA regional office.

1c. **DOE facilities may implement continuous monitoring procedures that differ from the reference methods of Section 61.93(b) with prior EPA approval.**

Section 61.93 provides for the use of alternate effluent flow rate measurement procedures or site selection and sample extraction procedures if all the criteria specified in Section 61.93(b)(3)(i) through (iv) are met. The criteria for establishing "impractical" pursuant to Section 61.93 (b)(3)(i) are site-specific and include engineering, economic, health and safety considerations. Prior EPA approval must be granted for each emission point for which alternate monitoring procedures are to be used.

1d. **Environmental measurements of radionuclide air concentrations at critical receptor locations may be used as an alternate to air dispersion calculations in demonstrating compliance with the standard, if the criteria of Section 61.93(b)(5) are met.**

Prior EPA approval must be granted for use of environmental monitoring as a substitute for air dispersion calculations when all the requirements of Section 61.93(b)(5) are met. This approach to demonstrating compliance is particularly appropriate where air dispersion modeling is overly conservative, and for facilities with minor emission points (of the periodic confirmatory type) and/or diffuse sources as primary contributors to the dose. The location of the air samplers should be selected to give an accurate representation of the dose received by a critical receptor and should be based on modeling results.

2. <u>Approval to Construct or Modify:</u>

2a. **Facilities meeting the requirements of 40 CFR Part 61, Section 61.96(b) are exempt from filing an application for approval to construct or modify.**

A facility is eligible for exemption from submitting an application for any new construction or modification within the existing facility if the effective dose equivalent to be caused by all emissions from the completed construction or modification is less that 1% of the standard prescribed in Section 61.92 and the facility was shown to be in compliance with all provisions of the subpart in the last annual report. As stated in Section 61.96(b), the effective dose equivalent shall be calculated with the source term derived using

Appendix D or other EPA approved procedures as input to the air dispersion and other computer models. DOE facilities not subject to the continuous monitoring requirements of section 61.93(b) are eligible for this exemption once a program which meets the periodic confirmatory measurement requirement is implemented.

3. <u>High Level Waste and Transuranic Waste Disposal and Monitored Retrievable Storage</u>:

3a. **EPA has determined that no NESHAP is needed for disposal activities at the High Level Waste Repository and the Waste Isolation Pilot Plant. DOE agrees, however, to implement the requirements of 40 CFR Part 61 as they apply to any test phase activity at either facility.**

EPA's analysis under source category F, High-Level Nuclear Waste Disposal Facilities, included the proposed High-Level Waste Repository and the Waste Isolation Pilot Plant (WIPP) transuranic waste disposal site. EPA's finding, "since, expected emissions are so low, no NESHAP is needed" (54 FR 51672) applies to the operations and disposal activities at both facilities. Operations are included to the extent they are limited to activities analyzed by EPA and described in the Background Information Document (EPA 520/1-89-006-1). 40 CFR Part 61 would apply, however, during any test phase of activities at either facility. Notwithstanding this finding, the policy of the Department of Energy will be to implement the requirements of Subpart I for the High-Level Waste Repository and Subpart H for WIPP until such time as the facilities have completed closure.

3b. **The Monitored Retrievable Storage (MRS) facility will be licensed and regulated by the Nuclear Regulatory Commission and therefore subject to the provisions of Subpart I of 40 CFR Part 61.**

DOE and EPA agree that operations at the MRS facility are subject to Subpart I of 40 CFR Part 61.

4. <u>Subpart Q Compliance</u>:

4a. **Subpart Q applies to radon-222 emitting sources at DOE storage and disposal facilities. Compliance of sources at DOE storage and disposal facilities with the 20 pCi/m$^2$-s emission standard of Section 61.192 will be addressed as part of any FFA reached between the relevant EPA regional office and DOE. For sources subject to the standard of Section 61.192, DOE will demonstrate compliance through direct measurement of radon-222 flux in accordance with Appendix B, Method 115, or use alternative procedures (based on best available data) that do**

not underestimate emissions.

Where flux measurements demonstrate compliance with the 20 $pCi/m^2$-s standard, no further measurements are required so long as the storage or disposal site remains in the condition for which compliance was demonstrated. If flux measurements indicate that a DOE storage and disposal facility is out of compliance and there is no FFA in place, the DOE facility and the relevant EPA regional office shall determine the appropriate actions necessary to return to compliance. If the site condition is significantly altered by adverse weather conditions, a natural catastrophe or other reason, the DOE facility will coordinate with the relevant EPA regional office to determine the appropriate actions necessary. DOE will monitor the storage and disposal sites in accordance with the requirements of DOE 5400.5 and the DOE Environmental Regulatory Guide (DOE/EH-0173T) and will report results in its annual site environmental reports.

5. Miscellaneous Sources:

5a. **Emissions of radionuclides to the ambient air from DOE facilities include point and diffuse source releases. Subpart H provides procedures for evaluating only emissions from point sources. DOE and EPA agree to the collection, analysis and review of emissions data from diffuse sources.**

EPA and DOE agree that the dose standard of 40 CFR Part 61, Subpart H applies to emissions from diffuse sources such as evaporation ponds, breathing of buildings and contaminated soils. EPA has provided DOE with a report on candidate methodologies for evaluating diffuse source emissions. EPA and DOE will continue to review methodologies to arrive at mutual guidance on procedures for evaluating these emissions. DOE will collect data on diffuse sources and provide this information to EPA. Data from environmental measurements and other appropriate methods may be used to evaluate diffuse emissions and to verify compliance with the Subpart H standard. DOE will provide its methodology for assessing diffuse sources to the appropriate EPA regional office. Data on diffuse sources and the results of analyses will be reported as part of DOE's Annual Air Emissions Report to EPA.

5b. **Current NESHAPs for radionuclide air emissions do not address radon-220 emissions. EPA and DOE agree to collect data and review the potential for exposure from these emissions.**

Current radionuclide emission standards do not address radon-220, which is exempt from Subpart H and not included in Subparts Q or T. DOE agrees to collect data at selected DOE sites and to provide the current or previously collected data to EPA for further analysis.

6. Reporting Requirements - Subpart H:

6a. **EPA and DOE agree that Appendixes D and E of 40 CFR Part 61 are acceptable "other procedures" relative to Section 61.93(a) of Subpart H.**

In fulfilling the requirements of Subpart H, DOE may use Appendixes D and E of 40 CFR Part 61.

6b. **EPA and DOE agree that DOE's annual report will contain a list of all stacks, vents or other points where radioactive materials are released to the atmosphere.**

While some release points may be considered minor because the potential discharge (assuming no effluent controls in place) of radionuclides into the air does not cause an effective dose equivalent in excess of 0.1 mrem/y, Section 61.94(b) requires that these release points be listed in the annual report. EPA and DOE recognize that many DOE facilities have large numbers of minor release points which have similar emissions and controls, and are similarly located. These sources may be grouped for reporting purposes unless there is a technical reason that would cause such grouping to be inappropriate. The number of emission points within the group should be indicated. Additional information, such as stack identification numbers, types and quantities of radionuclides emitted will be available to EPA inspectors.

7. MOU Status:

7a. **Effective date, Revision and Termination of MOU. - This MOU will be effective immediately and will continue in effect until revised or amended by mutual written consent of DOE and EPA. This MOU may be terminated by either party upon 120 days written notice.**

7b. **Public Information Coordination. - Decisions on disclosure of information to the public regarding projects and programs implemented under the MOU will be made consistent with the Freedom of Information Act (FOIA), 5 U.S.C. 552.**

Dated 9/29/94

Environmental Protection Agency
Mary D. Nichols
for Assistant Administrator
for Air and Radiation

Dated 4/5/95

Department of Energy
for Tara J. O'Toole
Assistant Secretary
for Environment, Safety and Health

SECTION B DOCUMENT 26

**Clarification Package: Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators (SVT&A Guidance) NOTE: Includes earlier clarification memo dated 6/14/94**

04/17/95 06/14/94

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

CAA
B26

APR 17 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Clarification Package: Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators (SVT&A Guidance)

FROM: Michael M. Stahl
Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance (2211)

TO: Karen V. Brown
Asbestos and Small Business Ombudsman
Office of Small and Disadvantaged
Business Utilization (1230C)

In my memorandum of September 21, 1994, I said that we would respond to your concerns relative to the subject memorandum dated June 14, 1994 (1994 Clarification) and the small business community. Your major concern was that the new guidance memorandum added non-major National Emission Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) sources as significant violators (SV) and that this "redefinition of SV" would adversely impact small businesses especially in light of new initiatives by our office to assist small sources in achieving compliance.

We have reviewed both the subject memorandum and the February 7, 1992 guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators (1992 Guidance) in light of our office's initiative to help small sources achieve compliance through compliance assistance and other means. The latter of these documents (our August 12, 1994 Enforcement Response Policy for Treatment of Information Obtained Through Clean Air Act Section 507 Small Business Assistance Programs) was being negotiated when you initially raised your concerns.

The SV guidance is intended to enable EPA and the States to focus enforcement efforts on the highest priority of noncomplying sources and to work together in resolving violations in a timely manner. One of the purposes of the 1994 Clarification was to include <u>all</u> NESHAP and NSPS sources as SVs as was done prior to 1992. It was our intent to include these sources in the 1992 Guidance by referencing the expanded definition of a major source under the 1990 CAA Amendments, but this definition fails to include all of the Part 61 NESHAP or the minor NSPS sources.

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EPA does not currently plan on revising the SVT&A guidance and considers the 1992 Guidance to be the controlling document in cases of conflict with the 1994 Clarification. We agree, therefore, that minor sources (including Title III air toxics area sources) should not be classified as significant violators at this time. While we do not plan on revising the SVT&A, it is still our intent to track violators which pose the most significant risk to human health and the environment. For this reason, we encourage the Regions and States to track Part 61 NESHAP violators as they deem appropriate. As stated in the 1992 Guidance, "this guidance is not intended to detract from the importance of addressing other violators and the right and responsibilities of the States and EPA for doing so."

While the 1992 Guidance policy does not require inclusion of all NESHAP sources as well as minor NSPS sources in attainment areas as SVs, many of the formerly minor NSPS sources in nonattainment areas may now be classified as major sources. This is due to the 1990 CAA Amendments, which set more stringent annual emission limits for the serious, severe or extreme nonattainment areas. Some of the sources within the small business community may be classified as major sources under the post-1990 CAA due to the new emission limits. However, Section 507(c) includes the eligibility requirement that the program applies only to those small businesses classified as non-major for all air programs. Therefore, by definition, the small businesses participating in the SBAP should not be classified as significant violators.

According to the final §507 policy, States may offer a correction period option to small businesses in the SBAP that allows up to 90 days to either correct or take substantial steps to correct violations discovered during compliance assistance. They also may be granted an additional 90 days for violations that cannot be corrected within the initial 90 days of detection. Since only small businesses that are non-major for all air programs are eligible to participate in the §507 program and EPA does not include Title III area sources as SVs, we do not believe that the SBAP sources will be entered into the Timely & Appropriate tracking of SVs. But were this somehow to occur and a source was given the 90 days to correct their violations, the Timely and Appropriate (T&A) timeclock would not begin unless the correction period (and extension if applicable) were exceeded. If this happens, the T&A timeclock would begin (Day Zero) 30-90 days (according to the SVT&A guidance) after the correction period and subsequent discovery of the violation. (We expect that a separate tracking system may be used for SBAP participants in order to determine the effectiveness of the compliance assistance program, i.e., whether the sources return to

compliance as a result of receiving compliance assistance. This is particularly important when sources are offered a correction period as part of compliance assistance. EPA is developing a tracking mechanism for the States to use in overseeing those sources offered compliance assistance.)

I trust that this clarifies your concerns. Please contact me or Linda Lay of my staff if you have any further questions.

cc: Steve Herman
Scott Fulton
Robert Van Heuvelen (2241)
Elaine Stanley (2221)
Kathie Stein (2242)
John Rasnic (2223)
Air Division Directors, Regions I-X
Regional Counsels, Regions I-X

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

JUN 14 1994

MEMORANDUM

SUBJECT: Clarification Package for the Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators (SV/T&A Guidance)

FROM: John B. Rasnic, Director
Manufacturing, Energy and Transportation Division
Office of Compliance

TO: Air, Pesticides and Toxics Management Division Directors
Regions I and IV

Air and Waste Management Division Director
Region II

Air Radiation and Toxics Division Director
Region III

Air and Radiation Division Director
Region V

Air, Pesticides and Toxics Division Director
Region VI

Air and Toxics Division Directors
Regions VII, VIII, IX and X

This memorandum introduces the clarification package for the Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators. The clarification package was developed by my staff who worked with the Air Compliance Section Chiefs and the AIRS Facility Subsystem (AFS) managers to reach consensus on reporting and defining aspects of the guidance that have been unclear or interpreted differently between Regions. The goal of the package is to encourage uniform implementation of the guidance and to make the data generated by the guidance consistent, hence, more representative and useful. An equally important benefit is that the package should prove to be a useful tool for instructing new staff on the logistics of the guidance.

If you would like to discuss this I can be reached at (703) 308-8600 or Seth Heminway can be reached at (703) 308-8716.

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# SV/T&A GUIDANCE CLARIFICATION PACKAGE

Prepared by Seth Heminway,
Stationary Source Compliance Division

JUN 14 1994

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Responsibilities for States, Regions and Headquarters p. 13

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Entering SV's into AFS and NARS
(under development by AFS Managers)

**Attachments:**

I Abbreviated Quarterly Reporting Form

II Annual State-By-State Reporting Form page 1

III Annual State-By-State Reporting Form pages 2+

# SV/T&A Guidance Clarification Outline

This outline will be most useful when it is read in conjunction with the SV/T&A Guidance. It is designed to encourage more consistent reporting and implementation of the Guidance by clarifying language that has been interpreted differently in various States and Regions.

Guidance Cover letter

I. Scope and Summary Of Guidance

A. Applicability

B. Summary of Guidance

C. General Information About the Guidance

II. Philosophy of Guidance

A. Definition of SV

**Under Title VI only violations at sources subject to Sections 604 and 606 (producers and importers of stratospheric ozone depleting compounds) could meet the definition of SV. The majority of violations that occur under Sections 608 and 609 at CFC sources would not meet the definition of Significant Violator since they are not major sources.**

**The definition should be interpreted to include violations at all NESHAP and NSPS sources.**

**All violators that meet the definition of significant violator shall be considered SV's, as defined by the February 7, 1992 SV/T&A Guidance, the October 27, 1993 Asbestos NESHAP Addendum to the SV/T&A Guidance and the Acid Rain Addendum to the SV/T&A Guidance when it is final.**

III. Processing of SV's

A. Agency Communications Concerning SV's

B. Processing of SV's

**6. The significant violator shall remain an SV (tracked in AFS/NARS) until all violations against it have been resolved.**

C. EPA Maintaining Enforcement Authority

IV. T&A Time Lines For Enforcement Actions

**Violations discovered in records received from a source shall be assigned a day zero no later than 30 days after the records were received by the enforcing agency.**

**A separate day zero can be created for any additional violations at a source that has unresolved violations. However, violations that were discovered during the same investigation, e.g., a series of inspections, a section 114 response, a record review or a quarterly report, that occurred within 30 days of each other, should be grouped under the same day zero, especially if the clustered violations will be addressed in the same enforcement action. When more than one air program or pollutant is listed under one day zero only the most serious air program and emission violation should be counted for purposes of Headquarters reporting.**

A. Day zero

"The clock starts (i.e., day zero) **no later than** 30 days after the discovering agency first receives information concerning a federally reportable violation..." (This has been highlighted in order to prevent timely and appropriate calculations from being negative, which happens when violations are addressed before a day zero has been assigned. The day zero is not revised once a violation has been confirmed.)

B. Day 45

C. Day 90

D. EPA Lead

E. Day 150 (no lead change), or Day 190 (lead change)

"By Day 150 (or 190 with lead change), the source shall either be ~~in compliance~~ **(RESOLVED)** or ADDRESSED, i.e., on a legally enforceable...." (This interpretation has been highlighted to ensure that violations are resolved with enforcement actions to maintain deterrence against future violations.)

F. Resolved v. Addressed

**Normally a violation is addressed first and then resolved.**

V. Penalties

VI. Consultation and Data Transfer

A. Informal Consultation

B. Update EPA's Compliance Database

**The SV flag (SVI1 field in AFS) must be accurately maintained in order to ensure that this data, which is shared by other enforcement offices within EPA and the States, correctly reflects the SV status for all sources subject to the SV/T&A Guidance.** (This field is becoming increasingly more important as the agency shifts further toward multimedia, geographic and industry specific enforcement. As stated in the SV/T&A Guidance AFS/NARS is to be updated monthly (SV/T&A p 10). Headquarters will pull SV information quarterly from AFS.)

**Summary data that is incorporated in the quarterly report to the Office of Enforcement and Compliance Assurance shall be used as the archived summary data for trends analysis.** (This approach will put renewed emphasis on getting the numbers right the first time. It will prevent last minute changes that, admittedly, may reflect the most accurate number but that often cause confusion later since not all parties who received the data have accounted for the last minute changes. If errors are made either in the reporting of data or in the classification of an SV then corrections to AFS would be captured in the following quarter's report.)

C. Provide Inspection Results

D. Sharing of Data

## SIGNIFICANT VIOLATOR ACCOUNTING GUIDELINES

Note: There are two major aspects of SV accounting that need to be recognized. One is the SVI1 flag in AIRS Facility Subsystem (AFS) that indicates whether or not a source is a significant violator and it is critical for multimedia enforcement targeting. The second is the T&A accounting of how long the lead agency took to address the violation(s), which is based on the day zero.

1. **Adding SV's to AFS**: Finding agency detects violation and enters it into AFS/NARS (or reports manually if not yet direct or upload user of AFS). EPA and State discuss / examine violation(s) and if it is a significant violation(s) EPA enters the compliance status and the SV flag in AFS indicating that the source is a significant violator. From this time until resolution the SVI1 flag is modified monthly to reflect the source's SV status. For multiple violations the SV flag shall reflect the worst compliance status. The SV is reported as "added" in the quarter the source is added to AFS. Violation(s) involving multiple pollutants or multiple air programs should not be counted more than once. Violations discovered during a single investigation should be counted for purposes of headquarters T&A reporting as one significant violator under a single day zero.

2. **SV's discovered by EPA after the end of the quarter**: When a significant violator is reported to EPA by a State or local agency after the end of the quarter in which it was discovered, it shall be reported to Headquarters as if it had occurred during the quarter that it was reported to the EPA Regional Office. Although this may distort the exact date that violations, addressing, resolution occurred, it will simplify reporting while continuing to provide Headquarters with an indication of the level of SV activity. The goal is to maintain a stable count for each quarter while allowing SV's that are discovered after the quarter ended to be added.

3. **Addressed**: The Significant Violator is maintained on HQ reports as unaddressed until the violations against it are addressed. Once an SV has been addressed it remains on the HQ SV Summary report only until the end of the fiscal year. At the beginning of the fiscal year only unaddressed SV's from the previous FY will appear on the HQ summary SV report. The Region continues to track addressed SV's until they are resolved and reports them to headquarters as such in AFS/NARS.

4. **Unaddressed**: Unaddressed SV's are reported on the SV summary report and are brought forward from the previous quarter to the next. Similarly, the unaddressed SV's are brought forward from one fiscal year to the next.

5. **Deletions from SV list**: If it is determined that an SV has been incorrectly identified as an SV, for instance, if upon

further examination it is determined that no violation actually occurred, or if the source was not in fact subject to the requirement, then the appropriate action code "RV" is added to AFS by EPA and the SV is reported in the HQ summary report as being deleted for cause, and the SVI1 flag is reset. For auditing purposes, a note to the file in the action comment field must be added that explains why the source is not being tracked as an SV.

6. **Resolved:** The resolved SV's should be reported in the quarter that EPA or the State discovers that the violation has been resolved, whether or not it is the actual quarter the violation was resolved. It is expected that the States and Regions will monitor addressed SV's until they are resolved. Once resolved the SV flags in AFS/NARS are updated and the violation is no longer tracked. (AFS/NARS coding conventions will be modified to accommodate SV's resolved.)

7. **Annual Reports:** In order to accommodate the end of year reports, the Timely and Appropriate Report and the State by State Enforcement Data Summaries, the Regions need to ensure that the core data fields and the T&A fields in AFS are properly filled out, otherwise manual tabulations will be required.

## SV/T&A GLOSSARY

(This glossary of terms is designed to clarify the terminology used by EPA in the SV/T&A Guidance and the associated compliance and enforcement reporting. Terms that originate with the guidance have been underlined and those that are legal terms have been italicized.)

**Addressed** means that one of the following actions that impose a compliance schedule or require immediate compliance have been taken: a notice of noncompliance that includes a penalty (section 120) issued (AFS code: 7A), an EPA civil action referred to DOJ (AFS code: 4B), a CAA section 113(a) order issued (AFS code: 8A), EPA CAA section 167 order issued (AFS code: 7E), a CAA section 113(d) complaint filed (AFS code: 7F), EPA criminal referral to DOJ (AFS code: 5B), a consent decree or consent agreement filed (AFS code: 6B), a consent decree or consent agreement filed (AFS code: 2D), a State civil action has been referred to AG (AFS code: 9C), a State criminal action referral to the AG (AFS code: 1D), a State administrative order issued (AFS code: 8C), or be subject to a proposed SIP or FIP provision, which EPA staff-level review shows is likely to be approved, will lead to compliance (AFS code: 2M or 2L).

Two additional addressing codes are listed in AFS for tracking purposes. They are: source returned to compliance by EPA with no further action required (AFS code: 7G) and, source returned to compliance by State with no further action required (AFS code: 2K). For cases where penalties are required, penalties that conform to the "Clean Air Act Stationary Source Civil Penalty Policy" must also be assessed.

**Addressed with Penalties** means appropriate penalties were collected or are likely to be collected because the action or complaint stipulates that a penalty be paid. Penalties must be calculated in accordance with the EPA civil penalty policy.

***Administrative Order*** means a CAA section 113(a) or section 167 order that requires the source to comply with the CAA or a permit promulgated thereunder but does not stipulate penalties. A State administrative action (not civil or criminal) against a source pursuant to the State authority.

***Administrative Penalty Order*** (APO) means a CAA Section 113 (d) order issued by EPA that has stipulated penalties.

***Civil Judicial Referral*** means a Federal or State case that has been referred to the Department of Justice or the State Attorney General for resolution in the civil judicial forum.

***Complaint*** means a written communication, alleging one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued by the complainant to a person.

***Confirming a Violation/Compliance*** includes the following: an on site inspection, a review of an appropriate self-monitoring report, a stack test, a reference method compliance test, or a response to a CAA section 114 letter.

***Consent Agreement*** (or ***Consent Decree)*** means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a ~~proposed~~ penalty or ~~proposed~~ revocation or suspension acceptable to both complainant and respondent.

***Consent Agreement / Consent Order*** **(CACO)** means a signed document settling a CAA section 113 (d) administrative penalty order.

**In Compliance** means all Federal and State administrative and judicial action against the source is complete and the source has been confirmed to be complying with the CAA. This term, as it is used in the SV/T&A Guidance, refers to a source being in compliance with all aspects of CAA requirements, not simply their emission limit.

**Investigation** means, but is not limited to, a series of, inspections, review of CAA section 114 responses, record reviews, review of quarterly reports, that were discovered within 30 days of each other and that pertain to the same source.

**Lead Change** means the lead changes from the State to EPA because either the State did not address the violation by day 90 or the State asked EPA to assume the lead. In the case of NESHAP D&R violators and Non-transitory NESHAP violators "Lead Change" means: the lead changes form the State because the State did not address the violation within two months or the State asked EPA to assume the lead. This does not include a change from EPA to the State.

***Major Source*** means a stationary source(s) located on one or more contiguous or adjacent properties that have the same standard industrial classification and are under the control of one person or persons and that emits or has the potential to emit 100 tons per year of VOC, $SO_2$, $NO_2$, CO, or PM-10; or a source, regardless of its attainment status, that emits or has the potential to emit 10 tons per year (tpy) of Hazardous Air Pollutants (HAP's) or 25 (tpy) of a combination of HAP's and other pollutants; or if the source is located in a nonattainment area and it emits or has the potential to emit quantities of VOC, $NO_2$, CO, or PM-10 that equal or exceed the following nonattainment status thresholds.

| | Nonattainment Status | Major Source (in tons per year) |
|---|---|---|
| OZONE (VOC / $NO_2$) | Marginal/Moderate | 100 |
| | Serious | 50 |
| | (Ozone Transport Region) | 50 |
| | Severe | 25 |
| | Extreme | 10 |
| CARBON MONOXIDE | Moderate | 100 |
| | Serious | 50 |
| PM-10 | Moderate | 100 |
| | Serious | 70 |

For a detailed definition of Major Source see Part 70 - State Operating Permit Programs Federal Register vol. 57, No 140 / Tuesday, July 21, 1992 and the CAA sections 112 & 302.

**Resolved** means that once the violation is addressed and a closeout memo has been issued, all penalties have been collected and the source is confirmed to be in compliance. Once these actions have been completed AFS should be updated with the following: C7 (Closeout memo issued), C3 (CAA section 113(d) penalty collected), WD (CAA section 113(d) complaint withdrawn), VR (Violation Resolved).

**Significant Violator (SV)** means an NSPS, NESHAP or major SIP, source that violates one or more: 1) emission, 2) monitoring, 3) substantial procedural requirement, 4) provision of a State or Federal administrative or judicial order relating to a SIP violation and 5) any requirement of Part C or D of title I of the

CAAA relating to construction or modification of a major source. Also included are any synthetic minor (SM) sources whose emission level would either classify the source as major or any SM source avoiding PSD while violating an emission limit or permit condition which effects its PSD status.

Asbestos NESHAP violations that fall under the SV definition are: circumvention / concealment, emission control, collection, packaging, transporting, disposal, substantive provision of a State or Federal Judicial Order, and a substantive provision of a Federal or State Administrative Order.

Acid Rain SV's are defined as any major source, as defined by the CAA, that violates one or more of the following: install, certify, operate and maintain required CEMS/COMS system; have an Acid Rain Permit; hold allowances as of the allowance transfer deadline not less than the total $SO_2$ emissions for the previous calendar year; submit a complete proposed offset plan; submit electronic quarterly reports to the administrator; for units governed by a Phase I extension plan, demonstrate at least 90% reduction of $SO_2$ in 1997, 1998, or 1999; ensure that all certification tests for the required CEMS/COMS are completed not later than the specified dates; any provision of a Federal Consent Decree or Federal Administrative Order; any substantive provision of a State Judicial Order or a State Administrative Order which was issued for an underlying Acid Rain violation.

For a more detailed definition see the February 7, 1992 SV/T&A Guidance, the October 27, 1993 Asbestos Addendum and the Acid Rain Addendum (not final as of June 1, 1994). Other media offices within EPA use the term significant non-complier (SNC) to mean significant violator.

**Significant Violation** means any violation according to the SV/T&A Guidance and its addenda that would cause a source to be classified as a significant violator.

**Substantial Procedural Requirement** It is EPA's policy to leave this definition to the discretion of the Regions. Substantial procedural requirements may include the procedural requirements that form the foundation of the compliance program, e.g., conduct a performance test, conduct a monitor certification test, maintain records, or submit a CAAA required Title V compliance certification.

## SIGNIFICANT VIOLATOR GUIDANCE QUESTIONS AND ANSWERS

### Significant Violator Definition

1) **Q**: Should CAA Amendment Title VI violations be added to the SV list?

**A**: Only Title VI violations that meet the definition of significant violator would be added to the SV list. The vast majority of violations under §§ 608 and 609 of CAAA Title VI would not meet the definition of SV because the sources would rarely, if ever, exceed the major source threshold. No violations under §§ 610 and 611 would meet the definition because these sources do not emit air pollutants. However, sources regulated by §§ 604, 606, and 612 may meet the definition because they could exceed the nonattianment emission thresholds that would classify the source as major.

2) **Q**: Are violations at non major NESHAP and NSPS sources included under the definition of significant violator?

**A**: Yes, emission, monitoring, and substantial procedural violations at all NESHAP and NSPS sources should classify the sources as significant violators.

3) **Q**: Is a non-major unit, that is in violation (i.e. spare boiler) at a major facility considered an SV?

**A**: Yes, violations at all units at a major source classify the source as a significant violator.

### Headquarters Reporting

4) **Q**: When should a Significant Violator be reported to Headquarters if EPA learned of the violation after the end of the quarter in which the violation occurred?

**A**: When the EPA Regional Office learns of the SV after the quarter in which it was discovered the SV shall be reported to Headquarters during the current quarter.

5) **Q**: If a source has an unresolved violation(s) and another violation is discovered should another day zero be entered?

**A**: If another violation is discovered during a later investigation, then a separate day zero can be assigned. Whenever possible, violations that were discovered during a single investigation (or within 30 days of each other) should be clustered under a single day zero.

**Processing of Significant Violators**

6) **Q**: Is a violating source which has been addressed by an addressing action considered addressed in accordance with the Timely and Appropriate policy prior to or in lieu of a penalty being collected?

**A**: An addressing action would normally assess a penalty through an enforcement action. Once the penalty has actually been collected then the violation can be considered resolved, assuming that all other stipulations have been met.

7) **Q**: If EPA identifies a violation, does it automatically become a federal lead or does a State have 150 days to address regardless?

**A**: Under the SV/T&A Guidance it is expected that once an SV has been identified the State and Region will discuss which agency is most appropriate to take the lead during the next monthly conference call.

8) **Q**: At what time should a facility which has an entered consent decree be considered resolved and thus removed from the SV list?

**A**: A facility is considered a violator and should be tracked with an SV flag even if it is on a compliance schedule. These facilities should remain an SV until they have been confirmed to be in compliance, met all of the requirements of the compliance schedule and all penalties have been collected.

9) **Q**: At what time should a facility which has an APO issued be considered resolved and thus removed from the SV list?

**A**: Once the penalty payment is received by the appropriate party at EPA or the State agency and the source has been confirmed to be in compliance. If the penalty is in installments, the facility should remain on the SV list until the final penalty payment is received.

10) **Q**: When should a facility's compliance status in AFS change from in compliance to in violation after a violation is confirmed?

**A**: The compliance status should be updated immediately or during monthly AFS updating.

## SIGNIFICANT VIOLATOR RESPONSIBILITIES
(Program Specific Guidance should be referenced)

### State and Local Agencies

Identify and initiate actions to resolve significant violations in accordance with the EPA Timely and Appropriate Guidance of February 7, 1992. Report to EPA via AFS the status of all significant violators in accordance with the guidance. Communicate periodically, monthly conference calls, with the Regional EPA Office to confirm reported SV's. States are expected to address and track all violations within their jurisdiction and delegated authority.

### Regional Offices

Quality assure State and Local SV data in AFS/NARS, enter data as necessary to ensure that all SV's are identified correctly in the appropriate field. Ensure that the violation in question meets the SV definition. Communicate periodically with the State and Local Agencies to confirm reported SV's and assist the State and Local Agencies in identifying, prioritizing and resolving SV's in a timely and appropriate manner. Discuss lead changes or over-filing as appropriate. In preparation for quarterly and annual reporting cycles, check SV data reported to Headquarters to ensure accuracy and correct accounting. Report to Headquarters on the progress of the SV program in relation to Regional MOA commitments and any problems that the Region or State offices may be experiencing.

### Headquarters

Quality assure summary SV data for correct accounting and ensure consistent implementation of the SV/T&A Guidance. Work with Regional AFS/NARS and/or SV coordinators to correct inconsistencies. Analyze Regional performance for quarterly MOARS reports and the annual Timely and Appropriate report. Maintain and improve national data systems for tracking and reporting on SV's.

## SIGNIFICANT VIOLATOR REFERENCE DOCUMENTS

I've attempted to list all of the documents that offer guidance on SV's on the policy level and the technical AFS operator level. Ensuring that we're all using the same guidance is essential to our task of maintaining consistent policy and reporting.

**SV/T&A POLICY DOCUMENTS**
"Timely and Appropriate Enforcement Response to Significant Air Pollution Violators" (SV/T&A Guidance) and cover letter, Signed by John S. Seitz, OAQPS and Robert Van Heuvelen, OE on Feb 7, 1992.

"Asbestos NESHAP Addendum to the Timely and Appropriate (T&A) Enforcement Response to Significant Air Pollution Violators (SV)" signed by John B. Rasnic, SSCD and Kathie Stein, OE on October 27, 1993.

An Acid Rain addendum is expected to be finalized in FY 1994.

**DOCUMENTS USED IN CONJUNCTION WITH THE SV/T&A GUIDANCE**
"Clean Air Act Stationary Source Compliance Civil Penalty Policy," William G. Rosenberg, Edward W. Reich October 25, 1991

"Guidance on Implementation of the Discretionary Contractor Listing Program," Thomas L. Adams Jr. November 26, 1986

"Listing Asbestos Demolition and Renovation Companies Pursuant to Section 306 of the Clean Air Act," Michael S. Alushin, John S. Seitz, Terrell E Hunt March 11, 1988

"Asbestos Contractor Listing," John S. Seitz June 30, 1988

Annual Program Specific Guidance, which is issued by the program offices.

**AIRS FACILITY SUBSYSTEM (AFS) GUIDANCE DOCUMENTS**
AIRS Users Guide Vol.AF1: AFS Data Dictionary, TRC November 1992

Action Linking Users Guide, TRC October 30, 1992

AIRS Facility Subsystem (AFS) AD HOC and Milestone Reporting (Volume XIII), TRC November 1992

"Major Sources in the AIRS Facility Subsystem (AFS)," Mamie Miller, SSCD April 27, 1993

"Minimum Data Requirements (MDR's) for Stationary Sources," Mamie Miller, SSCD December 22, 1993.
Additional guidance on adding and maintaining SV data in AFS is being developed by the AFS managers work group.

## SV/T&A Goal Statement

The Significant Violator Timely and Appropriate Guidance sets the framework and clarifies the relationship between Federal, State and Local air pollution control agencies. It provides the framework for improved cooperation between these agencies in order to maximize the effectiveness of available resources for protecting the environment. This is done by making it possible for agencies to have the flexibility to prioritize enforcement actions against the most environmentally damaging sources of air pollution. By maintaining an accurate SV census in AFS/NARS regulators are able to effectively target enforcement against sources that are significant noncompliers under other environmental statutes.

The SV/T&A guidance sets enforcement timeliness goals that environmental regulatory agencies aim to meet. By tracking and analyzing the time that elapses between the time that a violation is discovered and the day that a violation is resolved EPA can assess how effective the enforcement response has been. A rapid response including appropriate penalties to violations is crucial for maintaining credible deterrence in the regulated community. By analyzing the timeliness of the enforcement response EPA is able to identify and correct weak or slow enforcement. Additionally, by accounting for SV's unaddressed EPA can illustrate the need, in some cases, for additional resources to properly address and resolve all significant violations.

Attachment I

| | QUARTERLY REPORT OF SIGNIFICANT VIOLATOR ACTIVITY | | | | | |
|---|---|---|---|---|---|---|
| | REGION ___ FISCAL YEAR ___ QUARTER ___ | | | | | |
| POLLUTANT | | VOC | PM-10 | SO2 | OTHER | TOTAL |
| SIZE OF PROGRAM | | | | | | |
| SV'S ADDED YTD | A | | | | | |
| SV'S ADDRESSED YTD | B | | | | | |
| SV'S UNADDRESSED YTD | C | | | | | |
| TIMELINESS | | | | | | |
| ADDRESSED YTD < 150 DAYS | D | | | | | |
| ADDRESSED YTD > 150 < 365 DAYS | E | | | | | |
| ADDRESSED YTD > 365 DAYS | F | | | | | |
| TOTAL SV'S ADDRESSED (G=D+E+F) | G | | | | | |
| SV'S UNADDRESSED > 365 DAYS | H | | | | | |
| DELEGATION SUCCESS | | | | | | |
| LEAD CHANGES YTD | I | | | | | |

Attachment
ANNUAL SV/T and A STATE-BY- STATE REPORT
Page 1

| Evaluation of State-By-State SV's In FY 199_ Region __ | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | STATE | STATE | STATE | STATE | STATE | STATE | STATE | STATE | TOTAL |
| 1) Total Unaddressed SV's at BOY | | | | | | | | | |
| 2) Total SV's Added during FY | | | | | | | | | |
| 3) Total SV's Addressed during FY | | | | | | | | | |
| 4) Total SIP SV's | | | | | | | | | |
| 5) Total SIP SV's Added | | | | | | | | | |
| 6) Total SIP SV's Addressed | | | | | | | | | |
| 7) Total NSPS SV's | | | | | | | | | |
| 8) Total NSPS SV's Added | | | | | | | | | |
| 9) Total NSPS SV's Addressed | | | | | | | | | |
| 10) Total non-asbestos NESHAP SV's | | | | | | | | | |
| 11) Total non-asbestos NESHAP SV's Added | | | | | | | | | |
| 12) Total non-asbestos NESHAP SV's Addressed | | | | | | | | | |
| 13) Total Asbestos D&R SV's* | | | | | | | | | |
| 14) Total Asbestos D&R SV's Added* | | | | | | | | | |
| 15) Total Asbestos D&R SV's Addressed* | | | | | | | | | |
| 16) Total PSD SV's | | | | | | | | | |
| 17) Total PSD SV's Added | | | | | | | | | |
| 18) Total PSD SV's Addressed | | | | | | | | | |
| 19) Total NSR SV's | | | | | | | | | |
| 20) Total NSR SV's Added | | | | | | | | | |
| 21) Total NSR Addressed | | | | | | | | | |

Note: In order to prevent double counting, if more than one program violation occured only the primary emission violation should be counted for each SV. Only one program code will be counted for each day zero. The sum of lines 4, 7, 10, 13, 16 and 19 should equal the sum of lines 1 and 2. *This data should be accessible soon in ACTS/NARS.

ATTACHMENT III
Annual SV State-by-State Report
Pages 2 +

| TIMEFRAMES FOR ADDRESSING SV'S FY 199_ REGION __ STATE __ | | | | |
|---|---|---|---|---|
| This form needs to be filled out for each State. | | | | |
| | EPA LEAD | STATE LEAD | LEAD CHANGE | TOTAL |
| 22) SV's Addressed w/in 150 days | | | | |
| 23) SV's Addressed w/in 151-240 days | | | | |
| 24) SV's Addressed w/in 241-365 days | | | | |
| 25) SV's Addressed beyond 365 days | | | | |
| 26) Total SV's Addressed (sum of lines 22-26 / Should equal line 3) | | | | |
| 27) Total Unaddressed by EOY | | | | |
| 28) Total Unaddressed Over 365 days at End of FY | | | | |
| 29) Total of all Sources being tracked | | | | |
| 30) Of line 26, the number of SV's addressed with enforcement actions | | | | |
| 31) Of line 26, the number of SV's addressed with penalties | | | | |

SECTION B DOCUMENT 27

**Initial Operating Permit Application Compliance Certification Policy**

07/03/95

CAA
B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

JUL 3 1995

MEMORANDUM

SUBJECT: Initial Operating Permit Application Compliance Certification Policy

FROM: Kathie A. Stein, Director
Air Enforcement Division, OECA (2242A)

Lydia N. Wegman, Deputy Director
Office of Air Quality Planning and Standards (MD-10)

TO: See Addressees

In response to the inquiries and concerns expressed by permitting authorities, regulated sources, and other stakeholders in the title V process, the Office of Air and Radiation (OAR) and the Office of Enforcement and Compliance Assurance (OECA) have collaborated on the development of an Environmental Protection Agency (EPA) policy on a source's compliance certification to accompany the initial title V permit applications. The questions focused principally on the compliance certification requirements under 40 CFR 70.5(c)(9) and (d). In an effort to gather more information, OECA and OAR recently talked with industry representatives, Regions, and State and local agencies about their experience with the certification requirement. This information was helpful in developing the policy.

Sources are required to review current major and minor new source review permits and other permits containing Federal requirements, State implementation plans and other documents, and other Federal requirements in order to determine applicable requirements for emission units. The EPA and State and local permitting authorities may request additional information concerning a source's emissions as part of the title V application process. Companies are not federally required to reconsider previous applicability determinations as part of their inquiry in preparing title V permit applications. However, the EPA expects companies to rectify past noncompliance as it is discovered. Companies remain subject to enforcement actions for any past noncompliance with requirements to obtain a permit or meet air pollution control obligations. In addition, the title V permit shield is not available for noncompliance with applicable

requirements that occurred prior to or continues after submission of the application.

We anticipate that implementation of this policy will simplify the permit application process, while maintaining the compliance and flexibility benefits that the operating permits program will provide. Should you require further information concerning this policy, please contact Julie Domike of OECA at (202) 564-6577 or Barrett Parker of OAR at (919) 541-5635.

Addressees:
Director, Air Pesticides, and Toxics Management Division, Regions I & IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation, and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air, Pesticides, and Toxics Division, Region VI
Director, Air and Toxics Divisions, Regions VII, VIII, IX, and X

cc: Alan Eckert
Steven A. Herman
Jean C. Nelson
Mary D. Nichols
Richard D. Wilson

SECTION B DOCUMENT 28

**Clarification of the Use of Appendix I of the Clean Air Act Stationary Source Civil Penalty Policy**

07/23/95

CAA
B28

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

JUL 23

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Clarification of the Use of Appendix I of the Clean Air Act Stationary Source Civil Penalty Policy

FROM: Kathie A. Stein (2242-A)
for Air Enforcement Division
Office of Enforcement and Compliance Assurance

TO: Regional Division Directors

Region IV recently raised questions concerning the Clean Air Act Stationary Source Civil Penalty Policy (general policy). Specifically, the Region asked whether the Gravity Component in Appendix I ("The Permit Penalty Policy") should be used in addition to the general policy's gravity component when calculating the penalty amount, and specifically, whether "size of the violator" is included in addition to the penalty amount as calculated using the appendix. The policy may be confusing because of a clerical error on page 3 of Appendix I, which reads as follows:

> The economic benefit component and the gravity component are added together to determine the preliminary deterrence amount. This initial amount should then be adjusted, using the general stationary source civil penalty policy factors which take into consideration individual equitable considerations (Part III of the general policy).

This paragraph applied to Part III of September 12, 1984 general Clean Air Act policy, Adjusting the Gravity Component, and to the later policy revision in March 1987. The error occurred when the table of contents was changed during the 1991 revision of the general policy. Part III became Parts II.B.4. and IV, but the reference was inadvertently left unchanged in the above passage in Appendix I. The paragraph should read as follows:

> The economic benefit component and the gravity component are added together to determine the preliminary deterrence amount. This initial amount should then be adjusted, using the general stationary source civil penalty policy Part II.B.4., Adjusting the Gravity Component, Part III, Litigation Risk, Part IV, Ability to Pay, and other relevant adjustments.

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# Notes

Settlement with a Federal agency is encouraged in the same circumstances as with a private party. See 40 C.F.R. § 22.18. EPA should use the same conference and settlement discussion procedures with Federal agencies that it uses with private parties under Part 22. Except where the parties have reached a settlement, a case against a Federal agency would proceed to hearing under the provisions of Part 22 just as in a case against a private party, including the opportunity for either party to appeal an initial decision to the Environmental Appeals Board. Often, however, settlement discussions continue on a parallel track with the hearing procedures. Cases that settle do not require a conference with the Administrator, as discussed below. In settling a matter, the respondent Federal agency waives its opportunity to confer on the settled matter.

As with private parties, any voluntary resolution or settlement of such an action shall be set forth in a consent agreement/consent order. In addition, Federal parties have the same opportunity to confer with the appropriate Agency official or employee provided under 40 C.F.R. § 22.18. Regions should not confer with the Federal agency outside of their usual procedures to implement 40 C.F.R. § 22.18. As a result, after EPA issues the complaint, the respondent Federal agency may confer with the complainant (EPA employee authorized to issue the complaint) under Part 22 concerning settlement whether or not the respondent requests a hearing. This Part 22 opportunity to confer, however, does not affect the 30-day deadline for filing an answer under § 22.43, just as with a private party under § 22.18(a). Moreover, throughout this administrative process, the Regions should follow Part 22's requirements regarding ex parte communications.

B Opportunity to Confer[5]

Before a penalty becomes final, the respondent Federal agency must be afforded an opportunity to confer with the Administrator EPA will provide the same opportunity to confer with the Administrator prior to final assessment of a CAA administrative penalty as is currently provided in implementing the RCRA provision, and as proposed in general for Part 22. Although the "opportunity to confer" requirement can be satisfied by providing an opportunity to confer with a Regional official with properly delegated authority within a reasonable period of time following issuance of the penalty order, as a matter of practice, the Administrator will retain the opportunity to confer personally, as set out below. This is an appropriate way to implement EPA's existing administrative penalty authority, thereby preserving the President's authority to resolve disputes within the executive branch. As a result, EPA will provide the respondent Federal agency an opportunity to confer with the Administrator before a penalty order becomes final.[6]

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[5]EPA believes this guidance is consistent with Executive Order No. 12088, as it establishes an efficient and orderly procedure for implementing an opportunity for the head of the affected Federal agency to confer with the Administrator on disputed issues.

[6]As discussed below, such opportunity will not be available for administrative penalty orders unless the Part 22 administrative hearing procedures have been exhausted.

Federal agencies will have the opportunity to meet with the Administrator only after exhaustion of other Part 22 procedures. Placing the conference at the end of the process will enable the Agency to proceed with their enforcement case against the Federal agency in the same manner as they do against private parties. Similarly, placing the conference at the end of the hearing process was adopted in implementing the RCRA provision noted above, and has worked effectively in practice. See 58 Fed. Reg. 49044 (September 21, 1993).

Under the current Part 22 provisions, the EAB issues a final order under section 22.31, and sets the effective date of the order. A private party or a Federal agency may seek reconsideration of the order by filing a motion with the EAB, and the EAB may, if appropriate, stay the effective date of the final order pending such reconsideration. However, the Administrator does not participate in a case unless the matter has been referred by the EAB to the Administrator under section 22.04(a).

In cases involving a respondent Federal agency, the EAB will issue a final order under section 22.31, with an effective date that is no earlier than 30 days from issuance of the order. If a Federal agency wishes to confer with the Administrator, it must file a motion to reconsider the EAB's final order with the EAB under section 22.32 within 10 days of service of the EAB's final order (5 additional days where service is by mail). In its motion, the Federal agency must indicate that it desires an opportunity to confer with the Administrator, either in person or through an exchange of letters, and identify the issues which the Federal agency proposes to discuss with the Administrator. The motion to reconsider should also raise to the EAB any matters deemed to have been erroneously decided and the nature of the alleged errors. Upon receipt of such a request, the EAB will refer the request for a conference to the Administrator and stay the effective date of its final order pending the outcome of the referral and conference with the Administrator.[7]

The referral from the EAB pursuant to section 22.04(a) will authorize the Administrator, upon completion of the conference, to either issue a final order superseding the EAB's order, or refer the matter back to the EAB to issue a new final order or reaffirm its previous order on behalf of the Agency. If the matter is referred back to the EAB, the EAB shall resolve, as necessary, those issues raised in the motion for reconsideration relating to any errors allegedly made by the EAB.

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[7]Under the proposed Part 22 procedures, if the respondent Federal agency desires a conference with the Administrator, the head of the affected Federal agency must request a conference with the Administrator within 30 days of the EAB's service of a final order and serve that request on the parties of record. In that event, a decision by the Administrator shall become the final order. A motion for reconsideration of a final order shall not stay the 30-day period to request the conference unless specifically so ordered by the EAB.

Failure to request a conference with the Administrator in this manner and within this time frame will be deemed a waiver of the right to confer with the Administrator. If there is no timely request for a conference with the Administrator, any motion to reconsider filed with the EAB will be ruled on by the EAB.

The conference with the Administrator can occur directly or through an exchange of letters. A request for a direct conference should be included in the Federal agency's motion for reconsideration of the EAB's final order with a copy to the Director of the Federal Facilities Enforcement Office (FFEO) and all parties/counsel of record.[8] The request for a direct conference should specifically identify the issues which the Federal agency proposes to discuss with the Administrator, and should specifically identify who will represent the respondent Federal agency. In addition, as part of its request for a direct conference, the head of the Federal agency should attach copies of all prior administrative decisions and substantive briefs in the underlying proceedings Copies of these briefs and underlying decisions also should be provided to the Director of FFEO.

The parties/counsel of record may request to be present during the direct conference. A request to attend the direct conference should be in writing and served on the Director of FFEO and the parties/counsel of record. The Administrator or her designee shall notify the head of the Federal agency who requested the direct conference and the parties/counsel of record regarding her plan and arrangements for the direct conference.

Following the conclusion of the direct conference, a person designated by the Administrator will provide a written summary of the issues discussed and addressed. Copies of the written summary shall be provided to the parties/counsel of record. Within thirty (30) days of the conference, the Administrator shall issue a written decision with appropriate instruction regarding the finality of the order. This decision shall be filed with the Clerk of the EAB and made part of the administrative case file.

Instead of the direct conference, the conference with the Administrator may be conducted through an exchange of letters. If so, the head of the Federal agency should include the letter in its motion for reconsideration of the EAB's final order with a copy to the Director of FFEO and all parties/counsel of record. In addition, the letter should specifically identify the issues which the Federal agency proposes that the Administrator consider. The head of the Federal agency should also attach copies of all prior administrative decisions and substantive briefs in the underlying proceedings. Copies of these briefs and underlying decisions should be provided to the Director of FFEO. Within thirty (30) days of receipt of the head of the Federal agency's letter in the event of a conference by letter, the Administrator shall issue a written decision with appropriate instruction regarding the finality of the order. As in the direct conference, this decision shall be filed with the Clerk of the EAB and made part of the Administrative case file.

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[8]Participation by non-Federal parties in the Administrator's conference will be determined on a case-by-case basis.

If the Board referred the matter to the Administrator for decision under section 22 04(a) prior to the filing of a motion to reconsider under section 22 32, and if the Federal agency wants to request a conference with the Administrator, it must do so prior to the Administrator's decision To assure that Federal agencies are aware of these procedures, Regions should refer the Federal agency to Part 22 and other relevant Agency guidance

IV COMPLIANCE ORDERS

Unlike RCRA, the CAA does not have a separate statutory provision specifically addressing Federal agency penalty/compliance orders and requiring a conference with the Administrator prior to an order's becoming effective The CAA, however, does provide a general conference opportunity under section 113(a)(4), prior to a compliance order's becoming effective [9] CAA compliance orders to Federal agencies should follow the same procedures as for the issuance of such orders to private parties For example, as with a private party, a Federal agency respondent should be provided an opportunity to confer with a Regional official with the authority to issue a compliance order before the order becomes effective Because EPA issues a compliance order to achieve expeditious compliance with CAA requirements and not to assess a penalty, the time period to request a conference generally should be less than the 30 days afforded to seek a conference for penalty orders Ultimately, based on the seriousness of the violations and the nature of the compliance activities, the Regional office will determine the time period in which the Federal agency may request a conference, and specify that deadline in the cover letter transmitting the compliance order or in the compliance order itself The approach of providing an opportunity to confer before a compliance order becomes final has worked well under the Safe Drinking Water Act

With regard to section 113 compliance orders, section 113 mandates that such orders require the person to whom it was issued to comply within one year of the date the order was issued, and shall be nonrenewable For private parties, EPA would most likely pursue a civil judicial action against a violator should a schedule longer than a year be required for a return to compliance For executive branch agencies, this option is not available to EPA Therefore, when a Region believes that a schedule less than a year is infeasible to achieve compliance, the Region should negotiate a Federal Facility Compliance Agreement (FFCA) which either contains an order with a delayed issuance date to go into effect when compliance can be reached in one year or, instead, the Region could first negotiate an FFCA and then issue a separate order when compliance can be reached within one year FFEO strongly recommends that when the Region uses the FFCA, it be submitted for public comment via publication in the Federal Register in order

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[9] As a matter of practice, while EPA will also provide such opportunity to Federal agencies for compliance orders relating to violations of CAA section 112, 42 U S C § 7412, the opportunity for a conference does not suggest that the Federal agency may delay taking steps to come into compliance with these requirements or any other requirements under the CAA

to ensure public awareness of the compliance order's contents. This is similar to public comment on judicial consent decrees. Where compliance is achievable within one year of issuance, Regions should issue orders.

## V. WAIVERS

Under the CAA Section 113(d)(1)(C), the Administrator's administrative penalty authority is limited to matters where the total penalty sought does not exceed $220,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Where the Regions determine that a waiver should be granted in an action against a Federal agency, the Regions should direct their request for a waiver to the Director, FFEO with a copy to the Director, Air Enforcement Division, Office of Regulatory Enforcement. Waiver requests should follow the same format as similar requests in cases against private parties and include reasons justifying the waiver and a fact sheet on the matter.

## VI. PENALTIES

Federal agencies are liable for EPA-assessed CAA civil administrative penalties just like any other person. [10] If violations occurred prior to July 16, 1997 and are ongoing, EPA could assess penalties for the violations from July 16, 1997 until correction of the violation. Moreover, EPA can require correction of and, in some case, may seek penalties for violations that occurred prior to July 16, 1997. If a Region believes that seeking penalties for violations occurring prior to July 16, 1997 is warranted, the Region should submit a justification to the Director of the Federal Facilities Enforcement Office. Regions should consider the size of violator when determining the appropriate penalty against a Federal agency. In many instances, Federal agencies would be considered large violators; in these cases, the Regions should apply the 50% formula, under which the size of the violator component, if very large, may be reduced to 50% of the total penalty at the discretion of the Agency.

In determining an appropriate penalty, EPA will apply its penalty policies, the October 25, 1991, CAA Stationary Source Civil Penalty Policy, and amendments thereto, and the Mobile Source Penalty Policies[11], including capturing economic benefit for avoidance of costs, against a

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[10] This policy does not intend to require any conduct contrary to the Anti-Deficiency Act.

[11] Interim Tampering Enforcement Policy, 6/25/74, Civil Penalty Policy for Incorrect Aftermarket Catalytic Converter Applications, 4/18/88, Sale and Use of Aftermarket Catalytic Converters, contained in 51 Fed. Reg. 28133 (8/5/86), Enforcement Policy for Aftermarket Catalytic Converter Violations, 12/22/88, Volatility Civil Penalty Policy, 12/01/89, Aftermarket

Federal agency for violations of the CAA in the same manner and to the same extent as against any private party The May 1, 1998, "Supplemental Environmental Projects Policy" and any subsequent updates also apply in this context Moreover, for settled compliance cases that require work, stipulated penalties should be included in the Compliance Agreement

## VII PRESS RELEASE FOR CAA ENFORCEMENT ACTIONS

EPA uses the publicity of enforcement activities as a key element of the Agency's program to promote compliance and to deter noncompliance with environmental laws and regulations Publicizing EPA enforcement actions against private parties and Federal agencies informs both the public and the regulated community of EPA's efforts to ensure compliance and take enforcement actions EPA's decision to issue a press release and the contents of press releases are not negotiable with Federal agencies or other regulated entities Upon the issuance of an order or the filing of a complaint, FFEO strongly encourages Regions to issue a press release

## VIII CONCLUSION

FFEO is issuing this guidance to clarify enforcement procedures for Federal facility enforcement under the CAA This guidance supersedes earlier guidance regarding CAA enforcement at Federal facilities such as that found in the 1988 Federal Facilities Compliance Strategy Should you have any concerns or questions, please have your staff call Mary Kay Lynch at (202)564-2574 or Sally Dalzell at (202) 564-2583

## IX NOTICE

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U S Environmental Protection Agency Such guidance and procedures do not constitute rule making by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person The Agency may take action at variance with this guidance and its internal implementing procedures

Attachment

cc Air Enforcement Branch Chiefs
Federal Facility Coordinators, Regions I-X

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Defeat Device Authority with regard to Catalyst Replacement Pipe Manufacturers and Sellers, 1/02/91, Civil Penalty Policy for Administrative Hearings, 1/14/93, Manufacturers Programs Branch Interim Penalty Policy, Appendix I Manufacturers Programs Branch MFB Imports Program Penalty Policy, 3/31/93, Interim Diesel Civil Penalty Policy, 2/08/94, Tampering and Defeat Device Civil Penalty Policy for Notices of Violation, 2/28/94

CAA
B29
1996-2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

OCT 9 1998

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (CAA)

FROM: Steven Herman
Assistant Administrator

TO: Regional Counsels, Regions I-X
Air Program Directors, Regions I-X

## I. INTRODUCTION

The Clean Air Act (CAA or Act) contains several provisions authorizing the Agency to assess administrative civil penalties[1] and to issue administrative compliance orders[2] for violations of the Act and its implementing regulations. These provisions also authorize the Agency to assess administrative civil penalties or issue compliance orders against Federal agencies. This guidance will assist in the implementation of the CAA's administrative penalty authority and compliance order authority when used against a Federal agency.

## II. BACKGROUND

In response to a proposed rulemaking concerning CAA field citations (under section 113(d)(3) of the Act), the Department of Defense took the position that EPA did not have authority to issue citations against a Federal agency. To resolve this issue, EPA sought the opinion of the Office of Legal Counsel (OLC) in the Department of Justice (DOJ). The OLC is the office within the Department of Justice (DOJ) that settles legal disputes between Executive Branch agencies pursuant to Executive Order No.12146. On July 16, 1997, OLC issued an opinion confirming EPA's authority to assess administrative penalties against Federal agencies

[1] CAA sections 113(d), 205(c), 211(d)(1) and 213(d), 42 U.S.C. §§ 7413(d), 7424(c), 7545(d)(1), and 7547(d).

[2] 42 U.S.C. § 7413(a).

under the CAA, including field citations.[3] See attached opinion. DOJ applied a "clear statement" rule of statutory construction, and determined that these provisions authorize the Agency to assess administrative penalties against Federal agencies, and that separation of powers concerns do not bar EPA from exercising this authority.[4]

## III CAA ADMINISTRATIVE PENALTY ACTIONS

### A. Hearing Procedures/Settlement

The hearing procedures set forth at 40 C.F.R. Part 22 apply when EPA issues a penalty order against Federal agencies in the same manner as when EPA files an administrative action against private parties. Private parties and Federal agencies have an opportunity to challenge a CAA penalty complaint using the 40 C.F.R. Part 22 procedures. For instance, if the Region files an administrative penalty action against a Federal agency under CAA section 113(d)(1), EPA would file pursuant to EPA's procedural rules in Part 22 Under the Part 22 procedures, service on an officer or agency of the United States can be accomplished in several ways. For example, as a matter of practice, EPA has successfully served the base commander when a military service is involved with a copy of the action to that service's headquarters. If the case proceeded to hearing, it would be conducted in the same manner as a case against a private party.

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[3] While the OLC decision does not expressly address EPA's penalty authority under Section 213(d), EPA believes the same analysis applies to that provision.

[4]This authority can be exercised consistent with Articles II and III of the Constitution. For example, the Act does not preclude the President from authorizing any process he chooses to resolve disputes between EPA and other Federal agencies over assessment of administrative penalties. DOJ noted that nothing in the Act prevented, and EPA intended to provide, a Federal agency with an opportunity to confer with the Administrator before any assessment is final.

Congress has addressed this issue of providing such an opportunity to confer under other environmental statutes. In the 1992 amendments to RCRA, Congress provided that "[n]o administrative order issued to such department, agency, or instrumentality shall become final until such...agency...has had the opportunity to confer with the Administrator." This concerned both penalty and compliance orders. 42 U.S.C. § 6961(b)(2). A similar provision was adopted in the 1996 amendments to the Safe Drinking Water Act concerning administrative penalties. 42 U.S.C. § 300j-6(b).

In response to the 1992 RCRA amendments, EPA revised its hearing procedures to provide the opportunity to confer. 40 C.F.R. § 22.37(g). This provided an opportunity to confer at the end of the administrative hearing process. EPA recently proposed to revise the Part 22 hearing procedures so that this same regulatory approach for an opportunity to confer would apply generally to administrative hearings under Part 22 involving Federal agencies. 63. Fed. Reg. 9464, 9476, 9491 (February 25, 1998).

B29(1)

CAA

B29(1)
1996 ed

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

July 16, 1997

MEMORANDUM FOR:

JONATHAN Z. CANNON
GENERAL COUNSEL
ENVIRONMENTAL PROTECTION AGENCY

JUDITH A. MILLER
GENERAL COUNSEL
DEPARTMENT OF DEFENSE

CAA

From: Dawn E. Johnsen
Acting Assistant Attorney General
Office of Legal Counsel

Re: Administrative Assessment of Civil Penalties
Against Federal Agencies Under the Clean Air Act

You have asked for our opinion resolving a dispute between the Environmental Protection Agency ("EPA") and the Department of Defense ("DOD") concerning whether the Clean Air Act ("the Act"), 42 U.S.C. §§ 7401-7671q (1994), authorizes EPA administratively to assess civil penalties against federal agencies for violations of the Act or its implementing regulations, and if so, whether this authority can be exercised consistent with the Constitution.[1] Applying the "clear statement" rule of statutory construction, which is applicable where a particular interpretation or application of an Act of Congress would raise separation of powers concerns, we conclude that the Act does provide EPA such authority. We also conclude that these separation of powers concerns do not bar EPA's exercise of this authority because it can be exercised consistent with the Constitution.

[1] See Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jonathan Z. Cannon, Assistant Administrator (General Counsel), EPA (Oct. 3, 1995), enclosing Memorandum on Assessment of Administrative Penalties Against Federal Facilities under the Clean Air Act (Sept. 11, 1995) ("EPA Memorandum"); Letter for Walter Dellinger from Judith A. Miller, General Counsel, DOD (Dec. 15, 1995), enclosing DOD Response Memorandum: Assessment of Administrative Penalties Against Executive Branch Agencies Under Section 113(d) of the Clean Air Act (Dec. 15, 1995) ("DOD Response"); Letter for Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from Jonathan Z. Cannon (Oct. 18, 1996), enclosing EPA Memorandum in Reply to Department of Defense Concerning Administrative Assessment of Civil Penalties Against Federal Facilities Under the Clean Air Act (Sept. 16, 1996) ("EPA Reply").

I.

A.

EPA's authority to initiate enforcement proceedings under the Clean Air Act is set forth in section 113 of the Act, entitled "Federal Enforcement," 42 U.S.C. § 7413 (1994). As summarized in section 113(a)(3),[2] section 113 provides that when EPA finds that "any person has violated, or is in violation of" the Act or its implementing regulations, EPA may issue an administrative penalty order or a compliance order, bring a civil action, or request the Attorney General to commence a criminal action. The questions presented to us are whether the Act authorizes EPA to issue an administrative penalty order to a federal agency under section 113(d), and if so, whether that authority can be exercised consistent with the Constitution.[3]

The Act authorizes EPA to issue two kinds of administrative penalty orders. Section 113(d)(1) authorizes EPA to "issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation" when EPA "finds that such person" has violated the Act or its implementing regulations. 42 U.S.C. § 7413(d)(1) (1994). Such a penalty may be assessed only after opportunity for a hearing on the record in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554, 556 (1994). Id. § 7413(d)(2).

In addition, section 113(d)(3) authorizes EPA to implement a field citation program under which "persons" who commit minor violations of the Act or the regulations may receive field citations assessing civil penalties not to exceed $5,000 per day. Id. § 7413(d)(3). Field citations may be issued without a hearing, but persons who have received citations may request a hearing. "Such hearing shall not be subject to [the APA], but shall provide a reasonable opportunity to be heard and to present evidence." Id. The Act provides for the two types of administrative penalty orders to be litigated in the courts in a variety of ways. Persons against whom either kind of penalty is imposed may seek judicial review in federal district court, and in any such proceeding the United States may seek an order requiring that the penalties be paid. Id. § 7413(d)(4). In addition, if a person fails to pay any penalty after receiving an order or assessment from EPA, "the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed." Id. § 7413(d)(5).

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[2] See 42 U.S.C. § 7413(a)(3) (1994) (where it finds a violation, EPA may "(A) issue an administrative penalty order in accordance with subsection (d) of this section, (B) issue an order requiring such person to comply with such requirement or prohibition, (C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or (D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section").

[3] We intend that our resolution of the questions concerning section 113(d) will also apply to the comparable authority provided to EPA with respect to mobile sources by sections 205(c) and 211(d)(1) of the Act, 42 U.S.C. §§ 7524(c), 7545(d)(1) (1994). See EPA Memorandum at 2-3.

B.

EPA presents a straightforward position that section 113(d) authorizes EPA to assess administrative penalties against federal agencies. That subsection authorizes EPA to assess penalties against "persons." Although the term "person" is not defined in section 113, which is the Act's federal enforcement section, the term is defined in the Act's general definitions section, section 302(e), which provides that the term includes "any agency, department, or instrumentality of the United States and any officer, agent or employee thereof." 42 U.S.C. § 7602(e) (1994). EPA concludes that "[s]ince federal facilities expressly fall within the Act's definition of person, [section 113(d)] unambiguously demonstrate[s] that EPA has authority to issue administrative penalties against federal facilities." EPA Memorandum at 3.

DOD argues in response that EPA's interpretation would raise significant separation of powers concerns, because it would authorize civil litigation proceedings between federal agencies, and therefore it can be adopted only if there is an express statement of congressional intent to provide such authority that is sufficient to meet the high standard applied by the courts and this Office with respect to statutory interpretation questions involving separation of powers concerns.[4] DOD argues that "[s]ection 113(d) fails to provide clear and express authority for EPA to impose administrative penalties against Executive Branch agencies." DOD Response at 4. DOD rejects EPA's argument that the inclusion of federal agencies in the Act's general definition of "person" constitutes "a sufficiently express statement to allow [EPA] to exercise enforcement authority against other Executive Branch agencies." Id. at 5.

II.

We agree with DOD that the interpretation of the Clean Air Act advanced by EPA -- that EPA is authorized to initiate enforcement proceedings under section 113(d) against federal agencies -- raises substantial separation of powers concerns, thus warranting application of the clear statement principle.

In 1994, this Office was asked whether the Department of Housing and Urban Development ("HUD") has the authority under the Fair Housing Act to initiate enforcement proceedings against other federal agencies. We concluded that such an interpretation of the Fair Housing Act would raise substantial separation of powers concerns "relat[ing] to both the President's authority under Article II of the Constitution to supervise and direct executive

[4] See DOD Response at 4 ("The assessment of administrative penalties against Executive Branch agencies by EPA is based on a statutory scheme that contemplates judicial intervention into what should be a purely Executive Branch function, thus raising significant constitutional separation of powers concerns, warranting the high standard of review."), citing Memorandum for James S. Gilliland, General Counsel, Department of Agriculture, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Enforcement Proceedings Against Executive Branch Agencies under the Fair Housing Act (May 17, 1994) ("Fair Housing Act Opinion").

branch agencies and the Article III limitation that the jurisdiction of the federal courts extends only to actual cases and controversies." Fair Housing Act Opinion, at 6. We stated that "[w]ith respect to the Article III issue, this Office has consistently said that 'lawsuits between two federal agencies are not generally justiciable,'" id. (quoting Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 131, 138 (1989) ("NRC Opinion")), and that "[w]ith respect to Article II, we have indicated that construing a statute to authorize an executive branch agency to obtain judicial resolution of a dispute with another executive branch agency implicates 'the President's authority under Article II of the Constitution to supervise his subordinates and resolve disputes among them . . . .'" Fair Housing Act Opinion, at 6-7 (quoting Review of Final Order in Alien Employer Sanctions Cases, 13 Op. O.L.C. 370, 371 (1989)).

We observed in our Fair Housing Act opinion that these separation of powers concerns

> are the essential backdrop for our analysis of whether the Fair Housing Act authorizes HUD to initiate enforcement proceedings against other executive branch agencies. Like the Supreme Court, we are "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."

Id. at 7 (quoting Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989)). Accordingly, we applied a clear statement rule and concluded that the statute did not provide HUD this authority:

> Applying the standard the Supreme Court has used when a particular interpretation or application of an Act of Congress would raise separation of powers or federalism concerns, we believe that because substantial separation of powers concerns would be raised by construing the Act to authorize HUD to initiate enforcement proceedings against other executive branch agencies, we cannot so construe the Act unless it contains an express statement that Congress intended HUD to have such authority. Because the Act does not contain such an express statement, we conclude that it does not grant HUD this authority.

Id. at 1.

Our insistence in the Fair Housing Act Opinion that the statute must "contain[] an express statement that Congress intended HUD to have such authority" was consistent with a long line of opinions of the Supreme Court and this Office that require a clear statement of congressional intent when separation of powers or federalism concerns would be raised. Many of these opinions are cited in an opinion that we issued subsequent to the Fair Housing Act Opinion. See Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Application of 28

U.S.C. § 458 to Presidential Appointments of Federal Judges (Dec. 18, 1995) (concluding that 28 U.S.C. § 458 (1994), which prohibits appointment or employment of relatives of judges in same court, does not apply to presidential appointments of judges). We stated in that opinion that "[g]iven the central position that the doctrines of federalism and separation of powers occupy in the Constitution's design, [the clear statement rule] serves to 'assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters' of the balance of power between the three branches of the federal government, in the context of separation of powers, and between the federal and state governments, in the context of federalism." Id. at 4 (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)). See also Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); United States v. Bass, 404 U.S. 336, 349 (1971).

III.

Based on the foregoing discussion, we must find a clear statement of congressional intent before we can conclude that the Clean Air Act authorizes EPA to initiate enforcement proceedings against other executive branch agencies. As discussed below, we believe that the statutory text provides a very strong basis for finding a clear statement of such intent and that this conclusion is fully supported by the legislative history of the Act, particularly the 1977 amendment of the definition of "person" to include federal agencies.

A straightforward review of the relevant provisions of the Clean Air Act's statutory text supports EPA's position that the statute gives EPA authority to assess civil penalties against federal agencies administratively. EPA's authority under section 113(d) is available with respect to "persons" who violate the Act.[5] The term "person" is defined in section 302(e): "When used in [the Clean Air Act] . . . [t]he term 'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e) (1994) (emphasis added).

EPA rests its argument on the plain meaning of these two provisions. EPA does so with good justification, because read together sections 113(d) and 302(e) expressly provide that EPA may issue administrative penalty assessments against federal agencies. We have also reviewed the evolution of the relevant provisions of the Clean Air Act as reflected by various amendments to the Act over the years. As discussed below, that history

[5] Section 113(d)(1) provides for assessment of civil penalties against "persons": "The Administrator may issue an administrative order against any person . . . ." 42 U.S.C. § 7413(d)(1) (1994). Section 113(d)(3) achieves the same result, but uses indirect language: "The Administrator may implement . . . a field citation program . . . [under] which field citations . . . may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may . . . elect to pay the penalty assessment or to request a hearing on the field citation." Id. § 7413(d)(3). The plain language of these provisions refutes DOD's position that this language "cannot fairly be read to constitute an affirmative grant of authority to issue a field citation against 'any person.'" DOD Response at 5.

fully supports the conclusion that Congress contemplated EPA enforcement against other federal agencies.

The administrative enforcement provisions set forth in section 113(d) were enacted as part of the Clean Air Act Amendments of 1990 ("the 1990 Amendments"), Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2677-79. We have reviewed the legislative history of the 1990 Amendments and have found no discussion of the application of those provisions to federal agencies. We have not limited our legislative history review to the 1990 Amendments, however, because the administrative enforcement authorities provided by those amendments merely supplemented the enforcement authorities EPA already had with respect to "persons" under the other provisions of section 113. Thus, Congress's intent in providing EPA those other authorities is controlling.

EPA's other enforcement authorities under section 113 originated with the Clean Air Act Amendments of 1970 ("the 1970 Amendments"), Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1686-87. As with the current version of section 113, the 1970 version authorized federal enforcement against "persons." However, at that time the Act's definition of "person" did not include agencies of the federal government.[6] The 1970 Amendments also revised section 118 of the Act to make federal agencies subject to the substantive requirements of the Act: "[Federal agencies] shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." Id. § 5, 84 Stat. at 1689.[7] Thus, the 1970 version of section 118 referred only to federal agencies complying with substantive requirements; it did not contain any language subjecting federal agencies to enforcement authority.

In 1977, the definition of "person" was expanded to include "any agency, department, or instrumentality of the United States." Clean Air Act Amendments of 1977 ("the 1977 Amendments"), Pub. L. No. 95-95, § 301(b), 91 Stat. 685, 770. This amendment was contained in the House-passed version of the 1977 Amendments, which was accepted by the conference committee. See H.R. 6161, § 113(d), 95th Cong., 1st Sess. (1977) ("House Bill"); H.R. Conf. Rep. No. 95-564, at 137, 172 (1977), reprinted in 1977 U.S.C.C.A.N. 1502, 1517-18, 1552-53. The committee report accompanying the House bill expressly

[6] "Person" was limited to "an individual, corporation, partnership, association, State, municipality, and political subdivision of a State." Pub. L. No. 88-206, § 9(e), 77 Stat. 392, 400 (1963).

[7] The previous version of section 118, enacted in 1959, merely requested federal agencies to "cooperate" with air pollution enforcement control agencies. See Act of Sept. 22, 1959 ("the 1959 Amendments"), Pub. L. No. 86-365, § 2, 73 Stat. 646 ("It is hereby declared to be the intent of the Congress that any Federal department or agency . . . shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare, and with any interstate agency or any State or local government air pollution control agency in preventing or controlling the pollution of the air . . . .").

stated that the specific purpose of the expansion of the definition of "person" was to make it clear that section 113 enforcement was available with respect to federal agencies:

> Finally, in defining the term "person" for the purpose of section 113 of the act to include Federal agencies, departments, instrumentalities, officers, agents, or employees, the committee is expressing its unambiguous intent that the enforcement authorities of section 113 may be used to insure compliance and/or to impose sanctions against any Federal violator of the act.

H.R. Rep. No. 95-294, at 200 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1279 ("House Report").[8]

In sum, the expansion of the definition of "person" to include federal agencies, together with the statement in the House Report that the definitional change was for the express purpose of subjecting federal agencies to EPA enforcement under section 113, leave no room for doubt that Congress clearly indicated in 1977 its intent to authorize EPA to use its section 113 enforcement authorities against federal agencies.

IV.

EPA takes the position that its authority under the Clean Air Act to assess civil penalties against federal agencies administratively can be exercised consistent with Articles II and III of the Constitution. EPA bases its position on the view that the Act

> provides sufficient discretion to the affected parties so that complete resolution of the dispute may occur within the Executive Branch, up to and including referral to the President of any issues that are not otherwise resolved, and the President is not deprived of his opportunity to review the matter in dispute.

EPA Memorandum at 1. We agree with EPA's position. We will discuss the Article II and Article III issues separately.

A.

EPA asserts that it can exercise its administrative enforcement authority under the Act in a way that is consistent with the President's supervisory authority under Article II. EPA emphasizes that the Act

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[8] The quotation from the House Report indicates that the House Bill "defin[ed] the term 'person' for the purpose of section 113." The House Bill accomplished that purpose by amending the Act's general definition of "person," not by creating a special definition applicable only to section 113. See H.R. 6161, supra, § 113(d).

> provides a federal facility with the right to a hearing before final assessment of a penalty, and therefore . . . provides federal facilities with sufficient opportunity to raise any dispute to the President where considered appropriate. Nothing in the Act would prevent a federal facility from exercising this opportunity to raise any dispute to the President.

Id. at 5 (footnote omitted). Nor are federal agencies limited to using the hearing process to raise a dispute to the appropriate level within the executive branch: federal agencies will have the opportunity to consult with the EPA Administrator before any assessment is final, see id., and the Attorney General could seek to resolve the matter if either EPA or the respondent federal agency sought to litigate the matter, see id. at 6.

The critical point for constitutional purposes is that the Act does not preclude the President from authorizing any process he chooses to resolve disputes between EPA and other federal agencies regarding the assessment of administrative penalties. "[I]t is not inconsistent with the Constitution for an executive agency to impose a penalty on another executive agency pursuant to its statutory authority so long as the President is not deprived of his opportunity to review the matter." NRC Opinion, 13 Op. O.L.C. at 136-37.

DOD attempts to distinguish our NRC Opinion, which concluded that the administrative enforcement authority of the Nuclear Regulatory Commission ("NRC") under the Atomic Energy Act, see 42 U.S.C. § 2282 (1994), could be exercised against federal agencies consistent with Article II. DOD suggests that the statutory regimes are different, arguing principally that they differ with respect to the Attorney General's authority to resolve a dispute. It notes that the Atomic Energy Act contains an express authorization to the Attorney General, in circumstances where the NRC has requested that the Attorney General institute a civil action to collect a penalty, "to compromise, mitigate, or remit such civil penalties." 42 U.S.C. § 2282(c) (1994). See DOD Memorandum at 10-11. DOD then asserts that the Clean Air Act is different because it "limits the discretion of the Attorney General to compromise, mitigate or remit a penalty assessment." Id. DOD apparently bases that assertion on the language in section 113(d)(5) stating that in any civil action "the validity, amount, and appropriateness of such order or assessment shall not be subject to review." 42 U.S.C. § 7413(d)(5) (1994).

DOD's assertion that the Clean Air Act limits the Attorney General's discretion is incorrect. Section 113(d)(5) acts as a limitation only on the authority of the courts in any action that is brought before the courts. It is not a limitation on the Attorney General, acting under Executive Order 12146 or any litigation review process, or -- more to the point -- the President acting through whatever executive branch process he may authorize. The absence of any limitation on the President's discretion is the dispositive factor for constitutional purposes, and in that respect the two statutory regimes are the same. Neither statute

precludes resolution within the executive branch, including resolution by the President, of disputes between the enforcement agency and other federal agencies.[9]

B.

EPA acknowledges that the civil action provisions contained in sections 113(d)(4) and 113(d)(5) of the Act, see 42 U.S.C. §§ 7413(d)(4), 7413(d)(5) (1994), "raise the possibility of one executive branch agency suing another in federal court over the administrative penalty," EPA Memorandum at 9, but it takes the position that "[t]he constitutional concerns . . . could be avoided by an interpretation that the general reference to review in federal district court reasonably means only judicial review that was otherwise constitutional." Id. In particular, EPA emphasizes that "nothing in the Clean Air Act mandates that two executive branch agencies end up in federal court. There is at most an opportunity for an agency to seek judicial review, and a requirement that EPA 'request' that the Attorney General file a collection action." Id. EPA concludes that "the mere possibility that an interagency lawsuit might result does not invalidate an agency's ability to assess civil penalties against another executive branch agency, where the Attorney General has adequate discretion to control the filing of such a lawsuit." Id. at 10.

As stated in Section II of this opinion, "this Office has consistently said that 'lawsuits between two federal agencies are not generally justiciable.'" Fair Housing Act Opinion, at 6 (quoting NRC Opinion, 13 Op. O.L.C. at 138). "We have reasoned that federal courts may adjudicate only actual cases and controversies, that a lawsuit involving the same person as both plaintiff and defendant does not constitute an actual controversy, and that this principle applies to suits between two agencies of the executive branch." Id. We agree with EPA, however, that this Article III barrier to use of the civil action remedies of section 113(d) is not a barrier to EPA's exercise of its administrative enforcement authority under the Act. Put another way, we agree that the administrative authority can be exercised consistent with Article III. The Act does not require that civil actions be brought in the event of a dispute of an assessment by EPA; it merely authorizes the bringing of such actions.

Thus, as is the case with the comparable enforcement provisions contained in the Atomic Energy Act, which we concluded in our NRC opinion could be applied consistent with Article III, "this constitutional issue need not arise, because the framework of the Act

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[9] Nor does the Clean Air Act's citizen suit provision operate to preclude resolution within the executive branch. Section 304 provides that "any person may commence a civil action on his own behalf . . . against any person (including . . . the United States . . .) who is alleged . . . to be in violation of . . . (B) an order issued by [EPA] . . . with respect to [an emission] standard or limitation" under the Act. 42 U.S.C. § 7604(a)(1) (1994). The filing of a citizen suit during the pendency of a dispute between EPA and a federal agency would not prevent the President from directing EPA to suspend, withdraw or modify the order it had issued to the agency. Such direction could be provided specifically in individual cases or generally by operation of a standing directive setting forth procedures for resolution of enforcement proceedings under section 113.

clearly permits [a] dispute over civil penalties to be resolved within the executive branch, and without recourse to the judiciary." NRC Opinion, 13 Op. O.L.C. at 141.[10] To the extent that the civil action provisions of the two statutes are parallel, in that the Attorney General rather than the enforcement agency has control over whether to bring the civil action, our analysis in the NRC Opinion is directly controlling here:

> It is therefore clear that the Attorney General may exercise [her] discretion to ensure that no lawsuits are filed by [EPA] against other agencies of the executive branch. If the Attorney General and the President determine that no civil penalties should be collected, the Attorney General may simply refrain from bringing a lawsuit. If the Attorney General determines that certain civil penalties are appropriate, however, the Attorney General would still not bring a lawsuit because of the constitutional problems noted above. Rather, procedures internal to the executive branch are adequate to resolve the dispute through the determination that [the federal agency responsible for the federal facility] is liable.

Id. at 143.

The only difference between the two statutes that is relevant to the Article III question is that section 113(d)(4) of the Clean Air Act would also authorize the agency responsible for the federal facility to initiate a civil action to contest an EPA administrative order. See 42 U.S.C. § 7413(d)(4) (1994). The difference is not significant for constitutional purposes, however, because, as we have explained, the Act is permissive only and does not require any federal agency to bring a civil action. Moreover, the Attorney General and the President possess the authority to forestall litigation between executive branch entities. The Attorney General is responsible for conducting litigation on behalf of most federal agencies and therefore can ensure that no civil action is filed by those agencies against another federal entity. We would expect that the relatively few federal agencies that have relevant independent litigating authority similarly would decline to file civil actions, consistent with the conclusions set forth in this memorandum. In any event, the President could direct the agency head not to bring an action or to withdraw any action that might be filed.

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[10] See also id. at 143 ("We thus conclude that a lawsuit between two agencies of the executive branch would involve substantial constitutional problems, but that the statutory scheme permits resolution of the interagency dispute within the executive branch.").