Clean Water Act
Compliance Enforcement Policy
Compendiumm NPDES Program

II. NPDES PROGRAM: PRE-ENFORCEMENT

A. SOURCES OF EFFLUENT LIMITATIONS AND OTHER REQUIREMENTS

1. "NPDES Permit Authorization to Discharge", dated April 28, 1976.

2. "POTW Compliance with NPDES Permit Effluent Limitations", dated January 5, 1977.

3. "Confidentiality of NPDES Permit Applications" dated April 6, 1978 with attached memorandum dated March 22, 1978.

4. "Certification and Permitting of Dischargers Located on Waters Forming Boundaries Between States", dated April 19, 1978.

5. "Request for a Legal Opinion-Inclusion of Compliance Schedules in Second Round Permits and Newly Issued Permits", dated January 19, 1979.

6. "Policy for the Second Round Issuance of NPDES Industrial Permits", dated June 2, 1982.

7. "Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants", dated February 3, 1984. (See also 49 FR 9016, March 9, 1984.)

8. "Continuance of NPDES General Permits under the APA", dated January 16, 1984.

9. Summaries of NPDES Permit Decisions by the Administrator and Judicial Officer (Issued irregularly. For copies of summaries, contact the Permits Division, OWEC, EN-336).

10. "Training Manual for NPDES Permit Writers" dated May, 1987. Table of Contents only. Available from Permits Division, OWEC, (EN-336).

B. INSPECTIONS

1. "Visitor's Releases and Hold Harmless Agreements as a Condition to Entry to EPA Employees on Industrial Facilities",dated November 8, 1972. See GM-1.

2. "Conduct of Inspections after the Barlow Decision dated April 11, 1979. See GM-5.

3. "NPDES Compliance Sampling Inspection Manual", dated October 1979. Table of Contents only.

4. "Interim NPDES Biomonitoring Inspection Manual", dated October 1979. Table of Contents only.

5. "NPDES Compliance Monitoring Inspector Training, with Modules on Overview, Legal Issues, Sampling Procedures, Biomonitoring, Laboratory Analyses Modules", dated 1988. Table of Contents of individual modules only.

6. "NPDES Compliance Evaluation Inspection Manual", dated January 1981. Table of Contents only.

7. "Neutral Inspection Plan for the NPDES Program", dated February 17, 1981.

8. "NPDES INSPECTION STRATEGY AND GUIDANCE FOR PREPARING ANNUAL STATE/EPA COMPLIANCE INSPECTION PLANS", dated April 1985 with transmittal dated April 16, 1985.

9. "NPDES COMPLIANCE INSPECTION MANUAL", dated January, 1988. Table of Contents only. Replaces June, 1984 edition.

10. "Use of the New NPDES Compliance Inspection Form", dated Ma 14, 1985.

11. Pretreatment Compliance and Audit Manual for Approval Authorities. See VI.B.24.

12. "NPDES Compliance Flow Measurement Manual", dated September, 1981. Table of Contents only.

13. "Guidelines on Requirements for Exceptions for NPDES Inspector Training", dated January 28, 1990. Without attachments.

C. MEASURING COMPLIANCE/DATA PROCESSING

1. "PERMIT COMPLIANCE SYSTEM DATA ENTRY, EDIT AND UPDATE MANUAL; INQUIRY USER'S GUIDE; PCS GENERALIZED RETRIEVAL MANUAL; EDIT/UPDATE ERROR MESSAGES," updated July, 1990. Table of Contents only.

2. The "GREAT System" (General Record of Enforcement Actions Tracked), circa 1980. The GREAT System tracks EPA-issued Administrative Orders (AOs) and Notices of Violation issued from the commencement of the system until September 30, 1987. Requests for retrievals should be addressed to Mary Gair, OWEP, FTS 475-8557. See also II.C.10.

3. "PCS Data Element Dictionary", updated July 2, 1990 and "PCS Codes and Descriptions Manual", updated June 9, 1989. Table of Contents only.

4. "NPDES Self-Monitoring System User Guide", dated January 1985. Table of Contents only.

5. "Release and Description of Significant Violator Lists", dated March 8, 1984.

6. "PERMIT COMPLIANCE SYSTEM (PCS) POLICY STATEMENT", dated October 31, 1985. (appendices updated March 23, 1988)

7. "GUIDANCE FOR PREPARATION OF QUARTERLY AND SEMI-ANNUAL NONCOMPLIANCE REPORTS", March 13, 1986, with transmittal letter. Table of Contents.

8. "Managers' Guide to the Permit Compliance System" June, 1986. Table of Contents only.

9. "Guide to PCS Documentation" June, 1986. Table of contents only. (Information only; no longer current).

10. "General Record of Enforcement Actions Tracked (GREAT) Conversion to Permit Compliance System (PCS)", dated July 24, 1987. Supplements II.C.2. (Conversion completed prior to January 1, 1988).

11. "GUIDANCE FOR REPORTING AND EVALUATING POTW NONCOMPLIANCE WITH PRETREATMENT IMPLEMENTATION REQUIREMENTS", dated September, 1987.

12. "PCS PC PERSONAL ASSISTANCE LINK USERS GUIDE", updated December 21, 1988. Table of Contents only.

III. ADMINISTRATIVE ENFORCEMENT

A. ADMINISTRATIVE COMPLIANCE ORDERS

1. "Effect of Compliance with Administrative Orders", dated June 29, 1984.

2. "Use of Stipulated Penalties in Administrative Orders on Consent under the CWA", dated September 6, 1985.

3. "Remittance of Fines and Civil Penalties" dated April 15, 1985. See GM-38.

4. "Recommended Format for CWA Section 309 Administrative Orders", dated July 30, 1985 (Incorporated in III.A.5).

5. "REFERENCE DOCUMENT ON GUIDANCE AND PROCEDURES FOR ADMINISTRATIVE ORDERS ISSUED UNDER SECTION 309 OF THE CLEAN WATER ACT" dated September 26, 1986, Cover Memorandum, Table of Contents and Section I only.

6. "Relationship of Section 309(a) Compliance Orders to Section 309(g) Administrative Penalty Procedures", distributed August 28, 1987. This document is reproduced at III.B.3, of this compendium.

B. ADMINISTRATIVE PENALTY ORDERS

1. "Guidance on Class I Clean Water Act Administrative Penalty Procedures", dated July 27, 1987 and noted at 52 FR 30730 (August 17, 1987).

2. " Final Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties under the Clean Water Act," issued June 12, 1990, effective July 12, 1990. Published at 55 F.R. 23838 (June 12). Replaces the Interim Final Rules dated August 10, 1987.

3. "Relationship of Section 309(a) Compliance Orders to Section 309(g) Administrative Penalty Proceedings", distributed August 28, 1987. Includes transmittal memorandum covering items III.B.3 through 11, this Compendium.

4. "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies", distributed August 28, 1987.

5. "Guidance on State Action Preemption Civil Penalty Actions under the Federal Clean Water Act", distributed August 28, 1987.

6. "Guidance on "Claim-Splitting" in Enforcement Actions under the Clean Water Act", distributed August 28, 1987.

7. "Guidance on Retroactive Application of New Penalty Authorities under the Clean Water Act", distributed August 28, 1987.

8. "Guidance on Effect of Clean Water Amendment Civil Penalty Assessment Language", distributed August 28, 1987.

9. "Addendum to the Clean Water Act Civil Penalty Policy for Administrative Penalties", distributed August 28, 1987.

10. "Guidance on Notice to Public and Commenters in Clean Water Act Class II Administrative Penalty Proceedings", distributed August 28, 1987.

11. "Guidance Regarding Regional and Headquarters Coordination on Proposed and Final Administrative Penalty Orders on Consent under New Enforcement Authorities of the Water Quality Act of 1987", distributed August 28, 1987.

12. "Use of Administrative Penalty Orders (APO'S) in FY 89", dated March 13, 1990. This document is reproduced at VII.IS. below.

IV. CIVIL LITIGATION

A. GENERAL

1."Professional Obligations of Government Attorneys", dated April 19, 1976. See GM-2.

2."General Operating Procedures for EPA's Civil Enforcement Program", dated July 6, 1982. See GM-12.

3."Clearance of Significant Enforcement Pleadings", dated January 25, 1983.

4."Regional Counsel Reporting Relationship", dated August 3, 1983. See GM-16.

5."Implementing Nationally Managed or Coordinated Enforcement Actions", dated December 26, 1984. See GM-35.

6."Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies", distributed August 28, 1987. This document is reproduced at III.B.4., this compendium.

7."Guidance on State Action Preemption Civil Penalty Actions under the Federal Clean Water Act", distributed August 28, 1987. This document is reproduced at III.B.5., this compendium.

8."Guidance on "Claim-Splitting" in Enforcement Actions under the Clean Water Act", distributed August 28, 1987. This document is reproduced at III.B.6., this compendium.

9."Guidance on Retroactive Application of New Penalty Authorities under the Clean Water Act", distributed August 28, 1987. This document is reproduced at III.B.7., this compendium.

10."Guidance on Effect of Clean Water Amendment Civil Penalty Assessment Language", distributed August 28, 1987. This document is reproduced at III.B.8., this compendium.

11."Issuance of Guidance Interpreting 'Single Operational upset'", dated September 27, 1989.

B. ENFORCEMENT CASE MANAGEMENT PROCEDURES

1."MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE ENVIRONMENTAL PROTECTION AGENCY", dated June 15, 1977. See GM-3. (Amended by IV.B.29)

2."Memorandum of understanding Between the U.S. Coast Guard and the Environmental Protection Agency" dated August 14, 1979. outdated (See this index, Section VI.C.5.).

3."Allocation of Litigation Responsibilities Between Regional and Headquarters Components of Office of General Counsel", dated December 14, 1979.

4."Contacts with Defendants and Potential Defendants in Enforcement Litigation", dated October 7, 1981. See GM-6.

5."Quantico Guidelines for Enforcement Litigation", dated April 8, 1982. See GM-8.

6."Section Directives Concerning 60 Day Report and Processing New Referrals", dated June 22, 1982.

7."Request to Department of Justice to Withhold Action in Referred Cases", dated September 3, 1982.

8."Case Referrals for Civil Litigation", dated September 7, 1982. See GM-13.

9."Procedure for Withholding filing of Referred Cases", dated September 8, 1982.

10."Clearance of Briefs and Significant Pleadings", dated Octob 27, 1982.

11."Civil Litigation Referral Packages", dated December 2, 1982.

12."Headquarters Review of Pleadings", dated December 2, 1982.

13."Responsibility for Handling Judicial Appeals Arising Under EPA's Civil Enforcement Program", dated December 14, 1982.

14."Deferral in Filing Cases at the Request of EPA Attorneys", dated January 31, 1983.

15. "Case Management Procedures for Civil Water Referrals", dated March 28, 1983.

16. "Program Concurrence on Civil Referrals", dated July 20, 1983.

17. "Program Review of Civil Water Cases", dated July 20, 1983.

18. "DIRECT REFERRAL MEMORANDUM", dated September 29, 1983.(Amended by IV.B.29)

19. "Implementation of Direct Referrals for Civil Cases", dated November 28, 1983. See GM-18.

20. "Guidance on Evidence Audit of Case Files", dated December 30, 1983. See GM-20.

21. "Headquarters Review and Tracking of Civil Referrals", dated March 8, 1984.

22. "Delegation of Authorities to the Deputy Administrator", dated March 19, 1984.

23. "Races to the Courthouse", dated March 20, 1984.

24. "Guidance for Enforcing Federal District Court Orders", dated May 8, 1984. This document is reproduced at Section IV D.1., this compendium.

25. "Guidance on Counting and Crediting Civil Judicial Referrals", dated June 15, 1984. See GM-29.

26. "Revised Regional Referral Package Cover Letter and Data Sheet" dated May 30, 1985. See GM-40.

27. "FORM OF SETTLEMENT OF CIVIL JUDICIAL CASES", dated July 24, 1985. See GM-42.

28. "Direct Referrals Clean Water Act - 'No Permit' Cases", dated September 11, 1985.

29. "Direct Referrals", dated August 28, 1986.

30. "Expanded Civil Judicial Referral Procedures", dated August 28, 1986. See also GM-50.

31. "EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements", dated November 14, 1986; See GM-53. Supplements GM-17.

32. "Interim Guidance on Joining States as Plaintiffs," dated December 24, 1986, as corrected February 4, 1987.

33. "Expansion of Direct Referral Cases to the Department of Justice", dated January 14, 1988. See GM-69.

34. "Delegation of Concurrence and Signature Authority", dated January 14, 1988. See GM-70.

35. "Enforcement Docket Maintenance", dated April 8, 1988.

36. "Process for Conducting Pre-Referral Settlement Negotiations on Civil Judicial Enforcement Cases", dated April 13,1988. See GM-73.

37. "Criteria for Active OECM Attorney Involvement in Cases", dated May 22, 1988.

38. "Withdrawal of Referrals and Issuance of 'Hold' Letters", dated February 24, 1989.

39. "Agency Judicial Consent Decree Tracking and Follow-up Directive", dated January 11, 1990. Attached to IV.D.4. this compendium.

C. PENALTIES AND TERMS OF SETTLEMENT

1. "Civil Penalty Policy", dated July 8, 1980 (for reference only).

2. "GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES", dated October 19, 1983. See GM-17.

3. "New Civil Penalty Policy", dated February 16, 1984. See GM-21.

4. "A Framework for Statute Specific Approaches to Penalty Assessment", dated February 16, 1984. See GM-22.

5. "GUIDANCE FOR CALCULATING ECONOMIC BENEFIT OF NON-COMPLIANCE FOR A CIVIL PENALTY ASSESSMENT", dated November 5, 1984. See GM-33.

6. "Penalty Calculations Compliance Schedule for Pretreatment Enforcement Initiative", dated February 19, 1985. (See Also IV.C.10)

7. "Enforcement Settlement Negotiations", dated May 22, 1985. See GM-39.

8. "Headquarters Approval of Proposed Civil Penalties", dated May 31, 1985.

9. "Division of Penalties with State and Local Governments", dated October 30, 1985.

10. "CLEAN WATER ACT CIVIL PENALTY POLICY", dated February 11, 1986. Also see Addendum at III.B.9.

11. "Letter of the Administrator to James Borberg, President of the Association of Metropolitan Sewerage Agencies", (concerning penalties against municipalities), dated October 21, 1986.

12. "Guidance on Calculating after Tax Net Present Value of Alternative Payments", dated October 28, 1986. See also GM-51.

13. "Guidance on determining Violator's Ability to Pay a Civil Penalty", dated December 16, 1986. See GM-56.

14. "Addendum to the Clean Water Act Civil Penalty Policy for Administrative Penalties", distributed August, 1987. (This document is reproduced at III.B.9., this compendium).

15. "November 4, 1987 Congressional Testimony on Proposed Amendments to the Clean Water Act", dated November 24, 1987. Includes DOJ and EPA Testimony on "Environmental Improvement Projects".

16. "GUIDANCE ON PENALTY CALCULATIONS FOR POTW FAILURE TO IMPLEMENT APPROVED LOCAL PRETREATMENT PROGRAMS", dated December 22, 1988. Displayed at VI.B.30.

17. "Guidance on the Distinction Among Pleading, Negotiating and litigating Civil Penalties for Enforcement Cases under the Clean Water Act", dated January 19,1989.

18. "Use of Stipulated Penalties in EPA Settlement Agreements", dated January 11, 1990.

19. "Multi-Media Settlements of Enforcement Claims", dated February 6, 1990.

20."Documenting Penalty Calculations and Justifications in EPA Enforcement Actions", dated August 9, 1990.

D. ENFORCING JUDGEMENTS AND DECREES

1. "Guidelines for Enforcing Federal District Court Orders", dated April 18, 1984. See GM-27.

2. "Procedures for Assessing Stipulated Penalties", dated January 11, 1988. See GM-67.

3. "Guidance on Certification of Compliance with Enforcement Agreements", dated July 25, 1988, see GM-74.

4. "Manual on Monitoring and Enforcing Administrative and Judicial Orders", dated February 6, 1990. Transmittal Memorandum, Summary Introduction, and Table of Contents only.

5. "Agency Judicial Consent Decree Tracking and Follow-up Directive", dated January 11, 1990.

V. CRIMINAL LITIGATION/ENFORCEMENT[3]

1. "Agency Guidelines for Participation in Grand Jury Investigations", dated April 30, 1982. See GM-9.

2. "Criminal Enforcement Priorities for the EPA", dated October 12, 1982. See GM-14.

3. "Analysis of Existing Law Enforcement Emergency authorities", dated March 6, 1984.

4. "Guidelines on Sampling, Preservation, and Disposal of Technical Evidence in Criminal Enforcement Matters", dated April 18, 1984.

5. "Guidance Concerning Compliance with the Jencks Act", dated November 21, 1983. See GM-23. **Superseded and replaced by V.8. below.**

6. "Policy and Procedure on Parallel Proceedings at the EPA", dated January 23, 1984. See GM-30. **Superseded.**

7. "The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations", dated February 16, 1984. See GM-36. **Superseded.**

8. "Guidance Concerning Compliance with the Jencks Act" dated March 8, 1984.

9. "Functions and General Operating Procedures for the Criminal Enforcement Program", dated January 7, 1985. See GM-15.

10. "The Role of EPA Supervisors during Parallel Proceedings", dated March 12, 1985. See GM-37. **Superseded.**

11. "Environmental Criminal Conduct Coming to the Attention of Agency Officials and Employees", dated September 21, 1987.

12. "Procedures for Requesting and Obtaining Approval of Parallel Proceedings", dated June 15, 1989. Excludes attachment entitled "Guidelines on Investigative Procedures for Parallel Proceedings".

13. "Revised EPA Guidance for Parallel Proceedings", dated June 21, 1989. This document together with V.12. above, **supersedes** and **replaces the documents at V.6.,V.7., and V.10. This document is supplemented by the document at V.14.**

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[3] Memoranda in this Section are particularly germane to water enforcement and do not comprise a comprehensive listing of all criminal enforcement policies.

14. "Supplement to Parallel Proceedings Guidance and Procedures for Requesting and Obtaining Approval of Parallel Proceedings", dated July 18, 1990.

VI. SPECIALIZED ENFORCEMENT TOPICS

A. NATIONAL MUNICIPAL POLICY

1. "Municipal Enforcement Case Requirements", dated December 14, 1982.

2. "CWA Municipal Enforcement Cases", dated January 3, 1983.

3. NATIONAL MUNICIPAL POLICY, 49 FR 3832 (January 30, 1984).

4. "Municipal Enforcement: The Financial Ability Question", dated February 17, 1984.

5. "Financial Capability Guidebook", dated March 1984. (Table of Contents only)

6. "Eligibility for Variances under Section 301(i)(1) of the CWA", dated April 11, 1984.

7. "REGIONAL AND STATE GUIDANCE ON THE NATIONAL MUNICIPAL POLICY", dated March, 1984.

8. "Available Techniques for Obtaining Compliance with National Municipal Policy by Unfunded POTWs Requiring Construction", dated September 13, 1984.

9. "Finance Manual for Wastewater Treatment Systems", dated April 1985. (Table of Contents only)

10. "NATIONAL MUNICIPAL POLICY IMPLEMENTATION", dated April 1, 1985.

11. "NATIONAL MUNICIPAL POLICY IMPLEMENTATION", dated April 12, 1985.

12. Letter to House of Representatives from EPA regarding the NMP with Congressional Record materials attached, dated July 22, 1985.

13. "IMPLEMENTATION OF THE NMP", dated July 24, 1985.

14. "Relationship Between the National Municipal Policy and Construction Grants Extending Beyond FY 1988", dated July 26, 1985. (See also number 12 above for a copy of the letter referenced in this document)

15. Speech by Assistant Administrator, OECM to Association of Metropolitan Sewerage Agencies, dated August 8, 1985.

16. "HIGHLIGHTS FROM DECIDED AND SETTLED CASES UNDER THE NMP", dated August 27, 1985.

17. "DEADLINES AND THE NATIONAL MUNICIPAL POLICY", dated January 30, 1986.

18. "Letter of the Administrator to James Borberg, President of the Association of Metropolitan Sewerage Agencies", (concerning penalties against municipalities), dated October 21, 1986, (See No. IV.C.11 this Compendium).

19. "National Municipal Policy Litigation," dated December 23, 1986.

20. "Interim Guidance on Joining States as Plaintiffs," dated December 24, 1986, as corrected February 4, 1987. Reproduced at IV.B.32., this compendium.

21. "National Municipal Policy Enforcement", dated September 22, 1987, with attachment.

22. PRESS BRIEFING MUNICIPAL COMPLIANCE WITH THE CLEAN WATER ACT", dated July 27, 1988. Selected portions.

B. PRETREATMENT

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

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

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

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

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

6. "GUIDANCE MANUAL FOR POTW PRETREATMENT PROGRAM DEVELOPMENT", dated October 1983. Table of Contents only.

7. "Guidance Manual for Electroplating and Metal Finishing Pretreatment Standards", dated February 1984. Table of Contents only.

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

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

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

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

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

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

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

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

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

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

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

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

20. "Guidance Manual for Implementation of Total Toxic Organics (TTO) Pretreatment Standards", dated September 1985. Table of Contents only.

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

22. "CHOOSING BETWEEN CLEAN WATER ACT § 309(b) and 309(f) AS A CAUSE OF ACTION IN PRETREATMENT ENFORCEMENT CASES", dated September 20, 1985.

23. "RCRA Information on Hazardous Wastes for Publicly Owned Treatment Works", dated September 1985. Table of Contents only.

24. "Pretreatment Compliance Inspection and Audit Manual for Approval Authorities", dated July, 1986. Table of Contents only.

25. "Pretreatment Compliance Monitoring and Enforcement Guidance" (for Publicly Owned Treatment Works) dated July, 1986 (Printed September, 1986). Table of Contents only.

26. "Interim Guidance on Appropriate Implementation Requirements in Pretreatment Consent Decrees," dated December 5, 1986. Attachments excluded.

27. "Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", dated September, 1987. (This document is reproduced at II.C.11 of this compendium).

28. "Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program", dated November 1987. Indices and Tables of Content, only.

29. "GUIDANCE ON BRINGING ENFORCEMENT ACTION AGAINST POTW'S FOR FAILURE TO IMPLEMENT APPROVED PRETREATMENT PROGRAMS", dated August 4, 1988.

30. "GUIDANCE ON PENALTY CALCULATIONS FOR POTW FAILURE TO IMPLEMENT APPROVED PRETREATMENT PROGRAMS", dated December 22, 1988.

31. "ENFORCEMENT INITIATIVE FOR FAILURE TO ADEQUATELY IMPLEMENT APPROVED LOCAL PRETREATMENT PROGRAMS", dated February 1, 1989.

32."Guidance For Developing Control Authority Enforcement Response Plans", dated September, 1989. Table of Contents only.

33."FY 1990 Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", dated September 27, 1989.

C. SECTION 311[4]

1. "Oil Spill Enforcement", dated January 8, 1974. **Outdated.**

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[4] Recent passage of the Oil Pollution Act of 1990 has rendered all but one of the documents in this section outdated. The outdated documents are so marked.

2. "Civil Penalties Collected for Violations of 40 C.F.R. Part 112" - Transmittal to USCG Districts of Deposit in Revolving Fund Account, dated December 24, 1974. **Outdated.**

3. "Spill Prevention Control and Countermeasure (SPCC) Plan Program", dated April 23, 1975. **Outdated.**

4. "Penalty Assessment Procedures under Section 311(j)(2)", dated March 29, 1976. **Outdated.**

5. "Memorandum of Understanding Between the U.S. Coast Guard and the EPA", dated August 24, 1979. **Outdated.**

6. "Jurisdiction over Intermittent Streams under § 311 of the CWA", dated March 4, 1981.

7. "EPA Authority to Seek Court Imposed Civil Penalties Under Section 311(b)(6) of the CWA", dated November 19, 1984. **Outdated.**

D. CITIZEN SUITS

1. "EPA Response to Citizen Suits", dated July 30, 1984.

2. "Clean Water Act Citizen Suit Issues Tracking System", dated October 4, 1985.

3. "Notes on Section 505 CWA Citizen Suits," dated February 3, 1986.

4. "Clean Water Act Section 505: Effect of Prior Citizen Suit Adjudications or Settlement on the United States Ability to Sue for same violations", dated June 19, 1987.

5. "Procedures for Agency Responses to Clean Water Act Citizen Suit Activity dated June 15, 1988.

E. SECTION 404

1. "EPA Enforcement Policy for Noncompliance with Section 404 of the FWPCA", dated June 1, 1976.

2. Letter from Attorney General to Secretary of the Army regarding Section 404 of the CWA dated September 5, 1979.

3. "Enforcement of Section 404 of the CWA", dated November 25, 1980.

4. "Enforcement Authority for Violations of Section 404 of the Clean Water Act", dated November 7, 1980.

5. "Guidelines for Specification of Disposal Sites for Dredged Fill Material", Federal Register Notice, Volume 45, No. 249, dated December 24, 1980.

6. "CWA Section 404 Administrative Orders for Removal or Restoration",dated May 20, 1985.

7. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Regulation of Solid Waste Under the Clean Water Act, dated January 23, 1986, effective date April 23, 1986.

8. "MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND THE ENVIRONMENTAL PROTECTION AGENCY CONCERNING FEDERAL ENFORCEMENT OF THE SECTION 404 PROGRAM OF THE CLEAN WATER ACT", dated January 19, 1989, with collateral agreements concerning previously-issued Corps Permits Geographic Jurisdiction and Section 404 (f) exemption issues.

9. "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of Tabb Lakes v. United States," dated January 25,1990.

F. CONTRACTOR LISTING

1. "Guidance for Implementing EPA's Contractor Listing Authority", dated July 18, 1984. See GM-31. (Superseded by F.4, below)

2. "Implementation of Mandatory Contractor Listing", dated August 8, 1984. See GM-32.

3. "Policy on Implementing Contractor Listing Program", dated August 27, 1985. (deleted - Draft Policy only)

4. "Guidance on Implementing the Discretionary Contractor Listing Program", dated November 26, 1986. See GM-53.

G. FEDERAL FACILITIES

1. "Federal Facilities Compliance", dated January, 1984. Superseded by VI.G.2.

2. "FEDERAL FACILITIES COMPLIANCE STRATEGY", dated November, 1988. See GM-25(revised).

H. OVERSIGHT AND STATE PROGRAM COORDINATION

1. "Implementing State/Federal Partnership in Enforcement: State/Federal Enforcement Agreements", dated June 26, 1984. Superseded by H.3, below.

2. Policy on Performance-Based Assistance, dated May 31, 1985.

3. "Revised Policy Framework for State/EPA Enforcement Agreements", dated August 25, 1986 (Supersedes H.1). See also GM-41, revised.

I. PROVIDING ENFORCEMENT INFORMATION TO OUTSIDE PARTIES

1. "Policy Against No Action Assurances", dated November 16, 1984. See G.M.-34.

2. "Enforcement Document Release Guideline", dated September 16, 1985. See G.M.-43.

3. "Policy on Publicizing Enforcement Activities", dated November 21, 1985. Modified by I.5, below.

4. "Memorandum to General Counsels" (Concerning FOI requests pertaining to subjects involved in ongoing or anticipated litigation), dated March 27, 1986.

5. "Addendum to GM-46: Policy on Publicizing Enforcement Activities", dated August 4, 1987. (Contains discussion on explaining differences between initial penalty demands and final penalty)

J. TOXICS/TOXICITY CONTROL

1. "Policy for Development of Water Quality-Based Permit Limitations for Toxic Pollutants", dated February, 1984. See II.A.7.

2. "WHOLE EFFLUENT TOXICITY BASIC PERMITTING PRINCIPLES AND ENFORCEMENT STRATEGY", Dated January 25, 1989. Includes Compliance monitoring and Enforcement Strategy, dated January 19, 1989.

3."Quality Assurance Guidance for Compliance Monitoring in Effluent Biological Toxicity Testing", dated March 7, 1990.

VII. ANNUAL DOCUMENTS AND SHORT-TERM INITIATIVES

1. "EPA AGENCY OPERATING GUIDANCE - FY 1986-1987", dated February 1985. EXPIRED.

2. "FY86 GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS", dated June 28,1985. EXPIRED.

3. "NATIONAL MUNICIPAL POLICY ENFORCEMENT INITIATIVE", dated August 9, 1985. Attachments excluded.

4. "A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YE EVALUATIONS", dated September, 1985. EXPIRED.

5. "EPA AGENCY OPERATING GUIDANCE - FY 1987, dated March 1986". EXPIRED.

6. "A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS-FISCAL YEAR 1987", dated March 1986. EXPIRED.

7. "FY87 GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS", dated April 18, 1986. EXPIRED.

8. "EPA Agency Operating Guidance- FY 1988" dated March, 1987. Selected portions only. EXPIRED.

9. "GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS", dated May, 1987 (This document is reproduced at I.7., This Compendium).

10. "Guidance for the FY 1988 State/EPA Enforcement Agreements Process", dated April 31 (sic), 1987. EXPIRED.

11. "A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS, FISCAL YEAR 1988", dated May, 1987. Selected portions only. EXPIRED.

12. "FY 1988 OFFICE OF WATER OPERATING GUIDANCE", dated June, 1987. Selected portions only. EXPIRED.

13. "FY 1989 OFFICE OF WATER OPERATING GUIDANCE", dated May, 1988. Selected portions only.

14. "A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS, FISCAL YEAR 1989", dated March, 1988. Selected portions only.

15. "Guidance for the FY 1989 State\EPA Enforcement Agreement Process", dated June 20, 1988. See GM-57.

16. "FY 1990 OFFICE OF WATER OPERATING GUIDANCE", dated March, 1989. Selected portions only.

17. "A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS,FISCAL YEAR 1990", dated March, 1989. Selected portions only.

18. " Use of Administrative Penalty Order (APO's) in FY 89", dated March 13, 1990. Without Attachments.

19. "CWA Civil Judicial and Administrative Penalty Practices Report for FY89".

20. "FY 1990 Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", dated September 27, 1989.

1. INTRODUCTION

This Clean Water Act Compliance/Enforcement Compendium is a compilation of operative policies, guidance and staff manuals/ instructions which relate specifically to compliance and enforcement activities under the Clean Water Act (CWA). This Compendium is designed for use by Agency personnel and replaces "Water Compliance/Enforcement Guidance Manual - Compendium of Operative Policies (jointly issued by the Office of Water and the Office of Enforcement and Compliance Monitoring on April 23, 1984). The Compendium reflects a thorough search of relevant materials issued through December, 1985, but also lists key documents issued as recently as March, 1986.

The Compendium is divided into seven principal categories with several of the categories further divided. Section I incorporates the Table of Contents for several general reference documents -- including the "General Enforcement Policy Compendium" which contains policies applicable to all enforcement programs within the Agency and the "Permits Division Policy Book". Section I also includes the Enforcement Management System Guide, which is relevant to all aspects of the National Pollutant Discharge Elimination System (NPDES) compliance monitoring and enforcement program. Key documents from these other compendia are listed separately in Sections II through VI. Section II includes documents which address NPDES compliance monitoring and, as mentioned above, includes some documents indexed in the "Permits Division Policy Book" which describe the establishment of permit limitations and requirements. Sections III and IV identify procedures for formal Federal administrative enforcement (III) and civil enforcement (IV) in cases of non-compliance. Section V lists a number of Agency policies relating to criminal enforcement; Section VI lists policies and materials on specific topics (e.g., National Municipal Policy, Pretreatment, etc.) under NPDES and non-NPDES compliance and enforcement; and Section VII covers policy documents which are issued annually or support short-term initiatives (e.g., Agency Operating Guidance).

Within each subdivision -- or where there is no subdivision, within each section -- materials are listed in chronological order. Documents which are considered to be most significant and most frequently used are CAPITALIZED.

The Table of Contents of this Compendium also serves as the index of statement of policy and interpretation of CWA compliance and enforcement activities of the Office of Enforcement and Compliance Monitoring (OECM) and the Office of Water Enforcement and Permits (OWEP) which may be made available for public use in accordance with Section (a)(2) of the Freedom of Information Act, 5 U.S.C. §552. Certain staff manuals and instructions to staff are included. In addition, as a means of providing a complete background, the Table of Contents cross references relevant documents,

including explanatory materials prepared for the regulated public, which aid the user to understand EPA's Clean Water Act compliance and enforcement processes.

The Compendium will be revised annually. Although every effort has been made to include all applicable documents, some may have been missed. If additional appropriate documents are brought to the Agency's attention, they will be added to the Policy Compendium when it is next revised. Of course, as new policies, guidances, and memoranda are issued, these will be added during the annual update.

I. OVERVIEW AND GENERAL REFERENCE DOCUMENTS

"Permits Division Policy Book", dated June 23, 1982. Table of Contents by date and by subject only. Copies of individual documents may be obtained from Permits Division, OWEP. (EN-336).

WASHINGTON, D.C. 20460

JUN 2 3 1982

OFFICE OF WATER

MEMORANDUM

SUBJECT: Permits Division Policy Book Update

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

TO: Regional Water Management Division Directors
Regional Permit Branch Chiefs
NPDES State Directors

In 1981 we distributed a Permits Division Policy Book which provided a compilation of current policies and guidance material for your reference. We have reviewed and updated the contents of the Policy Book. Several outdated NPDES items should be deleted and nine more recent issuances should be included. Also, we are no longer including RCRA materials in this compilation.

Attachments 1 and 2 show additions and deletions by their subject headings. We will maintain a historical file of the deleted policy guidance materials. For your convenience I am also providing copies of the nine additions and new chronological and subject indices.

We will continue to provide periodic updates to the Permits Division Policy Book. Your comments and suggestions for improving the usefulness of this book are welcome.

Attachments

Additions

I. Administrative Guidance

A. Forms

* * *

Application Forms 1 and 2 c	12/10/80	n-80-18

* * * * *

IV. Legal Interpretation and Information Memos

* * *

NPDES Permit Issuance for Iron and Steel Industry	5/15/81	n-81-3
Use of "Draft Supplement to Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Phosphorous Derived Chemicals Segment of the Phospnate Manufacturing Point Source Category" (October 1977) in Writing NPDES Permits	1/18/82	n-82-1
BCT Permitting	11/2/81	n-81-4
NPDES Permit Issuance for Pulp and Paper Facilities with BCT Limitations to Other Facilities	5/15/81	n-81-5
Status of the Major NPDES Industrial Permits List	12/10/81	n-81-6

* * * * *

V. Second Round Permits:

Policy for the Second Round Issuance of NPDES Industrial Permits	6/02/82	n-82-2

VI. Technical Guidance:

Outer Continental Shelf Coordination Committee	6/6/80	n-80-19
Application of the NPDES General Permit Program to Offshore Oil and Gas Facilities	7/30/81	n-81-7

Deletions

Title	Date	Permit Program Code
II. Regulation Procedures		
A. ECSLs:		
Procedures for Issuance of ECSLs	6/03/76	n-76-2
Enforcement Actions Against Funded Municipal Dischargers	6/03/76	n-76-3
Enforcement Actions where an Industrial Discharger Fails to Meet 7/1/77 Deadline	6/03/76	n-76-4
Questions re: ECSLs	12/10/76	n-76-13
Additional Questions re: ECSLs	4/01/77	n-77-3
Use of ECSLs Past 7/1/77	5/11/77	n-77-9
Enforcement Policy and Use of ECSLs for POTWs	6/22/77	n-77-11
* * *		
E. Clean Water Act Extensions and Modifications:		
Municipal Permit Extensions under Section 301(i)	4/19/78	n-78-3
* * * * *		
III. Federal/State Relationships		
* * *		
D. Resource Conservation and Recovery Act:		
Establishment of RCRA "Program Implementation Guidance System (PIGs)"	10/03/80	PIG-80-1
Interim Authorization of Programs Based on Emergency State Regulations	10/03/80	PIG-80-2
Requirement that State-Permitted Hazardous Waste Facilities have "Interim Status"	10/03/80	PIG-80-3
Short-Term Financial Assistance for State Expected to Receive Authorization before 1/1/81	10/03/80	PIG-80-4
The Use of State Permitting Systems During Phase I Interim Authorization which are not Based on Explicit Regulatory Standards	10/17/80	PIG-81-1

Title	Date	Permit Progr Code
Federal Register Notice of Public Hearing and Comment Period on State Applications for Interim Authorization	10/30/80	PIG-81-2
Effect of RCRA Regulations Changes on Phase I Interim Authorization Approval	10/30/80	PIG-81-3
Delisting of Wastes by Authorized States	10/31/80	PIG-81-4
Used Oil Recycling Act of 1980	11/14/80	PIG-81-5
State Regulation of Federal Agencies For purposes of Interim Authorization	11/14/80	PIG-81-6
Final Determinations on State Applications for Interim Authorization: Action Memorandum & Federal Register Notice	12/1/80	PIG-81-7
Program Implementation Guidance on Issuance of Provisional EPA Identification Numbers	11/25/80	PIG-81-8
Effect of EPA's Memorandum of Understanding With the Dept. of Transportation on Activities in States with Cooperative Arrangements	12/10/80	P
Transfer of Modification and Permit Application Information to States	3/24/81	PIG-81-1
Involvement of States without Phase II Interim Authorization in RCRA Permitting	2/12/81	PIG-81-1

* * * * *

V. Second Round Permits:

Reissuing NPDES Permits to Sources Affected by the NRDC Consent Decree	5/16/78	n-78-5
Policies for Reissuing Industrial NPDES Permits	7/12/78	n-78-9*
Writing NPDES BAT Permits in the Absence of Promulgated Effluent Guidelines	6/25/80	n-80-7
Revised NPDES Second Round Permits Policy	8/29/80	n-80-10

* * * * *

XI. RCRA:

RCRA Permit Priorities Guidance	10/03/80	r-80-1
RCRA Emergency Permit Guidance	10/20/80	r-80-2*

Establishment of RCRA "Program Implementation Guidance System (PIGs)"	10/03/80	r-80-1
Interim Authorization of Programs Based on Emergency State Regulations	10/03/80	PIG-80-2
Requirement that State Permitted Hazardous Waste Facilities have "Interim Status"	10/03/80	PIG-80-3
Short-Term Financial Assistance for States Expected to Receive Authorization Before 1/1/81	10/03/80	PIG-80-4
The Use of State Permitting Systems During Phase I Interim Authorization Which are not Based on Explicit Permit Guidance	10/17/80	PIG-81-1
RCRA Emergency Permit Guidance	10/20/80	r-80-2*
Federal Register Notice of Public Hearing and Comment Period on State Applications for Interim Authorization	10/23/80	PIG-81-2
Effect of RCRA Regulations Changes on Phase I Interim Authorization Approval	10/30/80	PIG-81-3
Delisting" of Wastes by Authorized States	10/31/80	PIG-81-4

This book contains policies and guidance under the NPDES Permit Program. The materials are arranged and numbered in chronological sequence. NPDES policies are prefixed by an "n". Following the prefix, the first number is the year of issuance and the second is the chronological sequence for that year. In addition to the chronologcial listing a subject index is provided to assist in locating policies.

Documents which are too lengthy to be included are indicated by an asterisk. Copies of these documents may be obtained by contacting:

Mr. Timothy Dwyer
Permits Division (EN-336)
U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460
(202) 426-4793

Please use the policy number when requesting a document.

Title	Date	Program Code
1973		
. Policy on Storage & Releases for Water Quality Control in Reservoirs Planned by Federal Agencies	1/16/73	n-73-1
. Permit Form	9/18/73	n-73-2
. Intermittent Streams	9/28/73	n-73-3
. Alternative in Permit Language	12/27/73	n-73-4
1974		
. Additional Guidance for Petroleum Marketing Terminals & Oil Production Facilities	7/18/74	n-74-1
. Feedlot Permit Format	7/29/74	n-74-2
. Application of Electroplating Guidelines	8/28/74	n-74-3
. Disposal of Supply Water Treatment Sludges	9/13/74	n-74-4
1975		
. Use of Closed Cycle Cooling Systems to Meet the Requirements of Section 316(b)	2/26/75	n-75-1
1976		
. NPDES Permit Authorization to Discharge	4/28/76	n-76-1
. (Deleted)		n-76-2
. (Deleted)		n-76-3
. (Deleted)		n-76-4
. Coordination Between NPDES Program and Water Quality Management	7/07/76 and	n-76-5
Attachment - Coordination	4/02/76	n-76-5
. Municipal Wastewater Treatment Ponds	8/12/76	n-76-6
. American Petroleum Institute v. EPA - Information Memo	8/24/76	n-76-7
. Binding Effect of 303(e) Basin Plans	8/24/76	n-76-8
. Impact of Phase I Basin Plans	9/01/76	n-76-9
. Phase II Iron and Steel Guidelines - Mahoning River Valley	10/04/76	n-76-10
. Asbestos Limits	10/15/76	n-76-11
. Use of Low Flow Augmentation to Meet Water Quality Standards	11/08/76	n-76-12
. (Deleted)		n-76-13
. Comments on Region VIII's Approach to Writing Effluent Limits for Confined Animal Feeding Operations	12/15/76	n-76-14
1977		
. Clarification of OGC Opinion No. 40 (State Review Authority)	2/04/77	n-77-1
. Fecal Coliform Bacteria Limits	2/14/77	n-77-2
. (Deleted)		n-77-3
. Water Treatment Plant Limitations	4/13/77	n-77-4

Title	Date	Permit Program Code
. Request for Policy Regarding Possible Use of NPDES Permits to Promote Better Sludge Management	4/13/77	n-77-5
. 316(a) & (b) Technical Guidance Documents	5/01/77	n-77-6*
. Use of In-Stream Mechanical Aerators to Meet Water Quality Standards	5/02/77	n-77-7
. NPDES Permits and Requirements of State Law	5/04/77	n-77-8
. (Deleted)		n-77-9
. Implementation of Promulgated Section 307(a) Toxic Standards	6/01/77	n-77-10
. (Deleted)		n-77-11
. NPDES Permits in Wetlands Areas	7/12/77	n-77-12
. Implementation of Section 403	7/20/77	n-77-13
. Policy Regarding Procedures for Fundamentally Different Factors BPT Variances	8/18/77	n-77-14
. Policy Regarding the Inclusion in Permits of More Stringent Effluent Parameters	10/13/77	n-77-15
1978		
. State Regulation of Federal Facilities	3/10/78	n-78-1
. Confidentiality of NPDES Permit Applications	4/06/78	n-78-2
. (Deleted)		n-78-3
. Certification and Permitting of Dischargers in Boundary Waters	4/19/78	n-78-4
. (Deleted)		n-78-5
. Coal Mining Under the Surface Mining Control and Reclamation Act of 1977.	5/25/78	n-78-6
. Opinions on Variances in Second Round and Other Issues	6/13/78	n-78-7
. Ex Parte Contacts in Adjudicatory Hearings	6/15/78	n-78-8
. (Deleted)		n-78-9*
. Ex Parte Contacts in EPA Rulemaking	8/04/77	n-78-10
. Suspended Solids Limits for POTW Ponds	9/01/78	n-78-11
. Innovative Technology Extensions	9/06/78	n-78-12
. Guidance to States re Pretreatment Program	9/08/78	n-78-13*
. Variance Applications	9/12/78	n-78-14
. Applicability of 301(h) & (i) to Federal Facilities	9/12/78	n-78-15
. Transfer of Authority over Federal Facilities to NPDES States	11/28/78	n-78-16
. Coordination between Regional Enforcement and Water Programs re Pretreatment Program	11/29/78	n-78-17
. Request for Legal Opinion - Inclusion of Compliance Schedules in Second Round and New Permits	12/26/78	n-78-18
1979		
. Use of Biomonitoring in the NPDES Permits Program	1/11/79	n-79-1
. State Pretreatment Programs	4/12/79	n-79-2

Title	Date	Code
. EPA Procedures for Review & Approval of State Pretreatment Program Submissions	4/30/79	n-79-3
. Separate Storm Sewers	9/11/79	n-79-4
. National Municipal Policy & Strategy	10/79	n-79-5*
. Guidance on Setting BCT Permit Limits for Breweries under Section 402(a)(1) of CWA	10/18/79	n-79-6
1980		
. Regional Review of State-Issued NPDES Permits	1/18/80	n-80-1
. Applicability of Revised NPDES Regulations to Permits Currently Being Processed	1/18/80	n-80-2
. Incorporation of Pretreatment Program Development Compliance Schedules into POTW NPDES Permits	1/28/80	n-80-3
. OGC Memo-Use of BOD5 Carbonaceous Test Results	4/18/80	n-80-4
. Pretreatment Compliance Schedule		n-80-5
. Statement By Agency Personnel Purporting To Sanction Source Actions Which Are Inconsistent With Statutory Requirements	5/28/80	n-80-6
. (Deleted)		n-80-7
. Major Municipal Permitting in FY 81	7/10/80	n-80-8
. Suspension of Portion of Definition of "Waters of the US" in Consolidated Permit Regulations	7/15/80	n-80-9
. (Deleted)		n-80-10
. NPDES Permit Issuance for Iron & Steel Facilities	9/15/80	n-80-11
. Suspension of Provisions in Consolidated Permit Regulations Establishing Criteria for NPDES New Source Determinations and Proposed Revision of the Regulations	9/25/80	n-80-12
. Treatability Manual	9/25/80	n-80-13*
. BCT Cost Test Guidance	9/30/80	n-80-14*
. NPDES Evidentiary hearing Management Program	10/3/80	n-80-15
. Review of State NPDES Permits Written Prior to State Program Revision	12/24/80	n-80-16
. Procedures for Processing Plans of Approved NPDES States to Implement NPDES General Permit Programs	12/31/80	n-80-17
. Application Forms 1 and 2c	12/10/80	n-80-18
. Outer Continental Shelf Coordination Committee	6/06/80	n-80-19
1981		
(number not used)		n-81-1
. Determining Whether Revisions to State NPDES Programs Made to Authorize the Issuance of General Permits are Substantial	2/12/81	n-81-2
. NPDES Permit Issuance for Iron and Steel Industry	5/15/81	n-81-3

Title	Date	Permit Program Code
• BCT Permitting	11/2/81	n-81-4
• NPDES Permit Issuance for Pulp and Paper Facilities with BCT Limitations to Other Facilities	5/15/81	n-81-5
• Status of the Major NPDES Industrial Permits List	12/10/81	n-81-6
• Application of the NPDES General Permit Program to Offshore Oil and Gas Facilities	7/30/81	n-81-7
1982		
• Use of "Draft Supplement to Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Phosphorous Derived Chemicals Segment of the Phosphate Manufacturing Point Source Category" (October 1977) in Writing NPDES Permits	1/18/82	n-82-1
• Policy for the Second Round Issuance of NPDES Industrial Permits	6/02/82	n-82-

LIST OF CURRENT POLICIES BY SUBJECT

Title	Date	Permit Program Code
I. Administrative Guidance		
A. Forms:		
Permit Form	9/18/73	n-73-2
Alternative in Permit Language	12/27/73	n-73-4
Feedlot Permit Format	7/29/74	n-74-2
Application Forms 1 and 2c	12/10/80	n-80-18
B. Procedures:		
Applicability of Revised NPDES Regs. to Permits Currently Being Processed	1/18/80	n-80-2
II. Regulatory Procedures		
B. Industrial:		
C. Municipal:		
D. Tie-in:		
F. Consolidated:		
Suspension of Portion of Definition of "Waters of the US" in Consolidated Permit Regulations	7/15/80	n-80-9
Suspension of Provisions in Consolidated Permit Regulations Establishing Criteria for NPDES New Source Determinations & Proposed Revision of the Regulations	9/25/80	n-80-12
III. Federal/State Relationships		
A. NPDES States:		
Clarification of OGC Opinion No. 40 (State Review Authority)	2/04/77	n-77-1
State Regulation of Federal Facilities	3/10/78	n-78-1

Title	Date	Permit Program Code
Transfer of Authority over Federal Facilities to NPDES States	11/28/78	n-78-15
Review of State NPDES Permits Written Prior to State Program Revision	12/24/80	n-80-16
Procedures for Processing Plans of Approved NPDES States To Implement NPDES General Permit Programs	12/31/80	n-80-17
Determining Whether Revisions to State NPDES Programs Made to Authorize the Issuance of General Permits are Substantial	2/12/81	n-81-2
B. Non-NPDES States:		
C. Water Quality Management Plans:		
Coordination Between NPDES Program and Water Quality Management	7/07/76 and	n-76-5
Attachment - Coordination	4/02/76	n-76-5
Binding Effect of 303(e) Basin Plans	8/24/76	n-76-8
Impact of Phase I Basin Plans	9/01/76	n-76-9
NPDES Permit and Requirements of State Law	5/04/77	n-77-8
E. Safe Drinking Water Act:		
IV. Legal Interpretations and Information Memos.		
Intermittent Streams	9/28/73	n-73-3
Disposal of Supply Water Treatment Sludges	9/13/74	n-74-3
NPDES Permit Authorization to Discharge	4/28/76	n-76-[illegible]
American Petroleum Institute v. EPA - Information Memo	8/24/76	n-76-7
Phase II Iron & Steel Guidelines - Mahoning River Valley	10/4/76	n-76-10
Request for Policy re Possible Use of NPDES Permits to Promote Better Sludge Management	4/13/77	n-77-5
NPDES Permit in Wetlands Areas	7/12/77	n-77-12
Implementation of Section 403	7/20/77	n-77-13
Policy Regarding the Inclusion in Permits of More Stringent Effluent Parameters	10/13/77	n-77-15
Confidentiality of NPDES Permit Applications	4/06/78	n-78-2
Coal Mining Under the Surface Mining Control and Reclamation Act of 1977	5/25/78	n-78-6
Certification and Permitting of Dischargers in Boundary Waters	4/19/78	n-78-4
Opinions on Variances in Second Round and Other Issues	6/13/78	n-78-7

	Title	Date	Program Code
	Ex Parte Contacts in Adjudicatory Hearings	6/16/78	n-78-8
	Ex Parte Contacts in EPA Rulemaking	8/04/77	n-78-10
	Innovative Technology Extensions	9/06/78	n-78-12
	Applicability of 301(h) and (i) to Federal Facilities	9/12/78	n-78-15
	Request for Legal Opinion - Inclusion of Compliance Schedules in Second Round and New Permits	12/26/78	n-78-18
	Separate Storm Sewers	9/11/79	n-79-4
	Regional Review of State-Issued NPDES Permits	1/18/80	n-80-1
	OGC Memo-Use of Carbonaceous Test Results	4/18/80	n-80-4
	Statement By Agency Personnel Purporting to Sanctional Actions Which are Inconsistent w/ Statutory Requirements	5/28/80	n-80-6
	NPDES Permit Issuance for Iron & Steel Facilities	9/15/80	n-80-11
	BCT Cost Test Guidance	9/30/80	n-80-14*
	NPDES Evidentiary Hearing Management Programs	10/03/80	n-80-15
	NPDES Permit Issuance for Iron and Steel Industry	5/15/81	n-81-3
	BCT Permitting	11/02/81	n-81-4
	NPDES Permit Issuance for Pulp and Paper Facilities with BCT Limitations to Other Facilities	5/15/81	n-81-5
	Status of the Major NPDES Industrial Permits List	12/10/81	n-81-6
	Use of "Draft Supplement to Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Phosphorous Derived Chemicals Segment of the Phosphate Manufacturing Point Source Category" (October 1977) in writing NPDES Permits	1/18/82	n-82-1
V.	Second Round Permits:		
	Policy for the Second Round Issuance of NPDES Industrial Permits	6/02/82	n-82-2
VI.	Technical Guidance:		
	Policy on Storage & Release for Water Quality Control in Reservoirs Planned by Federal Agencies	1/16/73	n-73-1
	Additional Guidance for Petroleum Marketing Terminals & Oil Production Facilities	7/18/74	n-74-1
	Application of Electroplating Guidelines	8/28/74	n-74-3
	Use of Closed Cycle Cooling Systems to Meet the Requirements of Section 316(b)	2/26/75	n-75-1
	Municipal Wastewater Treatment Ponds	8/12/75	n-75-6
	Asbestos Limits	10/15/76	n-76-11

	Title	Date	Permit Program Code
	Use of Low Flow Augmentation to Meet Water Quality Standards	11/08/76	n-76-12
	Comments on Region VIII's Approach to Writing Effluent Limits for Confined Animal Feeding Operations	12/15/76	n-76-14
	Fecal Coliform Bacteria Limits	2/14/77	n-77-2
	Water Treatment Plant Limitations	4/13/77	n-77-4
	Use of In-Stream Mechanical Aerators to Meet Water Quality Standards	5/02/77	n-77-7
	Implementation of Promulgated Section 307(a) Toxic Standards	6/01/77	n-77-10
	Suspended Solids Effluent Limitations for Publicly Owned Wastewater Treatment Ponds	9/01/78	n-78-11
	Guidance on Setting BCT Permit Limits for Breweries under Section 402(a)(1) of the CWA	10/18/79	n-79-6
	Treatability Manual	9/25/80	n-80-13*
	Outer Continental Shelf Coordination Committee	6/06/80	n-80-19
	Application of the NPDES General Permit Program to Offshore Oil and Gas Facilities	7/30/81	n-81-7
II.	Variances:		
	Policy re Procedures for Fundamentally Different Factors BPT Variances	8/18/77	n-77-14
	Variance Applications	9/12/78	n-78-14
	316(a) & (b) Technical Guidance Documents	5/01/77	n-77-6*
III.	Coordinated Municipal Strategy		
	National Municipal Policy & Strategy	10/79	n-79-5*
	Coordination between Regional Enforcement and Water Programs re Pretreatment Program	11/29/78	n-78-17
	Major Municipal Permitting in FY 81	7/10/80	n-80-8
X.	Pretreatment:		
	Guidance to States re Pretreatment Program (see also Feb. 1979 publication-Guidance for NPDES States on Implementation of the General Pretreatment Regulations - 40 CFR Part 403)	9/8/78	n-78-13*
	State Pretreatment Programs	4/12/79	n-79-2
	EPA Procedures for Review and Approval of State Pretreatment Program Submissions	4/30/79	n-79-3

	Title	Date	Permit Program Code
	Incorporation of Pretreatment Program Development Compliance Schedules into POTW NPDES Permits	1/28/80	n-80-3
	Pretreatment Compliance Schedule		n-80-5
X.	Biomonitoring:		
	OGC Memo "Use of Biomonitoring in the NPDES Permit Program"	1/11/79	n-79-1

"Working Principles Underlying EPA's National Compliance/Enforcement Programs", dated November 22, 1983. See GM 24.

"CLEAN WATER ACT COMPLIANCE/ENFORCEMENT GUIDANCE MANUAL", dated May 1985. Table of Contents and Chapter Contents pages only. Copies of the manual or portions may be obtained from Program Development and Training Branch, Office of Enforcement Policy OE (LE-133).

EPA

The Clean Water Act

Compliance/Enforcement Guidance Manual

U.S. Environmental Protection Agency
Washington, DC 20460

Prepared by

The Office of Enforcement and Compliance Monitoring

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'ENFORCEMENT MANAGEMENT SYSTEM GUIDE", dated February 27, 1986, (updates interim document dated September 27, 1985). Table of Contents and Chapters 1 and 2 only.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

FEB 27 1986

OFFICE OF WATER

MEMORANDUM

SUBJECT: Enforcement Management System Guide

FROM: Lawrence J. Jensen, Assistant Administrator for Water (WH-556)

Larry Jensen

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

I am extremely pleased to transmit to you the revised and final version of the Enforcement Management System (EMS) Guide. This revision includes Chapter I, Chapter II, Attachment A (Violation Review Process), Attachment B (the Enforcement Response Guide), Attachment C (NPDES Violation Summary format), Appendix I (List of Guidance and Supporting Documents), and Appendix II (Abbreviations of Frequently Used Terms and EMS Definitions). The EMS Guide (especially the principles in Chapter II) provides additional explanation of the regulatory requirements of 40 CFR 123.26, Requirements for Compliance Evaluation Programs.

The attached document is a revision of the 1977 EMS Guide. It differs from the 1977 version in several ways. Perhaps most significantly, it requires that all administering agencies have a written description of an enforcement management system and that such a system be consistent with the principles of the 1986 EMS. The 1977 version had no such stated requirement. Additionally, the 1985 EMS is expanded beyond Chapters I and II and will eventually include all of the most significant strategy and policy documents affecting the NPDES compliance monitoring and enforcement program. Finally, this document has been updated to incorporate the language and concepts of the "Guidance for Oversight of the NPDES Program" and to reflect the emergence of a pretreatment enforcement program.

Later this year, a complete version of the EMS Guide with all chapters will be transmitted to you. The table of contents included in this transmittal identifies the additional chapters which will be included in that version. The 1986 EMS Guide will be expanded to nine chapters, including a chapter on Pretreatment Enforcement. These chapters will be transmitted when they are available and will contain policy and guidance for specific program areas.

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While the principles of EMS have not been changed, the 1986 EMS Guide may require that some Regions revise and update their system, and that NPDES States develop or update written procedures for a State-specific EMS. Both Regions and NPDES States should now adopt and implement the principles of EMS and procedures for reviewing violations, determining appropriate actions, and managing permit compliance information that are consistent with the EMS Guide. All administering agencies are expected to have written systems in place by October 1, 1986.

I want to express my deep appreciation to those Regional, Headquarters, and State personnel who have served on the Work Group which developed this document. Rebecca Hanmer, Director, Office of Water Enforcement and Permits has told me that the Group labored long and well. I believe you will agree that the final document reflects their substantial efforts.

If you have questions about this document or the plans for implementation, please feel free to call J. William Jordan, Director, Enforcement Division (202/475-8304) or Anne Lassiter, Chief, Policy Development Branch (202/475-8307).

Attachments

THE ENFORCEMENT MANAGEMENT SYSTEM

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

(CLEAN WATER ACT)

U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF WATER

1986

FOREWARD

This document describes the Enforcement Management System (EMS) for the National Pollutant Discharge Elimination System (NPDES) Program. The Enforcement Management System is a process to collect, evaluate, and translate compliance information into timely and appropriate enforcement actions. The process is supplemented by chapters various procedures, policies and regulations. While the Enforcement Management System embodies certain fundamental principles, the process for applying those principles must be flexible and dynamic. The Enforcement Management System reflects the collective experience of the administering agencies in managing NPDES compliance and enforcement activities.

Lawrence J. Jensen

Lawrence J. Jensen
Assistant Administrator for Water

2/27/86

Effective Date

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CHAPTER I - INTRODUCTION AND BACKGROUND

A. Introduction and Purpose

Achieving and maintaining a high level of compliance with environmental laws and regulations are two of the most important goals of Federal and State environmental agencies. The United States Environmental Protection Agency (USEPA) has stressed consistently the need for a systematic administrative approach to compliance monitoring and enforcement with the objective of achieving a consistent, uniform national posture in the implementation of the National Pollutant Discharge Elimination System (NPDES) program established by the Clean Water Act (CWA).

As the NPDES program has matured, there has been increased awareness that the program will be effective only to the extent that administering agencies (EPA or an NPDES State) are able systematically and efficiently to identify instances of non-compliance and then to take timely and appropriate enforcement action to achieve the final objective of full compliance by the permittee with the CWA. Each administering agency should have management procedures to track the status of permit compliance. to surface violations, and to take timely and appropriate enforcement action to achieve a return to compliance. USEPA is also responsible for assuring that administering agencies carry out their NPDES program functions--including timely and appropriate enforcement responses--in a generally consistent manner in order to protect water quality evenly across the country, and to ensure that all dischargers throughout the

nation receive fair treatment under the law. With the growth in the number of States approved to administer their own NPDES programs, EPA and the States face the challenge of ensuring fairness and consistency among NPDES programs while maintaining a strong Federal/State partnership which is based on mutual trust and respect.

Effective use of available resources is also important to achieving a consistent, national enforcement program. In implementing compliance tracking and enforcement systems, administering agencies must balance resources to ensure effective tracking and maintenance of compliance by permittees. Consequently, it is necessary for administering agencies to develop policies and strategies which lead to: (1) the systematic tracking of abatement steps taken by the permitted dischargers; and (2) specific procedures for adjusting resources to achieve compliance results in the most efficient manner possible.

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. The EMS places priority on rapid response to instances of significant noncompliance, especially by major dischargers. As resources allow, administering agencies should also address minor dischargers of concern and other instances of noncompliance.

This document establishes a framework upon which to build the management of a national enforcement program: the Enforcement Management System (EMS). The EMS constitutes a system for

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translating compliance information into timely and appropriate enforcement actions. It also establishes a system for identifying priorities and directing the flow of enforcement actions based on these priorities and available resources. Finally, the EMS provides the flexibility for each administering agency to develop management procedures which are best suited to its operations and resources with the goal of most efficiently translating compliance information into timely and appropriate enforcement action.

The original EMS was developed in 1977 through the efforts of a Federal/State work group. The fundamental principles of EMS, as established in that first work group, are still applicable to any compliance and enforcement system. However, the development of new and more comprehensive policies and procedures necessitates both the update and expansion of EMS.

The original EMS Guide covered only the material in Chapters I and II (including Attachments) of this document. The new EMS Guide is expanded, attempting to pull together all of the most relevant documents associated with an effective compliance monitoring and enforcement program (see Appendix I). The chapters of this system provide guidance and policy on individual elements of the enforcement system. As new policies are developed and old policies modified, they will be incorporated into the EMS. The EMS, therefore, provides a framework of basic principles, supplemented by policies and procedures which may be modified reflecting the dynamic process of compliance monitoring and enforcement.

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B. Use of This Document

The EMS is a national guidance document to be used by administering agencies in the development and improvement of their own compliance tracking and enforcement systems. The EMS, however, provides sufficient flexibility so that administering agencies may develop specific systems that accommodate their organizations, resources, and State laws, yet result in reasonable national consistency of enforcement.

All administering agencies should have an enforcement management system which is consistent with this document and the NPDES regulations (40 CFR 123.26). That system should be in writing and is subject to annual review. Of course, the length and complexity of the EMS will vary among administering agencies, reflecting variability in size of program. Each administering agency should review its existing system as quickly as possible to determine whether it is consistent with the principles stated here. Where it is not, the system should be amended.

There is no one "correct" EMS. What is described here are the minimum basic principles for an effective compliance tracking and enforcement system. The specific details of how these basic principles become operational by an administering agency may vary widely and should, of course, reflect differences in organizational structure, staffing and State laws. As long as the basic principles are incorporated, the agency-specific system will be acceptable.

The concept of national consistency in the implementation of the NPDES program is one of the basic tenets of the CWA. While it would be difficult, and not necessarily effective, to have identical enforcement responses for identical violations in different States, the enforcement response should be directly related to the severity of the violation. Given the decentralization of authority and responsibility in carrying out the NPDES program, implementation of the basic EMS principles in the EPA Regional Offices and the NPDES States should produce national consistency, while still accommodating differences between Regions and States.

C. Overview of Approved State Programs

A strong Federal/State relationship is essential to the effectiv operation of a program as comprehensive and complex as the NPDES program. One method of fostering a strong relationship is to assure that roles are clearly defined and that the "rules of the game" are understood by everyone. To achieve this end, the USEPA and States have worked together to develop "Guidance for Oversight of the NPDES Program" (see Appendix I) which is an umbrella document that establishes the general criteria under which both parties will operate. This document also sets forth the basic criteria for oversight of enforcement programs.

The Oversight Guidance requires that Regions and States 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. The Guidance is based on the assumption

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that where a State has an approved NPDES program, it has the primary responsibility to initiate appropriate enforcement action to ensure compliance by permittees. However, USEPA has oversight responsibility for that program, including the responsibility to ensure that enforcement actions are taken on a timely and appropriate basis, and may initiate direct Federal enforcement action. The Guidance requires the development of protocols for notification and consultation to foster effective communication and the timely resolution of issues between Regions and States, and contains criteria for direct Federal enforcement action.

The EMS further defines the principles necessary to the operation of an effective compliance/enforcement program and provides the basis for evaluation of the performance of administering agencies. This evaluation occurs at two levels: 1) USEPA Headquarters' mid-year evaluations of Regional implementation of the EMS; and 2) Regional Offices' reviews of NPDES States, including file audits of State programs. All States that receive Federal grants for implementation of water quality control programs can also expect Regions to evaluate their performance in the compliance/enforcement area against commitments made in the grant agreements.

In addition to the Guidance for Oversight of NPDES Programs and the EMS, there are other documents which are necessary for effective implementation of the NPDES program (see the list of guidance documents in Appendix I). Included among these are

the "Annual Operating Guidance" which identifies priority program activities for the operating year, and agency policy documents. Administering agencies are expected to be knowledgeable about these documents; however, they are not included as chapters in the EMS since they are frequently effective for a limited period of time or are more inclusive than the NPDES program.

CHAPTER II. THE ENFORCEMENT MANAGEMENT SYSTEM FRAMEWORK

The Basic Principles of EMS

There are seven basic principles that are common to an effective EMS. Described below are these principles and the minimum basic requirements necessary for an effective tracking and enforcement system. As stated in the Introduction, the specific details of how each of these basic principles becomes operational in a specific State or Regional system may vary to reflect differences in organizational structure, position mixes, and State laws. As long as the basic principles are incorporated and are clearly recognizable, the resulting system is acceptable. The purpose of the EMS is to translate compliance information into enforcement actions.

The EMS should:

1. Maintain a source inventory that is complete and accurate.
2. Handle and assess the flow of information available on a systematic and timely basis.
3. Accomplish a pre-enforcement screening by reviewing the flow of information as soon as possible after it is received.
4. Perform a more formal enforcement evaluation where appropriate, using systematic evaluation screening criteria.
5. Institute a formal enforcement action and follow-up wherever necessary.
6. Initiate field investigations based on a systematic plan.
7. Use internal management controls to provide adequate enforcement information to all levels of the organization.

These principles are discussed in greater detail in the following text. Each principle has certain subparts which are integral elements of the entire system.

Principle No. 1: Maintain a Source Inventory

At the foundation of the EMS is a complete and accurate compilation of all pertinent information on all dischargers covered by NPDES permits. An effective program cannot exist without this information base. [It is fully recognized that the level of information for major dischargers may be more complete than that for minor ones. The amount of information on minors will be a function of the administering agency's resources and priorities.] The EMS should have a detailed inventory of sources which encompasses the elements listed below:

A. The inventory should include appropriate basic information concerning each source, such as name, location, permit number, discharge limits, compliance dates, other permit requirements and effluent data. For minors, this source inventory might be as simple as a permit compliance file.

B. There should be a routine schedule for updating the inventory to reflect changes in basic information, such as changes in compliance schedules and permit limits, and changes in the ownership/address of a source. The more frequently the information is updated, the greater the confidence in its accuracy.

C. The inventory should be a ready reference for historical information (e.g., has a source previously missed or failed to comply with schedule requirements). This

historical inventory for majors and significant minors will consist of many parts, including a violation summary report (see Attachment C) and a log of previous enforcement actions. The summary and log are discussed in greater detail elsewhere in the text.

D. The inventory data for majors and significant minors should be entered directly into the Permit Compliance System (PCS, the automated NPDES data base), where it exists, in a timely manner consistent with nationally established procedures (see Chapter IX). States which are not regular users of PCS, and do not have an automated system that is compatible, should supply data to the Region in a form that facilitates USEPA's entry of the data into PCS.

E. Maintenance of the source inventory should be assigned to a specific, identified organizational entity so that responsibility for the completeness and accuracy of source information is clear.

F. Data on dischargers should be readily accessible to all parties (USEPA Headquarters, Regions, NPDES States and citizens) to facilitate cooperation in carrying out NPDES compliance and enforcement responsibilities.

G. There should be an identifiable process for determining which dischargers have not applied for permits after being required to do so and for following through in these cases.

Principle No. 2: Flow of Information

In order to ensure that the enforcement system is current, the flow of information into the system is critical. With the growth in the number and complexity of environmental regulatory programs, the need for rapid, efficient flow of information has become more important. Therefore, it should be possible to integrate information about individual dischargers obtained from various sources into an effective information flow, which is then channeled into decision and control points in the system so that all information on an individual discharger is available at any point in time.

The following items are examples of the types of reports and other data that are potential sources of information for use in an enforcement system:

-- Data-Related reports (including such items as compliance reports, industrial user reports, construction-completed reports, bypass/overflow reports, etc.)
-- Construction grant-related information
-- Discharge Monitoring Reports (DMRs)
-- Inspection reports from field surveys
-- Operation and maintenance reports, including annual fiscal data as available
-- Reports from other State and Federal agencies, e.g., health data, information on fish kills
-- Reports and complaints from citizens
-- Evidentiary hearing information
-- Permit modification requests

-- Information from other programs, such as the Resource Conservation and Recovery Act (RCRA), Comprehensive Emergency Response and Compensation Liability Act (CERCLA), Toxic Substances Control Act (TSCA), and the Safe Drinking Water Act (SDWA)
-- Various pretreatment program reports
-- Environmental audit reports provided by the permittee where they are required by the Agency to meet its statutory mission

The elements needed to assure the smooth flow of information are as follows:

A. Procedures should be established to integrate the information from various sources about individual dischargers into an effective data flow. The data flow should be designed so that it is readily accessible at appropriate points in the decision-making process. These procedures will facilitate the flow of information between the States and USEPA, and will assure that the terms and commitments contained in the various agreements between the State and USEPA are met.

B. Appropriate time frames for the information flow should be established and incorporated in the above procedures to ensure timely response to the information. For example, it may be appropriate to say that the allowable elapsed time from receipt of a compliance report to

its availability for review should be less than a week. Special procedures and/or agreements should be established with other programs (e.g., RCRA, TSCA, and CERCLA) to insure the timely receipt of information that may have a bearing on water enforcement actions.

Principle No. 3: Pre-Enforcement Screening

The pre-enforcement screening process involves a series of steps that should occur in the review of available information to efficiently sort out noncomplying sources for appropriate enforcement action. This process is critical to the integrity of the NPDES enforcement system because it initiates the process of sifting through the entire universe of permittees and others subject to NPDES requirements. This leads to later steps that place noncompliers into various categories for subsequent action. Most steps in the pre-enforcement screening process can be accomplished by a compliance analyst who is trained to identify signs of continuing or serious noncompliance.

Documented, in-place pre-enforcement screening procedures should include the following elements:

A. A system for initial review of incoming information:

(1) Procedures should clearly specify who is responsible for each screening function in this initial review.

(2) Procedures should require the forecast of reports due within a specified period of time (e.g., forecasting all reports due for the next 30 days).

(3) Specific guidelines for determining obvious compliance from noncompliance should be developed. The guidelines should at least establish criteria to be used to: determine receipt vs. nonreceipt; identify the methodology for determining effective permit limits and limits required by Agency or court orders and whether permit-effluent limits or other limits have been exceeded; and assign priority for review of incoming reports of different types.

(4) Procedures describing follow-up action once a determination of compliance status has been made should include:

a. In cases of obvious compliance, no further review may be necessary. In such situations, the appropriate update regarding the compliance status is made in the source inventory.

b. Appropriate responses and time frames for obvious noncompliance should also be established. For example, nonreceipt of a report should be followed up by a call or letter within ten days. Procedures should be specified for executing the initial response, triggering the follow-up, and closing out the case (including feedback to the source inventory, and entering the information into PCS).

(5) Control procedures should be established for the internal transmittal of compliance information

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(6) Procedures should be set up for the pre-enforcement screening of the Discharge Monitoring Reports (DMR), to determine whether the Violation Review Action Criteria (VRAC) have been exceeded. Attachment A to this chapter describes in detail those criteria and their use. DMRs should be screened and data entered into PCS (or transferred to the Region where a State does not use PCS) within 30 days of their receipt.

B. A system for development of a chronological history of noncompliance:

The initial review of the incoming information will determine an instance of possible noncompliance by the regulated facility (see A(3) above). Any instance of permit noncompliance should be entered into PCS or a comparable tracking system. The system that is used should be capable of producing a convenient historical reference of instances of noncompliance. Procedures should be developed to preserve this historical summary.

C. The means for technical evaluation of apparent noncompliance:

Following the preliminary screening in the two steps above, staff review of the file of a discharger that appears to be in noncompliance should be conducted for purposes of a substantive technical evaluation. At this point in the process, it is important to:

(1) Have detailed procedures and time frames for conducting the technical evaluation to determine the level and frequency of the violation, and to determine the appropriate response to the specific violation.

(2) Document any action taken/not taken (including the technical reason when the technical evaluation indicates that a violation falls below the level of "immediate action") in the historical summary and/or PCS. These types of violations remain "actionable" for future use as part of a subsequent file review.

(3) Establish timeframes for action on detected violations.

(4) Have standard procedures for compiling material to be used in the next evaluation step. For example, if the decision is made to proceed with a formal enforcement action, the procedures should set out the type of information to be contained in the documentation sent to the assigned author of the proposed action.

(5) Install a tracking system (e.g., violation summary, pink slip) which should be maintained to locate an enforcement action at any time in this process (see the example in Attachment C).

(6) Have procedures that identify who is responsible for completing each phase of the evaluation and who should make each decision as the instance of apparent noncompliance is processed.

Principle No. 4: Enforcement Evaluation

When an instance of noncompliance is identified by the pre-enforcement screening, the appropriate follow-up action must be determined. This is a determination that should be made by technical personnel with legal consultation, when necessary. The following elements need to be in place:

A. Guidelines and procedures which assist in determining the appropriate levels of action for specific categori of violations. National guidance on the appropriate enforcement response to specific violations has been developed and is contained in the Enforcement Response Guide (Attachment B). Deviations from this Guide may legitimately occur, depending upon the facts of a specific case.

B. Procedures delineating the respective roles of the technical and legal staff and establishing procedures for coordination.

C. Procedures for compiling enforcement action background information to support the enforcement decision.

D. Procedures for interaction and coordination with other affected programs (e.g., RCRA, CERCLA and/or other agencies). Written agreements between programs may be

E. Procedures for information flow and decision-making necessary to secure concurrence or nonconcurrence on the enforcement action.

F. Time frames for completing a determination as to whether the violation is "actionable" and initiation of the appropriate response. For example, the provision could state that the overall time from the date a report/event is due to initiation of the appropriate action should not exceed 45 days. The administering agency should establish time frames which are subject to review.

G. Procedures for escalating enforcement action if compliance is not achieved expeditiously after taking the initial action.

H. Procedures for closing out and updating the file and for returning the compliance information to the data base. When it is decided that an enforcement action will not be taken, it is important to have a written record that clearly documents why the alternative action (i.e., an informal notification or a permit modification), is more appropriate.

I. Procedures for providing feedback to the source inventory that would correct any errors/misinformation found during the screening process.

Principle No. 5: Formal Enforcement Action and Follow-Up

This crucial principle is the cutting edge of the EMS and begins when the decision has been made to issue a "formal" enforcement

... sections of Federal and State statutes

and/or regulations. In general, that decision is triggered by a failure to achieve compliance within a specified period of time through less formal means. According to the USEPA "Guidance for Oversight of NPDES Programs", a formal enforcement action is 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. Specific State enforcement actions should be addressed by Regions and States on a case-specific basis. Regions can exercise their own judgment in interpreting and adapting national criteria to States, so long as they can justify the adaption of the State's enforcement process consistent with national objectives.

The following elements for formal enforcement action should be included in the EMS:

A. Specific designation of responsibility for writing the formal enforcement action.

B. Guidance for the form and substance of the formal enforcement action for use by the legal and technical staff. The basic elements of the action should be summarized on this form.

C. A tracking system for following the progress of formal enforcement actions through to final physical compliance. This compliance tracking system should be capable of supporting the flow of required information into PCS.

D. Procedures and guidelines for escalating the action if compliance is not achieved expeditiously, especially in cases of noncompliance with an earlier enforcement action.

E. Procedures for establishing the basis for closing enforcement actions and routing the appropriate compliance information to the source inventory.

Principle No. 6: Initiation of Field Investigations

Field investigations are an integral part of any enforcement program. The level of enforcement action is often dictated by the ability of field inspection programs to respond to enforcement needs. Enforcement programs are responsible for selecting inspection candidates for both routine and special efforts of the field units in support of the program. Field investigations can be started at any time in the enforcement process. Chapter V of the EMS Guide provides detailed guidance on field inspections; however, the following elements related to field investigations should be included in an EMS.

A. Criteria and procedures for detecting candidates for field investigations. This should be accomplished through the development of an annual compliance inspection plan. Plans and procedures consistent with the Compliance Inspection Strategy (Chapter V) and clear criteria for selecting candidates for appropriate mix of routine and special compliance inspections must be in place.

B. Designation of responsibility to the enforcement program manager for requesting field investigations in support of the enforcement program.

C. Timeframes for reporting the findings of a field investigation. For example, the procedure may require a full report to be submitted to the enforcement program within 30 days of the completion of the investigation.

D. A mechanism for informing field investigation personnel of the utilization of field surveys.

E. Procedures for coordinating field investigations between the administering agencies.

Principle No. 7: Internal Management Control

Throughout the enforcement process it is vital for all levels of management to be able to assess the effectiveness of the program and to identify progress or deficiencies. Consequentl the organization's enforcement procedures should provide feedback to give management the information it needs to ensure that the program makes timely decisions and meets commitments. Those procedures should allow for self-evaluation based on reasonable timeframes, and should identify the focus of responsibility for each element of the EMS. For internal management control, an EMS should provide for:

A. The maintenance of a record of specific formal enforcement actions taken by the organization at any given period of time.

B. A method of tracking information in terms of location and action/reaction time.

C. A system of evaluating specific activities in terms of their quality, timeliness, results, and accomplishment of program objectives.

D. A system for assessing how the compliance data, as indicators of environmental results, help meet the goals of the CWA.

E. Procedures that will result in effective communication between the USEPA Regional Offices and the States on all aspects of the enforcement process, including: the current status of noncompliant sources and enforcement actions as reported in the Quarterly Noncompliance Reports; audit of approved State programs; problem resolution; advance notification of enforcement actions initiated by USEPA in approved States; and similar program matters.

Conclusion

The successful Enforcement Management System should contain certain key elements while remaining a flexible and dynamic system which is geared to the organization and resources of the particular administering agency. The system should be strong and resilent enough to continue and to translate compliance information into enforcement results, regardless of pressures that affect the system. The key to the success of the system is the unimpeded flow of information through the system which facilitates the rapid return of a noncomplying permittee to compliance. Good communication among all parties in the system is essential to its success.

This chapter of the Enforcement Management System has described the basic principles of the system. Implementation of the principles

number of essential documents support this framework in order to make the system whole (see Appendix I). The remaining chapters of the EMS contain the most important of the supporting enforcement guidance and policies.

ATTACHMENT A

VIOLATION REVIEW PROCESS

Many NPDES permittees may experience some violation of their permit conditions during the life of a permit or may violate enforcement orders. An effective Enforcement Management System (EMS) should describe a process for reviewing and screening those violations to assure that enforcement resources are concentrated on the most serious violations.

Throughout the violation review process, it should be remembered that any violation of an NPDES permit is a violation of the Clean Water Act (CWA) for which the permittee is strictly liable, and for which USEPA encourages some type of enforcement response. An administering agency's decision regarding the appropriate enforcement action should be based on an analysis of all of the facts and relevant legal provisions involved in a particular case. A decision to take no action in a given situation is within the enforcement discretion of the administering agency, so long as the reason for exercising the no-action alternative is warranted and documented.

The violation review process has two main review elements--screening all relevant data to determine: 1) whether there has been any type of violation and the nature of that violation, and 2) whether the violation requires professional review (defined by Violation Review Action Criteria) and in some cases, listing on the Quarterly Noncompliance Report (QNCR). These are discussed below.

General Screening Considerations

An administering agency's decision on whether to initiate an enforcement action, and the type of action which is appropriate, should include an evaluation of all available data to determine the seriousness of the violation, the compliance history of the permittee, and other relevant facts in the case. The decision to proceed should not be based solely on whether there is a violation. There are many other circumstances which should be considered in deciding whether to proceed with an enforcement action. Included are the following: 1) a permit or enforcement order schedule has been violated; 2) a violation has occurred that presents an actual or imminent threat of significant harm to the environment or to the public health and safety; 3) a violation has occurred which, unless corrected, would erode the integrity of an environmental protection program; 4) pretreatment program requirements are violated; 5) a source has failed to report; 6) a source has conducted an unauthorized bypass; 7) inspection results indicate a severe problem; 8) there are known or suspected operation and maintenance problems; 9) information provided by interested parties indicates that a significant violation has occurred; and 10) there are aesthetic impacts related to the violation. These general violation screening considerations should be applied in the violation review process.

Violation Review Process

An effective Enforcement Management System (EMS) should include a process for reviewing DMRs and other reports submitted by the

permittee to determine whether that permittee is violating the terms of its permit or enforcement order, where the permittee is subject to such an order. As a part of that process, the administering agency should establish criteria for reviewing violations to determine which violations require priority review by a professional to determine whether the violation should be subject to a formal or informal enforcement response. The initial screening of DMRs to make this determination is normally conducted by para-professionals. Any violation of a permit or enforcement order that exceeds the screening criteria -- called Violation Review Action Criteria (VRAC) -- should be reviewed by professional personnel to determine the appropriate enforcement response. The remainder of this section addresses the VRAC for: a) effluent violations of permits and enforcement orders; and b) schedule, reporting and other non-effluent violations of permits and enforcement orders.

A. Effluent Violations

Every NPDES permittee must submit Discharge Monitoring Reports (DMRs) to the administering agency for its review to determine whether there are violations of the effluent limitations in the permit or in an enforcement order that is active against the permittee. Federally-designated majors or P.L. 92-500 funded minor NPDES permittees should submit DMRs either on a monthly or quarterly basis. (Other permittees must also report but they may be required to report on a less frequent basis.)

The EMS encourages the administering agency to take an appropriate enforcement response against all violations.

A particular violation may be resolved by a permittee so that a formal enforcement response by the regulatory agency is unnecessary. Other violations may require formal enforcement action for resolution.

Table I of this Attachment identifies the VRAC to be applied by administering agencies in screening performance against effluent limits. The VRAC established for violation of permit effluent limits are more stringent than the reporting criteria established in the QNCR regulation. Magnitude is not a factor in screening for 30 day average violations--only the number of violations--and criteria are included for 7 day average and daily maximum violations. The VRAC for violation of effluent limits in enforcement orders equivalent to the criteria for reporting established by the QNCR regulation. Approved NPDES States should consider the VRAC included in Table I to be guidance and may modify the screening criteria to reflect State resources and priorities. However, the VRAC established by approved NPDES States should be no less stringent than the criteria established in Table I and should include criteria for violations of a seven day average or daily maximum. If the State chooses to establish VRAC different from Table I, the EMS should explain the basis for setting the threshold for VRAC.

B. Schedule, Reporting and Other Violations

The administering agency routinely examines the status of a permit ee on a monthly or quarterly basis through review of DMRs and other

reports to determine whether the permittee is complying with schedules, reporting, or other requirements set by the permit or by an enforcement order, where such an order exists. As discussed in A above, the EMS encourages the administering agency to take an appropriate enforcement action against all violations. A particular violation may be resolved by a permittee so that a formal enforcement response by the regulatory agency is unnecessary. Other violations may require formal enforcement action for resolution.

Table I of this Attachment identifies the VRAC to be applied by administering agencies in screening performance against schedule, reporting, and other requirements for all permittees. The VRAC for violations of schedule and reporting requirements in this Table are, in fact, equivalent to the criteria established for reporting in the regulation, "National Pollutant Discharge Elimination System Regulations; Noncompliance and Program Reporting," commonly referred to as the QNCR regulation. Approved NPDES States may modify the VRAC included in Table I, but in no case should the VRAC be set at a level less stringent than the reporting criteria identified in Table I.

Significant Noncompliance (SNC): Definition and Use

The QNCR regulation (40 CFR 123.45) establishes criteria for reporting violations of permit conditions or enforcement orders by major permittees in the Quarterly Noncompliance Report (QNCR). From the universe of violations identified in the QNCR, a subset of violations will be identified as significant noncompliance (SNC).

An explanation of which violations identified on the QNCR will be considered SNC is provided in the QNCR Guidance. It should be noted that since the definition of SNC is in guidance, it may change from time to time.

As stated previously, VRAC exceedances do not automatically require a formal enforcement response, but do require a professional review. The concept of SNC is important because it identifies those violations which must receive a formal enforcement response or return to compliance within a fixed period of time unless an acceptable justification is established for not taking action. (See Enforcement Response Guide.) Administering agency performance in addressing SNC on a timely and appropriate basis will be tracked in the Agency's Strategic Planning and Management System (SPMS).

Summary

The VRAC are criteria for screening DMR's and other reports submitted by permittees to determine whether the violation(s) requires a professional review. Identification of a violation as meeting or exceeding the VRAC does not establish the type of enforcement response which should be taken or the time frame in which it should be accomplished.

For many violations, VRAC is equivalent to the reporting criteria established by the QNCR regulation. Those violations will be reviewed by a professional and listed on the QNCR. In other cases,

violations will be reviewed by a professional even though they do not meet the magnitude or frequency criteria of the QNCR.

Finally, a subset of violations identified on the QNCR will meet the definition of SNC. A designation that a violation is SNC requires that the violation be corrected or that a formal enforcement response be initiated within a specific period of time by the administering agency, unless an acceptable justification for no action is provided. This definition is provided in the QNCR Guidance.

TABLE I

VIOLATION REVIEW ACTION CRITERIA

VIOLATIONS OF EFFLUENT LIMITS

a. Permit Violations	Criteria
30 Day Average Violations *	2 violations in 6 months
7 Day Average violations	Two violations in a month
Daily maximum violations*	Four violations in a month
* pH	<4.0 or >11.0, or if continuous monitoring criteria are exceeded
* Storm Water	Four times the effective limit
Any Limit	Causes or has potential to cause a water quality or a health problem or the violation is of concern to the Director
b. Enforcement Order Violations	
Any Limit Cited in the Enforcement Order**	Any violation during the quarter

VIOLATIONS OF COMPLIANCE SCHEDULE PERMITS AND ENFORCEMENT ORDERS

Start Construction End Construction Attain Final Compliance	90 days past scheduled date
All Additional Milestones	90 days past scheduled date

* Excludes bacteriological counts (e.g.,fecal coliform), color, and thermal parameters for which criteria are discretionary.

** In the absence of interim effluent limits in an enforcement order, permit limits should be tracked and evaluated based on the criteria for permit violations.

VIOLATIONS OF REPORTING REQUIREMENTS IN PERMITS AND ENFORCEMENT ORDERS

Discharge Monitoring Reports (DMRs)	30 days overdue or incomplete or not understandable
Pretreatment Reports	30 days overdue or incomplete or not understandable
Compliance Schedule Report Final Progress Report	30 days overdue or incomplete or not understandable
All Additional Reports	30 days overdue or incomplete or not understandable

VIOLATIONS OF OTHER REQUIREMENTS

a. Pretreatment Program	
-Implementation	Failure to implement (issue permits, enact ordinances, inspect IUs) local pretreatment program requirements.
-Enforcement by POTW	Failure of the POTW to enforce IU pretreatment requirements
b. General Permit Conditions	
-Record Keeping, O&M	Violation of narrative requirements (inaccurate recordkeeping, inadequate treatment plant operation and maintenance)
-BMP	Failure to follow Best Management Practices (i.e., requirement to develop SPCC plans and implement BMP)
c. Enforcement Orders	
Any Other Requirements Cited in the Enforcement Order	Any violations during the quarter
d. Other Violations	Violations for which a formal enforcement action is recommended by the Enforcement Response guide.

ANNUAL REVIEW

The file of any major permittee or minor permittee of concern should be reviewed at least once in a twelve month period, regardless of whether the above criteria have been exceeded.

ATTACHMENT B

ENFORCEMENT RESPONSE GUIDE

This guide is for the use of NPDES enforcement officials who are responsible for determining the appropriate enforcement response to a specific violation of the NPDES permit and related sections of the Clean Water Act. It is intended to serve two main purposes:

1. It recommends enforcement responses that are timely and appropriate in relation to the nature and severity of the violation and the overall degree of noncompliance;

2. It provides a guide to ensure a uniform application of enforcement response to comparable levels and types of violations, and it can be used as a mechanism to review the appropriateness of responses by an enforcement agency.

This guide should be used to select the most appropriate response to instances of noncompliance. When making determinations on the level of the enforcement response, the technical and legal staff should consider the degree of variance from the permit condition or legal requirement, the duration of the violation, previous enforcement actions taken against the violator, and the deterrent effect of the response on the similarly situated regulated community. Equally important are considerations of fairness and equity, national consistency and the integrity of the NPDES program.

In any particular case, these factors may lead to a response that differs from that contained in the guide. It should be emphasized that any violation of an NPDES permit is a violation of the Clean

Water Act (CWA). The administering agency (Region or approved State in its exercise of enforcement discretion, may elect any of the enforcement responses available under and consistent with the CWA.

All SNC violations must be responded to in a timely and appropriate manner by administering agencies (see Attachment A). The response should reflect the nature and severity of the violation, and, unless there is supportable justification, the response must be a formal enforcement action (as defined elsewhere in this document), or a return to compliance by the permittee generally within one quarter from the date that the SNC violation is first reported on the QNCR. Administering agencies are expected to take a formal enforcement action before the violation appears on the second QNCR, generally within 60 days of the first QNCR. If the approved State does not act before the second QNCR, the State should expect USEPA to take a formal enforcement action. In the rare circumstance when formal enforcement action is not taken, the administering agency is expected to have a written record that clearly justifies why the alternative action (informal enforcement action or permit modification) was more appropriate.

A key element in all enforcement responses is the timeliness with which they are initiated and effect compliance. Given many types of violations and the variance in resources available to the administering agencies, no specific time frame is established in which to initiate and complete a given response. Within 30 days of the identification of any violation, the appropriate response should be determined, and any action taken (or not taken) should

be documented. If noncompliance continues beyond what is considered to be a reasonable time, the type of formal enforcement action needed should be established.

This guidance addresses a broad range of NPDES violations. It is not intended to cover all types of violations. The responses in this guide are suggested responses. They reflect the enforcement actions available to the USEPA. Other administering agencies may have alternative enforcement responses that are equally effective. The measure of the effectiveness of an enforcement response includes:

- -- whether the noncomplying source is returned to compliance as expeditiously as possible;
- -- whether the enforcement response establishes the appropriate deterrent effect for the particular violator and for other potential violators; and
- -- whether the enforcement response promotes fairness of government treatment as between comparable violators, as well as between complying and noncomplying parties.

In exercising its enforcement oversight responsibilities, the USEPA must evaluate whether an administering agency has used an appropriate enforcement response to a given noncompliance situation. The Enforcement Response Guide will be used as a general guide in making that assessment, keeping in mind the enforcement responses available to the administering agency, the results that are achieved, and the need to achieve an acceptable level of national consistency.

This guide has been developed for the internal use of USEPA and is not intended to create legal rights or obligations, or to limit the enforcement discretion of any of the administering agencies.

ENFORCEMENT RESPONSE

SAMPLING, MONITORING AND REPORTING

NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE[1] (See Definitions)
Failure to sample, monitor or report (routine reports, DMRs)	Isolated or infrequent.	[2]Phone call, written letter of violation (LOV). Report to be submitted immediately. Administrative Order (AO) if no response is received.
Failure to sample, monitor or report (one-time requirement)	Isolated or infrequent.	LOV. Reports to be submitted immediately.
Failure to notify (compliance or noncompliance with schedule requirement)	Isolated or infrequent.	[2]Phone call or LOV. Reports to be submitted immediately.
Failure to sample, monitor, report or notify	Permittee does not respond to letters, does not follow through on verbal or written agreement, or frequent violation.	AO or judicial action if no response is received. Request for criminal investigation.
Failure to notify of effluent limit violation	Known environmental damage results.	AO or judicial action.
Failure to notify of effluent limit violation	Isolated or infrequent. No known effects.	Phone call or LOV.
Failure to notify of effluent limit violation	Frequent or continued violation.	LOV or AO.
Minor sampling, monitoring or reporting deficiencies	Isolated or infrequent.	Phone call or LOV. Corrections to be made on next submittal.
Minor sampling, monitoring or reporting deficiencies	Continuation.	AO if continued.
Major or gross sampling, monitoring or reporting, deficiencies	Isolated or infrequent.	LOV or AO. Corrections to be made on the next submittal.
Major or gross reporting deficiencies	Continuation.	AO or judicial action.
Reporting false information	Any instance.	Judicial action. Request for cr investigation.

ENFORCEMENT RESPONSE

PERMIT COMPLIANCE SCHEDULES (Construction phases or planning)[3]

NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE
Missed Interim Date	Will not cause late final date or other interim dates.	LOV.
Missed Interim Date	Will result in other missed interim dates. Violation for good or valid cause.	LOV or AO.
Missed Interim Date	Will result in other missed interim dates. No good or valid cause.	LOV, AO or judicial action.
Missed Final Date[4]	Violation due to force majeure (Strike, act of God, etc.)	Contact permittee and require documentation of good or valid cause.
Missed Final Date[4]	90 days or more outstanding. Failure or refusal to comply without good or valid cause.	AO or judicial action.
Major or gross deficiencies	Continuation.	AO or judicial action. Request for criminal investigation.
Failure to install monitoring equipment	Continuation.	AO to begin monitoring (using outside contracts, if necessary) and install equipment.
AO COMPLIANCE SCHEDULES	(Construction phases, MCP or CCP)	
Missed Deadline	Contained in AO previously issued (justifiable delay).	AO.[5]
Missed Deadline	Contained in AO previously issued and no justifiable reason for delay.	Judicial action. Request for criminal investigation.
Reporting False Information	Any instance.	Judicial action. Request for criminal investigation.

ENFORCEMENT RESPONSE

PERMIT EFFLUENT LIMITS

NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE
Exceeding Final Limits	Infrequent or isolated minor violation.	LOV.
Exceeding Final Limits	Infrequent or isolated major violations of a single effluent limit.	LOV, AO (judicial action if environmental harm resulted).
Exceeding Final Limits	Frequent violations of effluent limits.	AO or judicial action.
Exceeding Interim Limits	Results in known environmental damage.	AO or judicial action.
Exceeding Interim Limits	Without known damage.	AO or judicial action.
Exceeding Interim Limits (outside permittee's control, e.g. force majeure)	No harmful effects known.	AO.
Exceeding Interim Limits (outside permittee's control, e.g., force majeure)	With substantial environmental damage.	AO or judicial action.
Discharge without a permit	One time without known environmental damage.	AO.
Discharge without a permit	One time which results in environmental damage or continuing violation.	AO or judicial action. Request for criminal investigation.
Discharge without a permit	Continuing violation with known environmental damage.	Judicial action. Request for criminal investigation.

ADMINISTRATIVE ORDER INTERIM LIMITS

Exceeding Interim Limits contained in AO	Infrequent violation.	AO.[5]
Exceeding Interim Limits contained in AO	Frequent violations within the control of the permittee or environmental damage known.	Judicial action.

ENFORCEMENT RESPONSE

STATE/EPA COMPLIANCE INSPECTION

NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE
Minor violation of analytical procedures	Any instance.	LOV.
Major violation of analytical procedures	No evidence of intent.	LOV or AO.
Major violation of analytical procedures	Evidence of negligence or intent.	AO or judicial action (possible criminal action).
Minor violation of permit condition	No evidence of negligence or intent.	LOV. Immediate correction required.
Minor violation of permit condition	Evidence of negligence or intent.	AO or judicial action (possible criminal action).
Major violation of permit condition	Evidence of negligence or intent.	AO or judicial action (possible criminal action).
Non-submittal of DMR/QA data	Isolated violation.	LOV or AO.
Non-submittal of DMR/QA data	Continued violation.	Judicial action.

PRETREATMENT

INDUSTRIAL USERS

Non-submittal of BMR or periodic reports	Late.	LOV or AO.
Violation of general, categorical, or local limits	Infrequent.	LOV or AO.
Violation of general, categorical, or local limits	Consistent violations.	AO or judicial action.
Violation of categorical standards	No BMR or treatment installed.	AO or judicial action.
Gross violation or pass-through	Any occasion.	Judicial action. Request for criminal investigation.

ENFORCEMENT RESPONSE

PRETREATMENT (CONTINUED)

MUNICIPALS (POTWs)

NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE
Non-submittal of annual reports	First occurrence.	LOV.
Municipal non-enforcement of general, local or categorical limits	First time or infrequent.	LOV or AO.
Municipal non-implementation of pretreatment program (e.g, failure to enforce any limits, reporting requirements, etc.)	Continued non-implementation.	AO or Judicial Action (Judicial Action may be preceded by notice to POTW under Section 309(f)).
Failure to submit an approvable pretreatment program	First occurrence.	AO.
Failure to submit an approvable pretreatment program.	Continued.	Judicial action.

LEVELS OF RESPONSE[6]

There are three levels of response to all violations. For any violation the administering agency must review the violation and determine the appropriate response. For some violations, the response may be no action necessary at this time. The informal enforcement response can be an inspection, phone call, a violation letter, or a Federal Notice of Violation to the permittee with a copy to the administering State agency. The violation letter can be limited to a notification of the violation or to requiring certain steps to be taken within specific time frames. The formal enforcement response must be one of the following:

1. An Administrative Order or State equivalent action; or

2. A judicial referral to the State Attorney General or to the Department of Justice.

FOOTNOTES

[1]The Notice of Violation (NOV) is not specifically identified as a possible response in the "Range of Response" column. In fact, the use of an NOV by EPA as an initial response is an appropriate option where the violation is in a State with an approved NPDES program. However, it must be recognized that an NOV does not qualify as a formal enforcement action.

[2]Phone calls should be noted in the record and be followed up with warning letters if reports are not received within the specified time frame.

[3]If the compliance schedule is established by a consent decree or other judicial order, the violation should be brought to the attention of the program manager and legal counsel to determine whether the court should be notified. The permitting authority may not excuse or allow a violation of a consent decree or other court order without court approval.

[4]The enforcement response chosen for Missed Final Dates must be consistent with the provisions of the National Municipal Policy.

[5]The Clean Water Act does not authorize the issuance of an AO for a violation of a previously issued AO. Any successive AO issued must be based upon the underlying violations of the Act contained in the previous AO and/or upon subsequent violations of the Act.

[6]The amendments to the Clean Water Act proposed by both the House of Representatives and the Senate would give EPA authority to impose administrative penalties. If the final version includes this authority, the ERG will have to be modified to establish criteria for determining which violations should be addressed through a penalty action.

ATTACHMENT C

NPDES VIOLATION SUMMARY

[ ] Major [ ] Municipal
[ ] Minor [ ] Non-Mun.
[ ] Federal
[ ] State

NPDES No. _____

NAME & LOCATION _____

DATE OF VIOLATION MO/DA/YR	TYPE OF VIOLATION	AGENCY RESPONSES	DATE OF RESPONSES MO/DA/YR	PERSON(S) INITIATING RESPONSE	DUE DATE MO/DA/YR	STATUS	REVIEWER NAME AND TITLE

REMARKS

(Additional information may be entered across the sheet--between citations of permit violations--to meet local ancillary tracking requirements. Any other pertinent information, such as the rationale for unusual responses, may also be documented in this manner.)

_____

APPENDIX I

LIST OF GUIDANCE AND SUPPORTING DOCUMENTS

1. National Guidance for Oversight of NPDES Programs, FY 1986 (June 28, 1985).

2. Office of Water FY 1986-1987 Operating Guidance and Strategic Planning and Management System (February, 1985).

3. NPDES Inspection Strategy and Guidance for Preparing Annual State/EPA Compliance Inspection Plans (April 16, 1985).

4. National Municipal Policy (January 23, 1984).

5. Regional and State Guidance on the National Municipal Policy (April 17, 1984).

6. Municipal Enforcement Guidance (Issued by Office of Enforcement and Compliance Monitoring; October, 1984).

7. Recommended Format for Clean Water Act Section 309 Administrative Orders (July 30, 1985)

8. Pretreatment Program Guidance to POTWs for Enforcement of Industrial Categorical Standards (November 5, 1984)

9. NPDES Civil Penalty Policy (February 11, 1986).

10. Permit Compliance System Policy (October 31, 1985).

APPENDIX II

ABBREVIATIONS FREQUENTLY USED

AAW - Assistant Administrator for Water

ADA - Administering Agency (EPA and NPDES States)

ADP - Automated Data Processing

AO - Administrative Order

AT - Advanced Treatment

AWT - Advanced Waste Treatment

BAT - Best Available Technology

BCT - Best Conventional Technology

BCCT - Best Conventional Control Technology

BIO - Compliance Biomonitoring Inspection (see CBI)

BOD_5 - 5 Day Biochemical Oxygen Demand

BEJ - Best Professional Judgment

BPT - Best Practicable Treatment

CBI - Confidential Business Information or Compliance Biomonitoring Inspection (See BIO)

CEI - Compliance Evaluation Inspection

CFR - Code of Federal Regulations

CG - Construction Grant

CS - Construction Schedule

CSI - Compliance Sampling Inspection

CWA - Clean Water Act

DI (DIA or DIAG) - Diagnostic Inspection

DMR - Discharge Monitoring Report

DOJ - Department of Justice (US)

ELG - Effluent Limitation Guidelines

EMS - Enforcement Management System

ERG - Enforcement Response Guide

F - Final Limits

FEL - Final Effluent Limits

FFCA - Federal Facility Compliance Agreement

FR - Federal Register

GREAT - General Record of Enforcement Actions Taken

IAG - Interagency Agreement

IC - In Compliance

IEL (INT) - Interim Effluent Limits

IL - Interim Limits

LOV - Letter of Violation

MOA - Memorandum of Agreement

NC - Noncompliance

NCR - Noncompliance Report

NEIC - National Enforcement Investigations Center

NOV - Notice of Violation

NPDES - National Pollutant Discharge Elimination System

OECM - Office of Enforcement and Compliance Monitoring

OGC - Office of General Counsel

OIG - Office of Inspector General

O&M - Operations and Maintenance/Management

OW - Office of Water

OWAS (OWEG) - Guide to the Office of Water Accountability System and Mid-Year Evaluations

OWEP - Office of Water Enforcement and Permits

ORD - Office of Research and Development

PAI - Performance Audit Inspection

PCS - Permit Compliance System

POTW - Publicly Owned Treatment Works

PQR - Permit Quality Review

PWS - Public Water Systems

QA - Quality Assurance

QNCR - Quarterly Noncompliance Report

RE - Resolved

RI - Reconnaisance Inspection

SCO - Show Cause Order

SEA - State-EPA Agreement or State Enforcement Agreement

SNAP - Significant Noncompliance Action Program

SNC - Significant Noncompliance

SPCC - Spill Prevention Control and Countermeasures

SPMS - Strategic Planning and Management System

TOX (TOX SAMP) - Toxics Sampling Inspection (see XSI)

TPP - Temporary Pollution Permit

USEPA - United States Environmental Protection Agency

VRAC - Violation Review Action Criteria

WENDB - Water Enforcement National Data Base

WQM - Water Quality Management

WWTF - Wastewater Treatment Facility

WWTP - Wastewater Treatment Plant

XSI - Toxics Sampling Inspection (see TOX)

$ - Facility Contructed with P.L. 92-500 Grant Funds

Definitions for the Enforcement Management System*

1. Actionable: A violation by the NPDES permittee or other facility subject to regulation under the Clean Water Act (CWA), and/or the permit, which gives rise to a possible enforcement action by the NPDES State, USEPA, and/or any person or entity having standing, whether or not such action is taken.

2. Administrative Order (AO): A document issued by EPA under Section 309(a)(3) of the CWA which contains findings of fact determined through a unilateral, administrative process (without required notice or opportunity for hearing) and which demands that the permittee achieve compliance with the CWA (§§301, 302, 306, 308, 318, 405 or with conditions of a permit which implements one of those sections, or an equivalent State action issued under State authority. The document contains an order to cease the violation immediately, or a specific timetable for compliance.

3. Dischargers (Municipal, Industrial, Major and Minor):

   (A) Municipal Major: A municipal wastewater treatment facility which discharges a flow of one million gallons or more per day, or which serves a population of ten thousand or more. Any municipal facility not meeting this definition is classified as minor.

   (B) Industrial Major: An industrial discharger's permit is analyzed for specific discharge characteristics which are tied to a weighted point total classification

system. Points are assigned on the basis of the follow five effluent parameters: toxic pollutant potential; flow/wastewater type; conventional pollutant load; public health impact; and water quality factors. The point total is added. If the total is eighty points or higher the discharger is classified as major. Those dischargers which have less than eighty points are classified as minor.

(C) Discretionary Majors: USEPA Regions are permitted to assess up to five hundred points at their discretion, thereby placing some dischargers in the major classification which would not have otherwise been there. This provides the Regions the opportunity to classify certai dischargers with local problems as majors, even though they would not be under a fixed, inflexible national scheme. Each Region's discretion is limited to 20 discretionary additions plus five percent of their total major permits.

4. Formal Enforcement Action: An action 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.

5. Letter of Violation (LOV): A warning letter issued by either an NPDES State or USEPA to a permittee under the NPDES Program informing the permittee that it is in violation of the CWA,

implementing regulations, and/or the permit, and which indicates the possibility of escalated enforcement action if the violation is not corrected in a timely manner.

6. Notice of Violation (NOV): A formally-written document issued by USEPA under §309(a)(1) to an approved State with a copy to the permittee informing them of the permittee's violation of a State-issued NPDES permit or a State-issued §404 permit. The NOV specifically describes the violation and describes the action required by the State to avoid further action by USEPA.

General Enforcement Polıcy Compendium", updated December, 1988. Table of ontents and Topical Index Only. Contains policies numbered GM-1 thru M-74. Copies of individual policıes may be obtained from Legal nforcement Policy Branch, Office of Enforcement Policy, OE (LE-130-A).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

3 MAR 1983

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: General Enforcement Policy Compendium - Transmittal Memo

FROM: Robert M. Perry
Associate Admininstrator and General Counsel

TO: Associate Administrator for Policy and Resource Management
Assistant Administrators
Regional Administrators

Attached is the first edition of the General Enforcement Policy Compendium. This transmittal includes a chronological table of contents and a topical index of the currently effective general enforcement policies and guidance documents. Copies of the documents are tabbed and arranged in chronological order.

All of the AAs have had the opportunity to review a draft of this Compendium and all have concurred in this edition. Therefore, this Compendium contains all general enforcement policies and guidance documents, except those stated as part of a promulgated Agency regulation. Documents in effect concerning the daily operation of the criminal enforcement program have not been included in this Compendium but are available to necessary Agency personnel. Subject to these exceptions this Compendium contains those enforcement policies affecting all media which are in effect and which should be followed by Agency personnel. Any other general enforcement policies (as distinguished from media-specific enforcement policies) are hereby revoked. Media-specific enforcement policy compendiums will be issued as sections of the forthcoming Enforcement/ Compliance Guidance Manuals.

As new policies are developed, OLEC will transmit them to you for inclusion in the Compendium and update the table of contents and the index.

If you have any questions about matters contained in this memorandum, please contact Janet Tungland at FTS-426-7503.

Attachment

cc: Regional Counsels
Associate Enforcement Counsels

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"GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS", dated May 1987.

NATIONAL GUIDANCE

FOR

OVERSIGHT OF NPDES PROGRAMS

May 1987

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. Currently about three quarters of the States are approved to administer the NPDES program, more than half 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 and pretreatment programs 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;
- Outlines high priority achievements for NPDES and pretreatment programs;
- Clarifies how the Regions 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 conjunction with the Agency's "Revised Policy Framework for State/Federal Enforcement Agreements" (issued August 25, 1986). 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 Annual Agency Operating Guidance, the Annual Strategic Planning and Management System, and the Annual 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. This guidance emphasizes reissuing major industrial and major municipal permits to incorporate approved pretreatment program requirements and new requirements for controlling toxic and hazardous waste in wastewater discharges and in sludge. 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 should be phased-in for the full range of sources and violations. Finally, this guidance addresses implementation of approved local pretreatment programs, 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 and pretreatment programs, as well as their ability to achieve the goals and objectives of the CWA.

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

The Agency has developed a general set of oversight criteria for all compliance and enforcement programs.[2] This program-specific 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 direct 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.[3] 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

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2. See "Revised Policy Framework for State/EPA Enforcement Agreements," August 25, 1986.

3. Wherever data entry to and/or use of PCS is mentioned in this document, it is expected that, where a State is not a direct 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.

audits to verify that each approved State is maintaining current permit files (including an adequate administrative record) and data in PCS consistent with 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 strategy and issuance list by State that guides permit issuance/modification consistent with national priorities and assures that backlogs do not develop: It is the responsibility of the administering agency to develop a strategy and an annual permit issuance list of priority permits to be reissued/modified/reopened during the fiscal year (by name and type) consistent with the National Surface Water Toxics Control Initiative, the Annual Operating Guidance, and State permitting priorities. 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, General Pretreatment, State Water Quality Standards, secondary treatment, effluent guideline, and sludge 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).

- Clear identification of POTWs required to have approved local pretreatment programs (and significant IUs where

there is no approved local program) as evidenced by the existence and use of:

-- Established procedures for maintaining complete, accura and up-to-date data on all POTWs required to have approved local pretreatment programs: The agency administering the pretreatment program (i.e., approved State or EPA Region) is responsible for establishing and maintaining a complete inventory of all POTWs required to have approved local pretreatment programs (previously approved and newly identified) consistent with the Pretreatment Compliance Monitoring and Enforce ment Guidance. Administering agencies should enter required data into PCS in a timely manner consistent with established procedures. The administering agency should also maintain up-to-date files on individual POTWs, and should have a rationale for adding/deleting municipalities from the list of required local programs. Finally, the administering agency should have a plan for completing and maintaining an inventory of all categorical industrial users (IUs) and significant industrial users (SIUs) where there is no approved program, as resources allow.

-- Local pretreatment program data that are complete, accurate and up-to-date: The Region is responsible for conducting periodic file audits to verify that each approved State is maintaining current files on POTWs with pretreatment programs (including required reports, inspection reports, audit findings, record of enforcement actions taken, and documentation of assistance provided to resolve problems), and entering data into PCS consistent with prescribed procedures; the Region should also conduct periodic audits in cases where an unapproved State is working with the Region in a partnership arrangement to carry out pretreatment program responsibilities.

- Approval of sound local pretreatment programs and program modifications as evidenced by the existence and use of:

-- Current process for completing approval of newly identified pretreatment programs and for identifying/acting on existing local programs that need adjustments/refinements: The agency administering the pretreatment program (i.e., approved States or EPA Regions) is responsible for maintaining a process for reviewing/approving/disapproving newly required programs, as well as a process for establishing priorities and taking action on program modifications, as needed, consistent with national policy, regulations and and guidance. The process for reviewing existing local programs and for determining the need for adjustments/refinements should emphasize

further improving both the basic control mechanisms and the operational/enforcement aspects of the program

-- Approved/modified local pretreatment programs that have adequate control mechanisms, as well as appropriate mechanisms for monitoring compliance and carrying out enforcement responsibilities: The administering agency has the responsibility to ensure that its procedures for program review/approval/modification result in sound, enforceable local pretreatment programs. Where a POTW is newly identified, the procedures should address the modification/reissuance of POTW permits to incorporate: 1) a schedule for local program development, and 2) an approved local program and related conditions, including requirements for implementation and reporting. Where POTWs are newly identified as requiring a local pretreatment program, the review and approval process should be completed expeditiously. As a general rule, the administering agency should work with the POTW to assist in developing an approvable program submittal within one year of identification; the review and approval process should be completed two to three months following submission.

Where existing programs need to be modified, the administering agency should establish priorities based on a sound rationale, and should have a process for reviewing local programs and determining whether local programs need to be adjusted/refined to incorporate: 1) new/revised control mechanisms for significant industrial users (SIUs) and enforceable local limits based on headworks analysis and proper interpretation of categorical standards; 2) mechanisms to adequately monitor IU effluent, to track and determine compliance rates for SIUs; and 3) procedures for initiating appropriate enforcement responses against IUs for noncompliance and publishing the names of significant violators. The administering agency should conduct these comprehensive reviews whenever a POTW's permit is reissued/modified, and as needed.

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. 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 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 (using PCS, where possible to automatically screen data). The administering agency should enter all the Water Enforcement National Data Base (WENDB) data for major permittees (and a lesser amount for minor permittees) into PCS in a timely manner; DMR data should be entered within 30 days of receipt of the DMR. The administering agency may also enter data into PCS for minor permittees, as resources allow (see PCS Policy Statement for these requirements). 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 possible, 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.

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

  -- Established procedures within the annual plan f conducting compliance inspections: The administeri agency should have established procedures for conducti routine and special inspections as part of its annual Compliance Inspection Plan. The plan and procedures should be consistent with the most current EPA Compli Inspection Manual and the NPDES Compliance Inspection Strategy and Guidance, and should contain clear criter for selecting candidates for the appropriate mix of routine and special compliance inspections (including pretreatment and sludge inspections, as appropriate). The procedures should also outline the basic requiremer and time frames for completing reports on inspection findings and for entering the data into PCS wherever possible. 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 yea The Region should also agree to provide prior notice to the State before conducting joint or independent inspec tions, and to supply the State with at least semi-annua reports of its findings (mid-year and end-of-year); the State should be apprised of major problems as soon as they are discovered.

  -- Inspections that are conducted in an effective man 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 responsibilities, 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.

- Oversight of control authorities to ensure the adequacy of approved local programs and the effectiveness of local program implementation as evidenced by the existence and use of:

-- Comprehensive program for assuring the adequacy and effectiveness of approved local programs: POTWs act as the control authority for most local pretreatment programs, and have primary responsibility for compliance monitoring and enforcement activities.[4] Administering agencies should have procedures for carrying out a variety of periodic reviews designed to ensure that POTWs have adequate local programs that are being fully and effectively implemented. Oversight should include provisions for reviewing POTW reports, conducting routine and special inspections, and conducting periodic audits of control authorities.

-- Local pretreatment programs that are adequate and are being fully and effectively implemented: To ensure that control authorities maintain adequate local programs, and fully and effectively implement these programs, the administering agency should: 1) conduct audits of each local program at least once in every 5 years (20 percent per year), including an evaluation of whether local limits need to be revised and/or whether categorical standards are being properly interpreted to protect treatment works, prevent interference with sludge disposal, and protect receiving water quality (including toxic organics, hazardous waste, metals, and conventional pollutants); 2) conduct, as part of regular NPDES inspections, annual pretreatment inspections of POTWs with approved local programs (except where an audit has been performed in the same year), including a sample of IUs in the POTW, to the extent that resources allow; 3) review monitoring reports (consistent with the procedures and timeframes in the Pretreatment Compliance Monitoring and Enforcement Guidance), including annual reports submitted by POTWs and semi-annual reports submitted by categorical users in areas without local programs, to: assess the adequacy of industrial waste surveys, local legal authorities (including interjurisdictional agreements) and local implementation mechanisms (e.g. permits, contracts, and/or local limits); and to ensure that control authorities are conducting timely and appropriate review of required periodic reports, and are monitoring and enforcing consistent with their approved local programs. The administering agency should also have a plan for inspecting significant industrial users where there is no approved local program, to the extent resources allow.

III. Enforcement Response

The CWA (§309) requires EPA or NPDES States to respond to NPDES permit violations by initiating the appropriate enforcement

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4. Where States act as control authorities in lieu of local programs, they will be held to the same standards of implementation as local authorities and Regions will pay special attention to oversight of these programs.

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 States should have compliance and enforcement procedure 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 response 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 which the organization responsible for compliance/enforcement learns of the violation; an appropriate initial 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.

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

- 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 violations; procedure for preparing and maintaining accurate and complete documentation that can be used in future formal enforcement actions; and time frames for escalating enforcemen responses where the noncompliance has not been resolved The administering agency should also have an analytical process for assessing penalties or equivalent sanctions in appropriate cases.

  -- 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 enforcemen actions (as defined by State agreements) that clearly define what the permittee is expected to do by a reasonable date certain; an assessment of a civil penalty (or equivalent sanction) as part of all civil judicial referrals, when appropriate, based on a consideration of established factors[6] and in an amount appropriate

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6. For States, the determination of a civil penalty amount (or equivalent sanction) should be based on factors such as the seriousness of the violation(s), any history of noncompliance, any good faith effort to comply with applicable requirements, the amount of economic benefit resulting from the violation, the economic impact of the penalty on the violator, and such other factors as justice may require; the seriousness of a set of violations includes consideration of the harm or risk of harm posed to health or the environment by the violations, the amount by which effluent limits were exceeded, the violator's efforts to correct the problem, and the duration of the violations. Regions are expected to follow the CWA Penalty Policy in calculating penalties for EPA cases.

   For States, examples of sanctions include: bans on new sewer connections, bans on sewer usage, facility closure, and permit revocation or suspension. In defining the appropriate use of civil sanctions, the Region and State should consider whether the economic impact of the sanction is comparable to a cash penalty; specific actions qualifying as equivalent sanctions should be defined in State/EPA enforcement agreements. State/EPA agreeements should also be used to deal with those special circumstances in which the only formal enforcement action the State can take is a judicial action.

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 in the QNCR and determined to be in significant noncompliance based on the definition 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.[7] In the rare circumstances where formal enforcement action is not taken, the administering agency is expected to have a written record that clearly justifies why the alternative action (i.e. informal enforcement action or permit modification) was more appropriate. Audits will be used to verify the timeliness and appropriateness of an administering agency's enforcement actions, as well as its consistent application of penalties/sanctions.

- Appropriate involvement of Regional Counsel/State Attorneys General (or other appropriate government legal staff) to ensure legal support for national enforcement priorities as evidenced by the existence and use of:

  -- Established procedures for routine coordination and notification of proposed enforcement actions, as well as general time frames from case referral to filing: The administering agency is responsible for ensuring that the Regional Counsel(RC)/Attorney General(AG) is consulted on the annual judicial enforcement commitments the administering agency is making, and for establishing workable internal procedures for notifying and consulting with the RC/AG on individual cases arising throughout the year. The Region and State should reach a common understanding about the general timeframes from case referral to filing.

  -- Coordination that results in timely and appropriate action by the RC/AG: The administering agency should be able to demonstrate that its internal coordination procedures with the RC/AG (or other appropriate govern

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7. 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, as amended). Specific actions qualifying as appropriate will be defined in State/EPA enforcement agreements.

ment legal staff) result in: timely review of initi referral packages; satisfactory settlement of cases as appropriate; timely filing and prosecution of well-prepared referral cases; and prompt action where dischargers violate consent decrees. As a general goal, EPA and State cases should proceed from referral to filing in 60 - 90 days.

- 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 enforcement response procedures that include initiating appropriate enforcement action where POTWs: fail to submit approvable pretreatment programs; have violations of NPDES effluent limitations; fail to implement approved pretreatment programs; or fail to submit or submit delinquent annual and other reports. The administering agency should also have procedures for evaluating whether POTWs are initiating appropriate enforcement responses to violations by IUs. 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 action against permittees with pretreatment programs that are in significant noncompliance, which applies to: failure to meet milestones in enforceable schedules; violations of effluent limits; and delinquent POTW pretreatment reports. Enforcement actions against these POTWs should be taken consistent with the criteria and timeframes for the NPDES program. Administering agencies should also report POTW noncompliance consistent with national guidance that defines how to determine whether POTWs are failing to adequately implement their pretreatment programs. Administering agencies are expected to review the compliance status of these POTWs, and take appropriate follow-up actions, including inspections, audits, and enforcement against the most serious cases of noncompliance based on national guidance. Administering agencies should ensure that POTWs provide, at least annually, for public notification of significant 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 against industrial users violating categorical standards in accordance with their enforcement response criteria and procedures

- 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 condition by a Federal facility.[8] 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, act according to the document "Resolution of Compliance Problems at Federal Facilities" and the Agency's Federal Facility Compliance Strategy.[9] For violations constituting significant noncompliance, the timely and appropriate criteria for initiating action apply. Where a State has been approved to administer the Federal facility portion of the NPDES program, the basic enforcement responsibility rests with the State; these States should have their own established terms and procedures for dealing with noncompliance by Federal facilities, and should use their authorities in the same manner and to the same extent as any nongovernmental entity (CWA §313(a)).

  -- 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 the Agency's Federal Facility Compliance Strategy. 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.

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8. A Federal facility compliance agreement counts as a formal enforcement action in the SPMS system.

9. An Agency Workgroup has made final recommendations on an Agency Federal Facility Compliance Strategy, which will serve as the basis for revising the Yellow Book.

OVERALL PROGRAM ACTIVITIES 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. In order to ensure the required degree of Federal/State program consistency, the Region should complete review of the statutory and regulatory authority for all NPDES State programs whenever major State or Federal statutory or regulatory changes have been enacted. To the extent possible, Regions will conduct these State reviews after the State's self-evaluation of its legal authorities 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 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. Regions will also continue to wor with other States to promote full NPDES program approval

- Demonstrated ability to set program priorities and carry out the NPDES program in an effective manner:

In addition to evaluating the administering agency's performance in carrying out its operational responsibili as set forth earlier in this guidance, the agency's over effectiveness should be assessed based on its demonstrate progress towards achieving the goals and objectives of th CWA. Listed below are four goals, which, if achieved, would provide sound evidence that the administering agenc 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 major permit as they expire, reducing and eliminating any existing backlogs of minor permits consistent with national priorities and time frames, and in avoiding the develo ment of new backlogs of expired or unissued permits, especially major permits. As general goals, permit programs should strive to assure that: action on major permits occurs promptly in the last 6 months of an expiring permit term; all point sources suspected being toxic are properly screened and evaluated; permits reflect BAT/BCT based on promulgated guidelines or BPJ, or more stringent water quality-based limits, and sludge management requirements or criteria, as appropriate; all permits are written to enhance their enforceability; 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 these goals have been achieved, it may be appropriate to review a State's Continuing Planning Process and other procedures to assure proper coordination among water quality standard wasteload allocation, and permit issuance activities.

-- Demonstrated ability to consistently establish and oversee local pretreatment programs and to fully and effectively implement all pretreatment authorities reserved to the State: 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, including: an on-site audit, no later than one year after local program approval and at the time of permit reissuance thereafter; review of reports, conduct of inspections; and other activities as necessary. 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 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. 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 Annual 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 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, and the Office of Water Funding Policy in the Annual Agency Operating Guidance.

The agreements should contain requirements for key outputs, which the Region should review periodically based on the specific arrangements contained in the agreements. The Region should supply the State with written reports of its review 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. In addition, States should have the opportunity to evaluate the Region's performance in providing assistance and meeting commitments. These evaluations can coincide with regular Regional evaluations of States, and should be circulated to program offices as well.

The Region should tailor the level and the frequency of its review 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 reviewed less frequently and/or less extensively; other States may receive more frequent and/or more detailed reviews by the Region. When a State exhibits continued poor performance, the Region should make recommendations for changes and should take other action(s) as appropriate.[10] 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.

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.

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10. See the "Revised Policy Framework."

PROCESS FOR NOTIFICATION/CONSULTATION AND CRITERIA FOR DIRECT FEDERAL ENFORCEMENT

Under State delegation, EPA has the right to initiate an enforcement action in a State, and is required by the Clean Water Act, as amended in 1987, to notify a State prior to EPA assessment of administrative penalties. 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 for consulting and coordinating State/EPA enforcement activities, including determining when to initiate Federal enforcement action. This process should also be used in situations in which EPA plans to assess administrative penalties.

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 or that the State faces an unusually large caseload. 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; where a Region determines a State has failed to initiate timely and appropriate formal enforcement action (as prescribed earlier in this guidance); and/or where a Region determines that a State has obtained a grossly deficient penalty or sanction under the circumstances of a given case.

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.

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 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.

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 noncompliance 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 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 St will forward the amended strategies to EPA.

GROUND RULES: (cont)

The common goal of all parties is to cause permittee 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.

"Action Plan on Pollution Prevention", dated April 13, 1989.

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

APR 13 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Action Plan on Pollution Prevention and Enforcement

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Linda J. Fisher
Assistant Administrator for
Policy, Planning and Evaluation

Attached is the Office of Enforcement and Compliance Monitoring's Action Plan for Pollution Prevention. It shows how OECM plans to incorporate pollution prevention goals into enforcement program implementation. A draft action plan was reviewed by the Regions and Headquarters program offices. This plan reflects their comments. The plan encompasses four areas: environmental auditing, enforcement settlement agreements, vigorous enforcement of existing laws and the use of compliance inspections to disseminate information on pollution prevention. A further proposal to use compliance inspectors to affirmatively identify pollution prevention opportunities specific to individual sources -- drew little support and raised significant concerns.

We look forward to working with your staff to develop the Agency-wide Strategy on Pollution Prevention. If you have questions, please call Cheryl Wasserman, Acting Director, Enforcement Policy Division on 382-7550 or EMAIL EPA2281.

Attachment

cc: Associate Enforcement Counsels
Headquarters Compliance Program Directors
Acting Director, NEIC
Regional Enforcement Contacts

POLLUTION PREVENTION AND ENFORCEMENT

Action Plan to Foster Two Agency Goals

This paper describes the relationship between two important Agency goals: preventing pollution and achieving high levels of compliance with environmental requirements. It identifies specific actions to realize the mutual benefits of both goals.

WHAT ARE THE TWO GOALS?

o Compliance and enforcement strategies seek compliance with specific performance or operating standards. The key ingredients of the compliance goal are: 1) specific legal requirements that define acceptable performance; 2) a determination of compliance status against those requirements; 3) legal consequences for violations; and 4) enforceable action plans to permanently correct underlying compliance problems.

o In contrast, the pollution prevention goal as defined by the Agency transcends existing legal requirements. Sources are encouraged to reduce volumes of waste, waste streams, effluent, emissions or pollutants at their source, whether or not subject to specific requirements, and to reuse wastes to minimize the adverse environmental consequences of treatment and disposal.

o Compliance and enforcement strategies always seek to "prevent pollution" in the broadest sense of the term but not necessarily in the specific meaning of the term as now employed by EPA. Enforcement deters violations i.e., "excessive" pollution, and encourages reduced levels of pollution to avoid exceeding limits. In the extreme, it may remove from business operations repeat violators by resulting in denial of permits or demanding plant shut down. In most cases, this also means that in an effort to avoid violations, sources of pollution are encouraged to eliminate or keep emissions or effluent well below that required to comply. Moreover, if treatment of pollutants in order to comply with standards is sufficiently costly, it will drive pollution reduction for economic reasons, but only if such requirements are stringently enforced.

Unless specifically mandated, however, regulated entities are completely responsible for their choice as to how they will comply with requirements. This empowers the regulatee either to utilize the traditional "end of pipe" control to reduce emissions or effluent after they are generated or to change processes to reduce levels of pollution at the outset. Enforcement settlements and orders cannot unilaterally introduce requirements and restrictions on the means of compliance that were not otherwise set forth in the original requirements. Therefore, as a general rule, if a process or technology is preferable from a pollution prevention standpoint, as well as economically feasible, it is better to establish it as a norm in

the regulatory setting than to rely on case-by-case enforcement to realize its potential.

HOW DO THESE GOALS RELATE?

1- Strong, credible enforcement of existing laws is essential to encourage pollution prevention

The greatest incentive to action by public and private entities to reduce or eliminate pollution stems from a concern over liability, both now and in the future, personal and corporate, for the consequences of pollution generated.

Further, the expectation of fairness, that competitors will be made to comply, is essential to support those who choose to make investments in pollution prevention as a means of achieving compliance or of avoiding future environmental problems. The literature is replete with case studies of those who step out in an innovative way only to be undermined by those who flaunt the law.

2- Pollution prevention today can mean reduced need for enforcement tomorrow

In the extreme, if discharges are eliminated or reduced to well below otherwise acceptable levels, there would be minimal need for a major compliance monitoring and enforcement effort around these discharges. Further, if wastes are reused or not generated in the first place (and thus not disposed of), there would be less need for future after-the-fact "Superfund-type" enforcement to address disposal practices which we have not yet recognized as harmful. In this sense, the pollution that is prevented today, can indeed mean reduced need for enforcement tomorrow.

3- The compliance and pollution prevention goals fundamentally reinforce each other; however there may be isolated examples of conflicting short run strategies:

o The time allotted to legally come into compliance or the need to expeditiously remedy violations may not be sufficient to develop and implement pollution prevention alternatives.

o Incomplete environmental solutions proposed in the name of pollution prevention may actually shift the burden from one medium or forum to another, complicating enforcement.

o End-of-pipe controls may sometimes be easier to monitor for compliance than pollution prevention alternatives.

However, these conflicts can be illusory, and efforts to achieve both goals are usually reinforcing. Further, they can be avoided or reduced with more careful planning early in the regulatory process. Attachment #1 is an example of this interplay.

WHAT CAN ENFORCEMENT DO TO FOSTER POLLUTION PREVENTION?

1- Use ongoing compliance promotion initiatives in environmental auditing and environmental management as well as enhanced outreach within compliance strategies to promote pollution prevention

a- EPA's Policy statement on Environmental Auditing promotes this voluntary practice within the regulated community to prevent compliance problems, promptly correct them, ensure sound management practices and reduce risks of environmental harm generally. Outreach activities to promote these practices will continue and be strengthened. (See Attachment #2)

b- Compliance strategies are developed at the time a regulation is promulgated and include promotional activities as well as plans for compliance monitoring and enforcement when the rules become effective. Early development and dissemination of information on pollution prevention alternatives is key to ensure the regulated community can make informed choices about means of coming into compliance. OECM will work with the program offices to factor these activities into compliance strategies, in coordination with the States, where appropriate.

2- Encourage pollution prevention through enforcement settlement conditions

Given the importance in the long term of establishing approaches to pollution control which ultimately prevents pollution at its source, the Office of Enforcement and Compliance Monitoring along with the program offices will carefully review current policy and practice to assess where there are any impediments to pollution prevention that are otherwise unnecessary to preserving a strong and effective enforcement program.

Although enforcement must closely track agency requirements, there are opportunities for enforcement negotiations to better accommodate pollution prevention approaches for sources to return to compliance, and for these settlement agreements to introduce creative conditions which can further pollution prevention goals. These opportunities must take into account overriding concerns for preserving both the deterrent effect of enforcement actions as well as elements of fairness and equity in the extent to which pollution prevention conditions related to the legitimate environmental concerns of enforcement officials. Attachment #3 presents the charge of a new agency workgroup which will draft multi-media guidance for addressing these issues. Interim

guidance will be available by the end of the fiscal year. Following several regional pilots, the guidance will be finalized.

Program-specific guidance may also be developed to implement these principles. Programs are generally encouraged to develop their own guidance but OECM will work with them to ensure consistent application of overall enforcement principles that are in place and are being articulated through the umbrella policy workgroup. These approaches will then be fostered among State officials.

3- *Provide the incentive for pollution prevention by continuing* to enforce existing requirements vigorously

There are numerous examples of how traditional enforcement provides incentives for pollution prevention, some of which are highlighted in Attachment #4. Pollution prevention will be enhanced through continued efforts to strengthen enforcement and to better communicate the adverse consequences of non-compliance.

4- Use compliance inspectors to disseminate information in the field on pollution prevention

OECM will support proposals for field personnel to be used to disseminate information on pollution prevention to facility managers, which refer to other sources of expertise and technical assistance. A full discussion of this issue is included in Attachment #5.

Consideration also was given to using agency compliance inspectors to identify pollution prevention opportunities in the field. This proposal has proven to be highly controversial and will not be included in the action plan at this time. Those strongly opposed to this approach cite a confusion of roles. Those who support it identify a need for extensive training before agency inspectors would be in a credible position to offer such advice.

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Each of these areas is explored more fully in the attached discussion pieces and action summaries: Attachments #2-5.

ATTACHMENT #1

EXAMPLE

INTERPLAY BETWEEN ENFORCEMENT AND POLLUTION PREVENTION GOALS

An illustration of how these relationships play out in practice is the development and implementation of low solvent technology. EPA has encouraged the use of water based inks and paints, for compliance with air quality standards, in place of high solvent inks and paints, which require capture and incineration of volatile organic compounds.

Full substitution of water based paints and inks for high solvent paints and inks would enhance compliance with air pollution laws. There could be reduced need for continuous monitoring, record keeping, and inspection presence. As long as high solvent paints and inks are used, there is a need for end-of-pipe control, capture and destruction of volatile organic emissions through incineration, and this requires continued monitoring, surveillance and enforcement action for inadequate capture and destruction efficiencies. Adoption of water based paints and inks also could reduce the need for enforcement oversight of disposal of used solvents.

However, the industry was slow to respond to the pollution prevention alternative to incineration. Despite ample time to develop competitive processes if they had started right away to invest in these alternatives, industry ran out of time to comply. Perceptions of lax enforcement, concern that the technology would lead to inferior product, and that competitors would get away with no action, led to a wait and see attitude. It was only after vigorous enforcement, forcing either incineration, water based inks, or a combination of both, that progress in applying pollution prevention approaches proceeded at a rapid pace. In this regard, enforcement practices at first delayed and then enhanced pollution prevention. In forcing industry's hand, and not allowing more time to develop the alternative technologies, enforcement was also foreclosing pollution prevention by those who opted for the incineration option given time constraints.

Further, because the pollution prevention option is not yet as well developed as it might be, many chose to comply with a complicated arrangement combining both high and low solvent inks in production line averaging schemes. This introduced new wrinkles in compliance monitoring and enforcement requiring a recordkeeping and compliance trail for use of specified paints and inks.

Do the two goals therefore conflict? While seemingly more complex for instantaneously assessing compliance, the pollution prevention alternative probably facilitates continuing compliance. It is far easier to review records for an accurate portrayal of behavior over extended periods of time than

to attempt to demonstrate the capture and destruction efficiency of an incinerator's operation over time, between inspections.

At the same time, this mixed approach, using both water based paints and incineration, allows industry to become more familiar with the water based alternatives and to perfect their application to more specialized customer needs.

In this instance, the pollution prevention goal seemed on its face to make enforcement more complex and enforcement seemed to shut off pollution prevention options but, it is more likely that these efforts will reinforce each other in the long run. As the technology develops, spurred on by vigorous enforcement, its full use holds the potential for significantly reducing the need for compliance monitoring and enforcement.

Clearly, promoting compliance and pollution prevention can sometimes appear to be a careful balancing act, but one that is easier to perform if it is remembered that the ultimate gains are best served by seeking to achieve both goals.

Finally, as one cautionary note, in assessing the environmental benefits of proposals to prevent pollution at its source, the Agency must take into account compliance behavior and difficulty of enforcement. If reductions of pollutant discharges, emissions, or wastes leads to smaller, more numerous sources EPA must weigh the problems of monitoring and disposal against current practice to truly assess the benefits of the practice.

ATTACHMENT #2 ENVIRONMENTAL AUDITING

Use ongoing compliance promotion initiatives in environmental auditing and environmental management to promote pollution prevention

Ongoing agency initiatives promote environmental auditing and sound management practices. They serve to solicit the attention and commitment of senior management in public and private sector organizations to identify and take appropriate action both to improve compliance and to address environmental risk generally. The Office of Enforcement and Compliance Monitoring, in cooperation with the Office of Policy, Planning and Evaluation co-authored the agency's Policy Statement on Environmental Auditing, published in the Federal Register, July 9, 1986 (51 FR 25004). This policy does several things. In particular, it:

- Encourages environmental auditing as an effective, independent, systematic, periodic and objective review of plant operations and procedures to assess management systems, compliance status, risk reduction potential or any combination of these. Auditing is considered an augmentation of and not a substitute for ongoing environmental management, monitoring, reporting and recordkeeping obligations.
- Defines the general elements of an effective auditing program;
- Respects the importance of carrying out self-evaluations with some degree of privacy, clarifying when EPA may or may not request audit information.
- Offers no reduced enforcement presence as a quid pro quo for conducting audits and explains that continued EPA inspection and enforcement is essential to maintain the incentive to audit.
- Establishes agency policy to introduce environmental auditing provisions in consent decrees and orders with firms which evidence repeated patterns of violation, due at least in part to management failure, or where the violations are likely to occur similarly at other facilities owned and operated by the violator.

Before and since the issuance of the policy, both offices and the Office of Federal Activities have been actively involved in promoting the use of environmental auditing by regulated entities both to anticipate environmental compliance and other problems related to general environmental risk exposure. In addition, OPPE is in the process of documenting broader environmental management practices e.g. corporate policies, of leading industry programs.

Activities fall into three categories:

a) Outreach:
   - Speeches are regularly given by OECM/OPPE/OFA on the policy, encouraging these practices;
   - technical assistance is provided in the form of case studies, protocols and bibliographies distributed on request (recently waste minimization assessment guidance was added to these materials);

- OFA is preparing audit guidance for federal agencies
- OECM plans to strengthen the network in the Regions of individuals capable of providing information on environmental auditing; and
- OECM and OPPE have active representatives on the Environmental Auditing Roundtable, an industry group dedicated to promoting auditing as a profession.

b) Development of Auditing Guidance for Municipalities

- Municipalities are a last frontier for auditing and ripe for its application given compliance pressures on city and county governments. We are aware of only one municipal auditing program at present. In response to interest expressed by this community, OECM and OPPE are developing an initiative this year to promote auditing practices tailored to this group and its environmental concerns.

c) Conditions in Enforcement Settlements:

- In November, 1986 OECM issued guidance on the inclusion of environmental auditing provisions in enforcement settlements. Since that time, numerous orders and decrees have introduced audit applications.

  This guidance indicated that EPA's policy is to settle its judicial and administrative enforcement cases only where violators can assure the Agency that their noncompliance will be corrected. This assurance may, in part, take the form of a party's commitment to conduct an environmental audit.

  EPA reserves the right to review audit-related documents required as part of an enforcement settlement agreement, but usually oversight entails some form of self certification, review of findings and/or a management plan pursuant to an enforceable schedule.

  A violator's commitment to conduct an audit is one of several actions that can be required to remedy noncompliance or, in certain circumstances, may be a basis for reduced penalties. This element is discussed further in Attachment #3.

ACTIONS: 1) Continue and enhance outreach efforts, emphasizing new interest in pollution prevention; 2) undertake municipal project; 3) strengthen use of compliance and management-related audit conditions in settlements; and 4) explore use of waste minimization audit conditions in settlements under workgroup described in Attachment #3.

ATTACHMENT #3

ENFORCEMENT SETTLEMENT CONDITIONS

Encourage Pollution Prevention through Enforcement Settlements Conditions

Just as environmental auditing conditions related to compliance and/or management audits may be appropriate to introduce in enforcement settlement negotiations as described in Attachment #2, so may other means of encouraging pollution prevention. Two EPA Regions have expressed interest in exploring, with OECM and the Office of Pollution Prevention, what pollution prevention terms and conditions may be appropriate in enforcement settlement negotiations. In general, pollution prevention activities may be appropriate if they:

- Correct the underlying violation

  For example, if treatment capacity is exceeded, instead of agreeing to build additional capacity on a schedule, the source and agency might agree to a schedule to reduce pollution generation to the levels which can at least be accommodated with current treatment or control capacity.

  In such cases, pollution prevention is the means of compliance embodied in the agreement.

- Provide evidence of good faith efforts to comply, warranting penalty mitigation.

  Good faith is a factor which certain enforcement penalty policies recognize as a potential reason for downward adjustments in penalty assessments. This is the basis in the environmental auditing policy for any consideration of source proposals to audit for further remediation or improvement beyond that required by enforcement for the specific violation in question.

- Define projects which may be an acceptable basis for mitigation of penalties which would otherwise be assessed (Environmental Improvement Projects)

  The Uniform Penalty Policy contains provisions for considering projects as part of a settlement agreement (and have been adapted to program- specific penalty policies) where they do not significantly reduce the deterrent effect of a penalty.* The criteria include:

  -- Mitigation projects cannot substitute for full compliance (they must be undertaken in addition to correcting the violation).

  -- The project should be closely related to the nature of the original environmental harm or violation.

* A Workgroup is currently reviewing the existing criteria for considering alternative payments, in the context of developing a policy on mitigation of administratively assessed penalties.

-- Penalty reductions should reflect the actual cost of the penalty mitigation project (i.e., no tax advantages which can reduce the deterrent effect of the penalty).

-- Provisions in consent decrees or agreements cannot go beyond what is the equitable power of the Courts to order.

-- The project must primarily benefit the environment rather than the defendant (no favorable publicity for violator, etc.)

-- The project must not be something the defendant should be expected to do as sound business practice.

Two principles must guide any initiatives in this area:

o Any such provisions cannot weaken the deterrent effect of the enforcement action. Enforcement actions must establish the correct incentives and disincentives, leveraging relatively few individual actions into far reaching behavioral changes. We also must avoid perverse incentives to delay action to develop pollution prevention alternatives until they might be needed to bargain with enforcement personnel.

o Any such provisions must in turn be enforceable, that is, accompanied by tracking and follow through to ensure they are carried out. This has proven to be difficult in the past and is one reason for the traditional reluctance of the Department of Justice for accepting other than dollar penalties in addition to correction of the underlying violation.

Traditionally, EPA policy has followed these principles by rejecting proposals which defendants would otherwise choose to do on their own or projects whose benefits accrue to the defendant rather than the environment or the public at large. Current penalty policies are under review to assess the current limitations on accepting alternative payments and other beneficial projects.

ACTIONS: OECM will establish an Agency workgroup to: 1) prepare guidance on acceptable enforcement settlement provisions which promote pollution prevention consistent with Agency penalty policies and work with individual program offices on program-specific guidance; and 2) work with selected Regions to pilot the guidance.

ATTACHMENT #4

VIGOROUSLY ENFORCE EXISTING LAWS

Provide the incentive for pollution prevention by continuing to vigorously enforce existing requirements

The two greatest motivations for pollution prevention are the potential liability from enforcement of environmental laws and broader private liability through tort claims, contracts etc. for the adverse consequences of environmental pollution.

Specific examples of how strong enforcement can encourage pollution prevention include:

- **Pre-manufacture Notification:**

  By preventing new chemicals from being produced and marketed which pose unacceptable environmental harm, EPA can most effectively prevent new pollution at its source.

- **Title III Toxics Release Inventory reporting:**

  Required reporting under Title III section 313 encourages sources of toxic chemicals to reduce volumes of releases into the environment by making the information publicly available. It is also essential as a baseline for assessing progress in preventing pollution nationwide. Firm and visible enforcement is needed to reinforce those who diligently reported and gain compliance from those who have not.

- **Superfund and RCRA enforcement:**

  Corrective action and clean-up of past practices which are now deemed harmful, establishes new rules of behavior requiring anticipation of future liability regardless of whether action today is legal. Vigorous enforcement leads operators to conclude that reducing the amount of hazardous waste is in their own interest.

- **Pesticide use:**

  Groundwater contamination, air and surface water problems from excessive pesticide use, with vigorous enforcement, may drive reductions in application levels and for elimination of pesticide use.

- **Air and Water standards:**

  Given the substantial existing investment in pollution control, enforcement may force exploration of process change to meet new toxic requirements and demands of growth. In particular, firm enforcement of pretreatment and other toxic requirements, particularly new sludge disposal requirements,

may enhance substitution of product and process to avoid further pollution control expenditures.

o Continuous Emissions Monitoring:

There are natural variations in the operation of any type of equipment. When continuous emission monitoring is required to assess compliance status with requirements, it tends to force the regulated community to provide for an ample margin of safety in plant operations, to avoid reporting instances of non-compliance.

ACTIONS: 1) Continue strong emphasis and priority for enforcement of environmental laws; and 2) continue to pursue ways to enhance the visibility of enforcement and the adverse consequences of non-compliance.

ATTACHMENT #5

INSPECTOR ROLE IN TECHNICAL ASSISTANCE ON POLLUTION PREVENTION

Use compliance inspections to identify pollution prevention opportunities in the field

EPA, State, and local compliance monitoring programs rely on a combination of self-reporting by facilities and on-site inspections to determine compliance with permits, rules and existing enforcement commitments. These inspections may be carried out for cause, or as part of a neutral inspection scheme. The primary purpose of an inspection is to gather information and evidence to support the compliance determination and any follow up enforcement action where violations are discovered. The inspector is the most visible representative of EPA or the State or local agency at the plant or facility level. The presence of and conduct of the inspector on-site can add to or detract from the credibility and deterrent value of the compliance monitoring and enforcement program.

The appropriate role for inspectors in technical assistance has long been debated within EPA and the environmental community. State and local inspectors tend to adopt the technical assistance role more readily, but are notably less oriented to formal enforcement. The underlying concerns about the role of inspectors in providing technical assistance are:

1- Technical advice offered in the field for remediation or correction of the violation can undermine EPA's further enforcement action, or be raised as a defense. (For this reason, with few exceptions, inspectors are urged in closing conferences with facility managers not to even draw conclusions as to the violations.)

2- The roles of technical assistance/transfer and enforcement require different approaches and can cause confusion in roles, undermining the enforcement attitude which is already difficult to foster.

3- Effort spent on technical assistance when it is oriented to solving specific problems can be quite expensive and diverts limited resources from enforcement.

4- Depending on its scope and purpose, technical assistance may require a level of expertise that all but the most experienced engineers lack. Although a 1987 survey of EPA personnel performing compliance inspections found that 2/3 were environmental engineers or environmental scientists, knowledge of engineering design and processes at the plant-level sufficient to suggest pollution prevention options is quite different from identifying and documenting compliance problems.

5- Technical assistance from EPA may compete with and inhibit the development of such assistance in the private sector.

While all valid concerns, there is one area of potential benefit in using field inspectors for a well-defined but limited technical assistance role which avoids some of these pitfalls.

One approach, requiring little new expertise or change in roles, is for EPA inspectors to distribute to the plant operator literature promoting pollution prevention action. The inspector would not have a problem-solving role. OECM has suggested this approach for SARA, Title III reporting and RCRA small quantity generators. Some training may be needed so that likely questions can be answered without loss of credibility. However, such literature should always include references and contacts for further assistance from EPA Regions or Headquarters.

The majority of commenters suggested that a separate cadre of personnel, not compliance inspectors, be relied upon for pollution prevention expertise, such as for waste minimization. In such cases, however, it is important that the role and expectation be clearly established and distinguished from an enforcement-oriented field presence. This approach is adopted by OSHA which carefully separates the inspection function for enforcement from the technical assistance/consultation function. OSHA offers this latter assistance to small and medium sized businesses in hazardous industries through a consultation program for which it has a specific legislative mandate. Those who request a consultation must agree in advance to correct any deficiencies noted, and may be referred for compliance inspection if they fail to correct deficiencies.

ACTIONS: Based on comments from the lead Region, the Agency Inspector Training Advisory Board, and the Enforcement Management Council concerning the importance of separating the technical assistance function and the enforcement function, OECM is not proposing any further action at this time in regard to inspectors providing technical assistance in the field on pollution prevention opportunities. However, OECM will support specific proposals to use compliance inspectors to disseminate literature on pollution prevention. OECM will use existing institutional mechanisms to raise and gain support for such proposals developed in cooperation with the program offices.

II. NPDES PROGRAM: PRE-ENFORCEMENT

A. SOURCES OF EFFLUENT LIMITATIONS AND OTHER REQUIREMENTS

"NPDES Permit Authorization to Discharge", dated April 28, 1976.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

APR 28 1976

OFFICE OF ENFORCEMENT
M-76-1

MEMORANDUM

Subject: NPDES Permit Authorization to Discharge

From: Deputy Assistant Administrator for Water Enforcement

To: Regional Enforcement Director, Region V

This is in response to your March 17 memorandum requesting Headquarters' policy on the following issue:

"[W]hether an NPDES permit constitutes an authorization to discharge only specific parameters limited or monitored in the permit or a general authorization to discharge all parameters subject only to the limitations contained in the permit."

Answer

Headquarters policy, as well as the clear language contained in the standard permit form [EPA Form 3320-4 (10-73)], provides for a general authorization to discharge subject only to the conditions and limitations contained in the permit.

Discussion

Every standard permit issued by EPA provides that the named discharger is "authorized to discharge from a [named] facility . . . to [named] receiving waters . . . in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, III hereof." In addition to effluent limitations specified in Part I and any special requirements set forth in Part III each general authorization to discharge is subject to the general conditions set forth in Part II. Those general conditions which tend to restrict the general authorization to discharge are the following:

A.1. Change in Discharge - requires notice of facility expansions, production increases or process modifications resulting in any different or increased discharges of pollutants even if such changes do not violate the permit effluent limitations.

A.3. Facility Operation - requires the permittee to maintain his treatment facilities or systems in good working order and operate them as efficiently as possible.

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A.5. Bypassing all bypassing is prohibited except under certain circumstances.

It is believed that the above general conditions, along with the installation and proper operation of treatment systems designed to achieve compliance with effluent limitations based upon BPT and water quality standards requirements should adequately limit the general authorization to discharge. Should information which suggests otherwise subsequently become available (e.g., discovery of the presence of toxic substances such as PCBs in the discharge), the permit may be modified for cause in accordance with general condition B.4. ("Permit Modification")

The few permits issued under the NPDES's predecessor permit program, the Refuse Act Permit Program, authorized only those parameters identified in the permit. This approach was rejected by EPA during the early development phases of the NPDES because it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants. Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit. The permittee then would be in technical violation of his permit.

Because we believe the approach adopted in the NPDES Permit Form 3320 is valid we recommend against inserting in permits the language identified by Walter A. Romanek in his January 22, 1976, memorandum (attached). Although it may be appropriate in special cases to employ narrative language in addition to the Part II general conditions in order to further restrict the general authorization to discharge, as a routine matter such practices should be avoided.

I believe the above statement of policy is consistent with that provided to your staff by Dick Browne and Barry Shanoff. If you have any further questions please contact Dick Browne, Bob Barnett, Brian Molloy, or me.

Jeffrey G. Miller

Enclosure

cc: Roy Harsch, Enforcement Division, Region V

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"POTW Compliance with NPDES Permit Effluent Limitations", dated January 5, 1977.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

JAN 5 1977

OFFICE OF THE
ADMINISTRATOR

MEMORANDUM

TO: Regional Administrators

FROM: Deputy Administrator /s/ John Quarles

SUBJECT: POTW Compliance with NPDES Permit Effluent Limitations

Poor performance by Publicly Owned Treatment Works (POTWs) is of major concern to the Agency. Each successive review of POTWs' operations indicates that their overall performance level is unsatisfactory. Over a third of the POTWs are failing to produce the effluent quality for which they were designed. Nearly half of the POTWs originally designed for secondary treatment fail to comply with present secondary treatment standards. These conclusions have been confirmed both by EPA's annual Section 210 Reports to Congress and by the recently completed municipal compliance audit report. This memorandum briefly describes the EPA's policy for dealing with the problem.

The Federal Water Pollution Control Act clearly establishes EPA's primary role in assuring adequate POTW performance as being regulatory. This role requires us to insist that municipalities accept full responsibility for achieving effluent limits required by their NPDES permits. To accomplish this, we must assume an aggressive enforcement posture with respect to municipal noncompliance. Aggressive enforcement of municipal permit requirements can and will yield significant results. Region II, for example, recently initiated and won a major precedent-setting civil action against the City of Camden, New Jersey, forcing it to restore and properly operate and maintain its treatment facilities. Other significant enforcement actions are also being developed against POTWs. The amount of POTW enforcement activity, however, must be drastically increased in all Regions in order to demonstrate our insistence upon municipal accountability for POTW performance.

Municipalities are responsible and accountable for achieving the effluent limitations required in their NPDES permits whether or not they have the in-house capability to deal with the problem underlying the violation. It is the municipality's responsibility to seek and secure whatever technical assistance or training is necessary to solve that problem. EPA must insist that municipalities accept and carry out that responsibility and must take enforcement action against those that are unwilling to do so.

Although it is recognized that EPA and the States are currently providing limited technical and training assistance, most of such assistance and training must be provided by the private sector. While the private sector can undoubtedly develop the capability to provide such services when a sufficient demand is made on it for those services, to date that demand has not been strongly made. Consequently, many consultants, equipment manufacturers and systems vendors have not yet developed a significant capability to render technical assistance or training. EPA and the States must expand their present efforts to encourage and stimulate development of private sector capability and expertise to meet these needs. Aggressive enforcement of municipal permits and an insistence that municipalities seek needed technical and training services should provide an incentive for the private sector to develop the needed capability.

In those few cases where a municipality has recognized the need of outside assistance to meet permit effluent limitations and has unsuccessfully sought that assistance, formal enforcement might be a futile response. EPA or State assistance might be appropriate in such a situation. Since it is the municipality's responsibility to seek that assistance, it should be given normally at the municipality's request rather than on the initiative of EPA or the State. And since a demand must be placed on the private sector if it is to develop the capability of providing such assistance, EPA should not normally provide the assistance unless the municipality has unsuccessfully sought it elsewhere. Consequently, EPA and State technical and training capabilities will be helpful in the short term to fill gaps in local and private sector capabilities to resolve POTW compliance problems. To the extent that EPA capabilities in this regard exist at the present time, however, they should not be expanded, but should be reduced as private sector capabilities mature.

Any technical or training assistance provided by EPA must be provided in a manner compatible with our primary role as regulators. It should be regarded as but one option available to the regulator in a particular case and not as the sole option or the option of choice in all cases. The inability to provide technical assistance in a given case or the failure to achieve the required effluent limitations after the provision of such

assistance should never preclude the use of more demanding regulatory options. Where technical assistance is provided, it must be done in a manner that will not prejudice the Agency's case in a subsequent enforcement action if the effluent limitations are not achieved after assistance has been provided.

I recognize that many people, both within and outside the Agency, believe that EPA should conduct a strong program of technical assistance to individual communities in addition to its enforcement role. In the abstract, this proposition may appear attractive. As a practical matter, however, an active assistance role confuses and undercuts the predominantly regulatory role that the FWPCA has fashioned for the Agency. Moreover, limitations on existing and foreseeable resources make it wholly unrealistic to think that we have or could develop the capacity to provide technical assistance in any significant number of cases as part of our national program. Thus we have no choice but to accept our role as being predominantly regulatory. Within this context, we can and should conduct an active role in manpower training, technology transfer and the dissemination of technical assistance on a general basis rather than an individual case basis.

I also specifically do not intend to restrict by this means any activities we may be able to undertake in the neglected field of manpower training.

In summary, let me make clear that our philosophy toward operating POTWs is regulatory and that the responsibility for meeting applicable permit requirements rests squarely on the POTWs. To date the compliance assurance program has been successful in securing compliance from industry. It is our responsibility to make sure that it is equally effective in securing compliance from municipalities.

"Confidentiality of NPDES Permit Applications" dated April 6, 1978 with attached memorandum dated March 22, 1978.

6 APR 1978

n-78-2

MEMORANDUM

TO: Regional Administrators
State NPDES Directors

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

SUBJECT: Confidentiality of NPDES Permit Applications

Attached is a copy of a recent decision issued by the Office of General Counsel which requires that all information in NPDES permit applications and permits be made public. Please advise your staff of this change so that implementation can be uniform.

Jeffrey G. Miller

Attachment

cc: Regional Enforcement Division Directors
Regional Permits Branch Chiefs

JShaffer:mHite:PD:EN-336:3109 WSM:5-0750

CLASS DETERMINATION 1-78

CONFIDENTIALITY OF INFORMATION IN NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMITS AND PERMIT APPLICATIONS UNDER SECTION 402(j) OF THE FEDERAL WATER POLLUTION CONTROL ACT

Under the Federal Water Pollution Control Act (FWPCA), as amende (33 U.S.C. 466 et seq.), the Environmental Protection Agency (EPA) or counterpart State agencies issue National Pollution Discharge Elimination System (NPDES) permits to individual sources of water pollution. This program is administered primarily in EPA's Regional offices. Those offices have asked for a Class Determination concerning the confidentiality of information contained in NPDES permits and permit applications in light of section 402(j) of the FWPCA. Under 40 CFR 2.207, I have authority to issue Class Determinations concerni the confidentiality of classes of information obtained by EPA.

In the case of information contained in NPDES permit applicatio and NPDES permits, I have found:

1. EPA possesses and will continue to acquire information in NPDES permits and permit applications.

2. The information contained in NPDES permits and permit applic tions is of the same character. It is proper to treat all of the information as in the same class.

3. A Class Determination would serve a useful purpose in clari the status of potentially confidential information contained in NPDE permits and permit applications as restricted by section 402(j) of F

I have determined that information contained in NPDES permits and NPDES permit applications is not entitled to confidential treatment because section 402(j) of the FWPCA mandates disclosure of this information to the public notwithstanding the fact that it might be trade secrets or commercial or financial information.

Section 402(j) of FWPCA states "[a] copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available upon request for the purpose of reproduction." This language is different from that in section 308 of the FWPCA. Section 308 is the basic information gathering authority of the FWPCA. Paragraph (b) of section 308 states "[a]ny records, reports, or information obtained under this section...shall be available to the publi except upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code...."

The inconsistency between the language of section 402(j) and that of section 308 was brought to the attention of the House Committee on Public Works in a letter dated December 13, 1971, from William Ruckels Administrator of EPA. Congress chose to treat the information covere

MAR 22 1978 OFFICE OF GENERAL COUNSEL

MEMORANDUM

SUBJECT: Confidentiality of NPDES Permit Applications

FROM: Joan Z. Bernstein
General Counsel (LE-130)

TO: Thomas C. Jorling
Assistant Administrator for
Water and Hazardous Materials (WH-556)

Marvin Durning
Assistant Administrator
for Enforcement (EN-329)

Attached is a Class Determination I have issued concerning the status of potentially confidential business information contained in NPDES permits and NPDES permit applications. I have concluded that section 402(j) of the FWPCA requires that NPDES permits and permit applications be made public notwithstanding the fact that some of the information contained in them would otherwise be treated as confidential.

The Class Determination will be used by this office and the Regional Counsels in making final confidentiality determinations under the regulations in 40 CFR Part 2, Subpart B. Any request for confidentiality of information in a permit application or permit would be denied citing the Class Determination. The applicant would be given 10 days notice prior to disclosure in which to seek a judicial remedy. At the end of the 10-day notice period the information would be made available to the public.

An important part of implementing this Class Determination is to inform the various EPA regions and State agencies of the decision. I have informed the Regional Counsels of the Class Determination and of the way in which it is to be implemented. You will need to inform your counterpart offices in the Regions and the States.

I think it is also important that this be reflected in the NPDES regulations, in the application forms, and in any informational materials used by EPA to explain the NPDES program.

From what I have been able to determine, this decision may be a change from past practice in the treatment of information in NPDES permit applications. I believe that in the past section 402(j) was overlooked, and most offices treated information in NPDES permit applications the same as section 308 information. Accordingly, it will take time to bring everybody up to speed on this change.

If you have questions about how your offices should implement the Class Determination or other related matters, contact James Nelson at 755-0794.

Attachment

It is clear from the language of section 402(j) and the legislative history of that provision that Congress intended section 402(j) to be a disclosure mandate in contrast to the basic approach of section 308 which provides protection for trade secret information. Accordingly, EPA is required to make public NPDES permits and NPDES permit applications.

The NPDES permit application is a standard form specified by EPA. It asks the applicant to supply certain specific information. In some cases, there is insufficient space for the applicant to supply all of the requested information. In those cases the applicant attaches additional sheets with the further information. For purposes of section 402(j), the NPDES permit application required to be made public is the application form itself and any attachments that are used to supply information requested by the application form. Any information obtained by EPA that goes beyond that asked for in the application, whether submitted by the applicant or obtained by EPA under authority such as 40 CFR 125.13, is not considered part of the permit application as contemplated by section 402(j). This additional information will be treated in accordance with the procedures of 40 CFR 2.302.

If an applicant has claimed as confidential any information contained in the NPDES permit application or the NPDES permit, confidential treatment will be denied in accordance with this Determination and notice given to the applicant in accordance with 40 CFR 2.205(f).

Joan E. Bernstein
General Counsel (A-130)

3/22/74
Date

by section 402(j) differently from the information obtained unde section 308. In all versions of the bill that became the 1972 amendments to FWPCA, the same basic approach of requiring public disclosure of NPDES permits and permit applications was followed. The only amendments to section 402(j) were to eliminate a specific enumeration of the offices in which copies would have to be kept. In Senate Report 92-414, October 28, 1971, at page 72, the Senate Committee on Public Works made the following comments:

> An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing by the Federal Government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it. This includes the deposit of any permit, and the conditions thereto, in a place of ready public access. The scrutiny of the public and the exercise of authority under this section is extremely important to insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources.

"Certification and Permitting of Dischargers Located on Waters Forming Boundaries Between States", dated April 19, 1978.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

APR 19 1978

OFFICE OF
GENERAL COUNSEL
m-28-4

MEMORANDUM

TO: Assistant Administrator for
Enforcement

Regional Enforcement Directors

NPDES State Directors

FROM: Joan Z. Bernstein
General Counsel (A-130)

SUBJECT: Certification and Permitting of Dischargers Located on Waters Forming Boundries Between States

QUESTIONS PRESENTED

When a facility is located within one State, but the end of the discharge pipe is located within the waters of another State, which State has certification rights pursuant to Section 401 of the Clean Water Act ("The Act")? If the Section 402 NPDES permitting authority has been transferred by the Administrator to the States, which State has the 402 permitting authority?

FACTS

On February 16, 1978, the Atomic Safety and Licensing Appeal Board of the Nuclear Regulatory Commission issued a decision which interpreted Section 401 of the Act. The Board determined that the proper State to issue a certification is the State which has jurisdiction over the navigable waters in which the discharge originates rather than the State in which the facility is located. The Board noted that:

> "we are prepared to give substantial weight to the interpretation given a statute by the agency Congress entrusted with its administration. In this case, we acknowledge that EPA is that Agency with respect to the Water Act. But EPA has not specified how Section 401 controls the outcome of the issue

> before us. We are, therefore, left to do so ourselves." (PUBLIC SERVICE COMPANY OF INDIANA, INC., Docket Nos. STN 50546, STN 50-547, slip op. at 20-21, footnotes omitted).

On February 28, we received a letter from the attorneys for the Public Service Company of Indiana requesting that we address the legal issue which is before the NRC. In addition, we had informal communications with representatives from the NRC staff and the Commonwealth of Kentucky similarly requesting that we address the issue. On March 20, we wrote the Secretary of the NRC and notified him that we would prepare a legal opinion on the 401 certification question.

The proposed Marble Hill Nuclear Generating Station will be located in Indiana. Its discharge will enter the Ohio River, which forms the border between Kentucky and Indiana. Apparently, the precise border is located at the low water mark on the Indiana side of the river.1/

The legal question raised is of significance to this Agency because there are 29 rivers in the United States that are boundaries between two States. While the boundary line between the States is usually the midline or thread of the channel of the stream, this is not always the case. For some rivers the boundary line is the high-water mark or low-water mark on one side of the river.

The boundary line creates questions not only in regard to certification under Section 401 of the Act but also in regard to the question of which State has the permitting authority under Section 402 of the Act. In this opinion we shall address both issues.

ANSWER

The State in whose waters the discharge originates is the certifying authority pursuant to Section 401 of the Act. Section 401(a)(1) provides that whenever the construction or operation of a facility "may result in any discharge into the navigable waters", the certifying State shall be the one

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1/ There is a factual question as to whether the discharge originates in Kentucky or Indiana waters. As noted in our March 20 letter, we shall not address this factual question.

"in which the discharge originates or will originate." While it might be argued that a discharge of pollutants actually "originates" where the manufacturing or industrial facility is located, rather than at the end of the discharge pipe, the entire structure of the Clean Water Act, its legislative history, and intent clearly establish that the State whose waters are affected by the discharge is the proper certifying State.

Similarly, the State in whose waters the discharge originates is the Section 402 permitting authority. Section 402(b) provides that a permitting State shall "administer its own permit program for discharges into navigable waters within its jurisdiction."

The State in which the facility is located has rights pursuant to Section 401(a)(2) and Section 402(b)(5) only to the extent that the quality of its waters is affected by the discharge.

DISCUSSION

The Clean Water Act is a comprehensive statute designed to reduce and ultimately to eliminate the discharge of pollutants into the nation's waters. The Act provides for a delicate partnership between the Federal government and the States in achieving this result. A major responsibility of the Federal government under the Act is the development and promulgation of uniform national technology-based standards for categories and classes of industrial dischargers. At the same time, the States are granted the authority (with Federal support and in some cases oversight) to institute a range of more stringent, more comprehensive requirements to assure protection of the navigable waters within each State.

Pursuant to Section 510 of the Act, the States are empowered to develop more stringent water pollution control requirements than those developed by EPA. Section 510(2) also explicitly retains the authority of each State to control the waters within its jurisdiction.

In addition to these general powers, the Act provides that States shall have a series of rights and responsibilities based upon the State's jurisdiction and control over waters

of the United States. Section 208(a)(2) of the Act requires a State or its designated areawide agency to develop comprehensive pollution control plans for areas of the State which have "substantial water quality control problems." Clearly the State whose waters are affected must take the lead role in devising a plan to protect its waters.

Under Section 303 of the Act each State is required to develop water quality standards for all waters within its jurisdiction. Such standards consist of a designated use/uses of the stream (e.g. "protection and propagation of fish and wildlife") and criteria necessary to support the use, (e.g. "not less than 5 mg/l of dissolved oxygen"). Prior to the passage of the 1972 Amendments, such water quality standards were the major water pollution control mechanism under the Federal law. See State Water Control Board v. EPA, 426 U.S. 200, (1976). While the role of water quality standards was somewhat diminished by the 1972 Amendments, the standards form a major basis for numerous State and Federal programs. The difference between the designated standards and the actual ambient water quality may provide the basis for Section 208 planning. Under Section 303(d) of the Act, States must identify those streams where the federal technology-based standards are insufficient to meet the designated water quality standards. The States are required to develop maximum daily loads for such streams and to develop more stringent effluent limitations which will achieve the standards as part of the continuing planning process under Section 303(e).2/

These State plans, laws, regulations, and other requirements are translated into limitations applicable to individual point source dischargers through the NPDES permit program pursuant to Section 402 of the Act. And under Section 208(e) of the Act, no permit can be issued which is in conflict with an approved 208 plan. Under Section 301(b)(1)(C), a discharger must achieve by July 1, 1977, any more stringent limitation necessary to meet the requirements of State law,

2/ In addition, Section 305(b) requires each State to submit biannually a report describing the water quality of all navigable waters within the State and the steps which will be taken to improve water quality.

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including water quality standards. The 402 permitting authority is required to assure that permits are consistent with Sections 208(e) and 301(b)(1)(C), and thus consistent with the requirements of State law including State water quality standards and limitations developed pursuant to such standards.

Section 401 of the Act provides another mechanism to insure that NPDES permits (as well as other Federal licenses and permits) meet the requirements of state law, particularly State water quality standards. Section 401 has its origins in Section 21(b) of the Water Quality Improvement Act of 1970, April 3, 1970, P.L. 91-224, 84 Stat. 91. This provision required that any applicant for a federal license or permit which might result in a discharge into navigable waters must provide the permitting authority with a certificate from the State in which the discharge originates or will originate that:

> "There is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards."

Section 21(b)(1) also provided that if the standards had been promulgated by the Secretary of the Interior, the certification should be from the Secretary. Section 21(b(9) further provided that if there were no applicable water quality standards, no certification should be required. Section 21(b) therefore recognized that the appropriate certifying authority is that which has developed and implemented water quality standards for the wat body into which the discharge originates, since only the authorit that develops and implements the standards could provide the "reasonable assurance" that the standards won't be violated.

The substance of Section 21(b) became Section 401 of the 1972 Federal Water Pollution Control Act Amendments. The State was no longer required to directly certify that its water quality standards would be met by the permit, but was instead required to certify that the discharge would comply with "the applicable provisions of Sections 301,

302, 306 and 307 of this Act."3/ It is clear from the legislative history of the 1972 Amendments that the major purpose of Section 401 was to allow a State to assure that its water quality standards would be met.

As noted in the Senate Report:

> "The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."

A Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works, Committee Print, 93rd Cong. 1st. Sess., 1973 ("Leg. Hist.") at 1487.

In his statement on the Conference Bill, Senator Muskie further explicated this concern:

> "If a State establishes more stringent limitations and/or time schedules pursuant to Section 303, they should be set forth in a certification under Section 401." Leg. Hist. at 171.

3/ Section 401 was amended by the Clean Water Act of 1977 to include Section 303 in the list of enumerated sections. As stated in the Conference Report:

> The inserting of Section 303 into the series of sections listed in Section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under Section 402, must be certified to comply with State water quality standards adopted under Section 303. The inclusion of Section 303 is intended to clarify the requirements of Section 401. It is understood that Section 303 is required by the provisions of Section 301 . . . Section 303 is always included by reference where Section 301 is listed. (House of Representatives, Report No. 95-830, 95th Cong. 1st Sess. December, 1977 at 96)

III. ADMINISTRATIVE ENFORCEMENT

A. ADMINISTRATIVE COMPLIANCE ORDERS

"Effect of Compliance with Administrative Orders", dated June 1984.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

JUN 29 1984

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Effect of Compliance With Administrative Orders

FROM: Colburn T. Cherney
Associate General Counsel
Water Division (LE-132W)

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

In a June 5, 1984 memorandum, you asked whether compliance with an administrative order precludes, as a matter of law, further enforcement action on the underlying violation. Such compliance does not preclude enforcement. See, e.g., United States v. Earth Sciences, 599 F.2d 368, 375-76 (10th Cir. 1979). However, the administrative order, and the discharger's compliance with the order, are factors that are likely to be assigned significant weight when the reviewing court fashions a remedy in the enforcement action.

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"Use of Stipulated Penalties in Administrative Orders on Consent under the CWA", dated September 6, 1985.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

SEP 6 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Use of Stipulated Penalties in Administrative Orders on Consent under the Clean Water Act

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Paul A. Seals
Regional Counsel, Region VI

I am responding to Region VI's request for specific guidance on whether the use of stipulated penalties in administrative orders is permissable under the Clean Water Act, Section 309.

After extensive legal research by both my office and the Office of General Counsel, and consultation with the Department of Justice, it is our judgment that, as a matter of policy, EPA generally will not include stipulated penalties in administrative orders on consent under the Clean Water Act. The one exception to this policy (which probably has limited practical effect) is that EPA may consider using administrative orders on consent with a provision for stipulated penalties under the following terms:

1) that stipulated penalties provided for in an administrative order on consent (possibly though a confession of judgment clause) are collectible only through the commencement of an enforcement action for violations of the order and the statute or permit in federal district court, and

2) that any such order shall also provide that, irrespective of the penalty amounts so stipulated or confessed in judgment, the government shall reserve the right to seek whatever penalty amount it deems appropriate in an action to enforce the terms of the order and will not be bound by the amounts stipulated.

By this approach, we remove any doubt of the enforceability of the terms of the order by retaining the responsibility for imposing civil penalties or other appropriate remedies with the court as explicitly authorized in CWA Sections 309(b) and (d). In doing so, we also act consistently with the letter of 28 U.S.C. §§516 and 519 and the spirit of the Memorandum of Understanding between EPA and the Department of Justice that the Department settles and compromises claims of the United States which EPA is to bring through litigation. Also, the reservation clause ensures that if additional violations or other pertinent facts come to light after the AO on consent is entered into, the government will not be limited to the penalties contained in the AO.

If a Region chooses to employ the practice where the requisite criteria can be met, it should be done on a highly selective basis and only when, in the opinion of the Regional office, an administrative order without these stipulated penalty provisions will not result in final compliance as quickly or as well.

Since orders on consent with stipulated penalties are inherently more complex than traditional administrative orders and involve negotiations which may affect subsequent judicial enforcement actions, the Office of Regional Counsel must be involved from the outset, if their use is contemplated.

The above guidance may be short-lived, since the proposed amendment to the Clean Water Act giving EPA administrative penalty authority, if passed, will also probably give us stronger authority to use stipulated penalties in consent AOs. Should the administrative penalty authority amendment be enacted, we will develop guidance on the use of such authority, with the expectation that stipulated penalties in consent AOs meeting certain procedural preconditions probably will be acceptable.

cc: Associate Enforcement Counsels
Regional Counsels
Bill Jordan
Coke Cherney
David Buente
OECM-Water Attorneys

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"Remittance of Fines and Civil Penalties" dated April 15, 1985. See GM-38.

"Recommended Format for CWA Section 309 Administrative Orders", dated July 30, 1985 (Incorporated in III.A.5).

"REFERENCE DOCUMENT ON GUIDANCE AND PROCEDURES FOR ADMINISTRATIVE ORDERS ISSUED UNDER SECTION 309 OF THE CLEAN WATER ACT" dated September 26, 1986, Cover Memorandum, Table of Contents and Section I only.

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

SEP 29 1986

OFFICE OF WATER

MEMORANDUM

SUBJECT: Reference Document on Guidance and Procedures for Administrative Orders Issued under Section 309 of the Clean Water Act

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-338)

TO: Water Management Division Directors
Regions I-X

The attached Reference Document on Administrative Orders was recently completed by the Enforcement Division, Office of Water Enforcement and Permits, to address varied questions that may arise on Administrative Orders (AOs) authorized under the Clean Water Act. It is designed to provide, in one location, all pertinent information on the preparation and implementation of AOs. The attached Reference Document we believe, contains all pertinent guidance and procedures needed for day to day operations and for compliance activities relating to administrative orders.

This project continues our effort to produce manuals and centralized reference material for all personnel involved in the development and tracking of enforcement actions. It should be noted that the contents such as the descriptions of procedures relating to tracking and processing of AOs may change over the next few years, and will therefore need to be updated. We will notify you as changes are made.

We would like to thank all those parties from the Regional Offices and the Office of Enforcement and Compliance Monitoring for their comments and the extensive reviews they provided. In addition if you have questions or comments on the content, or if you believe we have missed some information that would make this a more comprehensive document, please contact Bill Jordan, Director, Enforcement Division (FTS/475-8304) or Virginia Lathrop, on his staff (EN-338), (FTS/475-8299).

Attachment

cc: Glenn Unterburger, OECM

REFERENCE DOCUMENT

Guidance and Procedures for

ADMINISTRATIVE ORDERS

Issued under Section 309

of the Clean Water Act

September 29, 1986

REFERENCE DOCUMENT - Guidance and Procedures for Administrative Orders Issued Under Section 309 of the Clean Water Act

I. Guidance

A. Recommended Format for Administrative Orders (AO's) - Memorandum from Rebecca Hanmer to Regional Directors, Water Management Division, 7/30/85. (Includes an AO evaluation checklist in addition to format and model order)

B. Guidance on Selected Topics Related to Limitations and Use of AO's - Topics as AOs on Consent; Refraining from use of AOs instead of issuing permits.

C. List of Guidances on Administrative Orders that are of historical value.

II. Specific Questions and Answers

III. Results of Studies/Assessments Completed by Contract

A. Proper Formatting and Content of AO's - Phase I - Dec. 31, 1984.

B. Timeliness and Effectiveness of AO's Including close out and continued compliance after close out - Phase II, October 11, 1985.

C. Assessment of AO's Which Were Not Closed Out and for Closed Out AOs, Analysis of Sustained Compliance Thereafter. (To be completed September 30, 1986)

IV. Key Steps in Preparing and Tracking AO's

A. Tracking Compliance Dates in PCS and reporting requirements of ONCR.

B. Office of Water tracking.

C. Close out procedures

SECTION I

GUIDANCE

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

JUL 30 1985

OFFICE OF WATER

I.A.

MEMORANDUM

SUBJECT: Recommended Format for Clean Water Act Section 309 Administrative Orders

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

TO: Water Management Division Directors
Regions I - X

One of the most frequently used Environmental Protection Agency mechanisms in the formal enforcement process is the Administrative Order (AO) issued under Section 309 of the Clean Water Act. It is our belief that AO's should be used in a consistent and effective manner since they are a major part of the enforcement scheme. For this reason, the Office of Water Enforcement and Permits has undertaken an effort to assess AO content and format during the past year. The outcome of that assessment was the draft Recommended Format for Administrative Orders forwarded to you on May 9, 1985. We have received comments and suggestions from several Regions which were utilized in preparing the final documents. Attached you will find the final Recommended Format for Clean Water Act Section 309 Administrative Orders (Attachment 1).

The Recommended Format was developed with the cooperation and assistance of the Office of Enforcement and Compliance Monitoring. The purpose of the Recommended Format is to provide a general guide which delineates (1) the specific statutory requirements (such as the requirements of Section 309(a)(4) on opportunity for a recipient to confer with the Administrator on violations based on failure to submit information); and (2) options and suggestions on format for Administrative Orders (such as the option of including violations in a separate section after Findings of Fact). The Recommended Format, as utilized by the Regions, should result in more effective and even-handed national enforcement through Administrative Orders.

5C-1

In addition to the Recommended Format, we are forwarding the Checklist on Administrative Orders (Attachment 2). The Checklist should be used for reviewing EPA and State-issued AO's. There will obviously be some variation among States with regard to AO's; however, the use of a Checklist should assure that the State-issued AO's are complete and enforceable.

The new guidance replaces a document dated April 18, 1975 that was developed by the Office of Water Enforcement. It should be noted that the statute was revised twice since 1975. In particular, the new guidance: discourages use of successive AO's for the same violation; clarifies which legal authority (e.g., Sections 308 and 309) EPA should cite as the basis for certain requirements imposed through an AO; clarifies the scope of requirements which EPA may impose through AO's; identifies sanctions available for AO violations; and sets out sample provisions which AO's should include to clarify the legal effect of the Order.

In the coming fiscal year, the Office of Water Enforcement and Permits, with extensive coordination with the Office of Enforcement and Compliance Monitoring (OECM), will develop further information on the use of Section 309 Administrative Orders. Some of those documents will cover: use of AOs on consent (bilateral and joint signature); principles for negotiation of bilateral orders especially for National Municipal Policy; use of multiple AO's and alternatives to AO's for the same facility when an AO is violated; and increased use of Section 308 to require information (including use of show cause proceedings).

If you have any specific questions on the above, please call me (FTS-475-8488) or Bill Jordan, Director, Enforcement Division (FTS-475-8304). The staff contact is Virginia Lathrop (FTS-475-8299).

Attachments

COY

ATTACHMENT 1

Recommended Format for Clean Water Act Section 309

Administrative Orders

The following is the recommended format and content for an Administrative Order (AO). Examples and suggested wording are included at various points in the discussion and in the sample AO (Attachment 1-D). Adherence to the Recommended Format should result in more effective and evenhanded national enforcement through Administrative Orders.

Introduction

The following should be followed for the venue, title, docket identification and preamble paragraph.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION ____

IN THE MATTER OF	DOCKET NO. XI-84-06
Wastewater Treatment Works #4 Sludge River Pollution Control District Sludge Falls, Columbia	
PROCEEDING UNDER SECTION 309(a) of the Clean Water Act, 33 U.S.C. Section 1319(a); in re NPDES PERMIT No. _____	FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE

"The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under Section 309 of the Clean Water Act, 33 U.S.C. §1319, (hereinafter the Act) and by him delegated to the Regional Administrator of EPA, Region XI (and redelegated by the Regional Administrator of Region XI to the Director, Water Management Division, Region XI)."

Venue and Title

The Region identification is included to establish the specific venue of the issuing authority. The full address of the Region is to be in the letterhead or under the Regional Administrator's (or his designee's) signature to the Order and on the blue back cover (which is optional).

Docket Number

To identify the proceeding, a docket number is required. To avoid confusion, the NPDES number should not be used as the Docket Number. However, the NPDES number, if any, should be referred to under the proceedings identification in the title. The docket number "XI-84-06" identifies the Order as being the 6th Order issued in 1984 in Region XI. An Administrative Order docket should be kept separate from any other docket. However, if a common docket is kept then a prefix should be added to the docket number, e.g., "XI-AO-84-06".

Preamble Paragraph

The preamble paragraph is important not only to establish the Administrator's authority to issue the Order but also to establish the delegation of authority to the Regional Administrator. If the Regional Administrator has redelegated his authority to the Director of the Regional Water Management Division, this redelegation should also be stated here or in the preamble to the Order portion of this document. It should be noted that there is no authority to redelegate this authority to other EPA Regional staff below the Division Director level. If the redelegation is asserted here, the paragraph should be amended by adding:

"... and redelegated by the Regional Administrator of Region XI to the (undersigned) Director, Water Management Division, Region XI".

The Administrative Order can be signed by a duly authorized Acting Regional Administrator or Director. However, the Agency should be prepared to show that the person signing as Acting Regional Administrator or Director has the requisite authority to sign the Order.

FINDINGS OF FACT

The Findings should adequately set forth the specific permit, statutory (and regulatory)* requirements violated and the specific nature and dates of the violations. In order to avoid difficulty in determining from the face of the Findings whether the order was necessary and timely, and the remedy was appropriate, the Findings and Order should be able to stand without reference to extraneous facts. The Findings should speak to all the pertinent facts and law much as a complaint in a civil action does. With these observations in mind, the following recommendations are made as to the specific facts to be alleged in the Findings.

Status of Violator

Findings of Fact should first identify fully the entity to whom the order is to be issued and define its legal status (i.e., corporation, partnership, association, state, municipality, commission or political subdivision of a state). Clearly identifying the orderee limits the possibility of challenges to jurisdiction or venue and establishes a record upon which subsequent enforcement actions may rely. The Findings should next establish the orderee's status under the Clean Water Act, (i.e., permittee, industrial user, control authority, etc.) and, in the case of permittees, the permit number, date issued, and current permit status. The Findings should name the receiving stream into which the violator discharges and should establish the violator discharges to "navigable waters" under Section 502(7) of the Act through a specific point source as defined in Section 502.

Basis of Violations

Section 309(a)(5)(A) requires that all orders ". . . should state with reasonable specificity the nature of the violation . . . ." It is imperative that the Findings contain the specific permit provision or statutory or regulatory requirement which has been violated and the authority by which it was imposed on the orderee. Next, the evidence or basis for the specific violation (such as DMR, inspection report, RMR) and dates of violation should be set forth concisely. In cases of more than one violation, identify what the documentation is for each and give the specific dates of violation. [In instances where only approximate dates are known or where there is a continuing violation say "on or about" or "beginning on or about".] Alternatively the violations may be set off in a separate section entitled "Violations" which can follow the "Findings of Fact."

* An AO should not set out a regulatory requirement that was violated without setting out the underlying statutory requirement. The Section 309(a)(3) authorizes AO's for violations of permit and statutory provisions.

Where the violation is based on a failure to provide required information, a finding can usually only state that the required information was not received by the agency. In those cases, the lack of receipt of the required information must serve as the basis of the violation. Section 308 violations have additional requirements as described below.

CWA Section 308 Violations

Administrative Orders issued for violations based on a failure to submit information requested under Section 308 of the Act do not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator (or his or her designee) concerning the alleged violation. (See CWA Section 309(a)(4)). It is essential that such person be provided with a reasonable opportunity to confer. Any order issued for a Section 308 violation either exclusively or in conjunction with other violations should provide for a period of time in which the orderee may confer with an authorized person designated in the Order. If an opportunity has been provided prior to the issuance of the order, the order should so state and set forth the documentation of the opportunity to confer and the outcome of the conference, if any.

Prior Enforcement Contacts

Administrative Orders frequently set forth prior contacts with the orderee in an attempt to obtain compliance. Generally, this is a good practice since it helps to build a record and may provide additional support in any subsequent enforcement action. This can be done by cataloguing the meetings, letters, telephone calls, etc., made in an attempt to secure voluntary compliance or by stating that repeated attempts were made. The repeated attempts may be set out in an attached summary or log of meetings, notices, letters, and telephone calls and dates thereof, along with dates of responses from the orderee, if any (see Attachment 1-A).

Other Findings

In certain circumstances it may be necessary or useful to include other findings which are supportive to the specific requirements of the order (e.g., "the company's treatment works are currently capable of meeting the effluent limits contained in its permit" or "the POTW has adequate authority to enforce the categorical pretreatment standards"). Whether or not to include such statements must be determined on a case by case basis but, if included, should be incontrovertible facts.

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ORDER FOR COMPLIANCE

The format for the Order should be as follows:

Order

"Based on the foregoing FINDINGS and pursuant to the authority vested in the Administrator, Environmental Protection Agency, under Sections 308 and 309(a) of the Act, and by him delegated to the undersigned (or if the Regional Administrator redelegates his authority to the Division Director, add after "of the Act" - "and by him delegated to the Regional Administrator, and redelegated to the undersigned"), it is hereby ordered:".

If the delegation statement is stated in the Preamble, this statement may simply be: "Based on the foregoing Findings, and pursuant to the authority of Sections 308 and 309(a) of the Act, it is hereby ordered:"

Terms of the Order

Section 309(a)(1) and (a)(3) authorizes the Administrator to issue an order requiring compliance with enumerated sections of the Act or a condition, limitation or permit requirement implementing the enumerated sections of the Act. Any requirement contained in the order must be directly related to achieving that compliance with those legal requirements. The terms of the order must set forth what EPA specifically expects the Orderee to do in order to achieve and maintain compliance.

Section 309(a)(5)(A) sets forth the time periods by which the orderee must comply. In cases of an interim compliance schedule or an operation and maintenance requirement the time for compliance may not exceed thirty days. In cases of compliance with a final deadline, the time for compliance must be "reasonable" as determined by the Administrator, taking into consideration the seriousness of the violation and past efforts of the orderee. Every order must contain a specific final date by which the orderee must achieve compliance (i.e., cease its violation(s)) consistent with the statutory language.

Although some Orders have included a prescribed method by which an orderee is to achieve compliance, specific prescribed steps or methodologies (such as a treatment technology) may be difficult to enforce. Because Section 309 specifies in explicit terms only that AO's require compliance by a date certain the more closely a requirement in the AO is related to actually achieving compliance, the sounder the legal position to include that requirement. Section 308 of the Act can provide substantial support in this area by requiring reporting of the specific steps or methods.

The Orders containing interim milestones leading to final compliance should include reporting requirements under Section 308 The order should specify the manner and timeframe for reporting compliance with the terms of the order to the issuing authority. The order should contain requirements for reporting on the compliance progress and submitting suitable documentation to show the Orderee has taken action to meet the AO requirements. The attached sample AO sets forth sample language on order requirements (Attachment 1-D), as well as a sample blue back (Attachment 1-C) and cover letter (Attachment 1-B).

Additional Provisions

It has been the long term practice of many of the Regions to include standard provisions regarding additional remedies, nonwaiver of permit conditions, etc., in all administrative orders or as part of the cover letter accompanying the AO. This practice should be used by all the Regions for every order issued. In addition to promoting national consistency, it alerts the violator to the array of sanctions which could be used should additional enforcement be necessary and helps encourage compliance with the Order as issued.

The following are sample provisions which should be added to Administrative Orders singly or in combination and may be modified based on the particular facts of the case. They may also be included in the cover letter.

Non Waiver of Permit Conditions:

> "This ORDER does not constitute a waiver or a modification of the terms and conditions of the Orderee's permit which remains in full force and effect. EPA reserves the right to seek any and all remedies available under Section 309(b) (c) or (d) of the Act for any violation cited in this ORDER."

Potential Sanctions for Administrative Order Violations (for Non-Municipals):

> "Failure to comply with this ORDER or the Act may result in civil penalties of up to $10,000 per day of violation, ineligibility for contracts, grants or loans (Clean Water Act, Section 508) and permit suspension."

General Disclaimers:

> "Issuance of an Administrative Order shall not be deemed an election by EPA to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act."

"Compliance with the terms and conditions of this ORDER shall not be construed to relieve the orderee of its obligations to comply with any applicable federal, state or local law."

Administrative Action Resulting in Ineligibility for Federal Contracts, Grants or Loans:

"Violations of this order may result in initiation of Agency action to prohibit the facility from obtaining Federal contracts, grants, or loans pursuant to Clean Water Act, Section 508, E.O. 11738, and 40 CFR Part 15."

Effective Date of the Order

When the Order does not address a violation of a requirement to provide information under Section 308, the ORDER can merely recite that:

"this ORDER shall become effective upon its receipt by (or service upon) said COMPANY."

For Section 308 violations where an opportunity for conference before the ORDER can become effective is required by section 309 and this was not done prior to the issuing of the ORDER, the last paragraph should read:

"The COMPANY shall have the opportunity, for a period of (_____) days from receipt of this ORDER, to confer with the following designated Agency representative: Mr. N. Force, Director, Water Management Division, Environmental Protection Agency, Room 5013, Region XI, Old National Bank Building, 1414 Main Street, Brewsterville, Centralia, 11101, (555) 123-4567; unless the Agency official issuing the Order decides otherwise, this ORDER shall become effective at the expiration of said period for consultation; and, the COMPANY shall have _____ (_) days from and after said effective date to comply with the terms of this ORDER. To constitute compliance, material required to be submitted by the COMPANY to the Agency must be in the hands of the designated Agency representative prior to the expiration of said _____ (_) day period."

Signing of the Order

When the Order is dated and signed, the name of the signing official (Regional Administrator, or Director, Water Management Division) should be typed below the signature, together with the address of the Regional office.

Other Considerations

The use of legal blue-back at least on the primary copy of the Findings and Order served, while not necessary, tends to impress upon the person served of the legal seriousness of the action being taken. Attachment 1-C provides a proposed format and content of the legal blue back. When a Order is issued to a Corporation, a copy of the Order shall be served on appropriate corporate officers.

As in court actions, the order should be retained and placed in a permanent file with the Docket Clerk, along with the affidavit or certification of service attached. If service is made by certified mail restricted delivery, a carbon copy of the letter of transmittal, together with the Post Office mailing receipt and the return receipt, when returned, should be stapled to the front of the original Order, just as a return of personal service would be.

Follow-up and File Closing

As good housekeeping practice, and more importantly, from the standpoint of possible reference for or evidence in future administrative or court actions, it is important that every file contain, at the minimum, a closing memo to the files delineating the final disposition of the matter. (The AO will only be closed out when the facility has returned to compliance or when appropri. EPA action is taken, i.e., escalating the enforcement response.)

When a file is closed out, a brief letter should be sent to the orderee with a carbon copy to Headquarters advising that the action has been completed. Attachment 1-E is an example of what a close out letter might look like.

Prior Contacts with Orderee

Despite repeated written and telephone requests, as more fully set out in the log attached as Exhibit __ and made a part hereof by reference, the COMPANY, in violation of Section 308 of the Act, has not supplied the requested information.

LOG SAMPLE

12/04/83	DMR data showed significant noncompliance (memo from X. Amin to file).
12/07/84	308 Letter sent to Company.
12/10/84	Plant Visit: Some data from inspection (by N. Spector).
04/23/84	Telephone - N. Force to Company. Follow-up requests for information on recent DMR from Company. No information sent.
04/24/84	Telephone - N. Force to Company. To request additional data by phone from Company. No information obtained.
05/06/84	Note filed by N. Force - No letter or further information from Company.

ATTACHMENT 1-

February 21, 1985

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Ms. Alice Smith, Director
Sludge River Pollution Control
District
13 Plain Street
Sludge Falls, Columbia 12345

RE: NPDES Permit No. CL0003456

Dear Ms. Smith:

Enclosed is an Administrative Order issued to the Sludge River Pollution Control District (SRPCD), by the Regional Administrator of the Environmental Protection Agency ("EPA"), Region XI, under Sections 308 and 309 of the Clean Water Act (the "Act"). The Regional Administrator has found that the SRPCD has violated Section 301 of the Act by failing to comply with certain requirements of its National Pollutant Discharge Elimination System permit. Specifically, during 1984 SRPCD consistently violated its effluent limitations on ammonia and phosphorus and intermittently violated effluent limitations for biochemical oxygen demand and total suspended solids.

The Order, which is effective upon receipt, seeks to remedy the violations by requiring SRPCD to submit a plan for meeting its effluent limitations and requiring SRPCD to then implement the plan and comply with its effluent limitations.

This Order does not modify your current NPDES permit; nor will compliance with the Order excuse any violation of the permit. Failure to comply with the enclosed Order may subject the District to further enforcement action. EPA may initiate a civil action in federal district court for violations of an Order seeking injunctive relief and civil penalties.

If you have any questions concerning this matter, please contact Mr. Jones, an engineer in the Permit Compliance Section, at 222-3922.

Sincerely yours,

Prudence Purewater
Regional Administrator

Enclosure

cc: State Division of Water Pollution Control
State Department of the Attorney General

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION _

IN THE MATTER OF

SLUDGE RIVER POLLUTION CONTROL DISTRICT
SLUDGE FALLS, COLUMBIA
PERMITTEE*

NPDES PERMIT NO. CL0003456*

PROCEEDINGS UNDER THE CLEAN WATER ACT
AS AMENDED (33 U.S.C. 1319(a)(3))**

FINDINGS OF VIOLATION
AND
ORDER OF COMPLIANCE

Issued by:

Prudence Purewater
Regional Administrator
Environmental Protection Agency
Region XI
Federal Building
Hokum, Centralia 12345

* Where Permit has been issued.

** May also have proceeding under 33 USC 1318.

ATTACHMENT 1-D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION XI

IN THE MATTER OF Sludge River Pollution Control District Wastewater Treatment Works #4 NPDES Permit No CL003456 Proceedings under Section 309(a) of the Clean Water Act, 33 U.S.C. §1319(a)	)	DOCKET Number AO-85-13 FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE

STATUTORY AUTHORITY

The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by Section 309 of the Clean Water Act, 33 U.S.C. §1319, (the Act), and by the Administrator delegated to the Regional Administrator of EPA, Region XI.

FINDINGS

1. The Sludge River Pollution Control District (the "District") is a political subdivision of the state organized under the laws of the State of Columbia and as such is a "person" under Section 502 of the Act, 33 U.S.C. §1362.
2. The Sludge River Pollution Control District is the owner and operator of a wastewater treatment facility which provides advanced treatment to wastewater from the Towns of Locus and Sludge Falls. The facility discharges pollutants into the Sludge River, a navigable water of the United States as defined by Section 502 of the Act, 33 U.S.C. §1362.

3. The discharge of pollutants by any person into the waters of the United States, except as authorized by an NPDES permit, is unlawful under Section 301(a) of the Clean Water Act.

4. On January 22, 1981, the District was issued National Pollutant Discharge Elimination System (NPDES) Permit Number CL0003456 (the "Permit") by the Regional Administrator of EPA pursuant to the authority given the Administrator of EPA by Section 402 of the Clean Water Act, which authority has been delegated by the Administrator to the Regional Administrator. The Permit became effective on February 22, 1981, and will expire on February 22, 1986.

5. The permit authorizes the discharge of pollutants into the Sludge River, in accordance with effluent limitations and other conditions contained in the Permit. The limitations contained in Special Condition A1 of the Permit require the plant to achieve monthly average limits of 7 mg/l for BOD and TSS, 1 mg/l for total phosphorus (Total P) and 1 mg/l for ammonia nitrogen (NH_3-N).

6. Attached hereto and incorporated herein by reference is a summary of effluent data submitted by the District to EPA for the period from December, 1983 to November, 1984. The data shows that:

   a.) the District violated the monthly average limits for TSS during two of the twelve months and violated the maximum daily limits for BOD nine times and TSS twelve times over periods of three months and five months, respectively;

b.) The District violated the limits on daily maximum concentrations thirty times for NH_3-N and twenty times for Total P over a six month period;

c.) The District violated average monthly concentration limits for NH_3-N and Total P each month over a period of four months and six months, respectively.

7. EPA personnel performed a diagnostic audit inspection at the facility during 1984. The purpose of the inspection was to determine the cause of non-compliance with the effluent limitations for NH_3-N and Total P. The inspection report was completed on December 8, 1984 and is attached hereto and incorporated herein by reference as a part of these Findings.

8. Based on the inspection report, the facility is currently capable of meeting the concentration limits for NH_3-N and Total P if properly operated in accordance with Condition D2 of the permit which requires maximizing the removal of those pollutants.

9. Based on the above, I find that the District is in violation of Section 301 of the Act, 33 U.S.C. §1311, and permit conditions implementing that section contained in a permit issued under Section 402 of the Act, 33 U.S.C. §1342.

ORDER

Based on the foregoing FINDINGS and pursuant to the authority of Sections 308 and 309 of the Act, IT IS HEREBY ORDERED:

1. Within sixty days of receiving this ORDER, the District shall submit to EPA a plan for achieving compliance with the effluent limitations on NH_3-N, Total P, BOD, and TSS. The plan shall address the operational problems cited in EPA's December 8, 1984, diagnostic audit inspection report and identify any changes in plant operation, funding, and staffing necessary to meet the permit conditions.
2. The District shall immediately comply with all effluent limitations contained in Special Condition A1 of the Permit for BOD and TSS.
3. The District shall immediately achieve and comply with the interim effluent limitations specified in Attachment A for NH_3-N and Total P as an intermediate step toward achieving final compliance. These interim effluent limitations shall terminate on May 1, 1985. During the time period that the interim effluent limitations are in effect, all requirements and conditions of the Permit remain fully effective and enforceable.
4. By May 1, 1984, the District shall have implemented any operational changes necessary to meet the permit effluent limitations for NH_3-N and Total P. The District shall comply with all effluent limitations contained in the Permit by May 1, 1985.

5. Where this ORDER requires a specific action to be performed within a certain time frame, the District shall submit a written notice of compliance or non-compliance with each deadline. Notification shall be mailed within seven days after each required action.

6. If non-compliance is reported, notification shall include the following information:

   a) A description of the nature and dates of violations;

   b) A description of any actions taken or proposed by the District to comply with the requirements;

   c) A description of any factors which tend to explain or mitigate the non-compliance;

   d) The date by which the District will perform the required action.

All reports shall be in writing and addressed as follows:

Director
Water Management Division
U.S. Environmental Protection Agency
Federal Building - Room 13
Hokum, Centralia 12345

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7. This ORDER does not constitute a waiver or a modification of the terms and conditions of the District's permit, which remains in full force and effect. EPA reserves the right to seek any and all remedies available under Sections 309(b), (c) or (d) of the Act for any violation cited in this ORDER.

8. Issuance of an Administrative Order shall not be deemed an election by EPA to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act.

9. This Order shall become effective upon the date of receipt by the District.

Dated this _____ day of _____

Signed: _____

Prudence Purewater
Regional Administrator
U.S. EPA, Region XI
Federal Building
Hokum, Centralia 12345

Attachment 1-E

Mr. Adams
Peerless Company
RR #3
Burning River, Centralia 12346

RE: Administrative Order #XI-AO-85-06
(NPDES Permit NO. 1111112)

Dear Mr. Adams:

This is to notify you that as of May 15, 1985 the above named permittee appears to have complied with Administrative Order #XI-AO-85-06 issued on February 24, 1985. This Administrative Order has been placed on inactive status, and the Agency intends no further enforcement action at this time based on presently available information.

Sincerely,

Director
Water Management Division

cc: Compliance Information and Support Branch
OWEP (EN-338)

SAMPLE EVALUATION CHECKLIST FOR EPA's CWA SECTION 309 ADMINISTRATIVE ORDERS or STATE EQUIVALENT

The purpose of this checklist is to serve as a guide for review of State AO's or EPA's AO's.

1. Region: _____

2. State: _____

3. Date Issued: _____

4. [ ] Major [ ] Minor

5. [ ] Municipal [ ] Non-Municipal

		Yes	No
6.	Does the administrative order contain a title?	[ ]	[ ]
*7.	Does the order establish the venue of the issuing authority? (i.e., identification of EPA Region).	[ ]	[ ]
8.	Does the order provide the address of the issuing authority?	[ ]	[ ]
9.	Does the order contain a standard docket number? (i.e., X-AO-84-01: X=Region; AO=AO; 84=Year; 01=Serial Number).	[ ]	[ ]
10.	Does the order state the appropriate statutory authority for issuing the order? (i.e., CWA Section 309(a) and where reports or information are required, Section 308).	[ ]	[ ]
*11.	Does the order contain a suitable statement of delegation? (i.e., Delegation should correspond to signatory of order).	[ ]	[ ]
12.	Does the order identify the legal status of the violating party? (i.e., legal status as a corporation, municipality, etc.).	[ ]	[ ]

* These questions are of particular interest for EPA issued Administrative Orders.

		Yes	No
13.	Does the order describe the legal authority/ instrument which is the subject of the violation? (e.g., statutory provision, regulatory provision, if applicable, statutory authority for permit issuance, name of permittee, permit number, date permit issued, permit modification or extension, date previous administrative order issued, etc.).	[ ]	[ ]

Examples

[ ] Statute

[ ] NPDES Permit

14.	Does the order contain a specific finding that the discharger is in violation of a specific statutory or permit requirement?	[ ]	[ ]
15.	Does the order describe or reproduce the specific terms of the legal authority/ instrument which are the subject of the violation? (e.g., effluent limitations, compliance schedules, etc.).	[ ]	[ ]
16.	Does the order state, with reasonable specificity, the nature of the violation? (e.g., type of violation, date, evidence, etc.).	[ ]	[ ]

Examples

[ ] Reporting or monitoring violation

[ ] Effluent limitation violation

[ ] Violation of special permit condition

[ ] Pretreatment violation

[ ] Unpermitted or unauthorized discharge

[ ] Failure to meet O&M/construction schedule

[ ] Violation of a Section 308 letter

[ ] Improper O&M

[ ] Other _____

		Yes	No
17.	Does the order specify the duration of violation, if known? Estimated violation _____	[ ]	[ ]
*18.	Does the order document prior requests to the violating party for compliance with the legal authority/instrument? (e.g., telephone calls, letters, meeting, etc.).	[ ]	[ ]
*19.	Where the order is issued for a CWA Section 308 violation does the order provide the violating party with an opportunity for prior consultation?	[ ]	[ ]
20.	Does the order establish interim effluent limitations?	[ ]	[ ]
21.	Does the order set out clearly any specific steps which EPA/State wants the violating party to take to achieve compliance?	[ ]	[ ]

Examples

[ ] Submission of monitoring reports

[ ] Compliance with existing effluent limitations

[ ] Submission of pretreatment program

[ ] Submission of correction/compliance plan or study evaluating compliance options

[ ] Compliance with existing O&M/construction schedule

[ ] Compliance with interim effluent limitation

[ ] Compliance with categorical or general pretreatment Standards

[ ] Other

22.	Are the number of days reasonable for the type of relief sought?	[ ]	[ ]

		Yes	No
23.	Does the order contain a specific requirement and date for final compliance?	[ ]	[ ]
24.	Does the order specify a manner and time frame for reporting compliance with the terms of the order to the issuing authority?	[ ]	[ ]
25.	Does the order specify the effective date of the order? (e.g., Date of receipt, date of consultation, etc.).	[ ]	[ ]
26.	What is the elapsed time between the dates of violation and the date of issuance of the order? Is the elapsed time reasonable?		

Number of days _____

*27. Who is the signatory of the order? (Choose <u>two</u> or less).

[ ] Regional Administrator

[ ] Regional Counsel

[ ] Water Division Director

[ ] State Water Pollution Control Officer

[ ] Other _____

Recommended Format - CWA - Administrative Orders

Summary of Changes from the April 18, 1975 Guidelines on Administrative Order Format

General Approach

The April 18, 1975 guidance entitled "Guidelines for issuing Administrative Compliance Orders Pursuant to Section 309(a)(3) and (a)(4) of the Federal Water Pollution Control Act, as Amended," has been clarified and been brought up to date with the new July 1985 "Recommended Format for Clean Water Act Section 309 Administrative Orders."

Some examples of the modifications and additions are:

- The new guidance makes it clear that citations of the regulatory basis of violations must also include the underlying statutory basis of the regulation.
- The new guidance makes it clear that the basis of the violation may be set off in a separate section of the order if the Region so chooses.
- The Section on Terms of the Order has been expanded to explain in greater detail the need for a final date for time periods for coming into compliance. This section also deals with prescribed methods which may be imposed on Orderees through AO's (i.e., the closer the requirement to achieving compliance, the sounder the legal position to include the requirement in an AO).
- The discussion on using successive AO's has been eliminated since the current view, successive AO's for the same noncompliance problems should normally be avoided and the case should be escalated to the referral process.
- The discussion on personal service of AO's has been eliminated since this is extremely resource intensive and the accepted method of service is now by Certified Mail-Restricted Delivery with a return receipt.
- New attachments have been included such as the sample AO. Other attachments were updated.
- We have added a section on Additional Provisions, such as a commonly used statement that further violations of the requirements of the AO and the permit may result in civil action including a penalty of up to $10,000 per day, ineligibility for Federal contracts, grants and loans and suspension of the permit.
- The Order portion of the Guidance and the Sample AO indicate that Orders which include milestones should include reporting requirements under Section 308 of the Act.

I. B. GUIDANCE ON SELECTED TOPICS RELATED TO LIMITATIONS AND USE OF ADMINISTRATIVE ORDERS UNDER SECTION 309 of the CLEAN WATER ACT

Draft Guidance on Selected Topics Related to Limitations and Use of Administrative Orders Under Section 309 and Information Requirements under Section 308 of the Clean Water Act

I. Administrative Orders on Consent

Introduction

In recent months a few Regional Offices of EPA have discussed the possibility of issuing Administrative Orders on Consent (AOC): that is, an Administrative Order issued under Section 309 of the Clean Water Act, which is then signed not only by the Regional Administrator (or his designee) but also by the responsible party for the Orderee who acknowledges jurisdiction, truthfulness of the findings and appropriateness of the relief. The purpose of the AOC would typically be the same and contain the same provisions as any unilaterally issued Administrative Order dealing with violations of a permit or statutory requirements. The Administrative Order would be the product resulting from negotiations with the Orderee and would contain findings of fact, and a directive to achieve compliance with the permit and the Act by date certain. The AOC may contain a specified time table for compliance and consequences of noncompliance; the AO would set forth fully the violation and the requirements for the orderees to meet. The AOC should specify a final compliance date, which may not exceed a time limit that the Administrator determines to be reasonable for for any final deadline. It is against Agency policy for the AOC to waive EPA's authority to pursue other enforcement alternatives either for the violations serving as the basis of the order, or for future violations.

Advantages of AOC

The AOC can provide an additional approach to bring a violator into compliance in the following ways:

1. The AOC creates a record of the orderee's agreement to milestones and an enforceable schedule of compliance.

2. The AOC has educational value. If there are negotiations to develop the AOC, both EPA and the orderee may benefit from the exchange of information. Such information may be beneficial to EPA if a subsequent enforcement action is required.

3. There may be psychological advantage to having the orderee commit to compliance schedule milestones and a final compliance date (as long as the approach is not coercive to the degree that the orderee is obliged to do more than required by law).

4. If the AOC has to be enforced through judicial action, it might be used as an admission by the defendant of those violations covered in the findings.

Limitations of an AOC

Because an AOC might under some circumstances require additional time for negotiations, the AOC may not be appropriate for many cases where prompt response is required such as when violations would cause environmental harm or endangerment of health. However, where EPA is seeking commitment to a long-term and more complicated compliance schedule, an AOC might have more value, and EPA might pursue a separate AOC for that purpose.

The AOC should not result in unwarranted delay of action by EPA. EMS requires that noncompliance situations be responded to with prompt enforcement action. If the situation is appropriate for an AOC, developing the terms of an AOC should be prompt to ensure that noncompliance is not delayed by the process. Finally, in the case of a violation of an AOC, as with a unilateral AO, the presumption is that EPA will first consider pursuing a judicial enforcement response.

Specific Uses of AOC

Some typical, though hypothetical, situations, where an AOC might be useful are the following:

Municipals

AOC could be useful for minor municipals. All minors and majors must be on enforceable schedules. Where States do not do this, EPA must. Because of the psychological value of the AOC, it may be useful to get commitments for municipal construction based on an acceptable compliance schedule. However, as in AO's, decisions on the exact techniques, construction etc., to come into compliance are in the end left to the orderee and not specified by EPA.

Industrials

The AOC could supplement general permits to set out an additional compliance requirement as in a study, or monitoring scheme to investigate appropriateness of additional limits, or to examine an environmental issue, where there have been violations or where other action is needed to bring an Orderee into compliance. These AOC should cite CWA §308 (instead of or) in addition to CWA §309, since the orders require monitoring or data gathering rather than actions intended to produce compliance with, e.g., effluent limits.

The AOC can be used to get an agreement on a compliance schedule (but not to modify a compliance schedule in a permit).

Legal Issues

The AOC does typically contain an agreement on the findings and a commitment to compliance, as indicated by the orderee's signature on the order.

The AOC should be prepared and negotiated with the participation of the Office of Regional Counsel to ensure appropriate language and that any litigation considerations that may subsequently arise are anticipated and dealt with.

OWEP and OECM will periodically provide updates of guidance on AOC. The AOC should be used to impose as strict a compliance deadline as possible and not to provide for a permissive deadline or requirement.

In level of response and escalation of enforcement response, an AOC is equivalent to an AO. For violation of an AO or an AOC, escalation to a referral presumably would be the first response considered.

II. Restricted Use of Administrative Orders for Unauthorized and Unpermitted Discharges

Summary

EPA may not rely on AOs as surrogate permits to address otherwise unpermitted discharges. For AO's which are issued addressing unauthorized, unpermitted discharges, the following criteria should be met:

- EPA should first consider whether to require immediate cessation of discharge.

- The AO should contain a date certain by which the discharger must apply or reapply for a permit. (No more than 60 days to apply is typically needed.) Interim limits should be set in the AO only for the briefest time possible leading up to final compliance and would probably be most defensible, for example, where health issues such as proper disposal of sewage require some discharge.

- The AO should have a reasonable final date for attaining compliance with final permit limits.

Discussion

The Environmental Protection Agency in the past has issued letters and Administrative Orders (AOs) to dischargers without a current NPDES Permit (especially in the case of minor dischargers or applicants for a general permit). These letters or AO's provided terms, conditions, and interim limits for the discharge. However in Nunan Kitlutsisti vs. Arco Alaska Inc. (an unreported case which was before the federal district court in Alaska) this practice was challenged by Kitlutsisti. The Court did not rule on the issue but the case narrative does show disapproval of such enforcement letters and AO's as an apparent substitute for permit issuance. An earlier EPA Guidance* has stated that in general a discharger who has filed a permit application should receive a decision on their permit before an AO is issued (except for exceptional situations such as a toxic discharge).

The issuance of an Administrative Order instead of following the permit issuance process means that EPA does not afford the public hearing and other procedural requirements normally associated with permit issuance such as opportunity for public comment, adversarial input and the creation of an administrative record. The Administrative Procedures Act (APA) requires that EPA act upon permit applications within a reasonable time, not delaying

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*Memorandum to Enforcement Divisions from Assistant Administrator for Enforcement, March 20, 1974.

the process with issuance of an AO or letter. The Court in the above case had the following objection to the "creative administrative techniques".

"Noncompliance with the statute has meant that third parties, the companies... have been needlessly subjected to citizen suits which they are powerless to avoid. It has also denied other users of Norton Sound's water resources their statutory right to comment on and object to those proposed discharges."

Administrative Orders cannot be used as a discharge-authorizing mechanism to fill the gap between the time of AO issuance and some indeterminate future date when an individual permit or general permit might be issued. EPA may not rely on an AO to act in place of an NPDES permit.

Under certain circumstances it may be necessary to issue an AO even though a strict reading of the Act might require a ceasing of the discharge and no resumption of the discharge until a permit is in place. Discretion should be used in establishing interim limits through an AO as long as the AO is not issued as a convenient method for EPA to deal with an NPDES permit backlog, and there is a clear justification for allowing the discharge to continue until the permit is issued. When used, compliance schedule deadlines and interim limits must be reasonably stringent. The AO should also state that the EPA may initiate a civil or criminal enforcement action seeking penalties and other appropriate relief, if the discharge does not cease or a permit is not obtained within the required time.

It is worth noting that there has been a change from the early stages of implementation of the Act. In general when guidance was written in 1973, circumstances were different. Many AO's addressed problems such as discharge without a permit. When, in these cases, a facility could not be shut down for health reasons, interim limits were a way of dealing with the discharger. Since the NPDES program has been in existence now for thirteen years, these situations are less commonly encountered. But in certain cases AO's with interim limits are used to address discharges without a permit depending on health issues, type of facility, how much construction is needed, environmental effects of shut down and the final compliance schedule.

It is also worthwhile noting that where a discharger is required to apply for a permit, the application should be sent in within 60 days.

III. Broader Usage of Section 308 in the Administrative Order

Authority to Impose Reporting Requirements in AOs

AOs should cite Section 308 when imposing reporting requirements, including those associated with specific steps and milestones in a compliance schedule. The stronger legal authority for imposing these reporting requirements actually is Section 308 of the Clean Water Act, rather than Section 309. The Order should specify the manner and timeframe for reporting on compliance to the issuing authority. The most common format is to cite Section 308 and Section 309 as a basis in the introductory paragraph of the Order portion of the AO. (See "Recommended Format for Administrative Orders Under Section 309 of the Clean Water Act", pages 5 and 6).

Section 308 and "Show Cause Hearings"

In the past, §308 of the Act has been cited to require members of the regulated community to attend "show cause hearings" or "show cause meetings" to explain records or provide direct testimony by personal examination why U.S. EPA should not take enforcement action for alleged violations of the Act. Notice to the violator to attend such a meeting was provided by a document constructed similar to §309 AOs. The term "show cause" does not appear in the Act and therefore while formal meetings with the violator are important, a violator's attendance strictly speaking is voluntary at all times. Under Section 308 (or Section 309), there is no authority to require the physical presence of a specific person or representative at a specific place and time. EPA can require documents, data and materials etc. to be provided to EPA under Section 308, however. Implied § 309 sanctions solely for failure to attend a meeting should not be made.

The Agency is on strongest legal footing when it characterizes these "hearings" as an opportunity for the alleged violator to provide oral explanation of information relevant to a potential enforcement matter.

Use of Section 308 in Pretreatment Enforcement against Industrial Users

In pursuing an enforcement action (particularly a judicial enforcement action) against an industrial user for violations of pretreatment standards, EPA typically should use a Section 308 letter to obtain sufficient process description, wastewater monitoring results, and wastewater treatment information to establish a clear pattern of violations by the industrial user.

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More active use of section 308 letters is particularly important for pretreatment cases because, unlike direct NPDES dischargers, EPA does not have a set of DMRs which can easily establish a clear track record of violating conduct. Where EPA can only introduce into evidence one or more isolated sampling reports, the government's case is much more vulnerable to factual challenges which a defendant might raise (e.g., the possibility of inaccurate sampling, upset, or isolated noncompliance). As a result, EPA should evaluate the need for obtaining additional wastewater monitoring data from an industrial user through a Section 308 letter before referring a pretreatment enforcement case to the Department of Justice.

I.C. LISTING OF OTHER EXISTING GUIDANCE ON ADMINISTRATIVE ORDERS

LIST OF OTHER GUIDANCE ON ADMINISTRATIVE ORDERS

The following documents and memoranda, among others, may be of interest to the reader, although they do not appear in full text within this reference document. They may also be of general interest and of historical value. Copies may be obtained by calling Enforcement Division, OWEP, (EN-338), EPA, Washington, D.C. (FTS/202/475-8310)

- Memo, "Compliance Monitoring, Administrative Orders, and Court Actions under Section 309 of the Federal Water Pollution Control Act Amendments of 1972," March 20, 1974

- Memo, "Guidelines for Issuing of Administrative Order Pursuant to Title III, Section 309(a)(3) and (a)(4) of the Federal Water Pollution Control Act, as Amended [33 U.S.C. 1319(a)(3) and (a)(4)]," April 18, 1975

- Memo, "Final Policy on Section 309(a)(5)(A) and (B) of the FWCPA, as Amended: Extension of the July 1, 1977, Deadline for Industrial Dischargers," March 30, 1978

- Report, "National Municipal Policy and Strategy: for Construction Grants, NPDES Permits, and Enforcement Under the Clean Water Act," October, 1979

o Memo, "Example Non-Judicial Enforcement Documents for Obtaining Compliance with National Municipal Policy," August 20, 1984.

"Relationship of Section 309(a) Compliance Orders to Section 309(g) Administrative Penalty Procedures", distributed August 28, 1987. This document is reproduced at III.B.3, of this compendium.

III. ADMINISTRATIVE ENFORCEMENT

B. ADMINISTRATIVE PENALTY ORDERS

"Guidance on Class I Clean Water Act Administrative Penalty Procedures", dated July 27, 1987 and noted at 52 FR 30730 (August 17, 1987).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

JUL 27 1987

MEMORANDUM

SUBJECT: Guidance on Class I Clean Water Act Administrative Penalty Procedures

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement and Compliance Monitoring

Lawrence J. Jensen
Assistant Administrator for Water

TO: Regional Administrators, Regions I-X

EPA will use the procedures set forth in the guidance which follows to issue Class I administrative penalty orders under Section 309(g) of the Clean Water Act (CWA). This guidance is set forth in the form of regulatory amendments with the expectation that EPA will later notice them for proposed rulemaking.

Add Part 126 as follows:

Subpart A - Procedures for EPA Assessment of Class I Administrative Penalties under Section 309(g) of the Clean Water Act

Sec.

126.101 Purpose

126.102 Initiation of Action, Public Notice and Opportunity to Comment

126.103 Presiding Officer

126.104 Opportunity for Hearing

126.105 Administrative Record

126.106 Counsel

126.107 Location of Hearings

126.108 Hearing Procedures

126.109 Record of Hearing

126.110 Recommended Decision of Presiding Officer

126.111 Final Order of the Administrator

126.112 Petitions to Set Aside an Order

126.113 Effective Date of Order

126.114 Payment of Penalties Assessed

§126.101 Purpose

This subpart sets forth procedures for initiation and administration of Class I administrative penalty orders under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. 1319(g).

§126.102 Initiation of Action, Public Notice and Opportunity to Comment

(a) If the Administrator finds that respondent has violated Section 301, 302, 306, 307, 308, 318 or 405 of the Clean Water Act, or has violated any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Clean Water Act by the Administrator or by a State, or in a permit issued under Section 404 by a State, the Administrator may issue a proposed administrative penalty order assessing respondent a civil penalty in accordance with these procedures. The proposed order shall specify the amount of the penalty which the Administrator proposes to assess and shall state with reasonable specificity the nature of the violation. Pursuant to Section 309(a), the Administrator may at the same time, or at a different time, and at his option, separately issue an administrative order (1) which shall require the recipient to comply with CWA requirements, (2) which shall not be a proposed order subject to these procedures and (3) which shall be immediately effective. Nothing in this Part shall stay the effectiveness of administrative orders issued by the Administrator pursuant to Section 309(a) of the CWA.

(b) The Administrator shall give public notice of the proposed administrative penalty order, and an opportunity to comment on the proposed order, in the form and manner set forth below.

(1) Such public notice shall allow 30 days for public comment prior to issuance of a final order.

(2) The Administrator shall give public notice by mailing a copy of the proposed administrative penalty order to:

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(A) the respondent;

(B) any person who requests notice; and

(C) the most appropriate State agency having authority under State law with respect to the matters which are the subject of the proposed order. The Administrator shall also have consulted with the applicable State authority in conformance with Section 309(g)(1)(A) before or at the time public notice is given of the proposed administrative penalty order.

(D) the Administrator may also, at his sole option, provide additional notice to persons on a mailing list which includes names and addresses developed from some or all of the following sources: those who request in writing to be on the list, soliciting persons for "area lists" from participants in past similar proceedings in that area, including evidentiary hearings or other actions related to NPDES permit issuance, and notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State-funded newsletters, environmental bulletins, or State law journals. The Administrator may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Administrator may delete from the list the name of any person who fails to respond to such a request. The Administrator may, at his sole option, publish notice of the proposed administrative penalty order in a newspaper of general circulation in the area in which respondent resides or is domiciled or conducts the activity which the proposed penalty addresses. In any event, the Administrator shall take such steps as are necessary to fulfill the public notice requirements of Section 309(g)(4). These notice provisions do not apply to separate administrative orders issued under Section 309(a), which are immediately effective except for orders issued for violations of Section 308, which orders shall take effect after the person to whom they are issued has had an opportunity to confer with the Administrator.

(3) All public notices issued under §§126.102(b)(2)(A)-(C), and (D) when applicable, shall be sent by first class mail. All public notices issued under this subpart shall contain the following minimum information:

(A) Name and address of the EPA office proposing to assess the administrative penalty for which notice is being given;

(B) Name and address of the respondent, and the person, facility or activity against which the proposed penalty is assessed;

(C) A brief description of the business or activity conducted by the person or facility or the operation described in the order, including where applicable, the NPDES permit number or permit number for the discharge of dredged or fill material, and issuance date;

(D) A summary of violations alleged for which the administrative civil penalty is being proposed, including the amount which the Administrator proposes to assess for the violations alleged;

(E) Name, address and telephone number of an Agency representative from whom interested persons may obtain further information, including copies of the proposed order;

(F) A statement of the opportunity to submit written comments on the proposed order, the deadline for submission of such comments which is thirty days after issuance of the notice, and the name and address of the Hearing Clerk to whom comments should be sent;

(G) A statement of the opportunity for the respondent to request a hearing and the procedures by which the respondent may request a hearing;

(H) A brief description of the procedures through which the public may comment on or participate in proceedings to reach a final decision on the order;

(I) The location of the administrative record referenced in §126.03, the times at which the file will be open for public inspection, and a statement that all information submitted by the respondent is available as part of the administrative record, subject to provisions of law restricting the public disclosure of confidential information.

(4) On the same date that the public notice is issued or earlier, the Administrator shall send to the respondent written notice by certified mail, return receipt requested, of the proposal to issue the administrative penalty order, and a copy of the proposed order. These materials should include the following information:

(A) The alleged violations, identification of the facility in violation, and a reference to the applicable law and regulations;

(B) The legal basis for EPA's authority to initiate this proceeding (e.g., violation of an NPDES permit, etc.)

(C) The general nature of the procedure for issuing administrative penalty orders and assessing civil penalties, including opportunities for public participation;

(D) The amount of penalty which the Administrator proposes to assess for the violations alleged;

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(E) The fact that the respondent must request a hearing within 30 days of receipt of the notice provided under this subparagraph and must comply with §126.104(a) in order for respondent to be entitled to receive a hearing;

(F) The name and address of the Hearing Clerk to whom respondent may send a request for hearing;

(G) The fact that the Administrator may issue the final order after 30 days following receipt of the notice provided under these rules, if respondent does not request a hearing; and

(H) The fact that any order issued under this subpart shall become effective 30 days following its issuance unless a petition for review is filed by an eligible commenter or an appeal is taken under Section 309(g) of the CWA.

(c) During the public comment period provided under subpart (b) above, any interested person may submit written comments to the Agency official designated. The Administrator shall include all written comments in the administrative record.

(d) Computation of time. In computing any period of time allowed in these rules, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day. Any time periods not specified by these rules shall be set by the Presiding Officer. Service on respondent of the initial proposed order and other information required by §126.102(b)(4) is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. With the exception for respondent for service of the initial proposed order and notice required by §126.102(b)(4), five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document where a pleading or document is served by mail. Filing of a pleading or document occurs on the date it is received by the Hearing Clerk.

(e) Service of documents. A certificate of service shall accompany each document filed or served by the Administrator or respondent. Agency counsel and the respondent shall serve copies of all filed pleadings upon each other, upon all commenters to the proceeding and upon the Hearing Clerk. The Hearing Clerk shall serve, with a certificate of service, copies of all statements or pleadings received from commenters, and service shall be made by the Hearing Clerk on Agency counsel, the respondent and any

other commenters. The Hearing Clerk shall also serve on all commenters the initial complaint and any request for hearing received from respondent. The Hearing Clerk shall serve, with a certificate of service, all orders, notices or other documents issued by the Presiding Officer or the Administrator on Agency Counsel to the proceeding, the respondent and any commenters to the proceeding.

126.103 Presiding Officer

(a) The Administrator shall act as Presiding Officer. No person shall serve as a Presiding Officer where he has any prior connection with the case including, without limitation, the performance of investigative or prosecuting functions. The Presiding Officer shall conduct hearings as specified by these rules and make a recommended decision to the Administrator. His recommended decision shall address both questions of fact and law. The Presiding Officer shall be assigned by the Administrator to the proceeding within thirty days after a hearing request is received by the Hearing Clerk identified by the Administrator for the proceeding. The Hearing Clerk shall notify the Administrator expeditiously of receipt of a hearing request. The Hearing Clerk shall be identified in the initial notices sent to respondent and potential commenters.

(b) The Presiding Officer shall consider each case on the basis of the evidence presented. The Presiding Officer is solely responsible for preparing and transmitting the recommended decision and order in each case to the Administrator, unless such decision and order are agreed upon by the parties. In such latter case, the agreed upon decision and order shall be reviewed and issued as appropriate by the Administrator, and no Presiding Officer shall be appointed or, if appointed, he shall have no further authority in the proceeding.

(c) The Presiding Officer is authorized to administer oaths and issue subpoenas necessary to the conduct of a hearing. The Presiding Officer is authorized to do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

(d) Ex Parte Communications.

(1) "Ex parte communication" means any communication, written or oral, relating to the merits of the proceeding, between the Presiding Officer and either an interested person outside the Agency or the interested Agency staff, which was not originally filed or stated in the administrative record or in the hearing. Such communication is not an "ex parte communication" if all parties have received prior written notice of the proposed communication and have been given the opportunity to be present and participate therein.

(2) "Interested person outside the Agency" includes the respondent, any person who filed written comments on the proposed penalty order, and any attorney of record for those persons.

(3) "Interested Agency staff" means those Agency employees, whether temporary or permanent, who may investigate, litigate, or present evidence, arguments, or the position of the Agency in the hearing before the Presiding Officer or who participated in the preparation, investigation or deliberations concerning the proposed penalty order, including any EPA employee, contractor, or consultant who may be called as a witness.

(4) No interested person outside the Agency or member of the interested Agency staff shall make, or knowingly cause to be made, to the Presiding Officer an ex parte communication on the merits of the proceeding.

(5) The Presiding Officer shall not make, or knowingly cause to be made, to any interested person outside the Agency or to any member of the interested Agency staff an ex parte communication on the proceeding.

(6) The Administrator may replace the Presiding Officer in any proceeding in which it is demonstrated to the Administrator's satisfaction that the Presiding Officer has engaged in prohibited ex parte communications to the prejudice of any participant.

(7) Whenever an ex parte communication in violation of this subpart is received by the Presiding Officer or made known to the Presiding Officer, the Presiding Officer shall immediately notify all parties or commenters in the hearing of the circumstances and substance of the communication and may require the party or commenter who made the communication or caused it to be made, or the party or commenter whose representative made the communication or caused it to be made, to the extent consistent with justice and the policies of the CWA, to show cause why that party's or commenter's claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(8) The prohibitions of this paragraph apply upon designation of the Presiding Officer and terminate on the date of final Agency action.

§126.104 Opportunity for Hearing

(a) Within 30 days after receipt of the notice set forth in §126.102(b), the respondent may request a hearing and may provide written comments on the proposed administrative penalty order. Respondent must request a hearing in writing. The request must specify the factual and legal issues which are in dispute and the specific factual and legal grounds for the respondent's

defense. Any and all specific allegations not responded to by the respondent or a commenter shall be deemed admitted.

(b) The respondent shall be deemed to have waived the right to a hearing if the respondent does not submit the request to the Hearing Clerk designated. Respondent's request must be in writing and received by the Hearing Clerk no later than 30 days after respondent receives the proposed order. For good cause shown, the Presiding Officer may grant a hearing if the respondent submits a late request.

(c) Except as provided in §126.104(f), the Presiding Officer shall promptly schedule all hearings and provide reasonable notice of the schedule to all parties and commenters. The Presiding Officer may grant any delays or continuances necessary or desirable to resolve the case fairly for good cause shown.

(d) Upon a finding of good cause by the Presiding Officer, a respondent who has requested a hearing may amend the specification of the issues in dispute and the grounds for defense not later than 20 days before the scheduled date of the hearing.

(e) The Presiding Officer shall give written notice of an hearing to be held under these rules to any person who comments on the proposed administrative penalty order under §126.102. This notice shall specify a reasonable time prior to the hearing within which the commenter may request an opportunity to be heard and to present evidence or to make comments in any such hearing. The notice shall require that any such request specify the facts or issues which the commenter wishes to address.

(f) Summary determinations.

(1) Any party in a hearing to be held under these rules may move, with or without supporting affidavits and briefs, for a summary determination upon any of the issues being adjudicated, on the basis that there is no genuine issue of material fact for determination. The motion shall be served upon each other participant and filed with the Presiding Officer at least 20 days before the date set for the hearing, except that upon leave granted for good cause shown, the motion may be filed at any time before the close of the hearing.

(2) Any other party may file and serve a response to the motion or a countermotion for summary determination, within thirty days of service unless a different schedule is set by the Presiding Officer. When a motion for summary determination is made and supported, a party opposing the motion may not rest on mere allegations or denials but must show, by affidavit or o.

other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact for determination at the hearing.

(3) Affidavits shall be made on personal knowledge, setting forth facts and showing that the affiant is competent to testify to the matters stated therein.

(4) No oral argument shall be had on the motions filed under this subpart unless the Presiding Officer so elects. The Presiding Officer shall rule on the motion promptly after responses to the motion are filed under this subpart.

(5) If all issues are decided by summary determination, no hearing shall be held and the Presiding Officer shall prepare a recommended decision under §126.110. If summary determination is denied or if partial summary determination is granted, the Presiding Officer shall issue a statement of findings and reasons available to the public at the time of issuance by the Presiding Officer, and the hearing shall proceed on the remaining issues.

(6) After receipt of all pleadings, the Presiding Officer may grant or deny any motion, order a continuance to allow additional affidavits or other information to be obtained, or make such other order as is just and proper.

(g) Default. Once the Presiding Officer has been assigned pursuant to §126.103(a), the Presiding Officer may recommend a party be found in default after motion for failure to file a timely response or for failure to appear at a hearing without good cause being shown. Any motion for a default order shall include a proposed default order, and the alleged defaulting party shall have thirty days from service to reply to the motion. The Presiding Officer shall issue his recommended default decision solely to the Administrator subject to §126.110 of these rules. If the Administrator determines that a default has not occurred, the administrative penalty action shall be returned to the Presiding Officer for further proceedings pursuant to these rules. If the Administrator finds a default has occurred, he shall issue a default order with penalty assessment, if applicable, against the defaulting party, which order shall constitute final agency action for purposes of judicial review. If the Administrator determines that a default has occurred, any commenter who filed comments in a timely manner under §126.102(b) may, within 30 days after the Administrator has issued the default order, petition the Administrator to set aside the default order and §126.112 shall apply to the Administrator's action on the petition.

§126.105 Administrative Record

(a) At any time after public notice of a proposed penalty order is given under §126.102, the Administrator shall make available the administrative record at reasonable times for inspection and copying by any interested person, subject to provisions of law restricting the public disclosure of confidential information. The requester may be required by the Administrator to pay reasonable charges for copies. The administrative record shall be kept and maintained by the Hearing Clerk and shall include the following:

(1) Documentation (field notes, inspection reports, photographs, etc.) relied on by EPA to support the violations alleged in the proposed penalty order with a summary of violations, if a summary has been prepared;

(2) A record or summary of EPA's consultation with the State in which the violations occurred;

(3) Subpoenas issued, if any, and all responses to those subpoenas;

(4) Proposed penalty assessment notice;

(5) Public notice of the proposed order with evidence of notice to respondent and to the public;

(6) Comments by respondent and/or the public on the proposed penalty order, including any requests for a hearing;

(7) All orders or notices of the Presiding Officer;

(8) Any motions, submittals or responses of any parties or commenters to the proceeding, including prefiled testimony or exhibits, if any;

(9) A complete and accurate record (sound or videotape) or transcription of the hearing;

(10) The final decision and/or order of the Administrator and the recommended decision of the Presiding Officer; and

(11) Any other documents which the Presiding Officer finds are related to the administrative proceeding. Copies of all pleadings and documents filed in the proceeding shall be served on the Hearing Clerk.

(b) The Presiding Officer may establish a deadline or deadlines for the submission of factual or legal documents which may be considered as part of the administrative record.

§126.106 Counsel

(a) A respondent or commenter may be represented at all stages of the proceeding by counsel. After receiving notification that a respondent or any commenter is represented by counsel, the Presiding Officer, the Administrator, the respondent and all other commenters shall direct all further communications to that counsel. Respondent and/or commenters shall bear all costs of counsel.

§126.107 Location of Hearings

(a) The hearing shall be held at the appropriate EPA office, except as provided in subparagraph (b).

(b) The respondent or EPA may request in writing that the hearing be held at a location other than that specified in subparagraph (a). Action on the request is at the discretion of the Presiding Officer.

§126.108 Hearing Procedures

(a) The Presiding Officer shall conduct a fair and impartial proceeding in which the parties or commenters are given a reasonable opportunity to be heard and present evidence. Materials in the administrative record under §126.105(a) shall be made available, if requested, to the parties and commenters prior to the hearing. For good cause shown by either party or a commenter, materials in the administrative record under §126.105(a) may be supplemented at or after the hearing.

(b) At the hearing, the Administrator shall be represented by counsel.

(c) The Presiding Officer may subpoena witnesses and issue subpoenas duces tecum and ad testificandum pursuant to the provisions of the CWA.

(d) The respondent may not challenge in an administrative proceeding, under these procedures, any final Agency action, including any final permit, for which judicial review was available under Section 509(b) of the Clean Water Act.

(e) During the hearing, an authorized representative of the Administrator may summarize the basis for the proposed administrative order and shall be the first party to make a presentation at the hearing. The administrative record shall be admitted into evidence. The respondent has the right to examine, and to respond

to the administrative record. The respondent may offer into evidence the response to the administrative record and any facts, statements, explanations, documents, testimony, or other exculpatory items which bear on any appropriate issues. The Presiding Officer may require the authentication of any written exhibit or statement.

(f) All direct and rebuttal testimony shall be submitted in written form, unless upon motion and good cause shown, the Presiding Officer determines that oral presentation of the testimony on any particular fact will materially assist in the efficient identification or clarification of the issues. The respondent and the Administrator shall be afforded a right of cross-examination after introduction by a witness of his written testimony. Cross-examination will be allowed both on the written statement of a witness and his oral testimony. The Presiding Officer may limit the scope or extent of cross-examination and the number of witnesses in the interests of justice and conducting a reasonably expeditious proceeding. No cross-examination shall be allowed on questions of law or regarding matters that are not introduced into evidence nor otherwise subject to challenge in a hearing under this subpart. No Agency witnesses shall be required to testify or be made available for cross-examination on the matters described in the prior sentence.

(g) At the close of the respondent's presentation of evidence, the Presiding Officer may allow the introduction of rebuttal evidence. The Presiding Officer may allow the respondent to respond to any such rebuttal evidence submitted.

(h) Commenters who commented within the timeframe of §126.102(b), and who filed a request to participate under §126.104(e) on the facts or issues specified in the request to participate, shall have a right to be heard and to present witnesses at the hearing held under these rules. However, commenters shall not have the right of cross examination, nor shall commenters be allowed to intervene as parties to the proceeding.

(i) In receiving evidence, the Presiding Officer is not bound by strict rules of evidence. The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious or of little probative value, except that evidence relating to settlement which would be excluded in the Federal courts under Rule 408 of the Federal Rules of Evidence is not admissible. In drafting the recommended decision, the Presiding Officer shall determine the weight to be accorded the evidence.

(j) The Presiding Officer may take official notice of matters judicially noticed in the Federal courts, of other facts within the specialized knowledge and experience of the Agency, and of matters that are not reasonably in dispute and are commonly known in the community or are ascertainable from readily available sources of known accuracy. Prior to taking notice of a

matter, the Presiding Officer shall give the Administrator and the respondent an opportunity to show why notice should not be taken. In any case in which notice is taken and his recommended decision is based in part upon this notice, the Presiding Officer shall place a written statement of the matters as to which notice was taken in the record.

(k) After all evidence has been presented, the Presiding Officer may allow any participant to present argument on any relevant issue specified in the request for hearing or in comments submitted prior to the hearing. Any participant may submit a written statement for consideration by the Presiding Officer. The Presiding Officer shall specify a deadline for submission of the statement. If the statement is not received within the time prescribed, the Presiding Officer may render a recommended decision in accordance with §126.110, without considering that statement. The Presiding Officer may also require the Administrator and the respondent to submit proposed findings of fact and conclusions of law and may specify a deadline for submission of these materials.

§126.109 Record of Hearing

The Presiding Officer shall cause a tape recording, written transcript or other permanent, verbatim record of the hearing to be made, which shall be included in the administrative record, and shall, upon written request, be made available, for inspection or copying, to the respondent or any interested person, subject to provisions of law restricting the public disclosure of confidential information. Any party or commenter making a request shall be required to pay reasonable charges for copies unless the party or commenter can show the cost is unduly burdensome.

§126.110 Recommended Decision of Presiding Officer

(a) Within a reasonable time following the close of the hearing and receipt of any statements following the hearing, the Presiding Officer shall forward a recommended decision which shall include a written statement of reasons for the decision and any penalty assessment to the Administrator. The decision shall recommend that the Administrator withdraw, issue, or modify and issue the proposed penalty order. The recommended decision shall be based on a preponderance of the evidence in the administrative record and shall take into account the penalty assessment factors specified in Section 309(g)(3) of the CWA. The Presiding Officer also shall make available to the Administrator for review the complete administrative record.

(b) The Presiding Officer provides a recommended decision solely to the Administrator. The Presiding Officer shall include the recommended decision in the administrative record and shall make it available to the parties to the proceeding at the time the Administrator's decision is released pursuant to §126.111. The Presiding Officer's recommended decision (1) shall not become part of the administrative record until the Administrator's final decision is released and (2) shall not be made previously available except to the Administrator.

(c) Ex parte Communications. The rules applicable to Presiding Officers under §126.103(d) regarding ex parte communications are also applicable to the Administrator and to any other person who advises the Administrator on the decision or the order. Communications between the Administrator and the Presiding Officer do not constitute ex parte communications.

§126.111 Final Order of the Administrator

(a) Within a reasonable time following receipt of the Presiding Officer's recommended decision, the Administrator shall withdraw, issue, or modify and issue the proposed order. The Administrator's decision shall be based on a preponderence of the evidence in the administrative record, shall take into account the penalty factors set out in Section 309(g)(3) of the Clean Water Act, shall be in writing, shall include a clear and concise statement of reasons, and shall include any final order. The Administrator's decision shall constitute final agency action for purposes of judicial review.

(b) The Administrator shall provide written notice of the issuance, modification and issuance, or withdrawal of the proposed order to the respondent and every person who submitted written comments on the proposed order.

(c) The decision shall include a statement of the right to judicial review and of the procedures and deadlines for obtaining judicial review.

(d) For appeal purposes, if a hearing is held under these rules, the date of issuance or withdrawal of an order by the Administrator shall occur on the date of mailing of the Administrator's order, referenced in §126.111(b), to respondent. The notice shall be sent to respondent by certified mail, return

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receipt requested. The Administrator shall provide notice of the decision to all persons who submitted comments.

(e) If no hearing is requested or held under §126.108, the Administrator shall consider the entire record, including any comments received, and shall issue an order, if appropriate, by sending the order to the respondent by certified mail, return receipt requested. The Administrator shall provide notice of the decision to all persons who submitted comments. The date of mailing of the order shall constitute final Agency action for purposes of judicial review. The order shall also note the right of a prior commenter to petition for a hearing pursuant to §126.112 if no hearing was previously held and that such petition shall be filed with the Hearing Clerk for transmittal to the Administrator. Prior to issuance of the order when no hearing is held, the Administrator or his delegatee may request additional information on specified issues from the participants in whatever form the Administrator designates, giving all participants a fair opportunity to respond. The Administrator shall include this additional information in the administrative record.

§126.112 Petitions to Set Aside an Order

If no hearing is held before issuance of an order, any commenter who filed comments in a timely manner under §126.102(b) may, within 30 days after the Administrator has issued an order under §126.111(e), petition the Administrator to set aside the order and to provide a hearing on the penalty. The Administrator shall set aside the order and provide a hearing in accordance with these rules if the evidence presented by the commenter/petitioner is material and was not considered when the assessment order was issued. If the Administrator denies a hearing, he shall provide notice to the commenter/petitioner and to the respondent and shall publish notice of the hearing denial in the Federal Register, together with his reasons for the denial.

§126.113 Effective Date of Order

Any order issued under this subpart shall become effective 30 days following its issuance unless an appeal is taken pursuant to Section 309(g)(8) of the CWA, or a timely petition for hearing is filed by a prior commenter before the Administrator. If the Administrator denies such a petition for a hearing, the order becomes final 30 days after the denial.

§126.114 Payment of Penalties Assessed

Payment of civil penalties finally assessed by the Administrator shall be made by forwarding a cashier's or certified check, payable to the United States of America, in the amount

assessed, and noting the case title and docket number to the following address: EPA Hearing Clerk, P.O. Box 360277M, Pittsburgh, Pennsylvania 15251 or to such other address designated in the final order. Notice of payment must be sent by respondent to the Hearing Clerk for inclusion as part of the administrative record for the proceeding in which the civil penalty was assessed.

Counsel Southern Regions Branch Office of Enforcement and Compliance Monitoring, Environmental Protection Agency 401 M Street SW Washington DC 20460

FOR FURTHER INFORMATION CONTACT: John W Lyon Assistant Enforcement Counsel Environmental Protection Agency Telephone 202/475–8177 (FTS) 475–8177

SUPPLEMENTARY INFORMATION: Section 314 of the Water Quality Act of 1987 Pub L 100–4 added section 309(g) to the Clean Water Act (the Act) to provide for the assessment of administrative civil penalties The statute established two classes of administrative civil penalties. Class I and Class II Class I administrative civil penalty assessments may not exceed $10 000 per violation, or exceed a total amount of $25 000. Class II assessments may not exceed $10,000 per day for each day during which the violation continues or exceed a total assessment of $125 000. Both classes of administrative civil penalties may be assessed for violations of section 301 302, 306 307 308, 318, or 405 of the Act, or for violations of any permit condition or limitation implementing any of these sections in a permit issued under Section 402 by the Administrator or a State or in a permit issued under section 404 by a State

This notice is to advise the public of the availability of guidance which the Agency will follow in issuing Class I administrative civil penalty orders. The guidance is written in the form of regulatory amendments with the expectation that EPA will later notice them for proposed rulemaking An interim final rule guiding the assessment of Class II administrative penalties is also being published in the Federal Register

Lee M. Thomas,

Administrator Environmental Protection Agency

Date August 10, 1987

[FR Doc. 87–18800 Filed 8–14–87 8 45 am]

BILLING CODE [illegible]

ENVIRONMENTAL PROTECTION AGENCY

[FRL–3210–8(5)]

Availability

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of availability.

SUMMARY: EPA is making available to the public a document entitled "Guidance of EPA Class I Clean Water Act Administrative Penalty Procedures" which will provide procedural guidance in the assessment of administrative penalties designated as Class I under section 309(g), 33 U.S.C. 1311(g)

EFFECTIVE DATE: This guidance document will be effective on August 17, 1987

ADDRESS: To obtain a copy of the guidance, write to:

Water Enforcement Division (LE–134W), Attention: Assistant Enforcement

[redacted]

[redacted]

[redacted]

" Final Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties under the Clean Water Act," issued June 12, 1990, effective July 12, 1990. Published at 55 F.R. 23838 (June 12). Replaces the Interim Final Rules dated August 10, 1987.

ENVIRONMENTAL PROTECTION NCY

FR Part 22

[. -3845-7]

Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties Under the Clean Water Act

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule

SUMMARY: EPA is today promulgating a final rule establishing procedures for its administrative assessment of Class II civil penalties under the Clean Water Act (CWA) There have been no substantive changes to this rule since it was issued as an interim final rule See 52 FR 30671 (August 17, 1987) This rule provides that EPA's administrative assessment of Class II penalties will be governed by EPA's Consolidated Rules of Practice for assessing administrative penalties EPA is taking this action in response to amendments to the CWA, made by the Water Quality Act of 1987, which authorize the Administrator to assess administrative penalties for specified violations of the CWA The authority granted to the Administrator sess administrative penalties was immediately effective on February 87, the date the Water Quality Act was enacted

DATES: The final rule is effective July 12, 1990. EPA will use the interim final rule for conducting these proceedings before the date the final rule becomes effective.

FOR FURTHER INFORMATION CONTACT: Susan Cary Watkins, Office of Enforcement and Compliance Monitoring (LE-134W), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, 202-382-2656

SUPPLEMENTARY INFORMATION. On February 4, 1987, section 309 of the CWA, 33 U S C 1319, was amended by section 314 of the Water Quality Act, Pub L 100-4, to authorize the Administrator of EPA to assess administrative penalties for violations of the CWA. The amendments to section 309 created a new subsection 309(g) establishing two classes of administrative penalties, which differ with respect to procedure and maximum penalty amounts

Class I administrative penalty proceedings are not subject to the Administrative Procedure Act, 5 U S C. 554 556, and authorize a maximum nt of $25,000. Notice of the ability of procedural guidance for Class I proceedings was published in the Federal Register See 52 FR 30730 (August 17, 1987)

The final procedures promulgated today apply only to Class II. Class II proceedings authorize a maximum penalty of $125 000 and are subject to the requirements of the Administrative Procedure Act, 5 U S C. 554, 556. Class II proceedings are similar to administrative penalty proceedings subject to the Administrative Procedure Act under other environmental statutes

EPA promulgated Consolidated Rules of Practice, 40 CFR part 22, governing the administrative assessment of penalties under other statutes administered by EPA. The Consolidated Rules provide a common set of procedural rules for certain of EPA's administrative penalty programs to reduce paperwork, inconsistency, and the burden on persons regulated See 45 FR 24360 (April 9, 1980).

Because of the similarity of Class II proceedings to other administrative penalty proceedings subject to the Administrative Procedure Act, EPA concludes that the Consolidated Rules of Practice should be used as the procedural framework for Class II administrative penalty enforcement under the CWA. Accordingly, EPA is today promulgating a final rule providing that the Consolidated Rules shall govern adjudicatory proceedings for the assessment of Class II administrative penalties under section 309(g) of the CWA.

EPA published this rule in interim final form in the Federal Register with a 30-day comment period. See 52 FR 30671 (August 17, 1987). The Agency received six comment letters. Comments fell into seven areas of concern.

1. Economic impact on small business One commenter wanted the Agency to perform an economic impact analysis This regulation is not considered a major rule by the Agency because it will not have an annual effect on the economy of $100 million or more and, therefore, no regulatory impact analysis is required. The economic effect on most small businesses is slight, therefore, no regulatory flexibility analysis is required. Moreover, this regulation will have no effect at all on small businesses that comply with the Clean Water Act

2. Public notice of complaints. One commenter asked that the standard public comment period be 30 days, that non-party commenters be allowed to submit late comments only when the commenter shows good cause, and that the Agency provide for late submission by parties to the enforcement action. Another commenter wanted the Agency to give notice of a violation and a reasonable time for correction before issuing an administrative penalty order The 30-day comment period after public notice is set forth in 40 CFR 22.38(d). Also § 22 38(d) provides that non-party commenters can submit late comments after showing good cause A party to the action is not covered by the § 22.38(d) provision for submitting comments, party submissions are governed by 40 CFR 22 07(b) and 22 15 The Clean Water Act imposes strict liability and does not require the Agency to give notice of violations before enforcing the Act These administrative penalties are for past violations Corrective action will not affect liability Because administrative penalty orders usually will be based on self-reported permit violations, the discharger should know of the violation before the Agency publishes a notice of the complaint.

3 Timing of state consultation. One commenter wanted the timing of state consultation clarified to ensure that state and federal actions are not initiated simultaneously The state consultation occurs before the Agency assesses a Class II civil penalty in a final order.

4 Evidentiary issues arising at a hearing One commenter wanted these supplemental regulations clarified as to admissability and relevance of evidence. The Presiding Officer follows the existing requirements of 40 CFR 22.22 to determine the admissibility of evidence.

5 Participation at a hearing by a commenter who is not an intervenor One commenter wanted to ensure that a person who is not a party but presents evidence at a hearing is subject to cross-examination. That commenter also wanted the regulations to state that a person who is not a party cannot cross examine witnesses Under 40 CFR 22 38(d), a commenter who is not a party has no right to cross examine witnesses Other participation by a commenter is governed by 40 CFR 22 22 and 22.38(d) Parties may cross examine See 40 CFR 22.22(b)

6. Right to trial by jury One commenter wanted the regulations to provide for a trial by jury on the issue of liability for administrative penalties. There is no right to a jury trial on the issue of liability in an administrative proceeding *Atlas Roofing Co., Inc* v *Occupational Safety and Health Review Commission*, 430 U S 442 (1977) *Accord Tull* v *U S.*, 412 U S. 481, 418 n.4 (1987) The purpose of the administrative penalty authority is to expedite enforcement in straightforward cases in which violations are clearly documented and are unlikely to be contested by a

violator The Consolidated Rules of Practice and this supplemental rule provide adequate due process protections for respondents.

7 Criteria for assessing a penalty. Three commenters wanted specific criteria for determining a proposed penalty amount. The criteria are stated in section 309(g)(3) of the Clean Water Act, 33 U S C. 1319(g)(3) EPA has not issued specific guidelines under the Clean Water Act for calculating administrative penalties for adjudicatory hearings. The Agency issued guidance for calculating a settlement penalty amount on August 28, 1987 The Uniform Civil Penalty Policy, issued February 16, 1984, provides a general framework for determining administrative penalties See 40 CFR 22 14(c).

Statutory Requirements

Under section 309(g) of the CWA, the Administrator assesses a Class II penalty by a final order after opportunity for a hearing on the record Under section 309(g), the Administrator also must consult with the State in which the violation occurs before assessing the penalty

Under section 309(g), the Administrator must provide public notice and reasonable opportunity to comment upon the complaint. The section provides that, if a hearing on the complaint is conducted, the Administrator shall give any citizen who commented on the complaint notice of the hearing, and a reasonable opportunity to be heard and to present evidence at the hearing. The section further provides that the Administrator shall give any person who comments on a complaint notice of the order assessing a penalty.

Under section 309(g), if no hearing is held, any person who commented on the complaint may petition the Administrator to set aside the order and to provide a hearing on the complaint. In addition, section 309(g) provides that the Administrator must set aside the order and provide a hearing if the Administrator determines that the evidence presented by the petitioner is material and was not considered in the issuance of the order Under section 309(g), if the Administrator denies a hearing, the Administrator shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for the denial.

Section 309(g) did not change the procedures for issuing and enforcing administrative compliance orders under other subsections of section 309 See section 309(g)(11) Accordingly, the rule promulgated today does not apply to or change the procedures for issuing or enforcing compliance orders issued by EPA under, for example, section 309(a) of the CWA.

Consolidated Rules of Practice

EPA concludes that the Administrator may use the Consolidated Rules of Practice, 40 CFR part 22, to assess Class II penalties under section 309(g) of the CWA. The Consolidated Rules were developed for administrative penalty actions like these that are subject to the Administrative Procedure Act.

Under the Consolidated Rules, as supplemented by this final rule, EPA will assess Class II penalties by a final order after opportunity for a hearing on the record Before issuing an order, EPA will give written notice to the person to be assessed the civil penalty by filing and service of a proposed order and complaint under the Consolidated Rules Under 40 CFR 22.15, the complaint will include a notice of the respondent's right to request, within 20 days, a hearing on the complaint.

EPA will provide public notice and reasonable opportunity to comment on the complaint under the Consolidated Rules. If EPA conducts a hearing on the complaint, EPA shall provide to any person who commented on the complaint a copy of the notice of hearing required by 40 CFR 22.21(b), and a copy of any final order assessing a penalty Commenters who wish to participate at a hearing may be heard and present evidence without right of cross examination or may move formally to intervene under 40 CFR 22 11 If no hearing is held, persons who commented on the complaint may petition to have the order set aside and to have a hearing on the complaint.

This final rule is effective 30 days after publication in the Federal Register The Consolidated Rules of Practice and the interim final rule will govern proceedings for the assessment of Class II administrative penalties under the CWA for which a complaint is filed before the effective date of this final rule.

The final rule affirms that actions of the Administrator for which judicial review could have been obtained under section 509(b)(1) of the CWA (for example, issuance of a waste water discharge permit) will not be subject to review in a Class II penalty assessment proceeding. The final rule makes clear that a person who is not a party to a penalty assessment proceeding may nevertheless comment on a complaint and petition for a hearing The rule requires that these persons file written comments with the regional hearing clerk and serve a copy of the comments upon each party. The rule cor that a person wishing to intervene as party in a Class II penalty proceed may move for leave to intervene under the Consolidated Rules

Regulatory Flexibility Act

Under the Regulatory Flexibility Act 5 U S C 601–612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment, a regulatory flexibility analysis that describes the impact of the rule on small entities, i e small business, small organizations, and small governmental jurisdictions The Administrator may certify that the rule will not have a significant economic impact on a substantial number of small entities

This regulation will impose no significant costs on any small entities The overall economic impact on small entities is slight. Accordingly, I hereby certify that this proposed regulation will not have a significant impact on a substantial number of small entities. This regulation does not require a regulatory flexibility analysis

Executive Order 12291

Under Executive Order 12291, EP must judge whether a regulation is major and, therefore, subject to the requirement of a Regulatory Impact Analysis. Major rules are those which impose a cost on the economy of $100 million or more annually or have certain other economic impacts. The Agency has determined that this proposed rule does not meet the criteria of a major rule set forth in section 1(b) of the Executive Order The Agency submitted this regulation to the Office of Management and Budget for review as required by Executive Order 12291.

Paperwork Reduction Act

Under the Paperwork Reduction Act EPA must submit all information collections to the Office of Management and Budget for approval As the present rule contains no information collection requirements, this stipulation does not apply.

Dated. May 30 1990

William K. Reilly,

Administrator

Accordingly, the interim final rule amending 40 CFR part 22, published 52 FR 30671 (August 17, 1987) is ado as a final rule with the following changes·

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Final Rule for Administrative Assessment of Class II Civil Penalties, 40 CFR Part 22

FROM: Patricia Chor
OE-Water Intern

TO: OE-Water Attorneys
Regional Counsels, Regions I-X

Attached is the final rule governing administrative assessment of Class II penalties. The rule was issued June 12, 1990 and becomes effective July 12, 1990. Please contact Susan Cary Watkins at (703) 768-2950 for further information.

Printed on Recycled Paper

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PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE VOCATION OR SUSPENSION OF RMITS

. The authority citation for part 22 is revised to read as follows:

Authority: 15 U S C. sec. 2615, 42 U.S.C. secs 7545 end 7601; 7 U S C secs 136(l) and 136(m); 33 U.S.C. secs. 1361, 1319(g), 1415, and 1418; 42 U.S C. secs. 6912, 6928, and 6991(e) and 6992(d).

2. Section 22.38 is revised to read as follows:

§ 22.38 Supplemental rules of practice governing the administrative assessment of Class II penalties under the Clean Water Act.

(a) *Scope of these supplemental rules* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), admmistrative proceedings for the assessment of any Class II civil penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g))

(b) *Consultation with states* The Administrator will consult with the state in which the alleged violation occurs before issuing a final order assessing a Class II civil penalty.

(c) *Public notice.* Before issuing a final order assessing a Class II civil penalty, the Administrator will provide public notice of the complaint.

(d) *Comment by a person who is not a party.* A person not a party to the Class II proceeding who wishes to comment upon a complaint must file written comments with the Regional Hearing Clerk within 30 days after public notice of the complaint and serve a copy of the comments upon each party. For good cause shown the Administrator, the Regional Administrator, or the Presiding Officer, as appropriate, may accept late comments The Administrator will give any person who comments on a complaint notice of any hearing and notice of the final order assessing a penalty. Although commenters may be heard and present evidence at any hearing held under section 309(g) of the Act, commenters shall not be accorded party status with right of cross examination unless they formally move to intervene and are granted party status under § 22.11.

(e) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the Act shall not be subject to review in an administrative proceeding for the assessment of Class II civil penalty under section 309(g).

(f) *Petitions to set aside an order and to provide a hearing* If no hearing on the complaint is held before issuance of an order assessing a Class II civil penalty any person who commented on the complaint may petition the Administrator, within 30 days after issuance of the order, to set aside the order and to provide a hearing on the complaint If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator will immediately set aside the order and provide a hearing in accordance with the Consolidated Rules of Practice and these supplemental rules of practice If the Administrator denies a hearing under section 309(g)(4)(C) of the Act, the Administrator will provide to the petitioner, and publish in the Federal Register, notice of and the reasons for the denial.

[FR Doc. 90-13347 Filed 6-11-90; 8.45 am]
BILLING CODE 6560-50-M

"Relationship of Section 309(a) Compliance Orders to Section 309(g) Administrative Penalty Proceedings", distributed August 28, 1987. Includes transmittal memorandum covering items III.B.3 through 11, this Compendium.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

AUG 28 1987

MEMORANDUM

SUBJECT: Guidance Documents and Delegations for Implementation of Administrative Penalty Authorities Contained in 1987 Clean Water Act Amendments

FROM: Lawrence J. Jensen L Jensen
Assistant Administrator
for Water

for Thomas L. Adams, Jr. Thomas L. Adams
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Water Division Directors, Regions I-X
Regional Counsels, Regions I-X
Environmental Services Division Directors
Regions III, VI
Assistant Regional Administrator for Policy and
Management, Region VII

Attached are final guidance documents and delegations necessary for implementation of the new administrative penalty authorities contained in the 1987 amendments to the Clean Water Act. You were sent copies of the procedural rules for Class I and Class II proceedings on August 12. Notices for these procedural rules were also published in the Federal Register on August 17. Copies of the Federal Register documents are enclosed for your reference.

This new administrative penalty authority provides the Agency with the opportunity to significantly increase the effectiveness of its Water Quality Enforcement program. We are fully committed to extensive use of administrative penalties and urge the Regions to quickly get the necessary processes and redelegations in place for prompt use of this authority. Headquarters offices will make every effort to support the Regions in the use of this enforcement mechanism and to resolve any problems which may develop during the initial implementation. The Regions should immediately proceed to develop written redelegations where the Regional Administrator wishes to redelegate some or all of these authorities.

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With the issuance of these materials, the Regions are now in a position to begin using administrative penalty authority subject to the delegations and headquarters concurrence as indicated in the guidance. We are today starting the ten working day clock for obtaining your concurrence on draft proposed administrative penalty orders [illegible].

List of Administrative Penalty Guidance Documents

The final [illegible] listed in this mailing are as follows:

1. Relationship of Section 309(a) Compliance Orders to Section 309(g) Administrative Penalty Proceedings.

2. Guidance on [illegible], Clean Water Act Administrative, Civil and Criminal Enforcement Remedies.

3. Guidance on State Actions Preempting Civil Penalty Actions under the Federal Clean Water Act.

4. Guidance on "Joint Liability," in Enforcement Actions under the Clean Water Act.

5. Guidance on [illegible] Penalty Amount under the Clean Water Act.

6. Guidance on Effect of Clean Water Act Amendment Civil Penalty Assessment Language.

7. **Addendum to the Clean Water Act Civil Penalty Policy for Administrative Penalties.**

8. **Guidance on Notice to Public and Commenters in Clean Water Act Class II Administrative Penalty Proceedings.**

9. **Guidance Regarding Regional and Headquarters Coordination on Proposed and Final Administrative Penalty Orders on Consent under New Enforcement Authorities of the Water Quality Act of 1987.**

10. Model Forms for Administrative Penalty Proceedings.

    - Sample Letter to Comply with State Consultation Requirement on Proposed Class I or II Administrative Penalty

    - Form of Letter to Respondent Covering Complaint for Class I or II Administrative Penalty (NPDES Violations)

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- Form of Letter to Respondent Covering Complaint for Class I or II Administrative Penalty (Dredge or Fill Violations)

- Form of Complaint in Proceeding to Assess Class I or II Administrative Penalty (NPDES Violations)

- Form of Complaint in Proceeding to Assess Class I or II Administrative Penalty (Dredge or Fill Violations)

- Form of Federal Register Notice of Proposed Administrative Penalty and Opportunity to Comment

- Form of Subpoena in Proceeding to Assess Class I or II Administrative Penalty

- Form of Notice to Commenters of Hearing to Assess Class I or II Administrative Penalty

- Form of Consent Order Assessing Class I or II Administrative Penalty (NPDES Violations)

- Form of Consent Order Assessing Class I or II Administrative Penalty (Dredge or Fill Violations)

- Form of Final Unilateral Order Assessing Class I or II Administrative Penalty (NPDES Violations)

- Form of Final Unilateral Order Assessing Class I or II Administrative Penalty (Dredge or Fill Violations)

11. Delegations

12. Federal Register Notices for Class I and Class II Procedural Rules

A separate Section 404 administrative penalty policy continues under development and will be distributed to the Regions in the near future. Pending finalization of the Section 404 guidance document, Regions may wish to consider the May 28, 1987 draft Section 404 penalty policy for Section 404 administrative penalty cases.

We want to thank the Regions for their comments on the several drafts and for their participation in the Agency workgroup that prepared the delegations, procedural rules and the guidance documents. The workgroup included representatives from all Regions who devoted large amounts of time to drafting and reviewing the many documents involved. The workgroup labored under very tight deadlines and delivered quality written products on time. We personally are very appreciative for what really was an extraordinary effort.

We plan to hold a Clean Water Act administrative penalty workshop on September 16 in Washington, D.C. to explain the delegations, procedures and guidance documents. We hope that each Region will be able to send one or more representatives to the workshop, which is described in a separate mailing.

If you wish any additional information on any of the matters referenced in the guidance documents, please contact John Lyon of OECM (Tel. FTS 475-[illegible]), Anne Lassiter of OWEP (Tel. FTS 475-8307), or Rosanna Buhrer of OWP (Tel. FTS 475-8738).

Attachments

cc: Workgroup Members

RELATIONSHIP OF §309(a) COMPLIANCE ORDERS TO §309(g) ADMINISTRATIVE PENALTY PROCEEDINGS

I. Purpose

The purpose of this document is to discuss the relationship between §309(a) administrative compliance orders and §309(g) administrative penalty proceedings. The specific issue is whether EPA, as a legal and policy matter, should join these administrative mechanisms together in one document that both orders future compliance and proposes administrative penalties for past violations. This guidance concludes that administrative compliance orders and administrative complaints for civil penalties should be kept procedurally separate: they should be issued and docketed as separate documents. However, there is nothing to prevent the Regions from issuing the two types of documents at the same time in response to a given violation.

II. Discussion

On one level it may appear quite sensible to issue one document that contains both a §309(a) administrative order to comply and a §309(g) administrative complaint for civil penalties. The two actions will often be based on the same set of facts that establish a violation. The simplicity of a single document may be more efficient for EPA to issue, and for an alleged violator to understand. And to propose administrative penalties for past violations would add substantial leverage to the prospective commands of a compliance order.

However, administrative compliance orders and administrative complaints are conceptually and procedurally very different, and there are dangers in joining the two together. Compliance orders under §309(a) are administrative commands; they are not adjudications of rights or liabilities, and they do not impose any sanctions for the underlying violation or for a violation of the compliance order itself. Because they do not have such determinate effects they lack "finality" and accordingly are not reviewable by a court. (The only exception to this is the limited review that occurs when EPA in a civil action seeks penalties for a violation of the compliance order.) EPA has fought hard to maintain the nonreviewability of compliance orders like those under §309(a). To have them subject to judicial review or adjudicatory procedures at the time of their issuance would seriously undermine their usefulness as an enforcement tool.

On the other hand, assessment of administrative penalties under §309(g) is an adjudicated remedy. Penalties under either Class I or Class II procedures can be assessed only

after an opportunity for hearing and notice to the public. Violators and members of the public can appeal EPA's findings of violation and penalty assessments to the courts.

The most serious potential problem in joining together §309(a) compliance orders and §309(g) administrative complaints in the same document is that compliance orders may directly or indirectly become subject to adjudication and judicial review. Adjudicatory procedures will apply to the portion of the document proposing administrative penalties: violators will have a strong incentive to force the compliance order provisions into the same adjudicatory framework. The risk of this occurring is most direct if the proposed penalty assessment is in any way linked to the provisions of the compliance order. An example of this would be a proposed assessment that states that administrative penalties will be reduced if the violator carries out the requirements of the compliance order. If the two are linked in this way, it may be very difficult to avoid having the lowest common denominator-- adjudicatory procedures-- apply to the entire document, including the compliance order.

Even if the two are not functionally linked, the compliance order and the proposed penalty assessment will have much in common. The two will usually be premised upon the same set of violations; and, the availability and reasonableness of corrective measures directed by the compliance order will be relevant factors for the administrative law judge to consider in assessing administrative penalties. The provisions of the compliance order thus may indirectly become subject to adjudication, and to eventual judicial review. It is true that a reviewing court most likely would give substantial deference to EPA on any issue pertaining to the compliance order. However, any breach in the principle that these orders are generally not reviewable <u>at all</u> is a very serious matter.

Public comment on the terms of proposed administrative penalty assessments is another way in which the provisions of a compliance order-- if part of the same document-- may be made part of the penalty adjudication and potentially subject to court review. Under §309(g)(4), EPA must give public notice of proposed penalty assessments, and allow the public to comment on these proposed assessments and participate in any adjudicatory hearings. If §309(a) compliance orders are integral parts of these administrative complaints for penalties, EPA in effect will be giving public notice and receiving comments on these compliance order provisions as well. The public may also attempt to present evidence at the penalty hearings that the associated compliance orders are too lax or too strict. Even if EPA is successful in excluding such evidence from the adjudicatory proceedings, the effect of the compliance orders will be blunted and EPA resources will be diverted to litigating extraneous issues at the hearings.

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Procedural complexities are also introduced when compliance orders and proposed penalty assessments are merged. One of the most useful aspects of §309(a) compliance orders is that EPA can amend them at will. Violators may argue that the primary characteristic of the joint document is its penalty assessment, and accordingly that the document as a whole should be governed by the procedural rules established for administrative complaints. There are limitations on amending administrative complaints once a violator has filed an answer It may be argued that EPA should be similarly limited in amending its compliance order once an answer is filed. Violators may also argue that other procedural limitations applicable to penalty proceedings-- e.g., substitution of parties, and opportunities to present rebuttal evidence-- should apply to the compliance order. These extraneous issues will complicate efforts to obtain compliance using a §309(a) order that is attached to an administrative complaint.

There is a simple way to avoid the risks discussed above: keep compliance orders and proposed penalty assessments in separate documents, and do not state in the administrative complaint that the penalty amount will depend upon meeting the terms of a compliance order. Given current word-processing capabilities, there should be little added administrative burden in issuing these documents separately instead of jointly. Also, there is no reason why the two could not be issued simultaneously. All that needs to be done to avoid the risks described above is to issue the compliance order and administrative complaint separately in the first instance.

III. Conclusion

There are substantial risks in issuing §309(a) compliance orders in the same document with §309(g) administrative complaints. The most serious risk is that compliance orders could become subject to administrative adjudication and judicial review. This would sharply limit their effectiveness. The simple route to avoiding these risks, which the Regions are strongly urged to take, is to issue compliance orders and administrative complaints as separate documents.

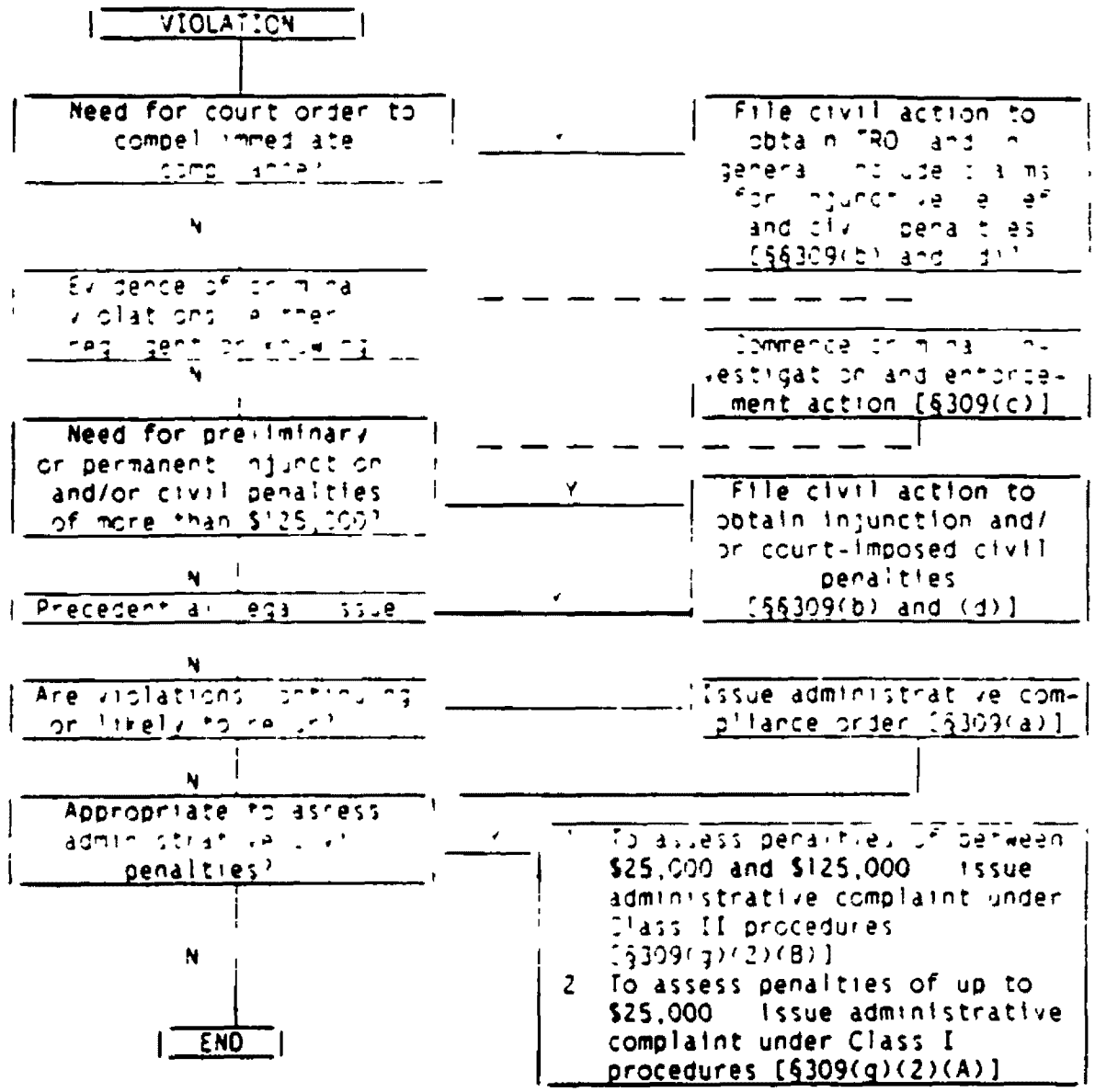
Contacts concerning this guidance:

David M. Heineck
Office of Regional Counsel, Region 10
FTS 399-1498

Gary Hess
Office of Enforcement and Compliance Monitoring
FTS 475-8183

"Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies", distributed August 28, 1987.

I Decision-Making Process to Determine Appropriate Enforcement Option Under Clean Water Act §309



[N B The dotted lines in the above chart are meant to illustrate two principles First if a civil or criminal action has already been initiated a parallel criminal or civil enforcement action should be taken only if consistent with EPA guidance on parallel proceedings Second for violations that are the subject of a civil action for court-imposed penalties administrative penalties under §309(g) may not be assessed for the same violations Another factor to consider is that violations for which an authorized NPDES state has commenced and is "diligently prosecuting" a claim for administrative penalties under comparable state authority may not be subject to a civil penalty act on under §309(d) See §309(g)(6)(11) and related sections of this guidance]

GUIDANCE ON CHOOSING AMONG CLEAN WATER ACT ADMINISTRATIVE, CIVIL AND CRIMINAL ENFORCEMENT REMEDIES

August. 1987

In the legislative history to the Water Quality Act of 1987, Congress indicated that judicial rather than administrative enforcement is more appropriate for certain types of cases:

> This authority to issue administrative penalty orders is intended to complement and not to replace a vigorous civil judicial enforcement program. Civil judicial enforcement is a keystone of successful enforcement of the Act and necessary for cases involving novel issues of law or contested penalty assessments, cases requiring injunctive relief, serious violations of the Act, or large penalty actions, and cases where remedies are sought requiring significant construction or capital investment. The addition of this enforcement tool is based in part on the Agency's assurance that it does not intend to retreat from vigorous judicial enforcement of Clean Water Act violations

S Rep No. 99-50, 99th Congress, 1st Session (to accompany S 1128) (1985). The following guidance is meant to be consistent with this Congressional directive: administrative penalties should supplement, not replace, judicial action

One qualification should be added Although this guidance may recommend a particular enforcement option for particular types of violations, other factors-- such as Agency priorities and available resources-- must also enter into the enforcement decision.

1. <u>A civil judicial action is more likely to be appropriate when there is a need for a court order directing immediate or long-term compliance measures (a TRO or an injunction).</u>

A basic limitation of the administrative penalty authority under §309(g) is that it does not grant EPA any power to directly compel a violator to stop continuing violations. The only direct authority under this provision is to assess civil penalties. Of course, the prospect of a significant civil penalty for past and ongoing violations can be a strong inducement to comply. However, there will be situations where this inducement, accompanied by a separate §309(a) compliance order, will not be enough. The $125,000 ceiling on administrative penalties may be insufficient to discourage continuing violations, for example where the cost of compliance or the economic benefit is high. Even if a penalty of less than $125,000 should be enough to deter ongoing noncompliance, the adjudicatory and public involvement

II. Discussion

A. Purpose

The purpose of this document is to discuss the various enforcement alternatives under the Clean Water Act, including the recently-added option of administrative penalties, and to discuss the types of violations that are most appropriate for each option. This guidance is primarily directed to NPDES permit-related violations, but it is also consistent with guidance for Section 404 enforcement (see related guidance).

B. Background

The Water Quality Act of 1987 greatly expanded EPA's enforcement options under the Clean Water Act by authorizing the Agency to assess penalties administratively. Prior to this legislation, EPA had to obtain a court order--either through a civil action [§§309(d) or 311(b)(6)(B)] or a criminal action [§309(c)]--to impose monetary penalties for Clean Water Act violations. The administrative enforcement authority granted by §309(g) provides a very useful and flexible third option for imposing penalties.

C. Decision Criteria

EPA may impose penalties under §309(g) for virtually the entire range of violations that can be addressed through judicial actions and administrative compliance orders under §§309(a) through (d). The only exception is that administrative penalties, unlike judicially-imposed penalties, may be imposed only for violations of underlying requirements of the Act and not for violations of §309(a) compliance orders.1/ Since EPA as a general rule should choose the least resource-consuming enforcement option that will do the job,2/ and administrative penalty proceedings under §309(g) should be both effective and much less onerous than civil judicial actions, the real issue is when not to use this administrative penalty authority. The following discussion, like the flowchart at the beginning of this document, approaches the issue from this perspective.

1/ A compliance order that does not expressly excuse penalties does not limit EPA's authority to assess an administrative penalty for that violation. Cf., U.S. v. Metropolitan District Commission, 23 E.R.C. 1350, 1355-56, 1359, 1360 (D. Mass. 1985).

2/ An important exception to this general rule is that prosecutorial considerations on the part of EPA and the Department of Justice may independently indicate the need for criminal prosecution, even if a civil action or administrative enforcement would achieve compliance.

requirements of §309(g) mean that there are uncertainties as to the amount of penalty that ultimately will be assessed, and a delay of at least 60 days from the date of the proposed penalty assessment until that assessment becomes effective. This may be enough to remove the inducement to stop ongoing violations.

In the above situations, or in any situation where the noncompliance is serious and continuing and the violator is uncooperative, EPA should commence a civil action to obtain a TRO or preliminary injunction enjoining further violations. In addition, if the violator must take specific measures to achieve compliance and the measures are complicated, costly or require a significant period of time to implement, a civil action should be commenced to obtain an appropriate mandatory injunction. Whenever an action is initiated to obtain a TRO or an injunction, in the interests of efficiency and case strategy all claims for civil penalties generally should be included in that action. There may be occasions, however, when the Agency may choose to file a civil action for injunctive relief alone.

2. Criminal enforcement rather than administrative penalty proceedings should be taken for serious violations that are knowing or negligent.

In addition to establishing administrative penalty provisions, the Water Quality Act of 1987 expanded the criminal sanctions of Clean Water Act §309(c). The higher levels of fines and imprisonment that were established constitute a strong remedy that Congress clearly intended should be used in appropriate circumstances.

Whether a particular matter should be considered for criminal prosecution will be determined on the basis of criteria which include the following:

a. Was the conduct knowing or negligent?

b. Was the conduct egregious in nature (e.g., a blatant disregard for commonly known requirements)?

c. Did the conduct cause foreseeable environmental harm?

d. Was the conduct characteristic of a type which especially should be deterred?

e. Was the violator from a category to which it is especially important to convey a deterrent message?

f. Did the conduct involve a particularly dangerous material?

g. Did the violation reflect conduct by responsible corporate officers or employees?

The list above should not be considered exclusive. Other circumstances may arise which also make a particular matter appropriate for criminal consideration. If any such factors are present, the matter should be forwarded to the region's Office of Criminal Investigators

Parallel civil judicial proceedings (as well as administrative penalty proceedings) generally should be held in abeyance so long as a criminal investigation or prosecution is underway, unless it is essential to obtain prompt injunctive relief to abate an ongoing hazard to human health or the environment. Whenever a Region has concerns regarding the appropriateness of initiating parallel civil and criminal enforcement proceedings, the Office of Regional Counsel for the Region should contact the OECM Office of Criminal Enforcement, at (FTS) 475-9660.

3. <u>To assess total civil penalties of more than $125,000, or where required by national EPA policy, EPA must commence judicial action rather than administrative penalty action.</u>

The maximum amount of civil penalties that can be assessed administratively under §309(g) is $125,000. Section 309(g)(3) of the Act and other sections of this guidance set out the factors to consider in determining the appropriate penalty amount to be collected.

It is clear that EPA must initiate a judicial civil action to assess penalties greater than $125,000. For civil penalties of less than $125,000, there still may be situations where a civil action rather than an administrative penalty proceeding is the better option, to preserve the possibility of assessing penalties of more than $125,000 for given violations. If EPA believes that the §309(g) process results in a penalty assessment that is too low, there is no "second chance" to obtain higher penalties through a §309(d) or §311(b)(6) civil action.

The decision becomes difficult as the appropriate bottom-line civil penalty approaches $125,000. On the one hand, this

may indicate the need to initiate a civil action, to preserve negotiating flexibility and to avoid placing a cap on amounts that the Administrative Law Judge may consider. On the other hand, administrative proceedings are generally preferred since they require less of a commitment of Agency time and resources. In these circumstances the Regions will have to weigh the resource and penalty factors on a case-by-case basis in deciding between the judicial and administrative penalty options.

EPA national policy or guidance may also require the choice of a particular enforcement option. An example is the April 1984 guidance supporting the National Municipal Policy, which presumes judicial enforcement in cases where compliance will not be achieved by July 1, 1988. Other EPA policies requiring court enforcement may be developed in the future.

4. EPA must weigh the costs of pursuing an administrative penalty action in deciding whether and when to pursue relatively small penalty claims.

Up to this point, this document has suggested that §309(g) proceedings generally should not be initiated where a higher level of enforcement (civil or criminal judicial action) is needed. This leaves a wide variety of violations that are good candidates for administrative penalties. Types of violations that will generally be more appropriate for administrative penalties are late or non-submission of DMRs or other permit-required reports, and effluent violations caused by poor O & M (as opposed to lack of treatment facilities, which may require an injunction to correct).

For violations that warrant only minor penalties, the Regions will have to weigh the benefits of enforcement against its costs. The costs include potential evidentiary hearings, solicitation and consideration of public comment, and potential judicial appeals. However, these costs should not necessarily deter the Regions from pursuing some number of relatively small administrative penalties: taking administrative enforcement against one of a number of comparable minor violators, where it may be impractical to pursue penalties against the entire group, may deter the group as a whole from similar violations.

III. Conclusion

The administrative penalty authority given to EPA by the Water Quality Act of 1987 can be used for a wide variety of violations. Administrative penalties will be particularly useful in dealing with violations that are serious but that in

themselves do not usually justify a judicial enforcement action-- for example, late or non-reporting of DMRs. Only certain categories of violations should not be addressed through §309(g) administrative penalties: violations requiring TROs, injunctive relief, criminal sanctions, or civil penalties of more than $125,000; and violations where national EPA policy calls for court enforcement. The wide use of §309(g) in appropriate circumstances will greatly strengthen EPA's ability to ensure compliance with the Clean Water Act

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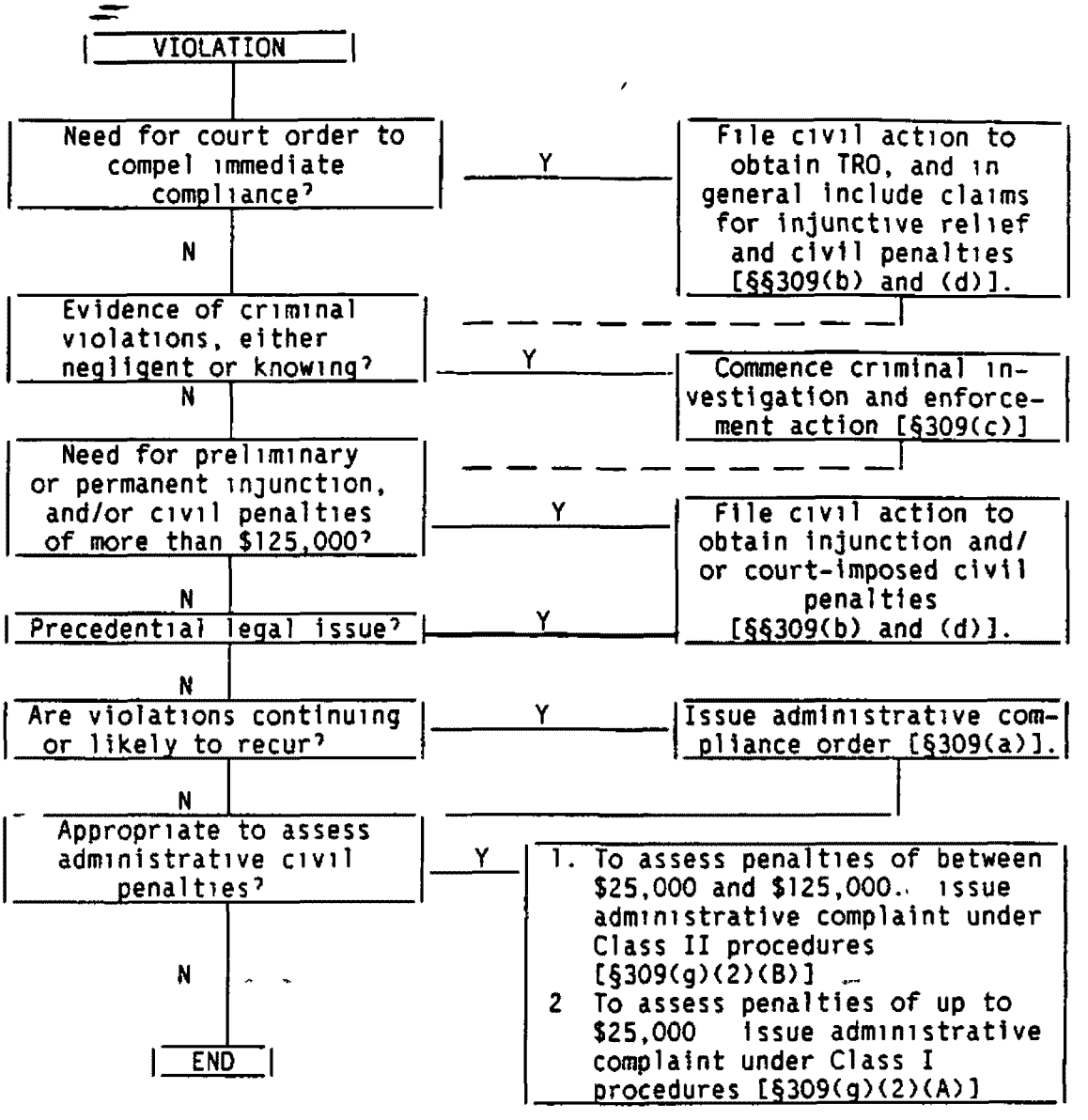
III B.4

GUIDANCE ON CHOOSING AMONG CLEAN WATER ACT ADMINISTRATIVE, CIVIL AND CRIMINAL ENFORCEMENT REMEDIES

I Decision-Making Process to Determine Appropriate Enforcement Option Under Clean Water Act §309



[N B The dotted lines in the above chart are meant to illustrate two principles First, if a civil or criminal action has already been initiated, a parallel criminal or civil enforcement action should be taken only if consistent with EPA guidance on parallel proceedings Second, for violations that are the subject of a civil action for court-imposed penalties administrative penalties under §309(g) may not be assessed for the same violations Another factor to consider is that violations for which an authorized NPDES state has commenced and is "diligently prosecuting" a claim for administrative penalties under comparable state authority may not be subject to a civil penalty action under §309(d) See §309(g)(6)(ii) and related sections of this guidance]

II. Discussion

A. Purpose

The purpose of this document is to discuss the various enforcement alternatives under the Clean Water Act, including the recently-added option of administrative penalties, and to discuss the types of violations that are most appropriate for each option. This guidance is primarily directed to NPDES permit-related violations, but it is also consistent with guidance for Section 404 enforcement (see related guidance).

B. Background

The Water Quality Act of 1987 greatly expanded EPA's enforcement options under the Clean Water Act by authorizing the Agency to assess penalties administratively. Prior to this legislation, EPA had to obtain a court order--either through a civil action [§§309(d) or 311(b)(6)(B)] or a criminal action [§309(c)]--to impose monetary penalties for Clean Water Act violations. The administrative enforcement authority granted by §309(g) provides a very useful and flexible third option for imposing penalties.

C. Decision Criteria

EPA may impose penalties under §309(g) for virtually the entire range of violations that can be addressed through judicial actions and administrative compliance orders under §§309(a) through (d). The only exception is that administrative penalties, unlike judicially-imposed penalties, may be imposed only for violations of underlying requirements of the Act and not for violations of §309(a) compliance orders.1/ Since EPA as a general rule should choose the least resource-consuming enforcement option that will do the job,2/ and administrative penalty proceedings under §309(g) should be both effective and much less onerous than civil judicial actions, the real issue is when not to use this administrative penalty authority. The following discussion, like the flowchart at the beginning of this document, approaches the issue from this perspective.

1/ A compliance order that does not expressly excuse penalties does not limit EPA's authority to assess an administrative penalty for that violation. Cf., U.S. v. Metropolitan District Commission, 23 E.R.C. 1350, 1355-56, 1359, 1360 (D. Mass. 1985).

2/ An important exception to this general rule is that prosecutorial considerations on the part of EPA and the Department of Justice may independently indicate the need for criminal prosecution, even if a civil action or administrative enforcement would achieve compliance.

In the legislative history to the Water Quality Act of 1987, Congress indicated that judicial rather than administrative enforcement is more appropriate for certain types of cases:

> This authority to issue administrative penalty orders is intended to complement and not to replace a vigorous civil judicial enforcement program. Civil judicial enforcement is a keystone of successful enforcement of the Act and necessary for cases involving novel issues of law or contested penalty assessments, cases requiring injunctive relief, serious violations of the Act, or large penalty actions, and cases where remedies are sought requiring significant construction or capital investment. The addition of this enforcement tool is based in part on the Agency's assurance that it does not intend to retreat from vigorous judicial enforcement of Clean Water Act violations.

S. Rep. No. 99-50, 99th Congress, 1st Session (to accompany S. 1128) (1985). The following guidance is meant to be consistent with this Congressional directive: administrative penalties should supplement, not replace, judicial action.

One qualification should be added. Although this guidance may recommend a particular enforcement option for particular types of violations, other factors-- such as Agency priorities and available resources-- must also enter into the enforcement decision.

1. A civil judicial action is more likely to be appropriate when there is a need for a court order directing immediate or long-term compliance measures (a TRO or an injunction).

A basic limitation of the administrative penalty authority under §309(g) is that it does not grant EPA any power to directly compel a violator to stop continuing violations. The only direct authority under this provision is to assess civil penalties. Of course, the prospect of a significant civil penalty for past and ongoing violations can be a strong inducement to comply. However, there will be situations where this inducement, accompanied by a separate §309(a) compliance order, will not be enough. The $125,000 ceiling on administrative penalties may be insufficient to discourage continuing violations, for example where the cost of compliance or the economic benefit is high. Even if a penalty of less than $125,000 should be enough to deter ongoing noncompliance, the adjudicatory and public involvement

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"Guidance on State Action Preemption Civil Penalty Actions under the Federal Clean Water Act", distributed August 28, 1987.

GUIDANCE ON STATE ACTION
PREEMPTING CIVIL PENALTY ACTIONS
UNDER THE FEDERAL CLEAN WATER ACT

GUIDANCE ON STATE ACTION
PREEMPTING CIVIL PENALTY ACTIONS
UNDER THE FEDERAL CLEAN WATER ACT

I. Introduction

The Water Quality Act of 1987, which on February 4, 1987, amended the Clean Water Act, contains language limiting EPA's authority to commence a judicial action for civil penalties under Sections 309(d) or 311(b) of the Act under certain narrowly circumscribed conditions relating to ongoing State administrative civil penalty actions.1/ This guidance addresses the question of when, and under what conditions, might the commencement and diligent prosecution, or completion, of a State civil penalty action preempt EPA enforcement action for the same violation or violations.2/

II. What Federal Enforcement Actions can be Preempted by the Appropriate State Action?

The operative language of the Act, as amended, is in Section 309(g)(6)(A). The language is clear that the actions that may under certain circumstances be preempted, are "...civil penalty action[s] under subsection (d) of this section [§309(d), judicial civil penalties] or Section 311(b)

1/ The relevant section is 309(g)(6)(A), which follows:

> "(6) Effect of Order.- (A) Limitation On Actions Under Other Sections. Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act; except that any violation - (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection, (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this Act."

2/ Many of the same considerations and conclusions also may apply to State action precluding citizen enforcement actions for civil penalties under CWA §505.

[judicial civil penalties for spills of oil or designated hazardous substances] or Section 505 [citizens suits]." [Material in brackets added.] Therefore it is clear that EPA's authority to issue administrative orders for compliance under Section 309(a), to seek judicial injunctive relief under Section 309(b), to judicially prosecute criminal violations under Section 309(c), and to administratively assess civil penalties under Section 309(g) are unaffected by the new language regarding preemption by state action. EPA's authority to issue and enforce administrative orders for compliance under Section 309(a) is not only exempted from this new limitation, but is explicitly preserved by new Section 309(g)(11).

It is similarly clear from the legislative history that the new language on preemption of Federal judicial civil penalty actions "... is not intended to lead to the disruption of any Federal judicial penalty action then underway, but merely indicates that a Federal judicial civil penalty action or a citizen suit is not to be commenced if an administrative penalty proceeding is already underway." Remarks of Senator Chafee, Cong. Record, Jan. 14, 1987, p. S737. (See Attachment.)

In summary, the federal enforcement actions affected by the new preemption language of Section 309(g)(6)(A) are limited to:

1. Judicial Civil Penalties for the same violations under Section 309(d); and

2. Judicial Civil Penalties for the same violations under Section 311(b).

The preemption does not affect:

1. Administrative Orders for compliance under Section 309(a);

2. Judicial Injunction Actions under Section 309(b);

3. Criminal Actions under Section 309(c);

4. Ongoing Judicial Civil Penalty Actions under Section 309(d);

5. Administrative Civil Penalty Assessments under Section 309(g); or

6. Any Federal enforcement action to the extent it addresses violations different from those addressed in the appropriate State penalty action.

III. What State Actions Can Preempt Commencement of Federal Judicial Penalty Actions Under Sections 309(d) and 311(b)?

EPA's policy can be summarized as follows:

Absent compelling circumstances, EPA will not commence a judicial civil penalty action to collect a penalty for any violation for which an approved NPDES State has collected, or has commenced and is diligently prosecuting under comparable authorities and by comparable procedures, an appropriate and adequate administrative civil penalty. The factors which define comparable authorities and procedures, and an adequate penalty, are described below.

A. The State Must be Implementing an Approved NPDES Program:

In the words of Senator Chafee on the floor of the Senate (Cong. Record, Jan. 14, 1987, p. S737), "... the limitation on Federal civil penalty actions clearly applies only in cases where the State in question has been authorized under Section 402 to implement the relevant permit program." In other words, the first criterion for determining whether State preemption is possible is to ascertain whether the relevant State is authorized to implement the relevant Clean Water Act program (e.g. direct discharge, pretreatment, dredge and fill, sludge disposal) within its borders. If not, EPA and the State would be enforcing distinct legal requirements (e.g. a Federal v. a State discharge permit) and thus would be enforcing against different violations and not be subject to the §309(g)(6) bar against judicial penalty actions for the same violation.

B. The State Action must be Concluded, or Commenced and Diligently Prosecuted:

The second criterion comes directly from the statutory language: Has the State either "... commenced and is [it] diligently prosecuting an action ...", or has the State "... issued a final order not subject to further judicial review and the violator has paid a penalty ..."? Unless the State administrative civil penalty action has been concluded as noted, or has been commenced and is being diligently prosecuted, no preemption can occur. Thus the mere commencement of a State administrative penalty action is insufficient to preempt a federal action if there is evidence that the State action is collusive, or is not being prosecuted diligently for reasons either intentional or wholly inadvertent as, for example, when resource constraints prevent a State from holding or concluding requested administrative hearings in a timely manner. The determination of whether a State administrative penalty action is proceeding with due diligence must be made on a case by case basis, with the realization that Congress did not intend partial or inadequate

State action to be a shield for violators of the Act, but rather intended to prevent unnecessarily redundant actions at the State and Federal levels.

C. The State Statutory Provision must be Comparable to Section 309(g):

The final set of criteria for determining if Federal judicial penalty action may be preempted are found underlying the statutory wording limiting preemption to cases where the State administrative penalty action is concluded, or has been commenced and is being diligently prosecuted "... under a State law comparable to this subsection ...", meaning Section 309(g). Again Senator Chafee's remarks on the Senate floor, Cong. Rec., January 14, 1987, p. S737, are extremely helpful in interpreting the meaning of the phrase "... comparable to this subsection ...." Senator Chafee lists the following elements which must be present in the State statutory provision to make it "comparable" and thus able to support a State administrative penalty action which can preempt a subsequent federal judicial civil penalty action:

1. The right to a hearing;

2. Public participation procedures similar to those set forth in Section 309(g);

3. Analogous penalty assessment factors;

4. Analogous judicial review standards; and

5. Other provisions analogous to the other elements of Section 309(g).

The following paragraphs expand these elements. To be "comparable," and thus able to support a State action capable of preempting a subsequent federal judicial penalty action, the State statute must provide:

1. The right of the person to be assessed an administrative penalty to a hearing analogous to that provided in Section 309(g)(2), which provides at least a reasonable opportunity to be heard and to present evidence in all cases and, in cases where the potential liability exceeds $25,000, the opportunity for a hearing on the record in accordance with Administrative Procedure Act procedures (5 U.S.C. §554).

2. Public participation procedures which must be analogous to Section 309(g)(4), which provides that EPA must give the public notice of any proposed administrative penalty assessment, the right of any person who commented on a proposed

penalty assessment to be heard and to present evidence in any hearing requested by the violator, and if the violator does not request a hearing, the right of a prior commenter to petition EPA to set aside the penalty and to hold a hearing thereon.

3. Penalty assessment factors analogous to those enumerated in Section 309(g)(3). Based on language in the Conference Report, Cong. Rec., October 15, 1986, p. H10570,3/ EPA believes that for preemption to occur, it is not sufficient that the maximum potential penalty liability under the State statute be equivalent to the federal limits, or that the factors to be considered in arriving at the appropriate penalty be comparable, but also that the actual penalty collected or assessed must be adequate and appropriate. This interpretation is expressed clearly in the Conference Report. It also is consistent with EPA's current policy which holds that a prior State judicial penalty action yielding a grossly deficient penalty does not preempt a subsequent federal "overfiling" for a more adequate civil penalty. This criterion is also reflected in the general principle enunciated above; namely that EPA will not commence a judicial civil penalty action for any violation for which an approved NPDES State has already collected, or has commenced and is diligently prosecuting, under comparable authorities and by comparable procedures, an appropriate and adequate administrative penalty.

4. Standards of judicial review analogous to Section 309(g)(8), which provides that judicial review can be had by filing an appeal within 30 days after penalty assessment, and that the court shall not set aside or remand the penalty unless there is not substantial evidence in the record supporting the finding of a violation or unless the assessment constitutes an abuse of discretion. The requirement that to be capable of preempting federal action, the State statute must impose such a heavy burden on the appellant, and grant such

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3/ "When a State has proceeded with an enforcement action relating to a violation with respect to which the Administrator or the Secretary is authorized to assess a civil penalty under this provision the Administrator and the Secretary are not authorized to take any action under this subsection if the State demonstrates that the state-imposed penalty is appropriate."

deference to the State agency's decision, is reasonable because a lesser standard of judicial review would undermine the integrity and predictability of the State administrative penalty process.

5. Among the other elements alluded to by Senator Chafee, that must be present in a State statute which might preempt federal judicial penalty action, is a system for judicial collection of unpaid administrative penalties analogous to Section 309(g)(9). This Section provides for a streamlined judicial assessment of the unpaid penalty plus interest, attorneys fees, court costs, and an additional quarterly nonpayment penalty of 20% of the aggregate amount owed at the beginning of such quarter. The validity and amount of the administrative penalty are not subject to review in the collection action. This requirement is important because the absence of such a streamlined judicial collection system, which insulates the issues of penalty validity and amount from a second judicial review, again would greatly undermine the predictability of the State's process. EPA should certainly not be preempted from, nor should it hesitate to commence a judicial penalty action against a violator who evades payment, for whatever reason, of a State-assessed administrative penalty.

In summary, in order to preempt federal judicial penalty action, the NPDES State must have collected, or at least commenced and be diligently prosecuting, an appropriate and adequate administrative penalty under a statute comparable to Section 309(g) in at least the following ways:

1. Right to a hearing;

2. Analogous rights of public participation;

3. Equivalent civil penalty maximum liabilities;

4. Analogous penalty assessment factors;

5. Analogous standards of judicial review; and

6. Analogous collection authorities and streamlined judicial collection procedures.

IV. Final Thoughts

From the foregoing it should be clear that federal judicial penalty actions are not likely to be preempted by State administrative penalty actions unless States begin to implement legislation specifically patterned on Section 309(g). Until that time, which EPA welcomes, the individual State/EPA Enforcement Agreements might be the appropriate forum for establishing some voluntary ground rules for preventing unnecessary duplication of efforts between EPA and approved NPDES States. Nothing in this guidance should be construed as limiting the ability of the States and EPA to agree to certain rules or principles in furtherance of their cooperative efforts to implement strong and consistent NPDES programs.

For further information or clarification of this guidance, contact Jed Z. Callen, Esq. at FTS 597-9882 or Gary Hess, Esq. of OECM at FTS-475-8183.

Attachment: [Floor Remarks of Senator Chafee]

thority aggressively against illegal pol[illegible]ers even if a memorandum of a[illegible]ement is not concluded with the [illegible]cretary of the Army

The corps enforcement record—and [illegible] Corps of Engineers is [illegible]olved in [illegible]—shows the corps has not been [illegible]erous enough against [illegible]al dumpers. Now we have given EPA the au[illegible]ority to move against these pollut[illegible]

[illegible] paragraph 309[illegible](b) sets out limitations that preclude citizen suits where the Federal Government or a State has commenced and is diligently prosecuting an administrative civil penalty action or has already issued a final administrative civil penalty order not subject to further review and the violator has paid the penalty. The same provision limits Federal civil penalty actions under subsections 309(d) and 311(b) for any violation of the Federal Water Pollution Control Act. While redundant enforcement activity is to be avoided and State action to remedy a violation of Federal law is to be encouraged, the limitation on Federal civil penalty actions clearly applies only in cases where the State in question has been authorized under section 402 to implement the relevant permit program.

A single discharge may be a violation of both State and Federal law and a State is entitled to enforce its own law. However, only if a State has received authorization under section 402 to implement a particular permitting program can it prosecute a violation of Federal law. Thus even if a nonauthorized State takes action under State law against a person who is responsible for a discharge which also constitutes a violation of the Federal permit, the State action cannot be addressed to the Federal violation, for the State has no authority over the Federal permit limitation or condition in question. In such case, the authority to seek civil penalties for violation of the Federal law under subsections 309(d) or 311(b) or section 505 would be unaffected by the State action, notwithstanding paragraph 309(g)(6).

In addition, the limitation of 309(g)(6) applies only where a State is proceeding under a State law that is comparable to section 309(g). For example, in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).

Finally, section 309(g)(6)(A) provides that violations with respect to which a Federal or State administrative penalty action is being diligently prosecuted or previously concluded shall not be the subject of a civil penalty actions under sections 309(d), 311(b) or 505. This language is not intended to lead to the disruption of any Federal judicial penalty action then underway, but merely indicates that a Federal judicial civil penalty action or a citizen suit is not to be commenced if an administrative penalty proceeding is already under[illegible]

NOTICE OF CONSENT DECREES

This bill requires that in connection with citizen suits notification of proposed consent decrees be provided to the Attorney General and to the Administrator.

It was originally proposed in the Administration's bill 2 years ago. The Administration bill contained a clause which specifically disclaimed that the United States could be bound by judgments in cases to which it is not a party.

That provision merely restated current law and thus we decided that it is not necessary to include it in this bill. The amendment is not intended to change existing law that the United States is not bound, since that rule of law is necessary to protect the public against abusive, collusive, or inadequate settlements, and to maintain the ability of the Government to set its own enforcement priorities.

Compliance dates for industries for which effluent guidelines have not been promulgated have been extended to March of 1989.

We have had a big problem over when you have to come into compliance because of the guidelines. EPA has not been quick enough to come out and tell industry A or industry F what they can and cannot do. So we have reluctantly given them an extension on these guidelines. The latest is March 1989, or 3 years from the date of promulgation of the guidelines by EPA, whichever is sooner. EPA is strongly encouraged to get these guidelines finalized so industry can comply with the discharge requirements as soon as possible. Until such guidelines are promulgated, the Agency is expected to proceed under its current policy with respect to noncompliance dischargers to meet the deadline.

A provision establishing a progressive stormwater control program is included in the bill. Although the law now requires EPA to establish discharge requirements for the stormwater point sources, EPA has been unable to develop a final permit program for these sources. This legislation sets up a program whereby EPA must issue permits for storm water point source discharges in municipalities with population of over a quarter million within 4 years of enactment.

Within 5 years of enactment, permits for stormwater point sources discharges are required in cities with populations between 100,000 and 250,000. These discharge requirements are to contain control technology or other techniques to control these discharges and should conform to water quality requirements. Requirements for storm water discharges associated with industrial activities are unaffected by this provision. The Age[illegible] b[illegible] unable to move forward[illegible] a[illegible] gram, because the current law did give enough guidance to the Age[illegible] This provision provides such gui[illegible] and I expect EPA to move rapidly implement this control program.

The legislation also contains Senate provision relating to the Ch[illegible]go tunnel and reservoir project. Th[illegible] something that has been around many many years. This provision c[illegible] allows funding for this project u[illegible] section 201(g)(1) without regard to limitation contained in the provisio[illegible] the Administrator determines t[illegible] such projects meets the cost-effect[illegible] requirements of section 217 and 218 the act without any redesign or rec[illegible] struction. The Governor of Illin[illegible] must demonstrate to the satisfact[illegible] of the Administrator the water qua[illegible] benefits of the project. This provis[illegible] does not apply to the cost-sharing[illegible] quirements under the other applica[illegible] provisions of the bill.

The legislation modifies EPA's c[illegible] rent policy with respect to antiba[illegible] sliding on best practical judgment a[illegible] water quality-based permits. T[illegible] thrust of this provision is to genera[illegible] prohibit affected permittees fr[illegible] weakening their discharge requi[illegible] ments as a result of subsequently p[illegible] mulgated guidelines. O[illegible] narrow circumstances[illegible] slid[illegible] be permitted, and in no eve[illegible] n it[illegible] permitted even if, after a dischar[illegible] leaves a stream, there is an impro[illegible] ment in water quality, unless the ar[illegible] degradation policy test is met. Th[illegible] test states that water quality may[illegible] lowered only if widespread adve[illegible] social and economic consequences c[illegible] be demonstrated through a full inte[illegible] governmental review process.

S. 1 also embodies many of the cor[illegible] struction grants and revolving loa[illegible] fund proposals contained in the bi[illegible] first passed by the Senate in 1985. I[illegible] other words, this bill was passed as[illegible] mentioned earlier, in 1985, we went[illegible] conference with the House, but[illegible] kept many of the provisions deali[illegible] with the construction grants and t[illegible] revolving loan.

The bill extends the current $2.4 b[illegible] lion annual authorization for title[illegible] construction grants for 3 years[illegible] fiscal years 1989 and 1990, the annu[illegible] authorization for title II would be r[illegible] duced to $1.2 billion. After that, the[illegible] is no more, no further authorizatio[illegible] would be made for title II after fisc[illegible] year 1990, and the money is shift[illegible] over into the revolving grants pr[illegible] gram.

States would be provided with suf[illegible] cient lead time to begin setting u[illegible] State revolving loan pro[illegible] T[illegible] bill encourages the creati[illegible] the self-sustaining financing[illegible] ies[illegible] the earliest opportunity by providi[illegible] each State with an option of conve[illegible] ing title II construction grants fun[illegible] into capitalization grants for SRF s.

"Guidance on "Claim-Splitting" in Enforcement Actions under the Clean Water Act", distributed August 28, 1987.

GUIDANCE ON "CLAIM-SPLITTING" IN ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT

GUIDANCE ON "CLAIM-SPLITTING" IN ENFORCEMENT
ACTIONS UNDER THE CLEAN WATER ACT

I. [illegible]

[illegible] separate administrative and judicial civil penalty enforcement actions [illegible] the same [illegible] This guidance addresses the appropriateness of such claim-splitting in the context of CWA enforcement.

II. Parallel Administrative and Judicial Proceedings

The enforcement structure of the amended CWA allows the Agency to bring administrative [illegible] or judicial [illegible] civil penalties against [illegible] violations of the Act. [illegible] The statute does not limit the Agency's authority to bring administrative actions for penalties [illegible] for the same violations which are the subject of judicial actions. Nor does it limit the Agency's authority to bring judicial actions for penalties [illegible] for the same violations which are the subject of administrative actions. Instead, it provides that administrative penalty actions may not be brought for violations with respect to which a judicial action has been commenced and is diligently prosecuted, or after a court has issued a final judgment in such an action. "Administrative Penalties ... shall not be [illegible] penalty action under subsection [illegible] of this section [illegible] Penalties or section 311(b) Penalties for oil[illegible] ..." [bracketed material added].

As a matter of policy, EPA intends not to impose an administrative penalty for any violation for which a judicial penalty has already been assessed.

Where a CWA violator is responsible for multiple violations, the Agency may simultaneously pursue administrative penalties of up to $125,000 for some violations, and judicial civil penalties of up to $25,000 per day for each violation" for other violations not addressed

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[illegible] administrative penalty proceedings. See Sections 309(g)(1) [illegible], EPA may choose to "select" its [illegible] cases between simultaneous administrative and judicial actions against the same violator for different past violations. As a matter of practice, however, such case-splitting could result in an inefficient use of Agency resources that could impair the enforcement efforts. To pursue two simultaneous civil penalty proceedings would require duplication of efforts by both legal and technical staffs, and could even result in unequal or inconsistent results. In addition, the prosecution of two simultaneous civil penalty actions in different forums, one administrative and one judicial, might provide the violator with an argument for staying one or the other of the enforcement proceedings to prevent inconsistency, thus potentially delaying resolution of some of the outstanding violations.

For the above reasons, EPA should generally avoid initiating parallel or simultaneous administrative and judicial civil penalty proceedings. This guidance does not apply to parallel civil (administrative or judicial) and criminal actions, which may sometimes be appropriate, nor does it apply to serial civil penalty actions, either administrative or judicial, in any order or combination, if the new civil penalty action addresses only violations which occurred after the date of the earlier concluded civil penalty action.

In addition, EPA must be particularly careful in framing its penalty orders and judicial complaints to identify as precisely as possible the violations which the Agency intends the enforcement action to address so as to avoid possible preemption of future claims for civil penalties.

Finally, EPA may, of course, pursue judicial enforcement under Section 309(b) of an administrative order for compliance issued pursuant to Section 309(a). And EPA may at any time initiate administrative or judicial civil penalty actions for the same violations that were the basis for an earlier (or indeed simultaneous) Section 309(a) administrative order for compliance.

III. Simultaneous Administrative Penalty Proceedings

Although nothing in the Clean Water Act or Amendments prohibits simultaneous administrative civil penalty actions for different past violations by the same violator, EPA will be on the strongest legal ground by avoiding simultaneous administrative penalty actions against a single violator. Should EPA initiate separate administrative penalty

actions for different sets of past violations. The Clean Water Act authorizes EPA to seek the assessment of penalties of up to $25,000 per day for each violation of the Act's requirements. See Section 309(d). In cases in which EPA is aware of past violations of the violator of sufficient number and seriousness to warrant a civil penalty in excess of $25,000, taking into account the factors for determining penalty amounts enumerated in Section 309(d), the assessment of penalties will in effect be limited to the $25,000 per day maximum for administrative penalties. Therefore, EPA would be better advised to proceed with a single judicial civil penalty action which has no civil penalty cap. This approach not only avoids the problem of duplication of the administrative penalty action, but will eliminate the inefficiency caused by duplication of enforcement efforts in the two forums. Finally, the desirability of seeking injunctive relief under Section 309(b) against most serious repetitive violators will often tip the balance away from administrative, but even serial administrative penalty actions, and toward judicial actions for injunction and penalty.

For further information regarding implementation of this guidance, contact Jeffrey Heller, Esq., at FTS 557-9408 or (FTS) (202) 475-9408.

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"Guidance on Retroactive Application of New Penalty Authorities under the Clean Water Act", distributed August 28, 1987.

GUIDANCE ON "RETROACTIVE" APPLICABILITY OF NEW PENALTY AUTHORITIES UNDER THE CLEAN WATER ACT

GUIDANCE ON RETROACTIVE APPLICATION OF NEW PENALTY PROVISIONS UNDER THE CLEAN WATER ACT

I. Introduction

The Water Quality Act of 1987, which amended the Clean Water Act (CWA) created some new areas of explicit criminal liability, increased the maximum civil and criminal penalties available under the Act, and authorized the administrative assessment of civil penalties. This guidance addresses which of these new penalty provisions may be applied to violations which occurred prior to February 4, 1987, the effective date of the CWA amendments.

II. Criminal Penalty Provisions of the Clean Water Act

The 1987 amendments to Section 309(c) of the Act create three distinct classes of criminal violation:

1.) Negligent Violations of specified sections of the Act or of any condition or limitation implementing any of the enumerated statutory sections in a NPDES permit or in a 404 permit; or of any requirement imposed in an approved pretreatment program, or by introduction into a sewer or POTW of a pollutant which causes a POTW NPDES permit violation, or which the introducer reasonably should have known could cause personal injury or property damage (See Section 309(c)(1));

2.) Knowing Violations of the same statutory and permit provisions (See Section 309(c)(2)), and

3.) Knowing Endangerment Violations involving a knowing violation of any of the enumerated provisions and concurrent knowledge that the violator thereby places another person in imminent danger of death or serious bodily injury. (See Section 309(c)(3)).

The penalties for the negligent violations remain "... not less than $2,500 nor more than $25,000 per day of violation or by imprisonment for not more than 1 year, or by both." Second and subsequent convictions are punishable by fines "...of no more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both." The increased penalties for knowing violations are fines of "...not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both." Second and subsequent convictions may

result in fines"... of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both." The new penalties for knowing endangerment violations are up to 15 years imprisonment or a fine of not more than $250,000, or both for individuals; and a fine of not more than $1,000,000 for organizations. The fine and term of imprisonment is doubled for second and subsequent convictions under this provision.

The "ex post facto" clause of the Constitution precludes retroactive application of new criminal provisions, either by punishing as criminal that which was not expressly defined as criminal when committed, or by increasing retroactively a criminal fine. Thus, the newly created criminal violations such as those defined in Section 309(c)(3) (knowing endangerment violations), may not be applied to activities which occurred prior to February 4, 1987, nor can a sentencing court apply increased penalties for any convictions pertaining to pre-February 4, 1987 conduct. However, any behavior which was violative of the criminal provision of the Act as it existed prior to February 4, 1987 may still be prosecuted pursuant to the provision as it then existed.

III. Civil Judicial Penalty Provisions Generally Not to Be Retroactively Applied

The Supreme Court has ruled that the "ex post facto" clause of the Fifth Amendment to the Constitution applies only to legislation imposing criminal fines or penal sanctions. Thus the retroactive application of civil penalties does not necessarily violate the "ex post facto" clause. However the "due process" clause of the Fifth Amendment to the Constitution does apply and may impose restrictions on the retroactive application of the increased maximum civil penalties. Therefore, in order to minimize the raising of Constitutional issues and the consequent expenditure of Agency legal resources, and in light of the strong likelihood that the old maximum civil penalty liability of "... $10,000 per day of such violation" will, in most cases, still prove adequate, it is the Agency's policy generally not to seek the increased maximum civil penalty amounts for violations occurring prior to February 4, 1987, the effective date of the amendments Exceptions may be appropriate on a case by case basis if it can be shown, for example, that the retroactive application of the civil penalty amount is necessary in order to recover the economic benefit which accrued to the violator by virtue of his violations.

Although the "due process" clause would prevent the retroactive assessment of civil penalties in cases where no authority to obtain penalties previously existed, it is the Agency's position that none of the amendments to Section 309(d) other than the increased maximum penalty amount create new civil penalty liabilities. Instead the amendments to Section 309(d) merely clarify and restate existing civil penalty authorities and liabilities. Specifically, the amendments clarify that violation of any requirement in an approved pretreatment program is subject to civil penalties under Section 309(d). Also the amendments clarify that civil penalty liability under Section 309(d) attaches "... per day for each violation."

IV. Administrative Penalties Retroactive Up To Old Penalty Limits

Statutory amendments that retroactively change the forum in which the penalty will be adjudicated, but not the substance of the liability, have been ruled constitutional. Therefore the Agency may assess administrative civil penalties under Section 309(g) for violations which occurred before February 4, 1987, up to the limits of liability which existed at that time. As long as the administrative penalty assessed (of up to the maximum administrative penalty liability of $10,000 per violation up to the Class I cap of $25,000, or $10,000 per day up to the Class II cap of $125,000) does not exceed the previously applicable Section 309(d) maximum civil penalty liability of $10,000 per day of such violation, there is no problem with retroactive application of the new Section 309(g) procedures. Given EPA's interpretation of each of the slightly differently worded limitations as being "per day per violation",* the retroactive application of the new Section 309(g) maximum penalty liabilities actually will never exceed the Section 309(d) maximum judicial civil penalty liability that applied prior to February 4, 1987.

For further information or clarification of this guidance, contact Jed Z. Callen, Esq. at FTS 597-9882 or Gary Hess of OECM at FTS 475-8183.

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* See "Guidance on Effect of Clean Water Act Amendment Civil Penalty Assessment Language", for a full discussion of EPA's interpretation of the various civil penalty liability provisions.

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"Guidance on Effect of Clean Water Amendment Civil Penalty Assessment Language", distributed August 28, 1987.

GUIDANCE ON EFFECT OF CLEAN WATER ACT AMENDMENT CIVIL PENALTY ASSESSMENT LANGUAGE

-- Appropriate Calculations Per Day and/or Per Violations

GUIDANCE ON EFFECT OF CLEAN WATER ACT AMENDMENT CIVIL PENALTY ASSESSMENT LANGUAGE -- Appropriate Calculations Per Day and or Per Violation

Summary

In this guidance, [illegible] is that prior Clean Water Act [illegible] a separate [illegible] penalty of $25,000 per day, but not the [illegible] administrative maximum assessment of $25,000 and the class II administrative maximum of $125,000. For guidance on the new statutory language regarding "single operational upset" and its effect it may have on civil penalty liability calculated as the statutory maximum amount, see a separate guidance document [illegible] Regions at a later date.

Background

When [illegible] Water Act, providing for increased civil penalties and for administrative penalties, it phrased each penalty provision [illegible]. An analysis of the [illegible] Water Act requirements or permit [illegible] separately subject to penalty assessment [illegible] violations continue.

The manner in which penalty liability is alleged in civil or administrative complaints is affected by interpretation of this statutory language, as is the Agency's assessment of penalties. With respect to civil or administrative complaints or proposed orders, EPA will operate from the strongest position where such pleadings allege the precise statutory language for penalties up to each applicable statutory maximum penalty amount.

In considering the number of violations to attribute to penalties in judicial or administrative proceedings, Agency enforcement personnel should account for the total number of violations of Clean Water Act requirements, permit violations or limitations that occur [illegible], as well as the number of days each violation continues. The amount [illegible] two purposes: first, it [illegible] the [illegible] to determine whether [illegible] attempt to [illegible] among Clean Water Act [illegible] penalties in this guidance [illegible] the Region may cite this amount [illegible] the complaint and proposed order, [illegible] the statutory caps on total penalty assessment.

The Provisions

The following chart sets out the evolution of the various penalty provisions in the process of amending the Clean Water Act.

	CIVIL JUDICIAL	ADMINISTRATIVE: CLASS I MAX. $25,000	ADMINISTRATIVE: CLASS II MAX. $125,000
Before 1987 Amendments	$10,000 per day of such violation		
Sen. Bill, S1128	$25,000 per day for each violation		$10,000 per day for each violation
S. Rep. 50	$25,000 per violation		$10,000 per day for each violation of a Clean Water Act requirement
House Bill, HR 8	$25,000 per day of such violation		$10,000 per day of violation
H. Rep. 99	$25,000 per day		$10,000 per day of violation
1986 Conf. Bill/1987 Amendments	$25,000 per day for each violation	$10,000 per violation	$10,000 per day for each day during which the violation continues

At issue is the question whether EPA may assess a number of violations in a single day, or only a single violation continuing for several days.

Discussion of Interpretation

In amending the enforcement provisions of the Clean Water Act, Congress generally sought to expand the Agency's enforcement authorities.[1] Additionally, the legislative history reflects

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1. 133 Cong. Rec. S736 (January 14, 1987)(statement of Sen. Chafee)

no intent to limit the Agency's past practice, either in pleading the statutory maximum or in using the penalty policy. In fac Congress ratified the Agency's penalty policy and practices by incorporating its basic principles in the Act. See §313 of [illegible] amends [illegible] to specify the factors to be assessed in [illegible] penalty amounts.

There is no doubt that there was no change, except as to dollar ceiling, to civil judicial penalties. On its face, the amended statute states that a violator shall be subject to $25,000 per day for each violation. Furthermore, Congress says clearly that "Section 309 and 404 of the Act are amended ... to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000..." H.R. Rep. No. 1004, 99th Cong., 2d Sess., 132 Cong. Rec. H10569 (Oct. 15, 1986).

For administrative penalties, the question is whether a similar, but different interpretation applies. Class I penalties are to be assessed "per violation". Congress explicitly states that "The maximum first tier penalty that may be assessed in any enforcement action is $25,000, regardless of the number of violations or number of days of violation." H.R. Rep. No. 1004, 99th Cong., 2d Sess., 132 Cong. Rec. H10571 (Oct. 15, 1986) (emphasis added). Accordingly, the number of violations and the number of days of violation are to be considered in Class I penalty assessment, [illegible]. The Class II [illegible] provision, which states that the penalty shall be per day for each day during which the violation continues, should be interpreted similarly.

In conclusion, the Agency's policy with respect to calculating counts (i.e. violations and days) of civil penalty liability has been unchanged by the Clean Water Act amendments, and may be extended in application to the new administrative penalty provisions. For further information, please contact Patricia Mott, attorney in OECM/Water (FTS 475-8320).

"Addendum to the Clean Water Act Civil Penalty Policy for Administrative Penalties", distributed August 28, 1987.

ADDENDUM TO THE CLEAN WATER ACT CIVIL PENALTY POLICY FOR ADMINISTRATIVE PENALTIES

ADDENDUM TO THE CLEAN WATER ACT CIVIL PENALTY POLICY FOR ADMINISTRATIVE PENALTIES

I. Purpose

The purpose of this Addendum is to provide guidance on the calculation of acceptable settlement amounts for EPA claims for administrative penalties authorized by Section 314 of the 1987 amendments to the Clean Water Act. Under that provision, codified as Section 309(g) of the amended Clean Water Act, the Administrator may assess a Class I civil penalty of up to $10,000 "per violation" to a maximum of $25,000 and a Class II civil penalty of "$10,000 per day for each day during which the violation continues," to a maximum of $125,000.

At this time, this Addendum applies only to the calculation of administrative penalties and does not affect the calculation of penalties for judicial actions. Neither does it apply to the calculation of penalties for violations relating to the discharge of dredge or fill materials regulated under Section 404 of the Clean Water Act. Guidance for calculation of penalties under Section 404 will be issued separately. At a later date, all provisions of the Clean Water Act Civil Penalty Policy will be re-evaluated to determine whether the methodology should be made identical for both administrative penalties and civil judicial actions.

The calculated penalty figure represents a reasonable and defensible penalty which the Agency will agree to accept in settlement of its administrative penalty action against a violating permittee. The complaint/proposed order should include the penalty amount which "the Administrator proposes to assess" as compared to the "settlement" amount calculated under this Policy; thus, the amount which the Administrator proposes to assess or seeks in administrative litigation by no means needs to be identical to the amount calculated under this Addendum as acceptable for settlement.

II. Penalty Calculation Methodology

As for judicial penalties, the initial calculation should be an estimate of the statutory maximum penalty in order to determine the potential maximum penalty liability of the defendant. The penalty which the government seeks in settlement may not exceed this statutory maximum amount. For administrative penalties, in addition to being governed by per day/per violation maxima, the government may not seek more than $25,000 in penalties through a Class I action nor more than $125,000 through a Class II adminstrative action.

The adminstrative penalty calculation involves the same four consecutive steps as for civil judicial actions:

1) calculate the "Economic Benefit" of noncompliance;

2) calculate monthly and total "Gravity Components";

3) calculate the "Adjustment Factors";

4) calculate the total penalty.

(1) Ecomomic Benefit. The economic benefit component typically should be calculated by using the EPA computer program -- "BEN". This program, which produces an estimate of the economic benefit of delayed compliance, includes, among other costs, avoided operating and maintenance expenses and thus should be usable in nearly all cases. If for some reason, the violations at issue are of such a unique nature that their associated economic benefit is not calculable through BEN, then the penalty calculation should include any significant economic benefit calculated through a reasonable methodology.

(2) Gravity Component. The gravity components to be used in calculating administrative penalties differ slightly from the components used for civil judicial penalties, although the general methodology is the same. The following five gravity weighting factors should be considered for each month during which there was one or more violations and should be assigned values according to the attached methodology:

"A" -- Significance of Violation. The definition is unchanged from that for civil judicial penalties. Note that this factor includes discharge violations by indirect dischargers.

"B" -- Health and Environmental Harm. The value for impact on the aquatic environment has been changed from 1-10 to 0-10 for administrative penalties to reflect the fact that some violations addressed through administrative penalties are of a type which may have little or no impact on the aquatic environment. This factor also explicitly includes impact on a POTW by a violating industrial user within the 0-10 range.

"C" -- Number of Violations. This factor is unchanged from that to be applied for civil judicial penalties.

"D" -- Duration of Noncompliance. This factor is unchan from that to be applied for civil judicial actions.

"E" -- Significance of Non-effluent Limit Violations. This factor is presently not applied for civil judicial penalties but should be included in the gravity calculation for administrative penalties. It has a value of 0-10 and should reflect the degree of deviation from the requirement for the most significant non-effluent limitation violation each month. Violations covered by this category might include failure to report, late reporting, schedule violations, laboratory analyses deficiencies, unauthorized discharges, operation and maintenance deficiencies, sludge handling violations and other non-effluent violations.

(3) Adjustment Factors. The same three adjustment factors will be used for administrative penalty calculations as for civil judicial penalties; however, additional language is added to make clear that the statutory factors are included for consideration. The consideration of "history of recalcitrance" may only result in an increased penalty. The "ability to pay" and "litigation considerations" may be applied to decrease the penalty.

(A) History of recalcitrance

In addition to the reasons identified for application of the recalcitrance factor in the main text of the CWA Civil Penalty Policy, the compliance history of the respondent should be considered in examining the history of recalcitrance. Where the respondent has a history of repeat violations or a series of recent violations which have not been satisfactorily corrected, a factor for recalcitrance should be applied in determining the penalty amount. In evaluating the history of compliance, it is appropriate to consider compliance at other facilities owned or operated by the violator as well as the violator's response in correcting the problems.

In assessing equitable considerations under History of Recalcitrance, the degree of culpability of the violator for the violation should be considered. Factors which might be examined include the degree of control the violator had over the events leading to the violation, whether the violation could have reasonably been anticipated, and whether the violator took reasonable precautions to avoid the violation. Where facts demonstrate the violation was largely within the control of the violator, increasing the penalty may be justified.

(B) Ability to Pay

There is no change in this adjustment factor from that applied for civil judicial penalties.

(C) Litigation Considerations

There is no change in this adjustment factor from that applied for civil judicial penalties.

III. Intent of Policy

The policies and procedures set out in this document are intended for the guidance of government personnel. They are not intended, and cannot be relied upon, to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Addendum to Clean Water Act Penalty Policy: Calculation Methodology

SETTLEMENT PENALTY[1, 2] = (ECONOMIC BENEFIT) + (GRAVITY COMPONENT) ± (ADJUSTMENTS)

Step 1: Calculate the Statutory Maximum Penalty

Step 2: Calculate the Economic Benefit Using "BEN" [3, 4]

Step 3: Calculate the Total Gravity Component [5]

- Monthly Gravity Component = ($1,000) x (1+A+B+C+D+E)
- Total = Sum of Monthly Gravity Components

GRAVITY CRITERIA			ADDITIVE FACTORS	
A. Significance of Effluent Violation[6]				
% Exceedence Monthly Avg.	% Exceedence 7-Day Avg.	% Exceedence Daily Max.	Toxic	Conventio 1/ Non-Toxi
0 - 20	0 - 30	0 - 50	0 - 3	0 - 2
21 - 40	31 - 60	51 - 100	1 - 4	1 - 3
41 - 100	61 - 150	101 - 200	3 - 7	2 - 5
101 - 300	151 - 450	201 - 600	5 - 15	3 - 6
301 - >	451 - >	601 - >	10 - 20	5 - 15

B. Harm to Health, Environment or Treatment Plant[7]

(i)	Impact on Human Health; or	10 - Stat. Max
(ii)	Impact on Aquatic Environment; or	0 - 10
(iii)	Impact of IU on POTW (Pretreatment Violations)	0 - 10

C. Number of Violations[8] 0 - 5

D. Duration of Noncompliance[9] 0 - 5

E. Significance of Non-Effluent Limit Violations[10] 0 - 10

Step 4: Include Adjustment Factors

A. History of Recalcitrance[11] (Addition)

- Penalty may be increased by up to 150 percent based upon the past and present recalcitrance of the defendant and for other matters as justice may require.

B. Ability to Pay (Subtraction)

- Penalty may be adjusted downward to represent the defendant's ability to pay.

C. Litigation Considerations (Subtraction)[12]

- Penalty may be adjusted downward to reflect the maximum amount which the court might assess if the case proceeds to trial.

ADMINISTRATIVE PENALTY CALCULATION METHODOLOGY: FOOTNOTES

1. In general, the Settlement Penalty amount shall be at least the Economic Benefit of Noncompliance plus a gravity component.

2. The maximum Judicial Settlement Penalty shall not exceed the amount provided by Section 309(d), $25,000 per day for each violation. The maximum Administrative Settlement Penalty shall not exceed $10,000 "per violation" or $25,000 for Class I violations and $10,000 "per violation for each day during which the violations continues" or $125,000 for Class II violations. Note also the statutory requirement that "a Single Operational Upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation."

3. Calculate all economic benefits using BEN, if possible. There is no minimum amount triggering the use of BEN. If BEN cannot be used, estimate economic benefit using best available information.

4. Economic benefit is to be calculated as the estimated savings accrued to the facility; i.e., it is to be based upon the total amount which should have been spent by the facility. (All capital and expense costs, direct and indirect, are to be considered. This includes operation and maintenance costs.)

5. The Total Gravity Component equals the sum of each Monthly Gravity Component for a month in which a violation has occurred.

6. The Significance of Violation is assigned a factor based on the percent by which the pollutant exceeds the monthly or 7-day average or daily maximum permit limitation and whether the pollutant is classified as toxic, non-toxic or conventional. The Significance of Violation factor is used for effluent limit violations only.

7. Where evidence of actual or potential harm to human health exists, a factor from "10" to a value which results in the statutory maximum penalty should be assessed. Where the identified impact or potential impact relates only to the aquatic environment, a factor from "0" to "10" should be used. Similarly, where the impact or potential impact is on a POTW by an Industrial User not meeting pretreatment requirements, a factor of "0" to "10" should be used.

8. The Region has the flexibility to assign a high penalty factor where an excessive number of violations occur in any month (effluent limit, reporting, schedule, unauthorized discharge, bypass, etc.).

9. The Duration of Noncompliance factor allows the Region to increase the monthly gravity component for continuing violations of the same parameter(s) or requirement(s). Generally, a "long-term" violation is one which continues for three or more consecutive months.

10. The Significance of Non-Effluent Violation factor covers the effects from all non-effluent violations--other than the interference effects on a POTW from an IU's pretreatment violations (see B iii)--such as reporting (nonsubmittal, incorrect and late Discharge Monitoring Reports), laboratory analyses deficiencie (includes DMR QA), unauthorized discharges, operation and maintenance deficiencies, sludge handling and schedule violations.

11. A factor ranging from "0" (good compliance record, cooperation in remedying the violation, no culpability) to 150 percent of the total of the Economic Benefit and Gravity Component may be added based upon the history of recalcitrance exhibited by the violator.

12. The penalty should be reduced by any amount which defendant paid as a penalty to a State or local agency on the same violations pursuant to State law.

CWA Penalty Summary Worksheet

Name and Location of Facility _____

_____

Date of Calculation _____

(1) No. of Violations = _____
x $10,000 = stat. max. = $ _____

(2) Economic Benefit ("BEN") (period covered/ months) = _____ $ _____

(3) Total of Monthly Gravity Components $ _____

(4) Benefit + Gravity TOTAL $ _____

(5) Recalcitrance Factor _____%
(0-150%) x Total (Line 4) = $ _____

(6) Preliminary TOTAL (Line 4 + Line 5) $ _____

ADJUSTMENTS

(7) Litigation Considerations (Amount of reduction) $ _____

(8) Ability to Pay (Amount of reduction) $ _____

(9) SETTLEMENT PENALTY AMOUNT $ _____

"Guidance on Notice to Public and Commenters in Clean Water Act Class II Administrative Penalty Proceedings", distributed August 28, 1987.

GUIDANCE ON NOTICE TO PUBLIC AND COMMENTERS IN CLEAN WATER ACT CLASS II ADMINISTRATIVE PENALTY PROCEEDINGS

I. Statutory Requirements of Notice to Public and Commenters

The Clean Water Act requires that, before issuing an order assessing a Class I or II penalty, the Administrator shall provide public notice of the proposed issuance of the order. Section 309(g)(4)(A). Persons who comment on a proposed assessment must be given notice of any hearing held, and notice of the issuance of the order that actually assesses the penalty. Section 309(g)(4)(B). EPA's Guidance on Class I Clean Water Act Administrative Penalty Procedures ("Class I Guidance") sets forth procedures by which EPA provides public notice in Class I proceedings. As set forth below, EPA should provide public notice in Class II proceedings in a manner similar to the procedures set forth in the Class I Guidance.

II. Public Notice of the Proposed Issuance of an Order

EPA should provide public notice of the proposed issuance of an order assessing a Class II penalty in the form and manner set forth in §126.102(b) of the Class I Guidance, except that the notice should refer to the comment period set forth in 40 CFR 22.28(d), and should not refer to the comment period set forth in §126.102(b)(1) of the Class I Guidance.

III. Providing Commenters with Notice of Hearing

As set forth in §126.104(e) of the Class I Guidance, the Presiding Officer should serve notices of hearing on each person who commented on the proposed Class II assessment.

IV. Providing Commenters with Notice of Order Assessing Penalty

As set forth in §126.102(e) and §126.111 of the Class I Guidance, the Hearing Clerk should serve a copy of the final order on each person who commented on the proposed Class II assessment.

For further information regarding the guidance, contact Gary Hess, OECM, at FTS 475-8183.

III. ADMINISTRATIVE ENFORCEMENT

> "Secondly, the Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State." Leg. Hist. at 176.

The legislative history of Section 401 thus shows that Congress intended that the certifying State be the State with jurisdiction over the navigable waters at the point of discharge.

The language of Section 401 itself further supports the same conclusion. First, Section 401(a)(1) grants certification to the State "in which the discharge originates or will originate." Under Section 502(12) the discharge of the pollutant is defined as "any addition of any pollutant to navigable waters from any point source." Thus, there is no discharge until the pollutants enter navigable waters. For the purposes of Section 401, at least, the discharge thus originates at the point at which it enters the navigable waters.4/

Secondly, when an interstate water pollution control agency "has jurisdiction over the navigable waters at the point where the discharge originates or will originate" it, rather than any State has the certifying authority. This is further indication that the certifying authority derives from jurisdiction over the navigable waters, not over the land where the facility is located.

Section 401(a)(3) provides further support for this conclusion. Pursuant to Section 401(a)(3), a certification with respect to the construction of any facility also is binding upon any subsequent operating licenses for such a facility, except that the certification may be withdrawn because of changes in four circumstances:

4/ In his discussion of Section 401, Senator Muskie says that the certification should come "from the State in which the discharge occurs." (Leg. Hist. at 1388, emphasis added) While there may be some question as to wnere a discharge originates, there can be no question that the discharge occurs in navigable waters.

It may be that the Congress used the word originates to distinguish between the State in whose waters the discharge initially enters from a downstream State whose waters are also affected by the discharge. See footnote 5, infra.

> (A) The construction or operation of the facility, (B) the characteristics of the receiving waters into which such discharge is made, (C) the water quality standards applicable to such waters, or (D) applicable effluent limitations or other requirements."

A concern for the receiving waters and the criteria applicable to such waters is primarily a concern of the State which has jurisdiction over the receiving waters. A State in which the facility is located may have a variety of concerns about the facility but does not have any direct concern or jurisdiction over the waters affected by the discharge.5/

Our interpretation of Section 401 is further buttressed by a reading of Section 402 of the Act. Under this section, permits are issued to point source dischargers. Although permits are initially issued by EPA, the Act provides that the permitting authority may be transferred to a State which has an adequate program. Section 402(a)(5) provides for a temporary transfer, while Section 402(b) provides for a more permanent transfer. Both sections provide that the State has the power to issue permits for all discharges into its navigable waters:

> "The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into navigable waters within the jurisdiction of such State." Section 402(a)(5) (emphasis added).

5/ Section 401 does provide protection for any other State whose water quality may be affected by the discharge. Section 401(a)(2). Such State may object to the issuance of a permit and request a public hearing. The permitting agency is then required to hold a public hearing and to "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements."

States whose waters may be affected by the issuance of an NPDES permit by another State also have rights to assure protection of their water quality. See Sections 402(b)(5) and 402(d)(2)(A).

> "At any time after the promulgation of the guidelines required by subsection (h)(2) of Section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." Section 402(b) (emphasis added).

Thus, the explicit statutory language of Section 402 authorizes a State to issue permits for all discharges into navigable waters within its jurisdiction.6/

In its letter requesting our opinion on this issue, the Public Service Company of Indiana suggested that the opposite answer would be preferable administratively since it would avoid the necessity of making a factual/legal determination in each case as to who owned the waters at the point of discharge. We recognize that in some circumstances such a determination may demand the resources of the permitting agency, but we believe that these considerations are insufficient to override the clear language of the Act, its legislative history, and its goals.

It has also been suggested that in issuing permits to facilities located in another State, the permit granting State may encounter difficulties in providing for inspection and monitoring of the facility, and in the enforcement of the permit. We do not regard these difficulties as insuperable, since we assume that all permits would include provisions allowing the issuing State to monitor and inspect the facility. In enforcing these provisions, or other provisions of a

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6/ The House Report clearly states that a permitting State does not have jurisdiction to issue permits for discharges into navigable waters outside of State's jurisdiction:

> Subsection (a)(5) further provides that the Administrator may authorize a State, which he determines has the capability of administering a permit program, to issue permits for the discharges into the navigable waters within the jurisdiction of such State (but not in the contiguous zone or the ocean). Leg. Hist. at 813. (emphasis added).

permit, the issuing State could bring an action in its State courts and should be able to establish that the defendant had sufficient contacts necessary to support the State's long-arm jurisdiction.

The questions answered in this opinion have not previously been formally addressed by this Agency. It is our understanding that this opinion is consistent with the actual "real world" permitting and certifying activities in most regions. A number of regions, however, have evidently allowed States to certify and to issue permits to facilities located in such States which discharge into the navigable waters of another State.

A permit issued by a State which does not have the authority under the Clean Water Act to issue such a permit is jurisdictionally defective, and would not therefore provide a discharger with the protection provided by Section 402(k) of the Act. I urge the Assistant Administrator for Enforcement to take whatever steps are necessary to expedite the re-issuing of such permits.

On the other hand, a Federal permit issued despite the lack of certification from the proper State remains valid. The Federal agency which issued such permit had the jurisdiction to take such action. To the extent that the permit is incomplete or illegal because of lack of proper certification, any injured party could seek judicial review of such permit under the appropriate provisions of Federal law. Any State which failed to assert its certification rights within the prescribed statutory and regulatory time period may be deemed to have waived such rights pursuant to Section 401(a)(1) of the Act.

"Request for a Legal Opinion-Inclusion of Compliance Schedules in Second Round Permits and Newly Issued Permits", dated January 19, 1979.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C 20460

JAN 19 1979

OFFICE OF ENFORCEMENT

n-78-18

MEMORANDUM

TO: Regional Enforcement Division Directors
Director, NEIC
NPDES State Directors

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

SUBJECT: Office of General Counsel (OGC) Memorandum

Attached is a copy of a legal opinion prepared by OGC in response to questions concerning the inclusion of compliance schedules in Second Round and new permits. The Permits Division is including this document in its Policy Book as 78-21-IV. If you have any questions or comments about this opinion please contact Scott Slesinger (EN-336), 202-755-0750.

Jeffrey G. Miller

Attachment

cc. Regional Permits Branch Chiefs

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C 20460

78 - 21 - IV

DEC 0 3 1978

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

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

FROM : Associate General Counsel
Water and Solid Waste Division (A-131)

SUBJECT: Request for a Legal Opinion -- Inclusion of Compliance Schedules in Second Round Permits and Newly Issued Permits -- Your Memo of November 2, 1978

QUESTION

You have asked a series of questions regarding the requirements of best practicable control technology currently available ("BPT") and water quality standards ("WQS") in permits issued after July 1, 1977. Your first questions concern reissuance of a permit to a source which had already been subject to BPT requirements in an expiring permit. If BPT or WQS have become more stringent since issuance of the first permit and additional construction would be necessary for the source to meet the changed requirements, you ask whether the permit must require the source to meet the new BPT or WQS requirements and, if so, whether the permit may include a schedule for achieving the new requirements. In addition you ask, in the case of a new permit, whether the permit may ignore BPT and WQS requirements and place the source on a direct schedule to BAT/BCT. In both cases, you ask whether a schedule of compliance, if allowable, may provide a time period during which no construction is required, to allow the permit writer and the discharger to determine what construction will be required by BAT/BCT where those requirements cannot be clearly determined when the permit is issued.

ANSWER

If a source, other than a publicly-owned treatment works, has never received an NPDES permit setting forth any applicable BPT and WQS based effluent limitations, a permit issued to such source must require immediate compliance with the applicable requirements of BPT or WQS as those requirements are in effect at the time the permit is issued. If a non-POTW source has achieved its first-round effluent control requirements, a new or reissued permit to that source should assure that the source will continue to achieve those effluent reductions. In addition, revised BPT and WQS must be applied to the source. Since the Act provides no fixed schedule for compliance with these requirements, EPA should adopt a reasonable scheme for attaining compliance expeditiously, consistent with orderly application of the Act's 1984 requirements.

DISCUSSION

Section 301(b)(1)(A) of the Clean Water Act requires all sources of pollutants, other than publicly-owned treatment works, to achieve BPT by July 1, 1977, and Section 301(b)(1)(C) requires all sources to comply with WQS by that date. Section 301(b)(2) establishes a second set of more stringent technological requirements to be achieved by non-POTW's by 1984 (or three years after the date the requirements are established, up to 1987). Thus, the Act establishes a two-phase structure for achieving specified effluent limitations.

The questions raised by your memorandum arise because (1) some sources did not achieve compliance with the Phase I requirements by July 1, 1977, and (2) in some instances the definitions of BPT, or the requirements of WQS, have been revised, and current levels of treatment, previously in compliance with BPT or WQS, as defined in an NPDES permit, are not adequate to meet the revised BPT or WQS. The Act addresses the first situation, but it is silent as to the second.

I

Congress made it clear, in Section 301(b)(1), that initial compliance with BPT and WQS was to be achieved by July 1, 1977. In the 1977 amendments to the Act Congress recognized that some sources had not met those requirements, sometimes for justifiable reasons. Nonetheless, it refused to waive or extend the deadline for such sources. See H.R. 3199, 95th Cong. 1st Sess., Section 13, eliminated in conference; see also, Cong. Rec. S 13538, Aug. 4, 1977, explaining that the 1977 amendments do not extend the deadlines of Section 301 but allow the Administrator certain Section 309 enforcement options.

Since Congress expressly determined not to waive Phase I compliance requirements or allow permits to extend the compliance deadlines of Section 301(b)(1), EPA cannot claim implied authority to do so. Instead, if a permit must be issued or reissued to a source which has never achieved compliance with applicable BPT or WQS requirements, the permit must require immediate compliance with those requirements as they are currently in effect when the permit is issued, and if relief is to be provided, Section 309(a)(5) orders must be employed.

II

A source which had complied with BPT before the determination of BPT changed is in a different position from the source which never complied. This source has already achieved the Act's Phase I requirement as administratively interpreted and applied to it and is in a position to proceed with the second phase. Therefore, it would be inappropriate to impose an immediate requirement that revised BPT be achieved.

The requirement that BPT be achieved remains in the Act even after the 1977 deadline has passed. However, the Act does not set a specific deadline for attaining revised BPT requirements, and some reasonable scheme should be adopted to ensure that such requirements be achieved as expeditiously as practicable, consistent with orderly imposition of Phase II (BAT and BCT) requirements. Thus, for example, if compliance with revised BPT is a logical step towards attainment of BAT or BCT limitations, such compliance could be included as a reasonable interim element of the source's permit responsibilities. Certainly any applicable BPT requirements would have to

be met not later than the date on which compliance with BCT and BAT is required. However, where a compliance date prior to that time would require construction or modification in addition to previously defined BPT, and where that construction would not constitute a logical step toward BAT, imposing the interim BPT requirement might well undermine the Act's orderly progression from the 1977 to the 1984 requirements.

III

The issue of compliance dates for ongoing WQS compliance is less clear. The Act establishes the end date for the first stage of WQS compliance, but for subsequent levels of possibly more stringent WQS, the Act defers to State planning determinations. See Section 303(e)(3)(A), Section 303(e)(3)(F), Section 208(b)(2)(B), Section 208(e), and Section 303(e)(3)(B). If a state has revised its WQS and established a schedule of compliance at least as stringent as any federal requirement, the NPDES permit would have to impose the state-established limitation. However, if the State plans do not contain specific compliance schedules, the EPA permit writer must establish the source's Phase II WQS compliance schedule.

The Act supplies no express guidance as to what the EPA-determined, post-1977 WQS compliance schedule should be. In general, Congress intended compliance with the Act's requirements to occur at the earliest practicable time.* One option, therefore, might be for EPA simply to establish the policy that post-1977 compliance must be achieved by the earliest practicable time.

Alternatively, the Section 301(b)(2) pattern is to require second round municipal compliance in 1983 and second round industrial compliance in 1984. It is reasonable to

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* The Section 301 requirements are all to be met "no later than" the statutory deadlines. See, e.g., Leg. Hist. 163. In the 1977 amendments, Congress confirmed its interest in securing the earliest possible compliance. See Sections 309(a)(5) and 309(a)(6), added by the amendments.

establish WQS compliance schedules in harmony with the Act's general regulatory structure. Thus, EPA may infer that the Section 301(b)(2) dates should be applied to WQS, in the absence of any more stringent state schedules.

Which of these approaches (or what combination of them) is to be selected is a policy judgment. Since the Act does not express compliance schedule requirements for post-1977 WQS compliance, EPA may wish to supply guidance by regulation. This would provide a reasonable, permanent method for establishing WQS compliance schedules where none are available from the states.

"Policy for the Second Round Issuance of NPDES Industrial Permits", dated June 2, 1982.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

JUN 2 1982

OFFICE OF WATER

MEMORANDUM

SUBJECT: Policy for the Second Round Issuance of NPDES Industrial Permits

TO: Regional Administrators

FROM: Frederic A. Eidsness, Jr.
Assistant Administrator for Water (WH-556)

The final "second round" policy for re-issuing NPDES industrial permits is attached. The policy reflects Regional comments in response to previous drafts sent to you and discussions with the Water Management Division Directors. This policy applies only to EPA-issued permits, although States may choose to adopt the principles outlined. I am sending the policy to both the NPDES and non-NPDES States under separate cover to solicit their comments and advice on the applicability of the policy to their programs. In addition to the priorities set here for reissuance of NPDES industrial permits, the issuance of new source or new discharge permits remains the highest priority to assure no undue delay in the construction or modification of such sources.

This policy reflects the Administrator's conviction that, to the extent possible, permit requirements should be based either on promulgated national wastewater treatment standards or requirements necessary to achieve the designated water uses specified in water quality standards. It also reflects the principles that permit effluent limitations should be developed using good scientific information and that, to the extent practicable, permits of a lasting value should be developed. Such permits assure protection of the environment while establishing wastewater treatment requirements that will not be subject to frequent change.

The policy establishes five priorities for permit issuance and describes the basis for assigning permit priorities and developing limitations. Based on this policy, Regions are to develop and submit by June 30, 1982, a list of priority permits which the Region expects to issue before the end of FY 1983. The initial list is to be submitted to Headquarters and should

contain key information such as the facility name, owner/operator, location, receiving water (STORET Reach Number), the issuance priority category (see attachment to the policy), pollutants of concern, and the anticipated schedule of issuance. Headquarters will use this information to report to the Congress and others on EPA's plans for and status of the permit program -- what our priorities are and where our resources are going. Regional performance against established plans will be assessed as part of the Office of Water's guidance/evaluation process.

Regions should also work cooperatively with the NPDES States to develop similar priority permit information on permits to be issued by the States. This is important to assuring a truly national effort and can be done as a part of routine cooperative program planning processes, such as the development of 106 plans. In this way we can determine how EPA can most usefully assist the States in their permitting efforts. Establishing State priority permit lists will also serve to assist in determining the most appropriate State-issued permits to be reviewed by the Region.

EPA headquarters will be providing guidance and assistance to help carry out this policy. Questions concerning the policy should be directed to Bruce Barrett, Director, Office of Water Enforcement and Permits (FTS/Area Code 202-755-0440).

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C. 20460

OFFICE OF
WATER

Policy for the Second Round Issuance of National Pollutant Discharge Elimination System (NPDES) Permits for Industrial Sources

STATEMENT OF POLICY

EPA-issued industrial NPDES permits will be issued according to the following priorities. (A detailed explanation of the policy is contained in the attachment to the "Implementation" section of this policy.) First priority shall be given to facilities discharging to waters where use impairment problems have been identified and where there is adequate information to develop either a water quality-based permit or, in the exceptional case detailed in the attachment, a BAT/BCT permit relying on best professional judgment. The second priority is to permit facilities for which applicable BAT effluent limitations guidelines have been promulgated. The third priority covers facilities suspected of contributing to the impairment of a designated water use but where insufficient information exists to confirm the extent of the use impairment. The fourth priority addresses facilities for which effluent limitations guidelines are not scheduled for promulgation and the existing permit limitations do not reflect sufficient treatment. The lowest priority is extension or reissuance of permits to facilities for which effluent limitations guidelines are not scheduled and the existing permit requires sufficient treatment. In all permitting actions, EPA will work cooperatively with States and permittees and adhere to procedures established by applicable statutes and regulations. This policy also establishes a mechanism for developing priority permit lists with the first list due by June 30, 1982 (see "Other Considerations" in the Attachment).

EXPIRATION DATE

This policy will remain in effect until September 30, 1983.

June 2, 1982

BACKGROUND

EPA and authorized States issue NPDES permits for periods not to exceed five years. Permit limits are based either on the application of available technology or on the protection of water quality, whichever is more stringent. The Clean Water Act (CWA) establishes two levels of technology standards and deadlines for industrial compliance: best practicable control technology currently available (BPT) by July 1, 1977 and best available technology economically achievable/best conventional technology (BAT/BCT) by July 1, 1984.

The majority of the "first round" permits, reflecting BPT or more stringent water quality-based limitations, were issued between 1974 and 1976. Most of these were based on technology using "best professional judgment" (BPJ) because effluent guidelines were unavailable (relying on section 402(a)(1) of the CWA). In 1978, as these permits began to expire, EPA instituted a policy of reissuing short-term (2 to 3 year) permits in order to await promulgation of BAT/BCT effluent guidelines. Most of these short-term permits have now expired. Thus there are now more than 35,000 expired permits. For the most part, these expired permits continue in effect under the federal Administrative Procedure Act or similar State statutes.

In the past, EPA and many States focused almost exclusively on the technology-based effluent limitations approach. While EPA will continue this technology-based approach using BAT/BCT effluent limitations guidelines, EPA will also look beyond technology-based requirements and issue permits based on scientifically determined requirements for assuring environmental protection. The development of requirements based on protection of water quality has often been hampered by lack of data. This policy makes clear that the burden of data collection is shared by EPA, the State, and the discharger. Further, the implementation of this policy should assure the most effective use of resources by carefully scheduling permit activities, waiting for national treatment standards where practicable, making better use of existing data, and initiati- cooperative efforts with States and permittees.

This approach is supported by initiatives that will strengthen both technology-based and water quality-based effluent limitations. It will produce permits of lasting value that are not subject to frequent change. EPA is moving ahead to promulgate national effluent limitations guidelines on a schedule which will provide guidelines for 24 primary industry categories before the end of FY 1983. Promulgated effluent limitations guidelines, in conjunction with their development documents, expert assistance, and permit writer training, will assure the application of good science and produce well founded permit limitations. Individual permit limitations developed in this way will significantly reduce conflicts and avoid protracted appeals.

2416

A sound technical and legal basis for permit limits is also provided by State water quality standards. All States have standards for each designated water use which include both numeric criteria for specific pollutants and general conditions. Expanding the scope of these standards and improving their scientific basis is a continuing process which is now being given additional attention by EPA, the States, and throughout the scientific community. EPA is encouraging States to review and revise their standards to reflect site-specific factors. The technological basis for implementing these standards using Total Maximum Daily Load/Wasteload Allocations is being significantly advanced. These factors and site-specific biological and chemical analysis will provide the needed scientific basis for water quality-based effluent limitations in permits.

APPLICATION

This policy applies only to EPA-issued industrial NPDES permits although States may choose to adopt the principles outlined.

IMPLEMENTATION

This policy is implemented by establishing permit issuance priorities and developing priority permit lists and schedules. This approach is designed to assure the best use of available resources and produce results where they are most needed. The details of this approach are explained in the attachment.

6/2/82
Date

Frederic A. Eidsness, Jr.
Assistant Administrator
for Water

Permitting Priorities	Discussion/Implementation
First Priority Issue permits to facilities where water use impairment problems have been identified	o States, with EPA assistance, identify water bodies where it is known that the water use is impaired or other major water quality problems exist. This may be based on factors such as drinking water supply contamination, exceedences of applicable water quality standards, and bioaccumulation of toxic pollutants. In coordination with the State, the available scientific information should be reviewed to identify significant contributors and determine whether there is adequate scientific information to develop water quality-based limits for those dischargers. o For those dischargers identified as contributing to a use impairment or other major water quality problem, and for which there are sufficient information and data, permit limits should be developed based on section 303(d) total maximum daily load/wasteload allocations (TMDL/WLA's) and relevant portions of section 208 plans. Where sufficient data exist, EPA may develop water quality-based limits in the absence of 303(d) TMDL/WLA's, using scientifically acceptable methods, including the use of bioassays. However, such effluent limits are subject to public, administrative, and judicial review as part of the permit process and any other permittees contributing to the water quality problem will have an opportunity to participate after notice of proposed effluent limits. All water quality-based permits with expiration dates beyond July 1, 1984, also must meet the statutory definition of BAT and BCT. o In those exceptional cases where major water quality problems are identified but there is insufficient information to develop limitations based on water quality, and effluent guidelines will not be available in the near term, the permit should be based on good scientific information with the limits reflecting BAT/BCT. In making determinations of BAT/BCT, the permit writer will rely on best professional judgment. Such permits will be issued with five year terms. More stringent limits required by national technology-based guidelines issued during the term of the permit will be included in subsequent permits. In addition, the organic chemicals and plastics/synthetics industry categories will likely present a number of cases which, because of the identified use impairment or other major water quality problems, justify the use of this approach. EPA headquarters will provide assistance to permit writers through teams of industry experts for these industrial categories.
Second Priority Issue permits based on promulgated BAT guidelines where BAT guidelines are scheduled	o Where BAT effluent guidelines have been promulgated, permits will be issued reflecting guidelines and any other necessary BAT/BCT or water-quality based limits. If BAT guidelines are scheduled but have not been promulgated and no major water quality problems are involved, the first round BPT permit should be extended under the Administrative Procedure Act (APA) while waiting for BAT guidelines.

Permitting Priorities	Discussion/Implementation
Third Priority Issue permits to facilities where water use impairment problems are suspected	o For those dischargers suspected of contributing to major water use impairment or other major water quality problems, but where insufficient confirming data exist, a specific short-term program of data collection should be initiated. The data collection program should include requirements for biomonitoring, chemical analysis, or field surveys necessary to obtain information to determine the magnitude and extent of the water use impairment. In setting up the data collection program, particular attention should be paid to potential contamination of public drinking water supplies. EPA Headquarters will provide further guidance on both the procedural mechanisms for implementing this data collection program as well as substantive guidance on the type of biomonitoring or chemical analysis requirements that could be used to collect data. o If sufficient information is obtained that shows the discharger is contributing to water use impairment problems, a new five year permit or modification of existing permit limits should be developed as appropriate.
Fourth Priority Issue permits where upgrading is needed and BAT guidelines are not scheduled	o Where no further BAT guidelines development is planned and the first round permit does not reflect sufficient treatment to comply with BAT/BCT, subsequently promulgated BPT guidelines or water quality standards, upgrade the permits limits and/or other necessary conditions and issue a five-year permit. Limits on conventional pollutants reflecting BCT may be developed using the BCT methodology when it becomes available, and limits on priority pollutants reflecting BAT should be developed using BPJ. Normally, significant discharges of priority pollutants are not expected where BAT guidelines are not scheduled for development.
Fifth Priority Issue permits for all others as the last priority	o Where no further guidelines development is planned but the first round permit requires sufficient treatment (i.e., would meet what are likely to be considered BAT/BCT limits and no water quality problems are suspected), the existing permit may be extended under APA provisions or reissued only as the last priority.

Other Considerations

• Priority Permits	EPA Regional Offices will identify facilities which are probable contributors to water use impairment or other major water quality problems. The 305(b) reports and 303(d) priority segments will be considered in identifying these priority facilities. Using this and other information, the Regional Offices will develop a listing of permits which are expected to be issued before October 1, 1983 consistent with the priorities established by this policy. The listing will include permit issuance schedules which will provide a reasonable estimate of expected issuance. The initial list of priority permits and schedules are to be transmitted to Headquarters by June 30, 1982. This list should be updated periodically to reflect current plans and priorities. Encouraging States to establish similar priority lists is also essential to the national program.
• General Permits	In addition to the points described above, we are encouraging the use of general permits to cover many facilities with the same or substantially similar types of operations and the same types of wastestream discharges. This should help significantly in reducing the backlog of expired NPDES permits. The Office of Water will analyze the opportunities for general permits for industry categories, including some primary industry categories, where the facilities' operations and discharges are very similar. Multi-State coverage will also be considered. We will keep you informed of progress in this area. In the meantime, permitting authorities should consider issuing general permits in their own jurisdictions where appropriate.
). Compliance Deadline	All permits extending past July 1, 1984 must contain final limitations that are deemed equivalent to BAT/BCT regardless of whether the limits are based on water quality, effluent guidelines, or BPJ.

"Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants", dated February 3, 1984. (See also 49 FR 9016, March 9, 1984.)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C. 20460

OFFICE OF
WATER

Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants

STATEMENT OF POLICY

To control pollutants beyond Best Available Technology Economically Achievable (BAT), secondary treatment, and other Clean Water Act technology-based requirements in order to meet water quality standards, the Environmental Protection Agency (EPA) will use an integrated strategy consisting of both biological and chemical methods to address toxic and nonconventional pollutants from industrial and municipal sources. Where State standards contain numerical criteria for toxic pollutants, National Pollutant Discharge Elimination System (NPDES) permits will contain limits as necessary to assure compliance with these standards. In addition to enforcing specific numerical criteria, EPA and the States will use biological techniques and available data on chemical effects to assess toxicity impacts and human health hazards based on the general standard of "no toxic materials in toxic amounts."

EPA, in its oversight role, will work with States to ensure that these techniques are used wherever appropriate. Under section 308 and section 402 of the Clean Water Act (the Act), EPA or the State may require NPDES permit applicants to provide chemical, toxicity, and instream biological data necessary to assure compliance with standards. Data requirements may be determined on a case-by-case basis in consultation with the State and the discharger.

Where violations of water quality standards are identified or projected, the State will be expected to develop water quality-based effluent limits for inclusion in any issued permit. Where necessary, EPA will develop these limits in consultation with the State. Where there is a significant likelihood of toxic effects to biota in the receiving water, EPA and the States may impose permit limits on effluent toxicity and may require an NPDES permittee to conduct a toxicity reduction evaluation. Where toxic effects are present but there is a significant likelihood that compliance with technology-based requirements will sufficiently mitigate the effects,

EPA and the States may require chemical and toxicity testing after installation of treatment and may reopen the permit to incorporate additional limitations if needed to meet water quality standards. (Toxicity data, which are considered "new information" in accordance with 40 CFR 122.62(a)(2), could constitute cause for permit modification where necessary.)

To carry out this policy, EPA Regional Administrators will assure that each Region has the capability to conduct water quality assessments using both biological and chemical methods and provide technical assistance to the States.

BACKGROUND

The Clean Water Act establishes two principal bases for effluent limitations. First, existing dischargers are required to meet technology-based effluent limitations that reflect the best controls available considering economic impacts. New source dischargers must meet the best demonstrated technology-based controls. Second, where necessary, additional requirements are imposed to assure attainment and maintenance of water quality standards established by the States and approved by EPA. In establishing or reviewing NPDES permit limits, EPA must ensure that the limits will result in the attainment of water quality standards and protect designated water uses, including an adequate margin of safety.

For toxic and nonconventional pollutants it may be difficult in some situations to determine attainment or nonattainment of water quality standards and set appropriate limits because of complex chemical interactions which affect the fate and ultimate impact of toxic substances in the receiving water. In many cases, all potentially toxic pollutants cannot be identified by chemical methods. In such situations, it is more feasible to examine the whole effluent toxicity and instream impacts using biological methods rather than attempt to identify all toxic pollutants, determine the effects of each pollutant individually, and then attempt to assess their collective effect.

The scientific basis for using biological techniques has advanced significantly in recent years. There is now a general consensus that an evaluation of effluent toxicity, when adequately related to instream conditions, can provide a valid indication of receiving system impacts. This information can be useful in developing regulatory requirements to protect aquatic life, especially when data from toxicity testing are analyzed in conjunction with chemical and ecological data. Generic human health effects methods, such as the Ames mutegenicity test, and structure-activity relationship techniques are showing promise and should be used to identify potential hazards. However, pollutant-specific techniques are the best way to evaluate and control human health hazards at this time.

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Biological testing of effluents is an important aspect of the water quality-based approach for controlling toxic pollutants. Effluent toxicity data in conjunction with other data can be used to establish control priorities, assess compliance with State water quality standards, and set permit limitations to achieve those standards.[1] All States have water quality standards which include narrative statements prohibiting the discharge of toxic materials in toxic amounts. A few State standards have criteria more specific than narrative criteria (for example, numerical criteria for specific toxic pollutants or a toxicity criterion to achieve designated uses). In States where numerical criteria are not specified, a judgment by the regulatory authority is required to set quantitative water quality-based limits on chemicals and effluent toxicity to assure compliance with water quality standards.

APPLICATION

This policy applies to EPA and the States. The policy addresses the use of chemical and biological methods for assuring that effluent discharges are regulated in accordance with Federal and State requirements. This policy was prepared, in part, in response to concerns raised by litigants to the Consolidated Permit Regulations (see 47 Federal Register 52079, November 18, 1982). Use of these methods for developing water quality standards and trend monitoring are discussed elsewhere (see 48 Federal Register 51400, November 8, 1983 and Basic Water Monitoring Program EPA-440/9-76-025). This policy is part of EPA's water quality-based control program and does not supercede other regulations, policy, and guidance regarding use attainability, site-specific criteria modification, wasteload allocation, and water quality management.

IMPLEMENTATION

State role-

The control of toxic substances to protect water quality must be done in the context of the Federal-State partnership. EPA will work cooperatively with the States in identifying potential water quality standards violations, assembling relevant

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[1] Section 308 of the Act and corresponding State statutes authorize EPA and the States to require of the owner/operator any information reasonably required to determine permit limits and to determine compliance with standards or permit limits. Biological methods are specifically mentioned. Toxicity permit limits are authorized under Section 301 and 402 and supported by Section 101.

data, developing appropriate testing requirements, determining whether standards are being violated, and defining appropriate permit limits.[2]

Integration of approaches-

The type of testing that is most appropriate for assessing water quality impacts depends on the type of effluent and discharge situation. EPA recommends that an integrated approach, including both biological and chemical techniques, be used to assess and control water quality. The principal advantages of chemical-specific techniques are that (1) chemical analyses are usually less expensive than biological measurements in simple cases; (2) treatment systems are more easily designed to meet chemical requirements than toxicity requirements; and (3) human health hazards and bioaccumulative pollutants can best be addressed at this time by chemical-specific analysis. The principal advantages of biological techniques are that (1) the effects of complex discharges of many known and unknown constituents can be measured only by biological analyses; (2) bioavailability of pollutants after discharge is best measured by toxicity testing; and (3) pollutants for which there are inadequate chemical analytical methods or criteria can be addressed.

Pollutant-specific chemical analysis techniques should be used where discharges contain a few, well-quantified pollutants and the interactions and effects of the pollutants are known. In addition, pollutant-specific techniques should be used where health hazards are a concern or bioaccumulation is suspected. Biological techniques should be used where effluents are complex or where the combined effects of multiple discharges are of concern. EPA recognizes that in many cases both types of analysis must be used.

Testing requirements-

Requirements for dischargers to collect information to assess attainment or nonattainment of State water quality standards will be imposed only in selected cases where the potential for nonattainment of water quality standards exists. Where water quality problems are suspected but there is a strong indication that complying with BCT/BAT will sufficiently mitigate the impacts, EPA recommends that applicable permits include testing requirements effective after BCT/BAT compliance and reopener clauses allowing reevaluation of the discharge.

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[2] Under section 303 and 401 of the Act, States are given primary responsibility for developing water quality standards and limits to meet those standards. EPA's role is to review the State standards and limits and develop revised or additional standards or limits as needed to meet the requirements of the Act.

The chemical, physical, and biological testing to be conducted by individual dischargers should be determined on a case-by-case basis. In making this determination, many factors must be considered, including the degree of impact, the complexity and variability of the discharge, the water body type and hydrology, the potential for human health impact, the amount of existing data, the level of certainty desired in the water quality assessment, other sources of pollutants, and the ecology of the receiving water. The specific data needed to measure the effect that a discharger has on the receiving water will vary according to these and other factors.

An assessment of water quality should, to the extent practicable, include other point and nonpoint sources of pollutants if the sources may be contributing to the impacts. Special attention should be focused on Publicly Owned Treatment Works (POTW's) with a significant contribution of industrial wastewater. Recent studies have indicated that such POTW's are often significant sources of toxic materials. When developing monitoring requirements, interpreting data, and determining limitations, permit engineers should work closely with water quality staff at both the State and Federal levels.

A diseharger may be required to provide data upon request under section 308 of the Act, or such a requirement may be included in its NPDES permit. The development of a final assessment may require several iterations of data collection. Where potential problems are identified, EPA or the State may require monitoring to determine whether more information is needed concerning water quality effects.

Use of data-

Chemical, physical, and biological data will be used to determine whether, after compliance with BCT/BAT requirements, there will be violations of State water quality standards resulting from the discharge(s). The narrative prohibition of toxic materials in toxic amounts contained in all State standards is the basis for this determination taking into account the designated use for the receiving water. For example, discharges to waters classified for propagation of cold water fish should be evaluated in relation to acute and chronic effects on cold water organisms, potential spawning areas, and effluent dispersion.

Setting permit limitations-

Where violations of water quality standards exist or are projected, the State and EPA will determine pollution control requirements that will attain the receiving water designated use. Where effluent toxicity is an appropriate control parameter, permit limits on effluent toxicity should be developed. In such cases, EPA may also require a permittee to conduct a toxicity reduction evaluation. A toxicity reduction evaluation is an investigation conducted within a plant or municipal system

to isolate the sources of effluent toxicity, determine specific causative pollutants if possible, and determine the effectiveness of pollution control options in reducing the effluent toxicity. If specific chemicals are identified as the cause of the water quality standards violation, these individual pollutants should be limited. If a toxicity reduction evaluation demonstrates that limiting an indicator parameter will ensure attainment of the water quality-based effluent toxicity requirement, limits on the indicator parameter should be considered in lieu of limits on effluent toxicity. Such indicator limits are not limits on causative pollutants but limits demonstrated to result in a specific toxicity reduction.

Monitoring-

Where pollution control requirements are expressed in terms of a chemical or toxicological parameter, compliance monitoring must include monitoring for that parameter. If an indicator parameter is used based on the results of a toxicity reduction evaluation, periodic toxicity testing may be required to confirm the adequacy of the indicator. Where biological data were used to develop a water quality assessment or where the potential for water quality standards violations exist, biological monitoring (including instream monitoring) may be required to ensure continuing compliance with water quality standards.

EPA believes that the intelligent application of an integrated strategy using both biological and chemical techniques for water quality assessment will facilitate the development of appropriate controls and the attainment of water quality standards. EPA looks forward to working with the States in a spirit of cooperation to further refine these techniques.

February 3, 1984

Date

Jack E. Ravan

Assistant Administrator
for Water

2607

"Continuance of NPDES General Permits under the APA", dated January 16, 1984.

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

*See Nunan Kitlutsisti v. Arco Alaska, Inc (D.C. Alaska, 1984), 592 F.S. 832, for a discussion of this issue. The court held tha an expired general permit is not continued under the APA; on appeal the decision was vacated, however.

OFFICE OF WATER

JAN 16 1984

MEMORANDUM

SUBJECT: Continuance of NPDES General Permits Under the APA

FROM: Bruce R. Barrett, Director
Office of Water Enforcement and Permits (EN-335)

TO: Regional Water Management Division Directors
Regional Counsels

We have received a number of inquiries as to whether continuation of expired general permits is allowed under the Administrative Procedure Act (APA) and the NPDES regulations. recent Office of General Counsel (OGC) opinion (attached) ndicates that such continuance is legally permissible. However, here are important reasons for EPA not to rely on APA continuance except in extreme cases where permit reissuance is delayed for unexpected or unavoidable reasons. This memorandum addresses the general permit reissuance process in light of OGC's recent review of the continuance issue.

SUMMARY

NPDES general permits may be continued under the APA where the Agency has failed to reissue the permit prior to expiration. Although continuance is legally permissible, permits should be continued only as a last resort and continuance should be avoided by timely reissuance of general permits wherever possible.

Because of the geographic scope of general permits and the number of facilities covered, continuance could raise questions as to whether EPA has adequately considered long-term cumulative environmental impacts, exacerbate the permit issuance backlog, and create new issues or workload problems associated with new facility permits since new facilities cannot be covered by a ontinued permit. Continuance is generally avoidable given equate planning. Where continuance is unavoidable, it should for the shortest possible time. Upon determining that a eneral permit will not be reissued prior to expiration, the

Regional Water Management Division Director should inform the Permits Division Director and provide a specific schedule for completing reissuance.

IMPLEMENTATION

The following requirements govern the continuance of general permits:

- Only those facilities authorized to discharge under the expiring general permit are covered by the continued permit.

- Where the notification requirements of a general permit provide permit coverage prior to the actual commencement of operations at a site (e.g., mobile seafood processors and oil and gas drilling vessels) facilities providing such notice prior to expiration are covered by the continued permit.

- At least six months prior to the expiration date of a general permit, the Regional Water Management Division Director should submit a draft general permit and a schedule for permit issuance or reissuance to the Permits Division Director. If a draft general permit is not ready at that time, an explanation of the reasons for delay and a schedule for permit development and reissuance, should be submitted instead. The Permits Division Director will expedite permit issuance and reissuance processes at headquarters as much as possible and will inform upper management in the Office of Water of any significant delays.

DISCUSSION

As with individual NPDES permits, it may become necessary to administratively continue a general NPDES permit when reissuance of the permit or issuance of a new permit is impossible before permit expiration. The APA allows for continuance of a Federal license or permit when a permittee has made a timely and complete application for a new permit. Until OGC's recent review of the issue, OWEP had advised the Regional Offices that general permits could not be continued under the APA because the NPDES regulations do not require applications for general permits. OWEP requested that OGC review and provide a written opinion on this issue since a number of parties had questioned our legal position. On November 17, 1983, OGC informe OWEP that general permits can legally be continued under the APA.

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There are a number of strong policy and program reasons to ure timely reissuance rather than relying on APA continuance. any general permits cover several dozens or even hundreds of individual facilities. The large number of facilities covered and the broad geographic coverage tend to focus industry and public attention on Agency inaction when the permit is allowed to expire, especially in the early stages of implementation of the general permit program.

Many general permits are controversial at the time of initial permit issuance. Similar controversies can be anticipated during reissuance. EPA cannot allow the public to perceive that we are avoiding these issues through administrative continuance of expired permits. For example, cumulative environmental impact assessments hinge on the number and volume of discharges. Information gathered during the term of the original permit may justify new permit limitations, terms and conditions at the time of reissuance. For marine dischargers, determinations pursuant to §403(c) of the Clean Water Act are usually dependent on the estimates of the number of facilities that will discharge during the term of the permit. Delay in updating these determinations raises questions about potential environmental impacts and the efficacy of permit conditions. milar issues arise where there have been new standards or fluent limitation guidelines promulgated during the course the permit or changes in the CWA or applicable requirements nder other applicable statutes (e.g., Coastal Zone Management Act, Endangered Species Act).

Finally, a major goal of the general permit program is to reduce the Agency's NPDES permit issuance backlog. Allowing general permits to expire aggravates the backlog problems. In addition, new dischargers would not be covered until EPA reissued the general permit. Since these facilities would be liable for discharge without a permit, they would likely request an individual permit and be required to submit a full application and do appropriate testing. This creates a permit issuance workload demand that would be avoided by timely reissuance of the general permit, as well as putting burdens on permit applicants that would be removed by reissuance of the general permit.

Given the drawbacks and problems, administrative continuance of general permits should be the exception rather than the rule. Adequate planning and timely permit preparation will allow us to avoid the necessity to use administrative continuance except as a stop gap, short term measure. The Office of Water Enforcement and Permits will work with the Regions to avoid continuance wherever possible.

... Colburn T. Cherney, OGC

Attachment

Summaries of NPDES Permit Decisions by the Administrator and Judicial Officer (Issued irregularly. For copies of summaries, contact the Permits Division, OWEP, EN-336).

"Training Manual for NPDES Permit Writers" dated May, 1987. Table of Contents only. Available from Permits Division, OWEP, (EN-336).

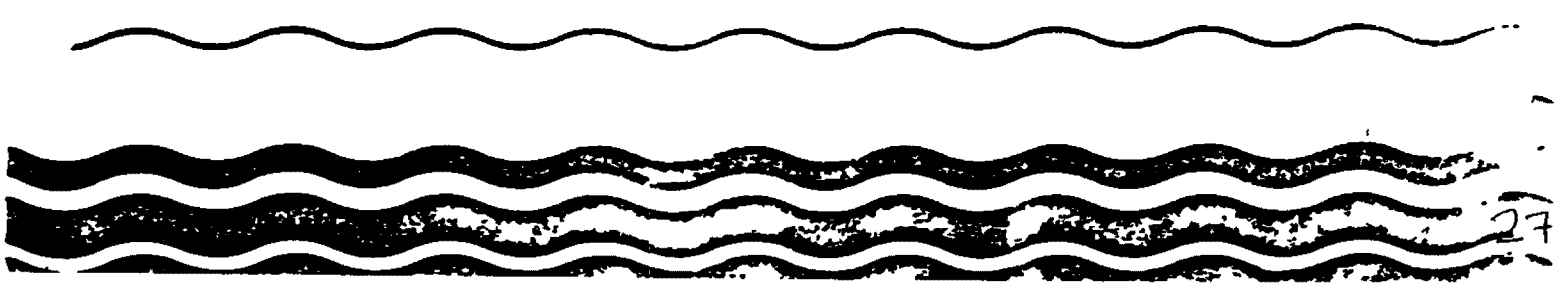
United States
Environmental Protection
Agency

Office of Water
Enforcements and Permits
Washington DC 20460

MAY 1987

EPA

Training Manual for NPDES Permit Writers



[illegible]

The Water Quality Act of 1965 [illegible] changes to the Clean Water Act and also [illegible] been included in the preparation of the manual. The [illegible] intended to give guidance to permit [illegible] the discharge. Further [illegible] the [illegible] application [illegible]

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"Conduct of Inspections after the Barlow Decision dated April 11, 1979. See GM-5.

"NPDES Compliance Sampling Inspection Manual", dated October 1979. Table of Contents only.

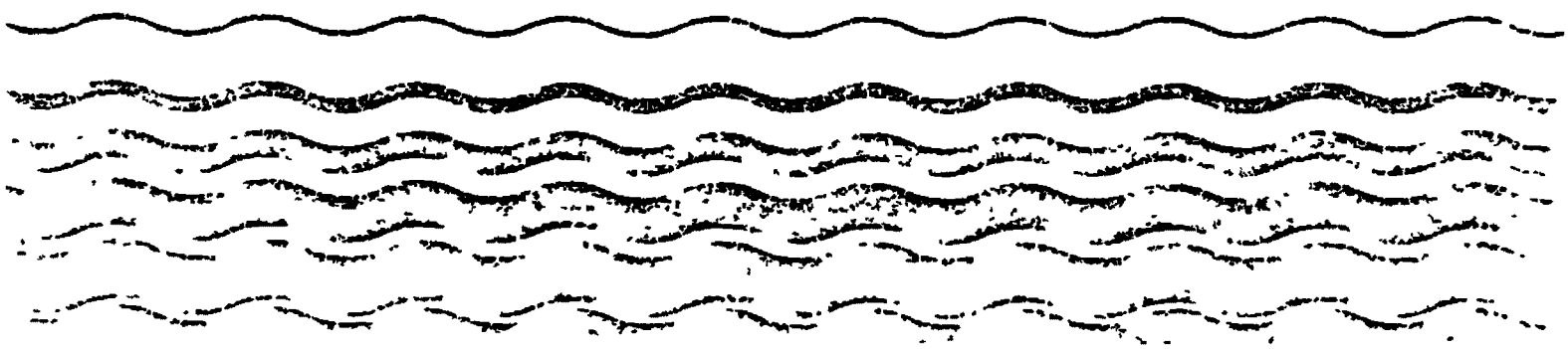
Division

Office
Water Enforcement
Washington DC

10/79

EPA

NPDES
Compliance Sampling
Inspection Manual



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United States
Environmental Protection
Agency

Office of Water Enforcement
Enforcement Division
Washington DC 20460

October 1979

Water

EPA

Interim NPDES Compliance Biomonitoring Inspection Manual

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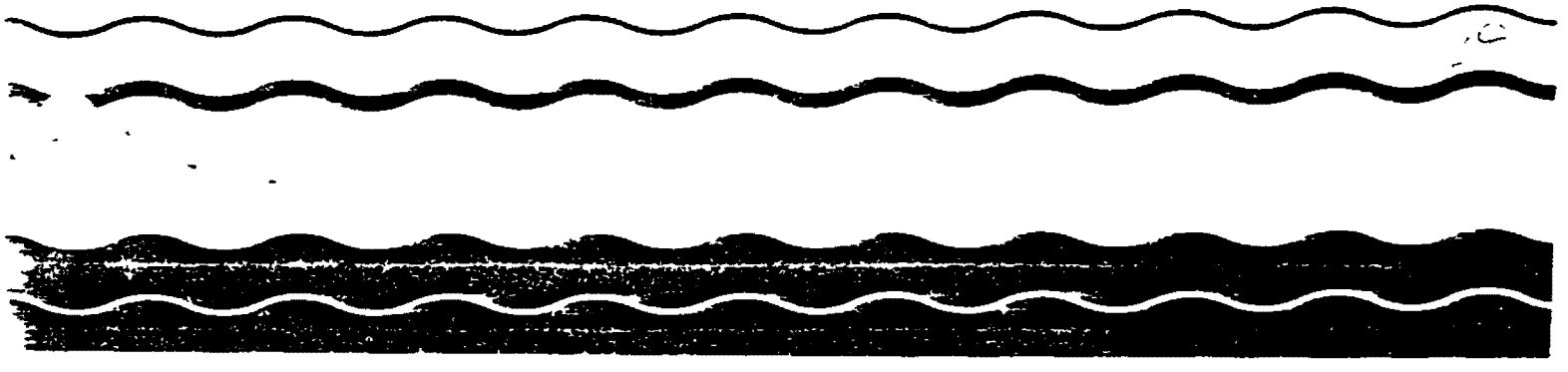

NPDES COMPLIANCE

BIOMONITORING INSPECTION MANUAL

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September 1988

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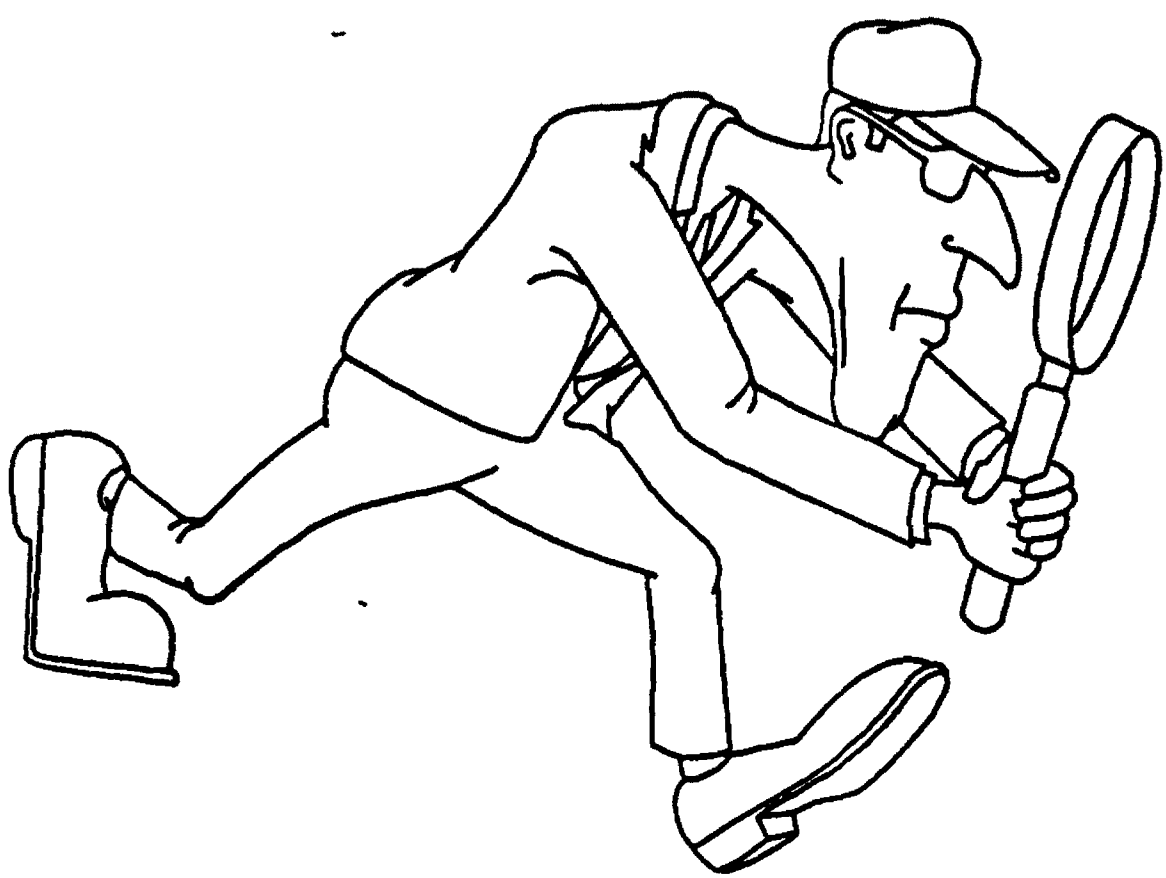
Overview



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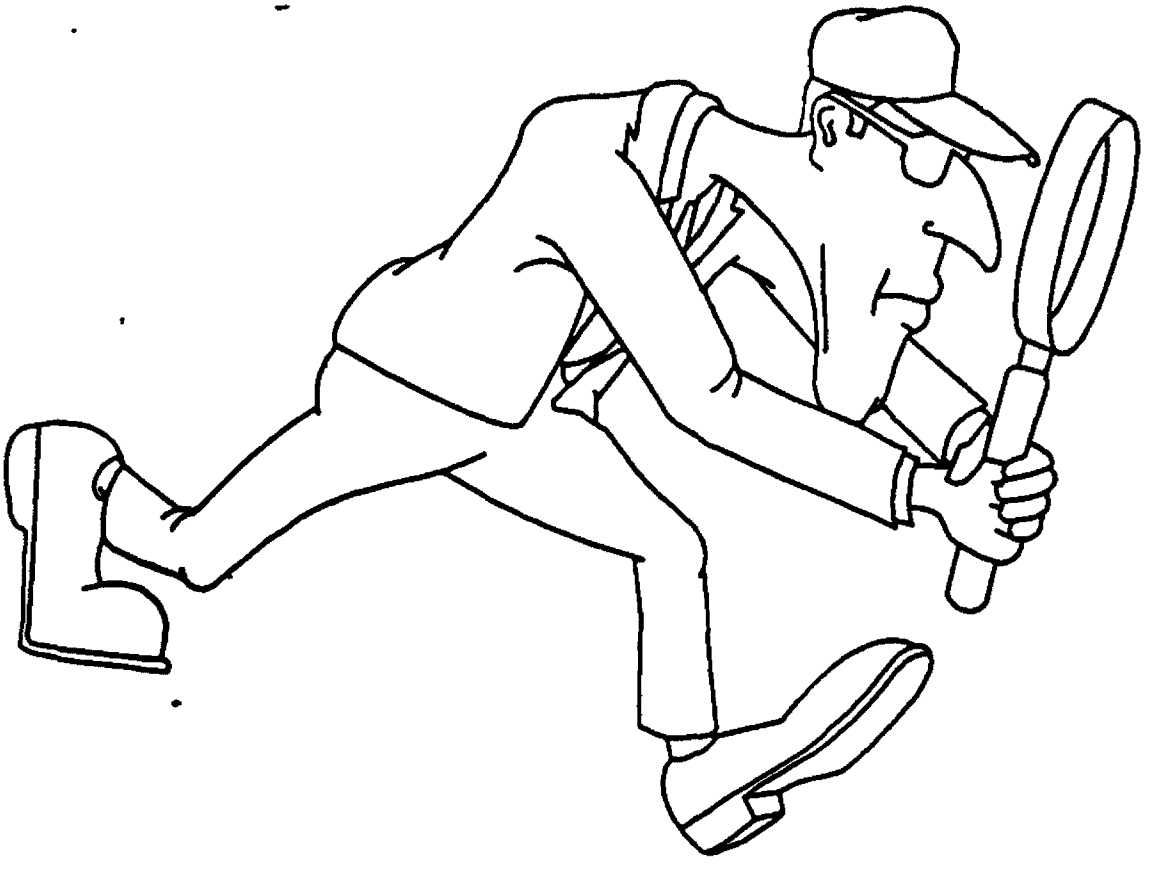
Legal Issues



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Sampling Procedures

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United States
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Agency

Office of Water Enforcement
Enforcement Division (EN 338)
Washington DC 20460

January 1981

Water

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NPDES
Compliance Evaluation
Inspection Manual

MCD — 75

NPDES COMPLIANCE EVALUATION INSPECTION MANUAL

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"Neutral Inspection Plan for the NPDES Program", dated February 17, 1981.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

FEB 17 1981

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Neutral Inspection Plan for the NPDES Program

FROM: Edward A. Kurent
Director, Enforcement Division (EN-338)

TO: Regional Enforcement Division Directors
Regional S&A Division Directors
Director, NEIC

Attached is the final Neutral Inspection Plan which was developed for the NPDES Compliance Inspection Program. This plan fulfills the requirements for performing neutral compliance inspections based on the Marshall v Barlow's, Inc. ruling. The Neutral Inspection Plan must be used to target all inspections which are not based on some type of probable cause. Copies of this plan were distributed to each Region last year for comments.

The selection of candidates for neutral inspections each year will be based on only two factors; the length of time since the last inspection and geographic grouping (to minimize the use of resources). The initial selection process will be done by computer using the Permit Compliance System (PCS). Selecting specific permittees for inspections will then be based on common geographic areas. For example, a permittee with a low priority for inspection may be chosen if it is in close physical proximity to a permittee with a very high priority for inspection.

This plan will not be used to target all NPDES compliance inspections, only those based on administrative factors. We expect that the portion of inspections which are not based on some form of civil probable cause (DMR data, citizen complaints) will be very small. Indeed, some Regions plan all their inspections based on probable cause for violations. In these cases, no Neutral Inspection Plan would be needed. Similarly, some Regions (along with the States) are able to inspect each major permittee once a year. Since this Neutral Inspection Plan is based on annual planning, it would not be needed in these cases.

Several Regions commented that the significance of the discharger should be a factor. Since this plan will be applied only to major permittees, we believe this issue is basically addressed. In addition, when the new major/minor designation system is complete, PCS will be able to use potential for a permittee to discharge toxics as a factor in the neutral inspection process. Without this information in PCS, it would be necessary to perform a review of every major permittee to determine the toxics discharge potential. This would place an unreasonable burden on Regional enforcement programs.

If you have any questions or comments on this plan, please contact me or Brian Maas of the Enforcement Division staff at 755-0994.

Attachment

CRITERIA FOR NEUTRAL SELECTION OF NPDES COMPLIANCE INSPECTION CANDIDATES

A. BACKGROUND

In response to the recent Supreme Court decision in Marshall v. Barlow's Inc., 436 U.S. 307 (1978), the Agency is developing neutral inspection criteria to be used when targeting compliance inspections. The purpose of using the neutral inspection plan is to eliminate any bias in choosing candidates for compliance inspections.

Under the National Pollutant Discharge Elimination System (NPDES) authorized by Section 402(a)(1) of the Clean Water Act, over 50,000 permits have been issued for the discharge of pollutants. Of these issued permits, about 8,000 have been classified by EPA or states with NPDES authority as major permittees. The designation of a permittee as "major" is based on quantity and potential environmental impact of the wastewater source.

EPA's program to monitor compliance with the terms and conditions of issued NPDES permits is primarily designed to ensure the compliance of the major permittees. EPA has not been provided with sufficient resources to routinely monitor the compliance of the remaining minor permittees.

Compliance inspections performed under the NPDES program can be divided into two general categories: 1) those

inspections based on administrative factors; and 2) those inspections based on specific evidence of an existing violation, e.g. civil probable cause.

Inspections based on the second category are not neutral since they are based on prior knowledge of apparent or probable permit violations. Factors which constitute specific evidence include: 1) violations reported on recent DMR's; 2) citizen complaints; 3) response to emergency situations, such as threats to public health or safety; 4) follow-up to previous inspections which indicated violations; and 5) specific enforcement case support.

For targeting inspections which rely strictly on administrative factors, the Agency has developed the following neutral inspection plan.

B. UNIVERSE OF NPDES INSPECTION CANDIDATES

The EPA, upon the presentation of credentials, has the authority to enter and inspect all NPDES permitted facilities at any time regardless of other factors such as "major" or "minor" designations. Because of limited resources, not all facilities are targeted for inspections each year. The frequency with which compliance inspections are performed is based on the discharger's environmental significance, available resources, the types and mix of inspections being employed, climatic and geographical influences on inspection logistics, and other factors influencing compliance monitoring such as the ability to follow up on inspection findings.

C. BASIC SELECTION CRITERIA

When targeting permittees of neutral compliance inspections, the time that has passed since the last inspection and the geographical grouping of the permittees are the only factors which may be considered. Other information, such as data from DMR's which indicated apparent violations, would not be used since this would constitute probable cause under the civil standard. However, the existence of such data would not preclude the facility from being considered for a neutral inspection if this neutral plan is followed during the selection process.

The only permittees who would not be considered when targeting neutral compliance inspections are permittees who are in current litigation with EPA. This does not apply to state litigation.

D. NEUTRAL COMPLIANCE INSPECTIONS

To target inspections based on a neutral inspection plan, Regions will first determine the length of time that has passed since the last EPA or state inspection for all major permittees. This can be done easily using the capabilities of the Permit Compliance System (PCS) available in each EPA Regional Office. A PCS report can be generated which will print out each major permittee in order by the date of the last inspection. Appendix A contains a sample list which the PCS System can generate. A separate report should be

generated for each state in the Region. In some cases, it may be appropriate to use subdistricts (by county) of a state depending on the organizational structure in a specific state or Region. The permittees which are highest on the list (greatest time since last inspection) will have the highest priority for neutral inspections.

In order to minimize use of Agency resources, inspection targeting should be based on both the priority list and geographical grouping. For example, any permittee on the list may be targeted for an inspection if it is in close physical proximity to a facility which is very high on the list. This is extremely important as it allows the most efficient use of the limited inspection resources. The PCS System can give t- names and most recent inspection dates for all permittees which are in the same county as a permittee which is selected for an inspection.

The priority list will identify only those facilities which are possible targets for compliance inspections during the current fiscal year. The exact timing of these inspections during the fiscal year will be at the discretion of the Regional Office, based on logistics and specific Regional needs.

The list of permittees targeted for inspections may be amended at any time during the fiscal year. Similarly, before the start of a new fiscal year, Regional Offices should

reassess all permittees regardless of whether all previously targeted inspections have been completed for the current fiscal year.

E. INSTRUCTIONS FOR TARGETING INSPECTIONS BASED ON THE POINT ASSESSMENT SYSTEM

To use the neutral inspection plan, Regional Offices will first determine the percentage of inspection resources that will be devoted to neutral administrative inspections. This will depend, to a large extent, on the ongoing enforcement case load and the percentage of major permittees which have probable violations of effluent limitations and compliance schedules. For example, a Region may allocate the following resources for neutral inspection activities:

a) 10% of the Compliance Sampling Inspection resources,

b) 25% of the Performance Audit Inspection resources; and

c) 50% of the Compliance Evaluation Inspection resources.

The remaining Regional inspection resources would be reserved for inspections based on probable cause and specific enforcement case support.

The Region should next determine the approximate number of neutral inspections that can be completed using the resources allocated for each inspection type (CSI, CEI, PAI). This number will be flexible depending on the type and/or the number of outfalls and size of the permitted facility.

For each state, starting with the permittees highest on the list, proceed down the priority list until about one third of the neutral inspection resources for that state have been allocated. For example, if the allocated inspection resources for neutral inspections in a particular state are enough for 30 inspections, approximately the first 10 permittees on the priority list would be targeted. The Region should then use the remaining 20 inspections for permittees which are grouped with the already targeted candidates based on common geographical and/or special technical considerations. For example, a Region may target a sampling inspection at a facility with a high point rating, and then target several more sampling inspections, CEI's or PAI's in the same geographic area. This would allow all these inspections to be done on one inspection trip.

Regions may target inspections to single facilites at times, such as when the facility is in close proximity to Regional Offices or Field Offices.

A specific percentage of inspection resources are set aside each fiscal year for enforcement case support activities and emergency response. By the last quarter of the fiscal year, Regions should know to what extent these set-aside resources will be available for routine inspections. To the extent that these resources become available, they should be utilized to inspect the remaining permittees on the priority list.

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Appendix A

The following two pages are sample printouts from the Permit Compliance System (PCS) for the State of New Jersey. Printout 1 gives a partial listing of major NPDES facilities in order by the date of the last inspection. Permittees with no date listed for inspections have not had an inspection which was noted in PCS. These permittees will have the highest priority for neutral inspections.

Printout 2 is a list of permittees and inspection dates by county (for New Jersey). This Printout is used to identify permittees which may be in close physical proximity to facilities which were chosen for inspections from Printout 1.

ALL MAJOR FACILITIES AND THEIR LATEST INSPECTION

REGION=02 STATE=NJ

NAME	IDATE	ITYPE	INSP	NPDES	CITY	CNTY
ATLANTIC COUNTY S.A.				NJ0024473	ATLANTIC CITY	ATLANTIC
HAMILTON TWP MUA	780215	C	N	NJ0021393	HAYS LANDING	ATLANTIC
CITY OF EGG HARBOR	770215	C	S	NJ0024589	EGG HARBOR CITY /C/	ATLANTIC
TOWN OF HAMMONTON	790611	C	S	NJ0025160	HAMMONTON	ATLANTIC
BUENA BOROUGH MUA	791003	C	S	NJ0021717	BUENA BORO	ATLANTIC
SCIENTIFIC CHEMICAL PROCESSING				NJ0003212	CARLSTADT BORO	BERGEN
JOINT MTG RUTH-E,RUTH-CARL,	751125	C	R	NJ0022756	RUTHERFORD	BERGEN
DIAMOND SHAMROCK CORP	770328	C	N	NJ0002798	CARLSTADT BORO	BERGEN
TECHNICAL OIL PRODUCTS INC	780626	C	N	NJ0005754	CARLSTADT BORO	BERGEN
MATHESON GAS PROD. CO.	780629	C	R	NJ0002721	EAST RUTHERFORD	BERGEN
ROYCE CHEMICAL CO	780911	C	R	NJ0002502	EAST RUTHERFORD	BERGEN
HAPCAL PAPER MILLS INC	780914	C	N	NJ0002674	EAST PATERSON	BERGEN
BENDIX CORP.	781025	S	N	NJ0002697	TETERBORO	BERGEN
ADCX CORPORATION,	790301	C	S	NJ0004130	HAHWAH TWP	BERGEN
INTERMEDIATES DIV-TENN. CHEM.	790328	C	R	NJ0002124	GARFIELD	BERGEN
HACKENSACK WATER COMPANY	790329	C	N	NJ0003310	OLDELL	BERGEN
BOROUGH OF EDGEWATER	790329	C	S	NJ0020591	EDGEWATER BORO	BERGEN
FORD MOTOR CO HAHWAH	790419	C	S	NJ0002704	HAHWAH TWP	BERGEN
LEVER BROTHERS CO.	790516	C	S	NJ0002193	EDGEWATER BORO	BERGEN
TRANSCONTINENTAL GAS PIPE LINE	790606	C	S	NJ0002101	CARLSTADT BORO	BERGEN
BERGEN COUNTY UTILITIES AUTH.	790620	C	R	NJ0020028	LITTLE FERRY /BORO/	BERGEN
UNIVERISAL OIL PROD.	790702	C	S	NJ0001252	EAST RUTHERFORD	BERGEN
NORTHWEST BERGEN COUNTY S.A.	790802	C	S	NJ0024813	WALDWICK	BERGEN
HAHARD CORPORATION	790912	C	S	NJ0023868	NORTH ARLINGTON	BERGEN
NO.ARLINGTON LYNDHURST JNT MTG	791019	C	R	NJ0025271	NORTH ARLINGTON	BERGEN
PUBLIC SERVICE ELEC & GAS	791128	C	S	NJ0000621	RIDGEFIELD BORO	BERGEN
BOROUGH OF FAIR LAWN NJ	800108	C	S	NJ0023571	FAIRLAWN	BERGEN
VILLAGE OF RIDGEWOOD	800305	C	S	NJ0024791	RIDGEWOOD /V/	BERGEN
CITY OF BORDENTOWN DPW	741211	C	R	NJ0024678	BORDENTOWN /C/	BURLINGTON
BEVERLY SEWERAGE AUTHORITY	770203	C	S	NJ0027481	BEVERLY /CITY/	BURLINGTON
STEPAN CHEM CO HID CHEM DIV	770210	C	R	NJ0005410	FIELDSBORO	BURLINGTON
HOORESTOWN TWP STP	771205	C	R	NJ0024996	HOORESTOWN TWP	BURLINGTON
HILLINGBORO MUA STP	771206	C	R	NJ0023361	HILLINGBORO TWP	BURLINGTON
BURLINGTON TWP MAIN STP	771212	C	N	NJ0021709	BURLINGTON /TWP/	BURLINGTON
CITY OF BURLINGTON	771212	C	R	NJ0024660	BURLINGTON /C/	BURLINGTON
IONAC CHEM CO DIV OF SYBRON	780830	C	R	NJ0005509	BIRMINGHAM	BURLINGTON
TENNECO CHEMICALS INC	781004	S	R	NJ0004391	BURLINGTON /TWP/	BURLINGTON
GRIFFIN PIPE PRODUCTS	781212	S	N	NJ0005096	FLORENCE TWP	BURLINGTON
MOUNT LAUREL MUA	790103	S	R	NJ0025178	MOUNT LAUREL TWP	BURLINGTON
EVESHAM MUA	790215	C	S	NJ0024040	EVESHAM TWP	BURLINGTON
MEDFORD TOWNSHIP	790215	C	S	NJ0026932	MEDFORD	BURLINGTON
BURLINGTON TWP LA GORCE SQUARE	790307	C	S	NJ0021695	BURLINGTON /TWP/	BURLINGTON
DELRAN SEWERAGE AUTHORITY	790314	C	S	NJ0023507	DELRAN TWP	BURLINGTON
MOUNT HOLLY SEWERAGE AUTHORITY	790314	C	S	NJ0024015	MOUNT HOLLY	BURLINGTON
MOUNT LAUREL MUA	790417	C	S	NJ0023981	MOUNT LAUREL TWP	BURLINGTON
MAC-MCGUIRE AFB	790425	C	S	NJ0022578	BURLINGTON /C/	BURLINGTON
HOOKER CHEMICAL CORP	790427	C	N	NJ0004235	BURLINGTON /TWP/	BURLINGTON
HERCULES INC	790502	C	S	NJ0005142	BURLINGTON /TWP/	BURLINGTON
FORT DIX	790517	C	S	NJ0004955	FORT DIX	BURLINGTON
ARMAX COMPANY	790530	C	S	NJ0004588	MAPLE SHADE	BURLINGTO
P S C SE.	790619	C	S	NJ0005002	BURLINGTON /C/	BURLINGT
	790619	C	S	NJ0005690	BURLINGTON COUNTY B	BURLING

THE PERMIT COMPLIANCE 9125 MONDAY, JUNE 16, 1980

ALL MAJOR FACILITIES AND THEIR LATEST INSPECTION

REGION=02 STATE=NJ

NAME	IDATE	ITYPE	INSP	NPDES	CITY	CNTY
PSE&G CO HARRISON GAS PLANT				NJ0000566	HARRISON	HUDSON
PUBLIC SERVICE ELEC & GAS				NJ0000582	EDISON /TWP/	MIDDLESEX
PUBLIC SERVICE ELEC & GAS				NJ0000639	NEWARK	ESSEX
PUBLIC SERVICE ELEC & GAS				NJ0000671	JERSEY CITY /C/	HUDSON
AL INDUSTRIES				NJ0000931	SAYREVILLE	MIDDLESEX
BRIFFANY PAPERBOARD CO,				NJ0001457	CLIFTON	PASSAIC
SCHERING CORP,				NJ0002305	KENILWORTH	UNION
E.I. DU PONT DE NEMOUR CORP,				NJ0002640	LINDEN	UNION
SCIENTIFIC CHEMICAL PROCESSING				NJ0003212	CARLSTADT BORO	BERGEN
PFIZER INC,				NJ0003484	PARSIPPANY	MORRIS
PORT AUTHORITY OF N Y AND N J				NJ0003824	NEWARK	ESSEX
BORDEN INC-SHOW FOOD PROD,				NJ0004901	CAPE MAY	CAPE MAY
P,S,E,& G MERCER GENER STA				NJ0004995	HAMILTON /TWP/	MERCER
ATLANTIC CITY ELEC,				NJ0005353	PENNS GROVE	SALEM
JERSEY CENTRAL POWER & LIGHT				NJ0005517	MILFORD	HUNTERDON
JERSEY CENTRAL POWER & LIGHT				NJ0005550	LACEY TWP	OCEAN
P,S,E, & G,				NJ0005622	HANCOCKS BRIDGE	SALEM
CITY OF ELIZABETH				NJ0020648	ELIZABETH /C/	UNION
PASSAIC VALLEY SEWERAGE COMM				NJ0021016	NEWARK	ESSEX
MOBIL CHEMICAL DIST, SER,				NJ0024392	CARTERET	MIDDLESEX
ATLANTIC COUNTY S.A.				NJ0024473	ATLANTIC CITY	ATLANTIC
CUMBERLAND COUNTY UTILITIES AU				NJ0024651	BRIDGETON /C/	CUMBERLAND
MONMOUTH CO, BAYSHORE OUTFALL				NJ0024694	MIDDLETOWN	MONMOUTH
CITY OF NEWARK DPW				NJ0024724	NEWARK	ESSEX
P,S,E,& G HOPE CREEK				NJ0025411	LOWER ALLOWAYS CREEK	SALEM
CITY OF ORANGE DPW				NJ0025925	ORANGE /C/	ESSEX
PEQUANNOCK LIN,FK,& FAIRFILD S				NJ0029305	LINCOLN PARK	MORRIS
OCEAN COUNTY SEWERAGE AUTH,				NJ0029408	BERKELEY TWP	OCEAN
CITY OF BORDENTOWN DPW	741211	C	R	NJ0024678	BORDENTOWN /C/	BURLINGTON
OLIN CORPORATION	750305	S	R	NJ0005088	PAULSBORO	GLOUCESTER
FOSTER GLASS WORKS	750904	S	R	NJ0004715	SALEM	SALEM
JOINT MTG PUTN-E,RUTH-CARL,	751125	C	R	NJ0022756	RUTHERFORD	BERGEN
PUBLIC SERVICE ELECTRIC & GAS	760305	C	G	NJ0000663	LINDEN	UNION
PUBLIC SERVICE ELEC & GAS	760326	C	S	NJ0000680	WOODBRIDGE	MIDDLESEX
PICATINNY ARSENAL	761109	C	R	NJ0002500	DOVER	MORRIS
CAMDEN COUNTY MUA	761110	C	S	NJ0026182	CAMDEN	CAMDEN
BEVERLY SEWERAGE AUTHORITY	770203	C	S	NJ0027481	BEVERLY /CITY/	BURLINGTON
STEPAN CHEM CO LED CHEM DIV	770210	C	R	NJ0005410	FIELDSBORO	BURLINGTON
DIAMOND SHAMROCK CORP	770328	C	R	NJ0002798	CARLSTADT BORO	BERGEN
CHEVRON OIL CO	770627	C	R	NJ0000264	ELIZABETH /C/	UNION
CHEMICAL CONTROL CORPORATION	770805	C	R	NJ0024201	ELIZABETH /C/	UNION
WARNER-CHILCOTT LABORATORIES	770811	C	S	NJ0002542	MORRIS PLAINS	MORRIS
PEINZ USA SALEM	770831	C	R	NJ0004693	SALEM	SALEM
FLORHAM PARK SEW, AUTH,	770907	S	R	NJ0025518	FLORHAM PARK	MORRIS
TOWN OF WEST NEW YORK	771130	C	R	NJ0025321	WEST NEW YORK,	HUDSON
MOORESTOWN TWP STP	771205	C	R	NJ0024996	MOORESTOWN TWP	BURLINGTON
WILLINGBORO MUA STP	771206	C	R	NJ0023361	WILLINGBORO TWP	BURLINGTON
BURLINGTON TWP MAIN STP	771212	C	R	NJ0021709	BURLINGTON /TWP/	BURLINGTON
CITY OF BURLINGTON	771212	C	R	NJ0024660	BURLINGTON /C/	BURLINGTON
HAYS [illegible] TWP MUA	780215	C	R	NJ0021393	HAYS LANDING	ATLANTIC
CHE [illegible] TOWNSHIP	780223	C	S	NJ0025194	CHERRY HILL /TWP/	CAMDEN
	780220	C	R	20955	LINDEN	UNION

"NPDES INSPECTION STRATEGY AND GUIDANCE FOR PREPARING ANNUAL STATE/EPA COMPLIANCE INSPECTION PLANS", dated April 1985 with transmittal dated April 16, 1985.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

APR 16 1985

OFFICE OF WATER

MEMORANDUM

SUBJECT: Transmittal of the Final NPDES Inspection Strategy and Guidance for Preparing Annual State/EPA Compliance Inspection Plans

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

TO: Regional Water Management Division Directors
Regional Environmental Services Division Directors
State Program Directors

Attached are the final NPDES Inspection Strategy and the Guidance for Preparing Annual State/EPA Compliance Inspection Plans. The Strategy and Guidance were developed during December 1984 with the assistance of a workgroup composed of representatives from six EPA Regions and two States, and the EPA Headquarters Offices of Water Enforcement and Permits, and Enforcement and Compliance Monitoring. In January 1985 the Strategy and Guidance were sent to EPA Regions and to all States through the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). Comments were received from nine EPA Regions and four States. In addition, the Inspection Strategy and Guidance were discussed briefly at the ASIWPCA meeting in Washington, D.C., February 1985. The resulting documents reflect those discussions as well as EPA Regional and State comments.

The comments were helpful in focusing on specific areas where clarification was needed. We believe we have accomplished our common goal of producing an overall national structure for NPDES inspection programs, which will serve as a model for EPA Regions and States during implementation.

The Inspection Strategy deals with issues such as inspection priorities, inspection mix, inspection report timeliness and reporting forms, and State/EPA relationships. The Guidance for Preparing Annual State/EPA Compliance Inspection Plans, along with the Strategy, are being transmitted to Regions in time for the FY 1986 planning cycle and should be used as a general guide and framework for planning the annual inspection programs in each State.

These documents should be used in conjunction with the Agency Annual Operating Guidance and the Annual Guidance for Oversight of NPDES Programs. The Inspection Strategy and Guidance will eventually be incorporated into the new Enforcement Management System Guide which is presently being revised by an EPA Region/State workgroup.

Some additional language on pretreatment has been added to the Inspection Strategy in response to the final Pretreatment Implementation and Review Task Force Report. However, at present the Inspection Strategy and Guidance do not contain detailed information on pretreatment and sludge inspections. Information on pretreatment will be provided later in specific guidance and in the Strategic Planning and Management System.

If you have any questions on the Inspection Strategy or Guidance, please contact David Lyons, Chief, Enforcement Support Branch, Enforcement Division (FTS or 202/475-8310).

Attachment

United States
Environmental Protection
Agency

Office of Water
Enforcement and Permits (EN 338)
Washington DC 20460

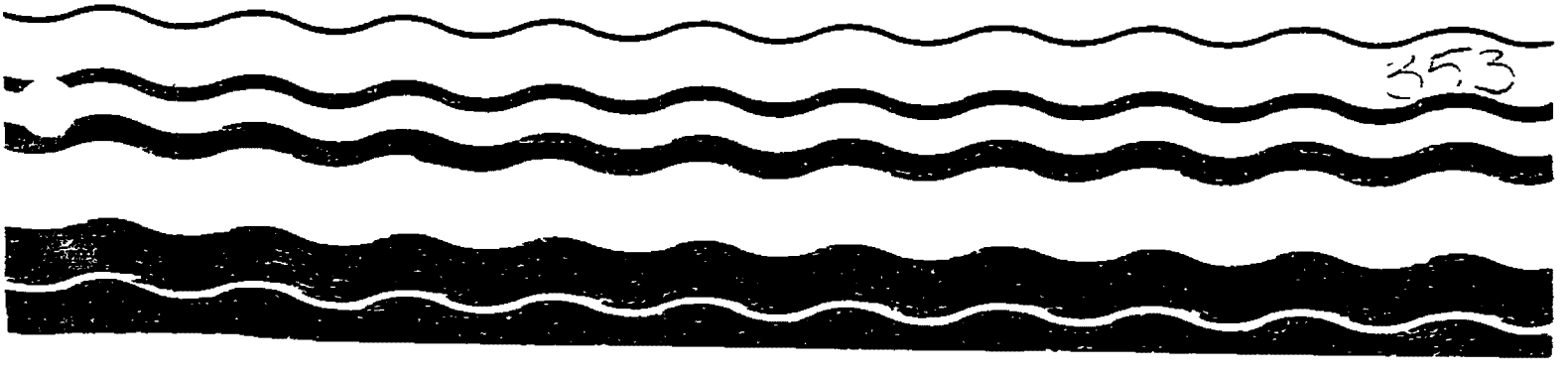
EPA

NPDES INSPECTION STRATEGY

and

GUIDANCE FOR PREPARING ANNUAL STATE/EPA COMPLIANCE INSPECTION PLANS

Office of Water Enforcement and Permits
April 1985



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Highlights

NPDES Inspection Strategy and Guidance for Preparing State/EPA Compliance Inspection Plans

NPDES Inspection Strategy

The Inspection Strategy is divided into five main sections: Background, Inspection Coverage, Mix of Inspections, Reporting, and EPA/State Relationships.

Background

- Explains that both EPA and the State share responsibility for developing and carrying out the NPDES Compliance Inspection Programs.
- Sets out the major purposes of these inspections which are to: satisfy the regulations, verify permittee compliance, develop enforcement information, improve permittee performance, improve data quality assurance, provide State overview, respond to citizen complaints and water quality problems, support permit development, and maintain regulatory presence.

Inspection Coverage

- Explains what types of Inspections make up the total NPDES Inspection scheme, including the Reconnaissance Inspection.
- States that all major NPDES permittees should be inspected at least once a year by EPA or the State.
- Expands coverage of major POTW inspections to include a pretreatment component where the POTW has an approved program.
- Establishes inspection priorities of (1) Inspections to respond to emergency circumstances and public health problems; (2) Inspections to support enforcement and potential enforcement actions; (3) Inspections to support development of major permits; and (4) Routine compliance monitoring inspections.

Mix of Inspections by Type

- Makes it clear that the mix of inspections within each State will be tailored to the needs in each State.
- Establishes the idea that a core capability will be maintained for conducting each type of inspection within the geographic boundaries of each State, and that EPA and State should work to eliminate unnecessary redundancies.

Reporting

° Describes how inspection data should be reported to EPA and how the results of the inspections should be reported.

° Makes it clear that the inspection reports are complete when they contain all necessary supporting data and have been signed by the reviewer.

° Establishes the fact that the Form 3560-3 must be filled out in order for the inspection to be entered into PCS (except when a State enters data directly to PCS) and in order to receive credit in SPMS. Timeliness criteria are established for completion of reports and entering data into PCS.

EPA State Relationships

° Makes it clear that the Annual Inspection Plan should be part of the Annual §106 grant agreement or the State/EPA agreement.

° Sets out the concept of joint planning using the Annual State/EPA Inspection Plan.

Guidance for State EPA Compliance Inspection Plans

The following are the major categories of the Guidance:

Background

° Explains that a 1983 evaluation showed the State/EPA planning documents lacked specific details needed to coordinate inspection activities, to manage resources, and avoid duplication.

° States that the Annual Inspection Plans are developed to correct these problems.

Purpose of the Plan

° To provide a basis for achieving National NPDES goals, and to coordinate and improve use of the compliance inspection resources.

Content of Plan

° Includes such specific items as workload projections, number and mix of inspections, criteria for selecting inspection candidates and procedures and timeframes for inspection reports and data entry.

Approval of Plan

° Plan is to be signed by the State and Regional program directors.

Implementing the Plan

° Establishes that the Region will normally provide prior notice to the State before conducting independent inspections, and that States will be apprised of major inspection problems as soon as they are discovered.

Evaluation of the Results

° The plan should contain procedures for the ongoing evaluation of a State inspection program through such means as periodic random audits of inspection reports and case files.

° The level and frequency of the State inspection program evaluation should be tailored to the State's overall performance in the inspection program.

Introduction

For FY 1985 the Office of Water Enforcement and Permits (OWEP) established as a major goal the completion of an NPDES Inspection Strategy, and the Guidance for State/EPA Inspection Plans. The Inspection Strategy is designed to describe how OWEP and the Regional Offices address questions on who, when and how to inspect. It addresses such issues as mix of inspections, coverage, EPA/State relationships and reporting on inspections.

The Guidance for Preparing Annual State/EPA Compliance Inspection Plans resulted from the FY 1983 OWEP evaluation of EPA inspection programs, which showed that the then current documents such as grant agreements lacked specific detail needed to coordinate inspections, manage resources and avoid duplication. The results of the evaluation included a recommendation to prepare annual EPA/State Compliance Inspection Plans. The Guidance for State/EPA Inspection Plans discusses how to go about preparing those Plans.

The Inspection Strategy and the Guidance for Preparing Annual State/EPA Compliance Inspection Plans are the major documents on managing the Inspection Program. Earlier OWEP documents dealing with program operations, strategies and memoranda are superseded by these two documents. Guidance that should be used in conjunction with the two above cited documents for program management include but are not limited to:

- Annual EPA Operating Guidance,
- Annual Strategic Planning and Management System documents,
- Annual OWEP Guidance for Oversight of NPDES Programs,
- Annual Workload Model for Water Quality Enforcement,
- Enforcement Management System, as revised, and
- NPDES Neutral Inspection Plan (2-17-81).

Manuals describing procedures for conducting inspections are found as Item A in the Appendix.

It should be noted that the NPDES Inspection Strategy and Guidance provide information primarily on the NPDES inspection program, and do not address many special concerns of the pretreatment and sludge programs. These concerns will be addressed in supplements to this document which will be issued within the next year.

NPDES INSPECTION STRATEGY

Background and Purpose

NPDES Compliance Inspections are a vital tool in implementing the NPDES Program. There is a ten-year history of NPDES inspections being conducted by EPA (and State) inspectors in NPDES as well as non-NPDES states. State Inspection programs have been funded through the Clean Water Act §106 grants to States. This Strategy attempts to restate, amplify and clarify the current approach Regions and States should be using to implement the NPDES inspection program. This Strategy should be used as a framework for Regional and State managers in developing a State-specific inspection program, and applies to both approved NPDES States and unapproved States.

EPA's primary role with respect to each State's inspection program, regardless of approval status, will be to: provide enforcement support; overview State inspection programs to ensure they are consistent with national guidance manuals; provide quality assurance, technical assistance and training; and augment State routine compliance inspection programs.

The EPA and States are responsible for developing and carrying out inspection programs for NPDES Compliance Monitoring in each State. The programs for each State follow a lead agency concept: States have lead responsibility, when their NPDES programs are approved, and EPA has responsibility in non-NPDES States. These programs serve many purposes. Some of the most important of these are to:

- Verify permittee compliance
  - verify self-monitoring information submitted
  - verify adequacy of pretreatment programs
- Satisfy the regulations which require inspections of all majors once a year
- Develop enforcement information
- Improve permittee performance
  - provide technical information and assistance
  - improve data quality (follow-up to Discharge Monitoring Report - Quality Assurance (DMR-QA))
- Provide State overview
- Respond to citizen complaints
- Respond to water quality problems
- Support permit development
- Maintain regulatory presence

Coverage

The NPDES Regulations at 40 CFR 123.26(e)(5) require States which administer the NPDES program to have procedures and abilities for inspecting all major dischargers (permittees) at least annually. As a matter of policy, all major NPDES permittees shall be inspected annually by a combination of Regional and State effort.

The annual inspection requirement may be satisfied by using any of the standard compliance inspection protocols described in the Appendix, Item B. Each State Inspection Program will continue to provide comprehensive inspections, but at the discretion of the Region or State, the Reconnaissance Inspection (RI) will be recognized as an integral part of each State's total inspection mix. The RIs may be used on a selective basis to satisfy the coverage requirement, but may not be used for any major permittees in the following categories:

- a facility that has been in significant non-compliance in any of the previous four quarters,
- a facility in a primary industrial category as defined in 40 CFR 122 Appendix A, or
- a facility to which pretreatment requirements apply.

The purpose of allowing RIs to be used to satisfy the routine compliance inspection coverage requirements for major facilities is to focus more intensive inspections on problem facilities. It would be most appropriate to allow an RI to satisfy the coverage requirement when the facility is subject to frequent visits and its operational characteristics are well known to the permitting authority. It would be generally inappropriate to use an RI to satisfy the annual coverage requirement for a major facility in two successive years. It should also be noted that if the results of an RI indicate significant problems in a facility's operations or discharge, the problems will be addressed as soon as possible by conducting a more comprehensive inspection or other followup action.

In each State, inspection coverage will address the following priorities, which are arranged from the more important to the less important (there will also be amplification in each year's Annual Operating Guidance):

- Inspections to respond to emergency circumstances and public health problems.
- Inspections to support enforcement and potential enforcement actions.
- Inspections to verify data quality, to follow up on Discharge Monitoring Report -- Quality Assurance (DMR QA).

- Inspections to support development of major permits.[1]

- Routine compliance monitoring inspections with all major facilities covered first, minor PL92-500 facilities,[2] then other minor facilities including those covered by general permits.

NPDES Inspection plans for major POTWs which have approved pretreatment programs will need to be expanded to cover implementation of these programs. Generally, it will be most cost-effective to combine the permit effluent limit compliance and pretreatment inspections. This inspection activity should begin as soon as possible; however, both the scope of the inspection and coverage of approved POTW programs will have to be phased in during FY 1985 - 1986 taking into account availability of resources, timing and availability of pretreatment audits and awareness of problems. (More detailed guidance on pretreatment inspection procedures will be forthcoming, as a supplement to this Strategy and the Compliance Inspection Manual.)

The number of joint EPA-State inspections and the number of EPA and State independent inspections will be negotiated between the EPA Region and the State, and included as part of the State/EPA Annual Inspection Plan. Each Region of EPA will maintain an independent inspection program to carry out its enforcement and overview responsibilities. The Region will normally provide prior notice to the State before conducting independent inspections. The only limited exception would be where investigative inspections would be jeopardized by the prior notice.

The coverage to satisfy the total inspection need in a State will be a responsibility that is shared by both the Region and State. However, direction is provided by the lead agency. In NPDES States, the State should take the lead in operating the inspection program (with EPA maintaining an independent inspection effort as noted above). In non-NPDES States, EPA has the lead responsibility for operating the inspection program.

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[1] This should be limited to situations where the applicant's data gathering techniques are a matter of contention and all other options for acquiring the information have been exhausted.

[2] Regional Offices will provide limited inspection coverage for minor permittees. Specific coverage will be negotiated with States as part of the Annual State Inspection Plans.

Routine inspections are also known as neutral inspections as opposed to "for cause" inspections described in the first two priorities. This distinction resulted from the decision in Marshall V. Barlow's, Inc. which required different approaches in selection of facilities for these inspections. (US, 98 S. Ct. 1816 (1978)).

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The lead agency concept will in no case exclude either EPA or a State from conducting independent inspections as prescribed in the above paragraph.[3] Where EPA is relying on inspections by an unapproved State to satisfy NPDES inspection needs, it must assure the federal NPDES permit requirements are covered in the State inspection along with the State requirements.

Mix of Inspections by Type

The type of inspection will be tailored to the individual purposes to be achieved by the inspection. The mix of inspections within each State in turn will be tailored to the needs in each State.

A recommended mix of inspections will be developed annually, in connection with allotment of EPA resources to the Regions in the National Water Quality Enforcement Workload Model. In each State, the recommended mix can be used as a guide in planning the annual State inspection coverage, which is established in the annual State EPA compliance inspection plan. The individual State inspection mix will be tailored to the particular needs of the State such as: a disproportionately large number of self-monitoring and laboratory problems among major permittees that need to be addressed with performance audit inspections, or a large number of dischargers with toxics limits problems that require toxics sampling inspections.

In selecting appropriate inspection types for special or routine problems, the definitions of inspections (Item B, Appendix) and the "primary use" criteria (Item C, Appendix) should be used as a general guide. The type of inspection selected depends on the compliance status, type of facility, and the nature of the information needed from an inspection.

Each Region should assure that a core capability for conducting each type of inspection is maintained within the geographic boundaries of the Region. Each State program should be supported where necessary by technical capability at the Regional level. Unnecessary redundancy and duplication should be avoided without sacrificing the ability of States and Regions to carry out their respective roles and responsibilities.

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[3] Under §309 of the Clean Water Act, EPA must take enforcement action when the State does not commence appropriate enforcement action. Consequently, EPA must maintain its own inspection program and must maintain enforcement presence through field activities, as required in §308 of the Clean Water Act.

Reporting

In order to describe accurately the full extent of the inspection program, the Regions and States are encouraged to report on all NPDES inspections. Data on inspections of major permittees should be reported in the Permit Compliance System (PCS), whenever possible. When 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 entry into PCS by EPA. To the extent possible, EPA encourages reporting on inspections of minor permittees in PCS; otherwise data should be reported to the Region manually in a format that includes at least the name of the facility, permit number, the type of inspection and the date of the inspection.

The organization conducting the inspection is responsible for providing reports that are complete and available in a timely manner.

An inspection report is complete when it contains all the inspector's observations, the analytical results, a completed form 3560-3 (Appendix, Item D), and evidence of peer/management review and signature of the reviewer. The inspection report should meet timeliness goals as follows:

- for sampling inspections, reports will be distributed within 45 days of the date of the inspection;
- for non-sampling inspections, reports will be distributed within 30 days of the inspection; and
- for entering inspection data into PCS, data entry will be completed within 90 days of the date of the inspection.

The inspection report must contain Form 3560-3 and the information must be entered into PCS to receive credit in Strategic Planning and Management System (SPMS). However, where the State enters data into PCS directly, the State may use an equivalent form if it contains at least the same data elements as Form 3560-3. The format and content of an inspection report are described in the EPA NPDES Compliance Inspection Manual, (June 1994).

Copies of the Inspection Reports should be sent to the permittee in a timely manner except when formal enforcement procedures are underway. In this instance, the case attorney will direct any disclosure of data.

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EPA/State Relationships

EPA overviews the State inspection program through a combination of independent and joint inspections as well as periodic review of inspection reports and files. In order to carry this out, the Annual Inspection Plans are negotiated between EPA and each State in accordance with the Guidance on Annual State/EPA Inspection Plans. Joint inspections will be negotiated as part of each Annual Inspection Plan. The Plan also includes inspection priorities and mix based on the Annual Operating Guidance priorities and the Workload Model recommended mix. The Annual Inspection Plans should establish that a quarterly list of candidates for inspections will be developed within thirty days prior to each quarter. The quarterly list should contain names of major and PL92-500 minor facilities to be inspected and the estimated number of other inspections to be conducted, grouped by inspection type and/or facility category. Annual Inspection Plans should be part of the annual §106 grant agreement or the State/EPA Agreement. To the degree that inspection plans are a part of the §106 process, inspection commitments and Annual State/EPA Inspection Plans may be jointly reviewed during mid-year and end-of-the-year program reviews.

The review of the inspection program should be part of the NPDES program review, and will be based on the Annual Guidance for Oversight of the NPDES Programs.

The Annual State/EPA Inspection Plan will contain procedures for communications between EPA and the State on conducting NPDES inspections within a given State. The detailed requirement for Annual State/EPA Compliance Inspection Plans follows this Strategy, as a separate document entitled "Guidance for Preparing Annual State/EPA Compliance Inspection Plans."

GUIDANCE FOR PREPARING ANNUAL STATE/EPA COMPLIANCE INSPECTION PLANS

Background

EPA has routinely negotiated agreements with States for conducting NPDES Compliance Inspections. The work plans based on these agreements are used to coordinate State/EPA activities and workflows within each State, to manage resources, and to assure that program needs are met to the fullest extent possible. Detailed planning is necessary because States conduct the majority of the compliance inspections.

An evaluation of EPA Regional Inspection Programs in 1983 showed that the current planning documents lack specific details that are needed to coordinate inspection activities, to manage resources, and to avoid duplications. The evaluation concluded that guidance was needed to help Regions and States prepare an annual State/EPA Compliance Inspection Plan (Plan).

This guidance will help EPA and State managers implement the planning requirements of the Compliance Inspection Strategy by: 1) describing the components of the Plan; 2) providing guidance for negotiating the Plan; and 3) providing guidance on evaluating the results achieved by the Plan. This guidance does not apply to procedures for carrying out inspections in support of criminal investigations.

Purpose

The purpose of the Plan is to: 1) provide a basis for achieving National NPDES Program goals and objectives; and 2) coordinate and improve the use of compliance inspection resources in accordance with the Guidance for Oversight of NPDES Programs.

The Plan should contain detailed procedures for communications between the Region and the State concerning the conduct of the NPDES inspection program in the given State.

Content

EPA identifies major NPDES program objectives as part of the Agency's annual operating guidance. The Plan should provide detailed procedures and specific workload projections to support these national objectives. In addition to the national objectives, the Plan should allow the State and EPA to address specific local and regional concerns.

Each Plan should establish annually the number and mix of inspections by type for both the State and Region. The type of inspection should be consistent with definitions and procedures outlined in the Agency's June 1984 NPDES Compliance Inspection Manual. The Plan should contain criteria for selecting inspection candidates for the appropriate mix of routine and special inspections. Each Plan will be prepared for an entire year and will account for the State and EPA resources devoted to NPDES compliance inspections. A quarterly list of facilities that are to be inspected should be established at least 30 days prior to the beginning of the quarter. The quarterly list should contain names of major and PL 92-500 minor facilities to be inspected and the estimated number of other inspections to be conducted that are grouped by inspection type and/or facility category. The status of the Plan should be assessed at established intervals throughout the year.

EPA annually establishes a recommended mix of inspection types through the budget workload model. The model generates a mix that reflects the level of EPA resources, the number of permittees to be inspected, and the emphasis of that National program on various groups of permittees during the budget year. This recommended mix should be used as a guide in preparing the Plan to establish coverage and to meet the priorities of each State.

In order to avoid advance notification to the permittee, specific dates of inspections should not be included in the Plan. The Plan should include a procedure for providing notice to the State prior to inspection where such notice will not jeopardize the purpose of the inspection.

The Plan should specify procedures, timeframes, and formats for producing inspection reports and entering data into PCS. Whenever the State and Region participate in a joint inspection, only the lead agency will complete the inspection form to account for the inspection. The agreement to conduct joint inspections is to be included in the Plan.

The Plan should specify procedures and timeframes by which the inspecting agency (either the Region or the State) will provide copies of inspection reports to the agency that has lead responsibility for NPDES program enforcement.

Development

The Plan should cover inspection activity as specified in the Agency's Annual Operating Guidance. The Plan should be prepared as part of the annual Region/State planning process and it should be incorporated into the §106 Plan or State/EPA Agreement. The Plan should be in place for each State no later than October 1, or the beginning of the State fiscal year.

Approval

The Plan will be cosigned for approval by the State and Regional program directors, who have the respective responsibility for authorizing the resources needed to carry out the Plan. In the Region, this is typically the Water Management Division Director.

Implementation

Ongoing coordination between the State and Region is expected during implementation. [The Region and State should have procedures to establish quarterly a list of facilities that are to be inspected, 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 the Region's findings (mid-year and end-of-year), the State should be apprised of major problems as soon as they are discovered. The Plan may be modified as needed to ensure that it reflects changing conditions throughout the year.

Evaluation of Results

The Plan should contain procedures for ongoing evaluation of the State inspection program, including periodic random audits of inspection reports and case files. In addition to ongoing evaluatio the Region will conduct at least an annual audit of the State inspection records and management system. Review of the inspection program should be part of the NPDES program review process, and the level and frequency of overview should be tailored to the State's overall performance in the inspection activity category.

Appendix

REFERENCES

1. Compliance Biomonitoring Inspection Manual (MCD-62, EPA, 1981)

2. Compliance Evaluation Inspection Manual (MCD-75, EPA, 1981)

3. Compliance Evaluation and Troubleshooting at Municipal Wastewater Treatment Facilities (EPA-430/9-78-001)

4. Compliance Flow Measurement Inspection Manual (MCD-77, EPA, 1981)

5. Compliance Sampling Inspection Manual (MCD-51, EPA, 1979)

6. Model State Water Monitoring Program (EPA-440/9-74-002)

7. Multi-Media Compliance Audit Inspection Manual (EPA-297/2-83-002)

8. Performance Audit Inspection Manual (EPA-330/1-79-004)

9. NPDES Compliance Inspection Manual (EPA/OWEP-6/84)

NPDES INSPECTION DEFINITIONS

Compliance Evaluation Inspection (CEI)

A CEI is a nonsampling inspection designed to verify permittee compliance with applicable permit self-monitoring requirements and compliance schedules. This inspection is based on record reviews and visual observations and evaluations of the treatment facilities, effluents, receiving waters, etc. The CEI is used for both chemical and biological self-monitoring programs. The CEI forms the basis for all other inspection types except the Reconnaissance Inspection. As the CEI does not involve sampling, it is frequently used as a "routine" inspection.

The CEI is appropriate for routine inspections of facilities to overview construction schedules, general plant operations and maintenance, record-keeping, and sampling. As the basic element of all NPDES inspection activity the evaluation can also concentrate on program areas such as pretreatment and discharge monitoring report quality assurance. The pricing factor for the CEI is 3 days for a major and 2 days for a minor permittee.

Compliance Sampling Inspection (CSI)

During the CSI, representative samples of a permittee's influent and/or effluent are collected. Samples that are required by the permit are also obtained. Chemical analyses are then performed and the results are used 1) to verify the accuracy of the permittee's self monitoring program and report and 2) to determine the quantity and quality of effluents, 3) to develop permits, and 4) where appropriate, as evidence for enforcement proceedings. The chemical analysis for the CSI is directed to pollutants which do not require expensive and elaborate procedures such as those involved in Gas Chromatograph-Mass Spectrophotometry. Other pollutants are covered by the Toxics Sampling Inspection. In addition to the above tasks, a CSI incorporates the same objectives and tasks as a CEI. The pricing factor for a CSI is 30 days for a non-municipal and 16 days for a municipal permittee with the resource difference due to the higher number of outfalls at a typical non-municipal facility.

The CSI inspection, because it is more resource intensive, must have a more limited use. The CSI is most often conducted when there is "cause" to suspect major violations of permit requirements and effluent limits.

Performance Audit Inspection (PAI)

The PAI is used to evaluate the permittee's self-monitoring progra The PAI incorporates the same objectives and tasks as a CEI, but in a PAI, the laboratory procedures, data quality, and data handling are examined in greater depth. In a PAI, the inspector actually observes the permittee going through all of the steps on the self-monitoring process from sample collection and flow measurement, through lab analyses, data work-up and reporting. Also, the PAI inspector may leave a check sample for the permittee to analyze. The PAI is more resource intensive than a CEI, but less than a CSI because sample collection and analyses by EPA or the State are not included.

The pricing factor for the PAI is 12 days. The PAI is used to follow up known or suspected problems with permittee self-monitoring such as DMR QA failures or inadequate DMR data.

Compliance Biomonitoring Inspection (CBI)

A CBI evaluates the biological effect of a permittee's effluent discharge(s) on test organisms through the utilization of acute toxicity bioassay techniques. In addition, this inspection includes the same objectives and tasks as CEI.

The pricing factor depends on method of exposure. The static test requires 6 work days and an on-site flow through bioassay requires 30 work days. The CBI should also be directed toward toxic proble It is most likely to be useful for non-municipals and municipals with a large proportion of industrial waste discharging into water quality limited stream segments. For States which have water quality standards for acute toxicity (e.g., Alabama, New Jersey), the results are a direct determination of compliance with the standard. (In addition to these methods, chronic toxicity methods are being developed.)

Toxics Sampling Inspection (XSI)

The XSI has the same objectives as a conventional CSI, however, it places increased emphasis on toxic substances (i.e. the priority pollutants) other than heavy metals, phenols and cyanide, which are typically included in a CSI. Increased resources over a CSI are needed because highly sophisticated techniques are used to sample and analyze for toxic pollutants. The pricing factor for XSI is 35 days. The XSI is usually reserved for toxics problems at non-municipal facilities. These problems may be noncompliance, permit reissuance, or water quality related.

Diagnostic Inspection (DI)

The DI focuses primarily on municipal POTW's that are not in compliance with their permit requirements. The purpose of the DI can be either to assist those POTWs without self-diagnostic capability or to evaluate causes for noncompliance in support of enforcement actions. In either case an objective of the DI is to identify causes for noncompliance which can be corrected in a relatively short period of time and without large capital expenditures. The DI will also have as an objective the identification of major plant deficiencies in operation, design, and/or construction. The pricing factor for a DI is 16 days.

Reconnaissance Inspection (RI)

The RI is used to obtain a preliminary overview of a permittee's compliance program. The inspector performs a brief visual inspection of the permittee's treatment facility, effluents and receiving waters. The RI utilizes the inspector's experience and judgment to quickly summarize a permittee's compliance program. The objective of the RI is to expand inspection coverage without increasing inspection resources. It is the briefest of all NPDES inspections. The pricing factor for an RI is one day.

Legal Support Inspection (LSI)

The LSI is a resource intensive inspection conducted when an enforcement problem is identified as a result of a routine inspection or a complaint. For an LSI, the appropriate resources are assembled to effectively deal with a specific enforcement problem, so there is no established pricing factor.

NPDES INSPECTION USES

Selection Criteria	Inspection Type *
Routine compliance verification and followup on specific problems (i.e. schedules, QA deficiencies, failure to report).	CEI (Compliance Evaluation)
Resolve permittee chronic self-monitoring problems and laboratory deficiencies.	PAI (Performance Audit)
Identify POTW compliance deficiencies that can be resolved quickly at limited cost.	DI (Diagnostic)
Expand regulatory presence with limited inspection resources to verify basic compliance data.	RI (Reconnaissance)
Sample conventional pollutants to verify effluent violations in support of enforcement and/or to support permit development.	CSI (Compliance Sampling)
Sample priority pollutants to verify effluent violations in support of enforcement and/or to support permit development.	XSI (Toxics Sampling)
Screen for effluent acute toxicity in lieu of sampling for priority pollutants and/or verify permit limits or water quality standards for acute toxicity.	CBI (Compliance Biomonitoring)
Provide intensive field investigation, technical analysis, and expert witness capability to support litigation, often as the result of routine inspection or complaint.	LSI (Legal Support)

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* Any of the inspection types with the exception of the Reconnaissance Inspection may be used for pretreatment program verification and for direct determination of industrial user compliance with categorical pretreatment standards.

Item D

EPA

Washington D C 20460

NPDES Compliance Inspection Report

Form Approved
OMB No 2040 0003
Approval Expires 7 31 85

Section A National Data System Coding

Transaction Code	NPDES	yr/mo/day	Inspection Type	Inspector	Fac Type
1 2 5	3 11	12 17	18	19	20

Remarks

Reserved	Facility Evaluation Rating	BI	QA	Reserved
67 69	70	71	72 73	74 75 80

Section B Facility Data

Name and Location of Facility Inspected	Entry Time/Date AM PM	Permit Effective Date
	Exit Time/Date	Permit Expiration Date

Name(s) and Title(s) of Facility Representative(s)	Title(s)	Phone No(s)

Name, Address of Responsible Official	Title	
	Phone No	Contacted ☐ Yes ☐ No

Section C Areas Evaluated During Inspection

(S = Satisfactory M = Marginal U = Unsatisfactory N = Not Evaluated)

Permit	Flow Measurement	Pretreatment	Operations & Maintenance
Records/Reports	Laboratory	Compliance Schedules	Sludge Disposal
Facility Site Review	Effluent/Receiving Waters	Self Monitoring Program	Other

Section D Summary of Findings/Comments (attach additional sheets if necessary)

Name(s) and Signature(s) of Inspector(s) | Agency Office/Telephone | Date

Signature of Reviewer | Agency Office | Date

Action Taken

Regulatory Office Use Only

Date

Compliance Status
☐ Noncompliance
☐ Compliance

EPA Form 3560 3 (Rev 3 85) Previous editions are obsolete

INSTRUCTIONS

Section A. National Data System Coding *(i e , PCS)*

Column 1 · Transaction Code. Use N, C, or D for New, Change, or Delete All inspections will b w unless there is an error in the data entered

Columns 3-11 NPDES Permit No Enter the facility s NPDES permit number *(Use the Remarks columns to record the State permit number, if necessary)*

Columns 12-17 Inspection Date Insert the date entry was made into the facility Use the year/month day format (e g , 82 06/30 = June 30 1982)

Column 18 Inspection Type Use one of the codes listed below to describe the type of inspection

A — Performance Audit
B — Biomonitoring
C — Compliance Evaluation
D — Diagnostic
E — Corps of Engrs Inspection
L — Enforcement Case Support
P — Pretreatment
R — Reconnaissance Inspection
S — Compliance Sampling
X — Toxic Sampling

Column 19 Inspector Code Use one of the codes listed below to describe the *lead agency* in the inspection

C — Contractor or Other Inspectors *(Specify in Remarks columns)*
E — Corps of Engineers
J — Joint EPA/State Inspectors—EPA lead
N — NEIC Inspectors
R — EPA Regional Inspector
S — State Inspector
T — Joint State/EPA Inspectors—State lead

Column 20 Facility Type Use one of the codes below to describe the facility

1 — Municipal Publicly Owned Treatment Works (POTWs) with 1972 Standard Industrial Code (SIC) 4952
2 — Industrial Other than municipal, agricultural, and Federal facilities
3 — Agricultural Facilities classified with 1972 SIC 0111 to 0971
4 — Federal Facilities identified as Federal by the EPA Regional Office

Columns 21-66 Remarks These columns are reserved for remarks at the discretion of the Region

Column 70 Facility Evaluation Rating Use information gathered during the inspection (regardless of inspection type) to evaluate the quality of the facility self-monitoring program Grade the program using a scale of 1 to 5 with a score of 5 being used for very reliable self-monitoring programs, 3 being satisfactory, and 1 being used for very unreliable programs

Column 71. Biomonitoring Information Enter D for static testing Enter F for flow through testing Enter N for no biomonitoring

Column 72 Quality Assurance Data Inspection Enter Q if the inspection was conducted as ·'owup on quality assurance sample results Enter N otherwise

Columns 73-80 These columns are reserved for regionally defined information

Section B Facility Data

This section is self-explanatory

Section C. Areas Evaluated During Inspection

Indicate findings (S, M, U, or N) in the appropriate box Use Section D and additional sheets as necessary Support the findings, as necessary, in a brief narrative report Use the headings given on the report form (e g , Permit, Records/Reports) when discussing the areas evaluated during the inspection The heading marked "Other' may include activities such as SPCC, BMP's, and multimedia concerns

Section D Summary of Findings/Comments

Briefly summarize the inspection findings This summary should abstract the pertinent insp n findings, not replace the narrative report Reference a list of attachments, such as completed checklists taken from the NPDES Compliance Inspection Manuals and pretreatment guidance documents, including effluent data when sampling has been done Use extra sheets as necessary

"NPDES COMPLIANCE INSPECTION MANUAL", dated January, 1988. Table of Contents only. Replaces June, 1984 edition.

United States
Environmental Protection
Agency

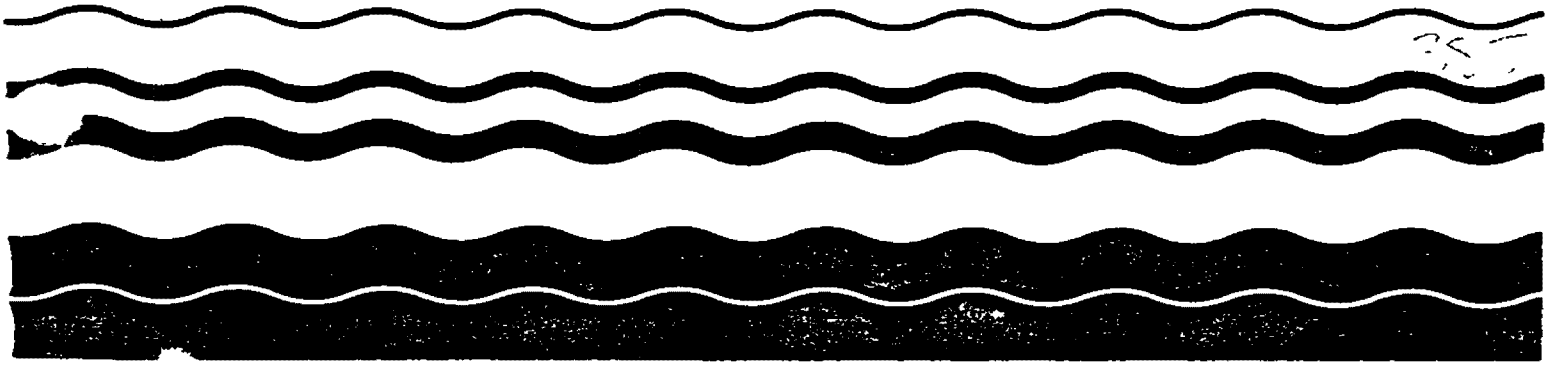
Office of Water
Enforcement and Permits (EN-338)
Washington, D.C. 20460

MAY 1988

Water

EPA

NPDES Compliance Inspection Manual



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"Use of the New NPDES Compliance Inspection Form", dated May 14, 1985.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C. 20460

OFFICE OF WATER

MAY 14 1985

MEMORANDUM

SUBJECT: Use of the New NPDES Compliance Inspection Form

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

TO: Regional Water Management Division Directors
Regional Environmental Services Division Directors
State Program Directors

EPA has prepared and obtained OMB authorization for the attached EPA Form 3560-3 (Revised 3-85). Users of the inspection form should be aware of the following information.

Purpose: The purpose of shortening Form 3560-3 is not to reduce the quantity and quality of data collected during inspections, but is to provide flexibility to Regions and States in the reporting formats they use. EPA Form 3560-3 includes only the most basic points of information necessary for the Permits Compliance System (PCS) national data base. States and Regions will prepare more comprehensive narrative reports on the findings from the inspections, and States may use their own detailed inspection forms in addition to the Form 3560-3, for NPDES inspections.

Required Use: The Form 3560-3 must be included in NPDES inspection reports and the information must be entered into PCS to receive credit in EPA's Strategic Planning and Management System (SPMS). However, where a State enters data directly into PCS, the State may use an equivalent form if it contains at least the same data elements as Form 3560-3.

Status of Old Form: The new inspection form essentially replaces the first page of the old form. The Regions and States, as they wish, may still utilize parts of the old form, specifically pages 2, 3, and 4, until supplies are exhausted. The old form will not be reprinted when the existing supplies are gone.

Guidance on Preparing Inspection Reports: In addition to instructions on the form, Regions and States should consult the Compliance Inspection Manual (June 1984) for detailed guidance on preparing inspection reports (pp. 2-27 to 2-30) and for use of the appropriate checklists for covering subject areas investigated during an inspection (pp. 3-9 to 11; 4-24 to 25; 5-22; 6-20 to 21; 7-8; and 8-9).

Reports Distribution: The shortened form is a single page with no duplicates or carbons, whereas the old form came in color coded multicopy pressure sensitive four-part sets. To satisfy the needs of distribution, a completed original of the new form and the attachments will need to be reproduced as needed. This reduces waste of extra unneeded copies and improves utility of the form in the field.

Availability of New Form: The new form was printed and distributed to Regions in April 1985. The forms are available from the Forms Officer in each Region or from:

EPA, Distribution and Warehousing
Wing G; Room 207
Research Triangle Park, NC 27711

Length of the OMB Approval: The new form indicates approval by OMB expires on July 31, 1985. However, we have been assured that approval will be extended through 1986, when it will be necessary to have the form reapproved.

Any questions about the new form may be directed to Gary Polvi (FTS/202 475-8318) or Virginia Lathrop (FTS/202 475-8299) in the Water Enforcement Division (EN-338), Washington, D.C. 20460.

Attachment

cc: Regional NPDES Inspection
Program Managers (WMD and ESD)

356

Item 0

EPA

United States Environmental Protection Agency
Washington D C 20460

NPDES Compliance Inspection Report

Form Approved
OMB No 2040 0003
Approval Expires 7 31 85

Section A National Data System Coding

Transaction Code	NPDES	yr/mo/day	Inspection Type	Inspector	Fac Type
1 2 5	3 11	12 17	18	19	20

Remarks

Reserved	Facility Evaluation Rating	BI	QA	Reserved	
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Section B Facility Data

Name and Location of Facility Inspected | Entry Time ☐ AM ☐ PM | Permit Effective Date

Exit Time Date | Permit Expiration Date

Name(s) of On Site Representative(s) | Title(s) | Phone No(s)

Name Address of Responsible Official | Title

Phone No | Contacted ☐ Yes ☐ No

Section C Areas Evaluated During Inspection

(S = Satisfactory M = Marginal U = Unsatisfactory N = Not Evaluated)

Permit	Flow Measurement	Pretreatment	Operations & Maintenance
Records/Reports	Laboratory	Compliance Schedules	Sludge Disposal
Facility Site Review	Effluent/Receiving Waters	Self Monitoring Program	Other

Section D Summary of Findings/Comments *(Attach additional sheets if necessary)*

Name(s) and Signature(s) of Inspector(s) | Agency/Office/Telephone | Date

Signature of Reviewer | Agency/Office | Date

Regulatory Office Use Only

Action Taken | Date | Compliance Status ☐ Noncompliance ☐ Compliance

EPA Form 3560 3 (Rev 3 85) Previous editions are obsolete

INSTRUCTIONS

Section A National Data System Coding *(i e., PCS)*

Column 1 Transaction Code Use N, C, or D for New, Change, or Delete All inspections will b[illegible] w unless there is an error in the data entered

Columns 3-11. NPDES Permit No Enter the facility's NPDES permit number *(Use the Remarks columns to record the State permit number, if necessary)*

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B — Biomonitoring
C — Compliance Evaluation
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2 — Industrial Other than municipal, agricultural and Federal facilities
3 — Agricultural Facilities classified with 1972 SIC 0111 to 0971
4 — Federal Facilities identified as Federal by the EPA Regional Office

Columns 21-66 Remarks These columns are reserved for remarks at the discretion of the Region

Column 70 Facility Evaluation Rating Use information gathered during the inspection (regardless of inspection type) to evaluate the quality of the facility self-monitoring program Grade the program using a scale of 1 to 5 with a score of 5 being used for very reliable self-monitoring programs, 3 being satisfactory, and 1 being used for very unreliable programs

Column 71 Biomonitoring Information. Enter D for static testing Enter F for flow through testing Enter N for no biomonitoring

Column 72: Quality Assurance Data Inspection Enter Q if the inspection was conducted as followup on quality assurance sample results Enter N otherwise

Columns 73-80 These columns are reserved for regionally defined information

Section B Facility Data

This section is self-explanatory

Section C. Areas Evaluated During Inspection

Indicate findings (S, M, U, or N) in the appropriate box Use Section D and additional sheets as necessary Support the findings, as necessary, in a brief narrative report Use the headings given on the report form (e g , Permit, Records/Reports) when discussing the areas evaluated during the inspection The heading marked ' Other ' may include activities such as SPCC, BMP s, and multimedia concerns

Section D. Summary of Findings/Comments

Briefly summarize the inspection findings This summary should abstract the pertinent inspe findings, not replace the narrative report Reference a list of attachments, such as completed checklists taken from the NPDES Compliance Inspection Manuals and pretreatment guidance documents, including effluent data when sampling has been done Use extra sheets as necessary

Pretreatment Compliance and Audit Manual for Approval Authorities. See VI.B.24.

"NPDES Compliance Flow Measurement Manual", dated September, 1981. Table of Contents only.

United States
Environmental Protection
Agency

Office of Water Enforcement and
Permits Enforcement Division (EN-338)
Washington, DC 20460

September 1981

Water

EPA

NPDES Compliance Flow Measurement Manual

MCD - 77

NPDES COMPLIANCE FLOW MEASUREMENT MANUAL

U.S. Environmental Protection Agency

September, 1981

by:

David L. Guthrie, P.E.

Office of Water Enforcement and Permits

Enforcement Division

Compliance Branch

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"Guidelines on Requirements for Exceptions for NPDES Inspector Training", dated January 28, 1990. Without attachments.

File

Sent out 6/29

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

JUN 28 1989

OFFICE OF WATER

MEMORANDUM

SUBJECT: Guidelines on Requirements for Exceptions for NPDES Inspector Training

FROM: David N. Lyons P.E., Chief
Enforcement Support Branch (EN-338)

TO: Regional Compliance Branch Chiefs,
Water Management Divisions
Field Service Branch Chiefs,
Environmental Services Divisions
Regions I - X

In compliance with the direction to the **Assistant Administrators in EPA Order 3500.1, on Training and Development for Compliance Inspectors and Field Investigators**, the Enforcement Division, Office of Water Enforcement and Permits has prepared the attached Guidelines on Requirements for Exceptions from NPDES Inspector Training which can be used by supervisors in evaluating training needs of those individuals conducting, or overseeing the conducting, NPDES/pretreatment compliance inspections. This guide establishes a process and offers work sheets and directions to plan and manage the NPDES Inspector Training Program. We have worked with members of the NPDES Inspection Materials Work group and the Agency Inspector Training Advisory Board to develop this final product. Our objective was to break the Work Sheets into manageable pieces, a modular form, to allow broader usage. The goal is to develop an easy to follow guideline to assure that all inspectors are well grounded in the basics of the program before performing NPDES inspections independently.

While these guidelines are considered final we continue to encourage comments on ways to make this a clear and concise document. We are especially interested in your comments on Work Sheet #1 and Form A since this portion of the guidelines are required for compliance with Order 3500.1. Work Sheet #2 is recommended but not required. Please provide ideas for improvement or questions to Virginia Lathrop, Enforcement Support Branch, (EN-338) FTS 475-8299.

Attachment

GUIDELINES ON REQUIREMENTS FOR EXCEPTIONS TO MINIMUM NPDES / PRETREATMENT INSPECTOR TRAINING

INTRODUCTION

These program specific guidelines are designed to help first line supervisors and inspectors with NPDES and pretreatment responsibilities to implement the requirements of EPA Order 3500.1 on Training and Development for Compliance Inspectors and Field investigators (6/88). The Guide contains: 1) work sheets to be used in documenting existing experience and assessing the inspector's (or first line supervisor of an inspector) training needs and whether previous training and experience qualifies for an exception to NPDES minimum training requirements* ; and 2) a form to request an exception to the minimum requirements. These forms are to be filled out by the current or prior supervisor. Supervisors should review and update all work sheets annually.

Required Work Sheet # 1

EPA Order 3500.1 requires Basic Training (that is the Fundamentals of Environmental Compliance Inspections and basic level health and safety course under EPA Order 1440.2) and the program - specific minimum training (defined by each media office in a Inspector Training Program Description). The NPDES Minimum Training*, includes any Regional workshop, self study or on the job training (OJT) utilizing the five modules on Introduction to NPDES Inspections, and the NPDES Compliance Inspection Manual. This program will develop basic program knowledge and skills primarily for the new inspector. This is essential to the development of skills for conducting compliance evaluation inspection (CEIs), compliance sampling inspections (CSIs) and reconnaissance inspections (RIs).

Completion of Work Sheet #1 is required for all NPDES Inspectors and their first line supervisors to show compliance with EPA Order 3500.1. (In order to cut down on verbosity, the Work Sheets and Form will refer to "inspectors", with the intent of covering "field investigators" and their first line supervisors as well.) If you answer "yes" in column 1 of this work sheet, the inspector may be eligible for an exception to the minimum requirements, and Form A may be used to request one. (The process for requesting an exception is relevant only to the minimum training requirements.)

---

*NPDES Minimum Training requirements are described briefly in the summary in the Appendix, Page A-3. They are described in more detail in the NPDES Inspector Training Program Description, March, 1989. If copies are needed please call Virginia Lathrop, OWEP (EN-338), FTS/475-8299.

Work Sheets # 2

Work sheet # 2 addresses NPDES Skills Development and Specialized training. Although the Order does not require a specific curricula of training as a prerequisite to inspectors leading or independently conducting more specialized and skill demanding inspections, it is obvious that some form of training is essential to develop advanced skills for conducting such technically oriented field investigations such as toxic sampling inspections (XSI), compliance biomonitoring (CBI), pretreatment compliance (PCI), performance audit (PAI), diagnostic (DI), or other specialized inspections. Therefore Work Sheet # 2 is offered as another planning tool for the Regional Offices.

WORK SHEET # 1

+18

GUIDELINES FOR EXCEPTIONS TO MINIMUM NPDES / PRETREATMENT INSPECTOR TRAINING - WORK SHEET # 1 (REQUIRED)

A. Background

Employee Name _____ Organization/ Program Assignment _____

New [ ] Experienced [ ] Inspector [ ] Supervisor [ ]

A.1 Scope of Training Program: This training program will prepare the employee to lead or independently conduct the following types of inspections. [Check all that apply.]

Compliance Evaluation Inspection (CEI) _____
Compliance Sampling Inspection (CSI) _____
Reconnaissance Inspection (RI) _____

A.2 Training Requirements

Type of Training	Applicability (Yes/No)	Previous Trng./ Exp. Satisfies Req'mts (Yes/No)	Training Completion Planned Date	Training Completion Actual Date
A.2.a Basic Curriculum				
Fundamentals of Environmental Compliance Inspections	_____	_____	_____	_____
A.2.b Health and Safety Orders				
1. 1440.2				
- Basic	_____	_____	_____	_____
- Intermediate	_____	_____	_____	_____
- Advanced	_____	_____	_____	_____
2. 1440.3	_____	_____	_____	_____

A.3 Program Minimum for NPDES Inspections

A.3 Minimum NPDES-Specific Training*

A.3.a Self study (to prepare for CEI, RI and CSI)

* See definition, page 2 of the Introduction.

WORK SHEET # 1

	PREVIOUS TRAINING/ EXPERIENCE SATISFIES REQUIREMENTS (Yes/No)	TRAINING COMPLETION TARGET DATE	TRAINING ACTUAL COMPLETION DATE
NPDES Compliance Inspection Manual (1988) with self study guides, policy guidance, regulations & Clean Water Act	(Yes/No)	_____	_____
A.3.b On the Job (OJT)			
OJT - Office			
1) Ability to perform file review, prepare a plan for coordination with the state.	(Yes/No)	_____	_____
2) Ability to prepare clear accurate, concise reports & any follow-up.	(Yes/No)	_____	_____
3) If a supervisor, ability to effectively plan, coordinate & schedule inspections	(Yes/No)	_____	_____
OJT - Field			
4) Ability in the field to evaluate Permittee's flow measurement, sampling, & analytical technique.	(Yes/No)	_____	_____
5) Ability to use personal skills (Balance of assertiveness and tact).	(Yes/No)	_____	_____

WORK SHEET # 1

		PREVIOUS TRAINING/ EXPERIENCE SATISFIES REQUIREMENTS (Yes/No)	TRAINING COMPLETION TARGET DATE	TRAINING ACTUAL COMPLETION DATE
6) Successfully completed at least 4 non-sampling insp. completed with inspector as asst to lead inspector (CEIs).	(Yes/No)		_____	_____
7) At least 2 sampling inspections completed with inspector performing all functions correctly with oversight of an experienced inspector. (Where inspector is to conduct CSI)	(Yes/No) (Yes/No)		_____ _____	_____ _____

A.3.c Successfully completed Regional Class/Workshop - Introduction to NPDES Inspections (using Introductory NPDES Inspector Training Modules).

1)	Overview	(Yes/No)	_____	_____
2)	Sampling	(Yes/No)	_____	_____
3)	Lab Analysis	(Yes/No)	_____	_____
4)	Legal Issues	(Yes/No)	_____	_____
5)	Biomonitoring	(Yes/No)	_____	_____

A.4 Additional Courses

Any remedial courses needed as in wastewater treatment, chemistry, etc.

SUBJECT	COMPLETION TARGET DATE	ACTUAL COMPLETION DATE
_____	_____	_____
_____	_____	_____

_____ _____

Signature of First Line Supervisor Date

WORK SHEET # 1 - INSTRUCTIONS - INSPECTOR TRAINING WORK SHEET

This work sheet developed by each Enforcement Program Office should must be completed for each inspector to show compliance with EPA Order 3500.1. This work sheet should be used to decide: 1) what training is applicable to the inspector or first-line supervisor; 2) whether previous training satisfies the requirement; and 3) if it does not, when training is planned and is completed. A separate form is available to document the request for an exception.

A. Background

1. Enter employee name, organization, and program assignment.

2. Check whether the individual is new or experienced as defined by EPA Order 3500.1; also check whether the individual is an inspector or supervisor, and whether or not a new employee. Definitions of new and experienced inspector are found in EPA Order 3500.1. Specifically those definitions are:

New Inspector - Individuals newly employed by EPA after June 29, 1988 regardless of previous training in and experience leading, (or conducting independently) environmental compliance inspections, OR

- Individuals rehired by EPA or transferred within EPA after June 29, 1988 with no previous training in and experience leading, (or conducting independently) environmental compliance inspections/field investigations.

Experienced Inspector - Individuals who were employed by EPA on June 29, 1988 and who have previous training in and experience leading, (or conducting independently) environmental compliance inspections/ field investigations in any one of EPA's compliance and enforcement programs.

A. Under Scope of Training, list the types of inspections.

A.1 Training Requirements

A.1 Basic Curriculum - Fundamentals of Environmental Compliance Inspections

1. Applicability: The Fundamentals Course applies to all inspectors and first-line supervisors; therefore, mark column 2 yes.

2. Previous Training/Experience Satisfies the Requirement: Answer yes in column 3, if the inspector or first-line supervisor has demonstrated previous training and/or experience commensurate with the objectives of the course. If no, complete column 4.

Refer to General Guidance on Exceptions under Section 7 of EPA Order 3500.1, Part III, pages 4 - 9, for the principles to follow in assessing previous training and/or experience, and examples that satisfy the course objectives.

WORK SHEET # 1 - INSTRUCTIONS

Course Objectives: To develop in inspectors and first line supervisors:

a. Knowledge of the Agency's compliance and enforcement policy, the enforcement process, and the roles inspectors play in compliance monitoring and case development;
b. Knowledge of the extent and limitations of EPA's legal authorities to enter and inspect facilities;
c. Knowledge of evidentiary requirements and the procedures designed to assure that data collected on an inspection will be admissible in court;
d. Knowledge of good work practices related to planning and conducting field inspections, including technical and administrative subjects \, and communic ations skills;
e. Knowledge of the requirements of a good quality inspection report; and
f. Knowledge of how to prepare for and participate in enforcement proceedings such as settlement negotiations, hearings, and trials.

3. Training Completion: If the inspector is not qualified for an exception, then establish a target date in column 4 for training to be completed. After th training is finished, then record the actual date it was completed.

The Office of Water Enforcement and Permits strongly believes that all inspectors should receive the Agency Course, "Fundamentals of Environmental Compliance Inspections," although experienced inspectors may seek an exception t this course.

A.2 Health and Safety Training (EPA Order 1440.2 and, if applicable, EPA Order 1440.3)

1. Applicability: The applicable training depends on the duties of the inspector; one or both health and safety orders may apply. Under EPA Order 1440.2, the basic-level training applies to all inspectors. Therefore, mark this item yes in column 2. Other levels of training under 1440.2, intermediate and advanced, as well as training required under 1440.3 depend on the types of hazards the inspector may routinely encounter. Consult Regional guidance or orders on health and safety to determine which levels apply and mark the work sheet accordingly.

2. Previous Training Satisfies the Requirement: In order to answer yes, in column 3, consult Regional guidance or the Regional Health and Safety Officer concerning courses or experience that satisfy the requirements. If no, then complete column 4.

EPA-approved courses include:

a. Environmental Health and Safety Division (EHSD) Developed Courses

i. Basic Field Activities Safety Training (HazTrain)
ii. Safety and Health in EPA Field Activities (Steere & Associates, Inc.) - a 22-module slide/tape program
iii. Basic Health and Safety Training for Field Activities (Available FY 89)

WORK SHEET # 1 - INSTRUCTIONS

b. Office of Emergency and Remedial Response (OERR) Developed Courses

i. Hazardous Material Incident Response Operations (Course #165.5)
ii. Personnel Protection Safety Training (Course #165.2)

NOTE: Upon request, EHSD will review commercially available Health and Safety Courses and approve them if the requirements of 1440.2 and/or 1440.3 are met. Contact EHSD in EPA Headquarters or Regional Health and Safety Managers.

A.3.a to A.3.c. NPDES Program Minimum Training

First Column - Previous training satisfies the requirements: If the inspector has had prior experience or training related to NPDES inspections in accordance with the following sections A.3.a, A.3.b or A.3.c, please circle the "yes."

The "no" response will normally be circled for new staff. If "no" is indicated under the "previous training satisfies requirement" section, training compl target dates must be established. All new inspectors are expected to complete the NPDES Minimum Training program.

A.3.a NPDES Minimum Training by Self Study (A.3.a training only) - For those individuals who within the past two years have become familiar with the material in the NPDES Compliance Inspection Manual (and Draft Self Study Guide as an option), the Flow Measurement Manual and the Clean Water Act and the regulations through self study, classroom/workshop exposure or supervisory experience in the NPDES program..

A.3.b NPDES Minimum Training by On the Job Training (OJT) (A.3.b training only) For those experienced individuals who within the last two years, have successfully led or independently conducted NPDES inspections, or have been designated trainers/coaches of other inspectors in OJT situations, or actively served on work groups for developing training materials, because of their extensive experience.

These individuals will by their career circumstances have already had the equivalent of a formal OJT program, and will have knowledge of how to prepare for inspections, how to use human relations skills during inspections, how to sample, review records and prepare reports. For supervisors a minimum of two years of supervising experienced NPDES inspectors and including responsibilities such as reviewing inspection reports. New or experienced supervisors would be expected to have observed or assisted on at least two NPDES inspections, though not necessarily to have conducted independently those inspections.

A.3.c NPDES Minimum Training by Classroom/Workshops (A.3.c training only) - those individuals who within the last two years, have successfully led or independently conducted or supervised NPDES inspections and have been designated

WORK SHEET # 1 - INSTRUCTIONS

by the supervisor to teach/ coach other inspectors, or have actively served on work groups for developing training materials, because of their extensive experience. (Self study would be appropriate if no NPDES class/workshop was offered within reasonable travel distance within one year of a new inspector's entry date.)

Training for NPDES inspectors may also include remedial classroom training in such areas as wastewater treatment, chemistry, biology, etc. should the supervisor require this. However this training will not be subject to the exceptions process.

Second Column - Target Completion Dates: Wherever the answer is "no" to the question on previous training, the "training completion target date" must be listed.

Third Column - Actual Completion Date: Where there is a target date entered, the actual completion date should be entered when the targeted training is completed.

Review and Approvals: The first line supervisor should review and approve the Work Sheet # 1.

FORM A - EXCEPTIONS

WORK SHEET # 1 -FORM A

FORM A - REQUEST FOR EXCEPTION UNDER EPA ORDER 3500.1

EMPLOYEE NAME _____ ORGANIZATION _____

New [ ] Experienced [ ] Inspector [ ] Supervisor [ ]

Types of Compliance
Inspection Related Duties:

Program Assignment:

[ ] Request for Exception: This employee has previous training and or experience that satisfies the following requirements of EPA Order 3500.1

TRAINING REQUIREMENT	Previous Trng SSS	OJT	Class	Previous Exper-ience	DESCRIPTION

Inspector Signature/ Date

Supervisor Signature/ Date

Approving Official/ Date

WORK SHEET # 1 - FORM A

FORM A
REQUEST FOR EXCEPTIONS UNDER EPA ORDER 3500.1

The purpose of this form is to document that the inspector or first-line supervisor is both eligible (as defined by EPA Order 3500.1 for the categories of "new" and "experienced" inspectors) and qualified to request approval of an exception. This form may be used alone or in conjunction with other documentation, such as certificates of completed training, depending on the level of detail required by the approving official. Refer to the General Guidance on Exceptions under Section 7 of EPA Order 3500.1, Part III, pages 4-9, for the principles to follow in assessing previous training and/or experience. A sample form has been completed for an "experienced" inspector assigned to the RCRA Program in Region III.

GENERAL INFORMATION: There are three major items, as follows. 1. Enter employee name, organization, and program assignment. 2. Check whether the individual is new or experienced, as defined by EPA Order 3500.1; also, check whether the individual is an inspector or a supervisor. 3. Under Duties: For the inspector, briefly state the types of compliance inspections. For the supervisor, indicate what inspection programs and/or case development work s/he oversees.

TRAINING REQUIREMENT: Under this column heading, list the applicable training requirements for which the individual is seeking an exception, including the Basic Curriculum, Health and Safety Training under 1440.2 and/or 1440.3, and Program-Specific Minimum Training.

PREVIOUS TRAINING: Under this column heading, check the type(s) of training, supervised self-study, on-the-job training and/or classes that satisfies the requirement.

PREVIOUS EXPERIENCE: Place a check under this column heading, if previous experience is the basis for the exception.

DESCRIPTION: Under this column heading, briefly describe the previous training and/or experience that is the basis for the exception. If more space is needed, attach a separaaaate separate written statement, signed by the first line supervisor, describing the following documentation as appropriate. For example, if comparable classroom training was offered through the Region, please provide the sponsor name, date(s) of attendance and location of the class. Also, attach a copy of the certificate of completion if the inspector received one.

A.3.a FOR SELF STUDY EXCEPTIONS: Dates and circumstances where the inspector gained familiarity with the self study materials cited above (See Section A.3.a, Work Sheet # 1, page 5).

A.3.b FOR ON-THE-JOB TRAINING EXCEPTIONS: Provide location and exact dates when the inspector has been assigned to coach or train other inspectors in the inspection planning, on-site and follow-up techniques for an NPDES Inspections. Describe field work involved and indicate type and number of inspections (CEI, CSI, or RI where applicable), and whether they involve municipal or nonmunicipal facilities. How long has the employee been conducting inspections?

WORK SHEET # 1 - FORM A

A.3.c DOCUMENTATION FOR NPDES CLASSROOM/ WORKSHOPS EXCEPTIONS: Provide the date, location, and sponsor of the workshop/ class the inspector has had that is comparable to the Introduction to NPDES Inspections workshop/ classroom training. This information may be contained on an attached copy of the certificate of completion.

VI. SIGNATURE: Each form should be signed by the inspector or first-line supervisor, the supervisor who is recommending the request be approved, and by the approving official, in accordance with procedures established within the Region for requesting an exception.

WORK SHEET # 2

WORK SHEET # 2

GUIDELINES ON NPDES INSPECTOR TRAINING - WORK SHEET FOR SKILLS EXPANSION/SPECIALIZED TRAINING FOR NPDES/PRETREATMENT INSPECTIONS

Employee Name _____ Organization _____

(See Page 3 for explanations and instructions.)

B. SCOPE OF SKILLS EXPANSION/SPECIALIZED TRAINING PROGRAM: This training program will assure that inspector is able to lead or independently conduct the following types of inspections:

- Toxic Sampling Inspection (XSI) _____
- Biomonitoring Compliance Inspections (CBI) _____
- Pretreatment Compliance Inspection (PCI) _____
- Performance Audit Inspections (PAI) _____
- Diagnostic Inspections (DI) _____
- Other (Offshore drilling rig CEIs (O-CEI);PCI-- for IU's,etc.) _____

TOPIC/ACTIVITY	TRAINING TARGET COMPLETION DATE	TRAINING ACTUAL COMPLETION DATE
B.1 Self Study		
Using the NPDES Compliance Inspection Manual (1988), with self study guide, in depth study of appropriate chapters. May also study the Act regulations and pertinent current guidelines.		
1) XSI	_____	_____
2) CBI	_____	_____
3) PCI	_____	_____
4) PAI	_____	_____
5) DI	_____	_____
6) Other (As CEI-drilling rig;etc.)	_____	_____

Work Sheet # 2 Cont.

		TRAINING COMPLETION TARGET DATE	ACTUAL COMPLETION DATE
B.2	On the Job Training:		
	Supervised inspections - two of each type with the inspector performing all functions with coaching by an experienced inspector.		
	1) XSI	_____	_____
	2) CBI	_____	_____
	3) PCI	_____	_____
	4) PAI	_____	_____
	5) DI	_____	_____
	6) Other (CEI-drill rig; PCI-IU; etc.)	_____	_____
B.3	Classes/Workshops		
	B.3.a Pretreatment Compliance Inspection Workshops, with two one-day workshops possible - one on concentrating on POTW's; and one on Industrial Users. (Through OWEP contract or Regional in-house effort.) (PCI)	_____	_____
	(PCI-IU)	_____	_____
	B.3.b Diagnostic Compliance Inspection Workshop - basic skills or more advanced skills coverage, through the OWEP Contract or through Regional in-house training.	_____	_____
	B.3.c Other Training Classes Assigned within the Region (such as on advanced wastewater treatment).	_____	_____

_____ _____

Signature of First Line Supervisor Date

_____

Organization

WORK SHEET # 2 - INSTRUCTIONS

B. The skills expansion and specialized training is generally provided after completion of the NPDES Minimum Training for inspectors. However when scheduling of workshops and other training experiences are constrained by availability and budget, some portions of the workshops, OJT, and self study may need to be scheduled simultaneously with the NPDES Minimum Training.

In addition it should be noted that where a new inspector has not been identified as an inspector who will not be needed for covering compliance sampling inspections, the OJT sampling inspections may be postponed until such time as the inspector will need the compliance sampling skills. Thus self study, classroom training and OJT for diagnostic inspections and pretreatment compliance inspections may precede certain portions of the minimum training for conducting sampling inspections.

For all specialized training (under B.1, B.2, and B.3), the target date should be listed in the first column. After the training is completed the actual completion date should be listed in the second column.

B.1 The Inspection Manual (1988) forms the primary self study material. In addition pertinent portions of the Clean Water Act and applicable portions of the regulations may need to be reviewed.

B.2 During the OJT portions of the training program, the inspector is performing all elements of the inspection with coaching of an experienced inspector. Before being qualified to lead or independently conduct the inspection, indicated under Section B, the inspector must have completed at least two and often more of that particular type of inspection while receiving coaching from an experienced inspector.

B.3 Self explanatory.

APPENDIX

GUIDELINES ON NPDES INSPECTOR TRAINING - SUMMARY of WORK SHEETS (OPTIONAL) ON EMPLOYEE'S NPDES INSPECTOR TRAINING

Employee _____ Date _____

Organization _____ New [ ] Experienced [ ]

EXPERIENCE - Inspections conducted in the previous fiscal year. List inspection numbers:

CEI ____ XSI _____ CBI ____ PAI _____ PCI _____

CSI _____ RI _____ DI _____ Other _____

A. MINIMUM TRAINING - Dates Completed

		Class/Wkshop	Self Study	OJT
A.2 Fundamentals		_____	N/A	N/A
Health and Safety	1440.2	_____	N/A	N/A
	1440.3	_____	N/A	N/A

A.3 NPDES - Program Minimum

- CEI	_____	_____	_____
- CSI	_____	_____	_____
- RI	_____	_____	_____

B. SPECIALIZED TRAINING - Date Completed

Type	Class/Wksp	Self study	OJT
XSI	_____	_____	_____
CBI	_____	_____	_____
PCI	_____	_____	_____
PAI	_____	_____	_____
DI	_____	_____	_____
Other-	_____	_____	_____

ADDITIONAL HEALTH AND SAFETY - Date Completed

Type Required (including refresher training)	Class/Workshop
_____	_____

_____ _____

Signature of Supervisor Date

INSTRUCTIONS - NPDES GUIDELINES ON INSPECTOR TRAINING

SUMMARY OF WORK SHEETS

The summary sheet provides space for recording only the completion date of the training indicated. It summarizes both the NPDES Minimum Training and the specialized training dates, where the supervisor wishes to keep a record of all training provided.

This Summary should only be utilized as a synopsis of the NPDES Work Sheets #1 and # 2, and as appropriate the generic form on health and safety provided by Office of Enforcement and Compliance Monitoring. This summary should be filled out only after providing documentation on Work Sheets # 1, and # 2. At the bottom of the Summary is space for health and safety training that is to be taken in addition to the basic health and safety under Section A.2.

SUMMARY OF NPDES INSPECTOR TRAINING PROGRAM DESCRIPTION

A. SUMMARY

The NPDES Training Program establishes a core program, of coursework, self instruction and on-the-job training (OJT) for those individuals who carry out NPDES compliance/enforcement activities for EPA. This summary describes a sequence for new inspectors, and for expansion of skills later on. After completion of Basic Training and Introductory NPDES training, self-instruction and OJT, the inspector should be able to conduct the compliance evaluation inspection and the sampling inspection. The goal is for each new inspector to complete this sequence within six to nine months on the job. Job skills can then be expanded through more study and instruction into areas such as performance audit, pretreatment, and diagnostic inspections.

The figure below shows the plan in summary fashion. In order to get a copy of the complete NPDES Training Program Description, contact: Director, Enforcement Division, Office of Water Enforcement and Permits, HQ (EN-338), USEPA, 401 M Street, SW, Washington, D.C. 20460. FTS 475-8310.

NPDES Training Plan

General Orientation

Courses/Workshops	Self Instruction /OJT

Program-Minimum

Basic Inspector Curriculum NPDES Introductory Coursework (Manuals available by 4/88)	CWA and Regulations Violation Recognition Sampling Techniques Manuals for Introduction to Compliance Inspections Flow Measurement Manual OJT- 2 inspections each for compliance evaluation and compliance sampling inspections

Skills Expansion

Pretreatment Inspection Workshop	Pretreatment Guidance Pretreatment Compliance Inspection and Audit Manual
Diagnostic Inspection Workshop	Inspector's Guide for Evaluating Municipal Wastewater Treatment Plants

Toxics Sampling

OJT-Biomonitoring, toxics sampling and pretreatment inspections

(To be developed)

Specialized Skills

Offshore Drilling Rig Inspections
(to be developed)
Criminal Investigations (FLETC, Glynco, GA)

B. TRAINING MATERIALS AND THEIR SOURCES

The following materials for the new inspector should be available from the inspector's first-line supervisor or the addresses footnoted below.

- General Orientation Package
  - Organization chart
  - Clean Water Act and regulations
  - NPDES Inspection Strategies and Guidance such as the Clean Water Act Compliance/Enforcement Compendium
  - Sample NPDES inspection reports
  - Description of HQ/Regional/State relationships
  - NPDES Compliance Inspection Manual

- Introduction to NPDES Inspections (Available 4/88)
  - NPDES Compliance Monitoring Inspector Training Modules [1]
    - -- Overview (draft)
    - -- Legal Issues (draft)
    - -- Sampling (draft)
    - -- Laboratory Analysis (under development)
    - -- Biomonitoring (under development)

	Order # NTIS	IRC[2]
- Field Manuals for Self Instruction and OJT		
-- NPDES Compliance Inspection Manual	PB85115897	068U
-- NPDES Flow Measurement Manual	PB82131178/AS	050U

- Skills Expansion Coursework
  - Pretreatment Inspections[1]
    - -- Pretreatment Compliance Monitoring and Enforcement Guidance (July 1986)
    - -- Pretreatment Compliance Inspection and Audit Manual for Approval Authorities (July 1986)

	IRC[2]
- Diagnostic Inspections	
-- Inspectors Guide for Evaluation of Municipal Wastewater Treatment Plants, EPA/430/9-79-010 (April 1979)	021U

II. NPDES PROGRAM: PRE-ENFORCEMENT

C. MEASURING COMPLIANCE/DATA PROCESSING

"PERMIT COMPLIANCE SYSTEM DATA ENTRY, EDIT AND UPDATE MANUAL; INQUIRY USER'S GUIDE; PCS GENERALIZED RETRIEVAL MANUAL; EDIT/UPDATE ERROR MESSAGES," updated July, 1990. Table of Contents only.

PCS Data Entry, Edit, and Update Manual

Document Number PCS-DE90-2.01

July 2, 1990

PCS USER SUPPORT
202/475-8529

U.S. EPA (EN-338)
401 M. St. SW
Washington, DC 20460

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PCS INQUIRY User's Guide

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PCS USER SUPPORT
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PCS Generalized Retrieval Manual

Document Number PCS-GR90-3.01

July 2, 1990

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202/475-8529

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PCS Edit/Update Error Messages

July 2, 1990

PCS USER SUPPORT
202/475-8529

U.S. EPA (EN-338)
401 M. St. SW
Washington, DC 20460

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The "GREAT System" (General Record of Enforcement Actions Tracked), circa 1980. The GREAT System tracks EPA-issued Administrative Orders (AOs) and Notices of Violation issued from the commencement of the system until September 30, 1987. Requests for retrievals should be addressed to Mary Gair, OWEP, FTS 475-8557. See also II.C.10.

"PCS Data Element Dictionary", updated July 2, 1990 and "PCS Codes and Descriptions Manual", updated June 9, 1989. Table of Contents only.

PCS Data Element Dictionary

Document Number PCS-DD90-2.01

July 2, 1990

PCS USER SUPPORT
202/475-8529

U.S. EPA (EN-338)
401 M. St. SW
Washington, DC 20460

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PCS Codes and Descriptions

Document Number PCS-CD88-1.01

December 19, 1988

PCS USER SUPPORT
202/475-8529

U.S. EPA (EN-338)
401 M. St. SW
Washington, DC 20460

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NPDES SELF-MONITORING SYSTEM

USER GUIDE

Office of Water
Office of Water Enforcement and Permits

January 1985

U.S. Environmental Protection Agency
EN-338
401 M Street S.W.
Washington, D.C. 20460

NPDES
Self-Monitoring System

User Guide

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"Release and Description of Significant Violator Lists", dated March 8, 1984.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

MAR 8 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Release and Description of "Significant Violator" Lists

FROM. Gerald A. Bryan, Director
Office of Compliance Analysis and Program Operations

TO. Regional Enforcement Contacts

EPA has begun to receive requests from parties outside the Agency for the lists of "significant violators" each program area is developing for tracking in the Agency's management systems.

Unless the facts pertaining to a specific situation merit otherwise, EPA will release these lists upon request. In order to avoid confusion or misunderstanding about the meaning or significance of these lists, we are suggesting that EPA personnel describe the lists in a manner consistent with the following:

> "EPA's list of significant violators" is a compilation of regulated entities which, based on available information, EPA believes are in violation of environmental laws or regulations and which EPA believes merit high priority attention. EPA's managers use the lists to reflect Agency priorities for tracking their progress towards compliance."

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OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

Principal Regional Enforcement Contacts

Region	Name	Title	Telephone Number
I	Paul Keough	Deputy Regional Administrator	223-7210
II	Doug Blazey	Regional Counsel	264-1018
III	Stan Laskowski	Deputy Regional Administrator	597-9812
IV	John (Alex) Little	Deputy Regional Administrator	257-4727
V	Alan Levin	Deputy Regional Administrator	353-2000
	Dave Ullrich	Deputy Regional Counsel	353-2094
VI	Dick Whittington	Regional Administrator	729-2600
VII	William Rice	Deputy Regional Administrator	758-5495
VIII	Kerry Clough	Chief of Staff	327-3895
IX	John Wise	Deputy Regional Administrator	454-8153
X	Ed Coate	Deputy Regional Administrator	399-1220

EPA personnel should avoid giving the impression that parties on the list necessarily have been adjudicated to be in violation or have agreed that they are in violation of environmental requirements. Of course, planned or proposed enforcement actions or strategies against specific facilities should not be released.

Only lists which are comprised of those violators tracked in EPA's Strategic Planning and Management System (SPMS) should be characterized as EPA's "official" significant violators list. In addition, tabulations of actions taken against these parties should be characterized as "official" only if those tabulations are obtained from reports submitted as part of SPMS.

- If you have any questions regarding the points raised in this memo, please feel free to give me a call at (FTS) 382-4140.

cc: Associate Enforcement Counsel
OECM Office Directors
Program Compliance Office Directors

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"PERMIT COMPLIANCE SYSTEM (PCS) POLICY STATEMENT", dated October 31, 1985. (appendices updated March 23, 1988)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

OCT 31 1985

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Permit Compliance System (PCS) Policy Statement

FROM: Lawrence J. Jensen
Assistant Administrator for Water (WH-556)

TO: Regional Water Management Division Directors
Regions I - X

I am pleased to issue the attached policy statement on the Permit Compliance System (PCS). This policy statement represents an important step in the continuing effort to support a reliable and effective automated information system for the National Pollutant Discharge Elimination System (NPDES) program.

PCS is the national data base for the NPDES program. It serves as the primary source of NPDES information for EPA, NPDES States, Congress, and the public. The use and support of PCS by EPA Regions and NPDES States are crucial to the effectiveness and proper oversight of the NPDES program. This policy statement establishes for EPA and NPDES States the key management practices and responsibilities central to PCS' ability to contribute to the overall integrity of the NPDES program and the achievement of our long-term environmental goals. One of the requirements is to have Regions and States enter all required data into PCS by September 30, 1986 (see Attachment 1 of the PCS Policy Statement). While the aim of the policy is a consistent approach across Regional and State NPDES programs, it retains flexibility for Regions and States to tailor agreements to the unique conditions of each State.

The PCS Policy Statement is effective immediately. The Office of Water Enforcement and Permits will monitor implementation of the policy statement and issue special instructions as necessary. Regional Water Management Division Directors and their State counterparts are responsible for ensuring that their staffs receive sufficient support to apply the principles of the policy to their PCS activities.

I look forward to a strong commitment to this policy statement by EPA and State NPDES programs. You can be assured of my full support as EPA and the States move forward with its implementation.

Attachments

cc: Administrator
Deputy Administrator
State Directors
PCS Steering Committee
PCS Users Group

JCD

PERMIT COMPLIANCE SYSTEM POLICY STATEMENT
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

STATEMENT OF POLICY

It is EPA policy that the Permit Compliance System (PCS) shall be the national data base for the National Pollutant Discharge Elimination System (NPDES) program. All EPA Regions must use PCS directly, and all NPDES States must either use PCS directly or develop and maintain an interface.

As our primary data source, PCS will promote national consistency and uniformity in permit and compliance evaluation. To achieve national consistency and uniformity in the NPDES program, the required data in PCS must be complete and accurate. Facility, permits (i.e., events and limits), measurement, inspection, compliance schedule, and enforcement action data are required. These required data elements are further defined in Attachments 1 and 2. They comprise the Water Enforcement National Data Base (WENDB) which has been redefined as the core of information necessary to enable PCS to function as a useful operational and management tool and so that PCS can be used to conduct oversight of the effectiveness of the NPDES program.

All required data for NPDES and non-NPDES States must be entered into PCS by September 30, 1986 and maintained regularly thereafter. This will require Regions and States to start entering data as early as possible, and not wait until late FY 1986.

By the end of FY 1986, direct users of PCS shall establish, with Office of Water Enforcement and Permits (OWEP) assistance, a Quality Assurance program for data in PCS. The program shall define:

- monthly measurement of the level of data entered;
- appropriate time frames to ensure that data are entered in PCS in a timely manner; and
- nationally consistent standards of known data quality based on proven statistical methods of quality assurance. PCS Quality Assurance shall address the completeness (for assurance of full data entry) and accuracy of the data entered into PCS.

Adoption of PCS by States should be formalized in each State's §106 Program Plan, State/EPA Agreement, or in a separate agreement. Each plan should clearly define EPA's and the NPDES State's responsibilities regarding PCS. The Key Management Practices in this Policy Statement should be incorporated into the §106 Program Plan.

BACKGROUND

When the PCS Steering Committee met in March 1985, EPA Regional representatives stressed the essential need for a positive statement from EPA Headquarters management to Regional and State management specifically requiring the support and use of PCS. Lack of such support may result in an incomplete and unreliable data base. With sufficient EPA Headquarters, Regional, and State support, however, PCS will come to serve several major purposes for the NPDES program:

- PCS will provide the overall inventory for the NPDES program.
- PCS will provide data for responding to Congress and the public on the overall status of the NPDES program. As such, it will serve as a valuable tool for evaluating the effectiveness of the program and the need for any major policy changes.
- PCS will encourage a proper EPA/State oversight role by identifying all major permittee violators.
- PCS will offer all levels of government an operational and management tool for tracking permit issuance, compliance, and enforcement actions.

This PCS Policy Statement is a result of the Steering Committee meeting. It is a clear message to Regional and State management that PCS is the primary source of NPDES information, and as such, it is to be supported wholeheartedly by all users of PCS.

The PCS Steering Committee meeting also resulted in a redefinition of WENDB and ratification thereof. WENDB is the minimum standard of data entry which will allow PCS to function as a useful operational and management tool (see Attachments 1 and 2). EPA Regions agreed that all WENDB elements will be entered into PCS by September 30, 1986, and maintained regularly thereafter.

Once the required data are entered into and regularly maintained in PCS, PCS will assist permits and compliance personnel in many of their operational and management responsibilities. PCS will greatly reduce reporting burdens for such activities as the Strategic Planning and Management System (SPMS), and it will reduce efforts needed for effective compliance tracking at both Regional and State levels. Also, substantial automation of the Quarterly Noncompliance Report (QNCR) will save time and resources.

-IC-

IMPLEMENTATION STRATEGY

Key Management Practices

To effectively implement and uphold this PCS Policy Statement and enhance PCS' capabilities, there are certain key management practices that must be implemented:

- The following milestones have been established to facilitate the entry of all required data by the end of FY 1986:
  - All required National Municipal Policy (NMP) data must be entered into PCS by October 31, 1985 (See Attachment 1).
  - All required data for non-NPDES States must be entered into PCS by March 31, 1986.
- NPDES permits shall be enforceable and tracked for compliance using PCS. The Office of Water Enforcement and Permits (OWEP) recognizes there may be situations where permit limits and monitoring conditions are not initially compatible with PCS data entry and tracking. In these cases, Regions should ensure that appropriate steps are taken by the permit writer to identify difficult permits to the PCS coder, and to mutually resolve any coding issues. The Regions should work closely with their NPDES States using PCS, to address similar data entry problems with State-issued NPDES permits.
- WENDB is the minimum standard of data entry for PCS (see the attached lists of data requirements). If States and Regions wish to enter NPDES data beyond what has been required, they may do so. For example, if States want to enter Discharge Monitoring Report (DMR) data for minor facilities, the option is available in PCS and the States' may use it as their resources allow. EPA will ensure that sufficient computer space is available for the currently projected use of PCS.
- All DMRs submitted to EPA Regional Offices (including DMRs submitted by NPDES States for EPA entry into PCS) must be preprinted using the Office of Management and Budget (OMB) approved DMR form. NPDES States directly using PCS are not required to use the OMB-approved form; however, its use is strongly encouraged. With the continuing demand for more complete information and with stable, if not diminishing, data entry resources, it is to EPA's and NPDES States' benefit to preprint DMRs. The use of preprinted DMRs will greatly reduce PCS' data entry burden, making available resources to be used in other areas (e.g., PCS quality assurance, data entry for other PCS records, etc.).

- The frequency with which DMRs are submitted to the EPA or NPDES State is important for ensuring timely entry of data into PCS and timely review of permittee's compliance status. Quarterly, semi-annual, or annual submission of DMRs creates a major data entry burden and impedes the compliance evaluation process. As a result, the usefulness of DMR data for compliance evaluation decreases substantially. Monthly submittal of DMRs alleviates this problem and enhances PCS' effectiveness significantly. It is recommended that monthly submittal of DMRs be incorporated into major permits as they are reissued. With approximately 20 percent of the permits reissued each year, it will take five years to complete the transition to monthly submittal for all major permittees.

- EPA Regions should coordinate with their respective States to develop strategies that describe each State's plans to either use PCS directly or develop an interface. These strategies should include the rationale for selecting one of these methods of data entry into PCS, an outline of all requirements necessary for implementing the selected method, the mechanisms to be used to supply sufficient resources, and a schedule for attainment not to exceed September 30, 1986. If a State is a current user of PCS via one of these methods, the strategy should describe its needs for enhancing its PCS usage or improving its PCS interface, the mechanisms to be used to supply sufficient resources, and a schedule for attainment not to exceed September 30, 1986.

- When writing or revising a Memorandum of Agreement (MOA), the Region and State should specify the State's intent to use or interface with PCS. The MOA should address the rationale for selecting one of these selected methods of data entry into PCS, an outline of all requirements necessary for implementing the selected method, the mechanisms to be used to supply sufficient resources, and a schedule for attainment.

Responsibilities

Office of Water Enforcement and Permits: It is OWEP's full responsibility to maintain the structure (i.e., the computer software) of PCS and to operate the system. OWEP will continue to support time-sharing funds needs, training, and the necessary resources to continue the operation of PCS. OWEP will work with the EPA Regions and NPDES States to continually evaluate and improve, where feasible, the system's software, time-share funding, operation, and maintenance. OWEP will maintain a Steering Committee and User Group, organize the national meetings, and work closely with the Regional and State representatives on major decisions related to PCS.

OWEP will oversee the Regions' and States' progress in fulfilling this policy statement by assessing the quantity of data entered each quarter.

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EPA Regions and NPDES States: It is the EPA Regions' and NPDES States' full responsibility to maintain the infrastructure of PCS by accurately entering data in a timely manner. Also, EPA Regions and NPDES States are responsible for participating in PCS Workgroups and contributing to improvements to PCS.

Three National PCS meetings are held each year, one for the Steering Committee and two for the PCS Users Group. EPA Regions are expected to attend all three meetings. NPDES States directly using PCS are invited to attend the State portions of these meetings. More meetings may be scheduled during the year if necessary.

Since consistent and objective compliance tracking is a central component of an effective and credible enforcement program, NPDES States are strongly urged to use PCS directly. We realize, however, that there may be some cases where NPDES States cannot use PCS directly. In these instances, in accordance with §123.41 of the regulations, EPA requests from the States all required information (as indicated in the attachments) for entry into PCS. This can be achieved one of two ways:

- A State Automated Data Processing (ADP) interface can be developed. It is the EPA Region's responsibility to work with the NPDES State to develop an effective State ADP interface. The State, however, should take the lead in developing the interface and work closely with the Region to ensure the interface is effective. It should be realized that system interfaces are often troublesome and unwieldy; they are often ineffective and limit the States' flexibility to change their systems quickly to meet management needs. In the event a State ADP interface is developed, there must be formal agreement that the State will operate the interface, maintain the interface software, and be fully responsible for making any changes to the interface based on changes made to its automated data base. This will ensure that the NPDES State will be held responsible for system compatibility. If the State does not accept full responsibility with system compatibility, then changes must not be made to the State system without the prior knowledge of EPA. The State is responsible for ensuring that the data are transferred to PCS in a timely manner, accurately, and completely. Interfaces must be developed and maintained so that they operate with maximum efficiency all of the time.

- OWEP recognizes that FY 1986 will be a transition year for PCS. NPDES States will begin using PCS or will develop interfaces. In the event that neither of these alternatives is accomplished by the end of FY 1986, in accordance with the FY 1986 Guidance for the Oversight of NPDES Programs, the State will be responsible for submitting all required information (as indicated in the attachments) in hard copy format. The data must be submitted either already

coded onto PCS coding sheets or in a format that can be readily transferred onto PCS coding sheets. Also, the data must be submitted at regular intervals to ensure timely entry into PCS. Once the data are received by EPA, it is the EPA Region's responsibility to enter the data into PCS in a timely manner.

Funding

- §106 grant funds may be used for interface software development. However, they cannot be used for maintenance of the interface software for State-initiated changes to a State ADP system or for the operation and maintenance of a separate State ADP system.

- §106 grant funds may be used for State data entry if and only if the State uses PCS directly or the State provides data to PCS via an interface that meets the standards of this policy.

- If requested by a State, EPA will agree to pay for its time-sharing costs to implement this policy, within given resources.

- Headquarters will continue to pursue alternative methods of reducing the data entry burden on Regions and States.

10/31/85
Date

Lawrence J. Jensen
Assistant Administrator for Water

4C8

ATTACHMENT 1

REQUIRED DATA TO BE ENTERED INTO PCS

Information Type[1]	Majors	Minor 92-500s	Other Minors
Permit Facility Data	X	X	X
Permit Event Data	X	X	X
Inspection Data	X	X	X
Parameter Limits and Pipe Schedule Data	X		
Compliance Schedule Data	X	X	
DMR Measurement Data	X		
Significant Noncompliance Flag		X	
Enforcement Action Data (Enforcement Action Data, Compliance Schedule Data, and Interim Limits Data from all active formal enforcement actions)	X		
Enforcement Action Data (Type Action, ENAC; Issue Date, ENDT; and Date Compliance Required, ERDT; from all active formal enforcement actions)		X	
Pretreatment Approval[2]	X	X	X
National Municipal Policy Data[3]	X	X	X

[1]For each of the categories listed in this chart, the Information Type is the set of core data elements listed in Attachment 2.

[2]Pretreatment Program Required Indicator, PRET; one data element.

[3]All required data as described in May 16, 1985 memorandum on National Municipal Policy Tracking in PCS. This includes Facility User Data Element 6 (RDF6), Compliance Schedule and Enforcement Action information.

ATTACHMENT 2

WATER ENFORCEMENT NATIONAL DATA BASE (WENDB) ELEMENTS

Data Element Name	Acronym
COMMON KEY	
NPDES Number	NPID
COMPLIANCE SCHEDULE RECORD	
Compliance Schedule Number	CSCH
Data Source Code	DSCD
Compliance Actual Date	DTAC
Compliance Report Received Date	DTRC
Compliance Schedule Date	DTSC
Compliance Schedule Event Code	EVNT
COMPLIANCE VIOLATION RECORD	
*Compliance Violation Date	CVDT
*Violation Compliance Event Code	CVEV
*Compliance Violation Code	CVIO
*Significant Non-Compliance Code (Compliance)	SNCC
*Significant Non-Compliance Date (Compliance)	SNDC
*Violation Compliance Schedule Number	VCSN
*Violation Data Source Code	VDCD
ENFORCEMENT ACTION RECORD	
Enforcement Action Response Achieved Date	EADR
Enforcement Action Comment Line 1	ECM1
Enforcement Action Comment Line 2	ECM2
Enforcement Action Comment Line 3	ECM3
Enforcement Action Comment Line 4	ECM4
Enforcement Action Comment Line 5	ECM5
Enforcement Action Compliance Violation Code	ECVC
Enforcement Action Compliance Violation Date	ECVD
Enforcement Action Modification Number	EMOD
Enforcement Action Code	ENAC
Enforcement Action Date	ENDT
Enforcement Action Status Code	ENST
Enforcement Action Response Due Date	ERDT
Enforcement Action Status Date	ESDT
Enforcement Action Season Number	ESEA
Enforcement Action Source Code	EVCD
Enforcement Action Discharge Number	EVDS

* Usually generated by PCS; can be manually entered.

WENDB ELEMENTS
(Continued)

Data Element Name	Acronym
Enforcement Action Event Code	EVEV
Enforcement Action Limit Type-Alphabetic	EVLM
Enforcement Action Monitoring Date	EVMD
Enforcement Action Monitoring Location	EVML
Enforcement Action STORET Parameter Code	EVPR
Enforcement Action Discharge Designator	EVRD
Enforcement Action Compliance Schedule	EVSN
Enforcement Action Violation Type	EVTP
EVIDENTIARY HEARING RECORD	
Evidentiary Hearing Event Date	EHDT
Evidentiary Hearing Event Code	EHEV
INSPECTION RECORD	
Inspection Date	DTIN
Inspector Code	INSP
Inspection Type	TYPI
MEASUREMENT VIOLATION RECORD	
Measurement Concentration Average	MCAV
Measurement Concentration Minimum	MCMN
Measurement Concentration Maximum	MCMX
Measurement Quantity Average	MQAV
Measurement Quantity Maximum	MQMX
Violation Date (Measurement)	MVDT
No Discharge Indicator	NODI
*Significant Non-Compliance Code (Measurement)	SNCE
*Significant Non-Compliance Date (Measurement)	SNDE
Violation Measurement Designator	VDRD
Measurement Discharge Number	VDSC
Violation Monitoring Location	VMLO
Violation STORET Parameter	VPRM
PARAMETER LIMITS RECORD	
Change of Limit Status	COLS
Contested Parameter Indicator	CONP
Modification Period End Date	ELED
Modification Period Start Date	ELSD
Concentration Average Limit	LCAV
Concentration Minimum Limit	LCMN
Concentration Maximum Limit	LCMX
Concentration Unit Code	LCUC
Quantity Average Limit	LQAV

WENDB ELEMENTS
(Continued)

Data Element Name	Acronym
Quantity Maximum Limit	LQMX
Quantity Unit Code	LQUC
Limit Type - Alphabetic	LTYP
Monitoring Location	MLOC
Modification Number	MODN
Limit Discharge Number	PLDS
Limit Report Designator	PLRD
STORET Parameter Code	PRAM
Season Number	SEAN
Statistical Base Code	STAT
PERMIT EVENT RECORD	
Permit Tracking Actual Date	PTAC
Permit Tracking Event Code	PTEV
PERMIT FACILITY RECORD	
River Basin	BAS6
City Code	CITY
County Code	CNTY
Type Permit Issued - EPA/State	EPST
Federal Grant Indicator	FDGR
Final Limits Indicator	FLIM
Average Design Flow	FLOW
Facility Name Long	FNML
Facility Inactive Code	IACC
Major Discharge Indicator (Entered by EPA Headquarters)	MADI
Pretreatment Program Required Indicator	PRET
SIC Code	SIC2
Type Ownership	TYPO
National Municipal Policy Tracking Indicator	RDF6
Significant Noncompliance Flag for P.L. 92-500 Minor Facilities	(To Be Created)
PIPE SCHEDULE RECORD	
Report Designator	DRID
Discharge Number	DSCH
Final Limits End Date	FLED
Final Limits Start Date	FLSD
Interim Limits End Date	MLED
Interim Limits Start Date	MLSD
Initial Limits End Date	ILED
Initial Limits Start Date	ILSD
Number of Units in Report Period	NRPU
Number of Units in Submission Period - EPA	NSUN
Number of Units in Submission Period - State	NSUS

WENDB ELEMENTS
(Continued)

Data Element Name	Acronym
Pipe Inactive Code	PIAC
Report Units	REUN
Initial Report Date	STRP
Initial Submission Date - State	STSS
Initial Submission Date - EPA	STSU
Submission Unit - EPA	SUUN
Submission Unit - State	SUUS

NOTE: Additional data elements subject to approval:

Frequency of Analysis	FRAN
Sample Type	SAMP
Compliance Schedule File Number	CSFN
Enforcement Action File Number	ERFN
Permit Limits File Number	LSFN
Inspection Comments (First Three Characters for the Number of Industrial Users Inspected)	ICOM
Facility Inactive Date	IADD
Reissuance Control Indicator	RCIN
Pipe Inactive Date	PIDT

Total:	111	WENDB elements
plus additional data elements:	+ 9	data elements
New total:	120	WENDB elements

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

MAR 23 1988

OFFICE OF WATER

MEMORANDUM

SUBJECT: Update of PCS Policy Statement/WENDB Data Elements

FROM: J. William Jordan, Director
Enforcement Division (EN-338)

TO: Regional Water Management Division Directors

Since the Permit Compliance System (PCS) Policy Statement was issued by Assistant Administrator Larry Jensen on October 31, 1985, additional Water Enforcement National Data Base (WENDB) data elements have been added to track key pretreatment (Pretreatment Permits and Enforcement Tracking System - PPETS) and administrative penalty order activities. Only three of the administrative penalty WENDB data elements listed in my previous memorandum on administrative penalty tracking are currently included. In each case we established task forces of EPA and, in the case of PPETS, State representatives to develop several options for new WENDB data elements. Regional (and State for PPETS) comments were received on numerous occasions before developing final lists.

Attached is an addendum to the PCS Policy Statement which includes these new WENDB data elements (i.e., those data elements that are required to be entered into PCS). The PPETS WENDB elements are required for both EPA and NPDES States. Administrative penalty order elements are required only for EPA actions. If new WENDB data elements are needed for new initiatives, EPA Regions and the States will be asked to participate in determining appropriate WENDB elements. After this process, updated WENDB lists will again be forwarded to you.

Please make sure your States receive a copy of this memorandum. Call me (FTS-475-8304) or Roger Hartung, Acting Chief Compliance Information and Evaluation Branch (FTS-475-8313) if there are questions. Questions on WENDB elements can be directed to Dela Ng (FTS-475-8323) on Roger's staff.

Attachment

cc: Jim Elder
Glenn Unterberger
Martha Prothro
Regional Compliance Branch Chiefs
Regional PCS Contacts
Regional Pretreatment Coordinators

APPENDIX B

REQUIRED DATA TO BE ENTERED INTO PCS

Information Type[1]	Majors	Minor[4] 95-500's	Other[4] Minor
Permit Facility Data	X	X	X
Permit Event Data	X	X	X
Inspection Data	X	X	X
Parameter Limits and Pipe Schedule Data	X		
Significant Compliance Data	X	X	
Compliance Schedule Data	X	X	
DMR Measurement Data	X		
Enforcement Action Data (Enforcement Action Data, Compliance Schedule Data, and Interim Limits Data from all active formal enforcement actions and Enforcement Action Data for all active informal enforcement actions)	X		
Enforcement Action Data from all active informal and formal enforcement actions		X	
Pretreatment Approval[2]	X	X[4]	X[4]
National Municipal Policy Data[3]	X	X	X
Single Event Violation Data	X	X[4]	X[4]
Pretreatment Compliance Inspection (PCI)/Audit	X	X[4]	X[4]
Pretreatment Performance Summary	X	X[4]	X[4]

1 For each of the categories listed in this chart, the Information Type is the set of core date elements listed in Attachment II.

2 Pretreatment Program Required Indicator, PRET; one data element.

3 All required data as described in May 16, 1985 memorandum on National Municipal Policy Tracking in PCS. This includes NPFF, NPSC, NPSQ, DC2, Compliance Schedule and Enforcement Action Information.

4 The following information types are only for minor POTWs which are pretreatment control authorities: pretreatment approval, single event violation data, pretreatment compliance inspection (PCI)/audit, and pretreatment performance summary.

APPENDIX C
WATER ENFORCEMENT NATIONAL DATA BASE (WENDB) ELEMENTS

Data Element Name	Acronym
COMMON KEY	
NPDES Number	NPID
COMPLIANCE SCHEDULE RECORD	
Compliance Schedule Actual Date	DTAC
Compliance Schedule Date	DTSC
Compliance Schedule Event Code	EVNT
Compliance Schedule File Number	CSFN
Compliance Schedule Number	CSCH
Compliance Schedule Report Received Date	DTRC
Compliance Schedule User Data Element2	RDC2
Data Source Code	DSCD
COMPLIANCE VIOLATION RECORD[1]	
Compliance Schedule Violation Code	CVIO
Compliance Schedule Violation Date	CVDT
Compliance Schedule Violation Event Code	CVEV
Compliance Violation Compliance Schedule Number	VCSN
Compliance Schedule Violation Data Source Code	VDCD
NCR Compliance Schedule Violation Detection Code	SNCC
QNCR Compliance Schedule Violation Detection Date	SNDC
QNCR Compliance Schedule Violation Resolution Code	SRCC
QNCR Compliance Schedule Violation Resolution Date	SRDC
ENFORCEMENT ACTION RECORD	
Enforcement Action Code (includes administrative penalty orders)[2]	ENAC
Enforcement Action Comment	ECMT
Enforcement Action Compliance Schedule Violation Code	ECVC
Enforcement Action Compliance Schedule Number	EVSN
Enforcement Action Compliance Schedule Violation Date	ECVD
Enforcement Action Data Source Code	EVCD
Enforcement Action Date	ENDT

NOTE: See last page for listing of footnotes

APPENDIX C

WENDB ELEMENTS

Data Element Name	Acronym
Enforcement Action Discharge Number	EVDS
Enforcement Action Event Code	EVEV
Enforcement Action File Number	ERFN
Enforcement Action Limit Type-Alphabetic	EVLM
Enforcement Action Modification Number	EMOD
Enforcement Action Monitoring Date	EVMD
Enforcement Action Monitoring Location	EVML
Enforcement Action Parameter Code	FVPR
Enforcement Action Report Designator	EVRD
Enforcement Action Response Due Date	ERDT
Enforcement Action Season Number	ESEA
Enforcement Action Status Code	ENST
Enforcement Action Status Date	ESDT
Enforcement Action Violation Type	EVTP
Enforcement Action Code - Violation Key[3]	EKAC
Enforcement Action Date - Violation Key[3]	EKDT
Enforcement Action Type Order Issued EPA/State Violation Key[3]	EKTP
Enforcement Action Single Event Violation Code[3]	ESVC
Enforcement Action Single Event Violation Date[3]	ESVD
Enforcement Action Type Order Issued EPA/State[3]	EATP
EVIDENTIARY HEARING RECORD	
Evidentiary Hearing Event Code[4]	EHEV
Evidentiary Hearing Event Date	EHDT
INSPECTION RECORD	
Inspection Date	DTIN
Inspector Code	INSP
Inspection Type	TYPI
Inspection Comments (First three characters for Industrial User pretreatment inspections)	ICOM

NOTE: See last page for listing of footnotes

APPENDIX C

WENDB ELEMENTS

Data Element Name	Acronym
MEASUREMENT VIOLATION RECORD	
Measurement/Violation Concentration Average	MCAV
Measurement/Violation Concentration Minimum	MCMN
Measurement/Violation Concentration Maximum	MCMX
Measurement/Violation Quantity Average	MQAV
Measurement/Violation Quantity Maximum	MQMX
Measurement/Violation Discharge Number	VDSC
Measurement/Violation Monitoring Location	VMLO
Measurement/Violation Monitoring Period End Date	MVDT
Measurement/Violation Parameter	VPRM
Measurement/Violation Report Designator	VDRD
No Discharge Indicator	NODI
QNCR Measurement Violation Detection Code[1]	SNCE
QNCR Measurement Violation Detection Date[1]	SNDE
QNCR Measurement Violation Resolution Code[1]	SRCE
QNCR Measurement Violation Resolution Date[1]	SRDE
PARAMETER LIMITS RECORD	
ange of Limit Status	COLS
ıcentration Average Limit	LCAV
ntration Maximum Limit	LCMX
centration Minimum Limit	LCMN
Concentration Unit Code	LCUC
Contested Parameter Indicator	CONP
Limit Discharge Number	PLDS
Limit File Number	PLFN
Limit Report Designator	PLRD
Limit Type - Alphabetic	LTYP
Modification Number	MODN
Modification Period End Data	ELED
Modification Period Start Date	ELSD
Monitoring Location	MLOC
Parameter Code	PRAM
Quantity Average Limit	LQAV
Quantity Maximum Limit	LQMX
Quantity Unit Code	LQUC
Season Number	SEAN
Statistical Base Code	STAT

NOTE: See last page for listing of footnotes

APPENDIX C

WENDB ELEMENTS

PERMIT EVENT RECORD

Permit Tracking Actual Date	PTAC
Permit Tracking Event Code[5]	PTEV

PERMIT FACILITY RECORD

Average Design Flow	FLOW
City Code	CITY
County Code	CNTY
Facility Inactive Code	IACC
Facility Inactive Date	IADT
Facility Name Long	FNML
Federal Grant Indicator	FDGR
Final Limits Indicator	FLIM
Major Discharge Indicator (Entered by EPA Headquarters)	MADI
NMP Final Schedule[6]	NPSC
NMP Financial Status[6]	NPFF
NMP Schedule Quarter[6]	NPSQ
Pretreatment Program Required Indicator	PRET
QNCR Status Code, Current Year (Manual)[7]	CYMS
Reissuance Control Indicator	RCIN
River Basin (first four characters)	BAS6
SIC Code	SIC2
Type of Permit Issued - EPA/State	FPST
Type of Ownership	TYPO

PIPE SCHEDULE RECORD

Discharge Number	DSCH
Final Limits End Date	FLED
Final Limits Start Date	FLSD
Initial Limits End Date	ILED
Initial Limits Start Date	ILSD
Initial Report Date	STRP
Initial Submission Date - EPA	STSU
Initial Submission Date - State	STSS
Interim Limits End Date	MLED
Interim Limits Start Date	MLSD
Number of Units in Reporting Period	NRPU
Number of Units in Submission Period - EPA	NSUN
Number of Units in Submission Period - State	NSUS

NOTE: See last page for listing of footnotes

APPENDIX C

WENDB ELEMENTS

Data Element Name	Acronym
PIPE SCHEDULE RECORD (continued)	
Pipe Inactive Code	PIAC
Pipe Inactive Date	PIDT
Report Designator	DRID
Reporting Units	RENU
Submission Unit - EPA	SUUN
Submission Unit - State	SUUS
SINGLE EVENT VIOLATIONS DATA ELEMENTS[3]	
Single Event Violation Code	SVCD
Single Event Violation Date	SVDT
QNCR Single Event Violation RNC Detection Code	SNCS
QNCR Single Event Violation RNC Detection Date	SNDS
QNCR Single Event Violation RNC Resolution Code	SRCS
QNCR Single Event Violation RNC Resolution Date	SRDS
PRETREATMENT PERMITS AND ENFORCEMENT TRACKING SYSTEM (PPETS)	
SOURCE - PRETREATMENT COMPLIANCE INSPECTION (PCI)/AUDIT	
Adoption of Technically-based Local Limits	ADLL
ategorical Industrial Users	CIUS
chnical Evaluation for Local Limits	EVLL
SIUS in SNC with Self-Monitoring	MSNC
Significant Industrial Users Without Control Mechanisms	NOCM
SIUS Not Inspected or Sampled	NOIN
SIUS in SNC with Pretreatment Standards or Reporting	PSNC
Date Permit Was Modified to Require Pretreatment Implementation	PTIM
Significant Industrial Users	SIUS
SIUS in SNC with Self-Monitoring and Not Inspected or Sampled	SNIN
PCI/Audit Date	DTIA
SOURCE - PRETREATMENT PERFORMANCE SUMMARY	
Formal Enforcement Actions Excluding Civil and Criminal Judicial Suits	FENF
Industrial Users From Which Penalties Have Been Collected	IUPN
Civil or Criminal Suits Filed Against SIUS	JUDI
SIUS in SNC with Pretreatment Compliance Scheduled	SSNC
SIUS with Significant Violations Published in Newspaper	SVPU
Pretreatment Performance Summary Start Date	PSSD
Pretreatment Performance Summary End Date	PSED

NOTE: See last page for listing of footnotes

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Listing of Footnotes

1. These data elements are automatically generated by PCS unless the user wishes to enter them manually.

2. This data element is required for both informal and formal enforcement action codes (when applicable). This includes administrative penalty orders.

3. These data elements were added at the request of the PCS Steering Committee at the 1986 meeting.

4. There are seven (7) required evidentiary hearing event codes (when applicable). They are as follows:

   01099 Date Granted
   06099 Date Hearing Scheduled
   07099 Date Requested
   08099 Date Settled
   09099 Date Denied
   10099 Date ALJ Decision Rendered
   11099 Date Appealed to Administrator (EPA issued permits only)

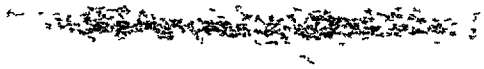
5. There are thirteen (13) required permit event codes (when applicable.) They are as follows:

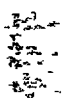
   P1099 Application Received
   P3099 Draft Permit/Public Notice
   P4099 Permit Issued
   P5099 Permit Expired
   P6599 Reopener
   P7099 Stays
   P7199 301 (c) Variance
   P7299 301 (g) Variance
   P7499 301 (k) Variance
   P7599 316 (a) Variance
   P7699 316 (b) Variance
   P7799 Fundamental Differe Factors Variance
   30099 Permit Modified

6. These data elements are previously approved National Mur :ipal Policy (NMP) data elements.

7. Required for P.L. 92-500 minors.

"GUIDANCE FOR PREPARATION OF QUARTERLY AND SEMI-ANNUAL NONCOMPLIANCE REPORTS", March 13, 1986, with transmittal letter. Table of Contents.





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C. 20460

MAR 13 1986

OFFICE OF WATER

MEMORANDUM

SUBJECT: Transmittal of the Final Quarterly Noncompliance Report Guidance

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

TO: Water Management Division Directors
Regions I - X

The Quarterly Noncompliance Report (QNCR) Guidance is attached (Attachment A) in final form reflecting comments on the draft. As you know, we held three national training sessions to acquaint the QNCR preparers with the new regulatory requirements and elicit additional questions not answered by the draft QNCR Guidance. The major change from the draft is the resolution of permit effluent violations. Permit effluent violations were resolved in the draft QNCR Guidance when a facility no longer met the pattern of noncompliance criteria for reportable effluent violations. These criteria were two monthly Technical Review Criteria (TRC) violations or four chronic violations in the two quarter period covered by the QNCR. Therefore, a permittee would have to experience fewer violations than two TRC or four chronic violations in the two quarters to be reported as resolved on the QNCR. The final guidance also now resolves these violations, for both QNCR and significant noncompliance (SNC) purposes, when a facility achieves one quarter of absolute compliance with the monthly average limitations.

The other issue which was resolved by your comments was the tracking of permit effluent measurements in the absence of interim limits in an enforcement order. The majority of comments were in favor of the draft guidance on this issue - that continuing permit violations not be reported on the QNCR, but tracked outside of the QNCR for escalation of enforcement when necessary. The final guidance remains unaltered on this issue.

In addition to the change mentioned above, several wording changes have been made in the final version based on comments received at the training sessions. The major comments and questions have been compiled into a "question and answer" format to be sent as a follow-up to the training. These questions and answers reflect a wide range of subjects indicating a great deal of careful thought by Regional staff.

5 | 2

One expected important result of the QNCR Guidance and our revised definition of SNC is an increase in the level of SNC (expressed as a percent of major permittees). The Office of Enforcement and Compliance Monitoring (OECM) has been informed of this increase and will be taking this into consideration when evaluating Regional performance. In addition, sample introductions to the QNCR have been drafted (see Attachment B for QNCRs generated automatically through the Permit Compliance System and Attachment C for manually prepared QNCRs) to accompany reports sent out under the Freedom of Information Act; these introductions will inform the public of the changes in the regulation and indicate that even though our definition of SNC is more stringent than it had been in the past, it does not include all instances of noncompliance listed on the QNCR.

Please call J. William Jordan (202-475-8304) or Larry Reed (202-475-8313) for questions, or have your staff call Sheila Frace (202-475-9456).

Attachments

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ATTACHMENT A

GUIDANCE FOR PREPARATION OF QUARTERLY AND SEMI-ANNUAL NONCOMPLIANCE REPORTS (PER SECTION 123.45, CODE OF FEDERAL REGULATIONS, TITLE 40)

FOREWORD

Section 123.45 of the Code of Federal Regulations, Title 40, establishes the reporting requirements for quarterly, semi-annual, and annual noncompliance reports on facilities that are permitted under the National Pollutant Discharge Elimination System (NPDES). This regulation, as published in the Federal Register on August 26, 1985, is a revision of previous reporting requirements. This revision was necessary because the old regulations were found to be too vague. This resulted in inconsistent reporting as each NPDES administering agency tried to manage their program in a manner that was consistent with their understanding of the intent of the regulation.

Quarterly Noncompliance Report

The current regulations for the Quarterly Noncompliance Report (QNCR) evolved from initial efforts by the compliance managers in the Regions and in States having NPDES authority to identify a concensus set of reporting criteria. These criteria were then reviewed by the Compliance Task Force of the Association of State and Interstate Water Pollution Control Administrators. The result was a set of specific, quantifiable reporting criteria; violation of these criteria is known as Category I noncompliance.

Since that time, EPA has identified additional violations that are harder to quantify but are of sufficient concern to be considered reportable; these violations are known as Category II noncompliance.

The regulations currently require the reporting of Category I and II noncompliance by major permittees; these regulations differ most significantly from the old ones in the areas of effluent and schedule noncompliance.

The major change in the area of effluent noncompliance is the concept that an isolated, minor excursion may not be of sufficient concern to warrant tracking on the QNCR. Instead, Category I effluent noncompliance is based on specifically defined "patterns of noncompliance" which take into account the magnitude, frequency of occurrence, and duration of the violations. These violations are resolved through issuance of a formal enforcement order or by demonstrated compliance such that the criteria are no longer met for the "pattern of noncompliance" or the permittee has achieved one complete quarter of compliance.

In contrast, the old regulations required that all violations during the quarter be reported. This requirement would have resulted in such voluminous reports that it was not strictly adhered to by the administering agencies (EPA or approved States). These violations were resolved in the past by one month of compliance.

One of the major changes in the area of schedule noncompliance is the concept that municipalities constructing treatment facilities using federal grant funding should be reported using the same criteria as for other municipalities and industries. This is a revision of the old requirements which allowed the subjective criteria of "unacceptable progress" to be used for federally funded municipalities.

The other major change in the area of schedule noncompliance is the length of the schedule delays that must be reported. In the past, the NPDES administering agency was required to report violations of schedules (other than grant schedules) that exceeded the reporting date of the schedule milestone by at least 30 days (generally 60 days from the scheduled milestone date). It was found, however, that it was often possible to make up for delays of less than 90 days within the overall schedule. The new regulation requires only the reporting of schedule violations (including grant schedule violations) that exceed the scheduled date by 90 days or more.

A summary chart of the noncompliance that must be reported in the QNCR can be found in Appendix I of this guidance.

Semi-annual Statistical Summary

In addition to these changes, the new regulation also establishes the requirements for a new report - the Semi-annual Statistical Summary Report. This report was designed as a complement to the QNCR as an indication of the amount of effluent noncompliance that did not meet the criteria for QNCR reporting. The Semi-annual Statistical Summary Report includes numerical counts of major permittees in violation of monthly average effluent limitations for two or more months of the six-month reporting period. This criterion was chosen based on a study of over 2500 major permittees in twelve states. The study found that only one percent of the permittees that would violate

their monthly average effluent limits twice in a year would not meet the chosen criteria of twice in six months. As such, the chosen criteria was believed to be a reasonable indicator of the level of effluent noncompliance - both the noncompliance that warrants tracking on the QNCR and that which does not.

Annual Noncompliance Report

The requirements for the Annual Noncompliance Report remain unchanged in the current regulation.

Significant Noncompliance

Significant Noncompliance (SNC) is a subset of Reportable Noncompliance as defined for the QNCR. SNC is not regulatory, but is defined by EPA in Part 2 of this guidance. SNC is used solely for management purposes and contains those instances of noncompliance (both Category I and II) that EPA feels merit special attention from NPDES administering agencies. These priority violations are tracked through the Strategic Planning and Management System (SPMS) to ensure timely enforcement.

An SNC/QNCR comparison chart can be found in Appendix I.

Agency Enforcement

Any violation or instance of noncompliance by any point source discharger is subject to agency enforcement actions. This principle applies to all dischargers (major, minor, and unpermitted), and to all violations of Clean Water Act/NPDES requirements, regardless of whether or not the violations meet either the Reportable (QNCR) Noncompliance or SNC criteria.

Major Guidance Topics

This guidance is being issued to clarify the revised reporting requirements and SNC. Major topics throughout the guidance include the following:

° QNCR reporting requirements

- Criteria for reporting noncompliance

° Separate criteria for reporting instances of noncompliance with permit conditions and with enforcement order requirements

- These criteria are considered Category I if they are part of the "readily quantifiable" criteria approved by the Compliance Task Force

- These criteria are considered Category II if they are part of the "less readily quantifiable" criteria later developed by EPA

- Category I versus Category II does not determine priority for enforcement response

- Evaluation of effluent noncompliance/compliance based on performance over a period of time (pattern of noncompliance) rather than at a specific point in time (e.g., the last month of the quarter)

- The capability to generate the QNCR from the national data base (the Permit Compliance System)

° Significant Noncompliance

- Subset of QNCR Category I and II noncompliance

° Semi-annual Statistical Summary Report requirements.

A copy of the current (revised and carried over) reporting requirements follows.

§ 123.45 Noncompliance and Program Reporting by the Director.

The Director shall prepare quarterly, semi-annual, and annual reports as detailed below. When the State is the permit-issuing authority, the State Director shall submit all reports required under this section to the Regional Administrator, and the EPA Region in turn shall submit the State reports to EPA Headquarters. When EPA is the permit-issuing authority, the Regional Administrator shall submit all reports required under this section to EPA Headquarters.

(a) Quarterly reports. The Director shall submit quarterly narrative reports for major permittees as follows:

(1) Format. The report shall use the following format:

(i) Provide a separate list of major NPDES permittees which shall be subcategorized as non-POTWs, POTWs, and Federal permittees.

(ii) Alphabetize each list by permittee name. When two or more permittees have the same name, the permittee with the lowest permit number shall be entered first.

(iii) For each permittee on the list, include the following information in the following order:

(A) The name, location, and permit number.

(B) A brief description and date of each instance of noncompliance for which paragraph (a)(2) of this section requires reporting. Each listing shall indicate each specific provision of paragraph (a)(2) (e.g., (ii)(A) thru (iii)(G)) which describes the reason for reporting the violation on the quarterly report.

(C) The date(s), and a brief description of the action(s) taken by the Director to ensure compliance.

(D) The status of the instance(s) of noncompliance and the date noncompliance was resolved.

(E) Any details which tend to explain or mitigate the instance(s) of noncompliance.

(2) Instances of noncompliance by major dischargers to be reported.

(i) General. Instances of noncompliance, as defined in paragraphs (a)(2)(ii) and (iii) of this section, by major dischargers shall be reported in successive reports until the noncompliance is reported as resolved (i.e., the permittee is no longer violating the permit conditions reported as noncompliance in the QNCR). Once an instance of noncompliance is reported as resolved in the QNCR, it need not appear in subsequent reports.

(A) All reported violations must be listed on the QNCR for the reporting period when the violation occurred, even if the violation is resolved during that reporting period.

(B) All permittees under current enforcement orders (i.e., administrative and judicial orders and consent decrees) for previous instances of noncompliance must be listed in the QNCR until the orders have been satisfied in full and the permittee is in compliance with permit conditions.

If the permittee is in compliance with the enforcement order, but has not achieved full compliance with permit conditions, the compliance status shall be reported as "resolved pending," but the permittee will continue to be listed on the QNCR.

(ii) Category I noncompliance. The following instances of noncompliance by major dischargers are Category I noncompliance:

(A) Violations of conditions in enforcement orders except compliance schedules and reports.

(B) Violations of compliance schedule milestones for starting construction, completing constructio and attaining final compliance by 90 days or more from the date of the milestone specified in an enforcement order or a permit.

(C) Violations of permit effluent limits that exceed the Appendix A "Criteria for Noncompliance Reporting in the NPDES Program".

(D) Failure to provide a compliance schedule report for final compliance or a monitoring report. This applies when the permittee has failed to submit a final compliance schedule progress report, pretreatment report, or a Discharge Monitoring Report within 30 days from the due date specified in an enforcement order or a permit.

(iii) Category II noncompliance. Category II noncompliance includes violations of permit conditions which the Agency believes to be of substantial concern and may not meet the Category I criteria. The following are instances of noncompliance which must be reported as Category II noncompliance unless the same violation meets the criteria for Category I noncompliance.

(A) (1) Violation of a permit limit;

(2) An unauthorized bypass;

(3) An unpermitted discharge; or

(4) A pass-through of pollutants

which causes or has the potential to cause a water quality problem (e.g., fish kills, oil sheens) or health problems (e.g., beach closings, fishing bans, or other restrictions of beneficial uses).

(B) Failure of an approved POTW to implement its approved pretreatment program adequately including failure to enforce industrial pretreatment requirements on industrial users as required in the approved program.

(C) Violations of any compliance schedule milestones (except those milestones listed in paragraph (a)(2)(ii)(B) of this section) by 90 days or more from the date specified in an enforcement order or a permit.

(D) Failure of the permittee to provide reports (other than those reports listed in paragraph (a)(2)(ii)(D) of this section) within 30 days

from the due date specified in an enforcement order or a permit.

(E) Instances when the required reports provided by the permittee are so deficient or incomplete as to cause misunderstanding by the Director and thus impede the review of the status of compliance.

(F) Violations of narrative requirements (e.g., requirements to develop Spill Prevention Control and Countermeasure Plans and requirements to implement Best Management Practices), which are of substantial concern to the regulatory agency.

(G) Any other violation or group of permit violations which the Director or Regional Administrator considers to be of substantial concern.

(b) Semi-Annual Statistical Summary Report. Summary information shall be provided twice a year on the number of major permittees with two or more violations of the same monthly average permit limitation in a six month period, including those otherwise reported under paragraph (a) of this section. This report shall be submitted at the same time, according to the Federal fiscal year calendar, as the first and third quarter QNCRs.

(c) Annual reports for NPDES.

(1) Annual noncompliance report. Statistical reports shall be submitted by the Director on nonmajor NPDES permittees indicating the total number reviewed, the number of noncomplying nonmajor permittees, the number of enforcem actions, and the number of permit modifications extending compliance deadlines. The statistical information shall

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be organized to follow the types of noncompliance listed in paragraph (a) of this section.

(2) A separate list of nonmajor discharges which are one or more years behind in construction phases of the compliance schedule shall also be submitted in alphabetical order by name and permit number.

(d) Schedule.

(1) For all quarterly reports. On the last working day of May, August, November, and February, the State Director shall submit to the Regional Administrator information concerning noncompliance with NPDES permit requirements by major dischargers in the State in accordance with the following schedule. The Regional Administrator shall prepare and submit information for EPA-issued permits to EPA Headquarters in accordance with the same schedule:

QUARTERS COVERED BY REPORTS ON
NONCOMPLIANCE BY MAJOR DISCHARGERS
(Date for completion of reports)

January, February, and March...	[1]May 31
April, May, and June.....	[1]August 31
July, August, and September....	[1]November 30
October, November, and December	[1]February 28

(2) For all annual reports. The period for annual reports shall be for the calendar year ending December 31, with reports completed and available to the public no more than 60 days later.

[1]Reports must be made available to the public for inspection and copying on this date.

Appendix A to § 123.45 - Criteria for Noncompliance Reporting in the NPDES Program

This appendix describes the criteria for reporting violations of NPDES permit effluent limits in the quarterly noncompliance report (QNCR) as specified under § 123.45 (a)(2)(ii)(c). Any violation of an NPDES permit is a violation of the Clean Water Act (CWA) for which the permittee is liable. An agency's decision as to what enforcement action, if any, should be taken in such cases, will be based on an analysis of facts and legal requirements.

Violations of Permit Effluent Limits

Cases in which violations of permit effluent limits must be reported depend upon the magnitude and/or frequency of the violation. Effluent violations should be evaluated on a parameter-by-paramete and outfall-by-outfall basis. The criteria for reporting effluent violations are as follows:

a. Reporting Criteria for Violations of Monthly Average Permit Limits - Magnitude and Frequency.

Violations of monthly average effluent limits which exceed or equal the product of the Technical Review Criteria (TRC) times the effluent limit, and occur two months in a six month period must be reported. TRCs are for two groups of pollutants.

Group I Pollutants - TRC=1.4
Group II Pollutants - TRC=1.2

b. Reporting Criteria for Chronic Violations of Monthly Average Limits.

Chronic violations must be reported in the QNCR if the monthly average permit limits are exceeded any four months in

a six month period. These criteria apply to all Group I and Group II pollutants.

Group I Pollutants - TRC=1.4

Oxygen Demand

Biochemical Oxygen Demand
Chemical Oxygen Demand
Total Oxygen Demands
Total Organic Carbon
Other

Solids

Total Suspended Solids (Residues)
Total Dissolved Solids (Residues)
Other

Nutrients

Inorganic Phosphorus Compounds
Inorganic Nitrogen Compounds
Other

Detergents and Oils

MBAS
NTA
Oil and Grease
Other detergents or algicides

Minerals

Calcium
Chloride
Fluoride
Magnesium
Sodium
Potassium
Sulfur
Sulfate
Total Alkalinity
Total Hardness
Other Minerals

Metals

Aluminum
Cobalt
Iron
Vanadium

Group II Pollutants - TRC=1.2

Metals (all forms)

Other metals not specifically listed under Group I

Inorganic

Cyanide
Total Residual Chlorine

Organics

All organics are Group II except those specifically listed under Group I

"Managers' Guide to the Permit Compliance System" June, 1986. Table of Contents only.

MANAGERS' GUIDE

TO THE

PERMIT COMPLIANCE SYSTEM

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"General Record of Enforcement Actions Tracked (GREAT) Conversion to Permit Compliance System (PCS)", dated July 24, 1987. Supplements II.C.2. (Conversion completed prior to January 1, 1988).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

JUL 2 4 1987

OFFICE OF WATER

MEMORANDUM

SUBJECT: General Record of Enforcement Actions Tracked System (GREAT) Conversion to Permit Compliance System (PCS)

FROM: J. William Jordan, Director
Enforcement Division (EN-338)

TO: Regional Compliance Branch Chiefs

To further implement the PCS Policy Statement, PCS should be used to track EPA administrative orders issued against NPDES facilities. This was requested by the PCS Steering committee at the November 6-7, 1985, meeting in Annapolis, Maryland. The PCS Policy Statement currently requires entry of enforcement actions for majors and 92-500 minors only, but the General Record of Enforcement Actions Tracked (GREAT) system contains all EPA administrative enforcement actions (majors and minors). To successfully convert from GREAT to PCS the Regions should agree to enter into PCS the enforcement actions against all minors and unpermitted facilities. This would not effect States, since we would only be tracking EPA actions. In 1986 457 EPA formal enforcement actions were taken against minors and unpermitted facilities. The total data entry burden for the entire nation is estimated at 26 hours for one fiscal year. The PCS ADE Screens necessary for this data entry are attached, and the amount of data entry is obviously quite small. We would only give credit for those AOs entered into PCS, as we presently do for NPDES and pretreatment inspections.

Under this program the GREAT System would become a historical data base. We would continue to track close-outs of administrative enforcement actions currently in the GREAT system to ensure consistent accountability. All quarterly measures for tracking EPA NPDES administrative orders for the Strategic Planning and Management System (SPMS) would be retrieved from PCS in FY 1988. We would, however, take parallel retrievals from GREAT and PCS for the third and fourth quarters of FY87 to give everyone time to ensure that all their enforcement actions are being entered into PCS.

The plan is to enter into PCS all data for EPA enforcement actions taken against majors, unpermitted facilities and all minors. "Hardcopies" of the administrative orders, notices of violation, 404 actions (dredge and fill violations), 311 actions (SPCC and CG referrals), and closeouts would continue to be sent to Headquarters. Please review the attached proposal for PCS data entry and its attachments. We have scheduled a conference call (FTS 382-2603) with each of you at 1:00 p.m. Eastern Daylight Savings Time on July 30, 1987, to discuss the proposed conversion.

Please call Larry Reed or George Gray (FTS 475-8313) if there are questions before the July 30th conference call. We will call you to assure that you received this notice.

Attachments

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"GUIDANCE FOR REPORTING AND EVALUATING POTW NONCOMPLIANCE WITH PRETREATMENT IMPLEMENTATION REQUIREMENTS", dated September, 1987.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

September 30, 1987

OFFICE OF WATER

MEMORANDUM

SUBJECT. Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

TO: Regional Water Management Division Directors,
NPDES State Pretreatment Program Directors

The Office of Water Enforcement and Permits has completed development of a guidance for evaluating and reporting noncompliance by Publicly Owned Treatment Works (POTWs) that have failed to implement their approved pretreatment programs The Guidance identifies criteria for evaluating the principal POTW activities that are essential to fully implement most local programs POTWs that meet the criteria in the definition should be reported by EPA and approved States on the Quarterly Noncompliance Report (QNCR)

These criteria were developed by an EPA workgroup and presented to States and Regions at the National Pretreatment Coordinators Meeting, December 17, 1986 Draft guidance was developed and circulated for comment in May 1987 In general, your comments supported the criteria that were proposed in the draft We also received comments from former PIRT members As a result, the final guidance has been modified in two areas Under the criteria for POTW inspections of SIUs, the percent coverage has been increased to 80% of the levels required in the permit or approved program If no specific permit or program requirement was established the guidance recommends reporting any POTW that failed to sample or inspect at least 50% of its SIUs in a 12 month period The second area of change was for enforcement of pretreatment standards Several PIRT comments wanted a specific criterion for failure to develop adequate local limits Instead of adding new criteria, we expanded the discussions under the criteria for issuance of SIU control mechanisms, implementation of pretreatment standards, and enforcement against interference and pass-through The discussions include minimum local limit requirements and recommended procedures to resolve these and other deficiencies of approved programs.

For FY 1988, EPA Regions and States should use this guidance to identify POTWs that are failing to implement their approved programs and should report them on the QNCR While formal enforcement is not automatically required as a response to noncompliance reported on the QNCR, Regions and approved States should seriously consider the use of an administrative order (and, perhaps, with a penalty depending on the egregiousness of the lack of implementation) to establish a schedule to correct the violations The Strategic Planning and Management System for FY 1988 contains two measures

WQE-12 which addresses the POTWs compliance assessment process; and WQE-13 which will tra how frequently POTW noncompliance is addressed by formal enforcement Further explanation of thi measure can be found in "Definitions and Performance Expectations" in "A Guide to the Office of Water Accountability System and Mid-Year Evaluations" (Fiscal Year 1988) EPA Regions should assist States in applying the definition of reportable noncompliance, identifying noncomplying POTWs and tracking cases where formal enforcement is taken The Office of Enforcement and Compliance Monitoring is developing more specific guidance on the criteria for judicial referrals and the burden of proof for demonstrating noncompliance for POTW pretreatment implementation That guidance will be distributed to the Regions for review before it is made final

If you have questions regarding the guidance or SPMS reporting, please contact Bill Jordan Director Enforcement Division, or Anne Lassiter, Chief, Policy Developm Branch (202 475-8307) The staff contact is Ed Bender (202/475-8331).

cc: Glenn Unterberger
Gerald Bryan
Pretreatment Coordinators, EPA and States
Regional Compliance Branch Chiefs
Regional Counsels
Rebecca Hanmer

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GUIDANCE FOR REPORTING AND EVALUATING POTW NONCOMPLIANCE WITH PRETREATMENT REQUIREMENTS

United States Environmental Protection Agency
Office of Water
Office of Water Enforcement Permits
Washington, D C

September 30, 1987

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I. INTRODUCTION

A. Background

EPA Regions and NPDES States must report certain permit violations on the Quarterly Noncompliance Report (QNCR) which meet criteria identified in the existing NPDES Regulations (40 CFR Part 123 45) One of the violations that must be reported is a POTW's failure to adequately implement its approved pretreatment program The interpretation of adequate implementation is currently left to the discretion of the Region and approved States

The Office of Water Enforcement and Permits has developed a definition of reportable noncompliance for POTW pretreatment program implementation which establishes criteria to evaluate adequate implementation Although the size and complexity of local pretreatment programs varies greatly among Control Authorities, all POTWs must perform certain basic activities to implement their pretreatment programs The definition of reportable noncompliance establishes criteria in five basic areas of POTW program implementation IU control mechanisms, compliance monitoring and inspections, POTW enforcement; POTW reporting to the Approval Authority; and other POTW implementation requirements

The purpose of this Guidance is to explain the basis for the definition and its criteria, provide examples of how to apply the the criteria explain how to report noncompliance for POTW pretreatment program implementation on the QNCR and suggest appropriate responses to noncompliance This Guidance should be used to fulfill requirements for reporting POTW pretreatment noncompliance that are described in the F Y 1988 Agency Operating Guidance and included as a performance measure for EPA and approved State programs under the Strategic Planning and Management System (SPMS)

B. Existing Rule

The QNCR is the basic mechanism for reporting violations of NPDES permit requirements Major POTW permittees[1] must be reported on the QNCR

(1) if they are under an enforcement order for previous permit violations, or

(2) if their noncompliance meets specific criteria (Category I noncompliance), or

(3) if the regulatory agency believes the violation(s) causes problems or is otherwise of concern (Category II noncompliance)

The specific requirements of the existing rule which relate to pretreatment program implementation are as follows:

1 **Enforcement Orders** - All POTWs that are under existing enforcement orders (e g, administrative orders, judicial orders, or consent decrees) for violations of pretreatment implementation requirements must be listed on the QNCR and the compliance status must be reported on each subsequent QNCR until the POTW returns to full compliance with the implementation requirements

[1] Major POTW permittees are those with a dry weather flow of at least 1 million gallons per day or a BOD/TSS loading equivalent to a population of at least 10 000 people Any POTW (including a minor POTW) with an approved local pretreatment program should have its pretreatment violations reported on the QNCR

2 Category I pretreatment program noncompliance - A POTW must be reported on the QNCR.

a) if it violates any requirements of an enforcement order, or

b) if it has failed to submit a pretreatment report (e g., to submit an Annual Report or t publish a list of significant violators) within 30 days from the due date specified in the permit or enforcement order, or

c) if it has failed to complete a pretreatment milestone within 90 days from the due date specified in the permit or enforcement order

3 Category II - A POTW must be reported on the QNCR if the instance of noncompliance is

a) a pass-through of pollutants which causes or has the potential to cause a water quality problem or health problem,

b) *a failure of an approved POTW to implement its approved program adequately* [emphasis added], including failure to enforce industrial pretreatment requirements on industrial users as required by the approved program,[2] or

c) any other violation or group of violations which the Director or Regional Administrator considers to be of substantial concern

C. Definition of Reportable Noncompliance

OWEP has developed criteria to evaluate local program implementation that explain and clarify the existing regulations As stated, these criteria highlight activities that control authorities should use to implement their programs These activities include

1) establishment of IU control mechanisms,

2) POTW compliance monitoring and inspections,

3) POTW enforcement of pretreatment requirements,

4) POTW reporting to the Approval Authority, and

5) Other POTW implementation requirements

Collectively, these activities are the framework for the definition of reportable noncompliance (Table 1), which should be used by EPA Regions and approved States to report POTW noncompliance with pretreatment requirements on the QNCR

The following table summarizes the reportable noncompliance criteria A more detailed explanation of their application is contained in Section II of this guidance

[2] The permit should require compliance with 40 CFR part Section 403, and the approved program Thus the permit is the basis for enforcing requirements of the approved p gram or the Part 403 regulations

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TABLE 1

DEFINITION OF REPORTABLE NONCOMPLIANCE

A POTW should be reported on the QNCR if the violation of its approved pretreatment program, its NPDES permit or an enforcement order[3] meets one or more of the following lettered criteria for implementation of its approved pretreatment program

I. Issuance of IU Control Mechanisms

A) Failed to issue, reissue, or ratify industrial user permits, contracts, or other control mechanisms, where required, for "significant industrial users", within six months after program approval Thereafter, each "significant industrial user" control mechanism should be reissued within 90 days of the date required in the approved program, NPDES permit, or an enforcement order

II. POTW Compliance Monitoring and Inspections

B) Failed to conduct at least eighty percent of the inspections and samplings of "significant industrial users" required by the permit, the approved program, or an enforcement order

C) Failed to establish and enforce self-monitoring requirements that are necessary to monitor SIU compliance as required by the approved program the NPDES permit or an enforcement order

III. POTW Enforcement

D) Failed to develop, implement, and enforce pretreatment standards (including categorical standards and local limits) in an effective and timely manner or as required by the approved program NPDES permit or an enforcement order

E) Failed to undertake effective enforcement against the industrial user(s) for instances of pass-through and interference as defined in 40 CFR Section 403 3 and required by Section 403 5 and defined in the approved program

IV. POTW Reporting to the Approval Authority

F) Failed to submit a pretreatment report (e g , annual report or publication of significant violators) to the Approval Authority within 30 days of the due date specified in the NPDES permit, enforcement order, or approved program [4]

V. Other POTW Implementation Violations

G) Failed to complete a pretreatment implementation compliance schedule milestone within 90 days of the due date specified in the NPDES permit, enforcement order or approved program [4]

H) Any other violation or group of violations of local program implementation requirements based on the NPDES permit, approved program or 40 CFR Part 403 which the Director or Regional Administrator considers to be of substantial concern [4]

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[3] The term enforcement order means an administrative order, judicial order or consent decree (See Section 123 45)

[4] Existing QNCR criterion (40 CFR Part 123 45), the violation must be reported

II. APPLYING THE CRITERIA

The criteria for reporting POTW noncompliance with pretreatment requirements are based on the General Pretreatment Regulations [particularly Section 403.8(f)(2)], approved pretreatment programs, and NPDES permit conditions (particularly Part III). Where specific conditions, deadlines, or procedures are specified in the regulations or the approved program, and incorporated or referenced in the NPDES permit, POTW performance should be evaluated against those requirements. Any failure to meet those requirements is a violation. The criteria included in this Guidance establish a basis for determining when a violation or series of violations should be reported on the QNCR for failure to implement a pretreatment program. If the POTW is identified as meeting one or more of the criteria, the POTW should be considered in reportable noncompliance and reported on the QNCR.

POTW performance should be evaluated using the information routinely obtained from pretreatment compliance inspections, annual reports, pretreatment audits, and Discharge Monitoring Reports (DMRs) as well as any special sources of information. All annual reports should include a Pretreatment Performance Summary of SIU compliance information.[5] This summary should be useful to assess the effectiveness of pretreatment implementation. Pretreatment staff should review the approved program, the NPDES permit, and any correspondence with the POTW regarding its pretreatment program to identify any specific procedures, levels of performance, or milestones that may apply to implementation of the particular program. Where these requirements exist, they should be recorded on fact sheets and possibly added to the specific requirements in the permit.

ISSUANCE OF IU CONTROL MECHANISMS

A. Failure to Issue Control Mechanisms to Significant IUs in a Timely Fashion

The POTW can use contracts[6], individual permits, or sewer use ordinances as control mechanisms. Control mechanisms establish enforceable limits, monitoring conditions, and reporting requirements for the industrial user. In some cases, an approved program may have a sewer use ordinance that defines the limits (including local limits) and a separate mechanism for establishing monitoring conditions at each facility. Technically, if a control mechanism expires, control of the SIU and enforcement of some pretreatment requirements may be suspended. Therefore, timely issuance and renewal of all control mechanisms is essential.

All Control Authorities must apply pretreatment standards to their industrial users. Where the approved program requires that individual control mechanisms be developed for significant industrial users, but does not include a timeframe, the POTW should be given a deadline to issue them. Some States include schedules for issuing specific SIU permits in a POTW's NPDES permit. Where the POTW has missed two or more deadlines specified in a permit or enforcement order for issuing individual control mechanisms by 90 days or more, the violation must be reported on the QNCR as a schedule violation. In general, EPA believes that where individual control mechanisms are required by the approved program, the POTW should issue control mechanisms to all SIUs within six months after the program is approved or after new pretreatment standards (categorical or local limits) are established, so that full implementation can be evaluated by an audit within one year after approval. Any delay in this schedule should be reported on the QNCR.

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[5] USEPA. Pretreatment Compliance Monitoring and Enforcement Guidance (PCME). 1986. Recommended specific data. EPA proposed rules for annual reports that include the PCME data.

[6] Proposed rule change to 40 CFR 403 on June 12, 1986 (51 FR 21454) would make contracts an unacceptable control mechanism to obtain penalties.

The POTW should also maintain and update its inventory of SIUs EPA is considering further rulemaking to require annual updates of the IU inventory by all POTWs The IU inventory is the foundation for applying pretreatment controls and monitoring IU compliance POTWs that fail to maintain an adequate inventory of SIU's and annually update the inventory should be reported on the QNCR Where necessary, permits should be modified to require routine updates of the IU inventory

POTW COMPLIANCE MONITORING AND INSPECTIONS

B Failure to Inspect Significant Industrial Users

POTWs are required to possess the legal authority to carry out all inspection surveillance, and monitoring procedures necessary to verify the compliance status of their industrial users independent of information provided by the industrial user [40 CFR 403 8 (f)(4)] In the PCME Guidance, EPA recommended that the Control Authority conduct at least one inspection and/or sampling visit for each significant industrial user annually

The approved program and/or the NPDES permit may establish other requirements for inspections or use a different definition of significant industrial user In those cases where the permit or approved program identifies specific requirements for inspection and sampling these requirements should be used as a basis to evaluate POTW compliance If the POTW has failed to inspect or sample at least 80% of the significant industrial users as required by the permit or the approved program the POTW should be reported on the QNC R for its failure inspect POTW sampling of all IU s is essential to evaluate IU compliance where IU's do not submit self monitoring information In the absence of specific inspection coverage requirements in the approved program or permit the Approval Authority should report any POTW which has not inspected or sampled at least 50% of all SIUs within a 12 month period In addition, if the approved program or permit does not contain specific criteria the Approval Authority should modify the NPDES permit to be sure that the POTW conducts inspections or sampling visits of all SIUs at least annually

C. Failure to Establish and Enforce IU Self Monitoring where Required by the Approved Program

All categorical IU s are required to report at least twice a year [40 C F R (403 12)] POTWs also have authority to require monitoring and reporting from non-categorical IUs As a result, most POTWs have established self-monitoring requirements for SIUs as a means of securing adequate data to assess SIU compliance at less cost to the POTW than if all data were developed by the POTW through sampling Where a program does not require SIU self-monitoring, the visits and inspections conducted by the POTW must be sufficient in scope or frequency to assure compliance

IU self-monitoring requirements should specify the location, frequency and method of sampling the wastewater, the procedure for analysis and calculation of the result, the limits, and the reporting requirements These self-monitoring requirements may be applied in general, through an ordinance, through specific control mechanisms or through a combination of general and specific mechanisms Where self-monitoring is used, it should be required frequently enough to accurately demonstrate the continuing compliance of the SIU A POTW may use a combination of SIU self-monitoring and its own data collection to evaluate SIU compliance with its limits As a guide EPA has published self-monitoring frequencies for significant industrial users that are related to their process wastestream flow rates (See section 2 2 of the PCME Guidance)

In most situations effluent monitoring information should be available so that the compliance of a SIU with a monthly 4-day or other average limit can be determined at least once a quarter This frequency is higher than the implied minimum in the regulations, however, this frequency is more likely to promote continued compliance and a more timely POTW response to violations Under proposed rules[7] for pretreatment, SIU violations would trigger additional self-monitoring. For each violation the SIU detects, it would be required to resample and submit both sample results for review by the Control Authority

In evaluating compliance with this criterion, EPA and approved States should examine the requirements of the permit and determine whether the Control Authority has established self-monitoring requirements as required Where appropriate requirements have been established, the Control Authority must ensure that SIUs comply with all aspects of the requirements and report in the manner required in the control mechanism Where the Control Authority fails to establish appropriate requirements or to adequately enforce (e g POTW should respond in writing to all SNC violations for IU self-monitoring) these requirements once established the Control Authority should be considered in noncompliance and listed on the QNCR

POTW ENFORCEMENT

D. Failure to Implement Pretreatment Standards

1. Application of Local Limits

Implementation of pretreatment standards requires the development of local limits as well as the enforcement of all pretreatment standards The discussion of local limits in the preamble to the 1981 *General Pretreatment Regulations* states in part "These [local] limits are developed initially as prerequisite to POTW pretreatment program approval and are updated thereafter as necessary to reflect changing conditions at the POTW" In order to comply with their permit and the regulations, each POTW should have already conducted a technical evaluation, using available techniques, to determine the maximum allowable treatment plant headworks (influent) loading for six metals (cadmium, chromium, copper, lead, nickel and zinc)[8] and other pollutants which have reasonable potential for pass-through, interference, or sludge contamination. Therefore, any POTW that has not conducted this evaluation and adopted appropriate local limits should be reported on the QNCR for failure to adequately implement their approved pretreatment program.

If any POTW program has already been approved without the analysis of the impact of the pollutants of concern and adoption of local limits, the Approval Authority should report the POTW on the QNCR and immediately require the POTW to initiate an analysis and to adopt appropriate local limits This requirement should be incorporated in the POTW's NPDES permit as soon as feasible. Where a POTW has previously adopted local limits but has not demonstrated that those limits are based on sound technical analysis, the Approval Authority should require the POTW to demonstrate that the local limits are sufficiently stringent to protect against pass-through, interference and sludge contamination POTWs which cannot demonstrate that their limits provide adequate protection should be reported on the QNCR and required to revise those limits within a specific time set forth in a permit modification

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[7] See proposed amendments to General Pretreatment Regulations 51 FR 2154 June 12, 1986

[8] See discussion from Rebecca Hanmer, Director, OWEP USEPA Memorandum "Local Limits Requirements for POTW Pretreatment Programs" August 5, 1985

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2. POTW Enforcement and IU Significant Noncompliance

The Control Authority must have the legal authority--usually expressed through a sewer use ordinance--to require the development of compliance schedules by IUs and to obtain remedies for noncompliance, including injunctive relief and civil or criminal penalties [40 CFR 403 8(f)(iv) and (vi)] In addition, the Control Authority must have an attorney's statement, which among other things, identifies how the Control Authority will ensure compliance with pretreatment standards and requirements and enforce them in the event of noncompliance by industrial users [Section 403 9(b)(1)(iii)] Further procedures for enforcement may be contained in the approved program, sewer use ordinance or NPDES permit

The attorney's statement and compliance monitoring sections of the approved program, taken in combination with the NPDES permit, may provide a comprehensive set of enforcement procedures which the POTW should follow to ensure the compliance of industrial users with pretreatment standards Where such procedures are inadequate, EPA strongly recommends that POTWs develop written enforcement procedures which describe how and when enforcement authorities are applied (See section 3 3 of the PCME) These procedures serve to inform industrial users of the likely response to violations and assist the POTW in applying sanctions in an equitable manner

The Approval Authority must periodically evaluate whether the POTW is effectively enforcing pretreatment standards In evaluating performance, the Approval Authority should examine both whether the POTW is following its enforcement procedures and whether the program is effective in ensuring compliance with pretreatment standards One of the indicators the Approval Authority should use in evaluating effectiveness is the level of compliance of SIUs with pretreatment standards Where the level of significant noncompliance (SNC)[9] of SIUs is 20% or greater, there is a reasonable presumption that the Control Authority is either not effectively enforcing its procedures or that the procedures are inadequate The burden of proving that this is not the case should fall on the Control Authority

EPA and NPDES States have been using a definition of significant noncompliance for major permittees to set priorities for formal enforcement and as a tool to evaluate the effectiveness of Regional and State compliance programs Major industrial permittees a subset of all industrial permittees, generally have the largest direct discharge flows, and highest toxic pollutant loadings Therefore their noncompliance has the greatest potential to adversely affect water quality or pose human health problems In terms of priorities, the significant industrial users within a POTW should be considered to be similiar to the major industrial permittees by the approved State or EPA Region

Enforcement followup by EPA Regions and approved States is generally considered to be effective if the levels of significant noncompliance among major industrial permittees is maintained below 6% Given the fact that most approved pretreatment programs are still relatively inexperienced, a 20% level of SNC for SIUs appears to be a reasonable starting point to assume that POTW enforcement is inadequate As POTWs gain experience, the level of SNC should decrease, and thus, this definition can be made more stringent

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[9] See SNC definition included in section 3 4 1 of the PCME The ANPR for the Domestic Sewage Study recommended that the definition of SNC in the PCME be incorporated into the definition of significant violators for industrial users (Section 403 8(f)(2)

3. **Enforcement Response Procedures**

Although most approved programs describe the authorities that are available to the POTW and e procedures for addressing SIU noncompliance, few programs specify what action will be taken or w it should occur POTWs have been required to develop enforcement response procedures under cons .. decrees with specific timeframes for initiating informal to formal enforcement. These timeframes range from 14 to 60 days

While a specific timeframe for POTW action against an SIU in SNC has not been set, as a general rule EPA recommends that a POTW respond initially to each violation within 30 days from the date the violation is reported or identified to the POTW As part of the initial responses, the POTW should evaluate the violation and contact the SIU (e g, telephone call, warning letter, or meeting) Where formal enforcement is needed as a subsequent enforcement response, the appropriate timeframe is 90 days from the date of the initial response to the violation This timeframe is equivalent to the expectation for initiating formal enforcement in the NPDES program

The Approval Authority should review the Control Authority's actions carefully to determine whether it has evaluated the violations and contacted the SIU in a timely manner escalating the response when compliance is not achieved If this review reveals that the Control Authority has often not followed its own procedures or that the Control Authority has not appropriately used its full authorities to achieve compliance by its SIUs, the Control Authority should be judged to be in noncompliance

Where the Control Authority is judged to have followed its procedures in almost all cases, but the level of significant noncompliance among SIUs is 20% or greater, the adequacy of Control Authority enforcement procedures should be reviewed If the procedures are found to be inadequate the procedures should be modified The Approval Authority might require modification of the approved program, through the NPDES permit or possibly an administrative order requiring the adoption of new procedures along the lines of those included in the PCME Guidance The Control Authority should listed on the QNCR in noncompliance until it has taken those actions required of it by the Appr Authority

Even where the SIUs have a low level of significant noncompliance, the Approval Authority should review the performance of the Control Authority to ensure that it is, in fact, implementing its enforcement procedures and that the procedures are adequate to obtain remedies for noncompliance For example, where a Control Authority fails to identify all violations or fails to respond to violations when they do occur, the POTW should normally be identified as in noncompliance on the QNCR.

E. Failure to Enforce Against Pass-Through and Interference

Definitions of industrial user discharges that interfere with a POTW or pass-through the treatment works were promulgated January 14, 1987 (52 FR 1586)

Interference generally involves the discharge of a pollutant(s) which reduces the effectiveness of treatment such that an NPDES permit limit is exceeded The pollutant that caused the interference will be different from the pollutant in the permit that was exceeded (If the pollutant that causes the violation is the same as the pollutant in the permit that was exceeded, pass-through has occurred) The POTW is responsible for identifying and controlling the discharge of pollutants from IUs that may inhibit or disrupt the plant operations or the use and disposal of sludge The POTW must monitor IU contributions and establish local limits to protect its sludge

The POTW should have written procedures to investigate, control and eliminate interference and pass-through. Whenever interference or pass-through is identified, the POTW should apply such procedures to correct the problem Section 403 5 of the General Pretreatment Regulations requires that the POTW develop and enforce local limits to prevent interference and pass-through from indus contributors to the treatment works If a POTW has permit limit violations that are attributabl industrial loadings to its plant, it is also a violation of Sect ~ 403.5 The POTW should be reported on

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the QNCR for failure to enforce against pass-through and/or interference, if the POTW has two or more instances of pass-through and interference in any month or 3 or more instances in a quarter.

The POTW is responsible for monitoring to detect these discharges and enforcing against the IU where it contributes to permit exceedances The PCME Guidance recommends one inspection and/or sampling visit each year for each SIU Many Approval Authorities require the POTW through its NPDES permit, to monitor the influent, effluent, and sludge at least annually to evaluate the potential for interference and pass-through In a few cases, special monitoring has been required for septage and other waste haulers or to monitor corrective actions for past violations of interference and pass-through POTWs that fail to have quarterly monitoring of their SIUs (by the POTW or SIU as discussed under the previous criterion) and/or have not developed appropriate local limits to prevent interference or pass through are generally unprepared or unable to enforce against interference or pass-through These POTWs should be reported as failing to adequately implement their pretreatment programs.

POTW REPORTING TO THE APPROVAL AUTHORITY

F. Failure to Submit Pretreatment Reports Within 30 days

This criterion already exists under Category I of 40 CFR Part 123 45(a) The term "pretreatment report" should be interpreted to include any report required by the Approval Authority from the POTW (including publication of significant violators in the newspaper as required by Section 403 8(f)(2)(vii) of the General Pretreatment Regulations) Where specific dates are established for these or other reports from the POTW they may be tracked as schedule requirements in PCS When deadlines are missed, the POTW should be notified immediately because these reports contain information which is essential to determine compliance status When the due date is missed by 30 days or more, the POTW should be reported on the QNCR as in noncompliance

OTHER POTW IMPLEMENTATION VIOLATIONS

G. Failure to meet Compliance Schedule Milestones by 90 Days or more

Compliance schedules are frequently used to require construction of additional treatment, corrective action, Spill Prevention Contingency and Countermeasure plans, additional monitoring that may be needed to attain compliance with the permit, and any other requirements, especially local limits. The schedules divide the process into major steps (milestones) that can be verified by inspection or review. Most schedules include progress reports EPA recommends that the milestones be set at least every six months throughout the schedule The schedules can be incorporated as part of the permit if final compliance will not exceed the regulatory compliance deadline If the compliance schedule is to resolve a violation that has occurred after the regulatory compliance deadline, the schedule must be placed in an administrative order, judicial order, or a consent decree

The existing rule for QNCR reporting requires that all permittees be listed on the QNCR if they are under an enforcement order If the permittee is in compliance with the order, the compliance status is "resolved pending" If the permittee has missed a compliance schedule date by 90 days or more, the permittee must be reported as noncompliant on the QNCR For POTW pretreatment programs, a failure to attain final compliance within 90 days of the compliance deadline in an enforcement order is considered SNC

H. Any Other Violation(s) of Concern to the Approval Authority

This criterion allows the Approval Authority to identify any POTW as in reportable noncompliance fo a single violation or any combination of violations which are judged to be important even though t may not be covered by the specific criteria in the definition. These violations may include instanc where the approved program and/or implementation requirements are considered to be inadequate to control IU contributions to the POTW (e g. failure to develop and/or enforce local limits), to monitor for SIU compliance with pretreatment requirements, or to enforce requirements and obtain remedies for SIU noncompliance

III. REPORTING ON THE QNCR

The Quarterly Noncompliance Report is prepared by NPDES States and EPA Regions each quarter It lists violations of Federally designated major NPDES permittees that are of concern to the Agency The format is described in Section 123 45(a) of the Regulations For each instance of noncompliance the report must show the date, basis and type of the violation, the date and type of action the agency has taken and the current compliance status The agency should also explain mitigating circumst inces or remedial actions which the permittee m is have planned Detailed guid ince for preparing the QNC R is available upon reques o the Regions or OWEP The following discussion summarizes the basic requirements for reporting POTW pretreatment violations

The QNCR must be submitted to EPA Headquarters sixty days after the reporting quarter ends The QNCR covers Federally designated majors Generally, a POTW over 1 MGD is automatically designated as a major This includes the vast majority of the POTW Control Authorities All POTW pretreatment implementation violations should be reported on the QNCR, regardless of whether the control authority is classified as a major or a minor POTW

A. Format

The general format for the QNCR is described in the Regulations A list of abbreviations and co used by the State Agency or EPA Region that prepares the report should be attached to each QNCR If the Permit Compliance System (PCS) is used to generate the QNCR, standard abbreviations are automatically used and no special list of abbreviations or codes is needed for the submittal to Headquarters (Note that a list of abbreviations may be needed for Freedom of Information Act requests) The format is intended to provide the minimum information that is necessary to describe the violation, show how and when the agency responded, explain any mitigating circumstances or clarifying comments, and indicate the current compliance status of the permittee.

The description of the permittee should include the name of the permit holder, the name of the municipality, and the NPDES permit number The permittee should be the Control Authority for the local pretreatment program. If other municipal permittees are subject to the Control Authority, they should be listed under the comments portion of the entry The Control Authority is responsible for violations by other permittees covered by the Control Authority's pretreatment program Similarly, industrial users that contribute to the violation should be listed under comments.

B. Description of the Noncompliance

Under the permittee's name and permit number, information on each instance of noncompliance must be reported For pretreatment violations, the description should summarize the criteria that were violated and reference the QNCR Regulation subparagraph The subparagraph of the August 1985 Regulations that apply would be as follows

Type of violation	QNCR (Section 123.45) Regulation Subparagraph
1) Failure to implement or enforce industrial pretreatment requirements (Criteria A-E)	(a)(iii)(B)
2) Pretreatment Report - 30 days overdue (Criterion F)	(a)(ii)(D)
3) Compliance schedule - 90 days overdue (Criterion G)	(a)(iii)(C)
4) Other violation or violations of concern (Criterion H)	(a)(iii)(G)

The criterion should be listed under the type of violation as the example (Section IV) shows

Each violation should include the date If the POTW has missed a deadline, the deadline is the date of the violation The last day of the month is used as the violation date for violations of monthly averages In some cases, the Agency may have discovered the violation through an audit or inspection of the POTW program The inspection/audit date should be noted under comments In the examples, all dates on the QNCR are written in six digit numbers representing the month, day and year The date, January 9 1987 is entered as 010987 for the PCS generated QNCR

The Region or approved State should contact the POTW promptly when a pretreatment implementation violation is detected The Region/State should also indicate its response to the POTW's failure to implement an approved program on the QNCR In determining the appropriate response, the Region/State should consider the impact of the violation, POTW compliance history the number of SIUs and the nature and/or duration of the violation Initial violations may be resolved through training, conferences or on site reviews The Regional, State response should be timely and escalate to formal enforcement (an administrative order or judicial referral) if the POTW fails or is unable to comply in a timely fashion (see example 2) The date the action was taken should also be indicated on the QNCR Planned actions by the POTW or its IUs and projected dates should be noted under comments

C. Compliance Status

The QNCR also tracks the status of each instance of reportable noncompliance Three status codes are usually reported noncompliance (NC), resolved pending (RP), and resolved (RE) "Noncompliance" means the violation or pattern of violations is continuing "Resolved pending" means the permittee is making acceptable progress according to a formal schedule (i e , through an administrative or judicial order) to correct the violation "Resolved" means the permittee no longer exceeds the QNCR criteria for which they are listed For the "noncompliance" and "resolved pending" status, the status date is generally the last date of the report period The status date for "resolved" is either the date the noncompliance requirement is fulfilled or the last day of the report period in which the permittee no longer meets the QNCR criteria

The "comments' column can be used to describe the violation explain permittee progress, indicate potential remedies projected dates of compliance and explain agency responses Other information can also be reported under comments, including the name of noncomplying SIUs, the level of performance or degree of failure by the POTW, the names of other permittees that are covered by the Control Authority, agency plans for training or technical assistance, and the manner in which the agency learned of the violation

IV. EXAMPLES OF REPORTING ON THE QNCR

The following examples illustrate how violations and agency responses are reported Example 1 is a moderate size POTW that has refused to implement the program Example 2 is a small POTW whic needs assistance. In each example, instances of noncompliance were addressed by an administrativ order after an initial warning

A) Example 1

Scenario: Hometown's pretreatment program was approved in June 1985 The permit required an annual report, fifteen days after the end of each year, beginning January 15, 1986 The program required that permits be issued to 15 SIUs by June 30, 1986 The POTW was audited in August 1986 and had failed to permit and inspect its IU's and failed to submit an annual report

QNCR Listing

Hometown WWTP, Hometown, US 00007

INSTANCE OF NONCOMPLIANCE	DATE	REG SUBPARA	ACTION (AGENCY/DATE)	COMPLIANCE STATUS (DATE)
Issue permits (Criterion A)	063086	(iii)(B)	Audit (EPA/083086) AO #123 (State/033187)	RP (033187)
Inspect SIUs (Criterion B)	083086	(iii)(B)	Audit (EPA/083086) AO #123 (State/033187)	RP (033187)
Submit Annual Report (Criteria F)	011587	(ii)(C)	Phone call (State/013087) AO #123 (State/033187)	RP (033187)

COMMENTS

AO requires submission of annual report by 4/30/87, and permit issuance and sampling inspections of all SIUs by 6/30/87. Control Authority includes two other permittees: Suburb One, Permit No. US 00008 and Suburb Two, Permit No. US 00009 who must meet the schedule for inspections

Discussion: The entry on QNCR for Hometown shows the name and permit number of the facility The Control Authority also covers two other permittees Three reportable noncompliance criteria were exceeded (see sections I and II of this guidance) The annual report was due January 15, 1987, according to the NPDES permit for Hometown The approved program was the basis for the other reported violations The "reg subpara" identifies the section of the existing QNCR which covers the violations The State has called the city which promised to submit the annual report After discussion with the city and its outlying jurisdictions an administrative order was issued with a compliance schedule to resolve all three violations Hometown is following an enforceable schedule that will lead to compliance, so its compliance status is shown as "RP" (resolved pending) for all three violations The comments indicate the compliance deadlines

B) **Example 2**

Scenario: Little Burg's pretreatment program was approved January 1, 1986 The facility has two SIU's one is a food processor and the other is a pharmaceutical manufacturer Little Burg has had loads that have resulted in permit violations of BOD (March - June 1986) The State Approval Authority issued an administrative order September 30, 1986 to establish a schedule for issuing IU permits The BOD violations were considered resolved for reporting purposes as of October 1 1986

QNCR Listing

Little Burg WWTP, Little Burg, US 0008

INSTANCE OF NONCOMPLIANCE	DATE	REG SUBPARA	ACTION (AGENCY/DATE)	COMPLIANCE STATUS (DATE)
Enforcement for IU pass through interference (Criterion L)	053186	(iii)(B)	AO#1 (State/093086) Warning letter (State/041586)	RP (033187)
Criteria E	043086	(iii)(B)	AO#1 (State/093086) Warning letter (State/051586)	RP (033187)
Criteria F	053186	(iii)(B)	same	RP (033187)
Criteria E	063086	(iii)(B)	same	RP (033187)

COMMENTS

State has provided training to Little Burg and PRELIM to calculate local limits (10/86) City will issue permits by 4/15/87

Discussion: Little Burg has a history of problems from industrial loadings The pretreatment violation is a lack of enforcement against interference and pass-through The same violation occurred four months in a row The POTW also had a violation of its BOD limit whi met the criteria for reporting on the QNCR In this case DMR data were critical flags an interference/pass-through problem. The solution is believed to be local limits and permits for the SIUs The administrative order established a schedule which is being tracked The original BOD violations have been resolved because the SIUs have reduced their loads and are preparing to add treatment When the POTW has completed the development of local limits and issued the permits, the instances of noncompliance will be deleted from the QNCR The State will continue to monitor progress each quarter through reports and/or inspections

V. COMPLIANCE EVALUATION

EPA or the approved State should use pretreatment compliance inspections, annual reports audits, and DMRs to evaluate the compliance status of the permittee At a minimum, available data should be reviewed every six months to determine whether the POTW is in compliance This review may occur in conjunction with the conduct of an audit or inspection or the receipt of a report Once the facility is shown on the QNCR, quarterly evaluations are needed to update the compliance status on each QNCR

Compliance with permit effluent limits, compliance schedules, and reporting can be tracked in PCS, which is EPA's automated data system The dates for submission and receipt of periodic reports and routine requirements should also be tracked in PCS WENDB data already require that receipt of an annual report (or periodic report) and its due date must be entered into PCS as a permit schedule requirement This tracking would allow Regions and States to forecast when reports are expected and detect reporting violations, similar to the process for tracking discharge monitoring reports and other scheduled events.

The Pretreatment Permits and Enforcement Tracking System (PPETS), has been developed, as a pa of PCS, to track the overall performance of POTWs with their pretreatment requirements and the compliance rates of significant industrial users Users guides and training will be provided to Regions and States in the fall of 1987 A few examples of the data which PPETS will include for each POTW are the number of significant users (SIUs), the number of required control mechanisms not issued, the number of SIUs not inspected or sampled, the number of SIUs in significant noncompliance (SNC), and the number of enforcement actions. Most of the data in PPETS will only be indicative of potential violations. The apparent violation should be verified as a continuing problem before the instance of noncompliance is reported on the QNCR The data elements in PCS and PPETS that may apply to reportable noncompliance are summarized for each criterion in Table 2

Once the POTW has been reported on the QNCR it should continue to be reported each quarter until the instance of noncompliance is reported as resolved Compliance with an enforcement order (both judicial and administrative) should be tracked on the QNCR from the date the order is issued until it is met in full. EPA and/or the approved State should verify the compliance status of the POTW each quarter through periodic reports from the POTW, compliance inspections, audits, meetings, or requests for compliance data and information

Table 2

REPORTABLE NONCOMPLIANCE CRITERIA AND RELATED PCS/PPETS DATA ELEMENTS

Criterion	Data Source	Data Element
Criterion A -- Failure to Issue Control Mechanisms	PPETS	o Number of SIUs without required control mechanisms[10]
		o Control mechanism deficiencies
Criterion B -- Failure to Inspect SIUs	PPETS	o Number of SIUs not inspected or sampled[10]
		o SIUs in SNC but not inspected or sampled[10]
		o SIUs not inspected at required frequency
		o Inadequacy of POTW inspections
Criterion C -- Failure to Establish Self Monitoring	PPETS	o SIUs in SNC with self-monitoring[10]
Criterion D -- Failure to Implement Standards	PCS	o Violation Summary
		o Effluent data[10]
	PPETS	o SIUs in SNC[10]
		o Number of enforcement actions[10]
		o Amount of Penalties[10]
		o Adopted local limits[10]
		o Technical evaluation for local limits[10]

[10] Water Enforcement National Data Base (WENDB) data elements for which data entry is required not optional

Table 2
(Continued)

Criterion	Data Source	Data Element
Criterion D (Continued) -- Failure to Implement Standards	PPETS	o Deficiencies in POTW application of standards
		o Date permit required implementation[10]
		o Number of significant violators published in the newspaper[10]
Criterion E -- Failure to Enforce	PCS	o Violation summary
		o Effluent data[10]
	PPLIS	o Same as Criterion D
		o Pass Through/Interference incidents
		o Deficiencies in POTW sampling
		o Deficiencies in POTW application of standards
		o Enforcement respons procedures used
Criterion F -- Failure to Submit Annual Report	PCS	o reporting schedule
		o permit reporting[10]
Criterion G -- Failure to Meet Compliance Schedules	PCS	o compliance schedule events[10]

[10] Water Enforcement National Data Base (WENDB) data elements for which data entry is required, not optional

VI. RESPONSE TO POTW NONCOMPLIANCE

The QNCR requires reporting of noncompliance, as well as the action taken by the approved State or EPA Region to resolve the noncompliance EPA Regions and approved States should review and verify all problems or violations related to POTW program implementation, regardless of whether they are or will be reported on the QNCR Specific implementation requirements must be identified and compliance should be systematically reviewed and evaluated In determining the appropriate response, the Approval Authority should consider the nature of the violation, the length of time the POTW has been approved and the compliance history of the permittee

Given the fact that implementation of pretreatment program requirements is a relatively new experience for many POTWs formal enforcement may not be initially appropriate The POTW may be unaware of how to correct the violations that have occurred and may need training and guidance from the Approval Authority The opportunity for a "second chance" is an important option for the Approval Authority In all cases, the POTW should be advised of its violations However, if the violation is the first such problem and the POTW is willing to implement the approved program and needed corrective action, then technical assistance may be appropriate to help the POTW personnel understand what is expected and when

EPA recommends closely monitoring the progress of the POTW in issuing, reissuing, or ratifying its control mechanisms If the POTW consistently fails to issue and maintain its control mechanisms in a timely fashion that is issuance in accordance with the approved program or permit or the requirement of an enforcement order within 90 days after permit expiration the Approval Authority should issue a warning letter or administrative order to the Control Authority and establish a schedule for issuing the necessary control mechanisms

Where a schedule is needed for corrective action, the Approval Authority may wish to establish that schedule in an enforcement order When a schedule extends for 90 days or longer, EPA recommends that the Approval Authority establish the schedule in an enforcement order A detailed schedule with intermediate milestones will help the POTW allocate appropriate time and priority to the required tasks while helping the Approval Authority assess the POTW's progress The Approval Authority may use a 308 letter to obtain information and time estimates from the POTW to develop the compliance schedule Compliance with an enforcement order is tracked on the QNCR until the POTW has returned to full compliance with the NPDES permit

Formal enforcement will be the appropriate initial response in a growing number of cases as POTWs become more knowledgeable of their implementation responsibilities Where the POTW has substantially failed to implement its approved program or demonstrates inadequate commitment to corrective action on a timely basis, the Approval Authority should initiate formal enforcement action [11] Formal enforcement may also be appropriate as an initial response where the POTW's failure to enforce has contributed to interference, pass-through or significant water quality impacts When a violation by the POTW has been identified and the POTW has failed to initiate corrective action in the quarter following identification on the QNCR, the Approval Authority should strongly consider formal enforcement action

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[11] EPA Headquarters is developing criteria for bringing formal enforcement actions and model pleadings and complaints for judicial actions against POTWs for failure to implement their pretreatment programs

VII. SUMMARY

The QNCR is an important tool to identify priority violations of permit conditions, to overview the effectiveness of State and EPA compliance and enforcement activities, to provide a framework to achie a nationally consistent pretreatment program, and to compile national statistics on noncompliance fo the NPDES program The existing rule for noncompliance reporting requires EPA and the States to report instances where POTWs have failed to adequately implement and enforce their approved pretreatment program

Nearly 1500 POTWs are now approved Pretreatment will be the primary mechanism to control toxic and hazardous pollutants which may enter the POTW or its sludge Therefore, it is vital that EPA and the approved States routinely evaluate POTW compliance with the requirements of their approved program and report POTWs that have failed to adequately implement their approved program

This Guidance is intended to assist Regions and approved States evaluate and report POTW noncompliance with pretreatment requirements The Guidance explains the criteria that should be used to evaluate principal activities and functions necessary to implement the program In some cases, approved States and Regions may need to modify the program and/or NPDES permit because the existing requirements are inadequate or because conditions have changed In general, those POTWs that meet the definition of reportable noncompliance should be priorities for resolving the inadequacies in approved programs or permits

EPA plans to incorporate specific criteria into the NPDES Regulations for noncompliance reporting of POTWs which fail to adequately implement their pretreatment programs The regulation will be developed after Regions and approved States have had the opportunity to use this Guidance for at least 12 months to assess the effectiveness of the criteria in identifying serious noncompliance Comments on the use of this guidance and the reporting of POTW noncompliance required under the Strategi Planning and Management System in FY 1988 will be carefully evaluated for future regulatory an program reporting requirements

"PCS PC PERSONAL ASSISTANCE LINK USERS GUIDE", updated December 21, 1988.
Table of Contents only.

PCS PC Personal Assistance Link (PAL) Users Guide

Document Number PCS-PA88-1.01

December 21, 1988

PCS USER SUPPORT
202/475-8529

U.S. EPA (EN-338)
401 M. St. SW
Washington, DC 20460

PREFACE

The Permit Compliance System (PCS) is a database management system that supports the NPDES regulations. The system is available to registered users in State and EPA Regions through the National Computer Center in North Carolina.

PCS PERSONAL COMPUTER (PC) PERSONAL ASSISTANCE LINK (PAL) is a user friendly PC software package which was developed specifically to allow managers to generate reports from PCS quickly and easily using only a few keystrokes on their microcomputers. In addition to the PCS PC-PAL Manual, the following manuals are available on the PCS system.

PCS Data Entry, Edit, and Update Manual - General Overview of PCS and detailed information on entering data into PCS. Includes documentation on PCS-ADE and PC-ENTRY.

Generalized Retrieval Manual -Provides complete information about how to run all flexible format and fixed format reports available in PCS. This includes preprinting DMRs and running the QNCR.

Inquiry User's Guide - Describes in detail the interactive retrieval software that provides interactive access to the PCS database.

Data Element Dictionary - Gives a detailed description of each type of data available in PCS, field by field.

PCS Codes and Descriptions - Provides a complete list of all of the code value tables used in PCS. Referenced by the PCS Data Element Dictionary

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"Guidance Regarding Regional and headquarters Coordination on Proposed and Final Administrative Penalty Orders on Consent under New Enforcement Authorities of the Water Quality Act of distributed August 28, 1987.

Guidance Regarding Regional and Headquarters Coordination on Proposed and Final Administrative Penalty Orders on Consent Under New Enforcement Authorities of the Water Quality Act of 1987.

I. Purpose

The purpose of this guidance is to explain the interaction required between Headquarters (HQ) and the Regions for administrative penalty actions taken by Regions under Section 314 of the Water Quality Act (WQA).

II. Background

On February 4, 1987, the WQA amendments of 1987 were enacted. Section 314 gives the Administrator new enforcement authority to issue administrative penalty orders against alleged violators of the WQA. The Administrator is delegating these new authorities to the Regional Administrators and the Assistant Administrator for Water, who may then redelegate many of these new authorities. The Office of General Counsel (OGC) and the Office of Enforcement and Compliance Monitoring (OECM) also will have certain prescribed roles.

The following guidance covers roles and responsibilities for Regional and HQ offices in EPA's use of these new enforcement authorities, including coordination responsibilities. The guidance is intended to promote consistent and sound development and use of these authorities, effective national management of the new enforcement program, and helpful information exchange, while affording significant flexibility for the Regions to implement the authorities most efficiently as seen fit in individual cases.

III. HQ CONCURRENCE ON INITIAL PROPOSED AND CONSENT PENALTY AO's

A. WQA Class I and II Penalties Other than §404

Each Regional office shall submit to Anne Lassiter, Chief, Policy Development Branch, Office of Water Enforcement and Permits (OWEP) copies of the following prior to issuance:

1. The first three Class I and the first three Class II combined complaints and penalty orders (and accompanying cover letters) proposing the assessment of penalties prior issuance under §314 of the WQA.

2. The first three Class I and first three Class II final penalty orders on consent prior to issuance under §314 of the WQA.

B. WQA Class I and II §404 Penalties

Each Regional office shall submit to Suzanne Schwar Chief, Policy and Regulations Branch, Office of Wetlands Protection (OWP), copies of the following prior to issuance:

1. The first three Class I and the first three Class II combined complaints and penalty orders with accompanying letters proposing the assessment of penalties prior to issuance under §314 of the WQA.

2. The first three Class I and first three Class II final penalty orders on consent prior to issuance under §314 of the WQA.

C. Implementation

The Office of Water Enforcement and Permits or the Office of Wetlands Protection, as appropriate, will distribute copies of the orders to the Office of Enforcement and Compliance Monitoring. EPA Regions must obtain comments and concurrence from OECM - Water, and OWEP or OWP, as appropriate, on initial proposed penalty orders/complaints and final orders on consent before signing or issuing these documents to the respondent or to any other party outside of EPA. OECM and OW offices will provide one joint response to the Regions to minimize coordinat burdens on the Regions.

In order to expedite Headquarters review of proposed and final orders, the Regions must include an action memo or a fact sheet explaining the factual basis, rationale, and significant issues associated with each proposed and final order. This material should show the basis for using the procedures chosen, and show application of penalty assessment criteria. We hope that in many cases the Regions will be able to use the same action memo already developed for their own internal use. The package also should designate a contact person in the Region with whom Headquarters should communicate on the package.

The Region may, at its discretion, submit in the package any other relevant materials which may be of assistance to Headquarters during the review process.

OWEP, OWP, and OECM review for purposes of deciding on concurrence will focus on whether the submitted documents are consistent with national law and policy in the area of WQA programs, WQA enforcement and enforcement generally. The review focus will be on the legal and technical soundness of the administrative documents submitted by the Region. The review typically will not focus on whether an administrat

penalty action is the best alternative enforcement response, although particular attention will be given to this issue on administrative cases that raise precedential national issues. The Headquarters concurrence memorandum may require document changes needed to protect the Agency's enforcement position, or may merely suggest changes preferred by Headquarters reviewers for the Region to consider implementing.

OWEP, OWP, and OECM will respond jointly in one written communication to the Regions no later than ten working days from receipt of the package unless there is good cause for a delayed decision. Headquarters may need to delay its response if, for example, additional information from the Region is essential before concurrence may be given. If good cause for delay exists, the appropriate OW Branch Chief must immediately notify the affected Region of the delay, and provide the reasons for the delay.

Upon resolution of the matter causing delay, OWEP, OWP, and OECM agree to respond to the Region as quickly as possible, but no longer than ten working days from receipt of all information requested.

If Headquarters does not respond to the Region within the appropriate time frame, the Region must notify OWEP or OWP, as appropriate, that a response has not been received. If the designated representatives for OWEP or OWP do not respond to the Region within one day, the Region may assume that OWEP or OWP, and OECM have no comment on the proposed or final order and concur in its issuance.

Where possible, the Regions are encouraged to forward diverse cases, involving a variety of WQA violations, to Headquarters for concurrence.

IV. Other Procedures to Facilitate National Management of the Administrative Penalty Program

A. Submission of Hard Copy of Penalty Orders

Currently, Regions are asked to submit copies of all administrative orders (§309) issued to OWEP. Through this guidance, we are also asking the Regions to submit hard copies of proposed and final penalty orders, either litigated or on consent, to OWEP or OWP as appropriate within 30 days of issuance of the order. These hard copies will be used as one mechanism for evaluating the effectiveness of implementation of administrative penalty authority and assessing national consistency in the use of the authority. Submission of hard copy should in no way delay or impede a Region's ability to use the administrative penalty authority.

B. Automated Tracking of Penalty Order Issuance

Headquarters will track the issuance of administrative penalty orders for other than Section 404 through the Permit Compliance System (PCS), an automated management information system for tracking permit, compliance, and enforcement status of NPDES permittees. This system is managed by the Office of Water Enforcement and Permits with data input at the Regional or State level. Regions are currently required to track all enforcement actions issued to major permittees and minor PL 92-500 municipal permittees. Regions and States will be given further guidance in the near future on the specific data to be entered for administrative penalty orders.

C. Compendium of Administrative Opinions

Headquarters will develop a compendium of decisions issued by Administrative Law Judges (ALJ) as well as any decisions handed down by courts on appeal. This compendium of decisions will be provided to Regions on a regular basis to assist in preparing cases to be heard by ALJs.

D. Circulation of Noteworthy Opinions/Orders

In addition to preparation of a compendium, Headquarters will distribute copies of noteworthy ALJ decisions as well as copies of final orders which are particularly well done or innovative, to all Regions. These will be distributed periodically, as they become available to Headquarters.

E. Coordination on Precedential Issues

From time to time, Regions will identify cases where the issues have national implications or are precedential in nature. In such circumstances, the Region will be responsible for notifying and working with headquarters (OECM) to develop arguments to be used in pleadings to presiding officers/administrative law judges. Additionally, Regions should be aware that the concurrence of the Assistant Administrator for Enforcement and Compliance Monitoring is required before an appeal of an ALJ decision is initiated and that the same Assistant Administrator must be consulted when no appeal of an adverse decision is recommended. (See Delegations of Authority.)

F. Headquarters Oversight of Administrative Penalty Implementation

Headquarters will exercise oversight of Regional use of administrative penalty authority primarily through program reviews or audits (e.g., integrated into the annual mid-year evaluation), as opposed to case-by-case, real-time review. The audits will be supplemented by data from the automated tracking system and information developed through review of the hard copies of penalty orders submitted by the Regions. In assessing overall performance, Headquarters will examine the following areas:

- overall penalty levels obtained
- conformity with penalty policy as established through review of penalty worksheets
- efficiency and use of penalty orders--number of orders issued, timely response and completion, effective negotiation and advocacy
- conformity with national enforcement policy
- establishment of significant precedent.

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"Use of Administrative Penalty Orders (APO'S) in FY 89", dated March 13, 1990. This document is reproduced at VII.IS. below.