810R86101

NATIONAL GUIDANCE

FOR

OVERSIGHT OF NPDES PROGRAMS

FY 1986

BACKGROUND

The Clean Water Act (CWA) authorizes EPA and approved States to administer the National Pollutant Discharge Elimination System (NPDES) Program, which is the basic regulatory mechanism for ensuring that dischargers meet the requirements of the CWA. There are currently 37 approved State NPDES programs, 21 of which also are approved to administer the pretreatment program. EPA retains the lead responsibility in the balance of the States, but shares many of the implementation functions of the NPDES program in a partnership arrangement with State agencies.

EPA has continuing overall responsibility for implementation or oversight of the NPDES program in all States--approved or not approved--in order to promote the achievement of national program goals and objectives, to ensure adherence to Federal and State statutory and regulatory requirements implementing the CWA, and to maintain reasonable national consistency. This guidance provides a set of criteria for evaluating and overseeing NPDES programs; the criteria also provide a basis for Regions and States to negotiate annual agreements and/or work plans. The document:

- Defines the major elements of a sound NPDES program;

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- Outlines high priority achievements for FY 1986;
- Clarifies how the Region and States should translate specific program goals and performance expectations into annual grant agreements and/or work plans; and
- Defines the respective roles and responsibilities of the EPA Regions and States in carrying out the NPDES program, as well as areas where there is a need for further definition of roles in the individual State agreements.

PURPOSE AND SCOPE

This guidance is a program-specific document for use in FY 1986. It must be used in conjunction with the "Policy Framework for State/Federal Enforcement Agreements" (issued June 24, 1984) and the May 20, 1985 memorandum from the Deputy Administrator, "Guidance for the FY 1986 State/EPA Enforcement Agreement Process". These documents contain the Agency's guidelines for all enforcement programs. The "Policy Framework" covers both the process and the substance of the Regional/State agreements, and, unless otherwise specified in this document, the national policy will apply.

This guidance establishes criteria for the NPDES program including permit issuance and reissuance, compliance monitoring, enforcement and pretreatment. It is intended to be used as a framework, with the Regions and the States supplying the details for their individual agreements and/or work plans based on current Federal regulations, national policy and guidance documents, and State priorities. In reviewing, and, where necessary, updating oversight agreements, the Regions and States should also use the

FY 1986-1987 Agency Operating Guidance, the FY 1986 Strategic Planning and Management System, and the FY 1986 Office of Water Evaluation Guide, which set forth national priorities and performance expectations. To the extent possible, all requirements for plans and strategies cited in this guidance should be consolidated into existing work plans and/or State EPA agreements.

Fully-functioning NPDES programs are required to permit all dischargers, both major and minor, and to conduct appropriate compliance assessment and enforcement activities for all permittees. EPA and many approved States have a substantial backlog of expired municipal and industrial permits and permits which need to incorporate new requirements for controlling toxic discharges. Consequently, this guidance emphasizes completing issuance and reissuance of major industrial and major municipal permits in FY 1986 and then reissuing timely, high quality permits as they expire; in FY 1986, administering agencies will also begin to eliminate the backlog of expired permits for environmentally significant minors. To aid permitting of minors, States may wish to seek authority for general permit issuance. The guidance also places priority on rapid response to instances of significant noncompliance, especially by major dischargers. As resources allow, administering agencies[1] should also address minor dischargers of concern and other instances of noncompliance. In the longer-term, the concepts in this guidance

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1. The term "administering agency" refers to EPA Regions and approved States that administer the NPDES/pretreatment programs.

Finally, in response to PIRT, this guidance addresses oversight of administering agency pretreatment programs.[2] The coverage in the present guidance focuses on pretreatment program approvals (State and local), modification of NPDES permits to incorporate local program requirements, implementation of approved programs, establishment of general oversight of approved State programs including oversight of compliance monitoring, and enforcement response to violations by POTWs of pretreatment requirements in NPDES permits that appear on the Quarterly Noncompliance Report (QNCR), as well as to violations by industrial users.

ELEMENTS AND CRITERIA FOR THE NPDES OVERSIGHT PROGRAM

There are three operational elements of the NPDES program that should be addressed in an effective Regional/State agreement and oversight program: permitting, compliance monitoring, and enforcement response. There is also a need to ensure the ongoing integrity of State NPDES programs, as well as their ability to achieve the goals and objectives of the CWA. One aspect of this concern is adequate data management in the NPDES program.

The Agency has developed a general set of oversight criteria for all compliance and enforcement programs.[3] This program-specific

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2. The Pretreatment Implementation Review Task Force, which advised the EPA Administrator on needed improvements in the pretreatment program, has recommended that EPA better define the roles and responsibilities of Federal, State and local governments. [Guidance on pretreatment program oversight is included in this document and additional guidance on program implementation is under development.]

3. See "Policy Framework for State/EPA Enforcement Agreements," June 24, 1984 and the Deputy Administrator's "Guidance for the FY 1986 State/EPA Enforcement 'Agreements' Process," May 20, 1985.

document provides guidance on how to use these criteria, as well as additional criteria related to permit issuance and the pretreatment program, to evaluate and oversee the operational elements of the NPDES program and to negotiate individual agreements and/or work plans with each State. Such agreements should take into account the unique circumstances, legal authorities and resources of each State NPDES program.

I. Permitting

The CWA (§402) calls for EPA or approved States to issue permits for the discharge of any pollutant or combination of pollutants. These permits are enforceable documents that contain specific discharge limitations, as well as conditions on data and information collection, reporting, and other requirements that the administering agency deems appropriate. The overall integrity of the NPDES program is, therefore, inextricably linked to the quality and timeliness of the permits that are issued by EPA and the NPDES States.

Evaluation and oversight of permit programs should be based on the following criteria:

- Clear identification of the regulated community as evidenced by the existence and use of:
  - -- Established procedures for maintaining a complete, accurate, and up-to-date automated data system that includes all sources that are covered by or have applied for NPDES permits: The administering agency should maintain a current inventory of all permit holders and applicants. States should enter current permit data

into the Permit Compliance System (PCS, the automated NPDES data base) in a timely manner consistent with the procedures in the Enforcement Management System (EMS). Where a State is not a regular user of PCS and does not have an automated system that is compatible with PCS, it should supply the data to the Region in a form that facilitates EPA's entry of the data into PCS. The administering agency should also maintain up-to-date files on individual permittees, and should have a process for identifying dischargers that are required to apply for but have not applied for permits and for following through as necessary in such cases.

-- Permit data that are complete, accurate and up-to-date: The Region is responsible for conducting periodic audits to verify that each approved State is maintaining current permit files and data in PCS consistent with its prescribed procedures; the Region should also conduct periodic audits in cases where an unapproved State is writing draft permits in a partnership arrangement with the Region.

- **Development and timely issuance of high-quality permits and permit modifications as evidenced by the existence and use of:**

  -- An up-to-date permit issuance list and strategy by State that guides permit issuance/modification consistent with national priorities and assures that backlogs do not develop: It is the responsibility of the adminis-

tering agency to develop a strategy and an annual permit issuance list of priority permits. In FY 1986, the priority list should include, as a minimum, all major industrial and major municipal permits, including major Federal facilities, to be issued or modified to reflect new effluent limits. Both the strategy and the list should be designed to eliminate any existing backlog and to ensure that new backlogs do not develop. In addition to major permits, the strategy should also address any substantial backlog of minor permits, especially those assigned a high priority due to water quality impacts and State and/or Federal funding (i.e., P.L. 92-500 minor facilities and minor Federal facilities that have the potential for significant water quality impacts). The list should specify the priority permits to be issued/modified during the fiscal year (by name and type) consistent with national and State permitting priorities and the FY 1986-1987 Operating Guidance. The list may be modified periodically to ensure that it reflects changing conditions throughout the year. At the time the list is developed, the Region and State should agree on procedures for modifying the list, as well as the role of EPA and the State in the permitting process.

-- Permits that contain appropriate, clear and enforceable requirements: The administering agency has the responsibility to ensure that individual permits are

consistent with the requirements in the regulations (NPDES, Secondary Treatment, and effluent guideline regulations), as well as current national policy, and that permits contain clear and enforceable provisions. Where the State is the administering agency, the Region should identify the specific State permits it plans to review prior to issuance/modification in accordance with applicable Federal regulations, and should target those specific types of priority permits that require early coordination prior to draft permit issuance. The State should submit copies of draft and final permits consistent with the NPDES regulations (40 CFR §123), and the Region should conduct periodic audits of permit quality. Where EPA is the permit issuing authority, the Region should coordinate with the State to assure timely review and certification of permits in accordance with the CWA (§401).

° <u>Approval, implementation and overview of high-quality pretreatment programs as evidenced by the existence and use of</u>:

-- <u>A current strategy and procedures for completing approval of remaining and newly identified pretreatment programs</u>: The agency administering the pretreatment program (i.e., approved States or EPA Regions) is responsible for implementing its FY 1985 written strategy for the review and approval of required local pretreatment programs and to identify, complete review,

approve and disapprove as appropriate, any remaining required local pretreatment programs consistent with the regulations and national policy and guidance. The procedures should address the modification of POTW permits to: 1) incorporate a schedule for local program development where a POTW is newly identified as needing a pretreatment program; and 2) incorporate approved local programs and related conditions, including reporting.

-- A current strategy and procedures for overviewing local pretreatment programs: The agency administering the pretreatment program is responsible for effective overview of approved local programs. The administering agency should have a current overview strategy and procedures for: 1) evaluation of local limits to assure that local limits are revised as needed to protect treatment works, prevent interference with sludge disposal, and protect receiving water quality (including toxic organics, metals and conventional pollutants); 2) assessing the adequacy of industrial waste surveys, local legal authorities (including interjurisdictional agreements), local implementation mechanisms (e.g., permits or contracts) and compliance monitoring procedures and practices; and 3) ensuring that control authorities are conducting timely and appropriate reviews of baseline monitoring reports (BMRs). The administering agency's overview procedures should include provisions for reviewing POTW reports and conducting periodic audits of control authorities.

-- A current strategy[4] and procedures for direct implementation where needed: The agency administering the pretreatment program should have a current strategy and implementation procedures for situations where it directly implements a pretreatment program when a municipality has failed to complete an approvable program. Additionally, where there are categorical industries discharging to POTWs that are not required to develop local pretreatment programs, a plan for identifying and regulating these dischargers should be included in the strategy. Finally, the strategy should address how the administering agency will implement all other pretreatment authorities reserved to it. For example, in those few States where the State is approved to implement pretreatment and regulates all of the affected dischargers, the State must have a plan for permitting indirect dischargers, establishing local limits, maintaining an adequate inventory, and otherwise assuring effective pretreatment.

-- Review/audit procedures that are effective in overviewing States that are directly implementing part or all of the pretreatment program: Where States regulate all or some of the affected indirect dischargers, the Region will evaluate the State's performance in permitting

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4. The various pretreatment strategies referred to in this subelemen may be combined into one overall pretreatment strategy.

indirect dischargers, establishing local limits, maintaining an adequate inventory, reviewing and responding to BMRs and otherwise assuring effective pretreatment.

II. Compliance Monitoring

The EPA Regions and NPDES States must maintain records and develop procedures for conducting accurate and reliable review and evaluation of permittee self-monitoring reports, as well as inspection of permittees (including industrial users that discharge to POTWs with approved pretreatment programs wherever resources allow); the administering agency should assume primary responsibility for these activities. These activities are essential to maintaining the overall integrity of the NPDES permit program and for identifying instances of noncompliance so that the administering agency can initiate appropriate and timely action as needed. The administering agency should also have an established compliance monitoring program that incorporates the requirements of the NPDES regulations, as well as the appropriate principles and supporting attachments of the most current Enforcement Management System (EMS).

Evaluation and oversight of compliance monitoring programs should be based on the following criteria:

- Timely receipt and review of accurate and complete self-monitoring reports, and maintenance of complete and accurate records as evidenced by the existence and use of:
  - -- Established procedures and time frames for review of DMRs, and maintenance of complete and accurate data:

The administering agency should receive and review all Discharge Monitoring Reports (DMRs) and POTW pretreatment program implementation reports for accuracy and completeness, and should assure that permittees are complying with their permit requirements. The administering agency should enter the data for major permittees into PCS within 30 days of receipt of the DMR. Where a State is not a regular user of PCS, it should enter the data into its own automated system and transfer the data into PCS, or it should provide the data to the Region in a form that facilitates EPA's entry into PCS (e.g., on preprinted DMR forms, conversion tape, etc.). Response to nonreceipt or unacceptable DMRs should be consistent with the time frames in the regulation and the EMS; failure to submit or unacceptable DMRs within 30 days of the required date are instances of significant noncompliance for major permittees.

-- Data that are accurate, complete and up-to-date: The Region should verify that each NPDES State is exercising its responsibilities properly through routine reviews of a random sample of DMRs and PCS entries during periodic audits of the State program.

- Maintenance of a reporting system that contains accurate, up-to-date, accessible information on current compliance status:

  -- Established procedures and time frames for submittal of QNCRs and maintenance of data: The administering agency

must prepare and submit its Quarterly Noncompliance Reports (QNCRs) consistent with the requirements and time frames in the NPDES regulation and national guidance. To the extent PCS allows, the administering agency should prepare the QNCR automatically by using DMR data and other data that are entered into PCS.

-- QNCRs and data systems that are accurate, complete, and up-to-date: The Region is responsible for verifying the accuracy and completeness of both the QNCRs and the data in PCS. Where a State is not a regular user of the national data system (PCS), the Region should actively encourage full participation at the earliest possible date, including giving priority in assistance and program grant funding to States that are direct users of PCS.

° Timely conduct of appropriate and effective compliance inspections as evidenced by the existence and use of:

-- Established procedures within the annual plan for conducting compliance inspections: The administering agency should have established procedures for conducting routine and special inspections as part of its annual Compliance Inspection Plan. The plan and procedures should be consistent with the EPA Compliance Inspection Manual and the NPDES Compliance Inspection Strategy and Guidance, and should contain clear criteria for selecting candidates for the appropriate mix of routine and special compliance inspections. The procedures

should also outline the basic requirements and time frames for completing reports on inspection findings and for entering the data into PCS wherever possible. Where the State is not a regular user of PCS, it should enter the data into its own automated system and transfer the data into PCS, or it should provide the data to the Region in a form that facilitates EPA's entry into PCS (e.g., EPA Form 3560-3 or State equivalent form that contains the same data elements as Form 3560-3). The Region and State should agree in advance to establish quarterly a list of facilities that are to be inspected (including joint and independent EPA and State inspections and to assess the status of the annual plan at established intervals throughout the year. The Region should also agree to provide prior notice to the State before conducting joint or independent inspections, and to supply the State with at least semi-annual reports of its findings (mid-year and end-of-year); the State should be apprised of major problems as soon as they are discovered.

-- <u>Inspections that are conducted in an effective manner</u>: The administering agency is responsible for conducting sampling and analysis in the prescribed manner, completing the required reports on findings within established time frames, and for ensuring the entry of the data into PCS. The Region should participate in an appropriate number of joint inspections with the State and maintain an independent inspections program in order to carry out its enforcement and overview responsibilitie

and should conduct periodic random audits of inspection reports and case files. The administering agency is also responsible for taking proper action in cases where permittees fail to respond to DMR Quality Assurance (QA) requirements, and for initiating appropriate follow-up to DMR QA test results. NPDES States should specifically identify the need for the Region's assistance or support from EPA contractors, as well as the type and level of assistance required.

° Effective integration of pretreatment compliance monitoring activities into the established NPDES program as evidenced by the existence and use of:

-- Established procedures and time frames for effective monitoring of local pretreatment programs. The administering agency should have procedures and time frames for: reviewing monitoring reports, including annual reports submitted by POTWs and semi-annual reports submitted by categorical users in areas without local programs; establishing and maintaining a complete inventory of POTWs with pretreatment programs, as well as a plan for completing an inventory of all categorical users and significant industrial users; and conducting annual inspections of POTWs with approved programs, as well as industrial users to the extent resources allow.

-- Routine monitoring that is conducted in an effective manner: The administering agency is responsible for

monitoring local pretreatment programs consistent with established procedures and time frames, including: review of POTW and industrial reports to assure compliance with local limits and categorical standards; updating of inventories; annual inspection of all POTWs with approved programs, and to the extent resources allow, inspection of industrial users. (To make effective use of resources, annual POTW pretreatment inspections should be part of the normal NPDES inspection of POTWs and may be phased in during FY 1986.)

III. Enforcement Response

The CWA (§309) requires EPA or NPDES States to respond to NPDES permit violations by initiating the appropriate enforcement action(s); the administering agency should assume primary responsibility for these activities. Enforcement response involves a series of actions, starting with the initial reaction to the identification of a violation and ending with the discharger's return to full compliance and close-out of the action.

NPDES approved States should have compliance and enforcement procedures that are consistent with the Enforcement Management System (EMS). Regions should follow the procedures established in that system. These procedures include screening and assessing the significance of the initial violation, translating compliance information into the appropriate enforcement response in a timely manner, and entering instances of noncompliance into the permittee's permanent record.

Evaluation and oversight of enforcement programs should be based on the following criteria:

- Timely evaluation and appropriate initial response to identified violations as evidenced by the existence and use of:

  -- Established pre-enforcement procedures that set forth criteria for evaluation and appropriate initial responses to identified violations: The administering agency should have current pre-enforcement procedures that are consistent with the principles in the EMS. The procedures should include: a violations review process and criteria for screening DMRs to determine the significance of the violation; procedures and time frames for applying appropriate initial response options to identified violations; and procedures and time frames for maintaining a chronological summary of all violations.

  -- Enforcement responses that are timely and appropriate: The administering agency should: screen all DMRs from permittees to determine the level and frequency of any violation, and specifically evaluate instances of non-compliance by major permittees and P.L. 92-500 minor permittees[5] within an average of 30 days from the identification of a violation; determine the appropriate response; and document any action taken/ not taken (including the technical reason). The date of identification of the violation is the point at

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5. Other minor permittees should be evaluated as resources permit.

which the organization responsible for compliance/ enforcement learns of the violation; an appropriate response is one that results in the violator returning to compliance as expeditiously as possible. The Region should verify the timeliness and appropriateness of a State's DMR evaluation and its initial responses through periodic audits.

- Timely and appropriate enforcement response, follow-up and escalation until compliance is obtained as evidenced by the the existence and use of:
  - -- Established enforcement response procedures that are appropriate and timely: The administering agency should have current enforcement response procedures that are consistent with the EMS, as well as an up-to-date strategy for addressing instances of significant noncompliance consistent with national and State priorities. The procedures should set forth: an analytical process for determining the appropriate level of action for specific categories of violation; procedures for preparing and maintaining accurate and complete documentation that can be used in future formal enforcement actions; and time frames for escalating enforcement responses where the noncompliance has not been resolved. Additionally, the administering agency should have a plan for placing all noncomplying municipalities on enforceable schedules to achieve compliance by the July 1, 1988 statutory deadline.

-- Enforcement actions (Administrative Orders and judicial actions) that are initiated in a timely fashion and contain clear and enforceable requirements: The administering agency should be able to demonstrate that its enforcement procedures result in: appropriate initial and follow-up enforcement actions that are applied in a uniform, consistent and timely manner; formal enforcement actions (as defined by State agreements) that clearly define what the permittee is expected to do by a reasonable date certain and the assessment of a civil penalty, when appropriate, and an amount appropriate to the violation; and compilation of complete and accurate permanent records that can be used in future formal enforcement actions. In the case of major permittees, by the time a permittee is identified on the QNCR and determined to be in significant noncompliance based on the definition to be provided in Guidance, the administering agency is expected to have already initiated enforcement action to achieve compliance. Prior to a permittee appearing on the subsequent QNCR for the same instance of significant noncompliance, the permittee should either be in compliance or the administering agency should have taken formal enforcement action (generally within 60 days of the first QNCR) to achieve final compliance.[6] In the rare circumstances where

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6. A formal enforcement action is defined as one that requires actions to achieve compliance, specifies a timetable, contains consequences for noncompliance that are independently enforceable without having to prove the original violation, and subjects the person to adverse legal consequences for noncompliance (see Policy Framework of June 24, 1984, for details). Specific action qualifying as appropriate will be defined in State/EPA enforcemen agreements.

formal enforcement action is not taken, the administering agency is expected to have a written record that clearly justifies why the alternative action (i.e. informal enforcement action or permit modification) was more appropriate. The Region should verify the timeliness and appropriateness of a State's enforcement actions through periodic audits.

- Effective integration of pretreatment enforcement activities into the established NPDES program as evidenced by the existence and use of:
  - -- Established enforcement response procedures that are appropriate and timely: The administering agency should have procedures and timeframes for initiating appropriate enforcement action where POTWs: fail to meet milestones in enforceable schedules for submitti approvable pretreatment programs; have violations of NPDES effluent limitations; fail to implement approved pretreatment programs; and fail to submit or submit delinquent annual reports. The administerin agency should also have procedures for evaluating whether POTWs are initiating appropriate enforcement responses to significant violations by IUs; and where POTWs are not the primary control authorities, administering agencies are directly responsible for having these procedures in place for categorical and non-categorical industrial users.

-- Enforcement actions that are initiated in a timely manner: The administering agency is expected to initiate enforcement response against permittees with pretreatment programs that are listed on the QNCR and are in significant noncompliance consistent with the criteria and timeframes for the NPDES program (page 28); this applies to: failure to meet milestones in enforceable schedules for submitting required local pretreatment programs and for implementing that program; violations of effluent limits; and delinquent POTW pretreatment reports, including removal credits reports. In addition, administering agencies should conduct inspections of local pretreatment programs to ensure that POTWs comply with their approved program procedures for taking action against significant violations by IUs. A significant violation is one that: remains uncorrected 45 days after notification of noncompliance which is part of a pattern of noncompliance over a twelve month period; which involves a failure to accurately report noncompliance; or which resulted in the POTW exercising its emergency authority (40 CFR 403.8(f)(2)(vii)). At a minimum, the POTW should provide for annual public notification of such violations in the largest daily newspaper published in the municipality in which the POTW is located. Also, where POTWs are not the primary control authorities, administering agencies should

initiate appropriate enforcement actions in accordance with their procedures against industrial users who are violating categorical standards.

- Timely and appropriate initial response and enforcement follow-up by EPA Regions to violations by Federal facilities as evidenced by the existence and use of:
  - -- Established procedures that include the appropriate use of the compliance agreement process in lieu of administrative orders: The EPA Regions should use the compliance agreement process in lieu of an administrative order as the initial approach to resolving noncompliance with NPDES permit conditions by a Federal facility.[7] Where such an approach does not result in expeditious compliance, the Region should have procedures for escalating the response which may include issuance of a Federal administrative order and, thereafter, according to the document: "Resolution of Compliance Problems at Federal Facilities" (Yellow Book, pg.15-17).[8] Where a State has been approved to administer the Federal facility portion of the NPDES program, the basic enforcement responsibility rests with the State, which should have its own established terms and procedures for dealing with noncompliance by Federal facilities.

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7. A Federal facilities compliance agreement counts as a formal enforcement action in the SPMS system as noted in the March, 1985, Guide to the Office of Water Accountability System and Mid-Year Evaluations (pg.B-20).

8. An Agency Workgroup has been formed to revise the "Yellow Book" and is scheduled to have revisions completed by the end of calendar 1985.

-- Compliance agreements that are concluded in a timely manner and result in expeditious resolution of the noncompliance: The Region should be able to demonstrate that it uses the established compliance agreement process in a manner that resolves noncompliance expeditiously. Where agreement cannot be reached in a timely manner or does not result in expeditious compliance, the Region should be able to demonstrate that it escalates its response in a timely and effective manner consistent with its established procedures. State response to instances of noncompliance by Federal facilities should be evaluated based on the terms and procedures set out in the State/EPA enforcement agreement.

OVERALL PROGRAM AUTHORITIES AND MANAGEMENT

Under §§402(c)(2) and 304(i)(2) of the CWA, EPA has the obligation to ensure that approved NPDES State programs continue to meet minimum statutory and regulatory provisions in terms of legal authority, procedures, funding, resources and personnel qualifications In addition, EPA has a responsibility to examine State NPDES programs periodically to assess their demonstrated progress in carrying out the basic goals and objectives of the Clean Water Act and in achieving results.

Evaluation and oversight for overall program management should be based on the following criteria:

- Adequate statutory and regulatory authority to administer the Federal NPDES program: The Region should ensure that,

in accordance with the CWA and the NPDES regulations (40 C.F.R. §123.62(e)), approved State programs are revised as necessary to reflect changes to Federal statutory and regulatory requirements, and that modifications to approved State programs conform to the NPDES regulations. Any modifications to approved programs that are needed as a result of changes to Federal legal requirements must be completed within one year of promulgation of the changed Federal requirements when changes to State regulation(s) are needed and within two years when changes to State statute(s) are needed. In addition, any proposed revisions to any State legal authorities must be submitted to EPA for review and approval.

The Region is responsible for assessing each approved State's statutory and regulatory authority, as well as the adequacy of its funding and staff qualifications to administer the NPDES program, and for initiating appropriate and timely follow-up action as needed when deficiencies are identified. The Regions should request that each State perform an evaluation of its legal authorities and submit its analysis to EPA. The Region should conduct a complete review of the statutory and regulatory authority for all NPDES State programs by the end of FY 1986, and should conduct regular assessments thereafter, as needed. To the extent possible, Regions will conduct these State reviews after the State's self-evaluation has been received; however, receipt of the State's self-evaluation is not a prerequisite to EPA review of legal authorities where a

State's legal authority has already been identified as already been identified as deficient. Regions should promptly notify the State of the need for corrective action. The State should correct any deficiencies identified in its self analysis or identified by EPA. In addition, the Regions should consider program withdrawal proceedings or sanctions provided for by the "Policy on Performance-Based Assistance" in appropriate cases where the NPDES State has failed to request authorization for the pretreatment program by FY 1986. Regions will also continue to work with other States to promote full NPDES program approval.

° Demonstrated ability to set program priorities and to carry out the NPDES program in an effective manner: In addition to evaluating the administering agency's performance in carrying out its operational responsibilities as set forth earlier in this guidance, the agency's overall effectiveness should be assessed based on its demonstrated progress towards achieving the goals and objectives of the CWA. Listed below are four goals, which, if achieved, would provide sound evidence that the administering agency is managing the operational aspects of the NPDES program with positive results:

-- Demonstrated ability consistently to issue timely, high-quality permits: The administering agency's permit program should be assessed based on its performance in issuing, reissuing and modifying permits to eliminate any existing backlogs consistent with national

priorities and time frames, and in avoiding the development of new backlogs of expired or unissued permits, especially major permits. As general goals, permit programs should strive to assure that: the permit backlog remains consistently below 10 percent of all permittees; all permits reflect BAT/BCT based on promulgated guidelines or BPJ, or water quality limits, as appropriate; and/or all water quality problems (including toxics problems) attributable to point source dischargers are adequately addressed by requirements in permits which, if met, would eliminate the problems. In assessing whether this goal has been achieved, it may be appropriate to review a State's Continuing Planning Process and other procedures to assure proper coordination among water quality standards, wasteload allocation and permit issuance activities.

-- <u>Demonstrated ability to consistently establish and oversee local pretreatment programs and to fully and effectively implement all pretreatment authorities reserved to the State</u>: The administering agency's effectiveness should be assessed in terms of its performance in establishing all required local pretreatment programs, overseeing implementation of these local programs following approval, and, where appropriate, directly implementing the program, including permit issuance or equivalent control for industrial users, establishment of local limits, and appropriate compliance

monitoring and enforcement activities. The overall adequacy of local programs and pretreatment-related conditions in municipal permits should be evaluated, preferably based on an on-site audit, no later than one year after local program approval and at the time of permit reissuance thereafter. Where an NPDES State does not yet have the authority to administer the pretreatment program, the State should be evaluated based on its performance of those activities for which it has agreed to assume a responsibility prior to program approval.

-- Demonstrated ability to initiate appropriate and timely enforcement actions against noncompliers: The administering agency's enforcement program should be assessed based on its performance in taking appropriate and timely enforcement responses, especially against permittees that are in significant noncompliance and against municipalities that are not in compliance with the statutory requirements of the CWA consistent with the National Municipal Policy (NMP). As a general goal, the administering agency should strive to take appropriate formal enforcement responses against 100 percent of its significant noncompliers before they appear on two consecutive QNCRs for the same violation (generally within 60 days of the first QNCR with identified SNC violations) if the permittee has not returned to compliance. Administering agencies will continue to place all noncomplying municipal dischargers

on enforceable schedules in accordance with the National Municipal Policy and Guidance, and enforce these schedules vigorously. Enforceable schedules (including interim milestones) for any municipal dischargers that were not completed by September 30, 1985, should be set as soon as possible. All other instances of noncompliance should be addressed consistent with the procedures and time frames in the administering agency's EMS.

-- Demonstrated progress in achieving high or improving rates of continuing compliance: The administering agency's compliance and enforcement efforts should be assessed based on its historical compliance trends in terms of the percentage of permittees in significant noncompliance. Annual goals should be set on a case-by-case basis, and should be based on the administering agency's current compliance rate plus a percentage improvement. Where the administering agency is below the goal, it should develop an achievable plan for making progress towards the goal over a reasonable period of time.

PROCESS FOR CONDUCTING OVERSIGHT OF STATE NPDES PROGRAMS

Based upon the general criteria outlined in this document, as well as the specific annual goals and priorities in the FY 1986-1987 Agency Operating Guidance, the Regions and States should negotiate individual agreements that clearly define performance expectations for the NPDES program, as well as the respective roles

and responsibilities of the Region and the State in administering the NPDES program. These may be separate agreements between the Region and the State, and/or part of the overall §106 work program or State/EPA agreement processes. In either case, the agreement should reflect the principles of the "Policy on Performance-Based Assistance" issued on May 31, 1985 by the Administrator.

The agreements should contain requirements for key outputs, which the Region should audit periodically based on the specific arrangements contained in the agreements. The Region should supply the State with written reports of its audit findings, and should make specific recommendations and suggestions for program improvements; the Region should discuss major problems with the State as soon as they are discovered.

The Region should tailor the level and the frequency of its audits to the State's overall performance in each specific program area. States that have consistently demonstrated their ability to adhere to or to exceed national program goals and priorities and to meet or to exceed national performance expectations may be audited less frequently (annually) and/or less extensively; other States may receive more frequent and/or more detailed audits by the Region. Where a State exhibits continued poor performance, the Region should make recommendations for changes and should take other action(s) as appropriate.[9] The criteria and goals in the earlier sections of this guidance provide the Region with a general baseline for determining the proper level and frequency of oversight of a State NPDES program.

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9. See the "Policy Framework" and the Deputy Administrator's May 20, 1985 Memorandum for details.

The Region should conduct a comprehensive assessment of the operational elements of each State NPDES program at least once a year prior to the Office of Water mid-year evaluation. This review may be a summary of the results of the periodic program evaluations that were performed during the year, and should provide the State with an opportunity to explain its activities and progress in areas of its NPDES program that are not directly related to national or Regional goals and priorities. At the conclusion of the annual review, the Region should supply the State with a written report that outlines the State's accomplishments and areas where improvement is needed, as well as any agreements that were reached on resolving problems that were identified during the review.

CRITERIA FOR DIRECT FEDERAL ENFORCEMENT

Under State delegation, EPA has the right to initiate an enforcement action in a State. The Region and State should have a process for notice and consultation with the State prior to initiating direct EPA enforcement action. The process should include a discussion between the Region and State with respect to the circumstances surrounding the specific noncompliance situation and the appropriate enforcement response. Such procedures can be used to handle Federal facilities violations where the State might need EPA's assistance in resolving the noncompliance. Attachment A is a generic outline for a process that Regions and States might use in determining when to initiate Federal enforcement action.

Using this advance consultation process, there will often be cases where the Region and the State reach mutual agreement that Federal action is more appropriate. EPA may also initiate direct

Federal enforcement action where the Region determines that Federal action is necessary because the case meets any of the following criteria: legal precedent under national environmental law(s), unresolved interstate issue(s), or violation(s) of an EPA order or consent decree; and/or where a Region determines a State has failed to initiate timely and appropriate formal enforcement action (as prescribed earlier in this guidance).

In all instances, the Region will adhere to the established process for advance notice and consultation with the State. The discussion should include the option of the Region issuing a Notice of Violation (NOV) to the permittee and the State indicating its intent to institute formal enforcement action in 30 days if the State fails to properly enforce and the source fails to return to compliance, or the option of foregoing the NOV process in favor of immediate EPA action against the permittee. This should be done in accordance with State delegation agreements and Memoranda of Understanding.

ATTACHMENT A

MODEL

SIGNIFICANT NONCOMPLIANCE ACTION PROGRAM
(SNAP)

MEMORANDUM OF UNDERSTANDING

PURPOSE: To provide for routine consultation and coordination of EPA/State enforcement activities, and for EPA oversight of the State's compliance and enforcement programs.

SCOPE: The QNCR, furnished by the NPDES State in accordance with Federal regulations, will serve as one of the basic mechanisms for coordinating and overseeing activites involving major permittees. Supplementary compliance information on P.L. 92-500 minor permittees will be submitted in accordance with written policy and guidance from EPA Headquarters (SPMS and OWEG).

PROCESS, SCHEDULING AND LOCATION: At least once each quarter, EPA and the State will discuss the status of all permittees that appear as SNC on the QNCR or supplementary submittal. The discussion should take the form of a meeting wherever possible. [Note: a conference call may be substituted where distances are prohibitive]. The meeting will take place on the work day closest to exactly four weeks prior to the stipulated State submission date for the next QNCR. The location of the meeting will alternate between EPA and a State office.

PREPARATION: EPA Regional staff will review the State QNCR, which must be prepared and submitted in accordance with Federal Regulations and written policy guidance from EPA Headquarters. EPA Regional staff will also review supplementary compliance information on minor permittees, which should be prepared and submitted in accordance with EPA guidance and policy.

Six weeks prior to the meeting, EPA will formally transmit to the State its detailed comments regarding items that appeared on the State's preceding QNCR. EPA's comments should include: the permittee(s) in question; the State action(s) in question; and the recommended action to be taken by the State and/or EPA.

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Region V, Library
230 South Dearborn Street
Chicago, Illinois 60604

PREPARATION: (cont.) Three weeks prior to the meeting, the State will furnish a response to EPA's list of concerns, including the State's action to obtain the permittee's compliance.

Two weeks prior to the meeting, the lead individuals from EPA and the State will agree on the list of permittees that will be discussed. The list will include those permittees from the preceding step that EPA wants to discuss at greater length, as well as cases where the State is seeking Federal intervention.

At least one week prior to the meeting, EPA will prepare the agenda and forward it to the State's lead individual.

GROUND RULES: It is understood that no permittee should remain in SNC for the same violation on two consecutive QNCRs without: 1) being returned to compliance; or 2) taking formal enforcement action directed at obtaining sustained compliance.

Discussion of a permittee's noncompliance does not constitute an action to cause compliance. The discussion must result in a conclusive, mutual understanding by EPA and the State of the formal actions that will be taken by a date certain to bring about compliance and/or to penalize the recalcitrant permittee.

Prior to the meeting, <u>all</u> permittees that appear as SNC on the QNCR will be addressed in the State's own compliance strategy/tracking system through the following procedure or one similar to it:

-- The State must hold preliminary meeting(s) with its field offices (if any) to define, clearly and concisely, the State's strategy for achieving compliance on a case-by-case basis. The strategy will include a description of the individual permittee, the nature of the violation, and the State's plan for handling each violation. It will be forwarded to EPA.

-- During the meeting(s), ample time must be allotted for a full, constructive discussion and disposition of all agenda items.

-- As a result of the discussion, the State may adjust the compliance strategies. Any modifications will require consultation with the State's field offices (if any). In such cases, the State will forward the amended strategies to EPA.

GROUND RULES: (cont)

The common goal of all parties is to cause permittees to achieve prompt and sustained compliance. There may be cases where it is impossible for EPA to agree with the State's actions to achieve this goal. In cases where agreement cannot be reached, both EPA and the State should avoid extended debate and should clearly define the actions that each party intends to take. Discussion should then move to the remaining items on the agenda.

Where there are significant differences of opinion, EPA and the State should present the divergent viewpoints to their respective Directors immediately following the meeting. The Directors will ultimately decide the actions to be taken by their respective Divisions and, as appropriate, will discuss with each other the decisions.*

PARTICIPANTS: The lead participants will be the Chief/Director from the appropriate Branches in the EPA and State offices. It is essential that the same individual participates in all four meetings held each year because commitments are made at the meetings. Other individuals may be asked to participate based upon the specific issues to be discussed at the meeting, (technical expertise, Construction Grants, etc.); EPA and State legal staff may also participate. The exact participants will be determined when the agenda is finalized.

MINUTES: The State will provide the minutes to the EPA lead individual within two weeks after the meeting. EPA must submit its detailed comments (if any) within one week; if no comments are submitted within the allotted time, the minutes will be considered final. The minutes will describe the actions that EPA and/or the State expect to take, including independent EPA action such as issuance of either NOVs or AOs. For the sake of brevity, the minutes can reference the submittals received prior to the meeting.

Director State Water Program Office	Director Water Management Division, U.S.EPA, Region _____

* Decisions should be escalated to the Division Directors as the exception rather than the rule.