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

EXAMPLES OF PERMIT LANGUAGE REQUIRING POTWs TO IMPLEMENT PRETREATMENT PROGRAMS

February 22, 1985

Prepared for:

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

Prepared by:

JRB Associates
A Company of Science Applications
International Corporation
8400 Westpark Drive
McLean, Virginia 22102

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

REGION II

(State of New York)

PRETREATMENT PROGRAM IMPLEMENTATION REQUIREMENTS

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

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

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

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

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

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

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

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

C. Sampling

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

D. Reporting

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

Department of Environmental Conservation
Regional Water Engineer

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

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

(applicable only if checked)
County Health Department

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

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

(i) An updated industrial survey, as appropriate.

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

(iii) Status of Program implementation to include:

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

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

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

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

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

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

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

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

(h) Planned changes in the implementation program.

(iv) Status of enforcement activities to include:

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

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

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

Special Conditions (case-by-case)

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

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

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

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

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

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

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

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

PART I

C. Special Condition - Chlorine

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

D. Pretreatment Program

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

E. Toxic Montioring Program

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

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

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

REGION IV

(State of Georgia)
(State of North Carolina)

State of Georgia

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

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

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

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

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

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

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

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

B. INDUSTRIAL PRETREATMENT STANDARDS

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

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

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

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

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

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

State of North Carolina

Pretreatment

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

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

Section II. Responsibilities of POTW and DEM

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

2. The POTW will have assumed responsibility for performing the following activities:

   a. Conduct an Industrial User Survey including identification of industrial users and the character and volume of pollutants contributed to the POTW by the industrial users.

   b. Submit an evaluation of legal authorities to be used by the permittee to apply and enforce the requirements of sections 307(b) and 402(b) (s) of the Clean Water Act, including those requirements outlined in 40 CFR 403.5 (f) (1) and .0905.

   c. Submit a determination of technical information (including specific requirements of 40 CFR 403.8 and 0905 and .0908.)

   d. Submit specific POTW effluent limitations for prohibited pollutants contributed to the POTW by industrial users.

   e. Submit design of a monitoring program which will implement the requirements of the State and Federal regulations.

   f. Submit list of monitoring equipment required by the POTW to implement the pretreatment program and a description of municipal facilities constructed for monitoring or analysis of industrial wastes.

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

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

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

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

Section III. Permit Review and Issuance

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

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

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

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

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

5. Prohibitive pretreatment determinations will be made in accordance with the POTW ordinance. The POTW ordinance will be required to meet the minimum criteria expressed in 40 CFR 403.5(b).

6. Permits will be issued under POTW procedures and will require renewal at established intervals except that permits may be modified or revised upon the adoption of new standards or, at such time as IU process changes become a factor.

Section IV. Compliance Assurance

1. All permitted IU's shall be required to submit self-monitoring data at monthly intervals to the POTW (unless otherwise instructed). These monthly reports will be submitted on standardized forms and due at reasonable reporting intervals, established by the POTW.

2. The POTW will maintain a compliance evaluation system for permitted IU's with overview by DEM. Copies of violation notices concerning compliance evaluation by the POTW will be provided to DEM.

3. Primary and significant industrial users will receive at least one compliance evaluation inspection and one compliance sampling inspection by the POTW each fiscal year. The DEM will overview this activity. All compliance inspection by the POTW will be maintained as a written report for accountability purposes. All compliance records shall be maintained for a minimum of three (3) years

Section V. Enforcement

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

Section VI. Reporting and Transmittal of Information

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

Section VII. Revisions to Agreement

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

REGION V

(State of Indiana)

(State of Wisconsin)

(Region V Model Language)

State of Indiana

Permit No. IN 0025755

INDIANA STREAM POLLUTION CONTROL BOARD

AMENDED AUTHORIZATION TO DISCHARGE UNDER THE

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

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

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

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

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

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

_____

Technical Secretary

PART III

Requirement to Operate
a Pretreatment Program

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

The Control Authority (CA) shall:

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

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

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

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

State of Wisconsin

E. PRETREATMENT PROGRAM REQUIREMENTS

The permittee is required to operate an industrial pretreatment program as described in the program approved by the Department of Natural Resources and that complies with the requirements set forth in NR 211, Wis. Adm. Code. To ensure the program is operated in accordance with the approved program, the following conditions and requirements are hereby established:

1. Inventories

a. Character and Volume of Industrial Discharges

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

b. Priority Pollutants and Additional Organic Compounds[1]

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

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

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

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

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

2. Control and Enforcement

a. Industrial User Compliance Schedules[2]

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

b. Industrial User Violation Report

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

3. Annual Program Reviews

a. Program Effectiveness Analysis

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

b. Program Modifications

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

4. Special Conditions

a. Surveillance

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

b. Publication of Violations

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

c. Limitations for Industrial Users

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

0521c

Region V Model Language

DRAFT COPY
SUBJECT TO REVISION

ATTACHMENT 3

OTHER REQUIREMENTS

APPROVED PRETREATMENT PROGRAM CONDITIONS

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

A. APPROVED PRETREATMENT PROGRAM CONDITIONS

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

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

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

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

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

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

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

B. REPORTING REQUIREMENTS

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

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

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

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

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

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

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

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

C. SAMPLING AND MONITORING REQUIREMENTS

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

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

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

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

D. SPECIAL CONDITIONS

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

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

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

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

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

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

E. RETAINER

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

REGION VI

(Region VI Model Language)

A. OTHER REQUIREMENTS

1. Contributing Industries and Pretreatment Requirements

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

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

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

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

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

2. Compliance action taken by the City, and

3. Current compliance status.

REGION VIII

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

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

Westminster, Colorado

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

City of Westminster, Colorado

By_____

Date_____

U.S. Environmental Protection Agency
Region VIII

By_____

Date_____

State of Colorado Department of Health
Water Quality Control Division

By_____

Date_____

State of South Dakota

OTHER REQUIREMENTS

Industrial Pretreatment Program

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

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

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

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

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

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

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

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

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

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

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

OTHER REQUIREMENTS (Continued)

Industrial Pretreatment Program (Continued)

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

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

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

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

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

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

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

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

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

REGION IX

(Region IX Model Language)

1989

Pretreatment of Industrial Wastewaters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) Consistently achieving compliance;

(C) Inconsistently achieving compliance;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(F) Restriction of flow to the POTW; or

(G) Disconnection from discharge to the POTW.

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

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

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

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

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

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

[STATE ADDRESS]

REGION X

(Region X Model Language)

M. Pretreatment Program Requirements

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

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

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

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

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

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

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

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

4. Pretreatment Program Sampling Requirements

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

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

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

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

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

5. Pretreatment Report

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

(i) An updated industrial survey, as appropriate.

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

(iii) Status of Program implementation to include:

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

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

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

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

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

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

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

h. Planned changes in the implementation program.

(iv) Status of enforcement activities to include:

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

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

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

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

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

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

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

MAY 3 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

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

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

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

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

Summary

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

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

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

Background

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

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

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

Interference

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

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

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

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

Pass Through

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

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

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

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

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

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

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

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

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

JUN 12 1985

MEMORANDUM

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

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

Henry L. Longest
Acting Assistant Administrator for Water

TO: Regional Counsels
Regions I-X

Water Management Directors
Regions I-X

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

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

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

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

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

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

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

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

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

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

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

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

Attachments

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

AGENDA

Municipal Pretreatment Enforcement Initiative

Second Wave

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

PRETREATMENT PROGRAM APPROVAL STATUS

REGION _____ REGIONAL CONTACT _____

DATE FORM COMPLETED _____ FTS NUMBER _____

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

*KEY:

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

REGIONAL BREAKDOWN OF REMAINING POTWs WITH UNAPPROVED PRETREATMENT PROGRAMS

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

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

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

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

F.18

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

1820

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JAN 27 1985

MEMORANDUM

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

FROM: William R. Diamond, Chief
Program Development Branch

TO: Permit Branch Chiefs, Regions I-X

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

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

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

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

---

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

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

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

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

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

cc: Rebecca Hanmer
Martha Prothro
Colburn Cherney

bcc: Jim Gallup
Geoff Grubbs
Program Development Branch

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

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

1826

United States
Environmental Protection
Agency

Permits Division EN-336
Washington, DC 20460

July 1985

Water

EPA

Guidance Manual for Preparation and Review of Removal Credit Applications

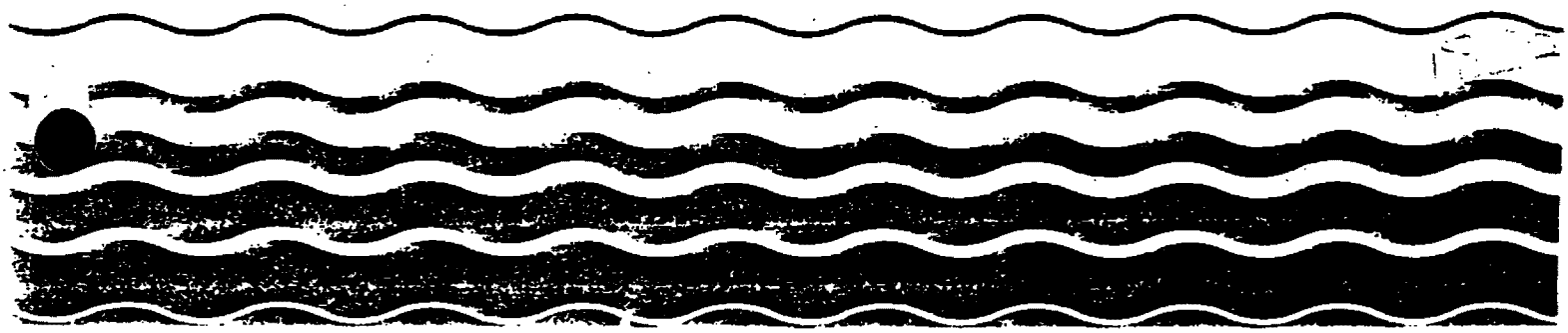


Table of Contents

Table of Contents (Continued)

1820

List of Tables

1832

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

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

AUG 15 1985

OFFICE OF WATER

MEMORANDUM

SUBJECT: Local Limits Requirements for POTW Pretreatment Programs

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

TO: Regional Water Management Division Directors
NPDES State Directors

I. Background

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

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

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

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

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

II. Minimum Requirements for Local Limits

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

cadmium	lead
chromium	nickel
copper	zinc

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

1431n

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

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

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

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

III. Application of the Minimum Local Limits Requirement

A. Unapproved Programs

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

B. Approved Programs

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

1985

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

IV. Local Limits to Control Additional Toxic Pollutants

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

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

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

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

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

VI. Control of Conventional Pollutants

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

VII. Deadline for Industrial User Compliance with Local Limits

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

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

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

VIII. Conclusion

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

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

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

United States
Environmental Protection
Agency

Industrial Technology Division
WH-552
Washington, DC 20460

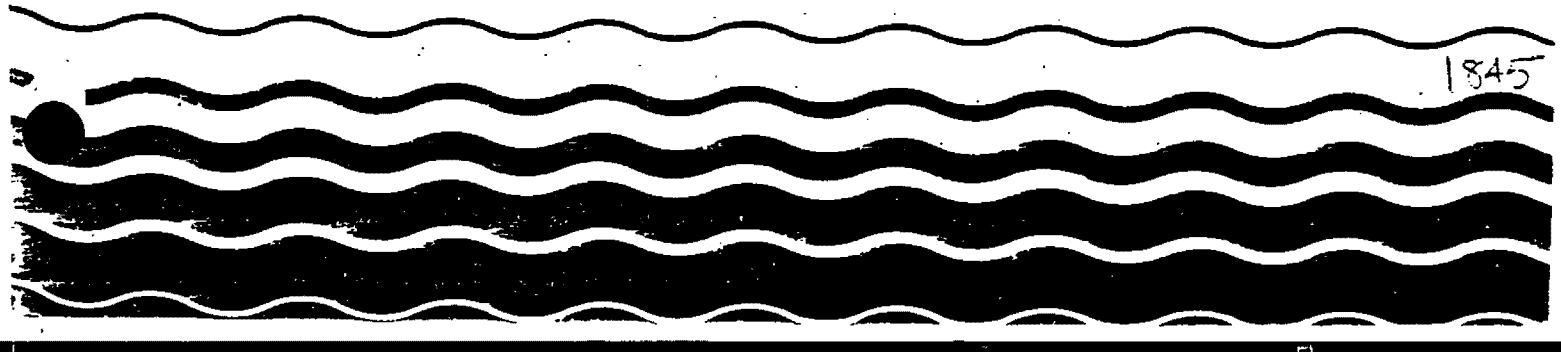
September 1985

Water

EPA

Guidance Manual for

Iron and Steel Manufacturing Pretreatment Standards



1846

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

F&48

LIST OF TABLES

1850

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

1952

United States
Environmental Protection
Agency

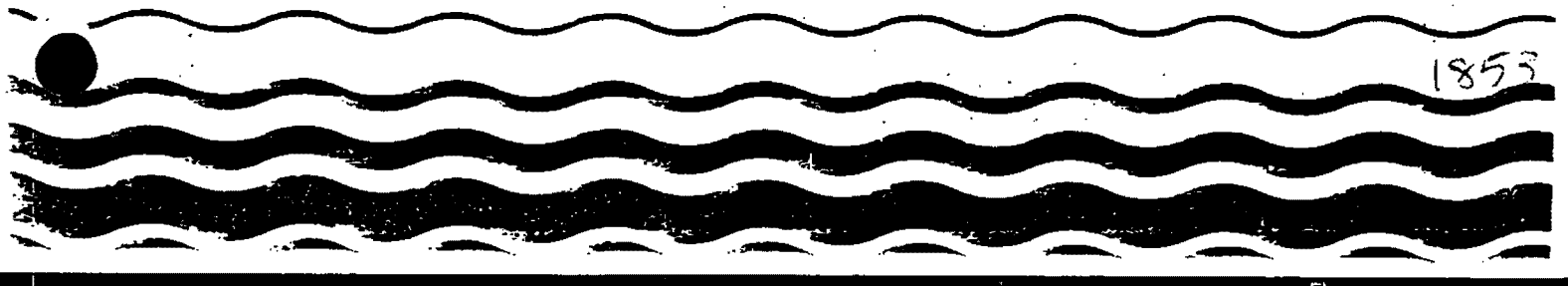
Permits Division and
Industrial Technology Division
Washington, DC 20460

September 1985

Water

EPA

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



1854

TABLE OF CONTENTS

1856

LIST OF TABLES

LIST OF FIGURES

1858

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

1860

United States
Environmental Protection
Agency

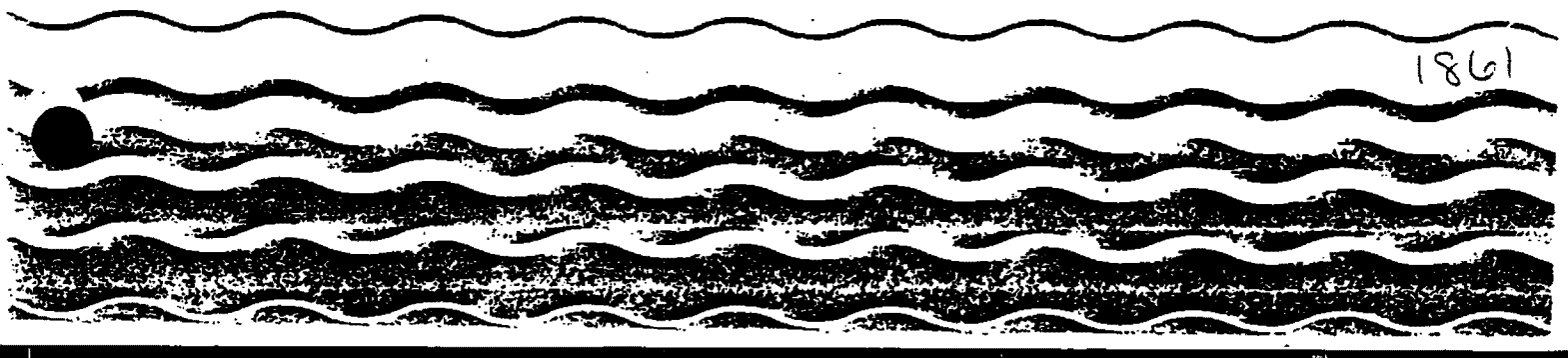
Permits Division EN-336
Washington, DC 20460

September 1985

Water

EPA

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



1861

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

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

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

SEP 20 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

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

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

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

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

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

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

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

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

1867

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

Attachments

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

GUIDANCE ON OBTAINING SUBMITTAL AND IMPLEMENTATION OF APPROVABLE PRETREATMENT PROGRAMS

Summary

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

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

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

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

Background

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

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

Enforcing a Permit Requirement to Develop a Pretreatment Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1877

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

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

Federal Enforcement in the Absence of a Permit Requirement

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

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

---

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

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

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

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

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

1874

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

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

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

---

(footnote continued)

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

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

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

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

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

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

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

Attachments

1978

ATTACHMENT A

Compliance Schedule for POTW Pretreatment Program Approval

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* While a POTW could have up to 3 months for any individual program step, the entire submittal process should take no more than 6 months.

1990

ATTACHMENT B

SUGGESTED NPDES PERMIT LANGUAGE

(for a POTW notified prior to July 1, 1983 that it needs a pretreatment program and for which a contemporaneous AO will be issued containing a compliance schedule)

Under the authority of Section 402(b)(8) of the Clean Water Act and the General Pretreatment Regulations (40 C.F.R. Part 403), which implement the pretreatment provisions of Section 307 of the Clean Water Act, the permittee is required to obtain approval in accordance with the provisions of 40 C.F.R. §§403.8 and 403.9, and thereafter implement, a pretreatment program.

(for a POTW previously identified and notified after July 1, 1983 that it needs a pretreatment program)

Under the authority of Section 402(b)(8) of the Clean Water Act and the General Pretreatment Regulations (40 C.F.R. Part 403), which implement the pretreatment provisions of Section 307 of the Clean Water Act, the permittee is required to obtain approval in accordance with the provisions of 40 C.F.R. §§403.8 and 403.9, and thereafter implement, a pretreatment program, in accordance with the following schedule:

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

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

SEP 20 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Choosing Between Clean Water Act §309(b) and §309(f) as a Cause of Action in Pretreatment Enforcement Cases

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Regions I-X

Summary

Statutory and regulatory compliance dates for many pretreatment requirements are now in effect. EPA has referred and will continue to refer enforcement actions to the Department of Justice against POTWs and Industrial Users for violation of general and categorical pretreatment requirements. The purpose of this memorandum is to provide guidance on when to use either §309(b) or §309(f) of the Clean Water Act as the cause of action in a pretreatment enforcement case.

The following guidelines apply when choosing between §309(b) and §309(f) as a cause of action in a federal pretreatment enforcement action:

(1) In an enforcement action solely against an Industrial User for violation of pretreatment standards, the enforcement action should be based on §309(b), and not §309(f);

(2) Typically, where a POTW has not obtained or implemented an approved pretreatment program, the most legally sound and most strongly preferred method for ensuring pretreatment program adoption is to enforce an appropriate provision in the POTW's permit under §309(b), or modify the permit if such a requirement is not yet present. Thus, in an enforcement action solely against a POTW for failure to obtain or implement an approved pretreatment program--if the POTW's NPDES permit requires program approval or implementation--the enforcement action should be based on §309(b), and not §309(f);

1885

(3) In an enforcement action solely against a POTW for failure to obtain an approved pretreatment program --if the POTW's NPDES permit does not require program approval--an enforcement action can be based on §309(b) if there are demonstrable NPDES permit violations, particularly ones which relate to the absence of a pretreatment program (program submission would be sought as "appropriate relief" under §309(b)); and

(4) In an enforcement action against a POTW and one or more Industrial Users covering the POTW's failure to obtain or implement an approved pretreatment program, the Government can base its enforcement action on §309(b), §309(f), or both. Note, however, that an action against the POTW is available under §309(b) only if the POTW's permit requires the POTW to obtain and implement an approved pretreatment program or if there are coexisting permit effluent violations, particularly ones which relate to failure to implement the pretreatment program. Moreover, if there is no enforceable permit provision, the Government will be in the best position to sustain its case if the POTW's failure to obtain program approval or program implementation has resulted in widespread Industrial User noncompliance with pretreatment standards or water quality problems.

It should be noted that both §309(b) and §309(f) do not include specific statutory authority to seek civil penalties; the statutory language in both subsections authorize the Administrator to "...commence a civil action for appropriate relief...." For this reason, an enforcement action based on §309(b) or §309(f) and seeking civil penalties should also include §309(d) in the cause of action.

Statutory Provisions Authorizing Pretreatment Enforcement Actions

Section 309(b) of the Clean Water Act is jurisdictional in nature; i.e., it authorizes the federal government to invoke the jurisdiction of a federal district court in an enforcement action for violation of specified sections of the Act, including the pretreatment provisions of the Act in §307.

> "(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State." (emphasis added)

1886

Section 309(d) of the Clean Water Act is the civil penalty provision of the Act; i.e., violators of specified sections of the Act are subject to a statutory civil penalty not to exceed $10,000 per day for each violation of those sections:

> "(d) Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation." (emphasis added)

Like §309(b), §309(f) of the Clean Water Act also confers authority on the Agency to invoke federal district court jurisdiction:

> "(f) Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 307, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter." (emphasis added)

Clearly, §309(f)--as does §309(b)--authorizes the Government to invoke a federal district court's civil jurisdiction in an enforcement action based on a violation of §307(d) of the Act. Thus, by the operation of both §309(b) and §309(f), the Government has the authority to invoke the jurisdiction of a federal district court to enforce pretreatment provisions of the Clean Water Act. In many cases, either subsection--(b) or (f)--or both, could be used in conjunction with subsection (d) as the Government's cause of action in a pretreatment enforcement action.

Legislative History of §309(f)

Section 309(f) was added to the Act as part of the 1977 amendments. 1/ It was added during the Conference Committee as a substitute for the original §309(f) contained in the Senate bill, S. 1952; §309(f) in the Senate bill bore no resemblance to the substitute §309(f) adopted at Conference. 2/ In the House bill, H.R. 3199, there were no pretreatment amendments. Therefore, there is no legislative history in the House or Senate committee hearings or in the House or Senate committee reports accompanying the 1977 amendments regarding this subsection of §309.

The Conference Report of the 1977 amendments states only that new subsection (f) was added to §309. 3/ The discussion new subsection (f) in the Conference Report is limited strictly

---

1/ It should be noted that §307(d) and §309(b) and (d) were added to the Clean Water Act as part of the 1972 Clean Water Act amendments. It is apparent from the legislative history of the 1972 amendments that §309(b) was contemplated as sufficient authority to enforce the pretreatment provisions of the Act. See, S. Rep. No. 92-1236, 92d Cong., 2d Sess. 131 (1972), reprinted in Rep. No. 93-1, Committee on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 314 (1973), and H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 114 (1972), id., at 801.

2/ See, S. Rep. No. 95-370, 95th Cong., 1st Sess. 46 (1977), reprinted in Rep. No. 95-14, Committee on Environment and Public Works, A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act, at 600 (1978).

3/ "Section 309 of the Federal Water Pollution Control Act is amended by adding at the end thereof the following new subsection: [quotes subsection (f) verbatim]." H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 28 (1977). Id., at 212. In addition, the Joint Explanatory Statement of the Committee of Conference only states "...section 309 of the Act is amended by adding a new subsection (f) to provide that [quotes subsection (f) verbatim]." Id., at 270-271.

1888

to a restatement of the subsection. The Conference Report thus provides no information regarding why the Senate version of subsection (f) was not accepted or why the Conference Committee version of subsection (f) was adopted.

The Conference Report was debated and passed by both the House and the Senate on December 15, 1977. The addition of subsection (f) to §309 was not debated in either House. Subsection (f) was mentioned by both Floor managers of the legislation, Congressman Anderson (D-Cal.) and Senator Muskie (D-Maine), during their extensive remarks covering the entire 1977 amendment package. 4/

While the remarks of Congressman Anderson and Senator Muskie do not discuss why §309(f) was included as part of the 1977 legislation, Congressman Anderson did state that "The municipality has the primary responsibility to enforce [the pretreatment] standards against the industries. EPA is not to unilaterally enforce these standards against the industries." It is unclear what this statement actually means since the last sentence in §309(f) states that it does not "...limit or prohibit any other authority the Administrator may have...", and §309(b) was not amended in any way to prevent its use in pretreatment enforcement against industrial users.

Choosing Between §309(b) and §309(f) -- §309(b) as the Preferred Cause of Action, and When §309(f) May Be Preferred

Nothing in §309 itself precludes the use of subsection (b) rather than subsection (f) as the cause of action in a federal pretreatment enforcement action; nor is the legislative history of §309(f) conclusive in requiring use of subsection (f) to the exclusion of subsection (b).

Where either subsection is applicable, the Government thus has the discretion--in most cases--to choose either subsection or both as its cause of action in a pretreatment enforcement action. However, because §309(b) requires no advance notice to the State, no opportunity for appropriate local enforcement action preemptive of federal action and no joinder, it is easier to invoke procedurally than §309(f). It is therefore likely that §309(b) would almost always be the Agency's "cause of action of choice." However, even if §309(f) is considered less attractive than §309(b) for procedural reasons in a pretreatment enforcement action, its use as a cause of action where §309(b) is available is not necessarily precluded, particularly if the Government can obtain relief not otherwise available under §309(b).

4/ House Debate, December 15, 1977, id., at 404, and Senate Debate, December 15, 1977, id., at 461.

In a pretreatment enforcement action in which the Agency seeks relief only against Industrial Users, or only against a POTW for failure to obtain or implement an approved pretreatment program, the Agency should continue to base its enforcement actions on §309(b).

Section 309(b), for the reasons described above, also is typically the preferable cause of action against a violating Industrial User and a POTW that has failed to properly implement its pretreatment program--approved pursuant to 40 C.F.R. §403.8 and required by the terms of its NPDES permit. Nevertheless, the Government alternatively may initiate a pretreatment enforcement action using §309(f) after providing 30 days notice to the POTW to implement pretreatment requirements and the subsequent failure of the POTW to do so. Section 309(f) would be directly on point in this situation because the Agency would be seeking relief both against the POTW for failure to implement its pretreatment program and against violating sources which the POTW had failed to enforce against.

The option to use §309(b) in the above instance would be preferable if it was determined that providing a POTW 30 days formal notice of a violating Industrial User would lead either to no remedial action by the POTW or remedial action that would be deemed unsatisfactory by the Agency but claimed to be "appropriate enforcement action" by either the source or the POTW if subsequently challenged by the Agency.

Section 309(b) would also be the preferable cause of action against a POTW failing to implement a permit-required program where the Agency lacked either the information or was unable to identify and bring a combined action against both a POTW and violating Industrial Users.

Situations may arise where the Agency would not desire to have a POTW/municipality as a defendant in a pretreatment enforcement action; e.g., a POTW may request the Agency to initiate an enforcement action against an industrial user or the Agency may desire to have the POTW as a party plaintiff. In this type of situation, §309(b) would be the Government's preferable cause of action.

The notification and litigation provisions described in §309(f) are discretionary. The Agency can notify a POTW of pretreatment violations without being obligated to follow up that notification with litigation. Therefore, it is conceivable that §309(f) could be used for "action-forcing" purposes to provide notice to a POTW that is not implementing its approved program. Using a §309(f) letter to motivate a POTW to properly implement an approved program would make a §309(f) letter to an offending POTW a "quasi Administrative Order". This use of §309(f) should be considered.

1890

The use of §309(f) "notice letters" would be most effective when a POTW has an approved pretreatment program; in the absence of an approved pretreatment program it is unlikely the POTW will be willing and able to assure a remedy of Industrial User violations in an expeditious manner.

It should be noted that in almost all instances an Agency enforcement action against a POTW is predicated upon the POTW having an approved pretreatment program incorporated in its NPDES permit pursuant to 40 C.F.R. §§403.8 and 403.9. This predicate is based on at least the following two reasons: First, §402(b)(8) of the Act--also added as part of the 1977 Clean Water Act amendments--requires that any POTW which receives pollutants subject to pretreatment standards under §307(b) have a "program to assure compliance" with those standards incorporated in its NPDES permit. Second, §402(k) of the Act may serve as a "shield" in prohibiting most enforcement actions against an NPDES permit holder that is not in violation of its permit.

A POTW without an NPDES permit requirement to obtain and implement a pretreatment program--and thus not susceptible to an enforcement action under §309(b)--could be subject to a §309(f) action. However, the Agency would have to bring a contemporaneous action against a violating Industrial User and seek relief against the POTW in the form of injunctive relief to obtain and/or implement a pretreatment program. The relief sought against the POTW would be pursuant to the "appropriate relief" clause of §309(f). At the same time the Agency should take steps to modify or revoke and reissue the POTW's permit to include a requirement to implement a pretreatment program. In order to bring such an enforcement action it should be thoroughly documented that significant, existing Industrial User violations would be alleviated by a properly implemented pretreatment program. Unless there are compelling reasons why permit modification cannot be accomplished expeditiously, Regional efforts should be directed at permit modification or reissuance.

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

cc: Office of Water Enforcement and Permits
Regional Water Management Directors, Regions I-X
OECM/Water attorneys
Environmental Enforcement Section, DOJ

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

United States Environmental Protection Agency

Office of Water Enforcement Permits Washington, DC 20460

September 1985

RCRA Information On Hazardous Wastes For Publicly Owned Treatment Works

TABLE OF CONTENTS

APPENDICES

1895

LIST OF TABLES

LIST OF FIGURES

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

1898

United States
Environmental Protection
Agency

Office of Water
Enforcement and Permits
Washington, DC 20460

July 1986

Water

EPA

Pretreatment Compliance Inspection and Audit Manual for Approval Authorities

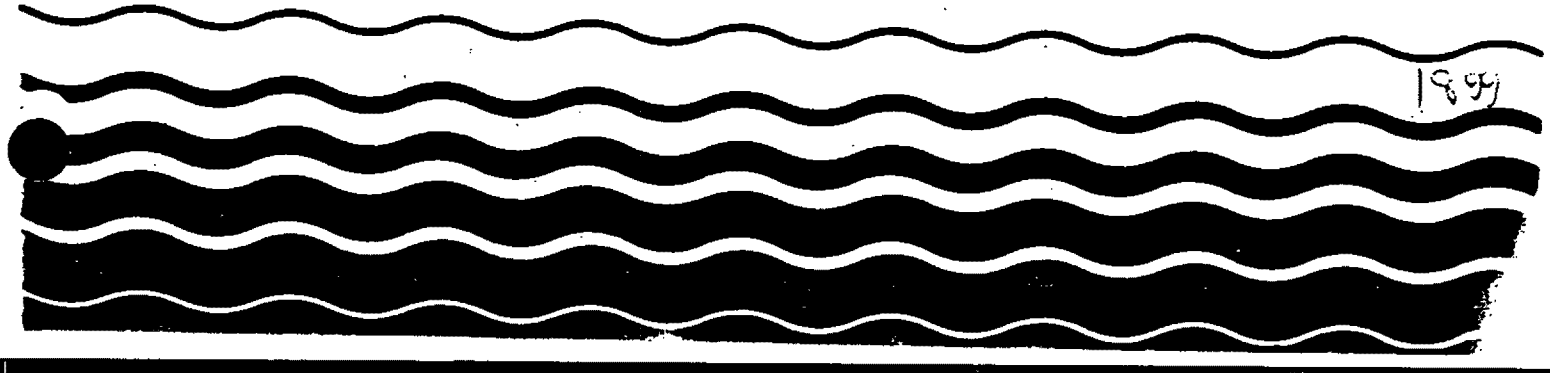


TABLE OF CONTENTS

TABLE OF CONTENTS
(CONTINUED)

TABLE

APPENDICES

1903

1904

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

PRETREATMENT COMPLIANCE MONITORING AND ENFORCEMENT GUIDANCE

OFFICE OF WATER ENFORCEMENT AND PERMITS

JULY 25, 1986

U.S. ENVIRONMENTAL PROTECTION AGENCY
401 M STREET, S.W.
WASHINGTON, D.C. 20460

1907

TABLE OF CONTENTS

190

LIST OF TABLES

APPENDICES

1911

1912

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

F.14

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

DEC 5 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Interim Guidance on Appropriate Implementation Requirements in Pretreatment Consent Decrees

FROM: Glenn L. Unterberger
Associate Enforcement Counsel for Water

J. William Jordan, Director
Enforcement Division, OWEP

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

This memorandum provides interim guidance for pretreatment program implementation provisions which should be included in all future municipal pretreatment consent decrees. This interim guidance should provide national consistency for court-ordered pretreatment implementation. This guidance may be expanded to include provisions developed by the Workgroup on Local Program Implementation.

Background

During the past two years, the Agency has launched the first and second wave pretreatment initiatives against POTWs that failed to develop local pretreatment programs, and has provided the Regions with a "Guidance on Obtaining Submittal and Implementation of Approvable Pretreatment Programs", September 20, 1985 and the "Pretreatment Compliance Monitoring and Enforcement Guidance" July 25, 1986, for POTWs with approved pretreatment programs. The latest Agency focus in the pretreatment area is on implementation of approved programs. Pretreatment cases against POTWs generally fall into two categories:[1]

---

[1] An exception to these two categories are cases against POTWs under Section 309(f) for failure to take appropriate action against an industrial user that is discharging into the POTW in

1915

1. Failure to develop and obtain approval of pretreatment programs. (The majority of these cases have already been brought; however, a number of consent decrees remain to be negotiated.)

2. Failure to properly implement approved programs.

For each type of case, a consent decree which concludes an individual case should contain provisions which require both implementation of the approved program and implementation status reports. The reporting requirements in the decree should provide sufficient information to allow EPA or a court to assess the adequacy of implementation activities. Stipulated penalties should attach to the failure to comply with definitive requirements such as the failure to report.

Implementation Requirements

At a minimum, the POTW should be required by the consent decree to do the following:

1. Implement the approved pretreatment program.

2. Inspect all significant IUs (defined as all categorical industrial users and any user which discharges over 25,000 gallons of process water or contributes 5% of the dry weather hydraulic or organic capacity of the plant or has a reasonable potential to adversely affect the POTW treatment plant) within six months of decree entry.

3. Submit semi-annual (or more frequent) implementation status reports beginning within six months of entry of the decree which supply, at a minimum, the following information:

   a) an updated list of significant industrial users and the limits that apply to each (whether based on local, categorical or prohibited limits); and

   b) an updated list of all waste discharge permits or equivalent instruments issued;

---

[1] (Continued)
violation of Section 307(d) of the Clean Water Act. Such actions may be brought whether or not a POTW is otherwise required to have a pretreatment program. Although 309(f) provisions are not discussed in this guidance, some of the provisions contained herein may be appropriate in settling 309(f) cases as well.

c) an updated list of local pretreatment limits;

d) a list of all IUs inspected, monitored and sampled since the date of program approval, together with a copy of all inspection reports;

e) a brief statement describing whether each IU (including categorical IUs) has continuously complied with its pretreatment requirements during the reporting period. For categorical IUs, include the dates of receipt of Baseline Monitoring Reports, 90 day compliance reports and semi-annual reports. For each IU out of compliance, include a descriptive summary of the violation, the cause, duration and reason for noncompliance; and

f) a descriptive summary for each non-complying IU of any efforts made by the POTW to bring that IU into compliance, a justification for any lack of appropriate enforcement and a statement as to whether the IU is now in compliance.

The consent decree should also contain a provision for a sufficient period of court oversight, i.e., approximately one year when implementation is the only issue.

Enforcement Response Procedures

In addition to the above minimum requirements, we recommend that, whenever possible, the decree require the POTW to develop and submit written Enforcement Response Procedures (ERP) within a specific period of time for review and approval by EPA. These response procedures should establish a timeframe for determining what action is appropriate for each violation, describe a range of actions appropriate to different types of violations, and describe how the control authority will document its decisions. These procedures, once formulated and approved, should serve as the POTW's operating enforcement criteria. The violation of the criteria by an IU should then trigger specific enforcement responses. Through the July 25, 1986 guidance, the Agency has encouraged all POTWs with pretreatment programs to develop such response procedures. These procedures provide a basis to evaluate compliance with the requirements to enforce pretreatment standards. Where an ERP is required, the semi-annual report should indicate whether the POTW is following the procedures.

Permit Modification

Where the State is the permitting authority, you may also wish to include a provision in the consent decree that the State will move to modify the POTW's permit to include pretreatment implementation as quickly as possible.

Attached are examples of the kind of language that should be included in all pretreatment consent decrees. Part A includes language incorporating minimum requirements normally necessary for Headquarters consent decree approval. Part B includes additional recommended provisions.

If you have any questions regarding this guidance or would like copies of consent decrees including recommended provisions, please contact Elyse DiBiagio-Wood of OECM/Water at 475-8187. If you have questions regarding the POTW guidance or would like copies, please contact Ed Bender of OWEP at 475-8331.

Attachment

cc: Susan Lepow, OGC
David Buente, DOJ
Jim Elder
Martha Prothro
OECM/Water Attorneys

1918

"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).

1977

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

United States
Environmental Protection
Agency

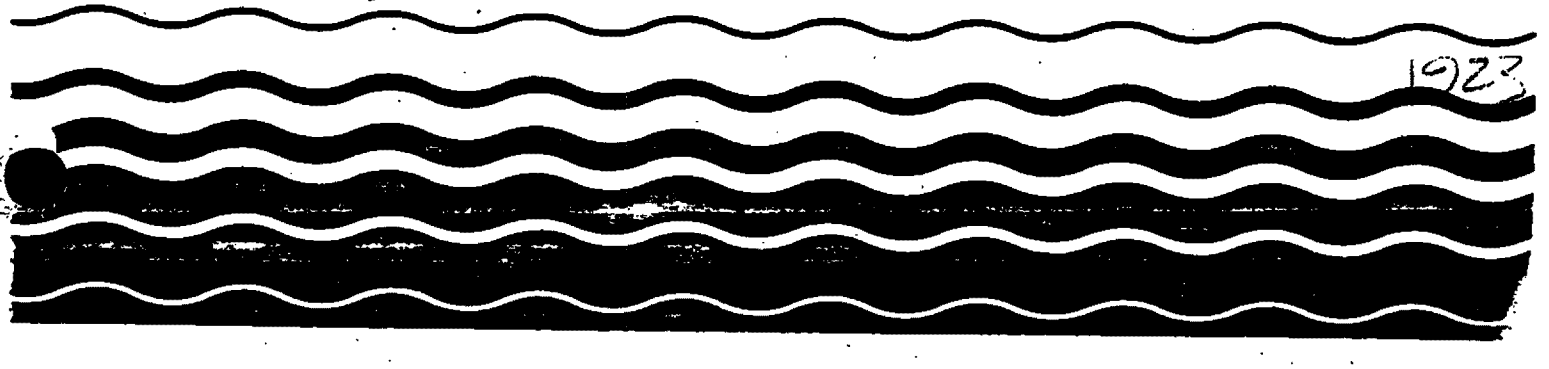
Office of Water Enforcement
and Permits
Washington, D.C. 20460

November 1987

Water

EPA

Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program



1924

TABLE OF CONTENTS

Volume I

TABLE OF CONTENTS (Continued)

1926

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

LIST OF TABLES

LIST OF FIGURES

1937

Volume II: Appendices

LIST OF APPENDICES (Continued)

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

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

AUG 4 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Bringing Enforcement Actions Against POTWs for Failure to Implement Pretreatment Programs

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

J. William Jordan
Enforcement Division Director,
Office of Water Enforcement and Permits

TO: Regional Counsels
Regional Water Management Division Directors
Susan Lepow, Associate General Counsel for Water
David Buente, Chief, Environmental Enforcement, DOJ

Attached is a final guidance document that explains the legal and policy considerations involved in deciding whether and how EPA shall pursue enforcement actions under the Clean Water Act against POTWs that have failed to adequately implement their pretreatment programs.[1] A model judicial complaint and model consent decree for failure to implement cases are included with this Guidance.[2] We will be preparing model administrative pleadings for these cases in the near future.

---

[1] This guidance document was distributed in draft for comment on February 11, 1988 (the draft was marked "January 1988 Regional Comment Draft). We received comments from seven regions, two headquarters' offices, and the Department of Justice. The comments were generally favorable and the Guidance has been revised pursuant to those comments.

[2] Drafts of the model judicial complaint and consent decree were sent to several regions and the Department of Justice for review in May 1988. We received helpful comments and the enclosed models have been revised accordingly.

1925

Now that virtually all Federally required local pretreatment programs have been approved, EPA is placing a high priority on assuring that programs are fully implemented. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report, pursuant to the definition of Reportable Noncompliance for POTW pretreatment program implementation, those POTWs that have failed to adequately implement their pretreatment program requirements.[3]

Given finite resources, EPA enforcement actions will not be appropriate for all of the POTWs that are listed on the QNCR for Reportable Noncompliance with pretreatment implementation requirements. The enclosed guidance document is intended to help EPA Regions select the best cases for enforcement in this area.

Enforcement actions against POTWs for failure to implement will be a high priority in FY 1989. Consistent with the attached guidance, we encourage all Regions to focus resources on POTWs that have failed to adequately implement their pretreatment programs.

We encourage all Regions to discuss any potential enforcement actions in this area with us. Discussion of potential cases for failure to implement should be directed to David Hindin, OECM-Water, (LE-134W), FTS 475-8547, or Ed Bender, OWEP, (EN-338), FTS 475-8331.

Attachment

cc: Ed Reich
Jim Elder
Paul Thompson
Tom Gallagher
Cynthia Dougherty
ORC Water Branch Chiefs
Regional Water Management Compliance Branch Chiefs
Regional Pretreatment Coordinators
Assistant Chiefs, DOJ Environmental Enforcement
OECM Water Attorneys

---

[3] See, U.S. EPA, Office of Water Enforcement and Permits, Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements, September 1987.

GUIDANCE ON BRINGING ENFORCEMENT ACTIONS AGAINST POTWS FOR FAILURE TO IMPLEMENT PRETREATMENT PROGRAMS
August 4, 1988

TABLE OF CONTENTS

1951

LIST OF TABLES

1940

I. EXECUTIVE SUMMARY

This guidance document explains the legal and policy considerations involved in deciding whether and how EPA shall pursue Federal enforcement responses under the Clean Water Act against POTWs that have been indentified on the Quarterly NonCompliance Report as having failed to adequately implement their pretreatment programs.

Municipal pretreatment programs must be fully implemented in order to effectively control industrial discharges of toxic, hazardous, and concentrated conventional wastes into public sewers and, ultimately, our rivers and lakes. Now that EPA has approved virtually all Federally required local pretreatment programs, EPA is placing a high priority on assuring local program implementation. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report those POTWs that have failed to adequately implement their pretreatment program requirements. EPA enforcement actions are necessary to ensure that POTWs fully implement their pretreatment programs. Indeed, this guidance document is intended to help EPA pursue enforcement actions in this area and establish a strong enforcement presence so as to assure proper program implementation on a broad scale from POTWs.

The decision to initiate an enforcement action against a POTW for its failure to adequately implement its pretreatment program requires a careful analysis of the underlying pretreatment program requirements, the legal basis for the violations and the seriousness of the violations. This is particularly true because of the differing implementation requirements which may apply to individual POTWs. In addition, the flexibility which many implementation requirements intentionally allow necessitates the use of considerable judgment in deciding whether to find a POTW in violation.

From a legal and equitable perspective, EPA is in the strongest position to enforce pretreatment program implementation requirements that are contained in a POTW's NPDES permit, either directly within the pages of a permit or indirectly through a permit condition that requires a POTW to implement its approved program and/or comply with the pretreatment regulations, 40 CFR 403.

The following approach should be useful in identifying potential pretreatment implementation violations for possible enforcement responses. First, examine the POTW's permit to identify all pretreatment activities the POTW is required to implement. Second, review all pretreatment program annual reports that the POTW has submitted since its program was

approved. All pretreatment audits and inspections should also be reviewed to identify potential violations.

Third, compile a list of all pretreatment implementation requirements applicable to the POTW which available information indicates the POTW may have violated. (See Tables 1 and 2 for possible examples, such as failure to issue industrial user (IU) control mechanisms, failure to establish necessary local limits, or failure to enforce IU pretreatment requirements adequately.) Fourth, in some cases, send a §308 letter to obtain more complete information necessary to support an enforcement case.

Once all potential violations have been identified, each violation must be evaluated to determine the strength of EPA's claim of violations in light of the facts and any imprecision in the way the underlying pretreatment implementation requirements define compliance.

Despite the flexibility a POTW may have in implementing some pretreatment requirements, the fundamental yardstick for measuring compliance is that a POTW must act reasonably by implementing its pretreatment requirements consistent with an effective pretreatment program: i.e., a program that will prevent interference and pass through, and improve opportunities to recycle municipal and industrial wastestreams and sludges (see 40 CFR 403.2). EPA should evaluate the reasonableness of the POTW's implementation activity in light of both the flexibility afforded by the applicable requirements and the impact or severity of the potential violations. Preparing a table similar to the one in Attachment A for evaluating program implementation violations should be helpful in making enforcement decisions in this area.

As a general rule, the strongest enforcement case against a POTW for failure to implement its pretreatment program will contain POTW effluent limit violations attributable to inadequate implementation and a number of related POTW pretreatment implementation violations. Such cases are compelling because they indicate that a POTW's implementation of its program has been so deficient that IU discharges have not been adequately controlled and these discharges have caused a POTW to exceed the effluent limits in its permit (or otherwise violate its permit). This type of case may very well be appropriate for civil judicial enforcement.

The lack of POTW permit effluent discharge violations (attributable to inadequate pretreatment implementation) does not mean that EPA should overlook or trivialize other types of implementation violations. Inadequate pretreatment implementation still could result, for example, in the POTW discharging increased loadings of pollutants (including

toxics) not yet controlled by its permit, or in increasing the risk of future effluent limit violations. Thus, for example, a POTW that has failed to issue control mechanisms to a number of its significant IUs in direct violation of a permit requirement to do so is committing a serious violation that may very well be subject to an enforcement response.

Other cases in which a POTW is running a sloppy pretreatment program, with clear implementation violations, but in which there is so far no evidence of interference or pass through problems, may be appropriately dealt with by issuance of a traditional compliance administrative order or by assessment of an administrative penalty, or by initiation of a civil judicial action. EPA's pursuit of a penalty in these circumstances should have great value in demonstrating to POTWs that they must fully implement their pretreatment programs now and not wait until after effluent violations occur.[1] Such enforcement actions should help EPA send the message that prevention is the goal of pretreatment programs, not damage control after POTW effluent limits violations or other unwarranted discharges have occurred.

If an IU has caused interference or pass through at the POTW, or has violated local limits, categorical standards or other pretreatment requirements, EPA may bring a joint action against both the IU and the POTW. The importance of joining an IU in an enforcement action is increased if an IU is a primary cause of a POTW's effluent limit violations, if an IU has obtained a significant economic benefit from its noncompliance, or if an IU needs to install pretreatment equipment at its facility, especially if a POTW is unwilling or unable to force an IU to install the necessary equipment.

A model judicial complaint and consent decree for pretreatment failure to implement cases are included as attachments to this guidance. Model administrative pleadings will be prepared shortly for Regional distribution.

Disclaimer

This guidance document is intended solely for the use of Agency enforcement personnel. This guidance creates no rights, is not binding on the Agency, and the Agency may change this guidance without notice.

---

[1] Instructions on how to determine settlement penalties using the standard CWA Civil Penalty Policy criteria of economic benefit, gravity and appropriate adjustments are contained in EPA's draft Guidance, "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program," distributed for Regional comment on August 1, 1988.

II. INTRODUCTION: POTW Implementation as the Key to an Effective National Pretreatment Program

A. Purpose of this Guidance

This document provides guidance on how and under what circumstances EPA should pursue administrative and judicial enforcement actions against Publicly Owned Treatment Works (POTWs) for violations of their pretreatment program implementation obligations arising under the Clean Water Act.

Local pretreatment programs must be fully implemented in order to effectively control industrial discharges of toxic, hazardous, and concentrated conventional wastes into public sewers and, ultimately, our rivers and lakes. Now that EPA has approved virtually all Federally required local pretreatment programs, EPA is placing a high priority on assuring local program implementation. Thus, EPA Regions and NPDES States now record on the Quarterly Noncompliance Report those POTWs that have failed to adequately implement their pretreatment program requirements. EPA enforcement actions are necessary to ensure that POTWs fully implement their pretreatment programs.

National guidance is needed for bringing enforcement actions against POTWs for their failure to adequately implement their pretreatment programs for four reasons. First, the determination of whether a POTW is violating its pretreatment program requirements, and whether such violations are serious, may involve careful, subtle judgments. Second, even though the failure to adequately implement may be clear, subtle legal issues may be involved in determining the best way to frame the Government's cause of action. Third, there is a need for national consistency to ensure that POTWs and their industrial users receive a consistent and strong message that pretreatment requirements must be complied with and that violations will not be tolerated. Fourth, pretreatment implementation cases are new and thus there are neither settled nor litigated precedents to follow in this area.

This guidance document builds upon the Office of Water Enforcement and Permits's (OWEP) definition of Reportable Noncompliance for POTW pretreatment program implementation.[2] EPA Regions and NPDES States use this definition of Reportable Noncompliance to identify and list on the Quarterly Noncompliance Report (QNCR) those POTWs that have failed to

---

[2] U.S. EPA, OWEP. Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Requirements. September 1987.

adequately implement their pretreatment program requirements. Given finite resources, EPA enforcement actions will not be appropriate for all of the POTWs that are listed on the QNCR for Reportable Noncompliance with pretreatment implementation requirements. This guidance document is intended to help EPA Regions select the best cases for enforcement in this area and thus establish a strong enforcement presence in order to ensure full program implementation across the nation by local POTWs.

B. Related Pretreatment Guidance Documents

In addition to this guidance document, there are five other EPA documents that are particularly relevant to bringing enforcement actions against POTWs for failure to implement. As indicated above, on September 30 1987, EPA issued a guidance document that explains how POTW noncompliance with pretreatment implementation requirements should be evaluated and reported on the QNCR. In short, today's guidance document expands upon the September 1987 Reportable Noncompliance guidance by detailing the considerations involved in bringing an enforcement action against a POTW listed on the QNCR pursuant to the definition of Reportable Noncompliance.

Another important document is OWEP's July 25, 1986 guidance, entitled, "Pretreatment Compliance Monitoring and Enforcement Guidance" (published as an EPA document in September 1986). This document provides POTWs with information about their pretreatment implementation responsibilities and describes the procedures POTWs should implement in order to successfully operate their approved pretreatment programs. In short, the document recommends standards of performance for a good pretreatment program.

Two other guidance documents, both issued on September 20, 1985, are also relevant to bringing failure to implement cases.[3] One document, entitled "Guidance on Obtaining Submittal and Implementation of Approvable Pretreatment Program," discusses EPA enforcement and permitting policy on obtaining POTW pretreatment program submittal and implementation. The other document, entitled "Choosing Between Clean Water Act §309(b) and §309(f) as a Cause of Action in Pretreatment Enforcement Cases" describes the legal considerations involved in choosing a cause of action in a pretreatment case.

---

[3] Copies of both documents are contained in the CWA Compliance/Enforcement Policy Compendium, Volume II, §VI.B. Copies of the Compendium are in OECM's new computer data base, the Enforcement Document Retrieval System.

Finally, on August 1, 1988, EPA distributed draft guidance, for Regional review, that explains how the CWA Civil Penalty Policy should be applied to cases in which a POTW has failed to adequately implement its pretreatment program. This document, entitled "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program" discusses the specific considerations involved in making penalty policy calculations for failure to implement violations.

C. Background on the National Pretreatment Program

The National Pretreatment Program is an integral part of the national goal to eliminate the discharge of pollutants into the nation's waters (§101 of CWA). The National Pretreatment Program's primary goal is to protect POTWs and the environment from the detrimental impact that may occur when toxic, hazardous or concentrated conventional wastes are discharged into a sewage system. With the retention of the Domestic Sewage Exclusion in RCRA, and as RCRA regulations for the disposal of hazardous waste in land fills become more restrictive, the amount of hazardous waste entering POTWs is expected to increase.[4] Thus, the role of pretreatment in controlling hazardous waste must also increase.

The role of pretreatment in controlling toxic pollutants must also increase as water quality-based toxics limits and monitoring requirements become a more common provision in the NPDES permits of POTWs. In order to comply with water quality-based toxics requirements, POTWs must fully implement their pretreatment programs in order to effectively control the discharge of toxic pollutants by industrial users.

The governmental entity that primarily implements pretreatment controls on industrial users (IUs) is usually the local municipality. The municipality, through its POTW, is called the Control Authority because it has the primary responsibility to control the industrial wastes that are

---

[4] The domestic sewage exclusion in RCRA, §1004(27), allows wastes which otherwise would be considered hazardous and regulated under RCRA, to be exempted from RCRA regulations when mixed with domestic sewage and discharged to a POTW. Pursuant to RCRA §3018, EPA concluded that the Domestic Sewage exclusion should be retained because the CWA pretreatment program is the best way to control hazardous waste discharges to POTWs.

entering its sewer system.[5] The Agency confirmed this responsibility that POTWs have in the preamble to its final 1978 General Pretreatment Regulations, 43 F.R. 27736, June 26, 1978. In that preamble the Agency stated:

> "Thus in the amendments to sections 309 and 402 of the Clean Water Act, Congress assigned the primary responsibilities for enforcing national pretreatment standards to the POTWs, while providing the EPA or the NPDES state with the responsibility to assure that local government fulfills this obligation." 43 F.R. at 27740.

U.S. EPA is performing four basic activities to ensure the success of the National Pretreatment Program. First, EPA has been developing national categorical pretreatment standards that contain effluent discharge limits for particular industrial processes.

Second, EPA has promulgated the General Pretreatment Regulations, 40 CFR 403. These regulations, inter alia, establish the criteria and procedures for the development, approval and implementation of local POTW pretreatment programs. Section 403.5 of these regulations prohibits the discharge of pollutants, by IUs, into a POTW that may cause interference or pass through at a POTW.

Third, EPA has issued guidance documents and conducted training seminars in order to help POTWs understand, develop and implement effective pretreatment programs.

Fourth, EPA must ensure that POTWs receive a strong message that full implementation of their pretreatment programs is required and will be legally enforced. With approximately 1500 approved local programs, the push to get POTWs to develop pretreatment programs is now largely complete. The next step is to make sure that these local pretreatment programs are fully implemented: Approved local programs must not be allowed to sit on the shelf and gather dust. Lifeless rivers, poisoned water supplies and crippled

---

[5] States also play an important role in the National Pretreatment Program. Once a state has been authorized by EPA to operate the National Pretreatment Program in its territory, the state is then responsible for approving, monitoring and regulating the performance of all the local POTW pretreatment programs. To date, 24 States have received federal pretreatment authority. These states are called Approval Authorities. For those states without an approved pretreatment program, EPA is the Approval Authority.

sewage treatment plants are the possible consequences if POTWs do not fully implement their pretreatment programs.

In order to ensure that POTWs fully implement their pretreatment programs, EPA intends to focus much of its oversight and enforcement resources on proper and full implementation of local pretreatment programs. To this end, EPA Regions now identify those POTWs that have failed to adequately implement their pretreatment programs and report these POTWs on the QNCR pursuant to the definition of Reportable Noncompliance for pretreatment program implementation. EPA Regions should then initiate enforcement actions against POTWs with serious pretreatment implementation violations.[6] Such enforcement actions are necessary to force the violating POTW to comply and to deter other POTWs from neglecting their pretreatment obligations.

III. LEGAL BASIS FOR ENFORCING POTW PRETREATMENT PROGRAM IMPLEMENTATION: Look First to a POTW's Permit

A. Statutory Authority for Requiring POTW Pretreatment Programs

Section 301 of the Clean Water Act prohibits the discharge of any pollutant except in compliance with the effluent limits established in §301 and the requirements in sections 302, 306, 307, 308, 402 and 404. The most relevant sections for pretreatment are 307 and 402.

EPA's authority to establish pretreatment effluent standards is contained in §307 of the Act. Section 307(b)(1) requires EPA to promulgate regulations:

> "establishing pretreatment standards for [the] introduction of pollutants into treatments works ... which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operations of such treatment works. ... Pretreatment standards under this subsection ... shall be established to prevent the discharge of any pollutant through treatment works ... which are publicly owned, which pollutant

---

[6] Of course, EPA Regions should initiate these enforcement cases consistent with the role of a state that has an approved state pretreatment program. EPA Regions should encourage states with approved programs to initiate state enforcement actions against violating POTWs.

1948

> interferes with, passes through, or otherwise is incompatible with such works."

In 1977, Congress amended §402(b)(8) to require a state that wishes to receive EPA approval to operate the NPDES program in its territory to have adequate authority:[7]

> "[t]o insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source ..."

Section 402(b)(8) further mandates that a state program have adequate authority to require POTWs to inform the state permitting agency of (1) the introduction of pollutants into the POTW from a new source, (2) a substantial change in the volume or character of pollutants coming into the POTW from an existing source and (3) any anticipated impact of such changes on the POTW's effluent discharge. In short, any state desiring to administer its own NPDES permit program must issue permits that require POTWs to have programs that will assure compliance with pretreatment standards.

The language of §402 indicates that POTWs are obligated to have programs to assure compliance with pretreatment requirements and gives EPA and approved states the authority and obligation to require POTWs to develop and implement effective pretreatment programs.

B. Civil Judicial Enforcement Authority

EPA's civil authority to obtain injunctive relief to enforce the obligation that POTWs adequately implement their pretreatment programs is contained in §309(a)(3) of the Act, which reads, in pertinent part:

> "Whenever ... the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit

---

[7] The requirements that govern a state NPDES program under §402(b) of the Act also apply to U.S. EPA where EPA is administering the NPDES program. §402(a)(3).

> issued under section 402 of this Act by him or a State ..., he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section."

Section 309(b) of the Act authorizes EPA, in pertinent part,:

> ... to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he [EPA Administrator] is authorized to issue a compliance order under subsection(a) of this section. ...

Civil penalty liability is established in §309(d) of the Act, which reads, in pertinent part:

> "Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State .., or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act, and any person who violates an order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 for each violation."

Thus, §309(b) and (d) of the Act give EPA plenary authority to bring a civil action for injunctive relief and penalties against a municipality that has violated the pretreatment implementation requirements contained in its NPDES permit and any requirements contained in an approved pretreatment program incorporated by reference into the permit. EPA also can enforce the pretreatment regulations, 40 CFR 403, if the permit (or approved program incorporated by reference into the permit) appropriately references the regulations. Specifically, EPA's cause of action under §309(b) and (d), in those circumstances, is that the POTW has violated a permit condition authorized by the statute for the purpose of implementing §307 of the Act.

In some circumstances, EPA may seek to require a POTW to implement an approved program or regulatory requirement in the absence of an NPDES permit condition requiring program implementation or compliance with the regulations where, for example, EPA can establish that the absence of an active pretreatment program is contributing to POTW effluent violations or the absence of a pretreatment program is causing apparent environmental problems. In this situation,

EPA could sue the POTW for NPDES permit violations other than inadequate implementation under § 309(b) and (d) of the Act and seek pretreatment implementation as "appropriate relief" under §309(b).

Also in some circumstances, EPA may seek injunctive relief under §309(f) of the Act to require a POTW to implement a pretreatment program (in the absence of a permit condition requiring implementation) if one or more IUs are violating federal pretreatment standards. Under §309(f) of the Act, EPA would have to establish that requiring a POTW to implement a pretreatment program is an element of "appropriate relief" and that such appropriate injunctive relief would remedy the IU noncompliance with federal pretreatment standards.[8]

As a general rule, EPA will be in the strongest position, from a legal and equitable perspective, to bring an enforcement action against a POTW for pretreatment program implementation violations when the case is based on violations of the POTW's NPDES permit related to pretreatment implementation. Permit requirements vary across POTWs and thus each permit must be reviewed to identify the specific implementation requirements. The ideal NPDES permit for a POTW with a pretreatment program should establish three types of implementation requirements as conditions of the permit:[9]

> (1) The permit should incorporate by reference the approved pretreatment program and require the POTW to comply with and implement the program.
> (2) The permit should require the POTW to comply with the federal pretreatment regulations at 40 CFR 403 and to implement its approved pretreatment program consistent with the federal pretreatment regulations. The permit also should require the POTW to comply, within 30 days after receiving notice from its Approval Authority, with all revisions to the pretreatment regulations subsequently promulgated.
> (3) The permit should, as needed, set out more specific requirements relating to important implementation procedures of the pretreatment program, and require the POTW to comply with these requirements by specific dates. For example, the permit could require the POTW

---

[8] Further details on bringing cases in these limited circumstances are contained in the two September 20, 1985, documents discussed earlier, at page 5.

[9] Permits that lack all three of these provisions should be modified as soon as possible, but no later than when the permit is next re-issued.

to inspect and sample IUs on an enumerated schedule (perhaps a specific number each quarter), beyond just simply requiring an inspection and sampling program.

The strongest enforcement cases consequently are likely to contain allegations that the POTW has violated its permit by failing to, for example,:

(1) perform a specific pretreatment activity directly required by its permit;
(2) fully implement its approved pretreatment program as explicitly required by its permit; and/or
(3) comply with the 40 CFR 403 regulations (especially, §§403.5 and 403.8(f)) as directly required by its permit.

C. Administrative Enforcement Authority

Under §309(a)(3) of the Act, EPA can administratively order a POTW to comply with the pretreatment program requirements contained in its permit and its approved pretreatment program incorporated by reference into the permit. EPA Regions also can issue an administrative order (AO) requiring a POTW to comply with the pretreatment regulations if the permit (or approved program incorporated into the permit by reference) requires compliance with the regulations. As stated previously, EPA is in the strongest position to enforce a pretreatment implementation requirement, either administratively or judicially, if the POTW's permit (or approved program or regulations, incorporated into the permit) imposes that requirement on the POTW.

If neither the permit nor the incorporated program requires a POTW to comply with the regulations, and a POTW is otherwise in compliance with its permit and approved program, but not with requirements in the regulations, then the recommended course of action is for the Region (or authorized state) to expeditiously modify a POTW's permit to incorporate all applicable pretreatment regulatory requirements into the permit explicitly or by reference.[10] An AO may, nevertheless, be an appropriate tool for enforcing pretreatment program implementation not otherwise required in the POTW's permit, where, for example, the POTW is violating effluent limits in its permit which violations are related to the POTW's failure to implement its local pretreatment program.

---

[10] Applicable regulatory procedures to modify permits must, naturally, be followed.

The Water Quality Act of 1987 authorized EPA to assess penalties administratively for violations of the Clean Water Act. Under §309(g), EPA may impose penalties for virtually the entire range of violations that are subject to civil penalties under §309(d). Administrative penalties may be assessed up to a maximum of $25,000 following Class 1 informal procedures and a maximum of $125,000 under Class 2 formal APA procedures. Administrative penalties cannot be imposed for violations of §309(a) administrative compliance orders, but, of course, may be imposed for underlying violations.[11] Administrative penalty authority, by itself, does not include the power to directly order a violator to stop continuing violations or take alternative activities to achieve compliance.

Subject to these qualifications, EPA now has administrative authority to assess penalties against a POTW that violates (1) the pretreatment implementation requirements contained in its permit, (2) an approved program incorporated into its permit, or (3) the pretreatment regulations if the permit or approved program appropriately references the regulations. Regions should review EPA's "Guidance Documents for Implementation of Administrative Penalty Authorities," August 1987, for the details on how to initiate these enforcement actions.[12]

D. Criminal Penalty Authority

Under §309(c), EPA has the authority to assess criminal penalties for negligent or knowing violations of the Act, for violations that knowingly put another person in imminent danger of death or serious bodily injury, or for making false statements under the Act. Criminal penalties can be assessed for the entire range of violations that are covered by EPA's civil and administrative authorities in §309(a), (b) and (d). For example, a POTW that falsely reports to its Approval Authority that it is complying with a pretreatment implementation requirement is a potential candidate for criminal enforcement.

---

[11] Civil penalties can be imposed judicially under §309(d) of the Act for violations of administrative (compliance) orders issued pursuant to §309(a) of the Act.

[12] EPA Regions should, naturally, include a copy of the POTW's permit in any proposed administrative penalty action sent to Headquarters for review.

IV. IDENTIFYING POTW PRETREATMENT IMPLEMENTATION VIOLATIONS LIKELY TO MERIT AN ENFORCEMENT RESPONSE:

Evaluating a POTW's Actions In Light of Allowed Flexibility and Impact of the Violation

A. Identifying Potential Violations

Once a POTW is listed on the QNCR for Reportable Noncompliance with pretreatment program implementation requirements (or the noncompliance otherwise comes to the Region's attention), the Region should evaluate whether to initiate an enforcement action.[13] In order to perform this evaluation, the Region should identify all potential pretreatment violations. Once the Region has identified all potential violations, it must examine the extent, scope, and impact of these potential violations to determine whether and what kind of an enforcement response is warranted.

This evaluation is necessary because some pretreatment requirements intentionally allow a POTW considerable flexibility in implementation. This flexibility may result in a pretreatment requirement lacking a completely precise definition of noncompliance, thereby calling for some exercise of judgment in determining whether a POTW violated the pretreatment requirement.

As an example, consider a POTW with a permit condition that requires the POTW to "analyze self-monitoring reports submitted by its IUs and then respond to those reports that indicate violations or other problems." Assume the facts reveal that this POTW reads each self-monitoring report and usually, but not always, writes a letter to those IUs that are violating their local limits. By themselves these facts may not be sufficient to demonstrate that this POTW has failed to implement this requirement in a reasonable fashion and thus has violated this pretreatment requirement. In contrast, if the facts revealed that the POTW rarely read the self-monitoring reports and that most were sitting in a pile unopened, this would almost certainly be a violation of the pretreatment implementation requirement.

The following approach should prove helpful in identifying all potential violations. First, the region should

---

[13] Before a POTW appears on the QNCR for Reportable Noncompliance, a region or state Approval Authority is likely to have already initiated informal enforcement actions against the POTW (e.g., NOVs or compliance meetings) in an attempt to correct the violations and bring the POTW back into compliance.

examine the POTW's permit (and approved program and Federal regulations where the permit incorporates these requirements by reference) to identify all pretreatment activities the POTW is required to implement. The Region must perform this step carefully, since the specific enforceable requirements set out in POTW permits (or approved programs appropriately incorporated in a POTW permit) can vary significantly across the 1500 or so POTWs with approved pretreatment programs. EPA's Pretreatment Compliance Monitoring and Enforcement Guidance serves as a good reference point for the kinds of requirements that are likely to be applicable in a strongly crafted permit to obtain effective program implementation. In addition, 40 CFR 403.5 and 403.8 detail elements of an acceptable local pretreatment program. Indeed, the permit may very well require the POTW to implement its local program consistent with the Part 403 regulations.[14]

Second, the region should compare all available compliance information to the identified, applicable pretreatment program requirements. At a minimum, the Region should review all pretreatment program annual reports that the POTW has submitted since its program was approved. The annual reports should be checked to make certain that they are complete and supply all the information required by the permit or approved program.[15] Naturally, all pretreatment program audits and inspections that have been performed by the Region or the state should also be reviewed to identify potential violations.

Third, the region should compile a list of all pretreatment implementation requirements applicable to the POTW which available information indicates the POTW may have violated. Fourth, in some circumstances, the region may wish to obtain more additional information by issuing a §308 letter to a POTW to fill in gaps in compliance information.

As a rough check that all potential violations have been identified, the Region should review the definition of Reportable Noncompliance contained in Table 1 and the examples of possible pretreatment implementation violations

---

[14] Table 2 provides a listing of some potential violations that might arise from a POTW's failure to comply, as instructed to by its permit, with the federal pretreatment regulations.

[15] Pursuant to the PIRT June 1986 proposed rule, EPA will be promulgating shortly a final regulation, 40 CFR 403.12(i), requiring POTWs with approved pretreatment programs to submit annual reports describing the POTW's pretreatment activities.

TABLE 1*

DEFINITION OF REPORTABLE NONCOMPLIANCE

A POTW should be reported on the QNCR if the violation of its approved pretreatment program, its NPDES permit or an enforcement order[3] meets one or more of the following lettered criteria for implementation of its approved pretreatment program:

I. Issuance of IU Control Mechanisms

A) Failed to issue, reissue, or ratify industrial user permits, contracts, or other control mechanisms, where required, for "significant industrial users", within six months after program approval. Thereafter, each "significant industrial user" control mechanism should be reissued within 90 days of the date required in the approved program, NPDES permit, or an enforcement order.

II. POTW Compliance Monitoring and Inspections

B) Failed to conduct at least eighty percent of the inspections and samplings of "significant industrial users" required by the permit, the approved program, or an enforcement order.

C) Failed to establish and enforce self-monitoring requirements that are necessary to monitor SIU compliance as required by the approved program, the NPDES permit, or an enforcement order.

III. POTW Enforcement

D) Failed to develop, implement, and enforce pretreatment standards (including categ... standards and local limits) in an effective and timely manner or as required by the ap... program, NPDES permit, or an enforcement order.

E) Failed to undertake effective enforcement against the industrial user(s) for instances of pass-through and interference as defined in 40 CFR Section 403.3 and required by Section 403.5 and defined in the approved program.

IV. POTW Reporting to the Approval Authority

F) Failed to submit a pretreatment report (e.g., annual report or public... of significant violators) to the Approval Authority within 30 days of the due date specified in the NPDES permit, enforcement order, or approved program.[4]

V. Other POTW Implementation Violations

G) Failed to complete a pretreatment implementation compliance schedule milestone within 90 days of the due date specified in the NPDES permit, enforcement order, or approved program.[4]

H) Any other violation or group of violations of local program implementation requirements based on the NPDES permit, approved program or 40 CFR Part 403 which the Director or Regional Administrator considers to be of substantial concern.[4]

---

[3] The term enforcement order means an administrative order, judicial order or consent decree. (See Section 123.45)

[4] Existing QNCR criterion (40 CFR Part 123.45); the violation must be reported.

Reprinted from: U.S. EPA, OWEP, "Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", September 30, 1987.

1951

listed in Table 2. Table 2 contains a listing of possible violations based on a reasonable interpretation of the pretreatment implementation regulations (40 CFR 403) when such regulations are incorporated by reference into the permit. While the list in Table 2 is not exhaustive, it is illustrative of those violations that may justify an enforcement response by EPA for failure to implement.

Once all potential violations have been identified, each potential violation must be evaluated to determine the strength of EPA's claim of violation in light of the facts and any imprecision in the way the underlying pretreatment implementation requirement defines compliance.[16] Each potential violation should be evaluated in this manner to determine the strength of a possible EPA claim of a violation of an underlying pretreatment requirement. After these evaluations are completed the Region should produce a table of violations which the Region concludes are strong enough to pursue. Such a table should describe each violation and identify the specific underlying legal requirement that was violated. In addition, such a table should indicate the duration of the violation and indicate how strong the evidence is supporting the violation. A model form for this process is included here as attachment A.

B. Determining the Extent To Which Identified Violations Warrant an Enforcement Response: How Strong Are EPA's Claims?

The strength of EPA's claims naturally will affect EPA's decision regarding whether to pursue an enforcement action against a POTW for failing to implement a local pretreatment program. In turn, the strength of EPA's enforcement claims depends to a large degree on the extent to which identified violations demonstrate that a POTW has acted unreasonably in meeting pretreatment program implementation requirements, given (1) the flexibility afforded by many requirements and (2) the impact or severity of the violations. More specifically, the more flexible the implementation requirements, the more important the need to demonstrate the extensiveness or severity of the violation.

1. Evaluating Unreasonable POTW Action Under Flexible Implementation Requirements. Some pretreatment implementa-

---

[16] Recall that EPA is in the strongest position to enforce a requirement if the requirement is expressly stated in the permit, in the approved program incorporated by reference into the permit, or in the regulations if the permit requires the POTW to comply with the regulations.

TABLE 2

EXAMPLES OF VIOLATIONS BASED ON A REASONABLE INTERPRETATION OF PRETREATMENT IMPLEMENTATION REGULATIONS WHEN INCORPORATED BY REFERENCE INTO THE PERMIT*

1. Failed to develop and/or implement procedures that reasonably identify all IUs, including new users. See 40 CFR 403.8(f)(2)(i).

2. Failed to develop and/or implement procedures that reasonably identify all incoming pollutants, including changes in the nature and volume of incoming pollutants. See 40 CFR 403.8(f)(2)(ii).

3. Lack of procedures to keep POTW itself informed of minimum legal requirements of pretreatment or keep its IUs informed. See 40 CFR 403.8(f)(2)(iii).

4. Failed to implement a system that allows the orderly receipt and informed analysis of self-monitoring reports. See 40 CFR 403.8(f)(2)(iv).

5. Failed to inspect and sample the effluent from IUs as often as is necessary to assure compliance with pretreatment standards and requirements. See 40 CFR 403.8(f)(2)(v).

6. Failed to investigate or respond adequately to instances of IU noncompliance. See 40 CFR 403.8(f)(2)(vi).

7. Failed to publish, at least annually, in the largest daily newspaper, a list of those IUs which, during the previous 12 months, were significantly violating applicable Pretreatment Standards and Requirements. See 40 CFR 403.8(f)(2)(vii).

8. Changes to POTW's legal authority such that the program no longer satisfies the minimum legal requirements of 40 CFR 403.8(f)(1).

9. Has never enforced its local limits beyond a telephone call or letter to the violating IU despite repeated violations by IUs. See 40 CFR 403.5(c)

10. Deficient POTW resources (supplies, equipment, personnel) which seriously hinder a POTW's ability to implement an effective pretreatment program pursuant to 40 CFR 403.8(f)(1) & (2). See 40 CFR 403.8(f)(3).

---

* EPA's enforcement case is strongest where the violations are based on an implementation requirement contained in a POTW's permit, either explicitly or by reference.

1258

tion requirements are quite specific and thus the determination of whether a POTW fully complied with such requirements will be straightforward. For example, if a permit requires a POTW to issue control mechanisms to all its significant IUs within one year of program approval, one year after program approval the facts should be clear whether or not a POTW complied with this requirement.

However, the pretreatment requirements contained in permits and approved programs, as well as the regulations, are often written in general terms that give a POTW considerable flexibility in implementing a given requirement. Indeed, virtually all regulatory implementation requirements allow some flexibility in implementation. While a POTW may have considerable flexibility in implementing some pretreatment requirements, a POTW must act reasonably by implementing its pretreatment requirements consistent with the objectives of the National Pretreatment Program. These objectives are presented in 40 CFR 403.2:

> (a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sewage;
> (b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works; and
> (c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

POTWs are on notice of these objectives and thus should implement a pretreatment program that "assure[s] compliance with pretreatment standards to the extent applicable under section 307(b)." 40 CFR 122.44(j)(2).[17] In short, a POTW's implementation of its pretreatment requirements must be reasonable: that is, consistent with the objectives of an effective pretreatment program.

In determining whether a POTW's implementation of a pretreatment requirement is reasonable or appropriate, the Regions again may wish to review OWEP's July 1986, "Pretreatment Compliance Monitoring and Enforcement Guidance". This document provides POTWs with information about their pretreatment implementation responsibilities and describes the

---

[17] The last sentence of §403.8(b) and the first sentence of §403.8(f)(2) contain similar language requiring a POTW to implement its pretreatment program in order to ensure compliance with pretreatment standards. See also §402(b)(8) of the Act.

rationale behind the procedures POTWs should implement in order to successfully operate their approved programs.

For example, one such potentially flexible requirement is the important permit condition that a POTW enforce all pretreatment standards and requirements, including local limits and categorical pretreatment standards.[18] There will be situations in which a POTW's performance is so inadequate that there is no doubt that this requirement was violated. For example, there is no doubt that a POTW that generally ignores most violations of local limits by its IUs, has never enforced beyond issuing a letter of violation to an IU, and that consequently has violated its effluent limits due to interference or pass through problems has violated its requirement to enforce pretreatment standards and requirements.

In contrast, consider a POTW that regularly issues letters of violations, has collected penalties from some IUs that were violating local limits, but has allowed a few IUs to violate local limits and cause interference violations without escalating its enforcement response beyond the issuance of "lenient" compliance schedules for the IU's. Such facts may paint a much more complicated picture on which to base a finding that this POTW is not complying with its obligation to enforce pretreatment standards. In situations such as this, EPA Regions must evaluate all the facts to determine whether a POTW has taken reasonable actions consistent with its obligation to enforce its program. If the Region believes that a POTW has not taken reasonable actions to comply with its obligation here and specific deficiencies can be identified, then this POTW should be considered in violation of its permit.

2. Evaluating the Impact or Severity of Identified Violations.

a. Inadequate Program Implementation Causing POTW Effluent Limit Violations. The most significant pretreatment implementation violation is failing to prevent interference or

---

[18] Much of the lack of precision in this requirement can be eliminated if a POTW is required to develop and implement an enforcement response plan that details how a POTW will respond to different kinds of violations by its IUs. See Enforcement Response Guide, §3.3 and Table 3-2, in OWEP's July 1986 "Pretreatment Compliance Monitoring and Enforcement Guidance."

pass through.[19] By regulatory definition, interference or pass through basically exists when an IU discharge is a cause of POTW effluent limit violation or inability to use or dispose of sewage sludge properly. Thus, a POTW which is violating its permit limits because of the IU discharges it is accepting has failed to implement a successful pretreatment program as defined by the Act.

A POTW that has experienced repeated interference or pass through problems but has taken no definite action to remedy the situation (i.e., to control the discharges of its IUs) generally should be an ideal candidate for an enforcement action. The fact that effluent violations have occurred at the POTW strongly suggests that the POTW is not effectively implementing its pretreatment program.

b. Inadequate Implementation Not Causing Effluent Violations. The lack of an interference or pass through violation, or any permit effluent discharge violation, does not mean that EPA should overlook or trivialize other types of implementation violations.

Beyond undermining the integrity of the national pretreatment program, a POTW's failure to implement a pretreatment program which does not lead to effluent limits violations can result in the discharge to waters of the United States or in a POTW's sludge of higher levels of pollutants, particularly toxics, which may not yet be controlled under the POTW's permit. In addition, an improperly implemented pretreatment program may allow slug loadings from IUs which might go undetected if the POTW is not sampling its effluent at appropriate times.

Moreover, inadequate implementation by one POTW may give its IUs an unfair advantage relative to industries discharging into another POTW and thereby may induce the second POTW to forego adequate pretreatment program implementation. Finally, inadequate local program implementation generally jeopardizes the ability of the National Pretreatment Program to effectively control industrial discharges of toxic and hazardous pollutants.

---

[19] Recall that §402(8) of the Act requires pretreatment programs to assure compliance with pretreatment standards and that such standards, pursuant to §307(b) of the Act, are "established to prevent the discharge of any pollutant through [publicly owned] treatment works ... which pollutant interferes with, passes through, or otherwise is incompatible with such works. [emphasis added]" See also 40 CFR 403.5(a) and (c).

Thus, a Region should evaluate each violation to determine its severity or seriousness. Violations that are truly minor, with no impact on the ability of a POTW to conduct an effective pretreatment program, should be so identified. Each violation should be evaluated with respect to the general guidelines listed in Table 3.

A Region may find it helpful to assign a numerical ranking to each identified violation reflective of its severity. The model form for creating a list of violations in Attachment A contains a numerical scale ranging from 1 (minor violation) to 5 (violation creating injury or risk of injury to human health or the environment) which may be used to rate the severity of each identified violation.

Of course, a violation which may not be severe and may not present EPA with a strong enforcement claim individually may very well warrant enforcement action by EPA if the POTW is committing a number of such violations simultaneously, even if the enforceable requirements afford a considerable amount of flexibility. Such a broad pattern of minor failures can add up to inadequate program implementation when viewed as a whole. Naturally, the more such violations are present, the stronger EPA's enforcement case.

V. ENFORCEMENT OPTIONS FOR FAILURE TO IMPLEMENT

A. General Considerations for Choosing an Appropriate Enforcement Response

Once a POTW has been identified as having pretreatment implementation violations meriting a formal enforcement response, the Region has several options to choose from in selecting an appropriate enforcement response. The available statutory enforcement responses are:

1. Administrative (compliance) Order -- §309(a)
2. Administrative penalty assessment -- §309(g)
3. Civil Judicial Action -- §309(b) & (d), 309(f)[20]
4. Criminal Judicial Action Referral -- §309(c).

---

[20] If there is not enforceable permit language requiring pretreatment program implementation but an IU is violating federal pretreatment standards, EPA can use §309(f) to initiate a judicial action seeking appropriate injunctive relief against both the IU and the POTW [see page 10]. Section 402(h) also may provide a useful cause of action in some circumstances where a sewer hook-up ban may be appropriate relief to pursue.

TABLE 3

GENERAL GUIDELINES FOR EVALUATING THE SEVERITY OF PRETREATMENT IMPLEMENTATION VIOLATIONS*

For each potential violation, consider:

A. Importance of activity at issue to environmental success of the POTW's pretreatment program.

B. Any identifiable environmental/public health harm or risk created by the alleged violation?

C. Is the quantity of pollutants being discharged into the receiving stream higher than it would otherwise be if the POTW was complying with the requirement at issue? By how much?

D. Did the POTW benefit economically from the alleged violation?

E. Are IUs benefiting economically (avoiding the costs of compliance) by the POTW's failure to implement this program requirement?

F. Has the violation persisted after the POTW was informed of this violation? And then ordered to remedy the situation?

G. How long has this violation persisted over time or is it more like a single, isolated incident of noncompliance?

---

* In general, this evaluation should be performed after a POTW has been listed on the QNCR for Reportable Noncompliance with pretreatment program implementation requirements.

In selecting an appropriate enforcement response, the Region should consider the overall severity of the violations, the compliance history and commitment of the POTW in question, whether injunctive relief is needed, whether a penalty is appropriate and if so, how large a penalty, and what kind of message needs to be sent to other POTWs (i.e., general deterrence).

The Regions should carefully consider using EPA's new administrative penalty authority in appropriate circumstances. The Regions should review the Agency guidance documents issued by the Office of Water and the Office of Enforcement and Compliance Monitoring (August 1987) for implementation of the new administrative penalty authorities. The document entitled "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies" should be particularly helpful in laying out the considerations involved in choosing between administrative and judicial enforcement actions.

As a general rule, the strongest enforcement case against a POTW for failure to implement its pretreatment program will generally involve POTW effluent violations and a number of related pretreatment implementation violations. In other words, the POTW's implementation of its pretreatment program has been so deficient that IU discharges have not been adequately controlled and these discharges have caused a POTW to exceed the effluent limits in its permit (or otherwise violate its permit). This type of case which calls for both injunctive relief and a substantial civil penalty is likely to be appropriate for civil judicial enforcement.

A case in which a POTW is running a sloppy or inadequate pretreatment program, with identifiable implementation violations, but in which there is so far no evidence of POTW effluent limit violations, may be appropriately dealt with by issuance of a traditional compliance administrative order or by assessment of an administrative penalty, or by initiation of a civil judicial action. EPA's pursuit of a penalty in these situations could have great value in demonstrating to POTWs that they must fully implement their pretreatment programs now and not wait until serious effluent violations occur. Enforcement actions initiated against POTWs for failure to implement in the absence of effluent limit violations (related to inadequate implementation) should help EPA send the message that prevention is the goal of pretreatment programs, not damage control after effluent limit violations have occurred.

There may be cases in which the POTW is complying with its permit and approved program, but nevertheless the Region believes that the POTW's pretreatment performance is inade-

quate. This situation is likely when the approved program does not specify all the necessary actions that the POTW should perform. In such a situation, if there are indeed no clear violations of the permit or approved program, the best course of action may be for the Region or approved state to expeditiously modify the POTW's permit and/or approved program to establish specific program implementation requirements to remedy the situation.[21]

In summary, civil judicial enforcement cases are most likely to be appropriate when the violations are severe, injunctive relief is necessary, and/or a penalty should be assessed in excess of EPA's new administrative penalty authority.

B. Penalty Assessments

Naturally, in determining an appropriate settlement penalty, the CWA Civil Penalty Policy must be followed. Earlier this month, EPA distributed draft guidance -- "Penalty Calculations for a POTW's Failure to Implement It's Pretreatment Program" -- that explains the specific considerations involved in making penalty policy calculations for failure to implement violations. In short, EPA should collect a penalty that recovers a POTW's full economic benefit stemming from the pretreatment implementation noncompliance plus an additional gravity amount based on the type and pattern of the violations. The POTW's economic benefit may accrue from costs avoided by not hiring program personnel, not issuing IU wastewater discharge permits, not conducting inspections or wastewater testing, failing to maintain records or submit reports, or failing to install or operate necessary equipment.

In applying the Penalty Policy adjustment factor for ability to pay to these cases, it should be stressed that since pretreatment programs are designed to control industrial discharges, the costs of the programs should be paid by IUs through appropriate user charges levied by a POTW. In assessing ability to pay, a POTW's ability to recover penalty amounts from its IUs is relevant. A per capita approach based simply on the residential service population of a POTW is not appropriate as the basis for establishing a settlement penalty for a POTW failure to implement case.

---

[21] Recall that EPA is in the strongest position to enforce a pretreatment requirement if the requirement is expressly stated in the permit, in the approved program incorporated by reference into the permit, or in the regulations if the permit requires the POTW to comply with the regulations.

C. Joining Industrial Users (IUs) and States

If an IU has caused interference or pass through at the POTW, or has violated local limits, categorical standards or other pretreatment requirements, EPA may include such an IU in a civil enforcement action. The importance of joining an IU in an enforcement action is increased if an IU is a primary cause of a POTW's effluent limit violations or if the IU needs to install pretreatment equipment at its facility, especially if a POTW is unwilling or unable to force an IU to install the necessary equipment. In general, if an IU has obtained an economic benefit from its noncompliance with pretreatment standards and requirements and its noncompliance is contributing to a POTW's problems, then in order to obtain a complete remedy and an appropriate penalty consistent with the Agency's Penalty Policy, EPA may very well want to include such an IU in any judicial action brought against a POTW for failure to implement. Similarly, if a Region contemplates an enforcement action against an IU for pretreatment violations, which violations have caused problems at the POTW and the POTW has failed to adequately respond to the IU's violations, claims against the IU and the POTW should generally be joined in a single civil action.

Pursuant to §309(e) of the Act, whenever EPA brings a judicial enforcement action against a POTW, the state in which a POTW is located must be joined as a party. If state law prevents a POTW from raising revenues needed to comply with any judgment entered against it, the Act makes a state liable for payment of such expenses. States may be joined in judicial enforcement actions against POTWs for failure to implement as either defendants or plaintiffs, as appropriate. Further details on how to join states under §309(e) is found in EPA's February 4, 1987, "Interim Guidance on Joining States as Plaintiffs."

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

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

DEC 22 1988

OFFICE OF WATER

MEMORANDUM

SUBJECT: Guidance on Penalty Calculations for POTW Failure to Implement an Approved Pretreatment Program

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

John Lyon, Acting Associate
Enforcement Counsel for Water (LE-134W)
Office of Enforcement and Compliance Monitoring

TO: Regional Water Management Division Directors
Regional Counsels

The attached Guidance is provided to assist you and your staff in applying the Clean Water Act (CWA) Civil Penalty Policy in cases where a POTW has failed to adequately implement its approved pretreatment program. The Guidance is based on the existing CWA Penalty Policy, as well as the August 28, 1987 amendment to the Civil Penalty Policy and the Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements. As a result, both administrative and judicial civil penalties for settlement should be calculated using this Guidance.

A draft version of this Guidance was provided to the Regions for comment on August 1, 1988. We wish to thank you for your timely and helpful comments and your overall support for this Guidance. The most significant comments on the previous draft were received on the "Ability to Pay" discussion which encouraged the recovery of penalties from industrial users. Based on comments received, that discussion has been revised, and the Guidance is now flexible as to the method which a municipality should use to pay penalties.

Several Regions requested additional guidance on estimating the economic benefit of failure to implement, especially for failure to enforce pretreatment standards. We have added Table 2 to the Guidance which provides resource estimates for enforcement responses to instances of noncompliance. The basic assumptions are drawn from earlier guidance and from resource estimates used by the Agency. At this time, we do not have additional data on program implementation costs to update Table 1. We do plan to develop such data during the coming year.

The major components of this Guidance will be incorporated into the Civil Penalty Policy later this fiscal year. However, this Guidance is effective immediately as a more detailed explanation of how to calculate penalties in pretreatment implementation cases.

If you have any further questions on the use of this Guidance, please feel free to contact one of us (Jim Elder at 475-8488 or John Lyon at 475-8180) or your staff may contact Ed Bender at 475-8331.

Attachment

1072

PENALTY CALCULATIONS FOR A POTW'S FAILURE TO IMPLEMENT ITS APPROVED PRETREATMENT PROGRAM GUIDANCE

I. INTRODUCTION

The Clean Water Act Civil Penalty Policy (Feb. 11, 1986) establishes a systematic approach for obtaining appropriate settlement penalties for violations of the Act. The Policy and Methodology were amended August 28, 1987 to include a methodology for the calculation of administrative penalties. One of the changes in the amendment was the addition of a gravity factor to address the significance of non-effluent violations. This Guidance applies the Civil Penalty Policy with amendment to implementation cases.*

In September 1987, OWEP issued "Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements" (RNC Guidance). That document provides a definition of reportable noncompliance (RNC) that is used to evaluate POTW implementation violations of approved pretreatment programs. The definition consists of eight criteria for determining when violations of an approved pretreatment program, of related NPDES permit requirements, or of regulatory requirements for implementation are of sufficient magnitude and degree to require that a POTW be reported on the QNCR for failure to implement an approved pretreatment program. The criteria are as follows:

1. POTW failure to issue control mechanisms to Significant Industrial Users in a timely fashion.

2. POTW failure to inspect Significant Industrial Users.

3. POTW failure to establish and enforce industrial user self-monitoring where required by the approved program.

4. POTW failure to implement and enforce pretreatment standards (including local limits).

5. POTW failure to undertake effective enforcement against the industrial user for instances of interference and pass/through.

---

* This Guidance, should be applied to calculate settlement penalties for both administrative and judicial cases against POTWs that fail to implement approved pretreatment programs.

6. POTW failure to submit pretreatment reports.

7. POTW failure to complete pretreatment compliance schedule milestones on a timely basis.

8. POTW failure to comply with other pretreatment program requirements which are of substantial concern.

The purpose of this Guidance is to provide Regions with a methodology to apply the CWA Penalty Policy, as amended, to calculate administrative and civil judicial penalties for failure to implement cases, using the criteria outlined in the RNC Guidance.

As in the CWA Penalty Policy, this calculated penalty should represent a reasonable and defensible penalty which the Agency believes it can and should obtain in settlement. In general, the settlement penalty should recover a) full economic benefit (avoided costs--salaries, financing, operating costs, and capital expenditures), and b) some gravity related to the type and pattern of the violation(s), even after adjustments.

Note: This guidance discusses the additional considerations that should be used in the penalty calculation for failure to implement. Penalty amounts for effluent violations should be included and calculated according to the existing CWA Penalty Policy and Methodology. However, Section III of this document, "Example of Penalty Calculation", does include penalties for both effluent and pretreatment implementation violations.

II. PENALTY CALCULATION METHODOLOGY - Pretreatment Implementation

The basic methodology of the CWA Civil Penalty Policy should be used to calculate settlement penalties in POTW pretreatment implementation cases. The three components of a settlement penalty (Economic Benefit, Gravity, and adjustments) are discussed below.

A) Economic Benefit

The following steps summarize the process to calculate economic benefit for pretreatment program activities:

- Obtain estimates of the costs to the POTW to implement its pretreatment program from the approved program submission.
- Update that information based on more current data from a pretreatment compliance inspection, a pretreatment audit, an annual report, or a 308 letter, if available.
- The economic benefit component of the civil penalty policy should be calculated using the EPA computer program "BEN".

1974

- For purposes of the "BEN" calculation, the value of delayed implementation includes delayed capital investment, delayed cost in developing or updating local limits, and annual pretreatment program operating and maintenance (O&M) costs that were avoided. Use separate BEN runs if changes in operating costs have occurred.

1) Estimating Avoided or Delayed Costs for Implementation

The approved pretreatment program will probably include a budget for program implementation. There may also be discussion of implementation activities and costs in the approved program elements covering the compliance monitoring and administrative procedures. Such data in the approved program submission provides a basis for developing the economic benefit derived by a POTW by not implementing its approved program. In particular, where a POTW has not complied with that budget, economic benefit may be represented in part by the amount of the budget the POTW has failed to expend. The Region should use data developed through audits, inspections, annual reports or 308 letters to develop these cost estimates.

In many cases, the POTW will have complied with the resource commitments in the approved program but still fail to adequately implement the required program. This may be the result of unrealistic estimates initially, the failure to update resource needs, changes in pretreatment program requirements or a failure to carry out required activities with existing resources. In such cases, economic benefit may be developed by estimating the specific costs that were avoided for required implementation activities.

Where specific costs estimates for non-implementation are not available, the costs avoided by the POTW for failure to implement can be expressed as a percent of the total implementation cost or as an estimated cost for each required activity that was not implemented. Pretreatment implementation costs for POTWs were evaluated as part of an earlier study (JRB Associates, 1982 "Funding Manual for Local Pretreatment Programs" EPA Contract No. 68-01-5052). This assumes that the POTW budget includes all costs associated with implementation. Based on a review of several programs, a table (Table 1) was developed for small, medium, and large programs to show the percent of total costs which each implementation activity represented. The small POTW pretreatment programs were all under 5 MGD flow and covered ten or fewer significant industrial users (SIU) with a total implementation cost ranging from $10,000-$50,000.00 annually. The medium sized POTW pretreatment programs had total flows from 5-15 MGD and up to 50 SIUs with an annual cost from $25,000-$200,000.00. The large POTW programs had flows over 15 MGD with 20 or more SIUs with annual implementation costs ranging from $100,000 to more than $350,000.00.

Table 1. Typical Program Costs for Implementation Activities by Program Size (as % of Total Cost)

Activity	Small	Medium	Large
1. Sampling and Industrial Review (*Criteria B, C,)	22%	19%	18%
2. Laboratory Analysis (*Criteria B, C, D)	34%	34%	39%
3. Technical Assistance (*Criteria A, D and E)	17%	26%	20%
4. Legal Assistance (*Criteria A, D, E)	13%	10%	13%
5. Program Administration (*all Criteria)	14	11	10
	100%	100%	100%

This Table can be used to assist in developing costs for a specific program activity where costs are unavailable or determined to be inadequate. For example, if a medium-sized POTW had costs for implementation of $100,000, but this POTW had failed to perform any compliance inspections of its IUs, the percentage from Table 1, activity 1 for a medium-sized program could be applied to total costs. The inspection costs in this case could be estimated to be $19,000.00. The costs of "avoided implementation" may differ from year to year depending on whether the activities are one-time or periodic (such as permit issuance or updating local limits) or continuing tasks (such as inspections). The costs of issuing permits may be 20% of an annual implementation budget of $120,000 or $24,000 for a particular year. If this POTW failed to issue four of the eight required permits, $12,000.00 in expenses would be avoided for that year.

Another approach to development of avoided costs is to estimate the labor and overhead costs for particular activities. This approach may also be used in combination with Table 1, where the budget does not cover costs for specific implementation requirements (e.g., IU permitting or enforcement). For example, if each permit required one month of engineering labor and analysis at $36,000.00/year, each permit would cost $3,000.00. The total avoided cost of four permits would also be $12,000.00. The cost of permit re-issuance could be lower than the initial issuance cost. This value would be entered under the variable for annual operating and maintenance expenses for

* Criteria from RNC Guidance that are likely to be associated with a listed activity.

a particular year. If the permits were issued late, as opposed to not issued at all, avoided costs (economic benefit) could be calculated for the period of delay.

If a POTW has failed to enforce against IUs or delayed enforcement against IUs, the POTW has received economic benefit by avoiding or delaying that action. Even when specific program costs for enforcement can be identified, it may be difficult to quantify the avoided or delayed costs. Where necessary, one approach to calculating the avoided costs by the POTW for inadequate enforcement is to assume that each IU violation would require a POTW enforcement response (see discussion in Pretreatment Compliance Monitoring and Enforcement Guidance (PCME), September 1986). The expected response against the IU would escalate with the duration and magnitude of the violation, either based on the POTW's own enforcement procedures or the Enforcement Response Guide in the PCME. As a guide for the cost to the POTW of each type of enforcement response and the delay that may have occurred, you may wish to use the table below. It is based on EPA's pricing factors and the enforcement response timeframes discussed in the RNC guidance.

Table 2. Resource Cost and Response Time for POTW Enforcement Actions

Initial Response to Violations	POTW Time to Respond*	Cost of Action in Workdays
Telephone calls	5 days	0.05-0.2
Warning Letters	10 days	0.2
Meeting	30 days	0.5
Demand Inspections	30 days	0.5-2.0
Follow-up for Continued Noncompliance		
On-site evaluation	15 days	0.5-2.0
Meeting	30 days	0.5
Formal Enforcement		
Administrative	60 days	10-50
Judicial	60 days	30-100
Penalty assessment and Collection	60 days	2-50

* Response time reflects EPA's expectation as to the amount of time in which the POTW should take enforcement action after notification of an IU violation. For example, the POTW initial response to notification noncompliance should occur within 5 days when it is a telephone call and within 30 days when it is a Demand Inspection.

The time required to complete a specific enforcement response should be evaluated based on the enforcement procedures developed by the POTW and the size and complexity of the IU. SIUs with significant noncompliance would be expected to require more POTW effort to resolve the noncompliance. The level of response should be escalated in relation to the magnitude and duration of noncompliance. The avoided enforcement costs would increase based on the number of IUs that were in noncompliance and not addressed by POTW enforcement. The actual cost can be estimated from salaries. EPA assumes each work year consists of 220 workdays after leave and holidays are subtracted. Typical EPA annual salaries and benefits (assuming 15% of salary) are as follows: inspectors $32,000, permit engineers $40,000, staff attorneys and chemists $37,000. However, it would be appropriate to use the salary scale of the affected POTW, if available.

The next three sections discuss the calculation of economic benefit, gravity, and adjustment to the penalty for pretreatment implementation violations. In some cases you may have effluent violations as well as implementation problems and additional penalty calculations will be required for these violations.

2) Using BEN

The BEN User's Manual provides basic instructions for entering variables and discusses the effect of changes in economic data and compliance dates on the estimate of economic benefit. The Manual describes the variables that are typically associated with construction and operation of wastewater treatment systems; however, there are a few special considerations for developing pretreatment implementation costs. If effluent violations are involved, a separate BEN run should be made to calculate the economic benefit of inadequate treatment, avoided operations and maintenance costs for the treatment system, or any other cause not related to implementation of a pretreatment program. The BEN estimates should be combined to develop the settlement penalty.

The capital investment for pretreatment is usually related to sampling and safety equipment, vehicles for inspections, and perhaps laboratory facilities. These typically have a shorter useful life (3 to 7 years)* than that which is assumed for pollution control equipment (15 years is the standard BEN value for tankage and pumps). The useful life is an optional input variable.

---

* United States Tax Guide No. 17 categorizes real property, vehicles, and equipment according to its useful life for purposes of depreciation.

1978

* Annual operating and maintenance costs related to pretreatment implementation include the costs to the POTW of: (a) IU permitting; (b) POTW monitoring, inspections, and analysis of IU compliance; (c) legal and technical assistance, (d) cost of taking enforcement actions, (e) updating local limits; and (f) program administration. The costs identified for operation and maintenance should include all salaries, supplies, maintenance, and support necessary to the operation of the pretreatment program. Most of the avoided costs of implementation will be the O&M expenses (see previous discussion). Since annual operating and maintenance costs and the level of implementation may vary each year, separate BEN runs may be needed to determine these costs, depending on the specific period of noncompliance.*

The Ben variable "one time, non-depreciable expenditures" is not likely to be appropriate for inclusion in the BEN penalty calculation for POTW implementation cases. All expenditures for pretreatment implementation are likely to be recurring at some frequency, so they are not truly one-time as, for example, the purchase of land. Even the development of local limits and the survey of industrial users are likely to require periodic updating. Most "set-up costs" were incurred as part of program development. In addition, a POTW does not pay income tax, so depreciation does not affect the POTW's economic benefit.

Economic benefit should be calculated from the initial date of noncompliance up to the time where the POTW was or is realistically expected to be in compliance.

B) Gravity Component

The gravity component of the existing Penalty Policy quantifies the penalty based primarily on the characteristics and consequences of effluent violations, although the amendment to the Penalty Policy adds a Factor E for non-effluent violations. The gravity of pretreatment implementation violations is evaluated primarily on the degree and pattern of failure to implement a required activity and the potential and actual impact of non-implementation. Thus, some modification or amplification of the gravity factors in the CWA Civil Penalty Policy is needed to reflect the characteristics of implementation violations.

---

* BEN will adjust cost estimates to current year dollars. POTWs are considered "not for profit" entities.

Pursuant to the amended CWA Civil Penalty Policy, five factors (A-E) are used to evaluate gravity. This Guidance presents the relationship of each factor to pretreatment implementation. The methodology for calculation of the gravity component is the same as in the CWA Penalty Policy -- that is each factor is calculated on a monthly basis with each violation presumed to continue until corrected. The gravity amount equals the sum of factors A through E plus 1, multiplied by $1,000.00 for each month of violation.

Note: Where effluent violations also exist, they should be considered in the appropriate monthly gravity component. Effluent violations are considered specifically under factor A, and they may also increase the levels for factors B, C, and D. All non-effluent violations would be evaluated under factor E. The penalty for effluent violations should be added to penalties for pretreatment implementation violations.

The basis for evaluation of performance on implementation is identified in the RNC Guidance. The RNC criteria identify the basis for evaluating implementation activities to determine the number of and most significant implementation violations. Of course, where actual approved program requirements vary from the RNC criteria, the program requirements should be the basis for evaluating performance.

The "Guidance on Bringing Enforcement Action Against POTWs for Failure to Implement Pretreatment Programs", August 4, 1988, discusses guidelines for evaluating the severity of pretreatment implementation violations (see Table 3 and discussion in that guidance).

The gravity factors as they are to be applied for pretreatment implementation cases are listed below:

Gravity Factor A. Significance of the Effluent Violation

This factor should be applied without change from current CWA Penalty Policy methodology to effluent violations where they occur. This factor is not applicable to failure to implement violations.

Gravity Factor B. Impact of the Violation

Failure to implement may result in POTW permit effluent limit violations, interference with the treatment works, pass through of pollutants from inadequately regulated IUs, and/or sludge contamination which may cause or contribute to harm to the environment or in extreme cases, a human health problem. Both effluent violations and all RNC criteria that are met by the POTW should be evaluated in selecting the value. The violation that gives the highest factor value should be used for each month. The value chosen should increase where the potential impact or evidence of an actual impact effects

1950

more than one of the listed categories. Also, where a POTW is Federally funded and is potentially damaged, a higher value should be assigned:

(i)	Impact on Human Health; or	Range: 10-Stat Max
(ii)	Impact on Aquatic Environment; or	Range: 1-10
(iii)	Potential Impact of Inadequately Controlled IU Discharges on POTW	Range: 0-10

Gravity Factor C. Number of Violations Range: 0-5

Each RNC criterion that is met is counted as a violation for the month. The more criteria that are met the higher the value chosen should be. In addition, this "number of violations" factor may be weighted more heavily to account for serious violations other than the most significant violation which was accounted for in factor "A" or "E". Effluent violations should also be included under this factor as part of normal Penalty Policy calculations.

Gravity Factor D. Duration of Noncompliance Range: 0-5

This factor allows consideration of continuing long-term violations of a permit (including effluent limits, schedules, and reporting requirements) and should include evaluation of all RNC criteria. The value should be increased if the same criterion is met for 3 or more months. When the violation is corrected for that criterion, a value of 0 is appropriate for the monthly gravity component in the months following the correction.

Gravity Factor E. Significance of Non-effluent Violations

The significance of a violation of an implementation requirement is evaluated based on the percent of a requirement that the POTW has failed to implement. All of the criteria identified in the RNC Guidance should be evaluated to identify the required activity for that month in which performance has been most inadequate. That activity will be deemed the most significant pretreatment implementation violation, and gravity factor E should be determined for that violation. Higher values within the range could be used for violations by large POTW programs and for programs with high rates of IU noncompliance. Higher values may be appropriate in such cases because the failure to implement may result in a higher discharge of toxic compounds to the environment. Factor E can also be used to address other permit violations such as reporting or schedule milestone violations.

% of a Requirement that The POTW Failed to Implement	Value Range
80-100%	3-10
41-79	2-7
20-40	1-4
0-19	0-3

C) **Adjustments**

1) **Recalcitrance (to increase penalty)** **Range: 0-150% of the preliminary penalty amount**

In addition to the discussion in the CWA Penalty Policy, recalcitrance includes consideration of whether the POTW continued in noncompliance after notification of the violations. The existence of audits or PCIs and follow up letters identifying these violations to which the POTW has failed to respond, generally indicate that recalcitrance should be increased. If the POTW has failed to comply with an administratively-imposed compliance schedule, the recalcitrance adjustment should be increased. Recalcitrance is indicated because the POTW was reminded of the requirements and notified of its violation, and yet failed to remedy the situation.

2) **Ability to Pay (to decrease penalty).**

The ability to pay adjustment becomes an issue when the municipality is incapable of raising sufficient funds to pay the proposed penalty. Ability of the municipality (or sewerage authority) to pay should rarely be a factor in pretreatment implementation cases since few involve large capitalization projects. Thus, the economic impact on the community from a penalty will be relatively small compared to the capital and O&M costs associated with the wastewater treatment system.

Funds to pay a penalty can come from a variety of sources within the municipality including unrestricted reserves, contingency funds, and any annual budget surpluses. The municipality could also make a one time assessment to the violating IUs or to all users of the system to cover the penalty amount. Where there is insufficient cash on hand to pay the entire penalty immediately, a payment plan can be developed which raises the needed funds over a specific time period (e.g., 6 - 12 months). This spreads the impact of the penalty over a longer period. Where a POTW chooses to assess all users to cover th penalty, the impact is likely to be small. Even a small municipa with 3,500 connections (service population about 10,000) with an

1962

existing sewer charge of $10/month could raise rates by 10% ($1) for 12 months and generate sufficient cash to pay a penalty of almost $50,000, which equates to about $.35/capita/month.

In determining whether ability to pay will become an issue, the standard Financial Capability Guidebook procedures can be used. While a specific municipality's debt situation could become an issue, the procedures primarily look at the increase in user fees which would be needed to generate the penalty amount compared to the median household income (MHI) of the community. Where the total wastewater treatment burden divided by the MHI is less than the standard indicators (between 1.00 - 1.75% of the MHIis considered an affordable sewer rate), ability to pay is not usually considered to be a problem.

3. Litigation Considerations (to decrease penalty)

The legal basis and clarity of the implementation requirements of an approved program and an NPDES permit are important factors in assessing the strength of the case. Where requirements are ambiguous, the likelihood of proving a violation is reduced, and this may be a basis for adjusting the penalty amount.* Otherwise, assessment of this factor will depend largely upon the facts of the individual case.

III. EXAMPLE OF PENALTY CALCULATION

The RNC Guidance (See pages 12 and 13) includes two examples of POTWs that failed to implement their approved pretreatment programs. The "Hometown" example will be used as a basis for computing a penalty to illustrate this Guidance. As noted previously, this example does include a penalty calculation for effluent violations.

A) Revised Scenario:

Hometown's pretreatment program was approved in June 1985. The annual implementation costs identified in the approved program were $100,000.00, plus the cost for issuing each SIU permit. The NPDES permit required an annual report fifteen days after the end of the year, beginning January 15, 1986. The approved program required that all 15 permits be issued by June 30, 1986. An August, 1986, audit of the program revealed that the POTW had failed to issue ten required permits and had not inspected its IUs as of that date. In addition, the POTW failed to submit its 1986 annual report on time. The State issued an administrative order on March 31, 1987 that required submission of an annual report by April 30, 1987 and permit issuance by June 30, 1987 and sampling inspections of all SIUs by August 30, 1987. The annual report was submitted September 30, 1987

* See OECM/OWEP "Guidance on Bringing Enforcement Actions Against POTWs for Failure to Implement Pretreatment Programs". August 4, 1988, for further discussion on assessing the strength of a case.

but as of January 31, 1988 only eight permits were issued and half the IUs were not inspected. This facility was on the Exceptions List for failure to implement its approved pretreatment program and for effluent violations. Thus, judicial action is appropriate. Full compliance was expected by April, 1988. Instances of noncompliance are tabulated below for both effluent violations and pretreatment implementation violations.

1. Effluent Violations

Monthly Average Effluent Limit Violations

Permit Limits: TSS 30mg/l; BOD 30mg/l; Cyanide 0.01mg/l; Copper 0.200 mg/l

Date	Value (all mg/l)
July, 1986	TSS 45 Cyanide 0.015 Copper 0.25
August, 1986	TSS 37 Cyanide 0.012 Copper 0.3
November, 1986	TSS 41 Cyanide 0.018 Copper 0.28 BOD 47
March, 1987	TSS 38 Cyanide 0.016 Copper 0.3 BOD 43
April, 1987	TSS 40 Cyanide 0.021 Copper 0.4
June, 1987	TSS 44 Cyanide 0.014 Copper 0.3
August, 1987	TSS 41 Cyanide 0.03 Copper 0.4
October, 1987	TSS 37 Cyanide 0.016 Copper 0.3
December, 1987	TSS 39

1984

2. Pretreatment Implementation Violations

Description of Violation Violations	Initial Date of Noncompliance*	Compliance Date
Failed to Issue permits (RNC criterion A)	6/30/86	60% Issued (1/31/88)
Failed to Inspect IUs (RNC criterion B)	8/30/86	50% Inspected (1/31/88)
Failed to Submit Annual Report (RNC criterion F)	1/15/87	(9/30/87)

* Under the same circumstances, this could be the date of program approval.

The minimum civil penalty for settlement can be determined as follows:

3. Estimates of Avoided Costs for Implementation Violations

The effluent violations are indicative of interference and pass-through caused by IU inputs of cyanide and metals that should be controlled by implementing pretreatment. The POTW has operated and maintained secondary treatment. Thus, the economic benefit is only calculated for pretreatment implementation violations. Since the approved program provided no information on the cost of issuing IU permits, an estimated cost has to be developed. The implementation costs are considered operation and maintenance costs (limited to certain time periods) for the BEN calculation of economic benefit. The BEN inputs and rationale are presented below for each violation.

1) Issue permits @ $3,000.00/permit

7/86 - 9/87, 10 unissued permits avoided cost-$30,000.00
10/87 - 1/88, 7 unissued permits avoided cost-$21,000.00

EPA uses a pricing factor of 40 days for issuing major, non-municipal, technology-based NPDES permits. SIU permits should be issued more quickly because there is less public notice. While the IU control mechanisms are likely to require similar types of evaluation and technical review as the comparable industries with NPDES permits, they are also likely to be smaller in size. Site and sampling data should already be available to the POTW, and there is no need for State certification as there is for EPA issued permits. Balancing the above facts with the limited POTW experience in issuing permits, thirty days was selected as an average time to issue a permit at a cost of $100.00 per day.

2) Inspection costs

7/86 - 12/86, no inspections avoided cost-$19,000.00/yr
1/87 - 9/87, 60% uninspected avoided cost-$11,000.00/yr
10/87 - 1/88, 50% uninspected avoided cost-$ 9,500.00/yr

From Table 1, use the sampling and industrial review percentage (19% for a medium-size program), multiplied by the total annual program implementation costs ($100,000). Therefore, inspections are estimated to cost $19,000.00/year. The POTW began conducting inspections after the audit--40% of the SIUs were inspected by January, 1987, and 50% were inspected by October, 1987.

3) Annual report - $5,000.00

Annual report costs are presumed to be part of program administration. This portion was estimated to be 5% of the total program costs (See Table 1).

B. Economic Benefit Component

BEN Inputs for each variable each are shown below:

1. Case Name=Hometown
2. Initial Capital Investment= 0
3. One-time non-depreciable expenditures= 0

Four separate BEN runs were made for avoided costs from permitting, inspection, and reporting violations. The avoided cost changed as permits were issued and inspections were completed. The time periods correspond to information obtained from the POTW in the senario.

	BEN Run			
	1	2	3	4
4. Annual O&M costs (all 1985 dollars)				
a) permits ($3,000 each)	30000 (10 unissued)	30000 (10)	30000 (10)	21000 (7)
b) inspections (% inspected)		19000 (0%)	11000 (40%)	9500 (50%)
c) annual report			5000	
5. Initial Date Noncompliance	7/86	8/86	1/87	10/87

6. Compliance Date	7/86	12/86	9/87	4/88
7. Penalty paid	4/88	4/88	4/88	4/88

(Remaining variables use standard values)

Results from BEN

Run 1	3,150
Run 2	20,018
Run 3	36,659
Run 4	15,803
Total	$75,630

Economic Benefit

D. Gravity Component

In developing the gravity amount, both effluent and pretreatment implementation violations should be included. A table showing the gravity calculation is provided below, along with a general description of the rationale for selection of values.

The values chosen for June-August 1986 reflect both the July and August effluent violations and the ten unissued permits which were to have been issued by June 30. The failure to issue permits was identified in the August audit and treated as the most significant violation and given a "3" under Factor E beginning in the month of July. (This factor could have been higher if the SIUs were major sources of toxics). September, 1986 represented the third month that the pretreatment implementation violation had continued, so Factor C was assessed at "1". Both effluent and implementation violations were counted under Factor D. The value assessed for Factor B, was related to the presumed IU impacts on NPDES permit violations. There was no evidence of any impact to the aquatic environment or human health from the effluent violations. For January, 1987, Factors C and D were increased to reflect the continuing effluent and implementation violations and the additional violations of the AO schedule. Factors were reduced in September, 1987 to reflect submission of the annual report, the issuance of some permits and the progress with inspections.

	Factors						
Month/Year	A	B	C	D	E	+1	Total
June, 1986	0	0	0	0	0	1	1000
July	3	1	0	0	3	1	8000
August	2	1	1	1	3	1	9000
Sept	0	0	1	1	3	1	6000
Oct.	3	0	1	1	3	1	9000
Nov.	4	1	1	1	3	1	11000
Dec., 1986	0	0	1	1	3	1	6000
Jan., 1987	0	0	2	2	3	1	8000
Feb.	0	0	2	2	3	1	8000
Mar.	4	1	2	2	3	1	13000
Apr.	5	2	2	2	3	1	15000
May	0	0	2	2	3	1	8000
June	3	2	2	2	3	1	13000
July	0	0	2	2	3	1	8000
Aug.	4	2	2	2	3	1	14000
Sept.	0	0	1	2	2	1	6000
Oct.	3	2	1	1	2	1	10000
Nov.	0	0	1	1	2	1	5000
Dec.	1	0	1	1	2	1	6000
Jan. 1988	2	0	1	1	2	1	7000
Feb.	0	0	1	1	2	1	5000
Mar.	0	0	1	0	1	1	3000
							179,000

1984

E. Adjustment Factors

1. Recalcitrance

A factor ranging from 0 percent (good compliance record, cooperation in remedying the violation) to 150 percent (extremely recalcitrant, despite repeated attempts to encourage compliance) of the total of the Economic Benefit and Gravity Components may be used to increase the penalty based upon the history of recalcitrance exhibited by the POTW. In this case, the POTW was advised of the implementation problems through an audit and an alternate schedule for compliance was established under an administrative order. Implementation was improved, but it was still inadequate. A factor of 20% was used because the POTW has failed to meet an administrative order schedule to fully implement its approved program.

Additional penalty .20 x ($75,630 + 179,000) = $ 50,800

Penalty Running total $ 304,800

2. Ability to Pay (Subtraction)

Several factors need to be considered in evaluating the defendant's ability to pay -- for example, domestic and industrial user fees, the cost of implementation relative to other municipalities, the size of the industrial users, the type of industrial base, and the financial condition of the city and its IUs. The combined bills for SIUs were 10% of all user charges, and IUs contributed 8% of the flow in 1986. The Hometown POTW is 10 MGD, with over 25,000 service connections and a $200 annual sewer rate. Assuming each connection represents a household with a MHI of $20,000, Hometown could afford a rate increase of about $12 annually per household. [EPA considers affordable sewer rates to range from 1.5 to 1.75 percent of the MHI (i.e., $250 to $275 per year)]. The POTW has an A Bond rating, strong financial condition, and has maintained the same user fees since 1984, prior to approval of the pretreatment program. There are no fees for permit issuance, discharger applications, or IU inspections. The results of the financial capability analysis indicate that if Howmetown used a general sewer rate increase to fund the penalty, it would be considered affordable. At this time, no adjustment for ability to pay seems appropriate.

Penalty Running Total $ 304,800

3. Litigation Considerations (Subtraction)

The federal case for Hometown is a strong one. The POTW has specific requirements for permitting and inspecting its industrial users. These are specified in the approved program and were incorporated into the NPDES permit in June 1985. The pretreatment audit identified specific violations, and the POTW began to address them. There is no evidence that the POTW was confused or that the requirements for implementation have changed. The failure to implement has contributed to permit limit exceedances for cyanide and copper, which are of concern. The large industrial community is an underused source of revenue for implementation and the current implementation violations may have provided them with some economic benefit. Therefore, there is no basis for adjustment for litigation considerations.

Final Penalty for Settlement $ 304,800

IV. Intent of Guidance

The guidance and procedures set out in this document are intended solely for the use of government personnel. They are not intended, and cannot be relied upon, to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these guidance and procedures and to change them at any time without public notice. In addition, any settlement penalty calculations under this Guidance, made in anticipation of litigation, are likely to be exempt from disclosure under the Freedom of Information Act. As a matter of public interest, the Agency may release this information in some cases.

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FEB 1 1989

MEMORANDUM

SUBJECT: Enforcement Initiative for Failure to Adequately Implement Approved Local Pretreatment Programs

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

Edward E. Reich
Deputy Assistant Administrator
for Civil Enforcement (LE-133)

TO: Regional Water Management Division Directors
Regional Counsels

As part of our continuing policy to seek improvement in the pretreatment implementation efforts of approved local pretreatment programs on a national basis, we have decided to initiate a nationally-coordinated failure-to-implement pretreatment program enforcement initiative. This initiative will address inadequate implementation efforts of local pretreatment programs by taking formal enforcement actions against noncomplying POTWs in every Region within a specific timeframe.

Effective implementation of approved pretreatment programs by municipalities is critical to controlling the discharge of toxic pollutants to surface waters; protecting the substantial financial investment in POTWs; protecting POTW worker health and safety; and preventing the contamination of sludge. Yet, data from the most recent QNCR report indicates that over 250 POTWs were reported for various aspects of inadequate pretreatment program implementation. Preliminary data from the Pretreatment Permits and Enforcement Tracking System (PPETS) indicates that approximately 47% of POTWs with approved local pretreatment programs may be in violation of one or more of the three pretreatment reportable noncompliance (RNC) criteria related to issuance of control mechanisms, inspections, or adequacy of

enforcement against significant industrial users in significant noncompliance (SNC). Given the fact that 90% of the pretreatment programs have been approved for at least three years, we believe that these POTWs have had adequate time to fully implement their programs.

Thus, we believe a national enforcement initiative is both appropriate and necessary to ensure that approved local pretreatment programs are fully implemented across the country. We consider such an enforcement initiative as our top water quality enforcement priority for this year. On January 17 and 18, Bill Jordan and John Lyon held conference calls with your Compliance and Regional Counsel Branch Chiefs and there was general support from all the Regions for this enforcement initiative. In fact, several Regions already had designated pretreatment enforcement as their top priority.

The initiative will include both administrative penalty orders (APOs) and civil judicial actions, but we would like to see each Region contribute at least one civil judicial referral to the initiative. Regions which directly oversee larger numbers of approved local pretreatment programs should contribute additional referrals and administrative penalty orders. States which have received approval to administer pretreatment programs are invited to participate in this initiative, with State Attorneys General filing civil judicial cases in State courts. Where appropriate, Regions and States should include key industrial users which are violating pretreatment standards and requirements as part of a POTW civil referral or proposed APOs.

EPA Regions are requested to provide EPA Headquarters with a proposed list of POTW candidates (including those in States with approved pretreatment programs) for this enforcement initiative. Among the criteria which the Regions should consider in the selection of candidates are the following:

- The POTW has been listed on the QNCR for pretreatment violations for more than two quarters,
- The POTW has discharges which impact near-coastal waters and enforcement would support the Agency's Near Coastal Water Initiative,
- The POTW exceeded one or more of the pretreatment RNC criteria or other specific requirements in their permit or approved program (The magnitude of such exceedances should also be considered.), or

- The POTW has unresolved TRC or chronic effluent violations (including heavy metal effluent violations) which appear to be related to inadequate pretreatment implementation.

All candidates should have an NPDES permit which, at a minimum, requires implementation of the approved pretreatment program. Also, the approved program should provide an adequate statement of program requirements.

Upon review of the Regions' list of candidates, Headquarters may inquire about additional POTW enforcement candidates as appropriate. EPA Headquarters staff will be available for two-day Regional visits (as necessary) to provide a better opportunity for face-to-face discussion of POTW enforcement candidates and details of the initiative.

Key dates in the schedule for this initiative are shown below:

o	2/6-3/1/89	Review of QNCR, PPETS, etc. by Region
o	3/3/89	Submission of POTW candidates (designated as probable referrals or APOs) to EPA Headquarters by Regions
o	3/6-4/7/89	Dialogue, negotiation, and two-day visits (as necessary) to Regions to discuss and confirm candidates
o	3/20-5/31/89	Preparation of referral/APO packages by Regions
o	4/3-6/2/89	Submission of referrals and APOs (as appropriate) by Regions to EPA Headquarters

- o 4/3-7/7/89 — Headquarters review of referrals and APOs (as appropriate) and subsequent referral of civil cases to the Department of Justice
- o 4/3-8/18/89 — Civil judicial cases filed by the Department of Justice and proposed APOs issued
- o 8/31/89 — National press release regarding the initiative (will include similar cases filed and APOs issued since 1/1/89)

Regarding APOs, please note that Headquarters review of APOs will only be required for those Regions which have not yet fulfilled the concurrence requirements identified in the guidance on administrative penalties issued on August 27, 1987. Regarding referrals, neither Headquarters nor the Department of Justice will stockpile or hold cases expressly to fit the proposed filing window but will continue to move the cases through the system.

Documents such as the August 4, 1988 "Guidance on Bringing Enforcement Actions Against POTWs for Failure to Implement Pretreatment Programs" and the December 22, 1988 "Guidance on Penalty Calculations for POTW Failure to Implement an Approved Pretreatment Program" should be utilized in this initiative as well as in other formal enforcement actions for failure to implement.

In regard to past civil referrals and APOs for failure to implement, for the purpose of this initiative, Headquarters will credit the Regions with civil referrals which are still in the review pipeline but not yet filed.

In a related matter, a preliminary review of PPETS indicates that data is still missing for the following large cities: Boston, Buffalo, Detroit, St. Louis, Phoenix, Tucson, San Francisco, Honolulu, Seattle, and Portland. Regions should make every effort to provide such data as soon as possible, but no later than March 6, 1989.

Thank you for your cooperation in this effort. If you have any questions or concerns in regard to this enforcement initiative, please contact Jim Elder (FTS-475-8488) or Bill Jordan (FTS-475-8304) in OWEP or John Lyon (FTS-475-8177) in OECM. If your staff wishes to discuss specific details of the initiative, including the selection process, proposed Regional visits, merits of a potential case, etc., please contact either Andy Hudock (FTS-382-7745) or David Hindin (FTS-475-8547) of our respective staffs.

cc: Rebecca Hanmer, OW
David Buente, DOJ
Cynthia Dougherty, OWEP
Susan Lepow, OGC
Regional Counsel Water Branch Chiefs
Regional Compliance Branch Chiefs
Regional Pretreatment Coordinators/Liaisons

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

1990

2000

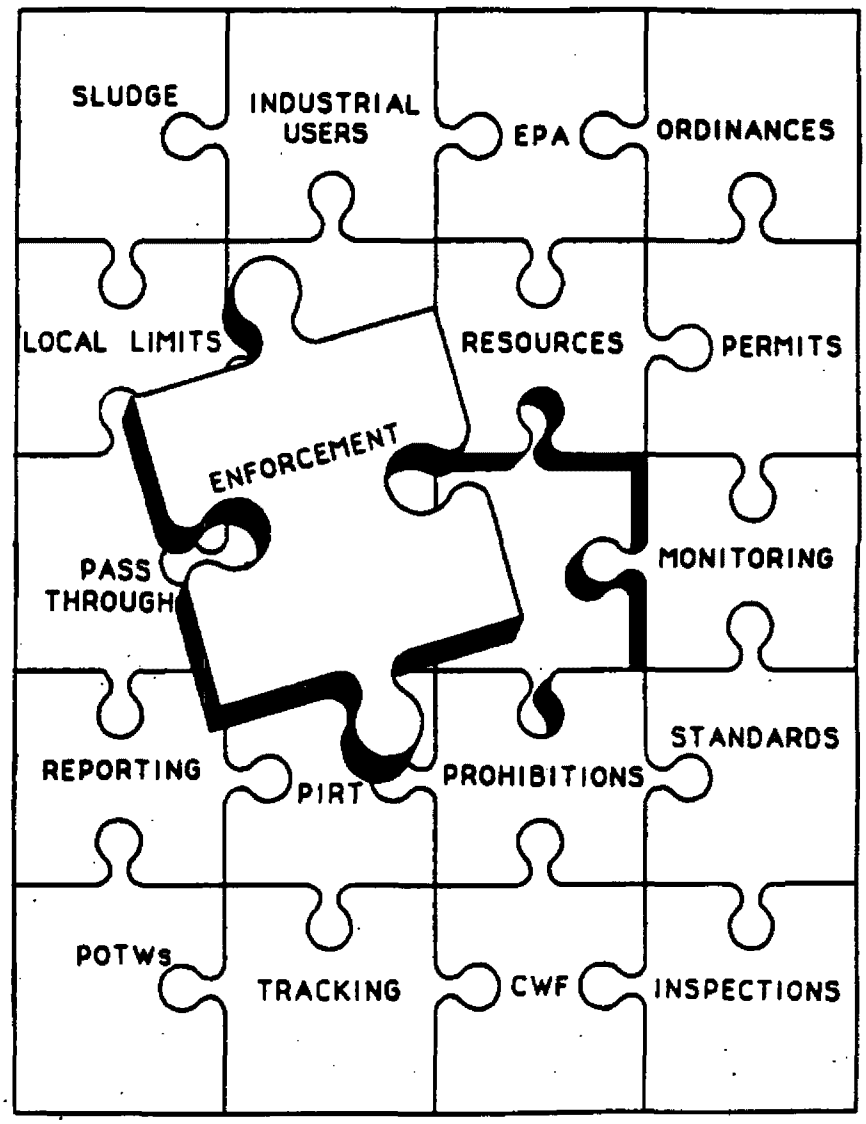
United States
Environmental Protection
Agency

Office of Water
(EN-338)

September 1989

EPA

Guidance For Developing Control Authority Enforcement Response Plans



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

DEC 4 1989

OFFICE OF
WATER

To All Approved Pretreatment Programs:

One of the most important requirements of pretreatment program implementation for Publicly Owned Treatment Works (POTWs) is an effective enforcement program to deal with Industrial User (IU) noncompliance. EPA expects POTWs to identify all violations, to respond with appropriate action and to follow up those violations with escalated levels of enforcement, if needed to ensure compliance. In January 1990 EPA expects to promulgate amendments to the General Pretreatment Regulations requiring all POTWs with approved pretreatment programs to develop enforcement response plans describing how the POTW will investigate and respond to instances of noncompliance.

In response to this coming requirement, the Office of Water Enforcement and Permits has developed the attached "Guidance for Developing Control Authority Enforcement Response Plans". This Guidance is intended to provide municipal pretreatment personnel with recommendations for assessing enforcement authorities, determining appropriate enforcement roles for personnel and deciding upon enforcement remedies for specific violations. To assist Control Authorities in meeting the changes to the General Pretreatment Regulations, the manual includes a model enforcement response guide and a detailed analysis of each of the common enforcement remedies.

If you have any questions or comments concerning the development of your own Enforcement Response Plans, please contact your Approval Authority or the Pretreatment Coordinator in your USEPA Regional Office.

Sincerely,

James R. Elder

James R. Elder, Director
Office of Water Enforcement
and Permits

GUIDANCE FOR DEVELOPING CONTROL AUTHORITY ENFORCEMENT RESPONSE PLANS

September 1989

Office of Water Enforcement and Permits
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

CONTENTS

CONTENTS (Continued)

TABLES

FIGURES

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

2007

2008

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

SEP 27 1989

MEMORANDUM

SUBJECT: FY 1990 Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements

OFFICE OF WATER

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

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

Attached is the final "FY 1990 Guidance for Reporting and Evaluating Noncompliance with Pretreatment Implementation Requirements". This Guidance defines criteria for determining which POTWs should be reported on the Quarterly Noncompliance Report (QNCR) for failure to implement pretreatment requirements and criteria for determining which pretreatment violations by POTWs meet the level of significant noncompliance (SNC). It also establishes timely and appropriate criteria for responding to noncompliance for pretreatment implementation violations. The timely and appropriate definition adopted for the pretreatment program is the same as for the NPDES program.

The comments received from you on the August 9, 1989 draft were timely and thoughtful. Perhaps the most frequent comment was the recommendation that we drop the separate definition for reportable noncompliance (RNC). As indicated in the August 9 letter, a workgroup is evaluating possible changes to the Quarterly Noncompliance Report and RNC/SNC reporting system. The workgroup should complete its assessment and recommend changes in FY 1990. A final decision as to whether to continue the use of both an RNC and an SNC definition will await the recommendation of that group. For FY 1990, we will use both the RNC and SNC definitions.

Two commenters suggested that the criterion addressing issuance of control mechanisms established an excessively long timeframe (180 days) for permit issuance and reissuance. Suggestions were made to shorten the timeframe for IU permit issuance and reissuance to as little as 90 days. While we did not make this change, we have added to the SNC definition a provision that EPA Regions and States may designate a POTW as in significant noncompliance if any violation substantially interferes with the ability of the POTW to attain program objectives.

2009

The FY 1990 SPMS requirements include two measures for POTW pretreatment implementation: 1) WQ/E-5, the number and percent of approved programs in significant noncompliance with pretreatment implementation requirements; and 2) WQ/E-10, the number of POTWs that meet the criteria for reportable noncompliance. We will track performance on both these measures for FY 1990 as a means of evaluating the efficacy of the new SNC definition.

Regions and States are expected to initiate timely and appropriate actions to resolve instances of significant noncompliance, including POTW pretreatment implementation violations. POTWs which meet the definition of SNC for pretreatment implementation and are not addressed on a timely basis will be carried on the Exceptions List until they have been resolved or received a formal enforcement response. All POTWs with approved pretreatment programs should be tracked for both RNC and SNC.

If you have any questions regarding the use of this document, you may contact me (475-8488) or Richard Kozlowski, Director, Enforcement Division (475-8304). The staff contact is Anne Lassiter, Chief, Policy Development Branch (475-8307).

Attachment

FY 1990 GUIDANCE FOR REPORTING AND EVALUATING POTW NONCOMPLIANCE WITH PRETREATMENT REQUIREMENTS

2011

TABLE OF CONTENTS

7012

I. Executive Summary

The QNCR is an important tool to identify priority violations of permit conditions, to overview the effectiveness of State and EPA compliance and enforcement activities, to provide a framework to achieve a nationally consistent pretreatment program, and to compile national statistics on noncompliance for the NPDES program. The existing rule for noncompliance reporting requires EPA and the States to report instances where POTWs have failed to adequately implement and enforce their approved pretreatment program.

Nearly 1500 POTWs are now approved. Pretreatment will be the primary mechanism to control toxic and hazardous pollutants which may enter the POTW or its sludge. Therefore, it is vital that EPA and the approved States routinely evaluate POTW compliance with the requirements of their approved program and report POTWs that have failed to adequately implement their approved program.

This Guidance is intended to assist Regions and approved States to evaluate and report POTW noncompliance with pretreatment requirements and to take formal enforcement action where violations are of a significant nature. The Guidance explains the criteria that should be used to evaluate principal activities and functions necessary to implement the program. In some cases, approved States and Regions may need to modify the program and/or NPDES permit because the existing requirements are inadequate or because conditions have changed. In general, those POTWs that meet the definition of reportable noncompliance should be priorities for resolving the inadequacies in approved programs or permits. POTWs that meet any Level I criterion or two or more Level II criteria are considered to be in significant noncompliance. In addition, the Region/approved State may designate any failure to implement violation as SNC if it substantially impairs the ability of the POTW to achieve its program objectives. POTWs with violations which meet SNC criteria must resolve those violations before appearing on the 2nd QNCR or the Region or approved State is expected to take formal enforcement action. Where the violation is not resolved and formal enforcement action is not taken on a timely basis, the POTW should be listed on the Exceptions List until such time as the violation is corrected or the POTW has been put on a schedule for correction through formal enforcement.

II. INTRODUCTION

A. Background

EPA Regions and NPDES States must report certain permit violations on the Quarterly Noncompliance Report (QNCR) which meet criteria identified in the existing NPDES Regulations (40 CFR Part 123.45). One of the violations that must be reported is a POTW's failure to adequately implement its approved pretreatment program. Prior to September 1987, the interpretation of adequate implementation was left to the discretion of the Regions and approved States.

In September 1987, the Office of Water Enforcement and Permits issued "Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements" which provided a definition of reportable noncompliance (RNC) for POTW pretreatment program implementation. These criteria were to be used in determining when a POTW should be reported on the QNCR. This guidance established criteria which covered five basic areas of POTW program implementation: IU control mechanisms; IU inspections; POTW enforcement; POTW reporting to the Approval Authority; and other POTW implementation requirements.

Now, based on experience with the use of that definition in Fiscal Years 1988 and 1989, EPA has revised the RNC criteria and has developed a new definition of significant noncompliance (SNC) for POTW's that have failed to adequately implement their approved pretreatment programs. The new definition of RNC will be used to determine which POTWs should be reported on the QNCR for failure to implement approved pretreatment programs. The definition of SNC is used to identify the instances of noncompliance that are subject to formal enforcement action, if not resolved on a timely and appropriate basis.

The purpose of this Guidance is to explain the RNC/SNC criteria, with examples of how to apply the criteria; describe how to report noncompliance for POTW pretreatment program implementation on the QNCR and establish timely and appropriate criteria for response to significant noncompliance. This Guidance should be used as a basis for reporting POTW pretreatment noncompliance as required in the Agency Operating Guidance and included as a performance measure for EPA and approved State programs under the Strategic Planning and Management System (SPMS).

7014

B. Existing Rule

The QNCR is the basic mechanism for reporting violations of NPDES permit requirements. Major[1] POTW permittees must be reported on the QNCR:

(1) if they are under an enforcement order for previous permit violations; or

(2) if their noncompliance meets specific criteria (Category I noncompliance); or

(3) if the regulatory agency believes the violation(s) causes problems or is otherwise of concern (Category II noncompliance).

The specific requirements of the existing rule which relate to pretreatment program implementation are as follows:

1. Enforcement Orders - All POTWs that are under existing enforcement orders (e.g., administrative orders, judicial orders, or consent decrees) for violations of pretreatment implementation requirements (except for orders addressing schedule and reporting violations) must be listed on the QNCR and the compliance status must be reported on each subsequent QNCR until the POTW returns to full compliance with the implementation requirements.

2. Category I pretreatment program noncompliance - A POTW must be reported on the QNCR:

   a) if it violates any requirement of an enforcement order (except schedule or reporting requirements as noted below), or

   b) if it has failed to submit a pretreatment report (e.g., to submit Annual Report or to publish a list of significant violators) within 30 days from the due date specified in the permit or enforcement order, or

   c) if it has failed to complete a pretreatment milestone within 90 days from the due date specified in the permit or enforcement order.

---

[1] Major POTW permittees are those with a dry weather flow of at least 1 million gallons per day or a BOD/TSS loading equivalent to a population of at least 10,000 people. Any POTW (including a minor POTW) with an approved local pretreatment program should have its pretreatment violations reported on the QNCR.

3. Category II - A POTW must be reported on the QNCR if the instance of noncompliance is:

   a) a pass through of pollutants which causes or has the potential to cause a water quality problem or health problem,

   b) a 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. Determination of Inadequate Program Implementation for QNCR Listing

OWEP has developed criteria to evaluate local program implementation that explain and clarify the existing regulations. As stated, these criteria highlight activities that control authorities must undertake to implement their programs. These activities include:

1) POTW establishment of IU control mechanisms,
2) POTW compliance monitoring and inspections
3) POTW enforcement of pretreatment standards and reporting requirements
4) POTW reporting to the Approval Authority, and
5) Other POTW implementation requirements.

Collectively, these criteria provide the framework for the definition of reportable noncompliance which should be used by EPA Regions and approved States to report POTW noncompliance with pretreatment requirements on the QNCR. These same criteria also provide the basis for a definition of significant noncompliance for pretreatment program implementation. POTWs with pretreatment violations which meet the level of SNC must either resolve these violations on a timely basis or the Region or approved State must take formal enforcement action on a timely basis. The attached table, Table 1, identifies the individual violations which constitute the criteria for reporting noncompliance on the QNCR, as well as the criteria for SNC.

---

[2] The permit is the basis for enforcing requirements of the approved program or the Part 403 regulations. It should at least require compliance with 40 CFR part 403 and the approved program and ideally it should provide more specific implementation requirements when they are necessary to evaluate noncompliance.

TABLE 1

DEFINITIONS OF REPORTABLE AND SIGNIFICANT NONCOMPLIANCE

A POTW should be reported on the QNCR if the violation of its approved pretreatment program, its NPDES permit or the General Pretreatment Regulations (40 CFR Part 403) meets any of the following Level I or Level II criteria for inadequate implementation of its approved pretreatment program. A POTW should be considered to be in significant noncompliance if it meets any one of the following Level I criteria or two or more of the Level II criteria. The POTW may also be identified as in significant noncompliance if it meets any one of the Level II criteria if that violation substantially impairs the ability of the POTW to achieve program objectives.

A. Level I

1) Failed to take effective action against industrial users for instances of pass through and/or interference as defined in 40 CFR Part 403.3 and required in Section 403.5, and as specified in the approved program or the NPDES permit. Actions taken in response to discharges which result in pass through and/or interference that failed to eliminate the causal discharge within 90 days of identifying the responsible industry or failed to place the responsible industry on an enforceable schedule within 90 days of identification are not considered to be effective, unless otherwise defined in an approved enforcement response plan.

2) Failed to submit a pretreatment report (e.g., annual report or publication of significant violators) to the Approval Authority within 30 days of the due date specified in the NPDES permit, enforcement order, or approved program.[3]

3) Failed to complete a pretreatment implementation compliance schedule milestone within 90 days of the due date specified in the NPDES permit, enforcement order, or approved program.

[3] The term enforcement order means an administrative order, judicial order or consent decree. (See 40 CFR 123.45)

TABLE 1 (Continued)

B. Level II

1) Failed to issue, reissue, or ratify industrial user permits, or other enforceable control mechanisms, where required, for at least 90% of the "significant industrial users", within 180 days after program approval (or after permit expiration), or within 180 days of the date required in the approved program, NPDES permit, or enforcement order.

2) Failed to conduct a complete inspection or sampling of at least eighty percent of the "significant industrial users" as required by the permit, the approved program, or enforcement order.

3) Failed to enforce pretreatment standards or reporting requirements -- including self-monitoring requirements -- as required by the approved program, the NPDES permit, or the General Pretreatment Regulations. Failed to take appropriate action against a violation within thirty (30) days of being notified of such violation. Actions taken in response to incidents of significant noncompliance that failed to return the SIU to compliance (or in compliance with an enforceable compliance schedule) within 90 days of the receipt of information establishing significant noncompliance are not considered effective unless otherwise defined in an approved program enforcement response plan.

4) Any other violation or group of violations of local program implementation requirements based on the NPDES permit, approved program or 40 CFR Part 403 which the Director or Regional Administrator considers to be of substantial concern.[5]

---

[4] See SNC definition for industrial users, section 3.4.1 of the PCME. EPA proposed to use that definition to identify significant noncompliers for the annual public notification requirement (section 403.8(f)(2)(vii)). Significant noncompliance (SNC) includes certain violations of pretreatment standards, reporting, schedules and enforcement orders by SIUs.

[5] Existing QNCR criterion (40 CFR Part 123.45); the violation must be reported.

III. Applying the Criteria

The criteria for reporting POTW noncompliance with pretreatment requirements are based on the General Pretreatment Regulations [particularly 403.8(f)(2)], approved pretreatment programs, and NPDES permit conditions (particularly Part III). Where specific conditions, deadlines, or procedures are specified in the Regulations or the approved program, and incorporated or referenced in the NPDES permit, POTW performance should be evaluated against those requirements. Any failure to meet those requirements is a violation. The criteria included in this Guidance establish a basis for determining when a violation or series of violations should be reported on the QNCR for failure to implement a pretreatment program. If the POTW is identified as meeting one or more of the criteria, the POTW should be reported on the QNCR. If the POTW's violations meet the criteria for significant noncompliance, the violation must be reported in the QNCR and it must be resolved or EPA or the approved State must take formal enforcement action to resolve the violation before the POTW appears on the second QNCR. This definition of "timely and appropriate" is the same as for the NPDES program.

POTW performance should be evaluated using the information routinely obtained from pretreatment compliance inspections, annual reports, pretreatment audits and Discharge Monitoring Reports (DMRs) as well as any special sources of information. All annual reports should include the compliance status of IUs, a summary of compliance and enforcement activities, and other information, as required by Section 403.12(i) of the General Pretreatment Regulations. This information should be useful to assess the effectiveness of pretreatment implementation. Pretreatment staff should review the approved program, the NPDES permit, and any correspondence with the POTW regarding its pretreatment program to identify any specific procedures, levels of performance, or milestones that may apply to implementation of the particular program.

A. LEVEL I CRITERIA (a POTW is considered to be RNC and SNC for any violation listed below)

1. Failure to Enforce Against Pass Through and Interference

Definitions of industrial user discharges that interfere with a POTW or pass through the treatment works were promulgated January 14, 1987 (52 FR 1586).

Protection against interference and pass through are fundamental objectives of implementing a local pretreatment program. Interference generally involves the discharge of a pollutant(s) which reduces the effectiveness of treatment such that a permit requirement is violated. (If the pollutant that causes the violation is the same as the permit pollutant limit that was exceeded, pass through has occurred.) The POTW is responsible for identifying and controlling the discharge of pollutants from IUs that may inhibit or disrupt the plant operations or the use and disposal of sludge. The POTW must monitor IU contributions and establish local limits to protect its sludge.

The POTW should have written procedures to investigate, control and eliminate interference and pass through. Whenever interference or pass through is identified, the POTW should apply such procedures to correct the problem. The effectiveness of POTW actions against IUs that cause interference and pass through is evaluated based on the timeliness of the POTW response, the degree to which the problem is abated, and the use of the maximum enforcement authority required to resolve the problem.

Whenever an industrial source has been identified as a cause of such violations, the control authority must respond in a rapid and aggressive manner to avoid continuing problems, consistent with the POTWs approved enforcement procedures. Where there are no approved procedures, a reasonable expectation would be that the interference/pass through would be corrected within 90 days after the industrial source has been identified as causing the interference or pass through or that an enforcement order setting an expeditions compliance schedule for corrective action would be issued within 90 days after the source is identified. Where the SIU does not comply with the schedule, the POTW would be expected to make use of full enforcement authorities to secure compliance.

Section 403.5 of the General Pretreatment Regulations requires that the POTW develop and enforce local limits to prevent interference and pass through from industrial contributors to the treatment works. If a POTW has permit limit violations that are attributable to industrial loadings to its plant, it may also be a violation of the requirement to enforce local limits. However, interference or pass through may reflect the fact that the approved program includes inadequate local limits. If such is the case the POTW should be required to modify its approved pretreatment program.

2. Failure to Submit Pretreatment Reports Within 30 days

This criterion already exists under Category I of 40 CFR Part 123.45(a). The term "pretreatment report" should be interpreted to include any report required by the Approval Authority from the POTW (including publication of significant violators/ noncompliers in the newspaper as required by Section 403.8(f)(2)(vii) of the General Pretreatment Regulations). Where specific dates are established for these or other reports from the POTW, they may be tracked in PCS. When deadlines are missed, the POTW should be notified immediately because these reports contain information which is essential to determine compliance status. When the due date is missed by 30 days or more, the POTW should be reported on the QNCR as in noncompliance. A POTW which meets this criterion would also be considered in significant noncompliance.

3. Failure to meet Compliance Schedule Milestones by 90 Days or more

This criterion is also included in Category I of 40 CFR Part 123.45(a). Compliance schedules are frequently used to require construction of additional treatment, corrective action to correct inadequacies in implementation, Spill Prevention Contingency and Countermeasure plans, additional monitoring that may be needed to attain compliance with the permit, and any other requirements, especially the development or revision of local limits. The schedules should divide the corrective action into major steps (milestones) that can be verified by inspection or review. Most schedules include progress reports. EPA recommends that the milestones be set at least every six months throughout the schedule. The schedules can be incorporated as part of the POTW's NPDES permit if final compliance will not exceed the regulatory compliance deadline. If the compliance schedule is to resolve a violation that has occurred after the regulatory compliance deadline, the schedule must be placed in an administrative order, judicial order, or a consent decree outside the NPDES permit.

The existing rule for QNCR reporting requires that all permittees be listed on the QNCR if they are under an enforcement order. If the permittee is in compliance with the order, the compliance status is "resolved pending". If the permittee has missed a compliance schedule date by 90 days or more, the permittee must be reported as noncompliant on the QNCR. For POTW pretreatment programs, a failure to begin corrective action, complete corrective action, or attain final compliance within 90 days of the compliance deadline in an enforcement order is considered SNC.

B. **LEVEL II CRITERIA** (a POTW is considered RNC for meeting any criterion and SNC for meeting two or more of the criteria listed, except that a POTW may be identified as meeting SNC if it meets any one of the criteria listed below if the violation substantially impairs the ability of the POTW to achieve program objections.)

1. Failure to Issue Control Mechanisms to Significant Industrial Users in a Timely Fashion

Control mechanisms establish enforceable limits, monitoring conditions, and reporting requirements for the industrial user. In some cases, an approved program may have a sewer use ordinance that defines the limits (including local limits) and an individual mechanism for establishing monitoring conditions at each facility. Technically, if a control mechanism expires, control of the SIU and enforcement of some pretreatment requirements may be suspended. Therefore, timely issuance and renewal of all control mechanisms is essential.

All Control Authorities must apply pretreatment standards to their industrial users. Where the approved program requires that individual control mechanisms be developed for significant industrial users, but does not include a timeframe for issuance, the POTW should be given a deadline to issue them through an enforcement order. Some States include schedules for issuing specific SIU permits in a POTW's NPDES permit. Where the POTW has missed one or more deadlines specified in a permit or enforcement order for issuing individual control mechanisms by 90 days or more, the violation must be reported on the QNCR as a schedule violation.

For failure to issue control mechanisms, where individual control mechanisms are required by the approved program or the NPDES permit, the POTW should issue or reissue control mechanisms to 90% of the SIUs within six months following the required date or, if there is no required date, within six months after the program is approved. Where initial issuance of individual control mechanisms has occurred, POTWs should be expected to reissue 90% of required control mechanisms within six months of expiration. POTWs that fail to meet these timeframes should be reported on the QNCR.

Some POTWs have stated that delay in submission of an application by the SIU or delay in review by a State agency causes unavoidable delays in issuance of control mechanisms. The POTW should establish a schedule for IU applications and any other required preliminary steps which allows for the timely review and issuance of a control mechanism prior to its expiration.

2. Failure to Inspect or Sample Significant Industrial Users

POTWs are required to carry out all inspections, surveillance, and monitoring procedures necessary to verify the compliance status of their industrial users independent of information provided by the industrial user [40 CFR 403.8 (f)(2)(iv)]. In the PCME Guidance, EPA recommended that the Control Authority conduct at least one inspection and/or sampling visit for each significant industrial user annually.

The approved program and/or the NPDES permit may establish other requirements for inspections or use a different definition of significant industrial user. In those cases where the permit or approved program identifies specific requirements for inspection or sampling, these requirements should be used as a basis to evaluate POTW compliance. If the POTW has failed to either inspect or sample at least 80% of the significant industrial users as required by the permit or the approved program, the POTW should be reported on the QNCR for its failure to inspect. POTW sampling of all IUs is essential to evaluate IU compliance where IUs do not submit self-monitoring information. In the absence of specific inspection coverage requirements in the approved program or permit, the Approval Authority should also report any POTW which has not either inspected or sampled at least 80% of all SIUs within a 12 month period.

3. Failure to Enforce Pretreatment Standards and Reporting Requirements

a. IU Reporting and Self-Monitoring Requirements

All categorical IUs are required to report at least twice a year (40 CFR 403.12). POTWs also have authority to require monitoring and reporting from non-categorical IUs. As a result, most POTWs have established self-monitoring requirements for SIUs as a means of securing adequate data to assess SIU compliance at less cost to the POTW than if all data were developed by the POTW through sampling. Where an approved program does not require SIU self-monitoring, the visits and inspections conducted by the POTW must be sufficient in scope or frequency to assure compliance.

In evaluating compliance with this criterion, EPA and approved States should examine the requirements of the NPDES permit and the approved pretreatment program and determine whether the Control Authority has established self-monitoring requirements as required. IU self-monitoring requirements should specify the location, frequency, and method of sampling the wastewater; the procedure for analysis and calculation of the result; the pollutant limits; and the reporting requirements. Under certain conditions, SIU violations may trigger additional self-monitoring (See 403.12(g)). For each violation the SIU detects, it must notify the POTW and resample and submit both sample results for review by the Control Authority. These self-monitoring requirements may be applied, in general, through an ordinance, through specific control mechanisms, or through a combination of general and specific mechanisms. Where self-monitoring is used, it should be required frequently enough so that in combination with POTW monitoring, compliance of the SIU can be accurately assessed.

Where appropriate requirements have been established, the Control Authority must ensure that SIUs comply with all aspects of the requirements and report in the manner required in the control mechanism. Where the Control Authority fails to establish appropriate requirements or to adequately enforce these requirements once established (i.e., POTW should respond in writing to all SNC violations for IU self-monitoring and reporting), the Control Authority should be considered in noncompliance and listed on the QNCR.

b. POTW Enforcement and IU Significant Noncompliance

The Control Authority must have the legal authority -- usually expressed through a sewer use ordinance -- to require the development of compliance schedules by IUs and to obtain remedies for noncompliance, including injunctive relief and civil or criminal penalties [40 CFR 403.8(f)(1)(iv) and (vi)]. In addition, the Control Authority must have an attorney's statement, which among other things, identifies how the Control Authority will ensure compliance with pretreatment standards and requirements and enforce them in the event of non-compliance by industrial users [403.9(b)(1)(iii)]. Further, procedures for enforcement may be contained in the approved program, sewer use ordinance, or NPDES permit.

The attorney's statement and compliance monitoring sections of the approved program, taken in combination with the NPDES permit, may provide a comprehensive set of enforcement procedures

which the POTW should follow to ensure the compliance of industrial users with pretreatment standards. Where such procedures are inadequate, EPA strongly recommends that POTWs develop written enforcement procedures which describe how, when, and by whom enforcement authorities are applied (See section 3.3 of the PCME). In fact, amendments to the General Pretreatment Regulations proposed on November 23, 1989 (40 CFR Parts 122 and 403) require POTWs to develop such procedures. These procedures must be approved by the Approval Authority. (After the NPDES permit is modified or reissued to incorporate these regulatory changes, these procedures become enforceable requirements of the pretreatment program.) These procedures serve to inform industrial users of the likely response to violations and assist the POTW in applying sanctions in an equitable manner.

The Approval Authority must periodically evaluate whether the POTW is effectively enforcing pretreatment requirements. In evaluating performance, the Approval Authority should examine both whether the POTW is following its enforcement procedures, where there are such approved procedures, and whether the program is effective in ensuring compliance with pretreatment standards. Regardless of whether there are procedures, one of the indicators the Approval Authority should use in evaluating effectiveness is the level of compliance of SIUs with pretreatment standards. Where the level of significant noncompliance (SNC) of SIUs is 15% or greater over a six month period without formal POTW actions or penalties where appropriate, there is a reasonable presumption that overall the Control Authority is not effectively enforcing its program. To overcome the presumption of ineffective enforcement, the POTW should be able to demonstrate maximum use of its enforcement authorities on a timeframe consistent with its enforcement procedures or, in the absence of written procedures, with the timeframes included in this document.

The Approval Authority should also review the nature and timeliness of the actions taken by the POTW to obtain compliance from individual SIUs. As a general rule, EPA recommends that a POTW respond initially to all violations with either formal or informal enforcement action within 30 days from the date the violation is reported or identified to the POTW. Frequently, the initial action will be informal (e.g., telephone call, warning letter, or meeting.) Where informal action does not bring compliance, the POTW should promptly escalate the level of enforcement response. As a general rule, escalation should occur within 90 days of the initial action, if compliance has not been achieved. Where an SIU continues to violate, so that the pattern of violations meets the criteria for significant noncompliance, the violation should be resolved within 90 days of the receipt of information which established the SIU to be in SNC or the POTW should issue an enforceable schedule for resolution of the noncompliance within that 90 days.

Under certain emergency situations -- to protect public welfare and property -- the initial response should be immediate and should include a formal enforcement action. The POTW should exercise any and all authority that is necessary to resolve instances of significant noncompliance or establish a schedule for resolving them.

The Control Authority should also use its authority to assess penalties against noncomplying industrial users to recapture the economic benefit of delaying compliance. Penalties would be expected as part of the response to violations of most compliance schedules and for violations which were related to interference and pass through at the POTW. EPA uses a computer model "BEN" to estimate the economic benefit. Economic benefit results from delaying capital expenditures, one-time costs for construction/acquisition of treatment facilities, and the avoided cost of operating and maintaining the treatment works. Control authorities should use procedures which consider economic benefit as part of their penalty assessment process.

The Approval Authority should review the Control Authority's overall actions carefully to determine whether it has routinely evaluated the violations and contacted the SIUs in a timely manner, escalating the response when compliance is not achieved. If this review reveals that the Control Authority has often not followed its own procedures or that the Control Authority has not appropriately used its full authorities to achieve compliance by its SIUs, the Control Authority should be judged to be in noncompliance.

Where the Control Authority is judged to have followed its procedures in almost all cases, but the level of significant noncompliance among SIUs is 15% or greater, the adequacy of Control Authority enforcement procedures should be reviewed. If the procedures are found to be inadequate, the procedures should be modified. The Approval Authority might require modification of the approved program, through the NPDES permit, or might issue an administrative order requiring the adoption of new procedures along the lines of those included in the PCME Guidance.

Even where the SIUs have a low level of significant non-compliance, the Approval Authority should review the performance of the Control Authority to ensure that it is, in fact, implementing its enforcement procedures and that the procedures are adequate to obtain remedies for noncompliance. For example, where a Control Authority fails to identify all violations or fails to respond to violations when they do occur, the POTW should normally be identified as in noncompliance on the QNCR.

c. Local limits

A POTW that has violations of its NPDES permit limitations which are attributed to interference or pass-through from non-domestic contributions, should be reported on the QNCR (40 CFR 123.45 (a)). Likewise, a POTW which fails to enforce its approved local limits should be included on the QNCR. Just as for limits based on national categorical pretreatment standards, POTWs are expected to exercise the full range of enforcement mechanisms available to ensure the compliance of industrial users with approved local limits. In assessing the effectiveness of enforcement of local limits, the same criteria should be applied as for enforcement of national pretreatment standards.

4. Any Other Violation(s) of Concern to the Approval Authority

This criterion allows the Approval Authority to identify any POTW as in reportable noncompliance for a single violation or any combination of violations which are judged to be important even though they may not be covered by the specific criteria in the definition. These violations might include such violations as failure to update an industrial user inventory, failure to staff the pretreatment program consistent with the approved program or NPDES permit, issuance of control mechanisms of inadequate quality, or failure to develop or analyze local limits as required by an NPDES permit or enforcement order.

IV. Compliance Evaluation

EPA or the approved State should use annual (or more frequent) reports, pretreatment compliance inspections, audits, any follow-up reports, and DMRs to evaluate the compliance status of the permittee. At a minimum, data should be reviewed every six months to determine whether the POTW is in compliance. The Approval Authority should attempt to schedule audits and/or inspections and receipt of reports to support this six month review. Once the facility is shown on the QNCR, quarterly evaluations are needed to update the compliance status on each QNCR.

Compliance with permit effluent limits, compliance schedules, and reporting can be tracked in PCS, which is EPA's automated data system. The dates for submission and receipt of periodic reports and routine requirements should also be tracked in PCS. WENDB data elements already include the date of receipt of an annual report (or periodic report). This tracking would allow Regions and States to forecast when reports are expected and detect reporting violations, similar to the process for tracking discharge monitoring reports and other scheduled events.

The Pretreatment Permits and Enforcement Tracking System, (PPETS), has been developed, as a part of PCS, to track the overall performance of POTWs with their pretreatment requirements and the compliance rates of significant industrial users. Most of the data in PPETS will only be indicative of potential violations. The apparent violation should be verified as a continuing problem before the instance of noncompliance is reported on the QNCR. The data elements in PCS and PPETS that may apply to reportable noncompliance are summarized for each criterion in Table 2.

Once the POTW has been reported on the QNCR it should continue to be reported each quarter until the instance of noncompliance is reported as resolved. Compliance with an enforcement order (both judicial and administrative) should be tracked on the QNCR from the date the order is issued until it is met in full. EPA and/or the approved State should verify the compliance status of the POTW each quarter once it is listed on the QNCR through periodic reports from the POTW, compliance inspections, audits, meetings, or by a 308 letter to the POTW for compliance data and information on the status of the pretreatment implementation violation.

Table 2

REPORTABLE NONCOMPLIANCE CRITERIA AND RELATED PPETS DATA ELEMENTS

Criterion	Data Source	Data Element
Criterion II-1 -- Failure to Issue Control Mechanisms	PPETS -	o Number of SIUs without required mechanisms*
		o Control mechanism deficiencies
Criterion II-2	PPETS -	o SIUs not inspected or sampled
-- Failure to Inspect SIUs		o Number of SIUs*
		o SIUs in SNC but not inspected or sampled
		o SIUs not inspected at required frequency
		o Inadequacy of POTW inspections
Criteria II-2	PCS -	o Violation summary
-- Failure to Enforce Standards and Reporting Requirements		o Effluent data*
	PPETS -	o SIUs in SNC*
		o Adequacy of POTW monitoring
		o SIUs in SNC with self-monitoring*

Criterion	Data Source	Data Element
		o Number of enforcement actions*
		o Existing local limits
		o Headworks analysis
		o Deficiencies in POTW application of standards
Criterion I-1	PCS -	o Violation Summary
-- Failure to Enforce against Interference and Pass-through		o Effluent data*
	PPETS -	o SIUs in SNC*
		o Number of enforcement actions*
		o Number of IUs assessed penalties
		o Number of significant violators published in the newspaper*
		o Pass Through/ Interference incidents
		o Deficiencies in POTW sampling

7R3D

Criterion	Data Source	Data Element
		o Deficiencies in POTW application of standards
		o Enforcement response procedures
Criterion I-2		
-- Failure to Submit Annual Reports	PCS -	o Reporting schedule
		o Permit reporting*
Criterion I-3		
-- Failure to Meet Compliance Schedules	PCS -	o Compliance schedule events*

* Water Enforcement National Data Base (WENDB) data elements for which data entry is required, not optional.

V. Reporting on the QNCR

The Quarterly Noncompliance Report is prepared by NPDES States and EPA Regions each quarter. It lists violations of Federally designated major NPDES permittees that are of concern to the Agency. The format is described in Section 123.45(a) of the NPDES Regulations. For each instance of noncompliance, the report must show the date, basis and type of the violation, the date and type of action the agency has taken, and the current compliance status. The agency should also explain mitigating circumstances or remedial actions which the permittee may have planned. Detailed guidance for preparing the QNCR is available upon request to the Regions or OWEP. The following discussion summarizes the basic requirements for reporting POTW pretreatment violations.

The QNCR must be submitted to EPA Headquarters sixty days after the reporting quarter ends. The QNCR covers Federally designated majors. Generally, a POTW over 1 MGD is automatically designated as a major. This includes the vast majority of the POTW Control Authorities. All POTW pretreatment implementation violations should be reported on the QNCR, regardless of whether the control authority is classified as a major or a minor POTW.

A. Format

The general format for the QNCR is described in the Regulations. A list of abbreviations and codes used by the State Agency or EPA Region that prepares the report should be attached to each QNCR. If the Permit Compliance System (PCS) is used to generate the QNCR, standard abbreviations are automatically used and no special list of abbreviations or codes is needed for the submittal to Headquarters. (Note that a list of abbreviations may be needed for Freedom of Information Act requests.) The format is intended to provide the minimum information that is necessary to describe the violation, show how and when the agency responded, explain any mitigating circumstances or clarifying comments, and indicate the current compliance status of the permittee.

The description of the permittee should include the name of the permit holder, the name of the municipality, and the NPDES permit number. The permittee should be the Control Authority for the local pretreatment program. If other municipal permittees are subject to the Control Authority, they should be listed under the comments portion of the entry. The Control Authority is responsible for violations by other permittees covered by the Control Authority's pretreatment program. Similarly, industrial users that contribute to the violation should be listed under comments.

B. Description of the Noncompliance

Under the permittee's name and permit number, information on each instance of noncompliance must be reported. For pretreatment violations, the description should summarize the criteria that were violated and reference the QNCR Regulation subparagraph. The subparagraph of the August 1985 Regulations that apply would be as follows:

Type of violation	QNCR (section 123.45) Regulation Subparagraph
1) Failure to implement or enforce industrial pretreatment requirements (Criteria I-1 and II-1, -2, and -3)	(a)(iii)(B)
2) Pretreatment Report - 30 days overdue (Criterion I-2)	(a)(ii)(D)
3) Compliance schedule - 90 days overdue (Criterion I-3)	(a)(iii)(C)
4) Other violation or violations of concern (Criterion II-4)	(a)(iii)(G)

The criterion should be listed under the type of violation as the example (Section VI) shows.

Each violation should include the date. If the POTW has missed a deadline, the deadline is the date of the violation. The last day of the month is used as the violation date for violations of monthly averages. In some cases, the Agency may have discovered the violation through an audit or inspection of the POTW program. The inspection/audit date should be noted under comments. In the examples, all dates on the QNCR are written in six digit numbers representing the month, day, and year. The date, January 9, 1987 is entered as 010987 for the PCS generated QNCR.

The violation date of some implementation requirements may be the date the program was approved. Where the POTW has taken no action to implement a requirement since approval of the program, this beginning date would be appropriate. In other cases, the POTW may have been issued a specific deadline. These deadlines may be established through a permit or a compliance order. For example, some programs require annual inspections of

all SIUs as a condition of the NPDES permit but do not establish specific timeframes. In the absence of a particular compliance date, the specific deadline should be assumed to be one year after the effective date of the NPDES permit. Thus, the initial date of the violation is one year after the effective date of the permit.

The Region or approved State should contact the POTW promptly when a pretreatment implementation violation is detected. The Region/State should also indicate the action taken in response to the POTW's failure to implement an approved program on the QNCR. In determining the appropriate response, the Region/State should consider the impact of the violation, POTW compliance history, the number of SIUs, and the nature and/or duration of the violation. Initial violations may be resolved through training, conferences, or on-site reviews. The Regional/State response should be timely and escalate to formal enforcement (an administrative order or judicial referral) if the POTW fails or is unable to comply in a timely fashion. The date the action was taken should also be indicated. Planned actions by the POTW or its IUs and projected dates should be noted under comments.

C. Compliance Status

The QNCR also tracks the status of each instance of reportable noncompliance. Three status codes are usually reported: noncompliance (NC), resolved pending (RP), and resolved (RE). "Noncompliance" means the violation or pattern of violations is continuing. "Resolved pending" means the permittee is making acceptable progress according to an enforceable schedule (i.e., through an administrative or judicial order) to correct the violation. "Resolved" means the permittee no longer exceeds the QNCR criteria for which they are listed. For the "noncompliance" and "resolved pending" status, the status date is generally the last date of the report period. The status date for "resolved" is either the date the noncompliance requirement is fulfilled or the last day of the report period in which the permittee no longer meets the QNCR criteria.

The "comments" column can be used to describe the violation, explain permittee progress, indicate potential remedies, project dates of compliance, and explain agency responses. Other information can also be reported under comments, including the name of noncomplying SIUs; the level of performance or degree of failure by the POTW; the names of other permittees that are covered by the Control Authority; agency plans for training or technical assistance; and the manner in which the agency learned of the violation.

VI. Example of Reporting on the QNCR

The following example illustrates how violations and Agency responses are reported. This is a moderate-sized POTW that has refused to implement the program.

Scenario: Hometown's pretreatment program was approved in June 1985. The permit required an annual report, fifteen days after the end of each year, beginning January 15, 1986. The program required that permits be issued to 15 SIUs by June 30, 1986. The POTW was audited in August 1986 and had failed to permit and inspect its IUs and failed to submit an annual report. Hometown meets the criteria for SNC.

QNCR Listing

Hometown WWTP, Hometown, US 00007

INSTANCE OF NONCOMPLIANCE / DATE	REG SUBPARA	ACTION (AGENCY/DATE)	COMPLIANCE STATUS DATE
Issue permits (Criterion II-1) RP (033187)	063086 (iii)(B)	AO #123 (State/033187)	
Inspect SIUs (Criterion II-2) RP (033187)	083086 (iii)(B)	AO #123 (State/033187)	
Submit Annual Report RP (033187) (Criteria I-2)	011587 (ii)(C)	Phone call (State/013087) AO #123 (State/033187)	

COMMENTS

AO requires submission of annual report by 4/30/87, and permit issuance and sampling inspections of all SIUs by 6/30/87. EPA Audit 8/30/86 identified violations of permit inspection requirements Control Authority includes two other permittees: Suburb One, Permit No. US 00008 and Suburb Two, Permit No. US 00009 who must meet the schedule for inspections.

Discussion: The entry on the QNCR for Hometown shows the name and permit number of the facility. The Control Authority also covers two other permittees. Three reportable noncompliance criteria were exceeded (see sections I and II of this guidance).

The annual report was due January 15, 1987, according to the NPDES permit for Hometown. The approved program was the basis for the other reported violations. The "reg subpara" identifies the section of the existing QNCR which covers the violations. The State has called the city which promised to submit the annual report. After discussion with the city and its outlying jurisdictions, an administrative order was issued with a compliance schedule to resolve all three violations. Hometown is following an enforceable schedule that will lead to compliance, so its compliance status is shown as "resolved pending" "RP" for all three violations. The comments indicate the compliance deadlines.

VII. Response to POTW Significant Noncompliance for Failure to Implement Approved Pretreatment Programs

This Guidance establishes criteria for determining when a POTW's failure to implement pretreatment program requirements meets the level of significant noncompliance. In all instances where the violation is judged to be SNC, the violation must be addressed on a "timely and appropriate" basis. The definition for "timely and appropriate" for pretreatment implementation will be the same as for NPDES violations. That is, the violation must be resolved or EPA or the approved State must take formal enforcement action to resolve the violation before the POTW appears on the second QNCR. In the rare circumstances where formal enforcement is not taken and the violation not resolved, the administering agency must prepare a written record to justify why no action or the alternate action was more appropriate. Where "timely and appropriate" enforcement action is not taken, the POTW will be listed on the Exceptions List and will be tracked until such time as the violation is fully resolved. Each justification for the Exceptions List will be evaluated individually to determine whether the failure to take action was justified. The justification should make clear the reason for not taking action and discuss such factors as the nature of the implementation requirement schedule, the expected date of compliance, and the alternative process that will be used to resolve the violation.

VI. SPECIAL ENFORCEMENT TOPICS

C. SECTION 311

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

2102

JUL 20 1984

MEMORANDUM

SUBJECT: EPA Response to Citizen Suits

FROM: William D. Ruckelshaus /s/ WDR
Administrator

TO: Regional Administrators (Regions I-X)
Regional Counsels (Regions I-X)

I recently met with several environmental groups to discuss their concerns regarding EPA responses to 60-day citizen-suit notices and the citizen suits themselves. The environmental groups have asked us to take several actions in support of citizen suits.

EPA values the efforts of citizen groups to bring instances of non-compliance to our attention and to support EPA efforts to reduce that non-compliance. Of course, in deciding on its own course of action, EPA must review the merits of every citizen suit notice on a case-by-case basis. Nonetheless, I greatly appreciate these groups' efforts to complement the EPA enforcement program and help promote compliance.

During our meeting, the citizen groups thanked me for the cooperation of EPA employees in responding to information requests on non-compliance. I would like to pass this "thank you" on to all of you, and urge all Agency enforcement personnel to continue to cooperate with citizen groups by promptly responding to these requests and reviewing 60-day notices.

As you may know, the Office of Policy, Planning and Evaluation (OPPE) is currently conducting a study of citizen suits through a contract with the Environmental Law Institute (ELI). OPPE expects to complete this study by the end of September 1984. Upon completion of the study, I will decide whether to issue a detailed EPA policy statement on citizen suits.

cc: Ross Sandler, Natural Resources Defense Council

LE-130A:A.Danzig:th:Rm.3404:7/10/84:475-8785:DISK:DANZIG:1/23

210

JUL 30 1984

Ross Sandler
Senior Attorney
Natural Resources Defense Council
122 East 42nd Street
New York, N.Y. 10168

Dear Mr. Sandler:

I enjoyed meeting with you and representatives of environmental groups on June 12, 1984, to discuss your views on citizen suits. I truly believe that citizen groups have played an important role in bringing instances of non-compliance to EPA's and the public's attention. Your efforts, especially under the Clean Water Act, have brought us closer to statutory goals, and for this I am grateful.

In response to your concerns, I have directed the Regional Offices to: (1) continue to cooperate with requests for information on non-compliance, and (2) to promptly review 60-day citizen-suit notices. (See attached memorandum). EPA will continue to decide on a case-by-case basis how to respond to citizen suit notices after consideration of the merits of the contemplated action and consistency with EPA enforcement priorities.

As you may know, EPA is currently studying citizen suits through a contract to the Environmental Law Institute. Upon completion of the study, expected by the end of September 1984, I will decide whether to issue a more detailed policy statement regarding how EPA should handle citizen suits.

Thank you again for expressing your concerns.

Sincerely yours,

/S/ WILLIAM D. RUCKELSHAUS

William D. Ruckelshaus

Attachment

LE-130A:A.Danzig:th:Rm.3404:7/10/84:475-8785:DISK:DANZIG:1/26

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

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

OCT 4 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Clean Water Act Citizen Suit Issues Tracking System

FROM: Glenn L. Unterberger
Associate Enforcement Counsel for Water

TO: Rebecca Hanmer, Director
Office of Water Enforcement and Permits

Colburn Cherney
Associate General Counsel for Water

Ann Shields, Acting
Section Chief, Policy, Legislation and Special Litigation, DOJ

Regional Counsels, Regions I-X

Purpose

The purpose of this memorandum is to establish procedures by which EPA will monitor important case developments involving national legal and policy issues, in order to decide on an appropriate position for the government to take regarding those issues, in citizen enforcement suits brought under §505 of the Clean Water Act.

Due to the growing number of §505 enforcement actions, and the importance of the legal, technical, and policy issues raised in them, it has become necessary for the Agency to develop a better system to track national issues arising in these citizen suits once they are filed. OECM-Water Division already maintains a log of citizen notices of intent to sue. We will expand the existing system to track subsequent filings,

2109

case developments, and judicial decisions. In that way, the Federal government will be in a better position to decide if, when, and how to participate in cases which may result in the establishment of legal or policy precedents affecting EPA's enforcement actions.

The Regions remain responsible for deciding whether a Federal judicial enforcement action is warranted to address the violations at issue. The new Tracking System does not affect Regional monitoring, review and recordkeeping systems relating to what enforcement response EPA decides to pursue against a violator in the wake of a citizen notice. Instead, the Tracking System is intended to enable the government to make timely and informed decisions as to whether, for example, it should intervene or file an amicus brief in a citizen enforcement suit to protect a Federal interest regarding a legal or policy question of national interest.

Procedures

EPA regulations (40 CFR 135) provide that CWA citizen notices of intent to sue must be sent to both the Regional Administrator (of the Region in which the alleged violations occurred) and the Administrator of EPA as well as to the affected State. My office will notify the Regional Counsel when we receive a citizen notice.

Promptly upon receipt of a §505 enforcement notice (in which the Administrator is not a proposed defendant), OECM-Water will send a short form letter to the prospective citizen plaintiff, requesting that a copy of the filed citizen complaint be sent to my office. (As of September, 1985, there are CWA amendments pending which would require citizen plaintiffs to send complaints and consent decrees to the Agency. If enacted, these amendments would require a response to this first letter.) Upon receipt of a filed complaint, OECM-Water will then request copies of all dispositive pleadings and court judgments or settlements. It is anticipated that voluntary responses to these requests will provide OECM-Water with the means to adequately track the progress of these suits and any substantial issues they raise at trial or on appeal, in the majority of cases.

OECM-Water will maintain a file for each citizen enforcement suit. As pleadings are received, my office will review them to identify those issues raised which are of particular concern or interest to the Federal government. We will also send copies of all citizen complaints and other significant documents to Regional Counsels when requested or appropriate as well as to the Policy, Legislation and Special Litigation (PLSL) office in the Department of Justice. Furthermore, we will share the information received with OWEP, to give the program office an opportunity to review technical and policy issues raised.

2110

When a legal issue arises which may merit some level of involvement by the Federal government, such as the filing of an amicus curiae brief, my office will coordinate any formal response with the Associate General Counsel for Water and with PLSL at the Department of Justice. In those situations, my office will also contact the Regional Counsel and the Director of OWEP's Enforcement Division. This group will be responsible for collectively deciding, in a timely manner, (1) whether government action on a specific issue arising in a citizen suit is warranted, (2) what the government's action should be, and (3) what roles the participating offices will play in pursuing any appropriate action.

As part of this expanded citizen suit tracking system, my office is now initiating the compilation or a compendium of documents which set out the government's position on general issues which have arisen in the context of CWA citizen suits. We will share this compendium with you when it is completed.

The procedures described above make up an interim system for tracking national issues in CWA citizen enforcement suits, and will be undertaken at the beginning of FY86. As other Divisions within OECM continue developing such systems as needed, or as proposed legislative amendments are adopted, the CWA procedures may be modified so as to promote cross-statutory consistency in citizen suit tracking.

If you have any questions about this new citizen suit tracking system, or related CWA §505 issues, please contact me (FTS 475-8180), Assistant Enforcement Counsel Jack Winder (FTS 382-2879), or staff attorney Elizabeth Ojala (FTS 382-2849).

cc: Courtney M. Price
Richard Mays
Directors, Regional Water Management Divisions
David Buente, DOJ
OECM-Water Attorneys
OECM Citizen Suit Work Group Members

Note: As of the date of issuance of this policy compendium, this tracking system has not been implemented by OECM.

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

T/11 c.

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

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

JUN 19 1987

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Clean Water Act Section 505: Effect of Prior Citizen Suit Adjudications or Settlements on United States' Ability to Sue for Same Violations

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels
Regions I - X

The purpose of this memo is to clarify, in response to several inquiries that this office has received, the United States' position on the question of whether the federal government is precluded from suing a violator in the face of a previous Clean Water Act citizen enforcement suit adjudication or settlement with the same defendant for the same violations. As indicated in the attached documents, our position is that the United States is in no way estopped from suing a violator (on the same violations) for separate or additional relief after a citizen suit has been initiated or concluded. The maximum potential civil penalty liability of the defendant in the U.S. action would be the statutory maximum reduced by any civil penalty assessed in the earlier citizen suit which was actually paid into the U.S. Treasury for the same violations. This position is supported and explained in three attachments to this memo.

Attachment One is the court's order dated March 16, 1987 in U.S. v. Atlas Powder Company, Inc., Civ. No. 86-6984 (E.D.Pa). The court holds that "the United States is not bound by settlement agreements or judgments in cases to which it is not a party." See also Attachment Two, the United States' memorandum in support of a Motion to Dismiss Atlas's Counterclaims, which asserts the general principle that the U.S. is not bound by the results of prior litigation by private parties over a given set of violations because the U.S. has interests distinct from those of any private citizens. The memorandum also quotes an excerpt from the Legislative History of the Water Quality Act of 1987, which clarifies that the new WQA provision that

2121

provides the United States an opportunity to review CWA citizen suit complaints and consent decrees will not change the principle that the U.S. is not bound by judgments in those cases.

Attachment Three is a letter dated April 1, 1987 from the Department of Justice to the judge in Student Public Interest Research Group of New Jersey v. Jersey Central Power and Light Co., Civ. No. 33-2840 (D.N.J.). This letter discusses in detail the non-preclusion issue, with relevant case citations. The letter also emphasizes that civil penalties must be paid to the U.S. Treasury and that any monetary payments made in settlement of citizen suits which are not paid to the U.S. Treasury do not reduce a defendant's potential civil penalty liability in any future government enforcement action. The Department of Justice is routinely issuing letters such as this to parties to proposed CWA citizen suit settlements which purport to bind the United States or to call for payment of civil penalties to any recipient other than the U.S. Treasury.

If you have any questions on these or related citizen suit issues, please contact OECM Water Division attorney Elizabeth Ojala at FTS 382-2949.

Attachments

cc: Susan Lepow
David Buente
Ray Ludwisewski
Ann Shields
James Elder
Associate Enforcement Counsels
Water Management Division Directors, Region I-X
Water Division Attorneys

2122

VI.D.5

"Procedures for Agency Responses to Clean Water Act Citizen Suit Activity," dated June 15, 1989.

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

JUN 15 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Procedures for Agency Responses to Clean Water Act Citizen Enforcement Suit Activity

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Regions I-X

James Elder, Director
Office of Water Enforcement and Permits

David Davis, Director
Office of Wetlands Protection

Susan Lepow
Associate General Counsel
for Water

Ann Shields, Section Chief
Policy, Legislation and Special Litigation,
Department of Justice

Purpose

The purpose of this memo is to set out the general procedures to be followed by the Environmental Protection Agency, in conjunction with the Department of Justice, in responding to and monitoring citizen enforcement suits brought under Section 505 of the Clean Water Act, 33 USC 1365.

This memo supersedes prior guidance, issued by this office on October 4, 1985, concerning EPA tracking of citizen suits. That guidance is now obsolete in light of recent amendments to Section 505 requiring citizen suit parties to send copies to EPA and DOJ of complaints and proposed settlements, and in light of EPA's new ability to bring administrative penalty actions and pre-empt potential citizen suits for civil penalties.

215

The guidance defines roles for various EPA and DOJ offices in addressing matters relating to CWA citizen enforcement suits; however, this guidance in no way affects the fact that the Regions remain responsible for deciding whether a federal enforcement action is warranted to address the violations at issue.

Background

Clean Water Act Section 505(a)(1) authorizes any person with standing to sue any person who is alleged to be in violation of certain Clean Water Act requirements, set out in CWA §505(f). In such lawsuits, the district courts have jurisdiction to enforce the Act and to apply appropriate civil penalties under CWA §309(d). Prior to filing enforcement suits under CWA §505(b)(1), however, citizens must give "60-day notice" of the violations to the Administrator, the State, and the alleged violator. These violation notices must be given in the manner prescribed by the Agency's regulations, found at 40 CFR 135, which require that copies of the notices (sent via certified mail to the alleged violator) be mailed or delivered to the Administrator, the Regional Administrator, the State, and the registered agent of corporate violators. Part 135 provides that the date of service of the notice is the date of postmark.

Through Section 505, Congress has fashioned a distinct role for private enforcement under the Clean Water Act. The purposes of the citizen suit provision are to spur and supplement government enforcement. The required 60-day violation notices are designed to provide the Administrator (or the State) the opportunity to undertake governmental enforcement action where warranted, given Agency priorities and finite resource levels. Where the government does not pursue such action, the citizen enforcer with standing may act as a "private attorney general" and bring the lawsuit independently, for civil penalties and injunctive relief.

Historically, in the majority of cases the regions have not initiated federal referrals as a result of citizen notices, and thus the citizens are allowed to serve the role of "supplemental" enforcers. This is reasonable in terms of best use of the Agency's finite resources, and the consistent setting of federal enforcement priorities, which should not necessarily be driven by citizen enforcement priorities.

Experience suggests that private enforcement is useful in helping to achieve Clean Water Act goals and to promote Clean Water Act compliance. However, it is important for the Agency to monitor citizen lawsuits to the extent possible to ensure proper construction of regulatory requirements and avoid problematic judicial precedents. It is also a good idea for the

federal government to support the citizens where feasible, such as by filing amicus briefs in appellate courts, in order to advance our federal enforcement interests. Examples of amicus curiae briefs which have been filed on behalf of citizens so far include those in Sierra Club v. Union Oil Co. (9th Cir.), Sierra Club v. Shell Oil Co., (5th Cir.), and Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd. (4th Cir. and S. Ct.).

Recent CWA Amendments Affecting Citizen Suits

The Water Quality Act (WQA) of 1987 amended the Clean Water Act, effective February 4, 1987, in two ways respecting citizen suit authorities and responsibilities. Generally, the amended CWA requires that the Administrator and the Attorney General receive copies of complaints and proposed consent decrees in citizen enforcement suits. In addition, citizen suits for civil penalties may now be precluded, in some cases, by administrative penalty actions.

WQA §504 provides as follows:

> Section 505(c) is amended by adding at the end thereof the following new paragraph:
> "(3) PROTECTION OF INTERESTS OF UNITED STATES. - Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator."

OECM-Water Division and the Office of Water are presently working on proposed regulations to govern service of the complaints and consent decrees, which will be published in the Federal Register shortly.

WQA Section 314 amends CWA §309 (governing federal enforcement actions) to add new subsection (g), authorizing federal administrative penalty actions. New CWA §309(g)(6)(A) and (B) provide that citizens may not bring civil penalty actions under Section 505 for the same violations for which (1) the Secretary (Army Corps of Engineers) or the Administrator has commenced and is diligently prosecuting an administrative action under Section 309(g); (2) the State has commenced and is diligently prosecuting an action under a comparable state law; or (3) the Secretary, Administrator or State has issued a final order and the violator has paid a penalty under §309(g) or

comparable state law; unless (a) the citizen's complaint was filed prior to the commencement of the administrative action, or (b) the citizen's 60-day notice was given (in accordance with 40 CFR 135) prior to commencement of the administrative action, and the complaint was filed before the 120th day after the date on which the notice was given.

Thus, under these new amendments, it will be necessary for the Agency to keep track of when citizen notices are served (i.e., postmarked), when complaints are filed, and when proposed consent decrees are received. Moreover, EPA and DOJ need to clarify procedures for deciding how, if at all, to review and respond to citizen enforcement activity. The following sets out the Agency's procedures, in conjunction with DOJ, to implement these responsibilities.

Procedures

(1) Violation Notices

When EPA Headquarters receives a copy of a citizen violation notice, the notice is routed to the Associate General Counsel for Water. That office logs in the notice, files the original, and forwards copies of the notices to the Associate Enforcement Counsel for Water (OECM-Water Division), and the Director of the Office of Water Enforcement and Permits, or the Director of the Office of Wetlands Protection, as appropriate. Under 40 CFR 135, each Regional Administrator must also receive a copy of the notice directly from the citizen; some regions have internal tracking systems, usually handled by the Water Management Divisions. In addition, the Office of Wetlands Protection will forward Clean Water Act §404 notices to their courterparts at the Army Corps of Engineers.

Since late 1983, OECM-Water has kept a region-by-region, chronological log of these citizen notices, recording the name of one notifier and the potential defendant, the location of the facility, and the date on the notice letter. (Recently, OGC has begun recording the "date of postmark," which is the official date of service under the regulations.)

In the regions, the general practice has been for Water Division personnel or Wetlands program personnel to investigate the compliance record of the noticed facility, and to contact the state (if the state runs an approved NPDES program) to inquire what, if any, enforcement action the state intends to take. The program office then makes a determination, with the Office of Regional Counsel, as to whether to initiate a federal enforcement action to address the alleged violations. This memorandum is not intended to change the procedures the regions use to evaluate and respond to the notices.

(2) Complaints

As in the case of violation notices, at Headquarters the Complaints are routed through the Office of General Counsel, to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 complaints to their counterparts at the Army Corps of Engineers. OECM-Water and the Office of Water are currently working together to amend 40 CFR 135 to include requirements relating to service of complaints on EPA and DOJ. We expect these regulatory provisions to require citizen plaintiffs to send copies of complaints to the Regional Administrator in addition to the Administrator and the Attorney General. In the interim, OGC is sending copies to the Regional Counsels. OECM-Water Division keeps a log of the citizen complaints. Attached for your information is a copy of the log which reflects citizen complaint activity through the end of fiscal year 1987.

The regions will retain the authority to recommend whether to initiate a federal enforcement action against the citizen suit defendant (e.g., by intervention in the citizen suit, by filing a separate suit, or by commencing an administrative action) in order to address the defendant's violations. The regions will also normally have the lead on monitoring active citizen suits from notice and filing to conclusion, within their discretion and as resources permit. However, Headquarters will get involved in the citizen enforcement action where national legal or policy issues arise which merit federal attention (other than intervention as a party to address the underlying violations), and each Region is requested to notify OECM-Water Division whenever such an issue comes to the Region's attention.

For example, Headquarters generally will take the Agency lead, working with the Policy, Legislation and Special Litigation (PLSL) Section of the Department of Justice, where issues of national law or policy arise which call for participation as amicus curiae in the district or appellate courts. In such situations, OECM-Water will be responsible for coordinating with PLSL, OGCWater, the appropriate Office of Regional Counsel, and the Office of Water to decide collectively (1) whether government action on a specific issue arising in a citizen suit is warranted, (2) what the government's action should be, and (3) what roles the participating offices will play in pursuing any appropriate action. This type of participation might occur most often in the context of appeals from judgments in citizen suits. However, the Agency will employ the same procedures in deciding whether and how to pursue Federal participation on the District Court level. Examples of issues which the United States has addressed to date in this context include the scope of the upset defense, whether the U.S. can be bound by settlements of suits between private parties, and whether citizens may pursue penalties for wholly past violations.

215

(3) Consent Decrees

The proposed consent decrees, like the violation notices and the Complaints, are routed through the Office of General Counsel to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 proposed consent decrees to their counterparts at the Army Corps of Engineers. Until 40 CFR 135 is amended to require that copies be sent to the Regions also, OGC will send copies to the Regional Counsels. OECM-Water Division keeps a log of these proposed consent decrees. Attached for your information is a copy of the log which reflects consent decree activity through the end of fiscal year 1987.

Once a copy of a proposed consent decree is received, the United States has 45 days within which to review the proposed consent decree and submit comments, if any. OECM-Water will solicit comments from the appropriate Office of Regional Counsel, to formulate the Agency's position on any issues which may arise in the citizen consent decree. Unless different arrangements are made (e.g., if Federal intervention is contemplated to obtain further relief), OECM-Water will take the lead for the Agency in coordinating with DOJ to formulate proper action by the United States in response to a proposed consent decree, such as a comment letter to the court, whenever necessary or advisable.

A region will have the opportunity, in its discretion and as resources allow, to offer timely case-specific comments on the adequacy of relief in a proposed citizen suit settlement. OECM-Water will consider comments, if any, from the Region received within 35 days after the date the settlement is logged in by the Administrator's office. In any event, the United States is not obliged to offer any comments to the court. Our position has consistently been that the federal government is not bound by the terms of citizen settlements or judgments, as the U.S. has interests distinct from any private litigants, and cannot be deprived of the opportunity to bring a subsequent action for more complete relief, should circumstances warrant.

PLSL/DOJ will provide copies to OECM-Water and the appropriate Regional Counsel of any correspondence submitted to the court or parties in CWA citizen suits and will work with designated EPA representatives in conducting any follow-up activity which results.

If you have questions regarding this matter, please contact David Drelich of my staff at FTS 382-2949.

Attachments

cc: Regional Water Management Division Directors
OECM-Water Attorneys
Doug Cohen, DOJ
Dan Palmer (EDRS)

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

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

JAN 8 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

TO: Regional Enforcement Directors
Surveillance and Analysis Directors
Regional Oil and Hazardous Materials Coordinators

FROM: Assistant Administrator for Enforcement and General Counsel

SUBJECT: Oil Spill Enforcement

Attached is a status report of EPA Oil and Hazardous Materials spill enforcement actions covering the period January 1 to October 1, 1973. It shows a great improvement over last year's record, although some Regions should apparently be more active. Some Regions with few actions reported may be relying on strong Coast Guard enforcement programs. All Regions should send me the Coast Guard records that would indicate the number of enforcement actions taken and the results to date. This may present a more complete picture of the status of spill enforcement activities.

I realize that lack of manpower and resources may result in the inability to follow up oil spill referrals, particularly in light of the present priority being rightly accorded to permit issuance and follow-up. What is needed, I believe, is a more efficient use of those Enforcement and Surveillance and Analysis personnel already working on oil spill problems. It is particularly important that Surveillance and Analysis personnel work closely with Enforcement staffs to maximize the number of investigations that can be completed and cases that can be prepared, in addition to the vital job of oil spill clean-up. Wherever reported spills cannot be investigated by the Environmental Protection Agency or the U. S. Coast Guard, a Section 308 information request should be sent to the discharger. Regional Administrators were delegated the authority to administer Section 308 in the Part 125--NPDES regulations, promulgated May 22, 1973 (38 Federal Register 13531). You should also encourage State agencies to provide EPA with evidence obtained from State investigations.

Some Regions have already been successfully using Section 308 letters in their oil enforcement programs. For those who have not, a suggested format is attached which should be helpful, which was prepared by Henry Stetina. Regional comments on this format should be forwarded to Rick Johnson, with a copy to Henry Stetina.

The following guidelines should apply when a Section 308 letter is sent to a discharger:

1. Section 308 letters should be used when a violator reports a spill which EPA is unable to investigate on scene.

2. Section 308 letters may also be used occasionally to supplement EPA or State investigations.

3. Section 308 information requests should not be utilized to investigate situations which may culminate in criminal prosecution.

4. Section 308 letters must be posted by "Registered Mail -- Return Receipt Requested."

5. Each Region must carefully maintain a log indicating for each letter the date mailed, the date received and the date a response is due.

6. When a Section 308 letter is used, the Enforcement Division should plan to exercise Section 309 sanctions if the violator fails to respond or if the response contains false statements -- the falsity of which can be established.

7. If the complete information submitted in response to the letter indicates that a violation did occur, that evidence should be referred to the Coast Guard as basis for a Section 311(b)(6) civil penalty.

A copy of the discharger's response should be automatically sent to the Emergency Response Branch in your Region.

To improve oil spill enforcement procedures within Regions, and to share successful Regional techniques among Regional staffs, we are planning a meeting for a representative of each Oil Enforcement staff and their counterpart in the Emergency Response Branch on February 20 and 21, 1973, in Atlanta, to be conducted in cooperation with the Oil and Hazardous Materials Division. Any suggestions for possible topics

to be included in the agenda should be sent to Patricia O'Connell, Headquarters. This will be a working level meeting which will focus on legal and investigative problems. Coast Guard and Justice Department participation is planned. We also plan to discuss the new EPA spill prevention regulations, and their implementation.

Alan G. Kirk II

Enclosures

cc: OGC Chron
Reading

Rick Johnson
Henry Stetina
Patricia O'Connell
Assistant Administrator for Air & Water Programs

RJohnson:dwk:12/28/73

Region	No. of Oil Spills Reported to Emergency Branch	No. of Oil Spills Not Reported to Enforcement	No. of Spills Enforcement Referred to Coast Guard	No. of Spills Enforcement Referred to U. S. Attorney (FWPCA)	No. of Spills Enforcement Referred to U. S. Attorney (Refuse Act)	Total Enforcement Actions
I	800	175	17	3	9	29
II	217	15	7		1	8
III	603	100	51	3	1	55
IV	192	61	52	19	- -	71
V	210	310	16	4	30	50
VI	499	17	8	1	3	12
VII	151	151	49	16	4	69
VIII	477	42	22	1	- -	23
IX	- -	24	9	1	- -	10
X	10	10	9	1	- -	10
Total.	3314	905	240	49	48	337

OIL AND HAZARDOUS MATERIALS SPILL ENFORCEMENT

JANUARY 1 [illegible] BER 1, 1973

Draft letter for Regional Administrators signature

Gentlemen:

The Environmental Protection Agency has received a report that your company was involved in the discharge of a harmful quantity of oil, estimated to be gallons into waters of the United States, to-wit: (name of waterway) near (city), (state) on or about (time, date) from a (truck, pipeline or facility) which you own (or operate).

The 1972 Amendments to the Federal Water Pollution Control Act (hereinafter, the "Act") prohibits the discharge of oil or a hazardous substance into or upon the waters of the United States in harmful quantities [33 U.S.C. 1321(b)(3)]. Any owner or operator of a vessel or facility from which oil or a hazardous substance is discharged shall be assessed a civil penalty by the Coast Guard of not more than $5,000 [33 U.S.C. 1321(b)(6)]. The definition of harmful quantities of oil appears in Title 40, Code of Federal Regulations, Section 110.3.

In order for this Agency to carry out its responsibilities under the Act, you are required under authority of Section 308 of the Act (33 U.S.C. §1318) to submit a letter of explanation including the specific information listed in Attachment A.

The letter of explanation must be submitted to: (Enforcement Director, Region address) within fourteen (14) days of receipt of this letter. It must be signed by a duly authorized official of the corporation or company. The information submitted will be considered in evaluating whether the oil spill violated Section 311. (Please note that your reply in no way constitutes immediate notification of a spill to the appropriate federal agency, as required by Section 311(b)(5).) Section 309 of the Act (33 U.S.C. §1319) provides civil and criminal penalties for failure to submit information required under Section 308 and criminal penalties for knowingly making a false statement in any submission under Section 308.

If you have any questions please contact (name), Attorney Legal Branch, Enforcement Division, at (phone number).

Sincerely yours,

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

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

DEC 24 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

To: Regional Enforcement Directors

From: Director, Enforcement Division

Subject: Civil Penalties Collected for Violations of 40 CFR Part 112 - Transmittal to USCG Districts for Deposit in Revolving Fund Account

Civil penalties collected for violations of the subsections of section 311 and regulations issued pursuant to section 311 of the FWPCA are being deposited in the revolving fund established by section 311(k) of the FWPCA which reads as follows:

> "(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

In compliance with the foregoing, civil penalties collected for violations of EPA's Oil Pollution Prevention Regulations, 40 CFR Part 112, are to be forwarded, by the EPA regional offices, to the main office of the U.S. Coast Guard District within which the violation occurred, for inclusion in the Coast Guard's revolving fund account established pursuant to section 311(k) of the FWPCA. The following procedures should be followed:

(1) Checks in payment of the civil penalty should be made payable to the "United States of America." Checks made payable to "EPA," "Treasurer of the U.S.," etc. are acceptable so long as the amount of the check is the same as the civil penalty. Do <u>not</u> endorse any such checks.

(2) The checks should be forwarded to the U.S. Coast Guard District with a cover letter setting out the following:

(a) Legal name and address of owner/operator charged with the violation.

(b) Date and nature of violation, including a citation of the relevant statutory and regulatory provisions. (i.e., failure to have SPCC Plan in violation of 40 CFR Part 112.3).

(c) EPA Regional Office Enforcement file number.

(d) Date of check, name of bank, amount of check.

(e) A statement that the check is being forwarded for deposit in the U.S. Coast Guard's revolving fund, and

(3) At times the EPA Part 112 violation will have as its genesis facts establishing other law violations. Where the Part 112 violation resulted from facts establishing another Federal law violation, including but not limited to the FWPCA's section 311 provisions relating to oil spills or failure to notify, identification data on the other Federal law violation, for the purpose of avoiding possible conflicts, should be included in the transmittal to the USCG.

(4) Where the violation, for which the check was submitted, is also the basis for a referral to a U.S. Attorney, the U.S. Attorney should be informed of the disposition of the EPA civil penalty proceeding.

J. Brian Molloy

005

Attachment A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Report of Oil or Hazardous Material Discharge

The following information is submitted concerning a discharge of oil or hazardous material:

1. Time and date of discharge.

2. Location of discharge, including;

   a. name of municipality and state;

   b. name and address of industry or commercial establishment at which the discharge occurred, if applicable;

   c. distance from receiving waterway.

3. Type of material discharged.

4. Quantity discharged.

5. Quantity of material which eventually reached the receiving waterway, and date and time it was discovered.

6. Type of vessel or facility (ship, barge, storage tank, tank truck, etc.) in which the oil was originally contained.

7. Describe in detail what actually caused the discharge.

8. Name and address of owner of facility causing the discharge.

9. Name and address of operator of facility causing the discharge.

10. Describe damage to the environment.

11. Describe steps the above named owner or operator took to clean up the spilled oil and dates and times steps were taken.

12. Actions by company to mitigate damage to the environment.

13. Measures taken by your company to prevent future spills.

14. List the federal and state agencies. if any, to which the owner or operator named in 8 and 9 above reported this discharge. Show the agency, its location, the date and time of the notification, and the official contacted.

15. List the names and addresses of persons you believe have knowledge of the facts surrounding this incident.

16. Name and address of person completing this report.

17. Your relationship, if any, to owner or operator.

18. List other information which you wish to bring to the attention of EPA. For example, number employed by the firm.

The above answers are true to the best of my knowledge and belief.

_____

Signature of person completing this report.

Date of Signature: _____

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

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

APR 20 1975

MEMORANDUM

To: All Regional Administrators

From: Acting Deputy Assistant Administrator for Water Enforcement
Director for Oil and Hazardous Materials Control Division

Subject: Spill Prevention Control and Countermeasure (SPCC) Plan Program

This memorandum covers a number of SPCC program issues raised at the March 27-28 joint meeting of Environmental Emergency Branch and Enforcement Division representatives in San Francisco.

Warning Letters to Violators

Several Regions are considering the transmission of warning letters as a means of giving notice to violations of SPCC requirements and obtaining compliance without going through the civil penalty assessment procedures. The warning letter device was discussed vigorously at the San Francisco meeting with strong arguments made both for and against warning letters. After careful consideration we have decided that warning letters are unnecessary and should not be used. The preferred procedure, upon detection of a violation, is to issue a notice of violation with a proposed civil penalty. The notice of violation will get the attention and compliance response from the owner or operator faster than a warning letter. As appropriate, the penalty can be compromised down to a much smaller figure or waived altogether. The notice of violation, when used in this manner, has the advantages of a warning letter but provides more clout with no loss of time.

Nature and Conduct of Civil Penalty Hearings

It is important that everyone connected with the civil penalty hearings provided for in 40 C.F.R. Part 114 understand that these hearings are to be informal. They can be held in an office or conference room with the casualness of a routine meeting. No formal record is necessary. No undue attention need be given to the materiality or relevance of statements or evidence offered by participants. The rules of evidence employed in courtrooms and formal hearings are not appropriate for Part 114 civil penalty hearings. No cross examination is required. The time and resources of Regional attorneys involved with these hearings should be kept to a minimum.

It should be noted that the Presiding Officer at a civil penalty hearing can raise as well as lower a proposed civil penalty.

Selection of Hearing Officers

Section 114.6 of the civil penalty regulations provides that the Presiding Officer may be any attorney in EPA who has no prior connection with the case. To maintain an atmosphere of fairness and impartiality, Regional Administrators should not appoint Enforcement Division Directors or other Enforcement Division supervisory personnel. Similarly, it is desirable to avoid appointing water enforcement attorneys. Because of the informality of the hearing and the relatively simple responsibilities of the Presiding Officer, Agency Administrative Law Judges should not be asked to conduct these hearings. The most desirable candidates for Presiding Officers are attorneys in the Regional Counsel's Office. Also acceptable, although with some loss of the appearance of impartiality, are Enforcement Division attorneys working in non-water programs such as air and pesticides.

Criteria for Civil Penalty Levels

The desirability of establishing national criteria for uniform assessment of civil penalties was discussed at the San Francisco meeting, but no conclusion was reached. We have decided to form a Headquarters-Regional work group to determine whether such criteria would be desirable and, if so, to set up a matrix or some other system for uniform civil penalty assessment.

Jurisdiction Over Local, State, and Federal Facilities

Doubt as to whether federal, state, or local facilities are subject to SPCC requirements has been raised because the definition of "person" in section 311 does not explicitly include federal, state, and local entities. Our interpretation of section 311 and the SPCC regulations is that local, state, and federal entities are subject to SPCC plan preparation and implementation requirements. A General Counsel's legal memorandum to this effect will be distributed shortly.

Inclusion of Animal and Vegetable Oils in Section 311 Definition of "Oil"

Attached are four letters discussing the inclusion of animal and vegetable oils in the section 311 definition of "oil." EPA and the U.S. Coast Guard have always treated spills of non-petroleum based oils as subject to the civil penalty and cleanup provisions of section 311. However, the National Broiler Council and similar organizations have questioned this interpretation, and, as a result, many users of animal and vegetable oils are not in compliance with the SPCC regulations and have not submitted requests for extensions of time for compliance. In his January 9, 1975, letter Alan Kirk made clear EPA's position that non-petroleum oils are included in the section 311 definition of "oil" and that animal and vegetable oil users are subject to the SPCC plan preparation and implementation requirements of Part 112.

You will note in Mr. Kirk's January 9 letter and Rick Johnson's February 3 letter that, in view of the good faith efforts of the animal and vegetable oil users to determine whether their facilities are subject to the SPCC regulations, we will consider requests for extensions of time for compliance received from users of non-petroleum based oils. Such requests should be approved in cases where the requestor can demonstrate his reasonable belief that he was not subject to the SPCC program and his firm commitment to comply fully with SPCC requirements. Civil penalties for failure to request extensions of time, in accordance with the timetable set out in Part 112, should not be imposed in these situations. Part 112 will be amended to clarify that the Regional Administrators have the authority to grant such extensions for appropriate reasons in addition to those listed in §112.3(f). Any grant of additional time should provide for

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

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

29 MAR 1976

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Penalty Assessment Procedures Under Section 311(j)(2)

FROM: Assistant Administrator for Enforcement

TO: Regional Enforcement Directors

On December 2, 1975, the Associate General Counsel for Water informed me of the case, United States v. Independent Bulk Transport, Inc., 394 F. Supp. 1319, 8 ERC 1202, (S.D.N.Y. May 29, 1975), in which Judge Frankel found that the requirement in section 311(b)(6) that penalties be assessed only after "notice and opportunity for a hearing" was violated because both in the hearing and in the appeal to the Commandant "matters not disclosed to defendant became part of the Agency's case record and basis for decision."

Similarly, penalty assessment procedures under section 311(j)(2) for violation of SPCC regulations (40 CFR Part 112) must also provide "notice and an opportunity for a hearing." Thus, the ruling in Independent Bulk Transport is applicable to section 311(j)(2) proceedings. In order to assure that this situation does not recur, the following procedures must be followed:

"1. Before the hearing, the defendant must be given copies of all materials which have been or will be submitted to the Presiding Officer. If the materials are too voluminous to make this practicable, the defendant or his attorney must be notified of an opportunity to review all such materials and make copies at their expense. The materials or the opportunity to review and copy them must be provided in sufficient time before the hearing to allow the defendant a reasonable opportunity to review and prepare to refute them.

"2. At no time may there be any ex parte communication concerning the case between the Presiding Officer and any EPA employee or agent engaged in the performance of investigation or prosecuting functions."

If you have any other suggestions to improve this procedure, please let me know. Thank you for your assistance and cooperation in this matter.

Stanley W. Legro

Stanley W. Legro

7012

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

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

MAILING ADDRESS:
U.S. COAST GUARD (G-LMI/81)
WASHINGTON, D.C. 20590
PHONE: (202) 426-1527

16460
24 AUG 1979

Mr. Marvin B. Durning
Assistant Administrator for
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Durning:

I am signing the Memorandum of Understanding concerning the Assessment of Civil Penalties for Discharges of Oil and Hazardous Substances Under Section 311 of the Clean Water Act with the understanding that the Coast Guard and EPA have agreed that either agency may terminate this agreement 90 days after having given notice to the other agency of its intent to so terminate.

Sincerely,

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

a. any indication of misconduct or lack of reasonable care on the part of the owner, operator, or person in charge with respect to the discharge or with respect to the failure on the part of the owner, operator, or person in charge to adhere to the guidance of the OSC regarding clean-up or any policies, procedures, guidelines, or regulations applicable to clean-up;

b. any discharge incident other than a threat for which payments are made or to be made from the section 311(k) fund pursuant to 33 CFR section 153.407, except where no discharger has been identified;

c. any indication of prior violations by the discharger of any provision of the CWA, or violations of provisions of the CWA other than section 311(b)(6) CWA occurring at the time of the discharge, such as violations of a section 402 permit;

d. any discharge incident (other than a threat) as defined in 40 CFR section 1510.5 (l) which requires activation (by full or limited assembly, or by telephone) of the Regional Response Team as required by 40 CFR section 1510.34(d), as amended; and

e. any discharge involving human injury or evacuation, damage to plant or animal life, or contamination of water supply or underground aquifers.

Other referrals to the EPA may be made on a discretionary basis.

Assistant Administrator for Enforcement, United States Environmental Protection Agency — (date) 8/15/79

Acting Commandant, United States Coast Guard — (date) 8/14/79

MEMORANDUM OF UNDERSTANDING BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES COAST GUARD CONCERNING THE ASSESSMENT OF CIVIL PENALTIES FOR DISCHARGES OF OIL AND DESIGNATED HAZARDOUS SUBSTANCES UNDER SECTION 311 OF THE CLEAN WATER ACT (33 USC 1321)

The United States Environmental Protection Agency (EPA) and the United States Coast Guard (USCG) have determined that it is necessary to establish procedures pursuant to which decisions may be made:

(1) Whether a discharge of a designated hazardous substance is excluded from the application of the civil penalty procedures prescribed by section 311(b)(6) of the Clean Water Act (CWA); and

(2) Whether action will be taken under paragraph (A) or under paragraph (B) of section 311(b)(6) CWA to impose a penalty for the discharge of a designated hazardous substance not so excluded.

The EPA and the USCG agree that decisions as to whether a discharge of a designated hazardous substance is excluded from the application of section 311(b)(6) CWA will be made initially by the EPA in cases evidencing particular potential violation gravity, i.e., meeting criteria set out in section III of this memorandum. In all other cases the decision will be made initially by the agency providing the On Scene Coordinator to the discharge incident. When a decision is made that a discharge is excluded, penalty action under section 311(b)(6) CWA will be withheld.

The EPA and the USCG agree that decisions as to whether action will be initiated to impose civil penalties under paragraph (B) of section 311(b)(6) CWA, will be made by the EPA. Cases involving USCG responses, which evidence particular potential violation gravity, i.e., meeting criteria set out in section III of this memorandum, will be transmitted to the EPA for its consideration. In all cases where EPA determines that it is appropriate to initiate civil penalty action under paragraph (B) of section 311(b)(6) CWA, the USCG will withhold the initiation of civil penalty action under paragraph (A) of section 311(b)(6) CWA.

This memorandum establishes policies, procedures, and guidelines concerning the responsibilities of the EPA and the USCG in carrying out the foregoing agreement.

The respective responsibilities of each agency specified in this memorandum may be delegated to their respective subordinates consistent with established procedures.

The EPA and the USCG will review the implementation of this memorandum at least one year from the effective date of 40 CFR Part 117 or sooner if agreed to by both agencies, and will make any changes to the policy, procedures,and guidelines set forth herein which are agreed to by both agencies.

SECTION I

GENERAL

The amendment of 2 November 1978 to section 311 CWA (Public Law 95-576) excluded certain discharges of hazardous substances from the application of section 311(b)(6) CWA. The discharges so excluded are: (a) discharges in compliance with a section 402 CWA permit, (b) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 CWA, and subject to a condition in such permit, and (c) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 CWA, which are caused by events occurring within the scope of relevant operating or treatment systems.

In addition, this amendment created two methods for penalizing discharges of hazardous substances. The first, which already existed as section 311(b)(6) CWA prior to the amendment, authorizes the USCG to assess a civil penalty not to exceed $5,000 for the discharge of oil or a designated hazardous substance (section 311(b)(6)(A)). The second method, created by the new amendment, provides that the EPA, through the Department of Justice, may initiate a civil action in Federal district court for penalties not to exceed $50,000 per spill of hazardous substance, unless such discharge is the result of willful negligence or willful misconduct, in which case the penalty shall not exceed $250,000 (section 311(b)(6)(B)).

The legislative history accompanying the amendment makes clear that Congress intended to create a dual option system for penalizing discharges of hazardous substances under section 311(b)(6) CWA. A discharger of a designated hazardous substance can be penalized under paragraph (A) or paragraph (B), but not both. The EPA and the USCG agree that paragraph (B) does not apply to oil discharges. The USCG will continue to assess oil discharge penalties administratively under paragraph (A).

SECTION II

COORDINATION

When a spill of a designated hazardous substance occurs, the On Scene Coordinator (OSC) will prepare a factual report of the incident. At the minimum, the report will address those criteria set forth in section III, of this memorandum.

The OSC will submit this report within 60 days of the spill incident. The OSC will submit the report to the District Commander when he is a USCG OSC, and to the Regional Administrator, when he is an EPA OSC.

When the District Commander reviews the USCG OSC's report and determines that one or more of the criteria set forth in section III, below is applicable to that case, the entire record of that case will be referred to the EPA Regional Administrator for review. In addition the District Commander will refer the entire record of:

(a) any other case involving a discharge of a designated hazardous substance from a point source subject to a section 402 permit or permit application, which, prior to or after the commencement of penalty action, the USCG determines is excluded from the application of section 311(b)(6) CWA; and

(b) any other case which, the District Commander considers appropriate for possible application of section 311(b)(6)(B) CWA.

When the Regional Administrator receives a case, either from an EPA OSC or upon referral from the District Commander, he will determine:

(a) whether the case is excluded from the application of section 311(b)(6) CWA, and, if not,

(b) whether a civil penalty action under section 311(b)(6)(B) CWA will be initiated.

The Regional Administrator will make these determinations within 90 days of his receipt of referral documents and will notify the District Commander promptly of the determinations in cases which have been referred. If the Regional Administrator determines that an action under section 311(b)(6)(B) CWA will be initiated, the case will be prepared in the EPA Regional Office and forwarded to the Department of Justice (DOJ) in accordance with established EPA case referral procedures.

If the Regional Administrator determines that the discharge is not excluded from the application of section 311(b)(6) CWA and that paragraph (B) action is inappropriate, or if EPA Headquarters declines to refer a Regional case, EPA will return the case to the USCG for appropriate action under paragraph (A).

Upon request, each Agency will make available to the other any or all cases, files, and records, including OSC reports and official determinations, regarding decisions concerning exclusions or the imposition of section 311(b)(6)(A) or (B) penalties. Where there is disagreement as to the disposition of a particular case, the District Commander and the Regional Administrator will consult to resolve the matter. If necessary, the matter will be submitted to the respective Agency Headquarters for final resolution.

SECTION III

CRITERIA

The USCG and the EPA agree that if one or more of the following criteria exists, the District Commander will refer the case to the Regional Administrator in accordance with section II of this memorandum:

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

AUG 16 1979

OFFICE OF ENFORCEMENT

Admiral John B. Hayes
Commandant, United States Coast Guard
United States Coast Guard Headquarters Building
2100 2nd Street S.W.
Washington, D.C. 20590

Dear Admiral Hayes:

I am signing the Memorandum of Understanding concerning the Assessment of Civil Penalties for Discharges of Oil and Hazardous Substances Under Section 311 of the Clean Water Act with the understanding that the Coast Guard and EPA have agreed that either agency may terminate this agreement 90 days after having given notice to the other agency of its intent to so terminate.

Sincerely yours,

Marvin B. Durning

Marvin B. Durning

7/DE

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

MAR - 4 1981

MEMORANDUM

SUBJECT: Jurisdiction Over Intermittent Streams under §311 of the Clean Water Act

FROM: Edward A. Kurent
Director, Enforcement Division (EN-338)

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

The 2nd Coast Guard District, St. Louis, Missouri, has raised the issue of whether Clean Water Act jurisdiction may be asserted over a seasonal drainage course which, at the time of the spill, contained only intermittent pools of water but which at other times flows to a named year-round watercourse. It has been suggested that the recent 10th Circuit opinion in United States v. Texas Pipe Line Company provides authority for the proposition that unless a body of water is a "running" or "flowing" stream at the time of a spill, it cannot be subject to §311 Clean Water Act jurisdiction.

The Texas Pipe Line case involved an oil spill from a pipeline that was struck by a bulldozer. Before the flow could be shut off, approximately 600 barrels of oil escaped. The oil spilled into an unnamed tributary of a named creek, which discharged into another named creek, which was a tributary of a navigable river. The record at trial indicated that there was a small flow of water in the unnamed tributary, but there was no evidence that the other streams were or were not flowing. The Federal Court for the Eastern District of Oklahoma held that the Federal Water Pollution Control Act (FWPCA) applies to tributaries of navigable waters regardless of whether there is a continuous flow of water through the tributaries to the navigable water:

> . . . the Court is of the opinion that the FWPCA Amendments of 1972 are applicable to the tributaries of navigable waters and that this is so regardless of whether there is a continuous flow of water from the point of

J.Hays/jtf/EN-336/320/0/2-26-81

> an oil spill, through any intermediate tributaries and eventually into navigable waters at the specific time of an oil spill. Water was flowing in the unnamed tributary of the Red River, a navigable river, was clearly one of "the waters of the United States" within the meaning of §1362(7), and was therefore one of the "navigable waters of the United States" under §1321(b)(3) . . . U.S. v. Texas Pipe Line Company, No. 77-63-C.

Among the issues on appeal to the 10th Circuit was whether the discharge of oil involved was into "navigable waters" within the meaning of the FWPCA. The 10th Circuit affirmed the district court's jurisdictional finding:

> While there is nothing in this record to show the effect on interstate commerce of this unnamed tributary, without question it is within the intended coverage of the FWPCA. It was flowing a small amount of water at the time of the spill. Whether or not the flow continued into the Red River at that time, it obviously would during significant rainfall.

The language in the Texas Pipe Line decision, to the effect that the unnamed tributary into which the oil was spilled was flowing at the time of the spill, has recently been cited by some parties as authority for the proposition that unless a body of water is a "running" or "flowing" stream at the time of a spill, it cannot be subject to §311 Clean Water Act jurisdiction. However, this interpretation is by no means dictated by the language of the 10th Circuit decision. Although it is noted in the decision that the body into which oil was spilled was flowing at the time of the discharge, it is not at all necessary to construe this as the essential jurisdictional fact in the case. A persuasive argument can be made that the Court would have affirmed the federal government's jurisdictional determination in Texas Pipe Line even absent a showing that water was flowing at the time of the spill, particularly since it ruled that it makes no difference whether the receiving water body is or is not discharging water continuously into a connected water course at the time of a spill for purposes of Clean Water Act jurisdiction.

In light of the ambiguity of the Texas Pipe Line decision, please take note that it continues to be the position of the enforcement Division that intermittent water courses which are ponded and non-flowing at the time of a spill are subject to 311 jurisdiction. This position is supported by the legislative history of the Act 1/ and by case law. 2/ Any jurisdictional disputes with the U.S. Coast Guard concerning this matter should be directed to Jerry Huys of my staff.

1/ See discussion of legislative history in United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (1979), and United States v. Holland, 373 F. Supp. 665, 672-73 (N.D. Fla. 1974) for proposition that Congress intended "waters of the United States" to reach to the full extent permissible under the Constitution.

2/ See United States v. Phelps Dodge Corporation, 391 F.Supp. 1161 (D. Ariz. 1975) for the proposition that the FWPCA extends to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest.

cc: Regional Enforcement Division Directors

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

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

NOV 19 1984

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: EPA Authority to Seek Court Imposed Civil Penalties Under Section 311(b)(6)(B) of The Clean Water Act

FROM: Ephraim S. King
Attorney
Solid Waste and Emergency Response Division (LE-132S)

TO: Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency Response Division (LE-132S)

ISSUE PRESENTED

Region X has requested a legal opinion regarding whether Section 311(b)(6)(B) of the Clean Water Act (CWA) grants EPA the authority to seek court imposed civil penalties for oil discharges.

CONCLUSION

A literal reading of Section 311(b)(6)(B) suggests that the Agency may have such authority. A review of the legislative history of that provision, however, indicates that it was enacted by Congress to modify the Section 311 hazardous substance program only. Consistent with this indication of Congressional intent, EPA has taken the position in an August 29, 1979 Memorandum of Understanding (MOU) with the United States Coast Guard (USCG) that suoparagraph (B) "does not apply to oil discharges." 44 Fed. Reg. 50785 (August 29, 1979). The Agency has taken the same position in its hazardous substance regulations. 40 C.F.R. §117.22(b) (1983), 44 Fed. Reg. 50774 (August 29, 1979), 44 Fed. Reg. 10277 (February 16, 1979). On the basis of relevant legislative history, EPA's role in proposing and interpreting the 1978 amendments which added this subparagraph to Section 311 and a review of relevant case law, I believe that the better interpretation of Section 311(b)(6)(B) is that EPA does not have authority to seek court imposed civil penalties relating to discharges of oil.

DISCUSSION

A. Statutory Language

Subsections 311(b)(6)(A) and (B) of the CWA provide a two tier penalty system administered jointly by the United States Coast Guard and EPA. Under subparagraph (A), the Coast Guard has exclusive authority to impose administrative penalties for discharges of oil and hazardous substances up to $5,000. Under subparagraph (B), EPA has exclusive authority to commence civil actions for penalties up to $50,000, and in those situations involving "willful negligence" or "willful misconduct" up to $250,000.

Subparagraph (A) of section 311(b)(6) provides that any owner, operator, or person in charge of a facility or a vessel "from which oil or a hazardous substance is discharged ... shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense." (emphasis added.) Subparagraph (A) clearly provides the Coast Guard with authority to impose administrative penalties for discharges of hazardous substances and oil.

Subparagraph (B) provides that "[t]he Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to a penalty under subparagraph (A) ...". (empnasis added.) Since the penalties under subparagraph (A) apply to discharges of both hazardous substances and discharges of oil, it would appear, based solely on the language of Section 311(b)(6), that the Administrator may seek civil penalties not only for discharges of hazardous substances but also for discharges of oil.

B. Legislative History

1. Introduction

The 1978 Amendments to the CWA added the penalty provisions of subparagraph (B) to Section 311 and also deleted certain other penalty provisions which had been established by the 1972 Amendments to the CWA. The legislative history of these two sets of amendments indicates that -- notwithstanding the language of the statute -- Congress intended EPA's authority under subparagraph (B) to extend only to hazardous substance discharges.

2. The 1972 Amendments to the Clean Water Act

In the 1972 Amendments to the CWA, Congress establishd clean-up liability provisions and penalty provisions for the discharge of oil and hazardous substances. The provisions relating to discharges of oil imposed liability upon the discharger for the costs of cleanup, removal, and mitigation incurred by the Government under Section 311(c) and (f) and authorized the Coast Guard to impose administrative penalties up to $5,000 per discharge.

The provisions relating to discharges of hazardous substances were somewhat more complicated. Congress distinguished between hazardous substances on the basis of whether they were "removable" or "non-removable". For "removable" hazardous substances, the administrative penalty and cleanup liability provisions outlined above applied in the same way under the same sections 311(b)(6), (c), and (f). However, for hazardous substances that were "non-removable" (and for which the cleanup liability provisions were therefore inapplicable), Congress authorized EPA to seek court-imposed penalties under Section 311(b)(2)(B). Under this subsection, EPA was required to determine which designated hazardous substances could be removed and, for those that could not, establish penalties of increasing severity which were designed to deter such discharges. The penalties which could be imposed by EPA under Section 311(b)(2)(B) were intended to act as an economic incentive for a higher standard of care in the handling of non-removable hazardous substances 1/ and, therefore, were much higher than those authorized for the Coast Guard under Section 311(b)(6). 2/

In its regulations implementing Section 311(b)(2)(B), EPA interpreted the term "removable" narrowly to mean only those substances that could physically be removed from water. 3/ For unlawful discharges of such removable substances, the Agency stated that the cleanup liability provisions of Section 311(c) and (f) would apply. For discharges of substances which could not be physically removed from water but which

---

1/ Cong. Rec. S18995 (daily ed., October 14, 1978) (remarks of Senator Muskie); Senate Environment and Public Works Committee, S. Rep. No. 92-414, 93rd Cong., 1st Sess. 66 (1971).

2/ For the first two years following enactment of Clean Water Act Amendments, the penalties were not to exceed $50,000 per discharge incident. Upon expiration of that period, the penalty was increased not to exceed $5,000,000 for the discharge of non-removable hazardous substances from vessels, and $500,000 from facilities.

3/ 43 Fed. Reg. 10488 (March 13, 1978).

were, nonetheless, susceptible to mitigation action to minimize the damage, EPA's hazardous substance regulations provided that they were subject to both the cleanup liability provisions of sections 311(c) and (f) as well as the deterrent penalty provisions of section 311(b)(2)(B).

These regulations (as well as other Section 311 regulations) were challenged by the Manufacturing Chemists Association in federal district court. Manufacturing Chemists Association v. Costle, 455 F. Supp. 968 (W.D. La. 1978). The court held that EPA's regulations subjecting contain discharges to both clean-up liability and deterrent penalty provisions created "a system of penalties which fulfills not in the slightest the original legislative intent." Id. at 977. As the basis for its ruling, the court relied on the Section 311(a)(8) definition of "removable" which explicitly includes "such other acts as may be necessary to minimize or mitigate damage ..." The court also referred to a February 18, 1978 letter from Senator Muskie, which stated:

> Unfortunately, EPA's regulations on this subject are deficient .... [T]hey do not make a distinction between those hazardous substances which can and cannot be removed from water. The statute clearly intended that the distinction be made in order to determine whether a spill of a hazardous substance would be subject to a cleanup liability provision or the deterrent penalty provision. Id. at 979.

3. The 1978 Amendments to the Clean Water Act

The Manufacturing Chemists Association case triggered the introduction of a number of Senate amendments to Section 311. These amendments were added by the Senate to H.R. 12140, an EPA research and development reauthorization bill, which had already passed the House.

The Senate amendments made three major changes in the Section 311 penalty provisions. First, they redesignated Section 311(b)(6) -- the Coast Guard administrative penalty provision for discharges of oil and hazardous substances -- as Section 311(b)(6)(A). Second, they deleted Section 311(b)(2)(B) (the court imposed penalty authority which was keyed to the "removability" of hazardous substance discharges). Third, the amendments established a new court-imposed penalty authority under which the Administrator was authorized to commence a civil action for penalties of up to $50,000 against "any such person subject to the penalty under Section 311(b)(6)(A)." It is this provision which was enacted as Section 311(b)(6)(B).

Congress' intent in adding Section 311(b)(6)(B) was discussed during Senate and House floor debates on the amendments to

H.R. 12140. The legislative history on the purpose of the penalty provision is remarkably consistent on both sides of Congress and focuses exclusively on its application to hazardous substance discharges.

Senator Muskie explained the addition of Section 311(b)(6)(B) as follows:

> [T]he amendment would establish two options for penalizing dischargers of hazardous substances. The first option, which is already in the statute [Section 311(b)(6)(A)] consists of an administratively assessed penalty of up to $5,000 for each violation. The second option would be a civil action in Federal District Court for penalties not to exceed $50,000 per violation, unless the discharge was the result of willful negligence or misconduct, in which case the penalty maximum would be $250,000 per discharge. The amendment specifies the factors the court would assess in establishing the penalty. Cong. Rec. S18995 (daily ed., October 14, 1978) (emphasis added.)

Senator Stafford, the sponsor of the amendment opened his own explanatory comments by inserting into the record without objection a letter from EPA's Assistant Administrator for Water and Hazardous Materials, Mr. Thomas Jorling, to Senator Muskie. In that letter, Mr. Jorling explained the impact of the Manufacturing Chemists Association decision and requested that the Senate consider adding to the House R&D bill, H.R. 12140, a "non-controversial legislative proposal" which would resolve the issues ruled on by the Court. Id. at S19257. With respect to the question of hazardous substance penalties, Mr. Jorling explained the purpose of Section 311(b)(6)(B) as follows:

> The amendments we propose basically place hazardous substances on a par with oil in how they relate to the major components of Section 311, with one major exception. Rather than the $5,000 penalty limit on oil, the limit for hazardous discharges would be $50,000. Id. (emphasis added.)

Following his insertion of EPA's letter into the record, Senator Stafford elaborated at greater length on the purpose of Section 311(b)(6)(B):

> [T]he changes place hazardous substances on a par with oil in their relation to the major components of Section 311, except that the maximum civil penalty for their discharge would be $50,000, compared with $5,000 for oil....

0080

> The $50,000 maximum involves a significant reduction from the existing $500,000 liability for facilities and $5,000,000 liability for vessels. Id., at S19258 (emphasis added.)

Senator Stafford's explanation 4/ appears to reflect an intention that Section 311(b)(6)(B) replace the hazardous substance deterrent penalty provisions of Section 311(b)(2)(B) contained in the 1972 Act. The first paragraph of his comments indicates that the penalties for discharges of hazardous substances and oil were intended to be different: $50,000 for hazardous substances "compared with $5,000 for oil." The second paragraph makes clear that while Section 311(b)(6)(B) represents a "reduction" in the 1972 hazardous substance deterrent penalties, it is in no way intended to eliminate them or fundamentally change their original application and purpose.

On the House side, Representative Breaux introduced the Senate amendments to H.R. 12140 with general explanatory comments similar to those of Senators Muskie and Stafford. He explained that "the bill amends Section 311 of the Act to provide for a program of notification, cleanup, and penalties for the discharge of hazardous substances" and that it "would amend Section 311 in such a way as to meet the court's concerns ...". Cong. Rec., H. 13599 (daily ed., October 14, 1978) (emphasis added). Representative Johnson, Chairman of the House Committee on Public Works and Transportaton, also spoke in favor of the bill and explained that "H.R. 12140 would amend Section 311 of the Federal Water Pollution Control Act concerning the regulation of hazardous substances." Id. at 13599. Chairman Johnson also introduced into the record a letter received from EPA Assistant Administrator for Water and Hazardous Materials, Mr. Thomas Jorling, which further explained the need for such legislation in terms almost identical to the letter received by Senator Muskie.

C. Memorandum of Understanding And Implementing Regulations

EPA and the Coast Guard executed a Memorandum of Understanding which established procedures under which the two agencies would determine whether a hazardous substance discharge should appropriately be subject to any 311(b)(6) penalty and, if so, whether it should be a Coast Guard adminstrative penalty or an EPA civil action penalty. (44 Fed. Reg. 50785, August 29, 1979). The MOU refers to Congress' intent to create a dual option system for penalizing discharges of hazardous substances under either Section 311(b)(6)(A) or Section 311(b)(6)(B). On the question of whether Section 311(b)(6)(B) applies to discharges of oil, Section I of the MOU simply concludes with the statement that "The EPA and the USCG agree that paragraph (B) does not apply to oil discharges." Id.

4/ This view was concurred in by Senator Muskie. Cong. Rec., supra at S18996

While no further explanation of the basis for this agreement is contained in the MOU, EPA's proposed rulemaking to implement Section 311(b)(6)(B) specifically addresses the point:

> The legislative history supporting the November 2, 1978 amendment does not demonstrate an intent to change the penalty structure under Section 311 for oil spill situations. Therefore, EPA does not intend to apply the 311(b)(6)(B) penalty to discharges of oil." 44 Fed. Reg. 10277 (February 16, 1979).

The Agency addressed this issue a second time in promulgating the final rule implementing the 1978 amendments to the Clean Water Act. In a response to one commenter's suggestion that section 311(b)(6)(B) be applied to discharges of oil, EPA again concluded that:

> The legislative history clearly indicates that the Section 311(b)(6)(B) penalty option only be used for discharges of hazardous substances. 44 Fed. Reg. 50774, (August 29, 1979.)

D. Analysis

The fundamental issue raised by Region X is whether, in interpreting Section 311(b)(6)(B), the "plain meaning" of the provision should control, or alternatively whether further reference to legislative history, contemperanous Agency interpretations, and Agency regulations should be considered.

A basic tenent of statutory construction is that statutes are to be interpreted in accordance with their "plain meaning." The relevance of the "plain meaning" rule is well recognized and is often relied upon by the courts. This rule was explained by the Supreme Court in Caminetti v. United States, 242 U.S. 470 (1917):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. 242 U.S. at 485.

As well known and often cited as this fundamental principle is, it is equally well recognized that the rule is by no means inviolate. In United States v. American Trucking Association Inc., 310 U.S. 534 (1940), the Supreme Court made clear that:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use,

however clear the words may appear on 'superficial examination.' 310 U.S. 543-44 (citation omitted)

The tension between these two rules of statutory interpretation continues to be reflected in the court's treatment of this issue up to the present day. Statutory construction cases reflect a struggle between the recognition, on the one hand, that Congress cannot craft words to address every contingency and, on the other, an understanding that extrinsic interpretive materials, such as legislative history, are susceptible to manipulation for partisan purposes and, accordingly, may be unreliable. 5/

In the period following American Trucking, a number of different approaches to resolving this conflict have developed. In some cases, the courts appear to look back to a strict interpretation of the Caminetti approach. 6/ In other cases, the courts have fashioned a more liberal interpretation of the plain meaning rule; allowing consideration of legislative history where statutory language is ambiguous. 7/ Yet another

---

5/ See e.g., United States v. Public Utilities Commission, 345 U.S. 295 (1953) (Jackson, J., concurring); Gemsco v. L. Metcalfe Walling, 324 U.S. 244 (1953); National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Board, 618 F.2d 819, 828 (D.C. Cir. 1980) ("[W]e note that interest groups who fail to persuade a majority of the Congress to accept particular statutory language often are able to have inserted in the legislative history of the statute statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative history.")

6/ See, e.g., National Railroad Passenger Corp., et al. v. National Association of Railroad Passengers, 414 U.S. 453 (1974); Gemsco v. L. Metcalfe Walling, 324 U.S. 244 (1953).

7/ See e.g., United States v. Public Utilities Commission, 345 U.S. 295, 315-16 (1953) ("Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion."); Demby v. Schweiker, 671 F.2d 507 (D.C. Cir. 1981); Lawrence v. Staats, 640 F.2d 427 (D.C. Cir. 1981); United States v. United States Steel Corp., 482 F.2d 439, 444 (7th Cir. 1973), cert denied, 414 U.S. 909 (1973) ("We think that the statute is plain on its face, but since words are necessarily inexact and ambiguity is a relative concept, we now turn to the legislative history, mindful that the plainer the language, the more convincing contrary legislative history must be".)

group of cases allows recourse to extrinsic material where adherence to the plain language of the statute (even where such language is unambiguous) would frustrate a larger congressional purpose; such purpose often being devined by reference to applicable legislative history. 8/ Prominent among this latter group is the 1976 Supreme Court case of Train v. Colorado Public Interest Research Group (PIRG), 426 U.S. 1 (1976). In reversing the lower court's "plain-meaning" opinion, the Supreme Court in this case refused to give effect to clear statutory language in the Clean Water Act which included "radioactive materials" within the definition of "pollutant," holding that clear and unambiguous legislative history showed that a literal reading was contrary to Congress' intent.

The only certain conclusion that can be drawn from an examination of case law on this question is that while the "plain-meaning" rule continues to be an accepted principle of statutory interpretation, it is not dispositive in every case. This qualification is particularly true in the presence of conflicting legislative history where alternative statutory constructions are possible that better reflect and more easily fit with stated congressional intent.

As discussed above, an examination of the 1972 amendments to the Clean Water Act and associated legislative history clearly indicates that due to the very nature of certain hazardous substances, Congress considered and explicitly choose to adopt a penalty strategy that in certain repects was different than that provided for oil spills. The fundamental question that must be addressed in considering the 1978 amendments is whether Congress intended to abandon the hazardous substance deterrent penalty established in 1972 or substantially modify it to cover a new class of discharges.

8/ See, e.g., Cass v. United States, 417 U.S. 72 (1974); Malat v. Riddell, 383 U.S. 569, 571 (1966) ("Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself and necessary in order to effect the legislative purpose" (citations omitted)); Wilderness Society v. Morton, 479 F.2d 842, 855 (D.C. Cir. 1973) ("but we have also faced up to the reality that the plain meaning doctrine has always been subservient to a truly discernable legislati purpose however discerned" (citation omitted)); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 379 (D.C. Cir. 1973) ("In ascertaining congressional intent, we begin with the language of a statute, but this is subject to an overriding requirement of looking to all sources including purpose and legislative history, to ascertain discernable legislative purpose"). (citations omitted).

Senator Muskie explained the penalty provisions of the 1978 amendments and left no question that while Congress was modifying the articulation of its hazardous substance spill liability and penalty strategy in response to the Manufacturing Chemists Association decision, it was not abandoning the 1972 strategy or expanding it to cover oil discharges. Senator Stafford's comments reinforce the conclusion that Congress was committed to a special hazardous substance penalty provision and explicitly decided to leave the oil discharge penalty provisions unchanged.

On the House side, explanation and support for H.R. 12140 tracked the debate in the Senate. Representative Breaux specifically pointed out that while the bill provided for hazardous substance penalties, the Coast Guard administrative penalties (which covered oil) were to remain unchanged.

Taken alone, the legislative history provides a persuasive basis for concluding that Congress did not intend to extend the hazardous substance deterrent penalties to discharges of oil. However, other considerations are also relevant to the question and provide further support for this conclusion. Chief among these is the Agency's own involvement in the process that led to the 1978 amendments. While it cannot be presumed that Congress acted only in response to EPA's request for legislative assistar it is clear from the fact that both the Senate and House formall incorporated EPA's request into the record that the Agency's position was carefully considered.

In his letter of request to Senator Muskie and Representative Johnson, EPA's Assistant Administrator for Water and Hazardous Materials could not have been more explicit on the question of penalties:

> The amendments we propose basically place hazardous substances on a par with oil in how they relate to the major components of Section 311 with one major exception. The present penalty structure would be replaced by one which sets a maximum fine of $50,000 for all hazardous dischargers. Cong. Rec. S19256 and H13600 (daily ed., October 14, 1978).

The request and explanation contained in this letter assumes particular relevance in view of the Supreme Court's holding that an Agency's interpretation "gains much persuasiveness from the fact that it was the [Agency] which suggested the provision's enactment to Congress." U.S. v. American Trucking Associations, Inc., supra, 310 U.S. at 549; Hassett v. Welch, 303 U.S. 303, 310 (1938).

Moreover, EPA's role did not end with its advisory function during the legislative process. Within the first month after

enactment of the 1978 amendments, EPA provided Congress with an Agency interpretation of Section 311(b)(6)(B). In a letter dated October 24, 1978 to the Chairmen of the Senate and House Committees with jurisdiction over the Clean Water Act, EPA's Assistant Administrator for Water and Hazardous Materials, Mr. Jorling, stated:

> It is our understanding that section 311(b)(6)(B) was intended solely to apply to hazardous substances, not to oil, which continues to be covered under section 311(b)(6)(A) of the amended Act .... In accordance with Congressional intent as described below, section 311(b)(6)(B) will only be applied to hazardus substance. (See attached letter)

On the general question of Agency legislative interpretations, it is well settled that courts show "great deference to the interpretation given the statute by the officials or agency charged with its administration" Udall v. Tallman, 380 U.S. 1, 16. Accord, e.g., Zuber v. Allen, 396 U.S. 168, 192 (1969); U.S. v. American Trucking Association, 310 U.S. 534 (1940); NRDC v. Train, 510 F.2d 692, 706 (D.C. Cir. 1975). This rule is particularly applicable when the Agency interpretation at issue "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961), quoting Norwegian Nitrogen Products Co. v. U.S. 288, U.S. 294, 315 (1933). Accord, e.g., U.S. v. Zucca 351, U.S. 91, 96 (1956). Congressional concurrence in an Agency's statutory interpretation is a further factor noted by the Court in Power Reactor Development Co. that may be relied upon as an indication of the interpretation's accuracy. Where Congress has been provided complete and direct notice of a particular statutory construction and has failed to take available legislative opportunities to correct that construction, then this inaction may be taken as "a de facto acquiesence in and ratification of" the Agency interpretation in question. Power Reactor Development Co, v. International Union of Electricians, supra, 367 U.S. at 409.

The Chairmen and ranking minority leaders of the Senate Environment and Public Works Committee and the House Public Works and Transportation Committee were personally notified by letter ten days after enactment of the 1978 amendments of the Agency's interpretation of Section 311(b)(6)(B). Further notice was provided, of course, through the Federal Register publication of the EPA - Coast Guard MOU and also by the proposal and final promulgation of hazardous substance regulations (40 CFR Part 117).

V. CONCLUSION

EPA's present position, which has been expressed in letters to Congress, federal regulations, and the EPA - Coast Guard MOU, is that Section 311(b)(6)(B) does not authorize it to impose civil penalties for discharges of oil. However, Region X suggests that a literal reading of subparagraph (B) leaves open the question of whether this interpretation is too narrow. I believe that the better interpretation of the provision is that does not authorize EPA to seek court imposed penalties for discharges of oil.

It should be noted that if the Agency decides to change its position on the applicability of Section 311(b)(6)(B) it would be necessary before acting on such reinterpretation to publish a renegotiated MOU with the Coast Guard and provide public notice of the change in the Agency's interpretation from that set forth in the proposed and final rulemaking preambles to 40 CFR Part 117.

Attachment

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

October 24, 1978

OFFICE OF WATER AND
HAZARDOUS MATERIALS

Honorable Jennings Randolph
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I want to thank you for your assistance in enacting amendments to section 311 of the Clean Water Act. I deeply appreciate the Congress's willingness to consider the section 311 amendments during the waning moments of the 95th Congress. Without the amendments, EPA could not have implemented any element of the hazardous substances spill program for a number of years. As a result of the efforts of the 95th Congress, we can build on the rulemaking effort conducted for the last few years and get a basic hazardous substances spill program into operation within a few months.

It has been brought to my attention that there may be some confusion over the applicability of the amended section 311(b)(6)(B). It is our understanding that section 311(b)(6)(B) was intended solely to apply to hazardous substances, not to oil, which continues to be covered under section 311(b)(6)(A) of the amended Act. In seeking an amendment to section 311, it was solely our intent to resolve the issues raised in the Court's injunction of the hazardous substances program. In accordance with Congressional intent as described below, section 311(b)(6)(B) will only be applied to hazardous substances.

I believe that Congress's intent to apply section 311(b)(6)(B) solely to hazardous substances is clear. When H.R. 12140 was introduced on the floor of the Senate, Senator Stafford's statement made clear the intent that the reduction of penalties to $50,000 applied solely to hazardous substances. In explaining section 311(b)(6)(B), he stated the amendment creates "two methods for penalizing dischargers of hazardous substances". He further described how the amendment provided for a sufficient incentive for a high standard of care for "hazardous substances discharges." Finally, in describing the factors a Court would consider in assessing a penalty under section 311(b)(6)(B), Senator Stafford indicated that one of the factors, the gravity of the violation, would

include consideration of the "disposal characteristic of the substance". Section 311 of the Act and the recent amendments distinguish "substances" from oil.

The statements made on the floor of the House of Representatives by Congressman John Breaux when the Senate amended version of H.R. 12140 was adopted also support the interpretation that Congress intended to apply section 311(b)(6)(B) to hazardous substances and not to oil. Congressman Breaux stated "...the bill amends section 311 of the Act to provide for a program of notification, clean up, and penalties for the discharge of *hazardous* substances." In describing the two tier penalty system, Congressman Breaux noted that the Coast Guard's authority under section 311(b)(6)(A) to administratively impose penalties of up to $5,000 for discharges of oil and hazardous materials remains unchanged. Further, in describing the "gravity of the violation" and the discharger's efforts to "mitigate the effects of the discharge", Congressman Breaux indicates that these factors, which the Court is to consider in establishing the penalty under section 311(b)(6)(B), apply to hazardous substances.

Again, thank you for your efforts to enable implementation of a hazardous substances spill program.

Sincerely,

Thomas C. Jorling
Assistant Administrator
for Water and Waste Management

VI. SPECIAL ENFORCEMENT TOPICS

D. CITIZEN SUITS

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

JUL 20 1984

MEMORANDUM

SUBJECT: EPA Response to Citizen Suits

FROM: William D. Ruckelshaus /s/ WDR
Administrator

TO: Regional Administrators (Regions I-X)
Regional Counsels (Regions I-X)

I recently met with several environmental groups to discuss their concerns regarding EPA responses to 60-day citizen-suit notices and the citizen suits themselves. The environmental groups have asked us to take several actions in support of citizen suits.

EPA values the efforts of citizen groups to bring instances of non-compliance to our attention and to support EPA efforts to reduce that non-compliance. Of course, in deciding on its own course of action, EPA must review the merits of every citizen suit notice on a case-by-case basis. Nonetheless, I greatly appreciate these groups' efforts to complement the EPA enforcement program and help promote compliance.

During our meeting, the citizen groups thanked me for the cooperation of EPA employees in responding to information requests on non-compliance. I would like to pass this "thank you" on to all of you, and urge all Agency enforcement personnel to continue to cooperate with citizen groups by promptly responding to these requests and reviewing 60-day notices.

As you may know, the Office of Policy, Planning and Evaluation (OPPE) is currently conducting a study of citizen suits through a contract with the Environmental Law Institute (ELI). OPPE expects to complete this study by the end of September 1984. Upon completion of the study, I will decide whether to issue a detailed EPA policy statement on citizen suits.

cc: Ross Sandler, Natural Resources Defense Council

LE-130A:A.Danzig:th:Rm.3404:7/10/84:475-8785:DISK:DANZIG:1/23

JUL 30 1984

Ross Sandler
Senior Attorney
Natural Resources Defense Council
122 East 42nd Street
New York, N.Y. 10168

Dear Mr. Sandler:

I enjoyed meeting with you and representatives of environmental groups on June 12, 1984, to discuss your views on citizen suits. I truly believe that citizen groups have played an important role in bringing instances of non-compliance to EPA's and the public's attention. Your efforts, especially under the Clean Water Act, have brought us closer to statutory goals, and for this I am grateful.

In response to your concerns, I have directed the Regional Offices to: (1) continue to cooperate with requests for information on non-compliance, and (2) to promptly review 60-day citizen-suit notices. (See attached memorandum). EPA will continue to decide on a case-by-case basis how to respond to citizen suit notices after consideration of the merits of the contemplated action and consistency with EPA enforcement priorities.

As you may know, EPA is currently studying citizen suits through a contract to the Environmental Law Institute. Upon completion of the study, expected by the end of September 1984, I will decide whether to issue a more detailed policy statement regarding how EPA should handle citizen suits.

Thank you again for expressing your concerns.

Sincerely yours,

/S/ WILLIAM D. RUCKELSHAUS

William D. Ruckelshaus

Attachment

LE-130A:A.Danzig:th:Rm.3404:7/10/84:475-8785:DISK:DANZIG:1/26

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

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

OCT 4 1985

MEMORANDUM

SUBJECT: Clean Water Act Citizen Suit
Issues Tracking System

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Rebecca Hanmer, Director
Office of Water Enforcement
and Permits

Colburn Cherney
Associate General Counsel
for Water

Ann Shields, Acting
Section Chief, Policy, Legislation and
Special Litigation, DOJ

Regional Counsels, Regions I-X

Purpose

The purpose of this memorandum is to establish procedures by which EPA will monitor important case developments involving national legal and policy issues, in order to decide on an appropriate position for the government to take regarding those issues, in citizen enforcement suits brought under §505 of the Clean Water Act.

Due to the growing number of §505 enforcement actions, and the importance of the legal, technical, and policy issues raised in them, it has become necessary for the Agency to develop a better system to track national issues arising in these citizen suits once they are filed. OECM-Water Division already maintains a log of citizen notices of intent to sue. We will expand the existing system to track subsequent filings,

case developments, and judicial decisions. In that way, the Federal government will be in a better position to decide if, when, and how to participate in cases which may result in the establishment of legal or policy precedents affecting EPA's enforcement actions.

The Regions remain responsible for deciding whether a Federal judicial enforcement action is warranted to address the violations at issue. The new Tracking System does not affect Regional monitoring, review and recordkeeping systems relating to what enforcement response EPA decides to pursue against a violator in the wake of a citizen notice. Instead, the Tracking System is intended to enable the government to make timely and informed decisions as to whether, for example, it should intervene or file an amicus brief in a citizen enforcement suit to protect a Federal interest regarding a legal or policy question of national interest.

Procedures

EPA regulations (40 CFR 135) provide that CWA citizen notices of intent to sue must be sent to both the Regional Administrator (of the Region in which the alleged violations occurred) and the Administrator of EPA as well as to the affected State. My office will notify the Regional Counsel when we receive a citizen notice.

Promptly upon receipt of a §505 enforcement notice (in which the Administrator is not a proposed defendant), OECM-Water will send a short form letter to the prospective citizen plaintiff, requesting that a copy of the filed citizen complaint be sent to my office. (As of September, 1985, there are CWA amendments pending which would require citizen plaintiffs to send complaints and consent decrees to the Agency. If enacted, these amendments would require a response to this first letter.) Upon receipt of a filed complaint, OECM-Water will then request copies of all dispositive pleadings and court judgments or settlements. It is anticipated that voluntary responses to these requests will provide OECM-Water with the means to adequately track the progress of these suits and any substantial issues they raise at trial or on appeal, in the majority of cases.

OECM-Water will maintain a file for each citizen enforcement suit. As pleadings are received, my office will review them to identify those issues raised which are of particular concern or interest to the Federal government. We will also send copies of all citizen complaints and other significant documents to Regional Counsels when requested or appropriate as well as to the Policy, Legislation and Special Litigation (PLSL) office in the Department of Justice. Furthermore, we will share the information received with OWEP, to give the program office an opportunity to review technical and policy issues raised.

When a legal issue arises which may merit some level of involvement by the Federal government, such as the filing of an amicus curiae brief, my office will coordinate any formal response with the Associate General Counsel for Water and with PLSL at the Department of Justice. In those situations, my office will also contact the Regional Counsel and the Director of OWEP's Enforcement Division. This group will be responsible for collectively deciding, in a timely manner, (1) whether government action on a specific issue arising in a citizen suit is warranted, (2) what the government's action should be, and (3) what roles the participating offices will play in pursuing any appropriate action.

As part of this expanded citizen suit tracking system, my office is now initiating the compilation or a compendium of documents which set out the government's position on general issues which have arisen in the context of CWA citizen suits. We will share this compendium with you when it is completed.

The procedures described above make up an interim system for tracking national issues in CWA citizen enforcement suits, and will be undertaken at the beginning of FY86. As other Divisions within OECM continue developing such systems as needed, or as proposed legislative amendments are adopted, the CWA procedures may be modified so as to promote cross-statutory consistency in citizen suit tracking.

If you have any questions about this new citizen suit tracking system, or related CWA §505 issues, please contact me (FTS 475-8180), Assistant Enforcement Counsel Jack Winder (FTS 382-2879), or staff attorney Elizabeth Ojala (FTS 382-2849).

cc: Courtney M. Price
Richard Mays
Directors, Regional Water Management Divisions
David Buente, DOJ
OECM-Water Attorneys
OECM Citizen Suit Work Group Members

Note: As of the date of issuance of this policy compendium, this tracking system has not been implemented by OECM.

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

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

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

JUN 19 1987

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Clean Water Act Section 505: Effect of Prior Citizen Suit Adjudications or Settlements on United States' Ability to Sue for Same Violations

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels
Regions I - X

The purpose of this memo is to clarify, in response to several inquiries that this office has received, the United States' position on the question of whether the federal government is precluded from suing a violator in the face of a previous Clean Water Act citizen enforcement suit adjudication or settlement with the same defendant for the same violations. As indicated in the attached documents, our position is that the United States is in no way estopped from suing a violator (on the same violations) for separate or additional relief after a citizen suit has been initiated or concluded. The maximum potential civil penalty liability of the defendant in the U.S. action would be the statutory maximum reduced by any civil penalty assessed in the earlier citizen suit which was actually paid into the U.S. Treasury for the same violations. This position is supported and explained in three attachments to this memo.

Attachment One is the court's order dated March 16, 1987 in U.S. v. Atlas Powder Company, Inc., Civ. No. 86-6984 (E.D.Pa). The court holds that "the United States is not bound by settlement agreements or judgments in cases to which it is not a party." See also Attachment Two, the United States' memorandum in support of a Motion to Dismiss Atlas's Counterclaims, which asserts the general principle that the U.S. is not bound by the results of prior litigation by private parties over a given set of violations because the U.S. has interests distinct from those of any private citizens. The memorandum also quotes an excerpt from the Legislative History of the Water Quality Act of 1987, which clarifies that the new WQA provision that

provides the United States an opportunity to review CWA citizen suit complaints and consent decrees will not change the principle that the U.S. is not bound by judgments in those cases.

Attachment Three is a letter dated April 1, 1987 from the Department of Justice to the judge in Student Public Interest Research Group of New Jersey v. Jersey Central Power and Light Co., Civ. No. 33-2840 (D.N.J.). This letter discusses in detail the non-preclusion issue, with relevant case citations. The letter also emphasizes that civil penalties must be paid to the U.S. Treasury and that any monetary payments made in settlement of citizen suits which are not paid to the U.S. Treasury do not reduce a defendant's potential civil penalty liability in any future government enforcement action. The Department of Justice is routinely issuing letters such as this to parties to proposed CWA citizen suit settlements which purport to bind the United States or to call for payment of civil penalties to any recipient other than the U.S. Treasury.

If you have any questions on these or related citizen suit issues, please contact OECM Water Division attorney Elizabeth Ojala at FTS 382-2949.

Attachments

cc: Susan Lepow
David Buente
Ray Ludwiszewski
Ann Shields
James Elder
Associate Enforcement Counsels
Water Management Division Directors, Region I-X
Water Division Attorneys

VI.D.5

"Procedures for Agency Responses to Clean Water Act Citizen Suit Activity," dated June 15, 1989.

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

JUN 15 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Procedures for Agency Responses to Clean Water Act Citizen Enforcement Suit Activity

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Regions I-X

James Elder, Director
Office of Water Enforcement and Permits

David Davis, Director
Office of Wetlands Protection

Susan Lepow
Associate General Counsel
for Water

Ann Shields, Section Chief
Policy, Legislation and Special Litigation,
Department of Justice

Purpose

The purpose of this memo is to set out the general procedures to be followed by the Environmental Protection Agency, in conjunction with the Department of Justice, in responding to and monitoring citizen enforcement suits brought under Section 505 of the Clean Water Act, 33 USC 1365.

This memo supersedes prior guidance, issued by this office on October 4, 1985, concerning EPA tracking of citizen suits. That guidance is now obsolete in light of recent amendments to Section 505 requiring citizen suit parties to send copies to EPA and DOJ of complaints and proposed settlements, and in light of EPA's new ability to bring administrative penalty actions and pre-empt potential citizen suits for civil penalties.

The guidance defines roles for various EPA and DOJ offices in addressing matters relating to CWA citizen enforcement suits; however, this guidance in no way affects the fact that the Regions remain responsible for deciding whether a federal enforcement action is warranted to address the violations at issue.

Background

Clean Water Act Section 505(a)(1) authorizes any person with standing to sue any person who is alleged to be in violation of certain Clean Water Act requirements, set out in CWA §505(f). In such lawsuits, the district courts have jurisdiction to enforce the Act and to apply appropriate civil penalties under CWA §309(d). Prior to filing enforcement suits under CWA §505(b)(1), however, citizens must give "60-day notice" of the violations to the Administrator, the State, and the alleged violator. These violation notices must be given in the manner prescribed by the Agency's regulations, found at 40 CFR 135, which require that copies of the notices (sent via certified mail to the alleged violator) be mailed or delivered to the Administrator, the Regional Administrator, the State, and the registered agent of corporate violators. Part 135 provides that the date of service of the notice is the date of postmark.

Through Section 505, Congress has fashioned a distinct role for private enforcement under the Clean Water Act. The purposes of the citizen suit provision are to spur and supplement government enforcement. The required 60-day violation notices are designed to provide the Administrator (or the State) the opportunity to undertake governmental enforcement action where warranted, given Agency priorities and finite resource levels. Where the government does not pursue such action, the citizen enforcer with standing may act as a "private attorney general" and bring the lawsuit independently, for civil penalties and injunctive relief.

Historically, in the majority of cases the regions have not initiated federal referrals as a result of citizen notices, and thus the citizens are allowed to serve the role of "supplemental" enforcers. This is reasonable in terms of best use of the Agency's finite resources, and the consistent setting of federal enforcement priorities, which should not necessarily be driven by citizen enforcement priorities.

Experience suggests that private enforcement is useful in helping to achieve Clean Water Act goals and to promote Clean Water Act compliance. However, it is important for the Agency to monitor citizen lawsuits to the extent possible to ensure proper construction of regulatory requirements and avoid problematic judicial precedents. It is also a good idea for the

federal government to support the citizens where feasible, such as by filing amicus briefs in appellate courts, in order to advance our federal enforcement interests. Examples of amicus curiae briefs which have been filed on behalf of citizens so far include those in Sierra Club v. Union Oil Co. (9th Cir.), Sierra Club v. Shell Oil Co., (5th Cir.), and Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd. (4th Cir. and S. Ct.).

Recent CWA Amendments Affecting Citizen Suits

The Water Quality Act (WQA) of 1987 amended the Clean Water Act, effective February 4, 1987, in two ways respecting citizen suit authorities and responsibilities. Generally, the amended CWA requires that the Administrator and the Attorney General receive copies of complaints and proposed consent decrees in citizen enforcement suits. In addition, citizen suits for civil penalties may now be precluded, in some cases, by administrative penalty actions.

WQA §504 provides as follows:

> Section 505(c) is amended by adding at the end thereof the following new paragraph:
> "(3) PROTECTION OF INTERESTS OF UNITED STATES. - Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator."

OECM-Water Division and the Office of Water are presently working on proposed regulations to govern service of the complaints and consent decrees, which will be published in the Federal Register shortly.

WQA Section 314 amends CWA §309 (governing federal enforcement actions) to add new subsection (g), authorizing federal administrative penalty actions. New CWA §309(g)(6)(A) and (B) provide that citizens may not bring civil penalty actions under Section 505 for the same violations for which (1) the Secretary (Army Corps of Engineers) or the Administrator has commenced and is diligently prosecuting an administrative action under Section 309(g); (2) the State has commenced and is diligently prosecuting an action under a comparable state law; or (3) the Secretary, Administrator or State has issued a final order and the violator has paid a penalty under §309(g) or

comparable state law; unless (a) the citizen's complaint was filed prior to the commencement of the administrative action, or (b) the citizen's 60-day notice was given (in accordance with 40 CFR 135) prior to commencement of the administrative action, and the complaint was filed before the 120th day after the date on which the notice was given.

Thus, under these new amendments, it will be necessary for the Agency to keep track of when citizen notices are served (i.e., postmarked), when complaints are filed, and when proposed consent decrees are received. Moreover, EPA and DOJ need to clarify procedures for deciding how, if at all, to review and respond to citizen enforcement activity. The following sets out the Agency's procedures, in conjunction with DOJ, to implement these responsibilities.

Procedures

(1) Violation Notices

When EPA Headquarters receives a copy of a citizen violation notice, the notice is routed to the Associate General Counsel for Water. That office logs in the notice, files the original, and forwards copies of the notices to the Associate Enforcement Counsel for Water (OECM-Water Division), and the Director of the Office of Water Enforcement and Permits, or the Director of the Office of Wetlands Protection, as appropriate. Under 40 CFR 135, each Regional Administrator must also receive a copy of the notice directly from the citizen; some regions have internal tracking systems, usually handled by the Water Management Divisions. In addition, the Office of Wetlands Protection will forward Clean Water Act §404 notices to their courterparts at the Army Corps of Engineers.

Since late 1983, OECM-Water has kept a region-by-region, chronological log of these citizen notices, recording the name of one notifier and the potential defendant, the location of the facility, and the date on the notice letter. (Recently, OGC has begun recording the "date of postmark," which is the official date of service under the regulations.)

In the regions, the general practice has been for Water Division personnel or Wetlands program personnel to investigate the compliance record of the noticed facility, and to contact the state (if the state runs an approved NPDES program) to inquire what, if any, enforcement action the state intends to take. The program office then makes a determination, with the Office of Regional Counsel, as to whether to initiate a federal enforcement action to address the alleged violations. This memorandum is not intended to change the procedures the regions use to evaluate and respond to the notices.

(2) **Complaints**

As in the case of violation notices, at Headquarters the Complaints are routed through the Office of General Counsel, to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 complaints to their counterparts at the Army Corps of Engineers. OECM-Water and the Office of Water are currently working together to amend 40 CFR 135 to include requirements relating to service of complaints on EPA and DOJ. We expect these regulatory provisions to require citizen plaintiffs to send copies of complaints to the Regional Administrator in addition to the Administrator and the Attorney General. In the interim, OGC is sending copies to the Regional Counsels. OECM-Water Division keeps a log of the citizen complaints. Attached for your information is a copy of the log which reflects citizen complaint activity through the end of fiscal year 1987.

The regions will retain the authority to recommend whether to initiate a federal enforcement action against the citizen suit defendant (e.g., by intervention in the citizen suit, by filing a separate suit, or by commencing an administrative action) in order to address the defendant's violations. The regions will also normally have the lead on monitoring active citizen suits from notice and filing to conclusion, within their discretion and as resources permit. However, Headquarters will get involved in the citizen enforcement action where national legal or policy issues arise which merit federal attention (other than intervention as a party to address the underlying violations), and each Region is requested to notify OECM-Water Division whenever such an issue comes to the Region's attention.

For example, Headquarters generally will take the Agency lead, working with the Policy, Legislation and Special Litigation (PLSL) Section of the Department of Justice, where issues of national law or policy arise which call for participation as amicus curiae in the district or appellate courts. In such situations, OECM-Water will be responsible for coordinating with PLSL, OGCWater, the appropriate Office of Regional Counsel, and the Office of Water to decide collectively (1) whether government action on a specific issue arising in a citizen suit is warranted, (2) what the government's action should be, and (3) what roles the participating offices will play in pursuing any appropriate action. This type of participation might occur most often in the context of appeals from judgments in citizen suits. However, the Agency will employ the same procedures in deciding whether and how to pursue Federal participation on the District Court level. Examples of issues which the United States has addressed to date in this context include the scope of the upset defense, whether the U.S. can be bound by settlements of suits between private parties, and whether citizens may pursue penalties for wholly past violations.

(3) Consent Decrees

The proposed consent decrees, like the violation notices and the Complaints, are routed through the Office of General Counsel to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 proposed consent decrees to their counterparts at the Army Corps of Engineers. Until 40 CFR 135 is amended to require that copies be sent to the Regions also, OGC will send copies to the Regional Counsels. OECM-Water Division keeps a log of these proposed consent decrees. Attached for your information is a copy of the log which reflects consent decree activity through the end of fiscal year 1987.

Once a copy of a proposed consent decree is received, the United States has 45 days within which to review the proposed consent decree and submit comments, if any. OECM-Water will solicit comments from the appropriate Office of Regional Counsel, to formulate the Agency's position on any issues which may arise in the citizen consent decree. Unless different arrangements are made (e.g., if Federal intervention is contemplated to obtain further relief), OECM-Water will take the lead for the Agency in coordinating with DOJ to formulate proper action by the United States in response to a proposed consent decree, such as a comment letter to the court, whenever necessary or advisable.

A region will have the opportunity, in its discretion and as resources allow, to offer timely case-specific comments on the adequacy of relief in a proposed citizen suit settlement. OECM-Water will consider comments, if any, from the Region received within 35 days after the date the settlement is logged in by the Administrator's office. In any event, the United States is not obliged to offer any comments to the court. Our position has consistently been that the federal government is not bound by the terms of citizen settlements or judgments, as the U.S. has interests distinct from any private litigants, and cannot be deprived of the opportunity to bring a subsequent action for more complete relief, should circumstances warrant.

PLSL/DOJ will provide copies to OECM-Water and the appropriate Regional Counsel of any correspondence submitted to the court or parties in CWA citizen suits and will work with designated EPA representatives in conducting any follow-up activity which results.

If you have questions regarding this matter, please contact David Drelich of my staff at FTS 382-2949.

Attachments

cc: Regional Water Management Division Directors
OECM-Water Attorneys
Doug Cohen, DOJ
Dan Palmer (EDRS)

VI. SPECIALIZED ENFORCEMENT TOPICS

E. SECTION 404

VI. SPECIALIZED ENFORCEMENT TOPICS

G. FEDERAL FACILITIES

"FEDERAL FACILITIES COMPLIANCE", dated January 4, 1984. See GM-25.*

"Federal Facilities Compliance Strategy," dated November, 1988. See GM-25 (revised).

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

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

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

MAY 31 1985

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Policy on Performance-Based Assistance

FROM: Lee M. Thomas

TO: Assistant Administrators
General Counsel
Inspector General
Associate Administrator
Regional Administrators
Staff Office Directors
Division Directors

I am pleased to issue the attached policy on EPA's performance-based assistance to States. This policy represents an important step in the continuing effort to achieve environmental results through a strong EPA/State partnership.

Our assistance to States covers a wide range of continuing environmental programs. In the past, the process for developing and managing assistance agreements has varied significantly among programs and Regions. This policy establishes an Agency-wide approach toward negotiating assistance agreements, conducting oversight of those agreements, and responding to key oversight findings. While the aim of the policy is a consistent approach across Agency programs, it retains considerable flexibility for Regions to tailor assistance agreements to the unique environmental conditions of particular States.

This policy is effective immediately. The accompanying Question and Answer Package explains how FY'86 assistance agreements will be expected to comply with it and details the rationale behind major policy components.

The Deputy Administrator will monitor implementation of the Policy on Performance-Based Assistance and issue special instructions as necessary. I expect Assistant Administrators to advise the Deputy Administrator of actions planned or taken to make their program policies, guidance and procedures fully consistent with this policy within thirty days.

Regional Administrators are responsible for ensuring that their staffs and States receive, understand and begin to apply this policy package to their assistance activities. To assist in its prompt and proper implementation, members of the task force and staff instrumental in the development of this policy have agreed to make Regional visits to explain and discuss it.

I would like to commend the task force that developed this policy, whose members included managers and staff from EPA's Headquarters and Regions, and State Environmental Directors, and representatives from the Washington-based Executive Branch Organizations. I believe they have done an excellent job and hope their effort can serve as a model for future EPA/State decision-making.

I look forward to strong Agency commitment to this policy. You can be assured of my full support as EPA and the States move forward with its implementation.

Attachments

POLICY ON PERFORMANCE-BASED ASSISTANCE

I am pleased to issue this EPA Policy on Performance-Based Assistance. This document was developed by a task force composed of representatives from EPA Headquarters and Regions, State environmental agencies and Executive Branch Organizations to establish a consistent, Agency-wide approach toward negotiating and managing assistance agreements with States.

The three major components of the policy describe how assistance agreements should be negotiated, how a State's performance against negotiated commitments should be assessed, and what actions should be taken to reward accomplishments and correct problems. The overall approach is one of EPA/State cooperation in setting and attaining environmental goals through effective State programs.

I anticipate strong Agency commitment to the principles of this policy and look forward to the strengthening of the EPA/State partnership I believe will result from this approach.

5/31/85

Lee M. Thomas
Administrator

Date

EPA POLICY ON PERFORMANCE-BASED ASSISTANCE

PURPOSE

This policy establishes an Agency-wide approach which links U.S. EPA's assistance funds for continuing State environmental programs to recipient performance. The approach employs assistance as a management tool to promote effective State environmental programs. The policy's goal is the consistent and predictable application of the performance-based approach across Agency programs and among Regions.

Mechanisms for tying EPA assistance to a recipient's accomplishment of specific activities agreed to in advance are contained in EPA's regulations governing State and Local Assistance (40 CFR Part 35, Subpart A). The degree and manner in which EPA programs and Regions have applied these regulations has varied greatly. Through this policy, the Agency articulates how it will consistently manage its intergovernmental assistance.

SCOPE

EPA's Regions will be expected to implement the portions of this policy governing the management of assistance agreements ("Oversight" and "Consequences of Oversight" sections) upon the policy's issuance. To the greatest extent possible, this policy should also guide the negotiation of grants and cooperative agreements for fiscal year 1986.

This policy supersedes all previous policies on performance-based assistance to the extent they conflict with the approach outlined below. It elaborates on regulations governing State and and Local Assistance (40 CFR Part 35, Subpart A) promulgated October 12, 1982, and the General Regulation for Assistance Programs (40 CFR Part 30) promulgated September 30, 1983. This policy does not replace funding or grant/cooperative agreement requirements established by Federal statutes or EPA regulations. States applying for Federal financial assistance are required to have adequate financial management systems capable of ensuring proper fiscal control.

The policy complements and is in complete accordance with EPA's Policy on Oversight of Delegated Programs (April 4, 1984) and the Policy Framework for State/EPA Enforcement "Agreements" (June 26, 1984).

While this policy will refer to all assistance recipients as "States" (since States receive most of EPA's assistance for continuing environmental programs), it applies equally to interstate and local agencies which receive similar support.

PRINCIPLES AND APPROACH

PRINCIPLES

This policy on performance-based assistance is designed to strengthen the EPA/State partnership by ensuring that EPA assistance facilitates the implementation of national environmental goals and promotes and sustains effective State environmental programs. The policy provides a framework within which EPA and States can clarify performance expectations and solve problems through a system of negotiation, according to a predictable but flexible set of national guidelines. This framework is built around several fundamental principles which will also guide the policy's implementation:

- o EPA will use performance-based assistance as a management tool to promote and recognize the effective performance of State environmental programs, and to ensure mutual accountability;
- o EPA Regions and programs will retain flexibility to tailor the performance-based approach to their needs and the policy's guiding principles;
- o States and EPA should share a common set of expectations regarding performance commitments and likely responses to identified problems. There should be no surprises as EPA and States relate to each other under this policy;
- o In negotiating State performance objectives, EPA and the States will seek realistic commitments and presume good faith in their accomplishment;
- o EPA and the States should maintain continuous dialogue for the rapid identification, solution and escalation of problems to top level managers;
- o EPA is fully committed to the success of State environmental programs and will seek opportunities to acknowledge their accomplishments.

APPROACH

The policy consists of three basic parts. The first section describes components of assistance agreements and how they are to be negotiated. The second section lays out EPA's expectations for the review and evaluation of assistance agreements and escalation of significant findings. The final section describes how EPA should respond to the findings of oversight: rewarding strong performance; applying corrective actions to solve problems; escalating significant conflicts to top management; and, in cases of persistent performance problems, imposing sanctions.

ASSISTANCE AGREEMENT

Clear expectations for program performance are crucial to an effective EPA/State partnership. Annual assistance agreements provide a key vehicle for expressing these performance expectations. Negotiated work programs, contained in an assistance agreement, form a fundamental basis for evaluation of State performance.

An assistance agreement should include three components: 1) a work program; 2) identification of support (other than federal assistance funds) a State needs from EPA to accomplish work program commitments; and, 3) a monitoring and evaluation plan.

APPROACH

EPA will require that the top national priorities as identified in Agency guidance be explicitly addressed in all State work programs. As EPA and States negotiate outputs, national priorities should be tailored to the real environmental conditions of each State and Region.

Assistance agreements may include outputs based on a State's priorities if those activities promise to deliver a greater environmental benefit than a national priority. State priorities should represent only those activities allowable under Federal statutes.

The appropriate mix of national and State priorities will vary from work program to work program, according to the unique features of each environmental program in each State. Regional offices must exercise their judgment and negotiate with States over what combination of national and State priorities can deliver the greatest environmental benefit with resources available after EPA's top national priorities have been addressed.

To better facilitate the negotiation of assistance agreements, the Agency's Operating Guidance should be strengthened through early State involvement in defining the order and scope of Agency priorities, a realistic consideration of funding limitations throughout its development, and specific identification of top priorities by Program Offices.

The development and oversight of an assistance agreement should be supervised by one senior Regional manager. EPA Regional Administrators are ultimately accountable for all assistance agreements made with States and should be familiar with the significant outputs and conditions of each agreement. They will be responsible for all major assistance-related decisions.

Assistance agreements may be amended by mutual agreement of the Regional Administrator and his/her State counterpart. A major change in national or State priorities, environmental emergencies, and the discovery of greatly overestimated commitments are examples of the types of circumstances which may necessitate renegotiation.

WORK PROGRAM

The work program should specify the outputs a State will produce under its federal assistance award (including the State match and level of effort) and the resources and time frames for completing the outputs.

- o Outputs should be measurable commitments, reflective to the extent possible of real environmental results. They should be ambitious but realistic commitments -- achievable objectives rather than lofty goals.

- o Work programs should focus on the objectives a State will meet, not how the State will accomplish an output.

- o Past performance should affect work programs. The good or poor performance of a State (or EPA) identified through oversight should influence the outputs and conditions contained in the next annual assistance agreement.

- o Work programs should specifically identify completion timeframes for outputs. EPA may also specify interim milestones and reporting requirements based on the priority needs of national programs and in keeping with good management practice. Reporting required under an assistance agreement should be consistent with EPA's information systems.

- o States should draft their work programs but may request assistance from EPA Regions in developing them.

- o States should be encouraged to volunteer a comprehensive work program that indicates activities, if any, outside those paid for with the federal and State funds included in the federal assistance agreement budget. Awareness of State responsibilites not related to federal assistance greatly enhances EPA's understanding of the scope of State environmental programs. Should a State choose to submit plans for its entire program, it need not indicate resource levels, but only program activities. EPA will not examine these activities in the course of assistance oversight except when necessary to ascertain the cause of a performance problem or to identify the corrective action which can best address a problem.

SUPPLEMENTAL EPA SUPPORT TO STATES

An assistance agreement should describe the types of support EPA will endeavor to provide in addition to an assistance award to enable a State to meet its work program outputs. Regions should consult with Headquarters about support which will require Headquarters action.

- The assistance agreement should describe the specific research, technical advice, guidance, regulations, contractor assistance or other support EPA will furnish States to enable them to fulfill specific work program outputs, making clear that accomplishment of the outputs is contingent upon the receipt of the EPA support. If EPA does not furnish the support described in the assistance agreement, the State will be relieved of output commitments contingent upon that support.

EVALUATION PLAN

The final component of an assistance agreement is a plan for EPA's evaluation of State performance. The evaluation plan should be mutually acceptable to EPA and a State.

- The plan should outline the schedule and scope of review EPA will conduct and should identify areas the evaluation will focus on.
- An evaluation plan must specify at least one on-site review per year, performance measures, and reporting requirements.

ASSISTANCE OVERSIGHT

EPA should oversee assistance agreements both informally and formally. Regions and States should maintain continuous dialogue so that States may alert EPA to problems they are experiencing and EPA can monitor State progress toward accomplishing outputs. EPA should also periodically conduct a formal evaluation of State performance. Oversight should identify the successes and problems States have encountered in meeting their commitments. Oversight also entails the joint analysis of identified problems to determine their nature, cause, and appropriate solution, and the escalation of significant findings (both positive and negative) to top managers in the Region and the State.

APPROACH

The formal assessment of State performance under assistance agreements should occur as part of EPA's comprehensive review and evaluation of State programs. This process is governed by EPA's Policy on Oversight of Delegated Programs which states that evaluations should focus on overall program performance (within a given program), rather than individual actions; they should be based on objective measures and standards agreed to in advance; they should be conducted on-site at least once a year by experienced, skilled EPA staff; they should contain no

surprises for States regarding content or expectations; and results should be documented in a written report.

EPA should adhere to these principles of oversight and to the scope and schedule of evaluation agreed to in the assistance agreement.

FEATURES

- States are responsible for notifying EPA in a timely manner of problems they experience in trying to accomplish their outputs. Likewise, EPA is responsible for promptly notifying States of its inability to supply promised support.
- Formal and informal evaluations by EPA should be constructive, conducted in the spirit of promoting good performance through problem-solving, not fault-finding.
- EPA's review and evaluation should emphasize overall performance within each program, concentrating on the composite picture revealed by total outputs and the quality of accomplishments.
- EPA should focus on a State's performance against work program outputs and conditions unless other aspects of a State's program (procedures, processes, other activities) must be examined to analyze a problem or find its appropriate solution.
- Formal review of State performance under the assistance agreement will entail, at a minimum, one on-site annual evaluation of each assistance agreement.
- Review and evaluation of assistance agreements should be conducted by skilled, experienced EPA evaluators.
- Oversight findings, successes as well as problems, should be documented to establish an accurate record of State performance over time.
- Assistance oversight should use existing reporting and evaluation mechanisms to the extent possible.

CONSEQUENCES OF OVERSIGHT

Once the assistance oversight process has identified and documented areas in which States have had success or difficulty in meeting their commitments under the assistance agreement, EPA should respond to those oversight findings. Potential responses range from rewards and incentives for good performance, application of corrective actions to solve uncovered problems, and the imposition of sanctions to address persistent, serious performance problems.

APPROACH TO OVERSIGHT RESPONSE

The Agency's goal in providing performance-based assistance is to promote national program objectives by supporting effective State environmental programs. Actions in response to oversight findings will be oriented toward finding the most effective ways to maintain or improve a State program's performance. Wherever possible, EPA should acknowledge excellent performance and help States solve problems which impede performance through corrective actions.

If problems regarding State achievement of work program commitments persist, EPA should pursue corrective steps as necessary based on experience with a given State. In general, sanctions should be imposed only when corrective actions have failed to solve persistent, significant performance problems. Before taking any sanction against a State, EPA should raise the performance issue to the highest levels of the Region and State necessary to negotiate an effective solution to the underlying problem. Sanctions should not be necessary if both parties are explicit, straightforward and realistic in their expectations of one another and approach the assistance agreement process in the spirit of cooperation.

INCENTIVES

- When a State meets its negotiated commitments or otherwise demonstrates success, the EPA Regional Office should take steps to acknowledge excellent State performance at the conclusion of the oversight review or at the end of the assistance agreement period.

- EPA is committed to publicizing State program success. Assured recognition of a State's environmental achievements is one of the most effective incentives at EPA's disposal. Publicizing accomplishments also benefits States with performance problems by providing them with models for success.

- In general, when a State demonstrates steady progress or a sustained level of high performance against negotiated commitments, EPA will institute the most appropriate rewards for achievement and incentives to promote continued success. Possible actions include but are not limited to:

    - Reducing the number, level, scope and/or frequency of reviews, reporting, or inspections to the minimum necessary for effective national program management;

    - Increasing State flexibility in using funds for special projects or State priorities;

    - Offering financial incentives (within existing resources), such as supplemental funding;

- Publicizing program successes through joint media presentations, awards, special letters of commendation to the Governor, or technology transfer to other States, EPA Regions and Headquarters.

CORRECTIVE ACTIONS

- o When oversight review uncovers a performance problem and determines its cause, EPA and the State must act on those findings by taking appropriate corrective steps.

- o Regions must initiate discussions with those States where problems have emerged, and work cooperatively with them to establish effective remedial strategies. This negotiated strategy should specify the time frame during which EPA will expect the problem to be resolved, and any interim milestones that will be necessary to monitor State progress.

- o Regions and States should follow a corrective action strategy based on the unique history and needs of a given State. This policy does not prescribe any particular sequence of corrective actions which must be undertaken, nor does it link specific corrective actions to particular types of performance problems.

- o Possible corrective actions include but are not limited to: providing EPA technical or managerial assistance, training, or additional resources; increasing the number and/or frequency of reporting and oversight requirements; and shifting State resources or otherwise renegotiating the assistance agreement.

- o If a Region is not able to provide a particular essential type of specialized assistance to a State, the Region should bring this corrective action requirement to the attention of Headquarters program managers for action as appropriate.

- o The intent of this policy is to see that EPA assumes a constructive approach in responding to State performance problems. When corrective actions have failed, or EPA and a State cannot agree on a corrective action, the Region may consider imposing a sanction. If a sanction is contemplated, the performance issue should be escalated to the highest appropriate level of EPA and the State. The following sequence should be observed whenever possible to ensure that significant problems receive prompt attention and are solved expeditiously:

  a. The Regional Division Director responsible for managing the assistance agreement will raise the issue to the attention of the Deputy Regional Admininstrator or Regional Administrator and advise his/her State counterpart of this notification.

b. The Regional Administrator will personally contact the State Environmental Director or other appropriate State manager to attempt to reach agreement on a corrective action, and to discuss the contemplated sanction.

c. National Program Managers should be advised of any State program problems warranting a sanction, and should be notified of any final decision to take such action.

d. If negotiations between the Regional Administrator and State counterpart fail to solve the problem, the Regional Administrator should judge under what circumstances notification of the Governor should occur.

SANCTIONS

- Regional Administrators must recognize that national responsibility for any State environmental program continues after the imposition of a sanction. They should make arrangements for completion of crucial outstanding outputs and should take steps to promote and sustain activities the State is performing effectively.

- As with corrective actions, any decision to impose a sanction must be based on EPA's particular experience with any given State. The Regional Administrator is responsible for determining when a problem may be significant enough to warrant such action, and for determining the appropriate type of sanction to apply.

- Gurrent regulations detail those sanctions traditionally available to EPA. They include: stop-work actions, withholding payment, suspension or termination of agreement for cause, agreement annulment, and other appropriate judicial or administrative actions.

- Adjusting the schedule for award or payment of assistance funds to quarterly, semi-annual, or other similar restrictive disbursement schedules is considered a sanction under the terms of this policy. (The customary mechanisms for the release of funds, such as standard letter of credit procedures, are not affected by this policy.)

- 40 CFR Part 30 Subpart L details formal procedures for resolving EPA/State disputes concerning assistance agreements. These procedures provide the opportunity for a State to document the grounds for any objections to the imposition of a sanction and for EPA to review its decision and address the State's objections on the basis of a written record.

Policy on Performance-Based Assistance
Question and Answer Package

PURPOSE

1. What is the purpose of this policy?

This policy lays out a framework for managing EPA's assistance to States for continuing environmental programs. It ties performance against negotiated work program outputs to federal financial assistance funds. It provides a consistent approach for managing assistance programs through negotiating work outputs, overseeing States' performance against agreed upon commitments, solving problems through corrective action strategies, and imposing sanctions when corrective actions have failed or EPA and a State cannot agree on a corrective action strategy.

Although the policy aims for a consistent approach toward managing assistance agreements, it provides Regional managers with flexibility to use their best judgment in applying the provisions of this policy to specific conditions that exist within their Regions and among programs.

TIMING

2. How will this policy affect FY'86 assistance agreements?

Any FY'86 assistance agreement negotiated after the issuance of this policy will be expected to conform to all of its provisions.

Assistance agreements for FY'86 agreed upon prior to the issuance of the Policy on Performance-Based Assistance will not have to be renegotiated. However, EPA's Regions will be expected to manage those assistance agreements according to the approach outlined in the "Oversight" and "Consequences of Oversight" sections of the policy.

FY'86 assistance agreements may be amended if a Region and State both agree to do so, under the terms of governing regulations.

All assistance agreements for FY'87 will be negotiated and managed according to this policy.

PRIORITIES

3. Why should EPA assistance support some State priorities in addition to national priorities?

"State priorities" refer to activities which are allowable for funding under federal statutes and which, although not always important enough nationwide to warrant a place

on or at the top of the national priority list, are of great concern to a particular State due to that State's unique environmental conditions. Recognizing that each of EPA's continuing environmental programs requires a combination of Federal and State resources, EPA may direct some of its assistance to support what States view as their most significant initiatives, if those activities promise to deliver a greater environmental benefit than a national priority. (National priorities include Regional priorities). In many instances, a State's priority activities will correspond closely to the list of national priorities in a given program, but the State may wish to distribute resources among those activities with a slightly different emphasis. The Regions have flexibility under this policy to negotiate support for those activities, consistent with Program Guidance.

4. How is the proper balance between national and State priorities to be achieved?

The appropriate mix of national and State priorities will vary from work program to work program, according to the unique features of each environmental program in each State. After ensuring that top national priorities as identified in the Agency Operating Guidance and Regional Guidance are included in a work program, Regional officials must exercise their judgment and negotiate with a State over what combination of national and State priorities can deliver the greatest environmental benefit given the remaining resources available.

GUIDANCE

5. How should the Agency Operating Guidance be refined to facilitate improved work planning?

EPA's annual Operating Guidance should clearly articulate national priorities. The Agency Priority list should be limited to those top priorities across all media. Each Program Office should also list priority activities in its media area, ranking them and identifying those which must be reflected in every State work program. The Program Office and Agency priority lists should complement one another. EPA will involve states early on in defining the order and scope of Agency and Program Office priorities.

EPA Regions should negotiate work program outputs based upon priorities as identified and ranked in the Guidance. Carefully delineated priorities will help ensure work programs that contain clear and measureable output commitments.

ESCALATION

6. What is the purpose of the escalation sequence outlined in the policy?

The Policy on Performance-Based Assistance establishes a problem-solving approach toward managing EPA assistance to States. It has been designed to promote the prompt identification and resolution of any problems States encounter in trying to fulfill the output commitments they agree to meet. The purpose in laying out a process by which issues can be surfaced quickly up the chain of command in both Regions and States is to ensure that significant problems receive the prompt attention of managers capable of solving those problems expeditiously. This sequence was included in the policy to address concern that State performance problems too frequently lie unattended at the lower levels of Regions and States where they become bigger problems.

While this process calls for consultation with State representatives and notification of the National Program Manager, EPA's Regions are responsible for managing the escalation sequence and rendering any final decision to impose a sanction.

7. Under what circumstances should the escalation sequence be followed?

The escalation sequence was designed specifically as a mechanism <u>for obtaining quick decisions</u> on whether EPA will impose a sanction on a State demonstrating performance problems. By establishing a predictable process for addressing these major conflicts, the policy seeks to <u>expedite</u>, not encumber with formality, resolution of the most serious problems likely to be encountered in an assistance relationship. While this escalation sequence applies uniquely to decisions regarding sanctions, the policy encourages the escalation of any significant information (positive and negative) regarding the performance of a State program within both Regions and States as appropriate.

QUARTERLY DISBURSEMENTS

8. Why does this policy classify quarterly disbursement schedules (or similar restrictive disbursement schedules) as sanctions?

Quarterly disbursement schedules involve awarding a portion of a State's grant each quarter or imposing quarterly performance-based restrictions on standard payment procedures. The Task Force agreed that putting States on quarterly or semi-annual disbursement schedules makes it difficult for

States to plan their programs, which are generally based on a yearly cycle. The Task Force felt that this type of action would signify a lack of faith in a State's ability to perform. Consequently, the Task Force viewed this type of action as a sanction which would reflect a State's inability to perform. As with other sanctions, quarterly disbursement schedules, should not be imposed before attempting to resolve the problem through more cooperative efforts (corrective actions) or after a demonstration of continued past performance problems by a State. As with all sanction decisions, the decision to place a State on a quarterly disbursement schedule should be made at the highest level of the Region.

A quarterly disbursement schedule signifies that the recipient's performance would be reviewed after each quarter to determine whether full release of funds would be made for the next quarter. Under the policy, putting a State on this type of schedule is considered to be a sanction.

9. Does this policy affect draw-downs under the letter of credit or other payment mechanisms?

The customary mechanisms for the release of funds are not affected by this policy. For example, letter of credit procedures, which are used by most Regions, provide a system whereby the recipient may promptly obtain the funds necessary to finance the Federal portion of a project, and which precludes the withdrawal of funds from the Department of the Treasury any sooner than absolutely necessary. (Payment procedures are described in the Assistance Administration Manual, 12/3/84, Chapter 33.) However, to the extent that Regions impose performance-related restrictions on letter of credit or other payment mechanisms, these restrictions would be considered a sanction under the policy.

10. How will this policy affect States currently on quarterly disbursement schedules?

Currently, a number of States are on quarterly disbursement schedules, primarily under the RCRA program. This policy does not prohibit the practice of imposing a quarterly schedule on a State, but it does consider this practice a sanction. It is not necessary to amend FY'85 or FY'86 assistance agreements that already place States on quarterly disbursement schedules. However, States should not automatically be either extended or taken off of quarterly schedules for the following year's grant cycle. In deciding whether to continue or discontinue quarterly disbursements, Regions should review State performance. A decision to continue or discontinue a quarterly schedule should be based on the presence or absence of performance problems, or successful or unsuccessful attempts to resolve the problems through corrective steps. Regional and programatic differences call for Regional managers to use their best judgment in making such decisions.

3241

11. What does this policy imply for withholding funds for problems that are not directly related to a State's performance of negotiated outputs under the assistance agreement?

This policy relates primarily to a State's performance of negotiated outputs under an assistance agreement. The decision to withhold funds from a State for output-related problems is a sanction which should be preceded by appropriate corrective actions and notification of high-level managers. However, funds are sometimes withheld for problems not directly related to a State's accomplishment of negotiated outputs under an assistance agreement. This may occur as a result of problems with a State's financial reporting and accounting system. For problems resulting from improper fiscal management or administrative practice (but not directly related to a State's performance on work outputs), the Regions may withhold funds in accordance with governing regulations.

OTHER QUESTIONS AND ANSWERS

12. Do assistance administration procedures need to be changed?

No. The policy was developed carefully so as not to conflict with the Agency's existing procedures for managing assistance agreements. Procedural details for administration are provided in the current (12/3/84) Assistance Administration Manual and they are consistent with the policy.

13. Why does the policy encourage the submission of comprehensive State work plans but not require them?

The current policy is consistent with existing regulations for State and Local Assistance (40 CFR Part 35, Subpart A). The policy encourages but does not require States to volunteer a comprehensive work program that indicates all activities the State is conducting under its environmental program.

14. Why does this policy call for a mutually acceptable evaluation plan?

The policy calls for EPA's evaluation of State performance to be described in a plan that is mutually acceptable to EPA and the State before the assistance agreement is finalized. This is consistent with the regulation which calls for the Regional Administrator to develop an evaluation plan in consultation with the State, and it reflects the principles of EPA's Policy on Oversight of Delegated Programs. Under the policy, changes to the original evaluation plan could occur as corrective actions.

15. How can the assistance agreement be amended?

Both the policy and the regulation allow for the assistance agreement to be amended at any time by mutual agreement between the Regional Administrator and the State. Either party (State or Region) may ask for amendment of the assistance agreement. (See 40 CFR Part 30-700, Subpart G.)

16. Do Regions have discretion to devise corrective action strategies and determine the timing and sequence of corrective actions?

Yes. Regions should attempt to implement corrective action strategies which respond to the problem in a timely and appropriate manner.

17. Why doesn't the policy deal with the "quality" of outputs?

While this Policy on Performance-Based Assistance focuses on State performance against measureable outputs, it complements and is in complete conformance with EPA's Policy on Oversight of Delegated Programs, which calls for review and evaluation activities which ensure quality State programs. Most of EPA's programs have instituted evaluation programs which examine not only "beans," but the quality of those beans. The oversight of work program outputs should occur as part of a comprehensive examination of State program performance.

18. How do State output commitments relate to SPMS commitments?

EPA should always discuss with States any State commitments to be included in EPA's Strategic Planning and Management System. Under a system of performance-based assistance, it is imperative that work program outputs which are also SPMS commitments be agreed upon in advance by Regions and States. Since poor performance may have fiscal consequences under a performance-based system, it would be unfair to hold States accountable for SPMS measures they were not aware of or did not accept.

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

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

AUG 25 1986

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Revised Policy Framework for State/EPA Enforcement Agreements

FROM: A. James Barnes
Deputy Administrator

TO: Assistant Administrators
Associate Administrator for Regional Operations
Regional Administrators
Regional Counsels
Regional Division Directors
Directors, Program Compliance Offices
Regional Enforcement Contacts

I am pleased to transmit to you a copy of the Agency's revised Policy Framework for State/EPA Enforcement Agreements. The Policy Framework, originally developed in 1984, along with program-specific implementing guidance, will continue to serve as the blueprint for our State/EPA enforcement relationship. The revised Policy Framework integrates new guidance developed since its original issuance. It reinforces the Guidance for the FY 1987 Enforcement Agreements Process which I transmitted to you on April 15, 1986 and should serve as your guide for negotiations and implementation of the Enforcement Agreements.

Although the intent of the revisions was to incorporate new policy, the process gave the Agency, with the assistance of the Steering Committee on the State/Federal Enforcement Relationship, an opportunity to reassess with the States our original approach. This process has clearly reaffirmed that the basic approaches we put in place in 1984 for an effective working partnership are sound and that all parties continue to be committed to its effective implementation.

The revisions incorporate into the Policy Framework addenda developed over the past two years in the areas of oversight of State civil penalties, involvement of the State Attorneys General

in the Enforcement Agreements process, and implementation of nationally managed or coordinated cases. The revisions also reflect, among other things, some of the points that have been emphasized in my annual guidances on the Enforcement Agreements process, the Evaluation Report on Implementation of the Agreements, and the Agency's Criminal Enforcement and Federal Facilities Compliance draft strategies.

I am firmly committed to full and effective implementation of the Policy Framework and am relying on your continued personal attention to this important effort. I plan to review the Region's performance in implementing the revised Policy Framework and the program-specific guidance, particularly the "timely and appropriate" enforcement response criteria, as part of my semi-annual regional visits.

I encourage you to share the revised Policy Framework with your State counterparts.

Attachments

cc: Steering Committee on the State/Federal Enforcement Relationship

7/7/87

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS

August 1986
(originally issued June 1984)

OFFICE OF ENFORCEMENT
AND COMPLIANCE MONITORING

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS[1/]

Achieving and maintaining a high level of compliance with environmental laws and regulations is one of the most important goals of Federal and State environmental agencies, and is an essential prerequisite to realizing the benefits of our regulatory programs. While States and local governments have primary responsibility for compliance and enforcement actions within delegated or approved States, EPA retains responsibility for ensuring fair and effective enforcement of Federal requirements, and a credible national deterrence to noncompliance. An effective State/Federal partnership is critical to accomplishing these goals, particularly given limited State and Federal resources. The task is difficult and one of the most sensitive in the EPA/State relationship, often compounded by differences in perspectives on what is needed to achieve compliance.

To establish an effective partnership in this area, and implement the State/Federal enforcement relationship envisioned in the Agency Oversight and Delegation policies, EPA called for State-specific enforcement agreements to be in place beginning FY 1985 which will ensure there are: (1) clear oversight criteria, specified in advance, for EPA to assess good State --or Regional-- compliance and enforcement program performance; (2) clear criteria for direct Federal enforcement in delegated States with procedures for advance consultation and notification; and (3) adequate State reporting to ensure effective oversight.

This document is the Agency's policy framework for implementing an effective State/Federal enforcement relationship through national program guidance and Regional/State agreements. It is the product of a Steering Committee effort involving all major national EPA compliance and enforcement program directors, State Associations, State officials from each of the media programs, and the National Governors' Association. EPA anticipates that the relationship, and the use of the agreements first established in FY 1985, will evolve and improve over time. They will be reviewed, and updated where necessary, on an annual basis. The Policy Framework will be subject to periodic review and refinement. Originally issued on June 26, 1984, the Policy Framework has been updated to reflect additional guidance developed since that time.

1/ The term Enforcement Agreement is used throughout to describe the document(s), be it an existing grant, SEA, MOU, or separate Enforcement Agreement, which contains the provisions outlined in the Policy Framework and related media-specific guidance. (See p.4 for description of form of agreement.)

Policy Framework Overview

The Policy Framework applies both to Headquarters program offices in their development of national guidance and to Regions in tailoring program guidance to State-specific needs and agreements. Although enforcement agreements are not required for States which do not have delegated or approved programs, Regions are encouraged to apply to these States certain policies and provisions where relevant, particularly advance notification and consultation protocols. The Policy Framework is divided into six sections, to address the following key areas:

A. State/Federal Enforcement "Agreements": Form, Scope and Substance (pages 4-7)

This section sets forth for Regions and States developing enforcement agreements, the areas that should be discussed, priorities, and the degree of flexibility that Regions have in tailoring national guidance to State-specific circumstances, including the form and scope of agreements.

B. Oversight Criteria and Measures: Defining Good Performance (pages 8-17)

This section is primarily addressed to EPA's national programs, setting forth criteria and measures for defining good performance generally applicable to any compliance and enforcement program whether administered by EPA or a State. It forms the basis for EPA oversight of State programs. A key new area that should receive careful review is the definition of what constitutes timely and appropriate enforcement response, Section B, Criterion #5, pages 11-13.

C. Oversight Procedures and Protocols (pages 18-20)

This section sets forth principles for carrying out EPA's oversight responsibilities, including approach, process and follow-up.

D. Criteria for Direct Federal Enforcement in Delegated States (pages 21-25)

This section sets forth the factors EPA will consider before taking direct enforcement action in a delegated State and what States may reasonably expect of EPA in this regard including the types of cases and consideration of whether a State is taking timely and appropriate enforcement action. It also establishes principles for how EPA should take enforcement action so that we can be most supportive of strengthening State programs.

E. Advance Notification and Consultation (pages 26-30)

This section sets forth EPA's policy of "no surprises" and what arrangements must be made with each State to ensure the

policy is effectively carried out by addressing planned inspections, enforcement actions, press releases, dispute resolution and assurances that publicly reported performance data is accurate.

F. State Reporting (pages 31-35)

This section sets forth seven key measures EPA will use, at a minimum, to manage and oversee performance by Regions and States. It summarizes State and regional reporting requirements for: (1) compliance rates; (2) progress in reducing significant non-compliance; (3) inspection activities; (4) formal administrative enforcement actions; and (5) judicial actions, at least on a quarterly basis. It also discusses required commitments for inspections and for addressing significant non-compliance.

In addition, it sets forth State and regional requirements for recordkeeping and evaluation of key milestones to assess the timeliness of their enforcement response and penalties imposed through those actions.

Appendices

Appendix A: Annual priorities and implementing guidance provides a list of the annual priorities for implementing the enforcement agreements and a summary index of what national program guidance has been or will be issued by programs to address the areas covered by the Policy Framework for State/EPA Enforcement Agreements.

Appendix B: Addendum to the Policy Framework on "Implementing Nationally Managed or Coordinated Enforcement Actions," issued January 4, 1985.

Appendix C: Guidance on "Division of Penalties with State and Local Governments," issued October 30, 1985.

A. STATE/FEDERAL ENFORCEMENT AGREEMENTS: FORM, SCOPE, AND SUBSTANCE

This section sets forth the form, scope and substance of the State/Federal Enforcement Agreements as well as the degree of flexibility Regions have in tailoring national policy to individual States.

1. What Form Should the Agreements Take?

We do not anticipate the need for a new vehicle or document for the State/Federal enforcement agreements. Wherever possible, State/Federal agreements should be set forth in one or more of a number of existing formats: grant agreements, State/EPA Agreements, Memoranda of Agreement or Understanding or a statement of Regional Office operating policy. Where there are new documents the appropriate linkage should be made to grants and SEA's as applicable. To the extent the areas covered by this Policy Framework translate into specific output commitments and formal reporting requirements, they may belong in the grant agreements as specified in national program grant guidance. Regions should discuss with the States at an early stage in the planning process their views on both the form and substance of the agreements. Once the basic agreements are in place, Regions should consider most aspects of the written agreements as multi-year, minimizing the need to renegotiate the agreements each year. Regions should conduct an annual review with the States to identify needed revisions and additions to the agreements to address identified problems or reflect further national guidance.

2. What is the Scope of the Agreements?

This guidance and the State/EPA agreements cover all aspects of EPA's civil compliance and enforcement programs, including those activities involving Federal facilities. The criminal enforcement program is not included and will be addressed elsewhere.

Discussions between EPA Regions and States should cover the minimum areas listed below:

- Oversight Criteria and Measures: Good Performance Defined --See Section B.
- Oversight Procedures and Protocols -- See Section C.
- Criteria for Direct EPA Enforcement -- See Section D.
- Procedures for Advance Notification and Consultation -- See Section E.
- Reporting Requirements -- See Section F.

However, Regions and States are not expected to duplicate national Program guidance in their agreements -- we are not looking for lengthy documents. Written agreements resulting from these discussions could cover topics which are not clearly specified elsewhere. If not otherwise specified, national policy will apply and should be so stated in the state agreements. Although not required for non-delegated or unapproved programs, Regions are encouraged to apply certain policies and provisions where relevant, particularly advance notification and consultation protocols.

This Policy Framework and the resulting State/EPA Enforcement Agreements are intended to enhance enforcement of State and Federal environmental laws. Each agreement should be careful to note that nothing in them or this Policy Framework constitutes or creates a valid defense to regulated parties in violation of environmental statutes, regulations or permits.

3. Parties to the Agreements and Participants in the Process.

It is important to involve the appropriate State and regional personnel early in the agreements process. In the Regions, this means involving the operating level program staff and the Regional Counsel staff along with top management; and in the States it means the participation of all the organizational units responsible for making enforcement work, e.g., State program staff, those responsible for oversight of field operations, staff attorneys, and the State Attorneys General (AG). The State agency should have the lead in establishing effective relationships with the State AG or State legal staff, as appropriate. The Regions should ensure that there is adequate communication and coordination with these other participants in the enforcement process. States are strongly encouraged to commit advance notification and consultation procedures/protocols between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Region should seek to incorporate these written protocols into the State/EPA Enforcement Agreements (See discussion on pages 17 and 26-27).

4. What Flexibility do Regions Have?

Regions must be allowed substantial flexibility to tailor agreements to each State, as the agreements process is intended to be based upon mutual understandings and expectations. This flexibility should be exercised within the framework of national program policy and the Agency's broad objectives. Specifically,

a. Oversight Criteria:

Oversight criteria would generally be provided in national program guidance but Regions should tailor their general oversight to address environmental and other priorities in the Region or State, and other specific areas of concern that are unique to an individual State, including any issues raised by the scope of State enforcement authorities, unique technical problems and available expertise, and areas targeted for improvement.

In addition, Regions and States should adapt national timely and appropriate enforcement response criteria to State-specific circumstances to fit State authorities and procedures as follows:

(i) Timeliness: The national program guidance on key milestones and timeframes should be applied to all States with adjustments to accommodate each State's laws and legal procedures. Such adjustment can be important particularly where the proposed enforcement action cannot possibly take place within the proposed timeframes or where a State chooses to address problems more expeditiously than the Federal guidelines. The trigger points should be realistic expectations, but within modest variance from the national goals. Other adjustments should not be made solely because a State program consistently takes longer to process these actions due to constraints other than procedural requirements, e.g., resources. However, if this is the case the timeframes should serve as a basis for reviewing impediments with the State to identify how problems can be overcome and to explore ways over time for the State program to perform more efficiently. (See discussion in Section B, p.13)

The timeframes are not intended to be rigid deadlines for action, but rather are: (1) general targets to strive for in good program performance; (2) trigger points that EPA and States should use to review progress in individual cases; and (3) presumptions that, if exceeded, EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State. It is not the Agency's intention to assume the major enforcement role in a delegated State as a result of these timeframes. The trigger points should be realistic expectations, but within modest variance from the national goals. It must also be realized that in some programs we need experience with the timeframes to assess how reasonable and workable they really are and further, that judgments on what is a reasonable timetable for action must ultimately be case specific. For example, complex compliance problems may require longer-term studies to define or achieve an appropriate remedy.

(ii) Appropriate Enforcement Response:

(a) Choice of response: National medium-specific program guidance applicable to State programs on appropriate enforcement response should be followed (See Appendix A). There is usually sufficient flexibility within such guidance to allow the exercise of discretion on how best to apply the policies to individual cases. The Agency is making every effort to set forth a consistent national policy on enforcement response for each program. It is therefore essential that in setting forth clear expectations with States this guidance not be altered.

(b) Definitions of formal enforcement actions: Regions should reach agreement with States as to how certain State enforcement actions will be reported to and interpreted by EPA. This should be based upon the essential characteristics and impact of State enforcement actions, and not merely upon what the actions are called. National program guidance setting forth consistent criteria for this purpose should be followed, pursuant to the principles listed in Section B, pages 11-12.

(c) Civil Penalties and Other Sanctions: Program guidance must also be followed on where a penalty is appropriate. Regions have the flexibility to consider other types of State sanctions that can be used as effectively as cash penalties to create deterrence, and determine how and when it might be appropriate to use these sanctions consistent with national guidance. Regions and States should reach understanding on documentation to evaluate the State's penalty rationale. Maximum flexibility in types of documentation will be allowed to the State.

5. Procedures and Protocols on Notification and Consultation:

Regions and States should have maximum flexibility to fashion arrangements that are most conducive to a constructive relationship, following the broad principles outlined in this document.

6. State-Specific Priorities:

In addition, while of necessity EPA must emphasize commitments by States to address significant noncompliance and major sources of concern, Regions should be sensitive to the broad concerns of State Programs including minor sources and the need to be responsive to citizen complaints. Regions should discuss the State's perspective on both its own and national priorities, and take into account State priorities to the extent possible.

7. What Does it Mean to Reach Agreement?

To the extent possible, these agreements should reflect mutual understandings and expectations for the conduct of Federal and State enforcement programs. At a minimum, EPA Regions must: (1) be clear and ensure there are "no surprises"; (2) make arrangements with the States so that actions taken are constructive and supportive; and (3) tailor the application of the national program guidance to the States' programs and authorities. Where mutual agreement cannot be achieved, clear unilateral statements of policy will have to suffice, with commitments to try to seek further agreements over time. Areas where agreements have not been reached should be clearly identified for senior Agency management attention.

B. OVERSIGHT CRITERIA AND MEASURES: DEFINING GOOD PERFORMANCE

The first step to achieving strong and effective national compliance and enforcement programs is a clear definition of what constitutes good performance. Because each of EPA's programs embodies unique requirements and approaches, good performance must be defined on a program-specific basis. Adjustments also must be made in applying criteria and measures to the States and Regions, based upon their environmental problems and authorities. Nevertheless, there are several basic elements which will generally be applicable to a good compliance and enforcement program in any of our medium-specific programs. The following outlines the criteria and measures that form the common framework for defining a quality program. The framework is to serve as a guide to the national programs as they develop, in cooperation with Regions and States, the criteria they will use to assess their performance in implementing national compliance and enforcement programs.

The framework is not intended to be adopted word-for-word by the programs, nor is there any format implied by this list. What is important are the concepts. This section addresses only the elements of a quality program. Issues such as how oversight should be conducted are addressed in Section C. Each national program may choose to focus on certain elements of performance in a given year.

These criteria and measures are intended to apply to the implementing agency, that is, to an approved or delegated State or to an EPA Region in the event a program is not "delegated." Our philosophy is that EPA should be held to the same standards as we would apply to the States if they were implementing the program. Portions may also apply to those non-approved or non-delegated States which are administering portions of the programs under cooperative agreements.

CRITERION #1 Clear Identification of and Priorities for the Regulated Community

A quality compliance and enforcement program is based upon an inventory of regulated sources which is complete, accurate and current. The data should in turn be accessible, preferrably in automated data systems which are accurate, and up-to-date. The scope of coverage for the inventory should be appropriately defined by each program as it is probably not feasible to identify every person or facility subject to environmental laws and regulations, especially when they are numerous small sources. Those priorities should be clearly established in national program guidance and tailored to State-specific circumstances as appropriate.

The inventory of sources or other relevant information on sources should be utilized as a basis for a priority-setting system established by the administering agency. These priorities should reflect and balance both national priorities and state-specific priorities. A quality program uses those priorities as a basis for program management. National priorities are generally set forth in EPA's Operating Year Guidance and program-specific compliance and enforcement strategies. State-specific priorities should address not only efforts to achieve broad based compliance but also should assess the expected environmental impact of targeting enforcement and compliance monitoring to specific geographic areas or against certain source types. Ambient monitoring systems can provide an important point of departure for priority-setting.

CRITERION #2 Clear and Enforceable Requirements

Requirements established through permits, administrative orders and consent decrees should clearly define what a specific source must do by a date certain, in enforceable terms. It is not EPA's intention in this policy framework to suggest that EPA conduct a top down review of a State or Regional program's entire regulatory program. However, areas where provisions cannot be enforced due to lack of clarity or enforceable conditions should be identified and corrected.

CRITERION #3 Accurate and Reliable Compliance Monitoring

There are four objectives of compliance monitoring:

- reviewing source compliance status to identify potential violations;
- helping to establish an enforcement presence;
- collecting evidence necessary to support enforcement actions regarding identified violations; and
- developing an understanding of compliance patterns of the regulated community to aid in targeting activity, establishing compliance/enforcement priorities, evaluating strategies, and communicating information to the public.

The two factors in assessing the success of a compliance monitoring program are coverage and quality.

Coverage: Each program's strategy should reflect a balance between coverage: (1) for breadth, to substantiate the reliability of compliance statistics and establish an enforcement presence; and (2) for targeting those sources most likely to be out of compliance or those violations presenting the most serious environmental or public health risk.

Inspections: Each administering agency should have a written and reviewable inspection strategy, reviewed and updated annually, as appropriate: in some programs a multi-year strategy may be preferable. The strategy should demonstrate the minimum coverage for reliable data gathering and compliance assessment set forth in national program guidance and meet legal requirements for a "neutral inspection scheme." The strategy should also address how the inspections will most effectively reach priority concerns and potential noncompliers including the use of self-reported data, citizen complaints and historic compliance patterns. The strategy will be assessed on whether it embodies the appropriate mix of categories of inspections, frequency and level of detail. Inspections should then be carried out in a manner consistent with the inspection strategy.

Source Self-Monitoring and Reporting: The administering agency should ensure that minimum national requirements for source self-monitoring and reporting are imposed and complied with, either through regulation or permit condition, pursuant to national guidance as appropriate.

Quality: Each program should define minimum standards for quality assurance of data and data systems, and timely and complete documentation of results. At a minimum, each program should have a quality assurance program to insure the integrity of the compliance monitoring program. This quality assurance program should address essential lab analysis and chain of custody issues as appropriate.

Inspections: Inspectors should be able to accurately document evidence needed to determine the nature and extent of violations, particularly the presence of significant violations. Documentation of inspection findings should be timely, complete and able to support subsequent enforcement responses, as appropriate to the purpose of the inspection. Federal oversight inspections should corroborate findings. Oversight inspections are a principal means of evaluating both the quality of an inspection program and inspector training.

Source Self-Monitoring: The administering agency should have a strategy for and implement quality assurance procedures, with sufficient audits and follow-up action to ensure the integrity of self-reported data.

CRITERION #4 High or Improving Rates of Continuing Compliance

The long-term goal of all of our compliance and enforcement programs is to achieve high rates of continuing compliance across the broad spectrum of the regulated community. Until that goal is achieved, compliance rates can fluctuate for several reasons. In assessing how well an administering agency is meeting the goal of high or improving rates of

compliance, other factors must be assessed in addition to the overall compliance rate. Improved inspections or inspection targeting often can result in a temporary decrease in rates of compliance until newly found violations are corrected and the regulated community responds to the more vigorous attention to specific compliance problems. In these instances, a decrease in the rate of compliance would be a sign of a healthy compliance and enforcement program. At a minimum, programs should design mechanisms to track the progress of all sources out of compliance through major milestones up to achieving final physical (full) compliance with applicable regulations and standards.

Program quality must also be assessed in terms of how well the program is returning significant noncompliers to compliance. The use of lists of significant violators and specific commitments to track and resolve significant noncompliance should be part of the planning process of the administering agency, and, between States and Regions. The lists should be developed in consultation with the States and continually updated each fiscal year and sources on it tracked through to final physical compliance.

CRITERION #5 Timely and Appropriate Enforcement Response

Quality enforcement programs ensure that there is timely and appropriate enforcement response to violations. Expectations for what constitutes timely and appropriate action should be based upon national program guidance, tailored to the procedures and authorities in a given State and assessed in regard to particular circumstances surrounding each instance of violation. National programs must establish benchmarks or milestones for what constitutes timely and appropriate enforcement action, forcing progress in enforcement cases toward ultimate resolution and full physical compliance. This concept is a key new feature to our compliance and enforcement program implementation.

In designing oversight criteria for timely enforcement response, each program will attempt to capture the following concepts:

1. A set number of days from "detection" of a violation to an initial response. Each program should clearly define when the clock starts, that is, how and when a violation is "detected."

2. Over a specified period of time, a full range of enforcement tools may be used to try to achieve compliance, including notices of violation, warning letters, phone calls, site visits, etc. The adequacy of these responses will be assessed based upon whether they result in expeditious compliance.

3. A prescribed number of days from initial action within which a determination should generally be made, that

either compliance has been achieved or an administrative enforcement action has been taken (or a judicial referral has been initiated, as appropriate) that, at a minimum:

- Explicitly requires recipient to take some corrective/remedial action, or refrain from certain behavior, to achieve or maintain compliance;
- Explicitly is based on the issuing Agency's determination that a violation has occurred;
- Requires specific corrective action, or specifies a desired result that may be accomplished however the recipient chooses, and specifies a timetable for completion;
- May impose requirements in addition to ones relating directly to correction (e.g., specific monitoring, planning or reporting requirements); and
- Contains requirements that are independently enforceable without having to prove original violation and subjects the person to adverse legal consequences for noncompliance.

4. A specific point at which a determination is made either that final physical compliance has been achieved, that the source is in compliance with a milestone in a prior order, or that escalation to a judicial enforcement action has been taken if such actions have not already been initiated.

   In developing program-specific guidance, this milestone may be treated more as a concept than as a fixed timetable, taking into account the fact that the administrative hearing process and the State Attorney General's actions are not within the direct control of the administering agency.[2/] What is important, is the embodiment of the concept of timely follow-up and escalation, in requirements for tracking and management.

5. Final physical compliance date is firmly established and required of the facility. Although it is not possible for programs to establish any national timeframes, the concept of final physical compliance by a date certain should be embodied in EPA and State enforcement actions.

6. Expeditious physical compliance is required. It may not be possible for programs to define "expeditious" in terms of set time periods, but some concept of "expeditious" (i.e., that the schedule will result in a return to full physical compliance as quickly as can reasonably be expected) should be embodied in each program's guidance.

2/ See p. 17, 26-27, regarding the State Agency's responsibilities for coordinating with the State Attorney General or other legal staffs.

Timeframes established by the national programs for each of these minimum milestones are principally intended to serve as trigger points and not as absolute deadlines, unless specifically defined as such. Whatever timeframes are established are intended to apply only to Federal requirements as adopted by the States, and do not apply to State statutes and requirements that go beyond those required by Federal law. The timeframes are key milestones to be used to manage the program, to trigger review of progress in specific cases, and a presumption of where EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State.

Timeframes and their use in management will evolve over time as they will have to reflect different types of problems that may warrant different treatment. For example, programs will have to take into account such factors as new types of violations, the difference between operating and maintenance violations versus those that require installation of control equipment, emergency situations which may fall outside the scope of the normal timeframes for action, etc.

Administering agencies are expected to address the full range of violations in their enforcement responses considering the specific factors of the case and the need to maintain a credible enforcement presence. However, the new management approach setting forth desired timeframes for timely action could have resource implications beyond what is currently available to or appropriate for the full range of sources and violations. Therefore, as we begin to employ the concept of timely and appropriate enforcement response, at a minimum, the focus should be on the greatest problems, i.e., the significant noncompliers. Over time, and with more experience, this concept should be phased-in to cover a broader range of violations. This in no way should constrain the programs from applying the concepts broadly.

The choices of appropriate response are to be defined within the constraints of national program guidance and applied by the administering agency based upon consideration of what is needed: (1) in general, to achieve expeditious correction of the violation, deterrence to future noncompliance and fairness; and (2) in individual circumstances, based upon the gravity of the violation, the circumstances surrounding the violation, the source's prior record of compliance and the economic benefits accrued from noncompliance. With three exceptions, the form of the enforcement response is not important by itself, as long as it achieves the desired compliance result. The exceptions generally fall into the following three categories:

1. If compliance has not been achieved within a certain timeframe, the enforcement response should meet minimum requirements, usually associated with at least the issuance of an administrative order (see criteria listed above) or judicial referral.

2. Because of the need to create a strong deterrence to noncompliance, it is important to assess penalties in certain cases, and only certain types of enforcement actions can provide penalties. Each program must clearly define, as appropriate, the circumstances under which nothing less than a penalty or equivalent sanction will be acceptable. (See Criterion #6 below.)

3. In some circumstances, a judicial action or sanction is usually the only acceptable enforcement tool. Each program must define these circumstances as appropriate. For example, a judicial action might be required where a compliance schedule for Federal requirements goes beyond Federal statutory deadlines.

A good program should have adequate legal authority to achieve the above objectives. Where deficiencies have been identified, steps should be taken to fill identified gaps.

CRITERION # 6 Appropriate Use of Civil Judicial and Administrative Penalty and Other Sanction Authorities to Create Deterrence[3/]

1. Effective Use of Civil Penalty Authorities and Other Sanctions:

Civil penalties and other sanctions play an important role in an effective enforcement program. Deterrence of noncompliance is achieved through: 1) a credible likelihood of detecting a violation, 2) the speed of the enforcement response, and 3) the likelihood and severity of the sanction. While penalties or other sanctions are the critical third element in creating deterrence, they can also contribute to greater equity among the regulated community by recovering the economic benefit a violator gains from noncompliance over those who do comply.

Effective State and regional programs should have a clear plan or strategy for how their civil penalty or other sanction authorities will be used in the enforcement program. At a minimum, penalties and/or sanctions should be obtained where programs have identified that a penalty is appropriate (see Criterion #5 above).

The anticipated use of sanctions should be part of the State/EPA Enforcement Agreements process, with Regions and States discussing and establishing how and when the State generally plans to use penalties or other approaches where some sanction is required.

3/ Excerpts from the Policy on "Oversight of State Civil Penalties" 2/28/86. The focus of the policy is on both civil judicial and civil administrative penalties, and does not cover criminal penalties.

EPA generally prefers the use of cash penalties to other types of sanctions.[4/] However, there may be other sanctions which are preferable to cash penalties in some circumstances. In particular, States may have a broader range of remedies than those available at the Federal level. Examples of other sanctions may be: pipeline severance (UIC), license revocation (FIFRA) or criminal sanctions including fines and/or incarceration. National program guidance should clarify in general terms how the use of other types of sanctions fits into the program's penalty scheme at the Federal and State levels, e.g., whether they are substitutes for or mitigate a cash penalty.[5/] In any case, States are urged to use cash penalty authorities in those cases for which a penalty is "appropriate" and/or to use other sanctions pursuant to these agreements with the Regions.

EPA encourages States to develop civil administrative penalty authority in addition to civil judicial penalty authority, and to provide sufficient resources and support for successful implementation where they do not already have this authority. In general, a well designed administrative penalty authority can provide faster and more efficient use of enforcement resources, when compared to civil judicial authorities. Both civil judicial and administrative penalty authorities are important, complementary, and each should be used to greatest advantage. EPA is similarly seeking to gain administrative penalty authority for those Federal programs which do not already have it. To support State efforts to gain additional penalty authorities, EPA will share information collected on existing State penalty authorities and on the Federal experience with the development and use of administrative authorities.

2. Oversight of Penalty Practices:

EPA Headquarters will oversee Regional penalties to ensure Federal penalty policies are followed. This oversight will focus both on individual penalty calculations and regional penalty practices and patterns.

4/ In limited circumstances where they meet specified criteria, EPA and DOJ policies and procedures allow for alternative payments -- such as beneficial projects which have economic value beyond the costs of returning to compliance -- in mitigation of their penalty liability.

5/ Until program-specific guidance is developed to define the appropriate use of civil sanctions, the Region and State should consider whether the sanction is comparable to a cash penalty in achieving compliance and deterring noncompliance. Costs of returning to compliance will not be considered a penalty. Criminal authorities, while not clearly comparable to cash penalties, can be used as effectively as cash penalties to create deterrence in certain circumstances.

EPA will review state penalties in the context of the State's overall enforcement program not merely on its use of cash penalties. While individual cases will be discussed, the program review will more broadly evaluate how penalties and other sanctions can be used most effectively. The evaluation will consider whether the penalties or other sanctions are sought in appropriate cases, whether the relative amounts of penalties or use of sanctions reflect increasing severity of the violation, recalcitrance, recidivism etc., and bear a reasonable relationship to the economic benefit of noncompliance (as applicable) and whether they are successful in contributing to a high rate of compliance and deterring noncompliance. EPA may also review the extent to which State penalties have been upheld and collected.

3. Development and Use of Civil Penalty Policies:

EPA Regions are required to follow written Agency-wide and program specific penalty policies and procedures.

EPA encourages States to develop and use their own State penalty policies or criteria for assessing civil penalties. The advantages of using a penalty policy include:

- leads to improved consistency;
- is more defensible in court;
- generally places the Agency in a stronger position to negotiate with the violator;
- improves communication and support within the administering agency and among the agency officials, attorneys and judges especially where other organizations are responsible for imposing the penalty;
- when based on recoupment of economic benefit and a component for seriousness, deters violations based upon economic considerations while providing some equity among violators and nonviolators; and
- can be used by judges as a basis for penalty decisions.

EPA encourages States to consider EPA's penalty policies as they develop their own penalty policies.

4. Consideration of Economic Benefit of Noncompliance:

To remove incentives for noncompliance and establish deterrence, EPA endeavors, through its civil penalties, to recoup the economic benefit the violator gained through noncompliance. EPA encourages States to consider and to quantify where possible, the economic benefit of noncompliance where this is applicable. EPA expects States to make a reasonable effort to calculate economic benefit and encourages States to attempt to recover this amount in negotiations and litigation. States may use the Agency's computerized model (known as BEN) for calculating that benefit or different approaches to calculating economic benefit. EPA will provide technical assistance to States on calculating the economic benefit of noncompliance, and has made the BEN computer model available to States.

CRITERION #7 Accurate Recordkeeping and Reporting

A quality program maintains accurate and up-to-date files and records on source performance and enforcement responses that are reviewable and accessible. All recordkeeping and reporting should meet the requirements of the quality assurance management policy and procedures established by each national program consistent with the Agency's Monitoring Policy and Quality Assurance Management System. Reports from States to Regions, Regions to Headquarters must be timely, complete and accurate to support effective program evaluation and priority-setting.

State recordkeeping should include some documented rationale for the penalties sought to support defensibility in court, enhance Agency's negotiating posture, and lead to greater consistency. These records should be in the most convenient format for administration of the State's penalty program to avoid new or different recordkeeping requirements.

CRITERION #8 Sound Overall Program Management

A quality program should have an adequate level, mix and utilization of resources, qualified and trained staff, and adequate equipment. The intention here is not to focus on resource and training issues unless there is poor performance identified elsewhere in the program. In those instances, these measures can provide a basis for corrective action by the administering agency. There may be, however, some circumstances in which base level of trained staff and equipment can be defined by a national program where it will be utilized as an indicator of whether the program is adequate.

Similarly, a good compliance and enforcement program should have a clear scheme for how the operations of other related organizations, agencies and levels of government fit into the program, especially the State Attorneys General or other appropriate State legal organizations. The State Agency should, at a minimum, ensure that the State AG, internal legal counsel, or other appropriate government legal staff are consulted on the enforcement commitments the State is making to EPA to assure that the level of legal enforcement support and associated resources needed to accomplish the agreed-upon goals are secured. This coordination should result in timely review of initial referral packages, satisfactory settlement of cases, as appropriate, timely filing and prosecution of cases, and prompt action where dischargers violate consent decrees. (See Section E, p. 26-27).

C. OVERSIGHT PROCEDURES AND PROTOCOLS

This section addresses how EPA should conduct its oversight function, its approach, process and follow-up, to build and improve individual programs and overall national performance. On May 31, 1985, the Agency issued the Policy on Performance-Based Assistance, which contains guidance on how Regions should oversee assistance agreements. Both of these policies call for oversight with a problem-solving orientation with clear identification of actions needed to correct problems or recognize good performance.

1. Approach

The goal of oversight should be to improve the State (or Regional) compliance and enforcement program. To accomplish this, oversight should be tailored to fit State performance and capability. The context must be the whole State compliance and enforcement program, although EPA's focus for audit purposes will be on national priorfty areas.

No new oversight process is intended here. Existing procedures such as mid-year reviews, periodic audits and oversight inspections as established by each program and Region should be used. Administering agencies should identify strengths and weaknesses of the State and Federal programs and develop mutual commitments to correct problems.

EPA oversight of State performance should be consistent with the following principles:

a. Positive oversight findings should be stressed as well as the negative ones.

b. Positive steps that can be taken to build the capability of State programs in problem areas should be emphasized. This should include providing technical assistance and training -- by EPA staff to the extent possible.

c. EPA action to correct problems should vary, depending on the environmental or public health effect of the problem and whether it reflects a single incident or a general problem with the State program.

d. The States should be given an opportunity to formally comment on EPA's performance. Regions should provide information to the States that is available on its performance against the national standards, including their performance on meeting the "timely and appropriate" criteria, as well as their performance on commitments to that State.

e. EPA should give States sufficient opportunity to correct identified problems, and take corrective action pursuant to the criteria for direct enforcement established in Section D.

f. EPA should use the oversight process as a means of transferring successful regional and State approaches from one Region or State to the other.

2. Process

Several actions can result in the most constructive review of the State's programs:

a. To the extent possible, files to be audited will be identified in advance, with some provision for random review of a percentage of other files if necessary.

b. Experienced personnel should be used to conduct the audit/review -- EPA staff should be used to the extent possible to build relationships and expertise.

c. There should be an exit interview and every opportunity should be made to discuss findings, comment on and identify corrective steps based upon a review draft of the written report.

d. Opportunity should be made for staffs interacting on enforcement cases and overseeing State performance to meet personally rather than rely solely upon formal communications -- this applies to both technical and legal staffs.

3. Follow-Up and Consequences of Oversight

When State performance meets or exceeds the criteria and measures for defining good program performance, EPA should reward this performance in some of the following ways:

a. reduce the number, level or scope, and/or frequency of reviews or of some reporting requirements consistent with statutory or regulatory requirements;

b. reduce the frequency and number of oversight inspections; and/or

c. allow the program more flexibility in applying resources from an almost exclusive focus on national priorities e.g., major sources, to addressing more priorities of concern to the State e.g., minor sources.

When State performance fails to meet the criteria for good State performance, EPA may take some of the following actions, as appropriate:

a. suggest changes in State procedures;

b. suggest changes in the State's use of resources or training of staff;

c. provide technical assistance;

d. increase the number of oversight inspections and/or requ submittal of information on remedial activities;

e. provide other workable State models and practices to States with problems in specific areas and match State staff with expertise in needed area;

f. if State enforcement action has not been timely and appropriate, EPA may take direct enforcement action;

g. track problem categories of cases more closely;

h. grant awards could be conditioned by targeting additional resources to correct identified problems or reduced based on poor performance where such performance is not due to inadequate resources; and/or

i. consider de-delegation if there is continued poor performance.

D. CRITERIA FOR DIRECT FEDERAL ENFORCEMENT IN DELEGATED STATES

This section addresses criteria defining circumstances under which approved State programs might expect direct Federal enforcement action and how EPA will carry out such actions so as to be most supportive of strengthening State programs.

1. When Might EPA Take Direct Enforcement Action in Approved States?

A clear definition of roles and responsibilities is essential to an effective partnership, since EPA has parallel enforcement authority under its statutes whether or not a State has an approved or delegated program. As a matter of policy in delegated or approved programs, primary responsibility for action will reside with State or local governments with EPA taking action principally where a State is "unwilling or unable" to take "timely and appropriate" enforcement action. Many States view it as a failure of their program if EPA takes an enforcement action. This is not the approach or view adopted here. There are circumstances in which EPA may want to support the broad national interest in creating an effective deterrent to noncompliance beyond what a State may need to do to achieve compliance in an individual case or to support its own program.

Because States have primary responsibility and EPA clearly does not have the resources to take action on or to review in detail any and all violations, EPA will circumscribe its actions to the areas listed below and address other issues concerning State enforcement action in the context of its broader oversight responsibilities. The following are four types of cases EPA may consider taking direct enforcement action where we have parallel legal authority to take enforcement action:

a. State requests EPA action
b. State enforcement response is not timely and appropriate
c. National precedents (legal or program)
d. Violation of EPA order or consent decree

In deciding whether to take direct enforcement in the above types of cases, EPA will consider the following factors:

- Cases specifically designated as nationally significant (e.g., significant noncompliers, explicit national or regional priorities)
- Significant environmental or public health damage or risk involved
- Significant economic benefit gained by violator
- Interstate issues (multiple States or Regions)
- Repeat patterns of violations and violators

How these factors are applied for the various types of cases is discussed below.

a. State requests EPA action:

The State may request EPA to take the enforcement action for several reasons including but not limited to: where State authority is inadequate, interstate issues involving multiple States which they cannot resolve by themselves, or where State resources or expertise are inadequate, particularly to address the significant violation/violators in the State in a timely and appropriate manner. EPA should honor requests by States for support in enforcement. EPA will follow its priorities in meeting any such requests for assistance, considering significance of environmental or public health damage or risk involved, significant economic benefit gained by a violator, repeat patterns of violations and violators. Based on this general guidance, each program office may develop more specific guidance on the types of violations on which EPA should focus. Regions and States are strongly encouraged to plan in advance for any such requests for or areas needing EPA enforcement assistance during the State/EPA Enforcement Agreements Process.

b. State Enforcement is not "Timely and Appropriate"

The most critical determinant of whether EPA will take direct enforcement action in an approved State is whether the State has or will take timely and appropriate enforcement action as defined by national program guidance and State/Regional agreements. EPA will defer to State action if it is "timely and appropriate" except in very limited circumstances: where a State has requested EPA action (a, above), there is a national legal or program precedent which cannot be addressed through coordinated State/Federal action (c, below), EPA is enforcing its own enforcement action (d, below) or the case of a repeat violator, where the State response is likely to prove ineffective given the pattern of repeat violations and prior history of the State's success in addressing past violations.

(i) Untimely State Enforcement Response:

If a State action is untimely, EPA Regions must determine after advance notification and consultation with the State whether the State is moving expeditously to resolve the violation in an "appropriate" manner.

(ii) Inappropriate State Action:

EPA may take direct action if the State enforcement action falls short of that agreed to in advance in the State/EPA Enforcement Agreements as meeting the requirements of a formal enforcement response (See Section B, page 13) where a formal enforcement response is required. EPA may also take action if the content of the enforcement action is inappropriate, i.e., if remedies are

7201

clearly inappropriate to correct the violation, if compliance schedules are unacceptably extended, or if there is no appropriate penalty or other sanction.

(iii) Inappropriate Penalty or other Sanction:

For types of violations identified in national program guidance as requiring a penalty or equivalent sanction, EPA will take action to recover a penalty if a State has not assessed a penalty or other appropriate sanction. EPA generally will not consider taking direct enforcement action solely for recovery of additional penalties unless a State penalty is determined to be grossly deficient after considering all of the circumstances of the case and the national interest. In making this determination, EPA will give every consideration to the State's own penalty authority and any applicable State penalty policy. EPA will consider whether that State's penalty bears any reasonable relationship to the seriousness of the violation, the economic benefit gained by the violator (where applicable) and any other unique factors in the case. While this policy provides the basis for deciding whether to take direct Federal action on the basis of an inadequate penalty, this issue should be discussed in more detail during the agreements process to address any state-specific circumstances and procedures established to address generic problems in specific cases. Where identified in national guidance and agreed to between the Region and State, other sanctions will be acceptable as substitutes or mitigation of penalty amounts in these considerations.

Program-specific national guidance on expectations for State penalty assessments may be developed in consultation with the States and applied for determining adequacy of penalty amounts after being applied in practice in EPA Regions. It is the current expectation of Agency managers that EPA will continue to gain experience in implementing its own penalty policies before national programs consider such guidance. Thus, in the near term a determination that a penalty is "grossly deficient" will remain a judgment call made on a case-by-case basis.

c. National Precedents

This is the smallest category of cases in which EPA may take direct enforcement action in an approved State, and will occur rarely in practice. These cases are limited to those of first impression in law or those fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis. Some of these cases may most appropriately be managed or coordinated at the national level. Additional guidance on how potential cases will be identified, decisions made to proceed and involvement of States and Regions in that process, has been developed as Appendix B to this document.

d. Violation of EPA order or consent decree:

EPA places a high priority on following through on enforcement actions until final compliance is achieved. If EPA has taken administrative, civil or criminal judicial enforcement in a delegated or approved State, EPA will take any follow up enforcement action on violations of those agreements or orders to preserve the integrity of Federal enforcement actions.

2. How Should EPA Take Action So As To Better Support Strong State Programs?

Section E describes in some detail the principles and procedures for advance notification and consultation with States. These are imperatives for a sound working relationship. In all of these circumstances, where EPA may overfile a State action on the basis that it is not timely and appropriate EPA should work with the State as early as possible in the case, well before completion of a State action which, if resulting in expeditious compliance by the facility, would render any subsequent EPA involvement unconstructive, ineffective or moot. This is particularly important since it is EPA policy that once a case has been commenced, EPA generally will not withdraw that case in light of subsequent or simultaneous State enforcement action.

In particular, Regions also should identify, with their States, particular areas in which arrangements can or should be made, in advance, for direct EPA enforcement support where State authorities are inadequate or compliance has been a continuing problem.

There are several other approaches identified here for how EPA can take enforcement action, where it is appropriate, in a manner which can better support States.

To the maximum extent possible, EPA should make arrangements with States to:

a. Take joint State/Federal action -- particularly where a State is responsibly moving to correct a violation but lacks the necessary authorities, resources, or national or interstate perspective appropriate to the case.

b. Use State inspection or other data and witnesses, as appropriate.

c. Involve States in creative settlements and to participate in case development -- so that the credibility of States as the primary actor is perceived and realized.

d. Arrange for division of penalties with State and local governments[6/] (to the extent they participate in Federal enforcement actions, and where permitted by law) -- to enhance Federal/State cooperation in enforcement.

e. Issue joint press releases and share credit with the State -- to ensure EPA is not in competition with the State and that EPA action is not erroneously perceived as a weakness or failure in the State's program.

f. Keep States continually apprised of events and reasons for Federal actions -- to avoid conflicting actions and to build a common understanding of goals and the State and Federal perspectives.

3. How Do the Expectations for "Timely and Appropriate Action" Apply to EPA in Delegated States?

In delegated States, EPA performs an oversight function, standing ready to take direct Federal enforcement action based upon the factors stated above. In its oversight capacity, in most cases, EPA will not obtain real-time data. As indicated in Section F on State Reporting, EPA will receive quarterly reports and will supplement these with more frequent informal communications on the status of key cases. Therefore, we do not expect EPA Regions, through their oversight, to be able to take direct enforcement action following the exact same timeframes as those that apply to the administering agency. However, when EPA does determine it is appropriate to take direct Federal action, EPA staff are expected to adhere to the same timeframes as applicable to the States starting with the assumption of responsibility for enforcement action.

6/ See Appendix C for Agency Policy on "Division of Penalties with State and Local Governments," issued October 30, 1985.

E. ADVANCE NOTIFICATION AND CONSULTATION

A policy of "no surprises" must be the centerpiece of any effort to ensure the productive use of limited Federal and State resources and an effective "partnership" in achieving compliance. This principle should be applied to all aspects of the compliance and enforcement program covering inspections, enforcement activities, press releases and public information, and management data summaries upon which State and national performance are assessed.

In order to guarantee that there is ample advance notification and consultation between the proper State and Federal officials, EPA Regions should confer annually with each State, discuss the following areas and devise agreements as appropriate. The agreements should be unique to each State and need not cover all areas -- so long as there is a clear understanding and discussion of how each area will be addressed.

1. Advance Notification to Affected States of Intended EPA Inspections and Enforcement Actions

   Agreements should identify:

   - who should be notified, e.g.
     -- the head of the program if it involves potential Federal enforcement; and
     -- who is notified of proposed/planned Federal inspections.

   - how the State will be notified, e.g.
     -- the agencies share inspection lists; and
     -- the agency contact receives a telephone call on a proposed Federal enforcement case.

   - when they will be notified -- at what point(s) in the process, e.g.
     -- when a case is being considered; and/or
     -- when a case is ready to be referred, or notice order issued.

   Some specific provisions need to be made to address the following:

   a. Advance Notification of State Attorneys General or other legal staff of potential EPA enforcement actions[1/]

      While EPA's primary relationship with the State is and should continue to be with the State agency that has been delegated or been approved to administer the programs, EPA needs to ensure that all parties in the

[1/] In some States there are legal organizations that have direct enforcement authority which by-passes the State AG, e.g., District Attorneys, internal legal counsel, Governor's General Counsel. In these instances, this guidance would apply to these other organizations.

State affected by a pending EPA enforcement action receive appropriate advance notification. In addition, when EPA negotiates commitments each year with the State to address specific significant violators, it is important that all the parties affected by these commitments are aware of the legal enforcement support and associated resources needed to accomplish these goals.

As part of the State/EPA Enforcement Agreements process, the Region should discuss with the State agency their internal procedures and/or protocols for advance notification and consultation with the State AG or other legal staff. The State agency is responsible for assuring that the State AG or other legal staff are properly notified and consulted about planned Federal enforcement actions and/or enforcement initiatives on an ongoing basis. States are strongly encouraged to commit advance notification and consultation procedures/protocols reached between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Regions should seek to incorporate these written protocols into the State/EPA Enforcement Agreements.

The Region should do everything possible to work through the State agency on the issue of communicating with the State AG or other legal staff on potential EPA enforcement actions as well as other matters. However, if the State agency does not have a workable internal procedure and if problems persist, the Region, after advance notification and consultation with the State agency, may make arrangements for directly communicating with the State AG or other legal staff.

The Region and State agency should discuss how the outside legal organizations will be consulted on the commitments the State is making to EPA on addressing significant violators each year. These consultations are intended to clarify the legal enforcement support needed to accomplish these goals. This is particularly important for those State agencies dependent upon the State AG or other outside legal organizations to implement their enforcement program.

State agencies are also encouraged to notify these organizations of the anticipated timing of the negotiations each year with EPA on the Enforcement Agreements, grants, and related documents.

Regions are encouraged to work with their State agencies to set up a joint meeting at least annually to which all parties are invited--the program and legal staffs of both the EPA Region and the State agency(s), plus U.S. Attorney staff and State AG staff--to review EPA's enforcement priorities and recent program guidance.

72M

b. Federal Facilities

Federal facilities may involve a greater or different need for coordination, particularly where the Federal facilities request EPA technical assistance or where EPA is statutorily required to conduct inspections (e.g., under RCRA). The advance notification and consultation protocols in the State/EPA Enforcement

Agreements should incorporate any of the types of special arrangements necessary for Federal facilities. The protocols should also address how the State will be involved in the review of Federal agency A-106 budget submissions, and include plans for a joint annual review of patterns of compliance problems at Federal facilities in the State.

c. Criminal Enforcement

Although the Policy Framework does not apply to the criminal enforcement program, to improve the coordination with States on criminal investigations and assist the States in their criminal enforcement efforts the Regions should discuss with States any affirmative plans for cross-referrals and cooperative criminal investigations. Such discussions should include the Special Agent in Charge and appropriate program staff familiar with criminal enforcement.

In cases where other States or jurisdictions may be directly and materially affected by the violation, i.e., environmental or public health impacts, EPA's Regional Offices should attempt to notify all of the States that are interested parties or are affected by the enforcement action through the communication channels established by the State agreements, working through the appropriate Regional Office. This notification process is particularly important for hazardous waste cases in which regulatees often operate across State boundaries.

Protocols for advance notification must be established with the understanding that each party will respect the other's need for confidentiality and discretion in regard to the information being shared, where it is appropriate. Continuing problems in this regard will be cause for exceptions to the basic principle of advance notification.

Many of our statutes or regulations already specify procedures for advance notification of the State. The State/Federal agreements are intended to supplement these minimum requirements.

2. Establishment of a Consultative Process

Advance notification is only an essential first step and should not be construed as the desired end result of these

State/Federal agreements. The processes established should be consultative and should be designed to achieve the following:

a. Inspections

Advance notice to States through sharing of lists of planned Federal inspections should be designed so that State and Federal agencies can properly coordinate the scheduling of site inspections and facilitate joint or multi-media inspections as appropriate. This should generally be done for all programs whether or not they are delegated, except for investigative inspections which would be jeopardized by this process.

b. Enforcement Actions

Federal and State officials must be able to keep one another current on the status of enforcement actions against noncomplying facilities. Regularly scheduled meetings or conference calls at which active and proposed cases and inspections are discussed may achieve these purposes.

3. Sharing Compliance and Enforcement Information

The Region and State should discuss the need for a process to share, as much as practicable, inspection results, monitoring reports, evidence, including testimony, where applicable for Federal and/or State enforcement proceedings. The Regions should also establish mechanisms for sharing with the States copies of reports generated with data submitted by the Regions and States, including comparative data -- other States in the Region and across Regions.

4. Dispute Resolution

The Region and State should agree in advance on a process for resolving disputes, especially differences in interpretation of regulations or program goals as they may affect resolution of individual instances of noncompliance. As stated in the policy on Performance-Based Assistance, the purpose in laying out a process by which issues can be surfaced quickly up the chain of command in both the Regions and States is to ensure that significant problems receive the prompt attention of managers capable of solving these problems expeditiously.

5. Publicizing Enforcement Activities

EPA has made commitments to account publicly for its compliance and enforcement programs. It is EPA's policy to publicize all judicial enforcement actions and significant administrative actions to both encourage compliance and serve as a deterrent to noncompliance.

While State philosophies on these matters may vary, the Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement.

Discussions should address how and when this coordination would take place. Regions should consult with the State on any enforcement related EPA press release or other media event which affects the State. To the extent possible, the State should be given an opportunity to join in the press release or press conference if it has been involved in the underlying enforcement action. Further, EPA generated press releases and public information reports should acknowledge and give credit to relevant State actions and accomplishments when appropriate.

6. Publicly Reported Performance Data

Regions should discuss with States mechanisms for ensuring the accuracy of data used to generate monthly, quarterly and/or annual reports on the status of State and Federal compliance and enforcement activities. Opportunities should be provided to verify the accuracy of the data with the States prior to transmittal to headquarters. Time constraints may be a real limitation on what can be accomplished, but it is important to establish appropriate checks and control points if we are to provide an accurate reflection of our mutual accomplishments. If there are no data accuracy concerns, these mechanisms may not be needed.

APPENDIX A: ANNUAL PRIORITIES AND PROGRAM GUIDANCES

Annual Priorities for Implementing Agreements

FY 1985: Given the enormity of the task in the first year, 3 priorities were established:

- defining expectations for timely and appropriate enforcement action;
- establishing protocols for advance notification and consultation; and
- reporting State data.

FY 1986: Building on the FY 1985 process, three areas were emphasized:

- expanding the scope of the agreements process to cover all delegable programs;
- adapting national guidance to State-specific circumstances; and
- ensuring a constructive process for reaching agreement.

FY 1987: Continuing to refine the approaches and working relationships with the States, three areas are to be emphasized:

- improving the implementation and monitoring of timely and appropriate enforcement response with particular emphasis on improving the use of penalty authorities;
- improving the involvement of State Attorneys General (or other appropriate legal staff) in the agreements process; and
- implementing the revised Federal Facilities Compliance Strategy.

APPENDIX A

EXISTING OR PLANNED NATIONAL GUIDANCE AFFECTING STATE/EPA ENFORCEMENT AGREEMENTS PROCESS — Revised: 8/14/86

Cross-cutting National Guidance:
- Revised Policy Framework for State/Federal Enforcement Agreements--reissued 8/86
- Agency-wide Policy on Performance-Based Assistance--issued by Admin. 5/31/85

NOTE. Underlining represents guidance still to be issued.

Water - NPDES	Drinking Water	Air	RCRA	FIFRA	Fed. Fac.
°"National Guidance for Oversight of NPDES Programs FY 1987." (issued 4/18/86)	°"FY 85 Initiatives on Compliance Monitoring & Enforcement Oversight." 6/29/84	°"Guidance on Timely & Appropriate"... for Significant Air Violators." 6/28/84	°"Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA." (reissued 6/86)	°Final FY 87 Enforcement & Certification Grant Guidance (issued 4/18/86)	°FF Compliance Strategy (to be issued 10/86)
°Final Regulation-Definition of instances of non-compliance reported in NCR. (8/26/85)	°"Final Guidance on PWS Grant Program Implementation" (3/20/84)	°National Air Audit System Guidelines for FY 1986. (issued 2/86)	°"RCRA Penalty Policy" 5/8/84	°Interpretative Rule - FIFRA State Primacy Enforcement Responsibilities. 40 FR Part 173 1/5/83.	°FF Prog. Manual for Implementing CERCLA Responsibilities of Federal Agencies (draft/85: to be issued in final after CERCLA reauthorization)
°ONC Guidance (issued 3/86)	°Reqs - NIPDWR, 40CFR Part 141 and 142.	°"Guidance on Federally-Reportable Violations." 4/11/86	°FY 1987 "RCRA Implementation Plan" (reissued 5/19/86)		
°Inspection Strategy and Guidance (issued 4/85)	°DW annual Reporting Requirements - "Guidance for PWSS Program Reporting Requirements" 7/9/84	°Inspection Frequency Guidance (issued 3/19/85 and reissued 6/11/86)	°"RCRA Enforcement Response Policy" (issued 12/21/84) (to be revised by 12/86)		
°Revised EMS (Enforcement Management System) (issued 3/86)	°"FY's 85-86 Strategy for Eliminating Persistent Violations at Community Water Systems." Memo from Paul Baltay 3/18/85.	°"Final Technical Guidance on Review and Use of Excess Emission Reports" Memo from Ed Reich to Air Branch Chiefs --Guidance for Regional Offices (issued 10/5/84)	°"Compliance and Enforcement Program Descriptions in Final Authorization Application and State Enforcement Strategies," memo from Lee Thomas to RAs. (issued 6/12/84)		
°NPDES Federal Penalty Policy (issued 2/11/86)	°Guidance for the Development of FY 86 PWSS State Program Plans and Enforcement Agreements" (issued 7/3/85)				
°Strategy for issuance of NPDES minor permits (issued 2/86)					

NPDES	DRINKING WATER	AIR	RCRA	FIFRA	FED FAC
	°Guidance on FY 86 UIC Enforcement Agreements" ICPG #40 (issued 6/28/85) °"FY 87 SPMS & OWAS Targets for the PWSS Program" (SNC definition) (issued 7/10/86) °Guidance on FY 87 UIC Enforcement Agreements (Draft issued 7/1/86) °Guidance on FY 87 PWSS Enforcement Agreements (issued 8/8/86) °Guidance on Use of AO Authority under SDWA Amendments (to be issued pending legislation)	°"Technical Guidance on the Review and use of Coal Sampling and Analysis Data:" EPA-340/1-85-010. 10/30/85 Guidance for Regional Offices	°Compliance Monitoring & Enforcement Log - form for recording monthly compliance data from States & Regions. °Technical Enforcement Guidance on Ground Water Monitoring (Interim Final Aug. 1985) °Compliance order Guidance for Ground Water Monitoring (issued Aug. 85) °Loss of Interim Status Guidance (issued Aug. 85)		

4) For contempt actions, the state or local government must have participated in the underlying action giving rise to the contempt action, been a signatory to the underlying consent decree, participated in the contempt action by filing pleadings asserting claims for penalties, and been actively involved in both litigating the case and any negotiations connected with that proceeding.1/

The penalties should be divided in a proposed consent decree based on the level of participation and the penalty assessment authority of the state or locality. Penalty division may be accomplished more readily if specific tasks are assigned to particular entities during the course of the litigation. But in all events, the division should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties. Penalty division should not take place until the end of settlement negotiation. The subject of penalty division is a matter for discussion among the governmental plaintiffs. It is inappropriate for the defendant to participate in such discussions.

cc: F. Henry Habicht II, Assistant Attorney General
Land and Natural Resources Division

1/ If the consent decree contains stipulated penalties and specifies how they are to be divided, the government will abide by those terms.

UTAC

EPA POLICY ON IMPLEMENTING NATIONALLY MANAGED OR COORDINATED ENFORCEMENT ACTIONS

This policy addresses how EPA will handle the small subset of federal civil enforcement cases, both administrative and judicial, which are managed or coordinated at the EPA Headquarters level. The policy was developed to ensure these actions are identified, developed and concluded consistent with the principles set forth in the Policy Framework for State/EPA Enforcement "Agreements." It covers the criteria and process for deciding what cases might best be managed or coordinated nationally; the roles and relationships of EPA Headquarters and regional offices and the States; and protocols for active and early consultation with the involved States and Regions.

A. Criteria for Nationally Managed or Coordinated Enforcement Cases

Most enforcement cases are handled at the state, local or EPA regional level for reasons of efficiency and effectiveness and because of the primary role that States and local governments have in enforcement under most of the major environmental statutes. The Policy Framework identifies several instances in which direct enforcement actions may be taken by EPA, which in most instances will be handled by EPA Regions pursuant to the State/EPA Enforcement "Agreements." However, some of those cases may most appropriately be managed or coordinated at the national level by EPA Headquarters.

In addition to instances in which an EPA Region requests Headquarters assistance or lead in an enforcement case, these "national" cases will usually arise within the context of three of the criteria for direct EPA action mentioned in the Policy Framework:

-- National Precedent (legal or program precedent): the degree to which the case is one of first impression in law or the decision is fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis.

-- Repeat Patterns of Violations and Violators: the degree to which there are significant patterns of repeat violations at a given facility or type of source or patterns of violations within multi-facility regulated entities. The latter is of particular concern where the noncompliance is a matter of national (e.g., corporate) policy or the lack of sound environmental management policies and practices at a national

*Issued by the Assistant Administrator for the Office of [illegible]

level which can best be remedied through settlement provisions which affect such national policies and practices.

-- Interstate Issues (multiple States or Regions): the degree to which a case may cross regional or state boundaries and requires a consistent approach. This is particularly important where there may be a potential for interregional transfers of pollution problems and the case will present such issues when EPA Regions or States are defining enforcement remedies.

EPA's response to any of these circumstances can range from increased headquarters oversight and legal or technical assistance, to close coordination of State and Regional enforcement actions, to direct management of the case by Headquarters.

There are essentially two types of "National" cases. A nationally managed case is one in which EPA Headquarters has the responsibility for the legal and/or technical development and management of the case(s) from the time the determination is made that the case(s) should be nationally managed in accordance with the criteria and process set forth in this policy. A nationally coordinated case(s) is one which preserves responsibility for lead legal and technical development and management of the cases within the respective EPA regions and/or state or local governments. This is subject, however, to the oversight, coordination and management by a lead Headquarters attorney and/or program staff on issues of national or programmatic scope to ensure that all of the cases within the scope of the nationally coordinated case are resolved to achieve the same or compatible results in furtherance of EPA's national program and enforcement goals.

Section C below describes more fully the roles and relationships of EPA headquarters, regional, and state personnel, both legal and technical, in either nationally managed or nationally coordinated cases.

There are several factors to apply to assess whether, in addition to the normal Headquarters oversight, a case should be handled as: (1) nationally managed; or (2) nationally coordinated. None of these factors may necessarily be sufficient in themselves but should be viewed as a whole. These factors will include:

-- availability or most efficient use of State or EPA Regional or Headquarters resources.

-- ability of the agency to affect the outcome through alternative means. One example is issuance of timely policy guidance which would enable the States, local governments or EPA Regions to establish the appropriate precedent through independent action.

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

OCT 30 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Division of Penalties with State and Local Governments

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

TO: Regional Administrators
Associate Enforcement Counsels
Program Enforcement Division Directors
Regional Counsels

This memorandum provides guidance to Agency enforcement attorneys on the division of civil penalties with state and local governments, when appropriate. In his "Policy Framework for State/EPA Enforcement Agreements" of June 26, 1984, Deputy Administrator Al Alm stated that the EPA should arrange for penalties to accrue to states where permitted by law. This statement generated a number of inquiries from states and from the Regions. Both the states and the Regions were particularly interested in what factors EPA would consider in dividing penalties with state and local governments. In addition, the issue was raised in two recent cases, U.S. v Jones & Laughlin (N.D. Ohio) and U.S. v Georgia Pacific Corporation (M.D. La.). In each case, a state or local governmental entity requested a significant portion of the involved penalty. Consequently, OECM and DOJ jointly concluded that this policy was needed.

EPA generally encourages state and local participation in federal environmental enforcement actions. State and local entities may share in civil penalties that result from their participation, to the extent that penalty division is permitted by federal, state and local law, and is appropriate under the circumstances of the individual case. Penalty division advances federal enforcement goals by:

1) encouraging states to develop and maintain active enforcement programs, and

2) enhancing federal/state cooperation in environmental enforcement.

However, penalty division should be approached cautiously because of certain inherent concerns, including:

1) increased complexity in negotiations among the various parties, and the accompanying potential for federal/state disagreement over penalty division; and

2) compliance with the Miscellaneous Receipts Act, 31 U.S.C. §3302, which requires that funds properly payable to the United States must be paid to the U.S. Treasury. Thus any agreement on the division of penalties must be completed prior to issuance of and incorporated into a consent decree.

As in any other court-ordered assessment of penalties under the statutes administered by EPA, advance coordination and approval of penalty divisions with the Department of Justice is required. Similarly, the Department of Justice will not agree to any penalty divisions without my advance concurrence or that of my designee. In accordance with current Agency policy, advance copies of all consent decrees, including those involving penalty divisions, should be forwarded to the appropriate Associate Enforcement Counsel for review prior to commencement of negotiations.

The following factors should be considered in deciding if penalty division is appropriate:

1) The state or local government must have an independent claim under federal or state law that supports its entitlement to civil penalties. If the entire basis of the litigation is the federal enforcement action, then the entire penalty would be due to the federal government.

2) The state or local government must have the authority to seek civil penalties. If a state or local government is authorized to seek only limited civil penalties, it is ineligible to share in penalties beyond its statutory limit.

3) The state or local government must have participated actively in prosecuting the case. For example, the state or local government must have filed complaints and pleadings, asserted claims for penalties and been actively involved in both litigating the case and any negotiations that took place pursuant to the enforcement action.

2144

-- favorable venue considerations.

-- environmental results which could be achieved through discrete versus concerted and coordinated action, such as potential for affecting overall corporate environmental practices.

-- location of government legal and technical expertise at EPA Headquarters or in the Regions, recognizing that expertise frequently can be tapped and arrangements made to make expertise available where needed.

To the extent possible, where cases warrant close national attention, EPA Headquarters will coordinate rather than directly manage the case on a national basis thereby enabling Regions and States to better reflect facility-specific enforcement considerations.

B. Process for Identifying Nationally-Managed or Coordinated Cases -- Roles and Responsibilities

EPA recognizes the importance of anticipating the need for nationally managed or coordinated cases to help strengthen our national enforcement presence; and of widely sharing information both on patterns of violations and violators and on legal and program precedent with EPA Regions and States. To do this:

Headquarters program offices, in cooperation with the Office of Enforcement and Compliance Monitoring should use the Agency's strategic planning process to help identify upcoming enforcement cases of national precedence and importance. They also should develop and disseminate to Regions information on anticipated or likely patterns or sources of violations for specific industries and types of facilities.

Regional offices are responsible for raising to Headquarters situations which pose significant legal or program precedent or those in which patterns of violations are occurring or which are likely to be generic industry-wide or company-wide which would make national case management or coordination particularly effective.

State and local officials are encouraged to raise to EPA Regional Offices situations identified above which would make national case management or coordination particularly effective.

Whether a case will be managed or coordinated at the national level will be decided by the Assistant Administrator for Enforcement and Compliance Monitoring after full consultation with the affected program Assistant Administrators, Regional Administrators and state or local governments in what is intended to be a consensus building process. There will be a full discussion among all of the parties of all of

the ramifications for the program and a review of all of the important criteria involved in the decision. In the event of a lack of consensus as to whether the case should be managed or coordinated at the national level, the AA for OECM shall make the determination, with an opportunity for a hearing and timely appeal to the Administrator or Deputy Administrator by the Regional or other EPA Assistant Administrator.

The Regions will be responsible for communicating with any affected States using mechanisms established in the State/EPA Enforcement "Agreements," to raise the possibility of national case management or coordination and to ensure that timely information on the status of any independent state, local or regional enforcement actions can and would be factored into the decisions regarding: (1) whether to manage the case nationally; (2) whether to coordinate the case nationally; (3) what legal and technical assistance might be provided in a State lead case; and (4) what facilities to include in the action.

C. Case Development -- Roles and Responsibilities

Nationally managed cases are those that are managed out of EPA Headquarters with a lead headquarters enforcement attorney and a designated lead headquarters program contact. Notwithstanding headquarters lead, in most instances, timely and responsive Regional office legal and technical support and assistance is expected in developing and managing the case. In these instances, the Regions will receive credit for a case referral (on a facility basis) for this effort. The decision on the extent of Regional office involvement and case referral credit will be made at the time of decision that the case should be nationally managed. Regions which play a significant role in the development and/or prosecution of a case will be involved in the decision-making process in any case settlement proceedings and the Regional Administrator will have the opportunity to formally concur in any settlement.

Nationally coordinated cases are those that are coordinated out of EPA Headquarters with lead regional and/or state or local attorneys and associated program office staff. The headquarters attorney assigned to the case(s) and designated headquarters program office contact have clear responsibility for ensuring national issues involved in the case which require national coordination are clearly identified and developed and in coordinating the facility-specific actions of the regional offices to ensure that the remedies and policies applied are consistent. This goes beyond the normal headquarters oversight role. The headquarters officials have both a facilitator role in coordinating information exchange and a policy role in influencing the outcome for the identified issues of national concern.

7446

Whether a case is nationally managed or nationally coordinated, as a general rule if EPA is managing a case, States will be invited to participate fully in case development and to formally join in the proceedings if they so desire by attending meetings and planning sessions. States will be consulted on settlement decisions but will be asked to formally concur in the settlement only if they are parties to the litigation.

On a case-by-case basis, the National Enforcement and Investigations Center (NEIC) may be asked to play a role in either type of national case to coordinate evidence gathering, provide needed consistency in technical case development and policy, witnesses and chain of custody, and/or to monitor consent decree compliance.

D. Press Releases and Major Communications

A communications plan should be developed at an early stage in the process. This should ensure that all of the participating parties have an opportunity to communicate their role in the case and its outcome. Most important, the communications plan should ensure that the essential message from the case, e.g., the anticipated precedents, gets sufficient public attention to serve as a deterrent for potential future violations.

All regional and state co-plaintiffs will be able to issue their own regional, state-specific or joint press releases regarding the case. However, the timing of those releases should be coordinated so that they are released simultaneously, if possible.

It is particularly important that the agencies get maximum benefit from the deterrent effect of these significant national cases through such mechanisms as:

-- more detailed press releases to trade publications i.e., with background information and questions and answers
-- development of articles
-- interviews with press for development of more in-depth reporting
-- press conferences
-- meetings with public/environmental groups -- including meetings on the settlement of national cases which have generated intense local or national interest
-- speeches before industry groups about actions
-- communications with congressional committees

VI. SPECIALIZED ENFORCEMENT TOPICS

I. PROVIDING ENFORCEMENT INFORMATION TO OUTSIDE PARTIES

"Policy Against No Action Assurances", dated November 16, 1984. See GM-34.*

"Enforcement Document Release Guideline", dated September 16, 1985. GM-43.*

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

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

NOV 21 1985

MEMORANDUM

SUBJECT: Policy on Publicizing Enforcement Activities

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

Jennifer Joy Manson
Assistant Administrator for External Affairs

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

Attached is the EPA Policy on Publicizing Enforcement Activities, a joint project of the Office of Enforcement and Compliance Monitoring and the Office of Public Affairs. The document establishes EPA policy on informing the public about Agency enforcement activities. The goal of the policy is to improve communication with the public and the regulated community regarding the Agency's enforcement program, and to encourage compliance with environmental laws through consistent public outreach among headquarters and regional offices.

To implement this policy, national program managers and public affairs directors should review the policy for the purpose of preparing program-specific procedures where appropriate. Further, program managers should consider reviewing the implementation of this policy in EPA Regional Offices during their regional program reviews. These follow-up measures should ensure that publicity of enforcement activities will constitute a key element of the Agency's program to deter environmental noncompliance.

Attachment

2157

EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES

I. PURPOSE

This memorandum establishes EPA policy on informing the public about Agency enforcement activities. This policy is intended to improve EPA communication with the public and the regulated community regarding the goals and activities of the Agency's enforcement program. Appropriate publication of EPA enforcement efforts will both encourage compliance and serve as a deterrent to noncompliance. The policy provides for consistent public outreach among headquarters and regional offices.

II. STATEMENT OF POLICY

It is the policy of EPA to use the publicity of enforcement activities as a key element of the Agency's program to deter noncompliance with environmental laws and regulations. Publicizing Agency enforcement activities on an active and timely basis informs both the public and the regulated community about EPA's efforts to promote compliance.

Press releases should be issued for judicial and administrative enforcement actions, including settlements and successful rulings, and other significant enforcement program activities. Further, the Agency should consider employing a range of methods of publicity such as press conferences and informal press briefings, articles, prepared statements, interviews and appearances at seminars by knowledgeable and authorized representatives of the Agency to inform the public of these activities. EPA will work closely with the states in developing publicity on joint enforcement activities and in supporting state enforcement efforts.

III. IMPLEMENTATION OF POLICY

A. When to Use Press Releases [1]/

1. Individual Cases

It is EPA policy to issue press releases when the Agency: (1) files a judicial action or issues a major administrative order or complaint (including a notice of proposed contractor listing and the administrative decision to list); (2) enters into a major judicial or administrative consent decree or files a motion to enforce such a decree; or (3) receives a successful court ruling. In determining whether to issue a press release,

---

[1]/ The term "press release" includes the traditional Agency press release, press advisories, notes to correspondents and press statements. The decision on what method should be used in a given situation must be coordinated with the appropriate public affairs office(s).

EPA personnel will consider: (1) the amount of the proposed or assessed penalty (e.g., greater than $25,000); (2) the signif of the relief sought or required in the case, and its public health or environmental impact; (3) whether the case would create national or program precedence; and (4) whether unique relief is sought. However, even enforcement actions that do not meet these criteria may be appropriate for local publicity in the area where the violative conduct occurred. Where appropriate, a single press release may be issued which covers a group or category of similar violations.

Where possible, press releases should mention the environmental result desired or achieved by EPA's action. For example, where EPA determines that a particular enforcement action resulted (or will result) in an improvement in a stream's water quality, the press release should note such results. In addition, press releases must include the penalty agreed to in settlement or ordered by a court.

Press releases can also be used to build better relationships with the states, the regulated community, and environmental groups. To this end, EPA should acknowledge efforts by outside groups to foster compliance. For example, where a group supports EPA enforcement efforts by helping to expedite the cleanup of a Superfund site, EPA may express its support for such initiatives by issuing a press release, issuing a statement jointly with the group, or conducting a joint press conference.

2. Major Policies

In addition to publicizing individual enforcement cases, EPA should publicize major enforcement policy statements and other enforcement program activities since knowledge of Agency policies by the regulated community can deter future violations. Such publicity may include the use of articles and other prepared statements on enforcement subjects of current interest.

3. Program Performance

Headquarters and regional offices should consider issuing quarterly and annual reports on Agency enforcement efforts. Such summaries present an overview of the Agency's and Regions' enforcement activities; they will allow the public to view EPA's enforcement program over time, and thus give perspective to our overall enforcement efforts. The summaries should cover trends and developments in Agency enforcement activities, and may include lists of enforcement actions filed under each statute. The Office of Enforcement and Compliance Monitoring's (OECM) Office of Compliance Analysis and Program Operations, and the Offices of Regional Counsel will assist the Public Affairs Offices in this data gathering. Public Affairs Offices can also rely on the figures contained in the Strategic Planning Management System.

2160

4. Press Releases and Settlement Agreements

EPA has, on occasion, agreed not to issue a press release as part of a settlement agreement. EPA should no longer agree to a settlement which bars a press release or which restricts the content of a press release. On January 30, 1985, the Deputy Administrator issued an abbreviated press release policy, which stated in pertinent part that: "It is against EPA policy to negotiate the agency's option to issue press releases, or the substance of press releases, with parties outside of EPA, particularly those parties involved in settlements, consent decrees or the regulatory process." This policy will help to ensure consistency in the preparation of press releases and equitable treatment of alleged violators.

B. Approval of Press Releases

EPA must ensure that press releases and other publicity receive high priority in all reviewing offices. By memorandum dated August 23, 1984, the Office of External Affairs directed program offices to review and comment on all press releases within two days after the Office of Public Affairs submits its draft to the program office; otherwise concurrence is assumed. This review policy extends to OECM and the Offices of Regional Counsel for enforcement-related press releases.

C. Coordination

1. Enforcement, Program, and Public Affairs Offices

More active use of publicity requires improved coordination among regional and headquarters enforcement attorneys, program offices and public affairs offices. The lead office in an enforcement case, generally the regional program office in an administrative action and the Office of Regional Counsel or OECM in a judicial action, should notify the appropriate Public Affairs Office at the earliest possible time to discuss overall strategy for communicating the Agency's action (e.g., prior notice to state or local officials) and the the timing of a press release. The lead office should stay in close contact with Public Affairs as the matter approaches fruition.

2. Regional and Headquarters Offices of Public Affairs

Regional and headquarters Public Affairs Offices should coordinate in developing press releases both for regionally-based actions that have national implications and for nationally managed or coordinated enforcement actions. Whenever possible, both regional and headquarters offices should send copies of draft press releases to their counterparts for review and comment. Both such offices should also send copies of final releases to their counterparts.

2161

3. EPA and DOJ

EPA can further improve the timeliness and effectiveness of its press releases regarding judicial actions by coordinating with DOJ's Office of Public Affairs. When an EPA Office of Public Affairs decides that a press release in a judicial enforcement case is appropriate, it should notify DOJ or the appropriate U.S. Attorney's Office to ensure timeliness and consistency in preparation of press releases. DOJ has been requested to notify OECM when DOJ intends to issue a release on an EPA-related case. EPA's Office of Public Affairs will immediately review such draft releases, and, if necessary to present the Agency's position or additional information, will prepare an Agency release.

4. EPA and the States

Another important goal of this policy is to encourage cooperative enforcement publicity initiatives with the states. The June 26, 1984, "EPA Policy on Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement 'Agreements,'" describes key subjects that EPA should discuss with the states in forming state-EPA Enforcement Agreements. The section on "Press Releases and Public Information," states that the "Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement." Further, as discussed in the subsequent January 4, 1985, Agency guidance on "Implementing Nationally Managed or Coordinated Enforcement Actions," the timing of state and EPA releases "should be coordinated so that they are released simultaneously.

Accordingly, EPA Public Affairs Offices should consult with the relevant state agency on an EPA press release or other media event which affects the State. EPA could offer the State the option of joining in a press release or a press conference where the State has been involved in the underlying enforcement action. Further, EPA-generated press releases and public information reports should acknowledge and give credit to relevant state actions and accomplishments when appropriate.

Finally, it is requested that EPA Public Affairs Offices send the State a copy of the EPA press release on any enforcement activity arising in that state.

D. Distribution of Press Releases

The distribution of EPA press releases is as important as their timeliness. Press releases may be distributed to the local, national, and trade press, and local and network television stations.

1. Local and National Media

EPA must "direct" its press releases to ensure that the appropriate geographical areas learn about EPA enforcement activities. To accomplish this goal, the appropriate Public Affairs Office should send a press release to the media and interest groups in the affected area, i.e., the local newspaper and other local publications, television and radio stations, and citizen groups. The headquarters Public Affairs Office, in conjunction with the appropriate regional office, will issue press releases to the national press and major television networks where an EPA enforcement activity has national implications.

2. Targeted Trade Press and Mailing Lists

The Agency must also disseminate information about enforcement activities to affected industries. Sending a press release to relevant trade publications and newsletters, particularly for a significant case, will put other potential violators on notice that EPA is enforcing against specific conduct in the industry. It is also useful to follow up such press releases with speeches to industry groups and articles in relevant trade publications, reinforcing the Agency's commitment to compliance.

To ensure the appropriate distribution of publicity, we are requesting each of the regional Public Affairs Offices, in cooperation with the Regional Counsels and regional program offices, to establish or review and update their mailing lists of print media, radio and television stations, state and local officials, trade publications, and business and industry groups for each of the enforcement programs conducted in the Regions.

E. Use of Publicity Other Than Press Releases

EPA headquarters and regional offices have generally relied on press releases to disseminate information on enforcement activities. Other types of enforcement publicity are also appropriate in certain instances.

1. Press Conferences and Informal Press Briefings

Press conferences can be a useful device for highlighting an enforcement activity and responding to public concerns in a specific area. Regional Administrators should consider using press conferences to announce major enforcement actions and to elaborate on important simultaneously issued press releases. Press conferences should also be considered where an existing or potential public hazard is involved. The regional Public Affairs Office should always inform the headquarters Public Affairs

Office when it decides to hold a press conference to provide an opportunity for the Administrator's advance knowledge and involvement if necessary.

2. Informal Meetings with Constituent Groups

To further supplement EPA efforts to inform the public and regulated community, regional offices should meet often with constituent groups (states, environmental groups, industry, and the press) to brief these groups on recent enforcement developments. These meetings can be organized by the Public Affairs Offices. By informing the public, EPA increases public interest in its enforcement program and thereby encourages compliance.

3. Responding to Inaccurate Statements

EPA should selectively respond to incorrect statements made about EPA enforcement activities. For example, EPA may want to respond to an editorial or other article which inaccurately characterizes EPA enforcement at a Superfund site with a "letter to the editor." Where an agency response is deemed to be appropriate, it should promptly follow the inaccurate statement.

4. Articles and Prepared Statements

EPA's Public Affairs Offices and the Office of Enforcement and Compliance Monitoring occasionally prepare articles on various aspects of the Agency's enforcement program. For example, Region I issues a biweekly column to several newspapers in the Region covering timely enforcement issues such as asbestos in schools. We encourage all regional and headquarters offices to prepare feature articles on enforcement issues. When the regional office is developing an article on a subject with national implications, it should contact the headquarters Office of Public Affairs to obtain a possible quote from the Administrator and to discuss whether the article should be expanded to a national perspective. Likewise, appropriate regions should be consulted in the preparation of headquarters articles or statements which refer to actions of or facilities in particular regions.

5. Interviews

In some cases, headquarters and regional Public Affairs Offices should consider arranging media interviews with the Regional Administrator, Deputy Administrator, the Administrator, or other EPA officials. Such an interview will reflect the Agency's position on a particular enforcement activity or explain EPA's response to an enforcement problem.

2164

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

The Associate Attorney General

Washington, D.C. 20530

March 27, 1986

MEMORANDUM TO GENERAL COUNSELS

It is becoming increasingly obvious that the ability of the Department of Justice effectively to represent the interests of the various agencies of the Executive Branch is being severely impaired by difficulties in coordinating obligations under the Freedom of Information Act ("FOIA") with litigation activities. This problem is particularly serious for the United States Attorneys' offices and, if allowed to continue unchecked, will almost certainly result in the loss of litigation that may be of significant importance to your agency.

FOIA, of course, is generally available to any person seeking government documents. FOIA requestors often do not identify the parties or the special interests they represent, and almost never indicate whether the requested documents will be used to support ongoing or contemplated litigation against the United States. Compounding the problem, FOIA personnel frequently are not fully aware of the full extent of the governmental interests implicated by a FOIA request. In particular, FOIA personnel often do not know of actual or impending litigation involving the subject matter of the requested documents.

Typically, each agency has a disclosure system designed to meet the needs and demands upon the agency in view of its substantive programs. Lack of coordination between these personnel and the persons with knowledge that documents relate to pending or potential litigation severely impairs the ability of the attorneys responsible for litigation effectively to represent the interests of the United States. Accordingly, I am requesting that all agencies establish procedures which will

2167

identify FOIA requests which pertain to subjects involved in ongoing or anticipated litigation.

If a FOIA request involves matters pertaining to ongoing litigation, it is essential that both the agency and the Department of Justice attorneys assigned to the litigation be informed of the request to ensure coordination of the government's position in the litigation with any release of documents under the FOIA. If no litigation is pending, but can be reasonably anticipated in the future, the FOIA request should be carefully reviewed by an agency attorney in light of that likelihood. In all instances where litigation is a possibility, agencies should maintain records identifying the documents released pursuant to a FOIA request so that the litigating attorneys can become fully informed of the documents made available to other parties. In addition, documents relating to agency investigations of matters which are in litigation or may reasonably be expected to result in litigation should be marked, where appropriate, to indicate that they are attorney work product. This will assist the FOIA personnel in identifying potentially exempt documents. Discretionary disclosures should be coordinated with the litigating attorney rather than relying solely on the existing FOIA release procedures. This will permit the attorney to protect the interests of the agency implicated in the litigation itself.

The general nature of the guidance set forth above meshes well with many agencies' present practices. However, because the persons responsible for disclosure sometimes are unaware of litigative concerns, I ask that you ensure that persons responsible for maintenance of documents subject to a FOIA request notify disclosure personnel whenever there is an indication that requested documents are or may be pertinent to pending or potential litigation. In other words, the document custodian should be told that it is his or her duty to inform the FOIA personnel of any pending or potential litigation pertaining to documents which are the subject of a FOIA request.

To summarize, I request that:

- Each document custodian be required to notify any person within the agency interested in the documents of any potential or pending litigation on the subject to which the documents pertain;

- Litigating attorneys (including Department of Justice attorneys) always be contacted when a FOIA request seeks documents pertaining to ongoing litigation;

- All discretionary disclosures relating to matters in litigation be closely coordinated with the litigating attorneys;

- A record be maintained so that the litigating attorneys will know which documents have been released;

- Documents be marked as attorney work product when it is correct and feasible to do so;

- FOIA personnel be made sensitive to the potential litigative interests of the government;

- Litigating attorneys routinely check with the agency's FOIA personnel in every litigation matter to determine whether any relevant documents have been the subject of a FOIA request.

I would appreciate your comments and suggestions on the proposals outlined above to enhance our ability to defend significant suits affecting each government agency. In addition, I suggest that you direct the persons responsible for FOIA matters within your agency to provide a report to you on the actions taken to implement these proposals. I would greatly appreciate it if you would send a copy of that report to Mr. David J. Anderson, Branch Director, Federal Programs Branch, Room 3643, plus any other periodic reports you may request to ensure that the concerns expressed in this letter, which I am sure you share, are not forgotten when personnel changes occur or over the course of time.

I firmly believe that these proposals, if implemented, will significantly enhance the ability of the Department of Justice to protect your agency's interests in litigation. Thank you for your cooperation in this matter.

Sincerely,

ARNOLD I. BURNS
Associate Attorney General

cc: Executive Office for United States Attorneys

2169

VI.I.5

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

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

AUG - 4 1987

MEMORANDUM

SUBJECT: Addendum to GM-46: Policy on Publicizing Enforcement Activities

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement
and Compliance Monitoring

Jennifer Joy Wilson
Assistant Administrator for External Affairs

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

I. ISSUE

Significant differences can exist between civil penalties proposed at the initiation of enforcement cases and the final penalties to be paid at the conclusion of such matters. This memorandum provides guidance on addressing the issue of the "penalty gap" where the difference between the proposed and final penalty is appreciable. EPA must avoid any public misperception that EPA is not serious about enforcement when such differences occur.

II. DISCUSSION

Attached is an "Addendum to the EPA Policy on Publicizing Enforcement Activities", GM-46, issued November 21, 1985. The Addendum provides standard text to be included in any press release announcing the settlement of an enforcement case in which the penalty amount finally assessed differs appreciably from the amount proposed.

Press releases issued at the filing of cases normally state the amount of the civil penalty being sought by the Agency. The proposed penalty may be the maximum statutory amount allowable under applicable law, or a penalty amount as calculated by application of an Agency penalty policy which assigns specific penalties to various violations of law.

When a case is settled, however, the penalty to be paid by the violator is oftentimes appreciably less than the penalty sought by the Agency at the initiation of the action. Members of the public may question any difference between these two amounts, especially persons who are not familiar with the laws, regulations, and published policies of the Agency.

The Addendum points out that a number of mitigating factors can result in a penalty adjustment, and that Congress on occasion has dictated that EPA take into account such factors in determining the amount of a civil penalty (e.g., TSCA §16, 15 U.S.C. 2615).

Attachment

ADDENDUM TO EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES, GM-46, ISSUED NOVEMBER 21, 1985

I. PURPOSE

This addendum to the EPA Policy on Publicizing Enforcement Activities, GM-46, issued November 21, 1985, provides standard text which should be included in EPA press releases which announce the settlement of an enforcement case in which the final penalty is appreciably less than the proposed penalty.

The purpose of the text is to preclude any public misperception that EPA is not serious about enforcement when these appreciable differences occur.

II. BACKGROUND

Congress has directed the Agency in certain instances to consider specific mitigation factors in assessing a final penalty. Accordingly, the Agency regularly takes into account such factors as the gravity of the violation(s), the violator's compliance history, and its degree of culpability--in addition to weighing such litigation concerns as the clarity of the regulatory requirements and the strength of the government's evidentiary case--when negotiating a civil penalty amount as part of a settlement agreement. Guidance for applying mitigating adjustment factors is included in the Agency's published penalty policies.

III. POLICY

Since it is the policy of EPA to use publicity of enforcement activities as a key element in the Agency's program to promote compliance and deter violations, public awareness and accurate perceptions of the Agency's enforcement activities are extremely important.

Appreciable differences between civil penalty amounts proposed at the commencement of enforcement cases and the final penalty sums to be paid at the conclusion of such matters may be erroneously perceived as evidence that EPA is not serious about enforcing the Nation's environmental laws. Consequently, such differences should be explained and accounted for in the Agency's communications to the public.

It is the policy of EPA that when press releases are issued to announce the settlement of enforcement cases in which the settlement penalty figure is appreciably less than the initially proposed penalty amount, such releases should include standard text (see Section IV, p.2) to ensure that the general public is

adequately informed of the analysis behind the final penalty amount, and the reasons justifying the penalty reduction. The release should also describe any environmentally beneficial performance required under the terms of the settlement which goes beyond actions being taken simply to come into compliance.

IV. IMPLEMENTATION OF POLICY

When a press release is issued at the settlement of an enforcement action, any such press release that includes the announcement of a final penalty assessment which is appreciably different from the penalty proposed at the outset of the case should include the following standard text:

> "The civil penalty in this action was the product of negotiation after careful consideration by the government of the facts constituting the violation, the gravity of the misconduct, the strength of the government's case, and established EPA penalty policies.
>
> [NOTE: Include the following paragraph only in cases involving environmentally beneficial performance.]
>
> "In agreeing to this $_____ penalty, the government recognizes the contribution to long-term environmental protection of [briefly summarize here the environmentally beneficial performance explained in detail in the body of the release]."

2176

VI. SPECIALIZED ENFORCEMENT TOPICS

J. TOXICS/TOXICITY CONTROL

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

VI.J.2

"Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy," dated January 25, 1989. Includes Compliance Monitoring and Enforcement Strategy, dated 1/19/89.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
January 25, 1989

OFFICE OF WATER

MEMORANDUM

SUBJECT: Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy

FROM: Rebecca W. Hanmer, Acting Assistant Administrator
Office of Water

TO: Regional Administrators

Since the issuance of the "Policy for the Development of Water Quality-based Permit Limitations for Toxic Pollutants" in March of 1984, the Agency has been moving forward to provide technical documentation to support the integrated approach of using both chemical and biological methods to ensure the protection of water quality. The Technical Support Document for Water Quality-based Toxics Control (September, 1985) and the Permit Writer's Guide to Water Quality-based Permitting for Toxic Pollutants (July, 1987) have been instrumental in the initial implementation of the Policy. The Policy and supporting documents, however, did not result in consistent approaches to permitting and enforcement of toxicity controls nationally. When the 1984 Policy was issued, the Agency did not have a great deal of experience in the use of whole effluent toxicity limitations and testing to ensure protection of water quality. We now have more than four years of experience and are ready to effectively use this experience in order to improve national consistency in permitting and enforcement.

In order to increase consistency in water quality-based toxicity permitting, I am issuing the attached Bas Permitting Principles for Whole Effluent Toxicity (Attachment .) as a standard with which water quality-based permits should conform. A workgroup of Regional and State permitting, enforcement, and legal representatives developed these minimum acceptable requirements for toxicity permitting based upon national experience. These principles are consistent with the toxics control approach addressed in the proposed Section 304(l) regulation. Regions should use these principles when reviewing draft State permits. If the final Section 304(l) regulations include changes in this area, we will update these principles as necessary. Expanded guidance on the use of these principles will be sent out shortly by James Elder, Director of the Office of

Water Enforcement and Permits. This expanded guidance will include sample permit language and permitting/enforcement scenarios.

Concurrent with this issuance of the Basic Permitting Principles, I am issuing the Compliance Monitoring and Enforcement Strategy for Toxics Control (Attachment 2). This Strategy was developed by a workgroup of Regional and State enforcement representatives and has undergone an extensive comment period. The Strategy presents the Agency's position on the integration of toxicity control into the existing National Pollutant Discharge Elimination System (NPDES) compliance and enforcement program. It delineates the responsibilities of the permitted community and the regulatory authority. The Strategy describes our current efforts in compliance tracking and quality assurance of self-monitoring data from the permittees. It defines criteria for review and reporting of toxicity violations and describes the types of enforcement options available for the resolution of permit violations.

In order to assist you in the management of whole effluent toxicity permitting, the items discussed above will join the 1984 Policy as Appendices to the revised Technical Support Document for Water Quality-based Toxics Control. To summarize, these materials are the Basic Permitting Principles, sample permit language, the concepts illustrated through the permitting and enforcement scenarios, and the Enforcement Strategy. I hope these additions will provide the needed framework to integrate the control of toxicity into the overall NPDES permitting program.

I encourage you and your staff to discuss these documents and the 1984 Policy with your States to further their efforts in the implementation of EPA's toxics control initiative.

If you have any questions on the attached materials, please contact James Elder, Director of the Office of Water Enforcement and Permits, at (FTS/202) 475-8488.

Attachments

cc: ASWIPCA
Water Management Division Directors

1984

BASIC PERMITTING PRINCIPLES FOR WHOLE EFFLUENT TOXICITY

1. Permits must be protective of water quality.

   a. At a minimum, all major permits and minors of concern must be evaluated for potential or known toxicity (chronic or acute if more limiting).

   b. Final whole effluent toxicity limits must be included in permits where necessary to ensure that State Water Quality Standards are met. These limits must properly account for effluent variability, available dilution, and species sensitivity.

2. Permits must be written to avoid ambiguity and ensure enforceability.

   a. Whole effluent toxicity limits must appear in Part I of the permit with other effluent limitations.

   b. Permits contain generic re-opener clauses which are sufficient to provide permitting authorities the means to re-open, modify, or reissue the permit where necessary. Re-opener clauses covering effluent toxicity will not be included in the Special Conditions section of the permit where they imply that limit revision will occur based on permittee inability to meet the limit. Only schedules or other special requirements will be added to the permit.

   c. If the permit includes provisions to increase monitoring frequency subsequent to a violation, it must be clear that the additional tests only determine the continued compliance status with the limit; they are <u>not</u> to verify the original test results.

   d. Toxicity testing species and protocols will be accurately referenced/cited in the permit.

3. Where not in compliance with a whole effluent toxicity limit, permittees must be compelled to come into compliance with the limit as soon as possible.

   a. Compliance dates must be specified.

   b. Permits can contain requirements for corrective actions, such as Toxicity Reduction Evaluations (TREs), but corrective actions cannot be delayed pending EPA/State approval of a plan for the corrective actions, unless State regulations require prior approval. Automatic corrective actions subsequent to the effective date of a final whole-effluent toxicity limit will not be included in the permit.

1986

Explanation of the Basic Permitting Principles

The Basic Permitting Principles present the minimum acceptable requirements for whole-effluent toxicity permitting. They begin with a statement of the goal of whole-effluent toxicity limitations and requirements: the protection of water quality as established through State numeric and narrative Water Quality Standards. The first principle builds on the Technical Support Document procedures and the draft Section 304(l) rule requirements for determining potential to violate Water Quality Standards. It requires the same factors be considered in setting whole-effluent toxicity based permits limits as are used to determine potential Water Quality Standards violations. It defines the universe of permittees that should be evaluated for potential violation of Water Quality Standards, and therefore possible whole-effluent limits, as all majors and minors of concern.

The second permitting principle provides basic guidelines for avoiding ambiguities that may surface in permits. Whole-effluent toxicity limits should be listed in Part I of the permit and should be derived and expressed in the same manner as any other water quality-based limitations (i.e., Maximum Daily and Average Monthly limits as required by Section 122.45(d)).

In addition, special re-opener clauses are generally not necessary, and may mistakenly imply that permits may be re-opened to revise whole-effluent limits that are violated. This is not to imply that special re-opener clauses are never appropriate. They may be appropriate in permits issued to facilities that currently have no known potential to violate a Water Quality Standard; in these cases, the permitting authority may wish to stress its authority to re-open the permit to add a whole-effluent limit in the event monitoring detects toxicity.

Several permittees have mistakenly proposed to conduct additional monitoring subsequent to a violation to "verify" their results. It is not possible to verify results with a subsequent test whether a new sample or a split-sample which has been stored (and therefore contains fewer volatiles) is used. For this reason, any additional monitoring required in response to a violation must be clearly identified as establishing continuing compliance status, not verification of the original violation.

The second principle also deals with the specification of test species and protocol. Clearly setting out the requirements for toxicity testing and analysis is best done by accurately referencing EPA's most recent test methods and approved equivalent State methods. In this way, requirements which have been published can be required in full, and further advances in technology and science may be incorporated without lengthy permit revisions.

The third and final permitting principle reinforces the responsibility of the permittee to seek timely compliance with the requirements of its NPDES permit. Once corrective actions have been identified in a TRE, permittees cannot be allowed to delay corrective actions necessary to comply with water quality-based whole effluent toxicity limitations pending Agency review and approval of voluminous reports or plans. Any delay on the part of the permittee or its contractors/agents is the responsibility of the permittee.

The final principle was written in recognition of the fact that a full-blown TRE may not be necessary to return a permittee to compliance in all cases, particularly subsequent to an initial TRE. As a permittee gains experience and knowledge of the operational influences on toxicity, TREs will become less important in the day to day control of toxicity and will only be required when necessary on a case-specific basis.

Background to the Compliance Monitoring and Enforcement Strategy for Toxics Control

The Compliance Monitoring and Enforcement Strategy for Toxics Control sets forth the Agency's strategy for tracking compliance with and enforcing whole-effluent toxicity monitoring requirements, limitations, schedules and reporting requirements.

The Strategy delineates the respective responsibilities of permittees and permitting authorities to protect water quality through the control of whole-effluent toxicity. It establishes criteria for the review of compliance data and the quarterly reporting of violations to Headquarters and the public. The Strategy discusses the integration of whole-effluent toxicity control into our existing inspection and quality assurance efforts. It provides guidelines on the enforcement of whole-effluent toxicity requirements.

The Strategy also addresses the concern many permittees share as they face the prospect of new requirements in their permit - the fear of indiscriminate penalty assessment for violations that they are unable to control. The Strategy recognizes enforcement discretion as a means of dealing fairly with permittees that are doing everything feasible to protect water quality. As indicated in the Strategy, this discretion deals solely with the assessment of civil penalties, however, and is not an alternative to existing procedures for establishing relief from State Water Quality Standards. The Strategy focuses on the responsibility of the Agency and authorized States to require compliance with Water Quality Standards and thereby ensure protection of existing water resources.

01/19/89

COMPLIANCE MONITORING AND ENFORCEMENT STRATEGY FOR TOXICS CONTROL

I. Background

Issuance of NPDES permits now emphasizes the control of toxic pollutants, by integrating technology and water quality-based permit limitations, best management practices for toxic discharges, sludge requirements, and revisions to the pretreatment implementation requirements. These requirements affect all major permittees and those minor permittees whose discharges may contribute to impairment of the designated use for the receiving stream. The goal of permitting is to eliminate toxicity in receiving waters that results from industrial and municipal discharges.

Major industrial and municipal permits will routinely contain water quality-based limits for toxic pollutants and in many cases whole effluent toxicity derived from numerical and narrative water quality standards. The quality standards to establish NPDES permit limits are discussed in the "Policy for the Development of Water Quality-based Permit Limits for Toxic Pollutants," 49FR 9016, March 9, 1984. The Technical Support Document for Water Quality-based Toxics Control, EPA #440/44-85032, September, 1985 and the Permit Writer's Guide to Water Quality-based Permitting for Toxic Pollutants, Office of Water, May, 1987, provide guidance for interpreting numerical and narrative standards and developing permit limits.

The Water Quality Act (WQA) of 1987 (PL 100-4, February 4, 1987) further directs EPA and the States to identify waters that require controls for toxic pollutants and develop individual control strategies including permit limits to achieve control of toxics. The WQA established deadlines, for individual control strategies (February 4, 1989) and for compliance with the toxic control permit requirements (February 4, 1992). This Strategy will support the additional compliance monitoring, tracking, evaluation, and enforcement of the whole effluent toxicity controls that will be needed to meet the requirements of the WQA and EPA's policy for water quality-based permitting.

It is the goal of the Strategy to assure compliance with permit toxicity limits and conditions through compliance inspections, compliance reviews, and enforcement. Water quality-based limits may include both chemical specific and whole effluent toxicity limits. Previous enforcement guidance (e.g., Enforcement Management System for the National Pollutant Discharge Elimination System, September, 1986; National Guidance for Oversight of NPDES Programs, May, 1987; Guidance for Preparation of Quarterly and Semi-Annual Noncompliance Reports, March, 1986) has dealt with

chemical-specific water quality-based limits. This Strategy will focus on whole effluent toxicity limits. Such toxicity limits may appear in permits, administrative orders, or judicial orders.

II. Strategy Principles

This strategy is based on four principles:

1) Permittees are responsible for attaining, monitoring, and maintaining permit compliance and for the quality of their data.

2) Regulators will evaluate self-monitoring data quality to ensure program integrity.

3) Regulators will assess compliance through inspections, audits; discharger data reviews, and other independent monitoring or review activities.

4) Regulators will enforce effluent limits and compliance schedules to eliminate toxicity.

III. Primary Implementation Activities

In order to implement this Strategy fully, the following activities are being initiated:

A. Immediate development

1. The NPDES Compliance Inspection Manual was revised in May 1988 to include procedures for performing chronic toxicity tests and evaluating toxicity reduction evaluations. An inspector training module was also developed in August 1988 to support inspections for whole effluent toxicity.

2. The Permit Compliance System (the national NPDES data base) was modified to allow inclusion of toxicity limitations and compliance schedules associated with toxicity reduction evaluations. The PCS Steering Committee will review standard data elements and determine if further modifications are necessary.

3. Compliance review factors (e.g., Technical Review Criteria and significant noncompliance definitions) are being proposed to evaluate violations and appropriate response.

4. A Quality Assurance Fact Sheet has been developed (Attached) to review the quality of toxicity test results submitted by permittees.

7192

5. The Enforcement Response Guide in the Enforcement Management System will be revised to cover the use of administrative penalties and other responses to violations of toxicity controls in permits. At least four types of permit conditions are being examined: (1) whole-effluent toxicity monitoring (sampling and analysis), (2) whole effluent toxicity-based permit limits, (3) schedules to conduct a TRE and achieve compliance with water quality-based limits, and (4) reporting requirments.

B. Begin development in Spring 1989

With the assistance of the Office of Enforcement and Compliance Monitoring (OECM), special remedies and model forms will be developed to address violations of toxicity permit limits (i.e., model consent decrees, model complaints, revised penalty policy, model litigation reports, etc.)

IV. Scope and Implementation of Strategy

A. Compliance Tracking and Review

1. Compliance Tracking

The Permits Compliance System (PCS) will be used as the primary system for tracking limits and monitoring compliance with the conditions in NPDES permits. Many new codes for toxicity testing have already been entered into PCS. During FY 89, headquarters will provide additional guidance to Regions and States on PCS coding to update existing documentation. The Water Enforcement Data Base (WENDB) requirements as described in the PCS Policy Statement already require States and Regions to begin incorporating toxicity limits and monitoring information into PCS.

In addition to guidance on the use of PCS, Headquarters has prepared guidance in the form of Basic Permitting Principles for Regions and States that will provide greater uniformity nationally on approaches to toxicity permitting. One of the major problems in the tracking and enforcement of toxicity limits is that they differ greatly from State-to-State and Region-to-Region. The Permits Division and Enforcement Division in cooperation with the PCS Steering Committee will establish standard codes for permit limits and procedures for reporting toxicity results based on this guidance.

Whole effluent toxicity self-monitoring data should undergo an appropriate quality review. (See attached checklist for suggested toxicity review factors.) All violations of permit limits for toxics control should be reviewed by a professional qualified to assess the noncompliance. Regions and States should designate appropriate staff.

2. Compliance Review

Any violation of a whole effluent toxicity limit is of concern to the regulatory agency and should receive an immediate professional review. In terms of the Enforcement Management System (EMS), any whole effluent violation will have a violation review action criterion (VRAC) of 1.0. However, the appropriate initial enforcement response may be to require additional monitoring and then rapidly escalate the response to formal enforcement if the noncompliance persists. Where whole effluent toxicity is based on a pass-fail permit limitation, any failure should be immediately targeted for compliance inspection. In some instances, assessment of the compliance status will be required through issuance of Section 308 letters and 309(a) orders to require further toxicity testing.

Monitoring data which is submitted to fulfill a toxicity monitoring requirement in permits that do not contain an independently enforceable whole-effluent toxicity limitation should also receive immediate professional review.

The burden for testing and biomonitoring is on the permittee; however, in some instances, Regions and States may choose to respond to violations through sampling or performance audit inspections. When an inspection conducted in response to a violation identifies noncompliance, the Region or State should initiate a formal enforcement action with a compliance schedule, unless remedial action is already required in the permit.

B. Inspections

EPA/State compliance inspections of all major permittees on an annual basis will be maintained. For all facilities with water quality-based toxic limits, such inspections should include an appropriate toxic component (numerical and/or whole effluent review). Overall the NPDES inspection and data quality activities for toxics control should receive greater emphasis than in the present inspection strategy.

7104

1. Regional/State Capability

The EPA's "Policy for the Development of Water Quality-based Permit Limits for Toxic Pollutants" (March 9, 1984 Federal Register) states that EPA Regional Administrators will assure that each Region has the full capability to conduct water quality assessments using both biological and chemical methods and provide technical assistance to the States. Such capability should also be maintained for compliance biomonitoring inspections and toxics sampling inspections. This capability should include both inspection and laboratory capability.

2. Use of Nonsampling Inspections

Nonsampling inspections as either compliance evaluations (CEIs) or performance audits (PAIs) can be used to assess permittee self-monitoring data involving whole effluent toxicity limits, TREs, and for prioritization of sampling inspections.* As resources permit, PAIs should be used to verify biomonitoring capabilities of permittees and contractors that provide toxicity testing self-monitoring data.

3. Quality Assurance

All States are encouraged to develop the capability for acute and chronic toxicity tests with at least one fish and one invertebrate species for freshwater and saltwater if appropriate. NPDES States should develop the full capability to assess compliance with the permit conditions they establish.

EPA and NPDES States will assess permittee data quality and require that permittees develop quality assurance plans. Quality assurance plans must be available for examination. The plan should include methods and procedures for toxicity testing and chemical analysis; collection, culture, maintenance, and disease control procedures for test organisms; and quality assurance practices. The

* Due to resource considerations, it is expected that sampling inspections will be limited to Regional/State priorities in enforcement and permitting. Routine use of CEIs and PAIs should provide the required coverage.

permittee should also have available quality control charts, calibration records, raw test data, and culture records.

In conjunction with the QA plans, EPA will evaluate permittee laboratory performance on EPA and/or State approved methods. This evaluation is an essential part of the laboratory audit process. EPA will rely on inspections and other quality assurance measures to maintain data quality. However, States may prefer to implement a laboratory certification program consistent with their regulatory authorities. Predetermined limits of data acceptability will need to be established for each test condition (acute/chronic), species-by-species.

C. Toxicity Reduction Evaluations (TREs)

TREs are systematic investigations required of permittees which combine whole effluent and/or chemical specific testing for toxicity identification and characterization in a planned sequence to expeditiously locate the source(s) of toxicity and evaluate the effectiveness of pollution control actions and/or inplant modifications toward attaining compliance with a permit limit. The requirement for a TRE is usually based on a finding of whole effluent toxicity as defined in the permit. A plan with an implementation schedule is then developed to achieve compliance. Investigative approaches include causative agent identification and toxicity treatability.

1. Requiring TRE Plans

TRE's can be triggered: 1) whenever there is a violation of a toxicity limit that prompts enforcement action or 2) from a permit condition that calls for a toxicity elimination plan within a specified time whenever toxicity is found. The enforcement action such as a 309(a) administrative order or State equivalent, or judicial action then directs the permittee to take prescribed steps according to a compliance schedule to eliminate the toxicity. This schedule should be incorporated into the permit, an administrative order, or judicial order and compliance with the schedule should be tracked through PCS.

2. Compliance Determination Followup

Compliance status must be assessed following the accomplishment of a TRE plan using the most efficient and effective methods available. These methods include site visits, self-monitoring, and inspections.

Careful attention to quality assurance will assist in minimizing the regulatory burden. The method of compliance assessment should be determined on a case-by-case basis.

D. Enforcing Toxic Control Permit Conditions

Enforcement of toxic controls in permits depends upon a clear requirement and the process to resolve the noncompliance. In addition to directly enforceable whole effluent limits (acute and chronic, including absolute pass-fail limits), permits have contained several other types of toxic control conditions: 1) "free from" provisions, 2) schedules to initiate corrective actions (such as TREs) when toxicity is present, and/or 3) schedules to achieve compliance where a limit is not currently attained. Additional requirements or schedules may be developed through 308 letters, but the specific milestones should be incorporated into the permit, administrative order or State equivalent mechanism, or judicial order to ensure they are enforceable.

1. The Quarterly Noncompliance Report (QNCR)

Violations of permit conditions are tracked and reported as follows:

a. Effluent Violations

Each exceedance of a directly enforceable whole effluent toxicity limit is of concern to the regulatory agency and, therefore, qualifies as meeting the VRAC requiring professional review (see section IV.A.2.).

These violations must be reported on the QNCR if the violation is determined through professional review to have the potential to have caused a water quality impact.

All QNCR-reportable permit effluent violations are considered significant noncompliance (SNC).

b. Schedule Violations

Compliance schedules to meet new toxic controls should be expeditious. Milestones should be established to evaluate progress routinely and minimize delays. These milestones should be tracked and any slippage of 90 days or more must be reported on the QNCR.

The following milestones are considered SNC when 90 days or more overdue: submit plan/schedule to conduct TRE, initiate TRE, submit test results, submit implementation plan/schedule (if appropriate), start construction, end construction, and attain compliance with permit.

c. Reporting/Other Violations

Violation of other toxic control requirements (including reports) will be reported using criteria that are applied to comparable NPDES permit conditions. For example, failure to submit a report within 30 days after the due date or submittal of an inaccurate or inadequate report will be reportable noncompliance (on the QNCR).

Only failure to submit toxicity limit self-monitoring reports or final TRE progress reports indicating compliance will be SNC when 30 days or more overdue.

Resolution (bringing into compliance) of all three types of permit violations (effluent, schedule, and reporting/other) will be through timely and appropriate enforcement that is consistent with EPA Oversight Guidance. Administering agencies are expected to bring violators back into compliance or take formal enforcement action against facilities that appear on the QNCR and are in SNC; otherwise, after two or more quarters the facility must be listed on the Exceptions List.

2. Approaches to Enforcement of Effluent Limitations

In the case of noncompliance with whole effluent toxicity limitations, any formal enforcement action will be tailored to the specific violation and remedial actions required. In some instances, a Toxicity Reduction Evaluation (TRE) may be appropriate. However, where directly enforceable toxicity-based limits are used, the TRE is not an acceptable enforcement response to toxicity noncompliance if it requires only additional monitoring without a requirement to determine appropriate remedial actions and ultimately compliance with the limit.

If the Regions or States use administrative enforcement for violations of toxic requirements, such actions should require compliance by a date certain, according to a set schedule, and an

administrative penalty should be considered.[1] Failure to comply with an Administrative Order schedule within 90 days indicates a schedule delay that may affect the final compliance date and a judicial referral is the normal response. In instances where toxicity has been measured in areas with potential impacts on human health (e.g., public water supplies, fish/shellfish areas, etc.), regions and states should presume in favor of judicial action and seek immediate injunctive relief (such as temporary restraining order or preliminary injunction).

In a few highly unusual cases where the permittee has implemented an exhaustive TRE plan[2], applied appropriate influent and effluent controls[3], maintained continued compliance with all other effluent limits, compliance schedules, monitoring, and other permit requirements, but is still unable to attain or maintain compliance with the toxicity-based limits, special technical evaluation may be warranted and civil penalty relief granted. Solutions in these cases could be pursued jointly with expertise from EPA and/or the States as well as the permittee.

Some permittees may be required to perform a second TRE subsequent to implementation of remedial action. An example of the appropriate use of a subsequent TRE is for the correction of new violations of whole effluent limitations following a period of

---

[1]Federal Administrative penalty orders must be linked to violations of underlying permit requirements and schedules.

[2]See Methods for Aquatic Toxicity Identification Evaluations, Phase I, Toxicity Characterization Procedures, EPA-600/3-88/035, Table 1. An exhaustive TRE plan covers three areas: causative agent identification/toxicity treatability; influent/effluent control; and attainment of continued compliance. A listing of EPA protocols for TREs can be found in Section V (pages 11 and 12).

[3]For industrial permittees, the facility must be well-operated to achieve all water quality-based, chemical specific, or BAT limits, exhibit proper O & M and effective BMPs, and control toxics through appropriate chemical substitution and treatment. For POTW permittees, the facility must be well-operated to achieve all water quality-based, chemical specific, or secondary limits as appropriate, adequately implement its approved pretreatment program, develop local limits to control toxicity, and implement additional treatment.

sustained compliance (6 months or greater in duration) indicating a different problem from that addressed in the initial TRE.

3. Enforcement of Compliance Schedule and Reporting Requirements

In a number of instances, the primary requirements in the permits to address toxicity will be schedules for adoption and implementation of biomonitoring plans, or submission of reports verifying TREs or other similar reporting requirements. Regions and States should consider any failure (1) to conduct self-monitoring according to EPA and State requirements, (2) to meet TRE schedules within 90 days, or (3) to submit reports within 30 days of the specified deadline as SNC. Such violations should receive equivalent enforcement follow-up as outlined above.

4. Use of Administrative Orders With Penalties

In addition to the formal enforcement actions to require remedial actions, Regions and States should presume that penalty AO's or State equivalents can be issued for underlying permit violations in which a formal enforcement action is appropriate. Headquarters will also provide Regions and States with guidance and examples as to how the current CWA penalty policy can be adjusted.

5. Enforcement Models and Special Remedies

OWEP and OECM will develop standard pleadings and language for remedial activities and compliance milestones to assist Regions and States in addressing violations of toxicity or water quality-based permit limits. Products will include model litigation reports, model complaints and consent decrees, and revised penalty policy or penalty algorithm and should be completed in early FY 1989.

7200

V. Summary of Principal Activities and Products

A. Compliance Tracking and Review guidance

1. PCS Coding Guidance - May, 1987; revision 2nd Quarter 1989

2. Review Criteria for Self-monitoring Data (draft attached)

B. Inspections and Quality Assurance

1. Revised NPDES Compliance Inspection Manual - May 1988.

2. Quality Assurance Guidance - 3rd Quarter FY 1989.

3. Biomonitoring Inspection Training Module - August 1988.

4. Additions of a reference toxicant to DMRQA program - (to be determined)

C. Toxics Enforcement

1. Administrative and Civil Penalty Guidance - 4th Quarter FY 1989

2. Model Pleadings and Complaints - 2nd Quarter 1989

3. EMS Revision - 2nd Quarter FY 1989

D. Permitting Consistency

1. Basic Permitting Principles - 2nd Quarter FY 1989

E. Toxicity Reduction Evaluations

1. Generalized Methology for Conducting Industrial Toxicity Reduction Evaluations - 2nd Quarter FY 1989

2. Toxicity Reduction Evaluation Protocol for Municipal Wastewater Treatment Plants - 2nd Quarter FY 1989

3. Methods for Aquatic Toxicity Indentification Evaluations

a. Phase I. Toxicity Characterization Procedures, EPA-600/3-88/034- September 1988

b. Phase II. Toxicity Identification Procedures, EPA-600/3-88/035- 2nd Quarter 1989

c. Phase III. Toxicity Confirmation Procedures- EPA-600/3-88/036 - 2nd Quarter FY 1989

Attachment

QUALITY CONTROL FACT SHEET FOR SELF-BIOMONITORING ACUTE/CHRONIC TOXICITY TEST DATA

Permit No. _____

Facility Name _____

Facility Location _____

Laboratory/Investigator _____

Permit Requirements:

Sampling Location _____ Type of Sample _____

Limit _____ Test Duration _____

Type of Test _____ Test Organism Age _____

Test Results:

LC50/EC50/NOEL _____ 95% Confidence Interval _____

Quality Control Summary:

Date of Sample: _____ Dates of Test: _____

Control Mortality: _____% Control Mean Dry Weight _____

Temperature maintained within ±2=C of test temperature? Yes____ No___

Dissolved oxygen levels always greater than 40% saturation?

Yes_____ No____

Loading factor for all exposure chambers less than or equal to maximum allowed for the test type and temperature? Yes____ No_____

Do the test results indicate a direct relationship between effluent concentration and response of the test organism (i.e., more deaths occur at the highest effluent concentrations)? Yes____ No_____

2203

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

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

MAR 7 1990

OFFICE OF WATER

MEMORANDUM

SUBJECT: Quality Assurance Guidance for Compliance Monitoring in Effluent Biological Toxicity Testing

FROM: David N. Lyons, P.E., Chief
Enforcement Support Branch (EN-338)

TO: Compliance Branch Chiefs, Water Management Division
Surveillance Branch Chiefs, Environmental Services Div.
Regions 1 - 10

I am attaching the "QA Guidance for Compliance Monitoring in Effluent Biological Toxicity Testing" for your distribution.

This document will supplement the QA section (Chapter 8) in the NPDES Compliance Inspection Manual. The objective of this guidance is to help NPDES inspectors, trained or untrained in the principles of biological testing, to understand the parameters that influence the acceptability of test data, and to recognize data that are invalid for verifying compliance.

Earlier drafts were reviewed by a workgroup consisting of Headquarters, Regional and State staff. Their comments were incorporated in this version. If you have any questions, please feel free to contact my staff, Samuel To (FTS-475-8322) and Theodore Coopwood (FTS-475-8327).

Attachment

QUALITY ASSURANCE GUIDANCE
FOR
COMPLIANCE MONITORING
IN EFFLUENT BIOLOGICAL TOXICITY TESTING

February 1990

Office of Water Enforcement and Permits
U.S. Environmental Protection Agency

2209

TABLE OF CONTENTS

INTRODUCTION

The purpose of this document is to provide quality assurance guidance for review and evaluation of effluent toxicity testing. It will serve as an addendum to the NPDES Compliance Inspection Manual. Its objective is to help those both trained and untrained in the principles of biological testing to understand the parameters that influence the acceptability of test data, and recognize data that are invalid for verifying compliance.

The primary goal of quality assurance is to ensure that all environmentally related measurements submitted to the U.S. Environmental Protection Agency (EPA) in permittee self monitoring reports represent data of known quality. The quality of data is known when all components associated with its derivation are thoroughly documented, and the documentation is verifiable and defensible. It is EPA's policy to ensure that data representing environmentally related measurements are of known quality.[a]

Quality Assurance is especially important in the NPDES program which obtains the majority of its information on permittee compliance from test data submitted by the permittees. Compliance with NPDES permit effluent limitations requires that accurate test results be within the allowable quantity or concentration prescribed in the permit.

---

[a] Quality Assurance is the program that assures the reliability of data. It includes policies, objectives, principles, programs, and procedures to produce data of known and accepted quality. It may include quality control, which is the routine application of detailed procedures for obtaining prescribed standards of performance in the monitoring and measurement process.

This guidance focuses on the quality assurance considerations that affect the acceptability of whole-effluent toxicity test data submitted by permittees. Whole-effluent toxicity tests involve the exposure of selected test organisms to prescribed concentrations of effluent under controlled test conditions for a specified time to determine effluent toxicity. Toxicity may be exhibited by changes in organism mortality, growth, reproduction or other physical response when compared to a control. As with specific chemical analyses, whole-effluent toxicity tests must conform to a specified set of physical conditions to be considered valid. Only valid tests can confirm compliance with an effluent limitation.

GENERAL QUALITY ASSURANCE CONCERNS

Objectives

The objectives of a toxicity testing quality assurance program are to ensure that generated data reflect accurately the conditions that the data represent, that commonly accepted or standard practices have been followed in all facets of data generation, and that each step of data generation from sample collection to reported results has an appropriate written verifiable log or record.

Quality Assurance Program

The elements of a good quality assurance program are designed to ensure that the above objectives are fulfilled. Such elements should be contained in a written quality assurance plan for each facility conducting toxicity testing. The plan for each facility should contain:[4,5]

a) Facility quality assurance policy
b) Standard operating procedures
c) System and performance audits
d) Facilities and equipment
e) Qualifications and training of personnel
f) Quality assurance/quality control responsibilities
g) Administrative sample handling procedures
h) Sample custody and chain-of-custody procedures
i) Applicable instrument calibration procedures, frequency, and records
j) Laboratory practices to ensure that reagents and standard solutions have not violated respective shelf holding time

The aspects of the quality assurance plan dealing with effluent toxicity tests should discuss:

a) Effluent sampling and handling
b) Source, condition and handling of test organisms
c) Condition of equipment
d) Test conditions
e) Instrument calibration
f) Replication
g) Use of reference toxicants
h) Record keeping
i) Data evaluation
j) Data reporting

The plan should specify where verifiable logs or records should be maintained and retained to identify the responsible person for each aspect of the data generating procedure, and the practices that will ensure that possible tampering with sample quality has not occurred.

Test organisms are the analytical instruments in a toxicity test. They respond to the elements of their environment in accordance with their individual sensitivity. Methods for toxicity testing have been accepted and published by EPA.[6,7,8] Quality assurance practices require that documentation shows that these methods have been followed or that any deviations are fully explained and documented.

Sampling and sample handling requires that sample holding time is not violated. Test organisms should be positively identified to species and be disease-free, of known age, and of good health; their source should be recorded and reference toxicant testing documented. Laboratory temperature control equipment must be adequate to maintain recommended test water temperatures. Test materials fabrication must not influence test solution or control water quality. Analytical methods must include quality control practices outlined in EPA methods manuals or as specified in

official EPA methods.[9,10] Instruments used for routine measurements of chemical and physical parameters must be calibrated and standardized according to accepted procedures. Dilution water should be appropriate to the objectives of the study.[6,7,8] Water temperature, dissolved oxygen, salinity or water hardness, and pH should be maintained within the limits specified for each test. Replication of test procedures are specified in the test instructions. Reference toxicants should be used to verify efficacy of laboratory procedures and health of organisms. Proper, accurate, complete record keeping and data reporting are essential. All of these parameters are specified in the methods manuals.

Review of Quality Assurance Procedures

One method used to evaluate permittee adherence to good quality assurance and test protocols is through an inspection or audit. A quality assurance inspection or audit would examine documents, records, and procedures, including:

a) Quality assurance program plan
b) Quality assurance audit reports and inspection records
c) Laboratory certifications
d) Equipment calibration records
e) Collection and management of samples to laboratory
f) Chain-of-custody and responsible-person procedures
g) Sample management, storage, and security within laboratory
h) Record keeping
i) Laboratory facility and equipment condition
j) Training and experience of personnel
k) Source, maintenance, and apparent health of test organisms
l) Source and results of reference toxicants (i.e., reference toxicant test results and control survival)
m) Shelf life and labeling of reagents and standard test solutions

n) Methods for preparation of laboratory standards and synthetic or artificial waters including the source of any sea salts used.

o) Deviations from standard procedures

p) Test reports that were rejected for unacceptable QA/QC by a regulatory agency

q) Adequacy of space and equipment for work load

r) Methods for laboratory waste disposal

An inspection or audit should determine compliance with minimum acceptable criteria for collecting samples, conducting the tests, and analyzing test results. In addition to examining the equipment and facilities, the acquisition, culture, maintenance, and acclimation of test organisms should be investigated. Detailed considerations of the primary aspects of whole-effluent toxicity testing follow.

2218

SAMPLE COLLECTION AND TEST PROCEDURES

Effluent and Receiving Water Sampling

The effluent sampling point should be the same as specified in the National Pollutant Discharge Elimination System permit. The collector of a sample should be recorded. It is essential that the sample be characteristic of the wastewater discharge. When chlorination is practiced, regulatory authorities measure the toxicity of the effluent at different steps in the process; i.e. prior to chlorination, or after chlorination, or after dechlorination with sodium thiosulfate. Receiving water samples are collected upstream from the outfall being tested or from uncontaminated surface water with similar natural qualities. It is common practice to collect grab samples for receiving water toxicity studies, and receiving water may be specified as a source of dilution water in effluent toxicity tests. These grab sample collections should be conducted following the specifications for each test method.[6,7,8]

Aeration during collection and transfer of effluents should be minimized to reduce the loss of volatile chemicals. Sample holding time, from time of collection to initiation of the test, should not exceed 36 hours. Samples collected for off-site toxicity testing are to be chilled to 4°C when collected, shipped in ice to the laboratory, and there transferred to a 4°C refrigerator until used.

The above precautions are taken to maintain the potential toxicity characteristics and integrity of the wastewater and to ensure that such characteristics are not changed following sample collection and prior to toxicity testing. Precautions should be taken to ensure that any materials used in sample collection or throughout the testing process will not affect the integrity of

the sample being tested. Any alterations to effluent or dilution water samples should be well documented even if that adjustment is standard, including the use of sea salts or hypersaline brine (HSB) to adjust the salinity of freshwater effluents.

Facilities, Equipment, and Test Chambers

Specific requirements have been developed for facilities and equipment used in toxicity testing,[6,7,8] and should be referred to during the conduct of each method. To summarize:

- Laboratory temperature control equipment must maintain recommended test water temperatures.

- All materials that come in contact with the effluent must be such that there is no leaching or reaction that potentially would alter the integrity of the wastewater being tested. Tempered glass and perfluorocarbon plastics (Teflon^{R}) should be used whenever possible to minimize sorption and leaching of toxic substances. These materials may be reused following decontamination.

- Plastics such as polyethylene, polypropylene, polyvinyl chloride, and TYGON^{R} may be used as test chambers or to store effluents, but caution should be exercised in their use because they might introduce toxicants when new, or carry over toxicants from one test to another if reused.

- The use of large glass carboys is discouraged for safety reasons. Glass or disposable polystyrene containers are used for test chambers.

- New plastic products of a type not previously used should be tested for toxicity before initial use by

2270

exposing the test organisms in the test system where the material is used.

- Silicone adhesive used to construct glass test chambers absorbs some organochlorine and organophosphorus pesticides. As little of the adhesive as possible should be in contact with the water and any beads of adhesive inside the containers should be removed.

- Cleaning of equipment should be rigorous and thorough.

Analytical Methods

Routine chemical and physical analyses must include established quality control practices outlined in EPA methods manuals or in 40 CFR 136 particular approved methods.[4,5]

Calibration and Standardization of Equipment and Reagents

Instruments used for routine measurements of chemical and physical parameters such as pH, dissolved oxygen, temperature, conductivity, alkalinity, and salinity/hardness must be calibrated and standardized according to instrument manufacturers' procedures. Wet chemical methods used to measure alkalinity and hardness must be standardized according to procedures specific in the EPA method. Logs should be maintained for the calibration of instruments.

Dilution Water

Dilution water should be the same as specified in the permit. If required, dilution water may be synthetic water, ground water, seawater, artificial seawater or hypersaline brine (HSB) made from a non-contaminated source of natural seawater (above 30 0/00 salinity) appropriate to the objectives of the study and

logistical constraints, and should follow recommendations of each individual method. Holding time and holding temperature for dilution water are specified as similar to that for effluent samples. Dilution water is considered acceptable if test organisms have adequate survival (during acclimation and testing), growth, and reproduction in the test chambers during a test; and give the predicted results when tested using a reference toxicant.

Water temperature within the test chambers must be monitored continually and maintained within the limits specified for each test. Dissolved oxygen concentrations must also be maintained within the limits specified, and pH should be checked and recorded at the beginning of the test and at least daily throughout the test. In regard to dissolved oxygen, if it is necessary to aerate during the test, and the protocol allows aeration, all concentrations and controls must be aerated and the fact noted on the test report.

Record Keeping

Records should detail all information about a sample and test organisms, including:

a) Collection: date; time; location; pre-, post-, or dechlorinated; weather conditions, methods, and collector

b) Transportation: method, chain of custody, packing to ensure correct temperature maintenance, and security

c) Laboratory: storage, analysis, and security

d) Testing: elapsed time from sample collection, treatment, and type of test

e) Test organism: species, source, age, health, and feeding

f) Records of diseased or discarded organisms

g) Test results including replicates and controls

h) All calculations that impact test results and data interpretation

2222

i) Any observations of a non-routine occurrence that may be important in interpretation of results

j) Equipment and instrument calibrations

k) Any deviation from the protocol.

Records should be kept in bound notebooks. Observations should be recorded as they occur to prevent the loss of information. Notebook data and observations should be initialed and dated by the observer.

TEST ORGANISMS

Organisms Used

The standard freshwater test organisms used in chronic toxicity tests are the fathead minnow, Pimephales promelas; the cladoceran, Ceriodaphnia dubia; and the green alga, Selenastrum capricornutum. Marine and estuarine organisms currently include the sheepshead minnow, Cyprinodon variegatus; the inland silverside, Menidia beryllina; the mysid, Mysidopsis bahia; the sea urchin, Arbacia punctulata; and the red alga, Champia parvula. Organisms used should be disease-free, and positively identified to species (ideally by an expert taxonomist).

Quality and Source of Test Organisms

When organism breeding cultures are maintained, the sensitivity of the offspring should be determined in a toxicity test performed with a reference toxicant at least once each month. If preferred, this reference toxicant test may be performed concurrently with an effluent toxicity test. The standard reference toxicant test should be conducted using the exact method for which the organisms are being evaluated.

Food Quality

Suitable foods must be obtained as described in the toxicity testing methods manuals. Limited quantities of reference food, information on commercial sources of good quality foods, and procedures for determining food suitability are available from the Quality Assurance Branch, Environmental Monitoring and Support Laboratory, U.S. Environmental Protection Agency, Cincinnati, OH 45268. The suitability of each new supply of food must be determined in a side-by-side test in which the response

of test organisms fed with the new food is compared with the response of organisms fed a reference food or a previously used, satisfactory food. Preparation of food should follow methods accepted and published.[6,7,8]

Reference Toxicants

Reference toxicants are standard chemicals that can be used to evaluate test organism sensitivity, laboratory procedures, and equipment. Their use allows a laboratory to compare the response of test organisms to a reference toxicant under local laboratory conditions.

When a toxicity value from a test with a reference toxicant does not fall within the expected range for the test organisms when using standard dilution water (i.e., reconstituted water), the sensitivity of the organisms and the overall credibility of the test system are suspect and should be examined for defects, and the health of the organisms questioned. The test should be repeated with a different batch of test organisms.

Four reference toxicants are available to establish the precision and validity of toxicity data generated by biomonitoring laboratories; copper sulfate ($CuSO_4$), sodium chloride (NaCl), sodium dodecylsulfate (SDS), and cadmium chloride ($CdCl_2$). The reference toxicants may be obtained by contacting the Quality Assurance Branch, Environmental Monitoring and Support Laboratory, U.S. Environmental Protection Agency, Cincinnati, OH, 45268. Instructions for their use and the expected toxicity values for the reference toxicants are provided with the samples. To ensure comparability of quality-assured data on a national scale, all laboratories must use the same source of reference toxicant and the same formulation of moderately hard, synthetic dilution water for freshwater tests and the same sea salt or HSB for marine tests.

Control Charts

A control chart often is prepared for each reference toxicant and organism combination. With such a chart the cumulative trend from a series of tests can be evaluated. The mean value and upper and lower control limits are recalculated with each successive point until the statistics stabilize. The upper and lower control limits are two standard deviations from the mean. Outliers, which are values that fall outside the upper and lower control limits, and trends of increasing or decreasing sensitivity are readily identified.

ASSESSING DATA QUALITY

Test Acceptability

Test acceptability depends upon test organism mortality in the test controls. It varies among organisms and tests. For acute toxicity tests,[b] the control survival must be 90 percent or greater for a valid test. For valid freshwater chronic fathead minnow or Ceriodaphnia dubia effluent toxicity tests,[c] control

---

[b] An acute toxicity test is a test of short duration where the organism response is typically observed in 96 hours or less. These tests are used to determine the effluent concentration, expressed as a percent volume, that is lethal to 50 percent of the organisms within the prescribed time period (LC_{50}). Where death is not easily detected, such as with invertebrates, immobilization is considered equivalent to death. Static and flow-through testing systems are used. Static tests include nonrenewal test where the organisms are exposed to the same effluent solution for the duration of the test, and renewal tests where the test organisms are exposed to a fresh solution of the same concentration of effluent every 24 hours or other prescribed interval. A flow-through test typically uses a diluter system and continuous feed of mixtures of effluent and diluent to a series of test chambers to ensure that different organisms are exposed continuously to different effluent concentrations throughout the test period.

[c] A chronic toxicity test is designed to measure long-term adverse effects of effluents on aquatic organisms. The organism's response is usually observed in 7 to 9 days, while the test period itself can last from one hour to several days. These test are used to determine the more subtle effects of toxicants such as adverse effects on survival, growth, reproduction, fertility and fecundity, and the occurrence of birth defects (teratogenicity). These effects can be quantitatively expressed in various ways, such as by determining the concentration at which 50 % of the organisms show a particular adverse effect (EC_{50}); or by observing the highest tested concentration at which the organisms' responses are not significantly different statistically from controls (the no observable effect concentration, or NOEC); or by observing the lowest observable effect concentration at which organisms' responses are different statistically from controls (the lowest observable effect concentration, or LOEC).

survival must be at least 80 percent. For the fathead minnow larval survival and growth test, the average dry weight of the surviving controls should equal or exceed 0.25 mg. For the Ceriodaphnia dubia survival and reproduction test, there should be an average of 15 or more young/surviving females in the control solutions. For valid reference toxicant tests, control survival growth and reproduction is the same as stated for the definitive test. For the marine short-term chronic tests with sheepshead minnow, silverside, or mysid, control survival must be equal to or exceed 80 percent in a valid test. The sea urchin test requires control egg fertilization of 70 to 90 percent. The Champia parvula test requires that control mortality does not exceed 20 percent and that plants have an average of 10 or more cystocarps. Other specifications for test acceptability are provided in test protocols.[6,7,8]

An individual test may be conditionally acceptable if temperature, DO, and other specified conditions fall outside specifications, depending on the degree of the departure and the objectives of the tests. The acceptability of the test will depend on the best professional judgment and experience of the investigator. The deviation from test specifications must be noted when reporting data from the test.

Precision

Precision is an expression of the degree of reproducibility of results. The ability of a laboratory to obtain consistent, precise results should be demonstrated with reference toxicants before measuring effluent toxicity. The single laboratory (intra-laboratory) precision of each type of test to be used in a laboratory should be determined by performing five or more tests with a reference toxicant. In cases where the test data are calculated in lethal concentrations (LC_{50}) and associated confidence intervals, precision can be described by the mean,

standard deviation, and relative standard deviation (percent coefficient of variation, or CV) of the calculated end points from the replicated tests. However, in cases where the results are reported in terms of the No-Observed-Effect Concentration (NOEC) and Lowest-Observed-Effect Concentration (LOEC), precision can only be described by listing the NOEC-LOEC interval for each test. In this case, it is not possible to express precision in terms of a commonly used statistic.

A new statistical procedure, an Inhibition Concentration (IC) will allow CVs to be calculated on chronic tests. CVs can be calculated for chronic tests because the IC, like the LC, is a point estimate derived from a mathematical model that assumes a continuous dose-response relationship. Specifically, the IC is a point estimate of the concentration that would cause a percent reduction in a non-quantal biological measurement such as fecundity or growth. Since the IC is a point estimate rather than a range, precision can be described in standard statistical terms such as mean, standard deviation, and percent coefficient of variation or CV.[11]

Other factors which can affect test precision include test organism age, condition, and sensitivity; temperature control; feeding; and type of dilution water used. However, these parameters are considered acceptable when the reference toxicity data are within the acceptable range.

Accuracy

Accuracy is the nearness of a measurement to its true value. In a biological toxicity test, accuracy is enhanced with test replication. Testing protocols are designed with replication sufficient to ensure that organism mortality or other effects will be as close to the true value as practicable when dealing with life sciences. Using EPA-approved test procedures, regular

and thorough laboratory inspections and audits, reference toxicants, and performance evaluation checks will ensure the highest degree of accuracy currently attainable in biological toxicity testing.

However, the accuracy of toxicity tests cannot be determined. This is because toxicity is a relative rather than an absolute concept, since only organisms can "measure" toxicity, and there is no true or absolute reference organism. Test results can be compared, but accuracy, as defined by a deviation from a true value, cannot be determined.[12]

Completeness

Completeness is the amount of data collected compared to the amount intended to be collected or required. Following EPA testing protocol will ensure completeness of results. According to the protocol a valid test requires a specified number of organisms to be exposed to a test solution under controlled conditions in both the test and the control for the test.

Representativeness

Representativeness is the extent to which the data collected accurately reflect the population or group being sampled. In conducting biological toxicity testing, there are two areas of representativeness concern: One is in collecting the sample of test solution to which the test organisms are exposed; the other is the species of organism used for the test. Methods of sample collection are detailed in the EPA testing protocol. A sample collector must adhere to standard operating procedures in sample collection, ensure that any sample collecting equipment is operating properly, and ensure that the integrity of the collected sample is preserved without dilution or contamination. The collected sample must, to the greatest extent possible,

represent the conditions that the collected sample was designed to represent. The other question relates to whether or not the organisms chosen for testing represent the universe of organisms in the environment that may be at risk when exposed to the test solution. In this context, representative means the most sensitive, and therefore the most protective of resident species. EPA has taken great care as a result of years of research experience to recommend particular organism species as test organisms. Considering the state-of-the-knowledge, the EPA test protocol's recommended test organisms are representative of the organism universe that they have been selected to represent.

Comparability

Comparability is the similarity of data from different sources. Standard procedures for test solution collection, conducting the test, and analyzing the resultant data must be observed by all who are engaged in NPDES biological toxicity testing to ensure that comparability of results is maintained. Different procedures will have different precision levels, thus invalidating a comparison of results among laboratories. EPA protocols on biological toxicity testing are detailed and specific. Strict adherence to these protocols when conducting a test, along with the use of reference toxicants and performance evaluation tests, alleviate many of the comparability concerns that otherwise would occur.

Replication and Test Sensitivity

The sensitivity of the tests will depend in part on the number of replicates, the statistical probability level selected, and the type of statistical analysis. The minimum recommended number of replicates varies with the test and the statistical method used in each protocol. If the variability remains constant, the sensitivity of the test will increase as the number of replicates is increased.

REPORTING RESULTS

The report should detail specific information about sampling, organism culture, and the test, including why it was performed, where, when, and how. Plant operations, source of effluent and dilution water, test methods, test organisms, quality assurance (i.e., physical-chemical measurements and organism response), data analysis and test results should be discussed. Facts should be complete, accurate, and understandable. Report format and contents have been recommended.[8]

Good writing is a systematic recording of organized thought. It involves a clear, concise, orderly presentation of an understandable message. Quality assurance measures are as important in report preparation as elsewhere in an investigation. Generally, such quality assurance takes the form of report peer review. A review should establish that each sentence is clear, technically accurate, and devoid of a dual meaning, and that no unanswered questions about the toxicity test remain. A toxicity testing report should contain the necessary data, readily accessible, for use in EPA data systems such as the Permit Compliance System. The report should be examined and reexamined to prevent data management errors in transcription, expression of units, and calculations. The use of preprinted forms is helpful because attention then is focused on specific data requirements. Checking of data and calculations by an individual not associated with the initial calculations is employed to minimize errors. Reducing the number of people involved in data transfer can minimize data management errors.

REFERENCES

1. Policy and program requirements to implement the mandatory quality assurance program. EPA Order 5360.1, April 3, 1984.

2. Development of water quality-based permit limitations for toxic pollutants; national policy. 49 FR 9016, Mar 9, 1984.

3. Technical support document for water quality-based toxics control. U.S. EPA, Washington, D.C. EPA-440/4-85/032, 1985.

4. Guidelines and specifications for preparing quality assurance program plans. Quality Assurance Management Staff, U.S. EPA, Sept 1987.

5. Preparing perfect quality assurance project plans. Risk Reduction Engineering Laboratory, Cincinnati, OH, EPA/600/9-89/087 October, 1989.

6. Methods for measuring the acute toxicity of effluents to freshwater and marine organisms. 1985. U.S. EPA. Cincinnati, OH, EPA-600/4-85/013.

7. Short-term methods for estimating the chronic toxicity of effluents and receiving waters to freshwater organisms. 1989. Second Edition. U.S. EPA, Cincinnati, OH, EPA-600/4-89/001.

8. Short-term methods for estimating the chronic toxicity of effluents and receiving waters to marine and estuarine organisms. 1988. U.S. EPA, Cincinnati, OH EPA-600/4-87/028.

9. Handbook for analytical quality control in water and wastewater laboratories. 1979. U.S. Environmental Protection Agency, Cincinnati, OH, EPA-600/4-79/019.

10. Methods for chemical analysis of water and wastes. Revised 1983. U.S. EPA, Cincinnati, OH, EPA-600/4-79/020.

11. Guidelines establishing test procedures for the analysis of pollutants under the Clean Water Act; Proposed Rule with Request for Comments. 51 FR 50215, December 4, 1989.

12. Supplement to "Short-term methods for estimating the chronic toxicity of effluents and surface waters to freshwater organisms." U.S. EPA, Washington, D.C. EPA-60014-89/001.

VII. ANNUAL DOCUMENTS AND SHORT-TERM INITIATIVES

VII.1. "EPA Agency Operating Guidance - FY 1986-1987", dated February 1985.** EXPIRED. Effective through September 30, 1986.

VII.2. "FY86 Guidance For Oversight Of NPDES Programs", dated June 28, 1985.** EXPIRED. Effective through September 30, 1986.

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

2240

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

AUG 9 1985

OFFICE OF WATER

MEMORANDUM

SUBJECT: National Municipal Policy Enforcement Initiative

FROM: J. William Jordan, Director
Enforcement Division (EN-338)

Glenn L. Unterberger
Associate Enforcement Counsel
for Water (LE-134W)

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

In order to focus nationwide attention on the July 1, 1988 compliance deadline for POTWs, we are preparing an enforcement initiative for the National Municipal Policy (NMP). We expect that grouping a number of well-selected cases into an enforcement initiative will advance substantially the Environmental Protection Agency's (EPA) efforts to obtain compliance by the deadline. We seek your participation in this initiative. The filing of cases in this initiative is tentatively scheduled for the first quarter of FY 1986. The purpose of this memorandum is to request a list of candidates from all Regions for the enforcement initiative. Based on the information available at Headquarters, we have generated a preliminary list for your review and revision. This memorandum also describes the criteria to be used in selecting candidates and a proposed schedule for implementing the NMP enforcement initiative.

An NMP enforcement initiative was discussed at the National Branch Chiefs' meeting in May of this year and in subsequent conference calls with all Regions participating. At the Branch Chiefs' meeting, all Regions were asked by Rebecca Hanmer to develop a preliminary list of enforcement initiative candidates. To date, we have received such lists from two Regions. Several other Regions are still actively preparing these lists, since in many cases, Municipal Compliance Plans (MCPs) were not due to be submitted until June of this year. If we are to have a successful enforcement initiative which demonstrates EPA's resolve to hold to the 1988 compliance deadline, we must be prepared to back this resolve through aggressive enforcement. The enforcement initiative will clearly demonstrate the importance the Agency places on municipal compliance.

2241

Purpose of the Initiative

The purpose of this initiative is to send a message to both those municipalities already committed to a July 1, 1988 schedule and those municipalities which have not, that EPA is serious about the deadline. State inventories have identified many POTWs which need construction to comply with permit limits. While many of these municipalities have agreed to a schedule requiring compliance with the July 1, 1988 deadline, it appears that a significant number have not submitted schedules and that a number of POTWs plan to submit schedules which extend beyond July 1, 1988. If EPA is to maintain a credible and evenhanded approach to all municipalities, we must be prepared to address those municipalities where the deadline will not be met or, as in many cases, is not even being taken seriously.

Scope of Enforcement Initiative

Under this initiative the following factors should be applied to select POTWs for action:

- The POTW is currently in violation of permit requirements.
- Major construction is needed to achieve compliance.
- The municipality has not submitted a required MCP, has submitted a deficient MCP, or has included a schedule which extends beyond the July 1, 1988 deadline. It is preferable to include POTWs which appear to be capable of meeting the deadline so we can reinforce its importance.
- It should be clear for each selected POTW what effluent limits are required; therefore, any 301(h), revised WQS, or redefined secondary issue should already be resolved.
- Selected facilities should be major permittees and, wherever possible, be larger municipalities to send as strong a signal as possible (i.e., 10 MGD and greater).
- All municipalities which have received State administrative extensions beyond the July 1, 1988 deadline should automatically be considered for inclusion in this initiative.
- Municipalities where it may be physically impossible to complete construction by July 1, 1988 should not be excluded from consideration. All such POTWs must be submitted for judicial action if the schedule extends beyond July 1, 1988, though not necessarily under this initiative.
- Municipalities where there is uncertainty as to the financial capabilities for construction should not be excluded. Financial experts funded through HQ are available to augment Regional analysis of the financial situation of municipalities
- Municipalities which have proven to be recalcitrant should be considered first.

7242

This initiative is intended to help ensure that EPA is taking serious enforcement action against facilities which have not received Federal construction grant funding. Nevertheless, EPA should also be taking enforcement action against POTWs which have received grants or are in the grants process consistent with the priorities set out in the National Municipal Policy and the April 1984 implementation guidance.

As a first step in helping to define the universe of possible candidates for this initiative, we have completed a search of the national Permit Compliance System (PCS) to identify those POTWs which, based on effluent data, appear to need major construction of treatment facilities. The POTWs with the most consistent and largest effluent violations were then cross-referenced with the national inventory of NMP POTWs submitted by each Region to identify those which have not committed to an acceptable compliance schedule. It appears from this preliminary review that there are a number of good candidates in all Regions for the NMP initiative. Since the PCS does not contain effluent data for all facilities in many Regions, the attached list should in no way be considered a complete list of possible candidates. Each Region should review the list and verify possible candidates and add any other candidates which may be appropriate to consider. If any of the candidates should not be included because the State will bring the judicial action before December 15, 1985, then indicate so and give an approximate date for the State action. Candidates should not be rejected unless the State filing is projected prior to the Federal filing date. Ultimately, we are looking to file at least a couple of the best cases in each Region as a part of this initiative so as to send a truly national message to the POTW community.

Schedule for the NMP Enforcement Initiative

1.	Regions review attached list, making additions and deletions, and submit preliminary list to Headquarters OWEP.	August 23, 1985
2.	Regions review submitted MCP schedules as they come into identify final candidates. Submit list of probable final candidates.	September 15, 1985
3.	Submit litigation reports for final candidates to Headquarters.	November 1, 1985
4.	Approximate DOJ filing date.	December 15, 1985

We will be working closely with the Department of Justice to assure that the NMP enforcement initiative cases are quickly moved through the referral system. Where effluent violations have occurred, it will be particularly helpful to make sure that the necessary documentation, such as DMRs, are assembled to include in litigation reports and that inspections are conducted where necessary to confirm the extent of the violations and the compliance measures likely to be needed.

2248

Any problems which will need expert contractor assistance resolve, such as physical or financial capability questions, should be identified as early as possible. Regions need not have the final answers from the contractor review of the financial or physical factors before submitting referral packages to Headquarters. Since it is expected that this support will be needed in many of the cases, it will probably be an ongoing process before and after filing. The contact person for this assistance is Brian Maas of the Enforcement Support Branch (FTS 475-8322).

We realize that the above schedule will require a significant commitment from Regional Water Programs and Regional Counsels Offices, as well as Headquarters EPA and Department of Justice Offices; however, this initiative is critical to accomplishing the major goals of the National Municipal Policy. If you have any questions or comments on the enforcement initiative, please contact either of us. If you desire any additional information on the attached lists call David Lyons, Chief of the Enforcement Support Branch (FTS 475-8310) or Brian Maas. Please submit the preliminary list to David Lyons. Caroline Poplin (FTS 475-8184) will serve as the OECM staff contact.

Attachment

cc: William Whittington

"CWA Civil Judicial and Administrative Penalty Practices Report for FY 89.

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: CWA Civil Judicial and Administrative Penalty Practices Report for FY89

FROM: Robert G. Heiss
Associate Enforcement Counsel
for Water

James R. Elder, Director
Office of Water Enforcement
and Permits

TO: Gerald A. Bryan, Director
Office of Compliance Analysis
and Program Operation

Attached is the Clean Water Act Civil Judicial and Administrative Penalty Practices Report covering cases concluded in FY89. The penalty numbers represent the decree or order amount without reduction to present value for those penalties to be paid over extended periods. If you have any questions regarding this report please contact Kathy Summerlee of the Office of Enforcement and Compliance Monitoring at 382-2879 or Ken Keith of the Office of Water Enforcement and Permits at 245-3714.

We look forward to receiving the final agency-wide report when it is completed.

Attachment

cc: George Alderson
Ken Keith
Rich Kozlowski
Kathy Summerlee

CWA CIVIL JUDICIAL AND ADMINISTRATIVE PENALTY PRACTICES REPORT FOR FY89

1. Use and Level of Penalties

This report summarizes the use and levels of civil judicial and administrative penalties in FY89 in cases concluded under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program.

Section 309(d) provides that any person who violates certain enumerated sections of the Clean Water Act, any NPDES or Section 404 permit condition or limitation implementing any one of those enumerated sections, any requirement in a pretreatment program, or any EPA-issued administrative order, shall be subject to a penalty of $25,000 per day for each such violation. Prior to enactment of the Water Quality Act (WQA) in February 1987, such violations were subject to a penalty of $10,000 per day per violation.

Section 309(d), as amended by the WQA of 1987, also lists criteria which the court must consider in determining the amount of the civil penalty. Specifically, the court must consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator and such other matters as justice may require."

The authority to seek administrative NPDES penalties is found in Section 309(g) of the Act. Prior to enactment of the WQA in 1987, the Agency did not have authority to seek administrative penalties. The WQA authorizes EPA to institute Class I or Class II administrative penalty actions. In Class I actions, EPA may seek penalties of up to $25,000, at a rate not to exceed $10,000 per violation. In Class II actions, the maximum is $125,000, also assessed at a rate not to exceed $10,000 per day. Class II penalty proceedings must conform to the Administrative Procedures Act. EPA issued guidance on administrative penalty orders in August 1987, and Regional Offices began imposing penalties shortly thereafter.

For purposes of settlement, penalties are calculated according to EPA's February 1986 Clean Water Act penalty policy. An addendum to the policy for the calculation of administrative penalties was issued in August 1987. Essentially, the policy requires the recoupment of economic benefit and a gravity component. Adjustments are authorized for inability to pay and litigation considerations. The economic benefit is typically calculated using EPA's BEN computer software program.

2. Statutory Changes to Penalty Authorities

There have been no changes to the penalty authorities under the Clean Water Act since the WQA of 1987.

3. Possible Influences on Use and Level of Penalties

There are several factors which may have affected the amount of penalties the United States has received in settling or litigating Clean Water Act cases in FY89:

a. For the second full year, the availability of administrative penalty authority, pursuant to the WQA of 1987;

b. The Clean Water Act settlement penalty policy which, absent ability to pay or litigation considerations, requires recoupment of economic benefit and a gravity component;

c. Use of the BEN computer model to calculate economic benefit; and

d. The agency's emphasis on enforcement of the National Municipal Policy and the pretreatment regulations.

4. Use of Penalties

Ninety-eight percent of the judicial cases concluded in FY89 included a penalty.* See Table 1. This continues the post-1985 trend of concluding virtually all Clean Water Act civil judicial cases with a penalty. See Figure 1 (Use of Penalties in CWA Judicial Cases FY75-89).

Virtually all administrative penalty actions in FY89 were concluded with a penalty. See Table 4.

5. Judicial Penalty Profile

The penalties which establish the data base for the judicial penalty profile include only upfront, cash penalties payable to the United States.

Only entered consent decrees or judicial decisions are counted as concluded cases in the data base. Multiple complaints consolidated in one consent decree or decision are counted as one concluded case.

* The one case concluded without a civil penalty was Ashland in Region III which was also the subject of a criminal case netting a penalty of over 2 million dollars.

a. Number of Cases

The total number of judicial cases concluded in FY89 (including those concluded without a penalty) was 56. This is a drop to approximately the level reported for FY86. See Figure 1.

b. Total Penalties

Total penalties for all concluded judicial cases in FY89 was $9,744,000. See Table 1. See Figure 2 (Clean Water Act Penalties By Year - Judicial Cases).

c. Typical Penalties

The median penalty for all concluded judicial cases in FY89 (including those concluded without a penalty) was $50,000. See Table 1. This is an increase from FY88 median of $37,500 and a new high point for Clean Water Act NPDES Cases. See Figure 3 (Median Penalties - Clean Water Act - All Concluded Judicial Cases).

d. Highest Penalties

The highest penalty in FY89 was negotiated by Region V in a concluded case against Koch for $1,540,000. The next highest penalty was negotiated by Region VIII against Metropolitan Denver Sewage Disposal District for $1,125.000. See Table 3.

e. Comparison of Regional Uses and Levels of Judicial Penalties

Two Regions concluded cases with penalties of over one million dollars in FY89. Region V obtained the largest amount of penalties, $3,389,000. Regions III, IV, VI and VIII obtained penalties of over $1,000,000 total.

In terms of the number of cases concluded, Region IV concluded the most cases (15) followed by Region VI (9). See Table 3.

6. Administrative Penalties Profile

The penalties which constitute the data base for the administrative penalty profile reflect upfront, cash penalties which are to be paid to the United States generally within 30 to 60 days. In a few instances payment terms extended beyond 60 days without interest payment. Since discounting these few extended payments to present value would not change the data significantly, they have not discounted.

VII. ANNUAL DOCUMENTS AND SHORT-TERM INITIATIVES

4. "A Guide To The Office Of Water Accountability System And Mid-Year Evaluations", dated September, 1985.** EXPIRED. Effective through September 30, 1986 only.

5. "EPA Agency Operating Guidance - FY 1987, dated March 1986".** EXPIRED.

6. "A Guide To The Office Of Water Accountability System And Mid-Year Evaluations-Fiscal Year 1987", dated March 1986.** EXPIRED.

7. "FY87 Guidance For Oversight Of NPDES Programs", dated April 18, 1986.** EXPIRED.

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

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

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

11. "A Guide To The Office Of Water Accountability System And Mid-Year Evaluations, Fiscal Year 1988", dated May, 1987. Selected portions only. EXPIRED.

12. "FY 1988 Office Of Water Operating Guidance", dated June, 1987. Selected portions only. EXPIRED.

"FY 1989 Office of Water Operating Guidance," dated May, 1988.
Selected Portions ONLY.

United States
Environmental Protection
Agency

Office of
the Administrator
Washington, D.C.

March 1988

EPA

Agency Operating Guidance

FY 1989

2255

Office of Water

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

226A

FY 1989 WATER PROGRAMS AGENCY OPERATING GUIDANCE

I. ASSISTANT ADMINISTRATOR'S OVERVIEW

The Water Programs portion of the FY 1989 Operating Guidance provides national direction to EPA, States and the regulated community in carrying out programs mandated under Federal water protection statutes. These statutes include: the Safe Drinking Water Act (SDWA), the Clean Water Act (CWA, as newly amended by the Water Quality Act of 1987) and the Marine Protection, Research and Sanctuaries Act (MPRSA). The Agency and the States also implement programs to protect groundwater quality through authorizations under several different statutes.

The Office of Water (OW) uses a management accountability system to set priorities, define performance expectations, and track and assess Regional and State performance. The Office of Water Accountability System (OWAS) includes the OW portion of the Guidance, the accompanying SPMS measures, the OW program evaluation guide with quantitative and qualitative measures, and the OW mid-year Regional evaluations. As part of the mid-year process, the Regions provide the OW Assistant Administrator with their projected operating strategy and plan for FY 1990, including an overview of Regional and State priorities and their relationship to national priorities. This is done before FY 1990 commitments are made to set the context for negotiation of State work programs and those commitments. The Regions present their plans at the time of the senior management review for the FY 1989 mid-year evaluation and, as described in Section III, negotiate specific Regional projects prior to the beginning of the fiscal year.

Part I of this Guidance outlines the major program directions for Water Programs in FY 1989, and describes three major program concerns: controlling the discharge of toxic pollutants into surface waters, developing State Clean Water Strategies, and ensuring program accountability while providing Regions and States with flexibility to address their particular concerns. Part II contains specific program guidance and priority activities for the water programs organized by three problem areas around which OW has structured its FY 1989 program planning. Part III provides the process through which Regions negotiate Region-specific initiatives for FY 1989.

Activities with associated SPMS measures are denoted by [SPMS] appearing at the end of the activities. Additionally, in line with the Agency format, activities increased from the FY 1988 Operating Guidance are indicated by a plus (+) in the left margin, new activities are indicated by the letter (N), and decreased activities are indicated by a dash (-). No notation indicates that the activity is the same as in FY 1988.

A. PROGRAM DIRECTIONS AND PRIORITIES

FY 1989 will be critical for Water Programs. States and EPA will be meeting near-term deadlines and requirements for implementing programs to address both newly identified and long standing problems as demanded by the Water Quality and Safe Drinking Water Acts as well as continuing to operate traditional base programs. Water Programs' approach for dealing with these challenges is to focus our efforts to areas of greatest risk, and where the results of our efforts will reap the greatest benefit. In 1989, Water Programs will focus on three problem areas:

1. Protecting Drinking Water Sources

FY 1989 is critical to the Drinking Water Program as it implements the first new substantive provisions related to the 1986 Safe Drinking Water Act amendments including enforcement of the first new volatile organic compound and microbiological Maximum Contaminant Levels (MCLs), State adoption of authority to implement the surface water treatment rule (for filtration), implementation of the revised public notification requirements, initiation of the one-year requirement to assess all 15,000 surface water systems, and enforcement of the ban on lead-content plumbing materials and lead public notification.

The Drinking Water Program will continue developing the regulatory framework for controlling drinking water contaminants by satisfying the statutory schedule for regulatory development as well as a continuing emphasis on enforcing existing drinking water standards. EPA will be increasing its efforts to build additional State capacity to implement new regulatory requirements, including mobilizing the regulated community for voluntary compliance with the new requirements.

The Water Program continues to believe that wellhead protection activities are a key component in States' protection of wells which supply public water systems. Therefore, we see a major emphasis on providing technical assistance to States in developing either wellhead protection programs or other wellhead protection initiatives. Water Programs will increase assistance to States as they review and refine their groundwater strategies and develop a more comprehensive approach to groundwater protection, including application of classification guidelines, and development of preventative approaches.

Finally, to protect our underground sources of drinking water, a key FY 1989 objective is more effective compliance and enforcement of the UIC program, including emphasizing approaches to control "high risk" injection practices into Class V wells which, in some States, are not effectively regulated now for most subclasses (e.g., agricultural drainage wells) and many of which may pose serious threat to underground water supplies.

22166

2. Protecting Critical Habitats

In line with the legislated mandates and our increasing concern for high risk, vulnerable ecosystems, including wetlands, near coastal waters, estuaries, and lakes, EPA is strengthening its programs for developing anticipatory approaches in identifying and resolving the most serious wetlands losses; expediting Section 404 policy development; and enhancing State and local wetlands protection capability. In protecting our near coastal waters and oceans, we are strengthening EPA management support to an expanding estuary program. We recognize that toxics and nonpoint source (NPS) pollution are major contributors to problems in these critical areas. Therefore, we are increasing technical and programmatic support to State and local officials by documenting and disseminating successful control approaches through technology transfer from the near coastal, estuary, Chesapeake Bay and Great Lakes programs.

3. Protecting Surface Waters

In this area we propose to accelerate the development and adoption of water quality standards, primarily for toxic pollutants, by increasing EPA assistance to States, increasing EPA review of State standards and tracking State progress; continue investigating regulated and unregulated industries known to and/or suspected of discharging significant amounts of highly toxic pollutants, developing requisite regulations; review Individual Control Strategies (ICSs) which (under the Water Quality Act of 1987) are to be submitted by February 19[illegible]; focus the NPDES program on implementing these ICSs in NPDES permits and pretreatment programs where States/EPA have identified toxicity problems and data exist to establish water-quality based controls; increase emphasis on the regulation of stormwater discharges and assure progress in establishing sludge management programs; and maintain enforcement levels with greater emphasis on post-BAT/water quality requirements. Recognizing the critical role of the monitoring program in these activities, we propose to expand our surface water data base to identify hazardous substances; and develop exposure analyses using a risk-based, geographic approach.

Finally, we plan to continue the development and updating of water quality criteria, including investigation of improved biological assessment methodologies (bio-criteria).

B. MANAGEMENT PRINCIPLES

The following management principles will guide Water Program activities in meeting the challenges of FY 1989.

1. Enlarging the EPA/State Partnership

Water Programs will work actively to create a dialogue for participation among Federal, State, and local agencies; industry, environmentalists, and the public. In particular, Water Programs will take a leadership role in establishing networks with other Federal agencies in stimulating coordination among a variety of State and local agencies, and in encouraging public participation in the sharing of information, and the development of consistent, supportive protection approaches.

2. Integrating Water Program Responsibilties

As States implement their State Clean Water Strategies (SCWS) in FY 1989, the Water Programs will take a leadership role in encouraging Regions and States to coordinate their many CWA program responsibilities, to set priorities to target water resources for immediate action, and to identify the most important water resources for future controls. We will be watching for SCWS applications to CWA programs in those States that did not choose to participate in the 1988 process, for potential use in Drinking Water Programs, as well as for cross-media applications that will improve the effectiveness of environmental programs.

3. Targeting Based On Comparative Risk Assessments

In setting priorities and managing resources the Water Programs will meet legislatively mandated requirement and increasingly focus on high risk areas with the greatest potential environmental benefits and with feasible solutions in terms of the available tools and resources.

4. Indian Tribal Participation

Both the Safe Drinking Water Act Amendments of 1986 and the Water Quality Act of 1987 authorize EPA to treat Indian tribes which meet identified criteria as States for various pollution control activities. By the beginning of FY 1989, regulations will be in effect enabling eligible tribes to receive grants and contractual assistance under the Safe Drinking Water and Clean Water Acts (including municipal wastewater treatment) and to assume public water system and underground injection control enforcement responsibility. Other regulations are anticipated in FY 1989 including establishment of tribal water quality standards, delegation of NPDES permitting activities, and assumption of the Section 404 dredge and fill program. For these programs, and other pertinent activities, the word "State" includes tribes as appropriate.

C. CONTROLLING THE DISCHARGE OF TOXIC POLLUTANTS INTO SURFACE WATERS

Given the level of public attention to potential environmental and public health impacts, as well as the WQA amendments, the Agency's highest CWA priority in FY 1989 continues to be protecting the nation's surface waters from point source discharges, especially hazardous and toxic pollutants. By February 4, 1989, Section 304(l) requires States to develop lists of impaired waters, identify point sources and amounts of pollutants they discharge that cause toxic impacts, and develop individual control strategies (ICSs) for each such point source.

The general effect of §304(l) is to focus national surface water quality protection programs immediately on addressing known water quality problems due entirely or substantially to point source discharges of §307(a) toxic pollutants. Controls for these pollutants must be established as soon as possible, but no later than the statutory timeframes set forth in §304(l). However, EPA considers the WQA statutory requirements only one component of the ongoing national program to control toxics. EPA will require all known water quality problems due to any pollutants to be controlled as soon as possible, giving the same priority to controls for non-§307(a) pollutants as for controls where only §307(a) pollutants are involved. Such problems include any violation of State numeric criteria for any pollutant known to cause toxic effects and any violation of a State narrative water quality standard that prohibits instream toxicity due to any pollutant (including chlorine, ammonia, and whole effluent toxicity) based on ambient or effluent analysis.

States are required by §303(c)(2)(B) to adopt numeric criteria in water quality standards (WQS) for all the toxic pollutants listed pursuant to §307(a) where criteria have been published and where the the discharge or presence of those toxic pollutants can reasonably be expected to interfere with designated uses. These criteria are to be numeric, or, where numeric toxic criteria are not available, States must adopt toxics criteria based on biological monitoring or assessment methods. While this mandate may be met by traditional in-stream WQS, States may comply by adopting a procedure to be applied to the narrative water quality criterion, which is used to calculate numeric criteria to use as the basis for deriving WLAs/TMDLs and NPDES permit limits.

Under the WQA, States must adopt numeric criteria in WQS by the end of this triennial review period (FY 1990). Where a State does not adopt toxic chemical-specific criteria, it is EPA policy that States must be able to demonstrate that the particular toxic pollutant is not relevant because it is not present in the waters, or, if present, is not interfering with attaining uses, and new/existing dischargers are not likely to lead to interference with attaining the uses. As part of this triennial process,

States will also upgrade their anti-degradation programs to protect existing high quality waters, and will adopt effective whole effluent toxicity control programs.

Section 304(l) requires States to develop and submit to EPA lists of impaired waters. In FY 1989, States will refine and expand these lists, submitted initially to EPA in FY 1988, in order to meet the statutory deadline for their final submission. §304(l) also requires States to establish individual control strategies (ICSs) by the statutory deadline to reduce the discharge of toxic pollutants from each identified point source. Controls will be established as effluent limits in NPDES permits that assure, in combination with existing nonpoint source controls, the attainment and maintenance of applicable WQS for toxic pollutants and toxicity.

The immediate emphasis of §304(l) and the national program for toxics control requires States and EPA to address problems identified through review of existing and readily available data. However, States and EPA Regions will continue to collect new water quality data to assure that changes in water quality are identified and any gaps in existing data are filled to provide a reasonable basis for identifying and solving cases of water quality impairment. Revised State monitoring strategies will probably be necessary to address toxic pollutants and nonpoint source information needs in a cost-effective manner, based on EPA's Surface Water Monitoring Strategy.

D. STATE CLEAN WATER STRATEGIES

In FY 1988, EPA encouraged States voluntarily to develop State Clean Water Strategies (SCWSs) to set forth their priorities for action over a multi-year period, and to provide a basis for targeting their water pollution prevention and control efforts on water resources they determined to be most valuable and/or most threatened. In developing these SCWSs, States chose a format and scope of coverage that best suited their particular needs--so long as the final management plan was multi-year and recognized the interconnections among water programs. The nature of the final State management plans, therefore, would vary depending upon whether a State elected to use a comprehensive, integrated approach or a more traditional programmatic approach to convert its concepts into a multi-year strategy.

Where States took advantage of this opportunity, FY 1989 will be the first year for implementation of these multi-year management plans. As the plans vary, so will the nature of the FY 1989 implementation activities. States that adopted the more traditional, programmatic approach will be implementing the first round of actions set forth in the multi-year plan, and may want to strengthen further their public interest coalitions in an effort to generate State funding needed to carry out specific programmatic activities such as nonpoint source pollution control. Where States opted to focus more broadly across programs, implementation activities may involve focusing a combination of the tools and resources of several programs on

protecting and restoring specific areas of concern, such as estuaries, near coastal waters, special groundwater areas, or wetlands. FY 1989 might also be a year in which these States work to build a more Regional/local base of support for action and funding for these geographic-based initiatives.

As States meet the February 4, 1989, statutory deadline for activities under 304(l) of the Clean Water Act, they will update their SCWSs to complete integration of key long-term activities that will be necessary to fully implement the surface water toxics control provisions of the law. These changes may include expanding and/or setting priorities for new water quality monitoring for toxics, as necessary; and collecting new data where current data are not adequate to assure problems have been identified. States may also choose to update other aspects of their SCWSs as a result of new information.

To assist States in carrying out their SCWSs, EPA Regions will work with States to coordinate program requirements and to provide incentives to States to implement their risk-based approaches to targeted water resources. In addition, in FY 1989 EPA Headquarters will promote transfer of information and ideas generated by States that developed SCWSs in FY 1988. EPA expects that these individual State experiences will provide a body of information that may be useful to other States that decide to develop multi-year plans for water programs based on a targeting and ranking exercise. EPA Headquarters will work with the States to package this information, and to provide on-site peer group expertise to new States that may benefit. EPA will also consider the usefulness of this approach in other water activities and programs, particularly activities under the Safe Drinking Water Act.

E. FLEXIBILITY/ACCOUNTABILITY: NATIONAL CONSISTENCY vs. REGIONAL/STATE NEEDS AND PRIORITIES

The 1987 Water Quality Act (WQA) ratified existing surface water programs and set forth a number of new activities and initiatives to address emerging water pollution problems. Soon after enactment, EPA and the States agreed they would strive to meet the statutory goals, requirements, and deadlines of the Act to the fullest extent possible. In doing so, EPA and the States also agreed they would pursue with vigor both the new initiatives under the 1987 WQA and the ongoing programs, priorities, and responsibilities of the traditional CWA programs. This has come to be known as "maintaining the base program," which means that, as we move forward with new and/or expanded water quality management programs that have not been sufficiently funded (such as protection of estuaries and nonpoint source control in general), we do whatever is necessary to assure that the water quality gains already made through the existing (largely technology-based) point source controls are maintained. The

fundamental issue at debate is one of flexibility versus accountability or the degree to which Regions and States do less in the base program in order to account for new activities.

In response to the need to provide Regions and States with a vehicle to allow such flexibility to occur, States were encouraged to develop State Clean Water Strategies (SCWSs) as one process for setting out a plan that would give EPA an opportunity to make a reasoned judgment whether a State's alternative program made sense even though certain activities did not take place (see section on SCWS). In addition, EPA and the States will work together to explore other ways to improve the balance between accountability and flexibility, including:

- Ways to increase efficiencies/improve effectiveness in operation of the base program;
- Ways to make better use of Agency/OW accountability systems to provide both the national consistency Headquarters seeks and the flexibility Regions and States desire; and
- Ways to improve State fiscal capacity over the longer-term, accompanied by better use of performance-based grants.

EPA and the States will work together on these issues throughout FY 1988, with the expectation that some of this work will come to fruition in FY 1989.

II. ENVIRONMENTAL PROBLEM AREAS

7147

C. PROTECTING SURFACE WATERS

1. Strategy

EPA and State water programs will continue and accelerate their efforts to protect and restore the nation's surface waters through effective implementation of traditional CWA activities along with the WQA initiatives. Consistent with the WQA mandates, EPA and the States will focus on protecting human health and aquatic resources by identifying and controlling toxic pollutants and hazardous substances entering the nation's surface water (see earlier section on "Controlling the Discharge of Toxic Pollutants into Surface Waters").

In addition, EPA and the States will carry out a number of CWA activities related to water quality standards, monitoring, NPDES permitting, pretreatment, nonpoint source control, and enforcement. EPA will work with the States to help: upgrade monitoring programs to improve the identification of impaired waters; upgrade water quality standards programs to incorporate standards for toxic pollutants and upgrade anti-degradation and whole effluent toxicity control programs. As State toxic control programs are upgraded, EPA and the States will implement improved controls for toxic pollutants and toxicity through NPDES permits. EPA and the States will also help local POTWs upgrade and refine their approved local pretreatment programs. EPA and the States will maintain their NPDES enforcement capability to ensure compliance with water quality- and technology-based requirements, and will improve their pretreatment enforcement capabilities. EPA will make effective use of its Federal administrative penalty authority to assure faster, more cost-effective enforcement against direct and indirect dischargers.

EPA will assist the States by undertaking activities to prepare for later phases of toxics control by developing information on new toxic pollutants and hazardous chemicals (i.e. beyond the 126 priority pollutants) that could cause significant problems for surface waters. EPA will place priority on bioaccumulative pollutants and other chemicals (generally carcinogenic or mutagenic pollutants) that could require controls for human health related use that are more stringent than those needed to protect aquatic species. EPA will also develop effluent guidelines and water quality criteria or advisories to serve as the basis for new State water quality standards and fourth round permits in the early 1990s.

In an effort to strengthen State responsibility for water programs, EPA will work with States to maintain effective State NPDES programs, and to increase the level of program approvals by

approving new State pretreatment and sludge management programs and approving whole or partial NPDES programs. EPA will also continue the phase-out of the Federal Construction Grants Program, leaving in its place financially viable State Revolving Funds and POTW user charge systems to meet municipal financing needs for long-term compliance. EPA will also continue to ensure that scarce resources are used efficiently to produce reliable, high quality, effective municipal wastewater treatment systems.

In the nonpoint source area, the WQA mandates a multi-year approach. State Management Programs are initially expected to target control actions at specific nonpoint source problems or areas where water quality data are available to support development of effective nonpoint source controls. In the longer-term, States are expected to maximize environmental benefit by devoting resources and efforts to water resources in a priority order that recognizes the values of the waterbody in question, the benefits of various control actions (including evidence of local public interest and support), and the problem(s) controllability.

2. Indicators

The following indicators are being considered by EPA as a means to evaluate the long term impact of the programs described in this section. They are not accountability measures for evaluating FY 1989 program performance or impact.

a. Sizes and location of areas classified for various designated uses.

b. Sizes and location of areas that fully or partially do not support uses and are threatened due to point and nonpoint sources.

c. Sizes of waters with elevated levels of toxics.

d. Extent of fish tissue contamination.

e. Municipal wastewater treatment works projects which initiate operations and were funded with assistance of a construction grant or other assistance under an SRF.

f. Industrial and municipal compliance.

e. NPDES Permitting

In recognition of the importance of toxic pollutant controls, the Water Quality Act of 1987 (WQA) added section 304(l) to the CWA with specific deadlines to accelerate activities for controlling certain toxic discharges to surface waters where water quality is now impaired. This new mandate is one component of the ongoing national toxics control program. In FY 89, Regions and NPDES States will expedite permitting actions to set toxics limits. Where appropriate, States will translate the results of whole effluent toxicity and water quality studies begun in earlier years into water quality-based limits to meet existing and new water quality standards. Where major or minor dischargers are on waters listed under §304(l), individual control strategies (ICSs) must be established in permits by February 4, 1989. Within 120 days, EPA must review and approve or disapprove all State ICSs submitted in accordance with the February 4, 1989 deadline. Where State ICSs are disapproved, EPA must issue ICSs by June, 1990.

In addition, where instream toxicity problems are identified, even if the source is not listed under 304(l) (because the pollutant involved is not a priority 307(a) pollutant) States and Regions will reissue permits to include, as appropriate, toxicity based limits, toxicity reduction evaluations, compliance schedules, biomonitoring, revised local pretreatment programs, and pollutant-specific limits. In unusual cases, Regions and States may require permittees to conduct appropriate studies leading to future permit limits, but only where data deficiencies make it impossible to set appropriate limits now. Administering agencies will also reissue and/or modify permits to implement BAT guidelines for organic chemicals to reflect best currently available technology on a case-by-case basis where guidelines are outdated or unavailable and to incorporate sludge requirements and needed revisions to pretreatment implementation requirements.

In FY 1989, NPDES permitting authorities will begin to focus on section 405 requirements for controlling sludge use and disposal. EPA will develop regulations for incorporating sludge use/disposal criteria in NPDES permits. Generally, EPA will defer to State sludge permitting efforts wherever they exist, and will focus on appropriate monitoring requirements, along with compliance with existing sludge standards. Where sludge disposal practices are presenting a threat to human health and the environment, EPA and States will take appropriate permitting and enforcement actions to address the concern. When the technical criteria regulations are promulgated, NPDES permits with such criteria must be issued to all covered POTWs unless the requirements are covered in another permit issued under an approved State permit program.

Consistent with the 1987 WQA, EPA Headquarters will develop regulations and guidance on: new permit application and control requirements; stormwater application requirements for industry and for municipalities with storm sewers serving 100,000 or more population; antibacksliding; FDF variances; variances for non-conventional pollutants (ammonia, chlorine, color, iron, and total phenols); and other new permit related authorities. Regions and States will modify certain permits to reflect new authorities (e.g., coal remining). Stormwater dischargers will begin to prepare permit applications (due to EPA and States one year after regulations are promulgated).

In FY 1989, the Regions and States will continue to implement the RCRA corrective action process begun in FY 1988. In FY 1988, the Regions (or the State where applicable) will have initiated the corrective action process by issuing RCRA "rider" permits to POTWs subject to corrective action requirements. In FY 1989, the Regions and States will complete the second phase of corrective action, the RCRA Facility Investigation, and will initiate interim corrective measures where appropriate. Regions will review CERCLA and RCRA remedial actions involving discharges to surface waters or POTWs to ensure that appropriate technology and water quality limits are met.

Headquarters

- o Headquarters/Regions will provide oversight, guidance, and technical assistance to Regions/States to complete the toxics activities noted above by the statutory deadline of February 4, 1989. (Ongoing)

- o Headquarters will issue regulations to implement the WQA and provide technical assistance and training for permit writers, and contract assistance to develop permits. (Ongoing)

- o ORD will continue to support toxicity reduction evaluations for the development of water quality based permit limitations in the Municipal Wastewater Program and the development of Best Conventional Technology (BCT) and Best Available Technology (BAT) limitations in the Industrial Wastewater Program. Information will be developed on treatability of RCRA wastes that will be useful in predicting effluent concentrations, POTW pass-through and potential water quality problems. (Ongoing)

Regions/States

+ o Regions/States will reissue all major permits expired or expiring in FY 1989. (Ongoing) [SPMS]

+ o Regions/States will establish ICSs for all facilities listed under 304(l) by 2/4/89. (Second Quarter [SPMS]

- o Regions/States will reopen permits for some major and minor dischargers to incorporate water quality-based limits based on studies required at the time of permit issuance, and will modify other major permits as needed to impose necessary and appropriate toxic controls. (Ongoing)

N o Regions will assist States to take needed steps to strengthen their toxics control programs in accordance with Action Plans established in FY 1988 (joint monitoring, water quality standards and permitting program). (Ongoing)

N o Regions will review, approve and disapprove as appropriate State permits issued to dischargers in waters listed under §304(l)(B) and will issue federal permits where States fail to correct any deficiencies in individual control strategies. (Third and Fourth Quarters) [SPMS]

+ o Regions/States will implement the RCRA permit-by-rule requirement and establish corrective action requirements where necessary for POTWs that are receiving hazardous wastes not mixed with domestic sewage. (Ongoing)

+ o Regions/States will begin to include sludge monitoring and existing national sludge regulatory requirements in NPDES and State sludge permits. (Ongoing)

f. NPDES Enforcement

In FY 1989, the CWA enforcement priority will be given to protection of the gains achieved in implementing the National Municipal Policy (NMP) through aggressive enforcement against major and water quality affecting minors that are violating MCP schedules. Administering agencies will coordinate pretreatment and NMP enforcement actions so that, when an action is taken in response to noncompliance in one program, consideration is given to the other.

Industrial enforcement efforts will continue to focus attention on significant noncompliance. As the NPDES program turns its attention increasingly to enforcement of new controls for toxics and hazardous wastes, it will place more emphasis on considering cross-media impacts in prioritizing enforcement cases and on the role and use of expanded CWA criminal enforcement authorities.

EPA, in cooperation with the States, will implement a Compliance Monitoring and Enforcement Strategy for Toxics Control. The strategy focuses on inspections to monitor acute and chronic toxicity; criteria targeting enforcement responses to violations that pose the greatest potential risk to aquatic life and human health; lab performance evaluation criteria for toxicity analysis (ORD); and an updated DMR/QA program to meet new and expanded needs for toxicity controls.

Headquarters

+ o Headquarters (OWEP/OECM) will revise the Clean Water Act Penalty Policy and Enforcement Management System to address the use of administrative penalties to further supplement civil, judicial and criminal enforcement actions in assuring compliance with the Clean Water Act. (Ongoing)

o Headquarters/Regions will analyze the effectiveness of referral/case management and support process based in part on an FY 1987 analysis of the variation in ORC/WMD productivity, as well as new arrangements with DOJ. (Ongoing)

Regions/States

o Regions will fully implement CWA administrative penalty authority consistent with FY 1987 national guidance; Regions will also adhere to FY 1987 national guidance on the best use of the entire spectrum of existing/new/expanded CWA enforcement mechanisms (compliance only Administrative Orders, administrative penalties (2 tiers), civil and criminal referrals, and contractor listing). (Ongoing)

N o Regions/States will increase the use of inspections to assess permittee biomonitoring capabilities and evaluate permittee procedures/techniques for toxicity reduction evaluations. (Ongoing) [SPMS]

N o Regions/States will take timely and appropriate enforcement against SNC violations, including those involving toxic pollutants. (Ongoing) [SPMS]

o Regions/States will ensure timely and accurate data entry of WENDB data elements for pretreatment and NPDES. (Ongoing)

o Regions/States will monitor POTW compliance with NPDES milestones in consent decrees, permits and administrative orders, and initiate/escalate enforcement actions as necessary based on the 9/22/87 Enforcement Strategy. (Ongoing) [SPMS]

o Regions will ensure that EPA judicial referrals/consent decrees and final administrative penalty orders contain appropriate civil penalties consistent with the CWA Penalty Policy; NPDES States will comply with penalty provisions in the National Guidance for Oversight of NPDES Programs. (Ongoing)

o Regions and States will ensure compliance with all formal enforcement actions (AOs civil and criminal) by tracking cases from initiation of referrals to entry of consent decrees or court orders, and by prompt follow up action when deadlines are missed. (Ongoing)

o Regions will provide technical support for criminal investigations and prosecutions in program priority areas. Regions shall refer to the Office of Criminal Investigation matters involving suspected criminal violations, including significant unpermitted discharge and false reporting, or other fraud to the Agency. (Ongoing)

+ o Regions/States will enforce against: POTW non-respondence to 308 letters concerning POTWs receiving hazardous wastes; POTWs that are required to have RCRA permits, but do not; and POTWs not complying with corrective action plans. (Ongoing)

g. Pretreatment

The goal is to assure that POTWs* fully implement and enforce pretreatment controls for conventional and toxic pollutants and hazardous wastes that are necessary to protect human health, the environment, and the treatment works. Administering Agencies

* Throughout this section, wherever POTWs are cited, the same requirements apply to States or EPA acting as Control Authority in lieu of local program .

should give priority to modifying the requirements of the approved program and NPDES permit: 1) to incorporate new requirements resulting from new or revised regulations; or 2) to correct inadequacies identified in the operations of the POTW pretreatment program. Additionally, Administering Agencies should closely monitor the performance of POTWs to identify those that should be reported on the Quarterly Noncompliance Report and should take necessary action to return these POTWs to compliance.

In FY 1989, 395 POTWs with approved local programs have permits which will expire. Administering Agencies should use this opportunity to modify these permits to incorporate new or revised requirements established in amendments to the General Pretreatment Regulations as a result of the Domestic Sewage Study (DSS) or Pretreatment Implementation Review Task Force (PIRT). Additionally, the NPDES permit and/or approved program should be modified to incorporate needed changes or refinements to the approved program identified through audits, inspections or annual reports and to ensure that these requirements are enforceable. Administering Agencies should give emphasis to establishing specific levels of activity and timeframes for issuance of industrial user (IU) control mechanisms, monitoring IU performance, and enforcing against IUs who are in noncompliance. Administering Agencies should continue to give emphasis to the following three key areas to ensure effective implementation:

o Program Modification: Regions and States will formally modify approved pretreatment programs to incorporate new requirements or correct inadequacies. Modification and approval will follow the FY 88 amendments to the General Pretreatment Regulations, and focus on the following three areas:

  a. Local Limits - In accordance with the 1985 policy memorandum and the FY 88 Local Limits Guidance Manual, site specific technically-based local limits must be developed for each approved program and periodically reevaluated.

  b. Control Mechanisms - Based on the FY 88 IU Permitting Guidance Manual, the PIRT amendments and the DSS amendments, POTWs may need to develop and issue stronger IU control mechanisms for significant industrial users (SIUs).

  c. Enforcement Procedures - POTWs must be accountable for surfacing IU noncompliance and enforcement actions within certain time frames. Where approved programs do not specify detailed enforcement response procedures, they should be modified to include them consistent with the 1986 Pretreatment Compliance Monitoring and Enforcement Guidance (PCME).

- o Enforcement: Regions and States will assure that POTWs operate their approved programs and comply with reporting requirements. Where POTWs fail to successfully implement their program as measured by the FY88 guidance on reportable noncompliance, Administering Agencies should use technical assistance, formal enforcement or a program modification to eliminate the problem. When technical assistance is the chosen approach a schedule for return to compliance should be developed. If the schedule is longer than 90 days, it should be incorporated, at a minimum, in an administrative order.

- o Data Management: Regions and States will assure that POTWs have in place and employ appropriate mechanisms to track and determine compliance rates for SIU's consistent with the PCME, and that POTWs report such data at least annually. States and Regions will employ PCS to track pretreatment information and assist in identifying POTWs which meet the criteria for reportable non-compliance.

Where there is an approved program, and the POTW has not taken all available action to secure the compliance of the IU, action against both the POTW and the IU will usually be appropriate. Where EPA or the State is the Control Authority, enforcement action should be taken against those IUs which have not complied with categorical standards, giving priority to IUs where the POTW has been identified as having toxics discharge problems.

Headquarters

- o Headquarters (OWEP) will promulgate change to the NPDES and General Pretreatment regulations based on the recommendations of DSS. (Third Quarter)

- o Headquarters (ORD) will develop information on treatability of hazardous wastes that will be useful in predicting effluent concentrations, POTW pass-through, and potential water quality problems. (Ongoing)

- o Headquarters will issue guidance to improve POTW control mechanisms, compliance tracking and enforcement (e.g., setting local limits for toxic pollutants/hazardous wastes; setting priorities for enforcement; etc.), and a companion document on oversight responsibilities of administering agencies. (Ongoing)

Regions/States

- o Regions/States will assess and assist POTWs as they implement/enforce their programs and adopt new regulations resulting from the findings of the DSS; the focus will be on adequate control mechanisms for compliance tracking of, or enforcement against, IUs. (Ongoing) [SPMS]

- Regions/States will place highest priority on enforcement against POTWs consistent with reportable noncompliance guidance which discusses how to determine whether a POTW is failing to implement its local program (and against some IUs within those POTWs). EPA will also take enforcement against IUs where POTWs do not have, or are not required to have, approved local programs. (Ongoing) [SPMS]

- Regions will use new criminal enforcement authorities consistent with new/expanded CWA authorities, with special attention on knowing/negligent introduction into a sewer system/POTW of toxic pollutants/hazardous wastes (as defined by CWA §§311(b)(2)(A) and 307(a); CERCLA §102; SDWA §3001; TSCA §7) in excess of legal limits. Regions will provide technical support for criminal investigations and prosecutions in pretreatment cases. (Ongoing)

- States that act as control authorities in lieu of local programs will implement/enforce the pretreatment program consistent with national guidance, and will be held to the same standards of implementation as local authorities. (Ongoing)

h. NPDES State Program Approval, Review, and Oversight

In FY 1989, the goal is to further strengthen the Federal/State partnership by approving new State NPDES, pretreatment and sludge programs, improving the legal and regulatory basis of current State programs, and conducting effective oversight to ensure sound, consistent implementation of State programs. As State NPDES and pretreatment programs mature and as more States assume these responsibilities, these activities continue to grow in importance. In addition, EPA will work with any Indian tribes seeking to administer the NPDES program as authorized by the WQA.

The Regions will continue to encourage NPDES States to assume authority for the pretreatment program, and will continue to condition §106 grants accordingly. Regions should continue to encourage State program modifications for general permitting authority, since this will be a key to successful implementation of FY 1990 stormwater program activities for all NPDES States. In addition, the CWA amendments are expected to produce increased activity with respect to State program assumptions, including approval of State NPDES or other federally authorized programs to include sludge requirements, and treatment of Indians as States. Finally, Regions, with Headquarters assistance, will continue to review State programs to ensure that current State laws and regulations provide adequate authority to administer and enforce the national NPDES/pretreatment program requirements under the CWA, as amended. Special emphasis will be given to following up on Action Plans established by States and Regions in FY 1988 to strengthen water quality based permitting for toxic pollutants and toxicity.

WATER ENFORCEMENT AND PERMITS
FY 89 PROGRAM SUPPLEMENTAL GUIDANCE

GUIDANCE	FINAL PUBLICATION DATE
Interim Implementation Strategy for Sludge Issuance	March 1988
Guidance for Writing Interim Case-by-Case Permit Requirements for Sludge Issuance	March 1988
State Program Review Guidance	December 1987
304(l) Guidance	March 1988
Designation of Dischargers Contributing to Water Quality Standards Violations or Significant Contributor of Pollutants	March 1988
Compliance Monitoring and Enforcement Strategy for Toxics Control	March 1988
Guidance on the Collection of Stipulated Penalities	July 1988
Enforcement Strategy for Industrial Users Where EPA is the Control Authority	April 1988
Guidance on Development of Penalties for Pretreatment Implementation Cases	March 1988
PCS Evaluation Study-Recommendations and Data Entry Guidelines	February 1988

OFFICE OF WATER

STRATEGIC PLANNING AND MANAGEMENT SYSTEM

FY 1989 MEASURES

DEFINITIONS AND PERFORMANCE EXPECTATIONS FOR THESE MEASURES
ARE FOUND IN THE FY 1989 OFFICE OF WATER EVALUATION GUIDE

OFFICE OF WATER
FY 1989
Program: Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Assess toxicity control needs and reissue major permits in a timely manner.	Track, against targets, the number of permits reissued to major facilities during FY 89 (report NPDES States and non-NPDES States separately).	WO-11	O 1,2,3,4
	Identify the number of permits reissued and the number modified during FY 89 that reflect water quality based assessments for toxics. Of these, report number that are Individual Control Strategies (NPDES States, non-NPDES States; report majors and 304(l) listed minor separately.)	WO-12	O 1,2,3,4
Assure NPDES permits are fully in effect and enforceable.	Identify, by Region, the number of pending evidentiary hearing requests and track, by Region, progress against quarterly targets for the evidentiary hearing requests pending at the beginning of FY 1989 resolved by EPA and for the number resolved by NPDES States.	WO-13	O 1,2,3,4
Effectively implement approved local pretreatment programs.	Track, by Region, against quarterly targets, the number of: 1) audits of approved local pretreatment programs conducted by EPA and the number conducted by approved pretreatment States; and 2) approved local pretreatment inspections conducted by EPA and the number conducted by the States for POTWs.	WO-14	O 1,2,3,4

OFFICE OF WATER
FY 1989
Program: Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Implement the National Municipal Policy	Identify, by Region, the number of major municipals on MCPs and the number that are not in compliance with their schedule (report EPA/State separately).	WO/E-2	O 1,2,3,4
	Report, by Region, the number of major facilities addressed by formal enforcement actions against municipalities that are not complying with their schedules (report State/EPA separately).	WO/E-3	O 1,2,3,4
Achieve and maintain high levels of compliance in the NPDES program.	Track, by Region, the number of major permittees that are: on final effluent limits and not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	WO/E-4	O 1,2,3,4
	Track, by Region, the number and percentage of major permittees in significant noncompliance with: final effluent limits; construction schedules; interim effluent limits; reporting violations (list separately: muncipal, industrial, Federal facilities; NPDES States, non-NPDES States).	WO/E-5	O 1,2,3,4
	Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators) (Report separately: municipal, industrial, Federal). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters.	WO/E-6	O 1,2,3,4
	Report, by Region, the number of major permittees that are on the previous exception list which have returned to compliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action by the QNCR completion date, and the number that were unresolved. (After a permittee has been reported as returned to compliance or addressed by a formal enforcement action, it should be dropped from subsequent lists. (Report separately: municipal, industrial, Federal facilities)	WO/E-7	O 1,2,3,4

OFFICE OF WATER
FY 1989
Program: Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Achieve and maintain high levels of compliance in the NPDES program. (continued)	Report, by Region, the total number of EPA Administrative Orders and the total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatment. Report the number of Class I and Class II proposed administrative penalty orders issued by EPA for NPDES, pretreatment, and 402 wetlands violations.	WQ/E-8	Q 1,2,3,4
	Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorney General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts (OECM will report EPA referrals)	WQ/E-9	Q 1,2,3,4
Effectively enforce the pretreatment program.	Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and track by State the number of POTWs in that universe where action taken resolves the violation. Report EPA and State separately for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	WQ/E-10	Q 2,4
	Report, by Region, the number of pretreatment State civil referrals sent to State Attorneys General, the number of criminal actions filed in State courts, the number of State cases filed, and the number of administrative penalty orders. (OECM will report EPA referrals.)	WQ/E-11	Q 1,2,3,4
Identify compliance problems and guide corrective actions through inspections.	Track, by Region, against targets, the number of major permittees inspected at least once (combine EPA and State inspections and report as one number).	WQ/E-12	Q 1,2,3,4

"A Guide to the Office of Water Accountability System and Mid-Year Evaluations, Fiscal Year 1989," dated March 1988. Selected Portions ONLY.

March 1988

A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS

Fiscal Year 1989

Office of Water
U.S. Environmental Protection Agency
Washington, D.C. 20460

229

TABLE OF CONTENTS

2-95

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Develop and Approve/Modify Local Pretreatment Programs	(A) What rationale does the Region/States use to add/delete municipalities from the list of required local programs?	(a) Identify the local pretreatment programs requiring approval but not yet approved at the beginning of the fiscal year and distinguish between those newly identified in FY 89 and those previously required. (list separately: nonpretreatment States, approved pretreatment States).	No/No	10/31/88
	(B) What are the Region/States doing to encourage local program modifications where deficiencies are identified? Is the Region/State relying solely on the POTW to identify deficiencies?	(b) Track progress against targets for the programs approved during FY 1989 (list separately: non-pretreatment States, approved pretreatment States).	No/OW	Quarterly
	(C) When a local program submitted for approval is not acceptable, what follow-up action is taken by the Region/State if the local program is not resubmitted in the time prescribed by the Approval Authority?			
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements	(A) How do the Region/States ensure that local pretreatment programs are fully implementing NPDES permit pretreatment requirements? Other pretreatment program requirements? Are POTWs experiencing problems with implementing the significant noncompliance (SNC) criteria?	(a) Report, by Region, the number of pretreatment administrative orders issued by EPA to IUs and the number of pretreatment equivalent actions issued by States to IUs.	No/No	Quarterly

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements (continued)	(B) What are the criteria the Region/States use to select pretreatment referral cases? What is the involvement of ORC in the selection and preparation of cases?	(b) Pretreatment Referrals (1) Report by Region the number of pretreatment State civil referrals sent to State Attorneys General, the number of criminal actions filed in State courts, the number of State cases filed, and the number of administrative penalty orders.	Yes/SPMS WQ/E-11	Quarterly
	(C) What is the level of coordination for pretreatment cases between the compliance section and ORC in the Region and the respective agencies in the States? If less than satisfactory, what steps is the Region taking to improve coordination?	(2) # of pretreatment referrals or State equivalent actions: --civil referrals sent to HQ/DOJ/SAG: --civil referrals filed; and --criminal referrals filed in response to: o POTW non-submittal of an approvable pretreatment program o other POTW pretreatment violations o industrial user pretreatment violations (list separately EPA, States)	No/No	Quarterly
	(D) How do the Regions and States identify and respond to industrial noncompliance with categorical pretreatment standard deadlines in a municipality where there is an approved pretreatment program?			

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements (continued)		(c) Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and track by State the number of POTWs in that universe where action taken resolves the violation. Report EPA and State separately for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	Yes/SPMS WQ/E-10	Quarterly
	(E) Is the Region/State using the Guidance on Reportable Noncompliance for Pretreatment Implementation to identify POTWs which should be listed on the QNCR? Is the Region/State having any difficulty in interpreting or using the Guidance? If so, in what areas?			
	(F) Has the Region provided training to POTWs on the Pretreatment Compliance Monitoring and Enforcement Guidance? What other steps have been taken to implement the Guidance?			

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation	(A) How do Regions/States establish priorities for pretreatment oversight of POTWs?	(a) Track, by Region, against quarterly targets, the number of (1) audits of approved local pretreatment programs conducted by EPA and the number approved by pretreatment States; and (2) inspections of approved local pretreatment programs conducted by EPA and the number conducted by the States for POTWs.	Yes/SPMS WQ-14	Quarterly
	(B) How do Regions independently assess the effectiveness of POTW program implementation in pretreatment States?			
	(C) What are the criteria used by EPA/States to select industrial users to be inspected? Do the Region/States place a priority on inspecting IUs subject to Federal categorical standards which are located where there is no local program? What do the results of these inspections indicate? What use is being made of IU results? Does the Region/State include personnel from the approved POTW in the IU inspection?	(b) Report number of EPA and State pretreatment inspections of: --IUs that discharge to unapproved POTWs --IUs that discharge to approved POTWs (list separately: IU of an unapproved POTW, IU of an approved POTW; EPA, States)	No/No	Quarterly
	(D) Does the Region/State use the Audit/PCI checklist in conducting POTW pretreatment reviews? If the checklist is modified, describe the modifications.	(c) Track # of POTW annual reports required/received/ reviewed (non-pretreatment States, pretreatment States)	No/No	Quarterly

WATER ENFORCEMENT AND PERMITS

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(E) How are audits used by Region/States to overview implementation? What are the findings from these audits? What follow-up actions are taken when problems are identified? Do the Regions review State audits and reports? How often? Do Regions keep copies of State audits, reports, and follow-up documents on file?	(d) Identify # of POTWs that need to conduct local limits headworks loading analysis (non-pretreatment States, approved pretreatment States).	No/No	Quarterly
	(F) How are inspections used by Regions/States to overview implementation? What are the findings from these inspections? What follow-up actions are taken when problems are identified?	(e) Track # of POTWs requesting changes to local limits (non-pretreatment States, approved pretreatment States).	No/No	Quarterly
	(G) Are inspections used to track follow-up actions required by an earlier audit? If not, how is audit follow-up determined?	(f) Track, by Region, against quarterly targets, the number of pretreatment POTWs which Regions/States determine have issued adequate control mechanisms.	No/OW	Quarterly
	(H) Aside from audits and/or inspections, what other oversight mechanisms are the Regions/States using to evaluate POTW performance year to year?			
	(I) Are annual report submissions by POTWs reviewed by the Region/State? What criteria are used for these reviews? Does the Region require the POTW to use the SNC definition in reporting on compliance by IUs?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(J) Are POTWs considering all appropriate factors in developing local limits, including protection of water quality (State numeric standards and narrative "free from" standards, Federal criteria), sludge quality and worker health and safety? Characterize the changes being made to local limits. What is the Region/State strategy for assuring POTWs develop/implement adequate local limits? Do NPDES permits include toxicity limits and numeric limits for organic chemicals that may be used to establish local limits? Are they being reflected in local limits? (K) Are control mechanisms adequate? Are POTW enforcement procedures adequate? How is adequacy determined and what follow-up is taken when deficiencies are found? Are control mechanisms updated regularly to address new pollutant levels? Do mechanisms address organic pollutants, hazardous constituents or toxicity? (L) What mechanisms are being used by approval authorities to determine if local programs are properly applying categorical standards to IUs? To what extent are local programs failing to properly apply categorical standards? What problems are being encountered?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(M) Are POTWs taking necessary enforcement actions against industrial users when they are in noncompliance? Where POTWs do not act expeditiously, what actions are the Regions/States taking?			
4. Enforce Pretreatment Standards as a Control Authority	(A) Have Region/States completed an inventory of categorical industrial users in cities without required pretreatment programs? How were the inventories conducted? How will the inventory be maintained?	(a) Identify # of categorical IUs in nonpretreatment cities (report non-pretreatment States and pretreatment States separately).	No/No	3/89 and 9/89
	(B) Does the Region/State notify these categorical industrial users of their pretreatment and RCRA responsibilities?	(b) Track levels (percent) of significant noncompliance by categorical IUs in non-pretreatment cities. (Report separately for non-pretreatment States and pretreatment States).	No/No	3/89 and 9/89
	(C) Does the Region/State receive and evaluate baseline monitoring reports, compliance reports, and periodic monitoring reports from IUs in non-pretreatment cities? How does the Region establish compliance schedules and monitoring frequencies?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Enforce Pretreatment Standards as a Control Authority (continued)	(D) How do the Regions and States identify and respond to industrial noncompliance with categorical pretreatment standard deadlines in a municipality where there is an approved pretreatment program? Where there is not an approved pretreatment program? Are Regions/States having difficulty implementing the SNC definitions?			

WATER ENPORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Identify Compliance Problems	(A) Do the Regions'/States' compliance rates show improvement in FY 1989?	(a) Track, by Region, the number of major permittees that are: --on final effluent limits and --not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	Yes/SPMS WQ/E-4	Majors: Quarterly (Data lagged one quarter)
	(B) Is the QNCR regulation/guidance being properly applied in the Region/States? Is the Region reviewing State QNCRs to ensure proper reporting? If reviews identify inadequate QNCRs what action is the Region taking?	(b) Track, by Region, the # and % of major permittees in significant noncompliance with: --final effluent limits; --construction schedules; --interim effluent limits --reporting violations (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States)	Yes/SPMS WQ/E-5	Majors: Quarterly (Data lagged one quarter)
	(C) Are there new reasons for municipal/nonmunicipal noncompliance in the Region/States? What is the Regions/States strategy for dealing with such noncompliance.			
2. Expand Enforcement Efforts Under the National Municipal Policy	(A) Have the Region/States completed filed enforcement cases against major POTWs? If not, what is delaying action?	(a) Identify, by Region, the number of major municipals on MCPs that are not in compliance with their schedule (report EPA/State separately).	Yes/No WQ/E-2	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Expand Enforcement Efforts Under the National Municipal Policy (continued)	(B) To what extent are the Region/States still establishing permit/compliance schedules for all remaining POTWs?	(b)Report, by Region, the number of major facilities addressed by formal enforcement actions against municipalities that are not complying with their schedules (report EPA/State separately).	Yes/No WQ/E-3	Quarterly
	(C) How are the Region/States tracking and documenting noncompliance with all interim milestones (non-SNC) in permits/enforceable schedules? How are the Region/States responding to noncompliance with interim milestones in permits/enforceable schedules? How are schedules adjusted following slippage? Where no action is taken, what is the rationale?	(c) Of those reported in (b), provide a separate count for judicial orders.	No/No	Quarterly
	(D) If there is major slippage in a construction schedule, is the Region/State seeking judicially imposed schedules? If not, why not?			
	(E) Are the Region and the States enforcing MCP schedules for affected minors? When will this be completed?			
3. Ensure Industrial Compliance with BAT and Water Quality Based Toxic Requirements	(A) How do the Region and each State direct compliance monitoring efforts to enforce BAT and water quality based toxic requirements?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Ensure Industrial Compliance with BAT and Water Quality Based Toxic Requirements (continued)	(B) Do the Region and each State have sufficient laboratory and biomonitoring capability to conduct the necessary analysis to support toxic inspections?			
	(C) Are Regions/States implementing the Compliance Monitoring and Enforcement Strategy for Toxics Control?			
4. Improve Quality and Timeliness of Enforcement Responses	(A) How has the mix of enforcement actions for the Region (AOs, penalty orders) changed since gaining authority to assess administrative penalties?	(a) ADMINISTRATIVE ORDERS (1) Report, by Region, the total number of EPA Administrative Orders and total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatment. Report the number of Class I and Class II proposed administrative penalty orders issued by EPA for: --NPDES violations; --pretreatment violations; or --402 wetlands violations.	Yes/No WQ/E-8	Quarterly

2307

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTIN(FREQUENC)
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(B) Is the Region using the penalty authority effectively--in terms of number of orders issued, timely response and completion, effective negotiation and advocacy?	(2) Of those reported in (1) above, break out by the following categories: --municipal permittees (major/minor) --non-municipal permittees (major/minor) --Federal permittees (major/minor) --unpermitted facilities 402 --section 311 actions --SPCC (list separately: EPA, NPDES States). Note: We recognize that in some Regions these responsibilities are split between Divisions, in which case each Division should submit data for its appropriate piece.	No/No	Quarterly
		(b) Track the total amount of EPA administrative penalties assessed.	No/No	Quarterly
	(C) Is the Region conforming to the Guidance on the use of Penalty Orders, including the addendum on the Penalty Policy?	(c) CLOSE OUT UNIVERSE # of EPA AOs with final compliance dates between July 1, 1988 through June 30, 1989.	No/No	10/15/88
	(D) Has the Region experienced any problems in carrying out the Class I or Class II hearing process? How frequently are hearings requested in each Class?	(d) CLOSE OUTS ACHIEVED # and % of (b) which are successfully closed out (the final step is achieved or action is referred to Headquarters or DOJ).	No/OW	Quarterly

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(E) How frequently are comments from the public received on penalty orders? Have any consent decrees been modified by the RA as a result of public petition?	(e) REFERRALS (1) Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorneys General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts.	Yes/No WQ/E-9	Quarterly
	(F) Does the Region routinely use 309(a) administrative orders in combination with penalty orders when compliance has not yet been achieved?	(2) # of 309 referrals or equivalent actions generated: --civil referrals sent to HQ/DOJ/SAG; --civil referrals filed; --criminal referrals filed (list separately: EPA, NPDES States)	No/No	Quarterly
	(G) How frequently does the Region have to institute collection actions to collect administrative penalties assessed? Do the NPDES States have administrative penalty authority? Does the State authority meet criteria for pre-emption of Federal action?	(3) Track the number of referrals (EPA and State) with penalties assessed.	No/No	Quarterly
	(H) Are the Regions/States working effectively with Federal facility coordinators to improve enforcement response times to instances of noncompliance by Federal facilities? If not, what is the nature of the problem? Are approved States using their full range of enforcement authority against Federal facilities? If so, what are the results? If not, why not?	(4) Track the amount of time lapsed from the time of initiation of the case to filing and the amount of time lapsed from filing to signing of the consent decrees. Report by State respectively.	No/No	Second and Fourth Quarters

6252

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(I) Do Region/States track AO requirements closely? Have all close-outs been reported to Headquarters? Are they reported promptly upon close out?	(f) Identify by name and NPDES number all permittees with active consent decrees and report their compliance status as follows: --in compliance with decrees; --in violation of decree, but remedial action taken; and --in violation of decree, no remedial action taken (list separately: major, minor; municipal, nonmunicipal, Federal).	No/No	Quarterly
	(J) How do the Region and States ensure that violations of Court Orders/AOs get prompt enforcement action?	(g) Track, by Region, the total number of settlements of Judicial/Consent Decrees filed in Federal Courts.	No/No	Quarterly
	(K) How is the enforcement agreement used to identify enforcement priorities and appropriate follow-up? How does the Region assess compliance with the agreements?	(h) # of follow-up actions on DMR/QA performance sample results: --nonrespondents; --permittees requiring corrective action; --major permittees with incomplete reporting.	No/No	Semi-annually: April 1, 1989 and October 1, 1989
	(L) What is the level of coordination between the compliance section and ORC in the Region? Are there any problems in implementing the administrative penalty authority? If less than satisfactory, what steps is the Region taking to improve coordination?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(M) What is the level of coordination between the NPDES States enforcement program and the state Attorney General's Office? Are there established procedures for coordination and communication? If less than satisfactory, what steps is the State taking to improve coordination? Are State AGs generally filing cases within the goal of 60-90 days? (N) Have the Region and approved States negotiated a basis for Regional evaluation of the States' penalty program, including identification of sanctions which might be used in lieu of penalties and the documentation which must be maintained by the State for review? Are States complying with the provisions of the agreement on penalties? To what extent are States calculating economic benefit? Are States seeking penalties in the majority of cases? Are States getting the penalty amounts they are seeking? (O) What problems is the Region encountering in assessing penalties using the CWA Penalty Policy? Is the Region experiencing problems/delays with Headquarters reviews? Explain. Is the Region generally getting the penalty amounts identified in the referral? What improvements could be made to the review process to speed up the referral process?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(P) Do Regions/States use PCS to track compliance with consent decree schedules? If not, why not?			
	(Q) What types of action are being taken in response to violations of consent decrees? Are stipulated penalties collected? Are civil contempt proceedings initiated? Are the decrees modified? Are additional compliance monitoring requirements imposed?			
	(R) What are the reasons for the Regions/States failure to take remedial action against permittees that violate their consent decrees?			
	(S) What problems still need to be addressed by the Region/States to make the DMR/QA program more effective? Should it cover pretreatment?			
	(T) How do you ensure the quality of data collected by permittees and subsequent data transfer, and data storage in PCS?			
	(U) How do you promote better quality of future DMR data when drafting new permits?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(V) What procedures does the Region have in place to identify criminal cases? What role does the Office of Regional Counsel play in identification and case development? Has the staff provided technical support for criminal investigations and prosecutors? How has the Region made use of the new CWA criminal enforcement authorities? (W) What is the trend in the number of EPA formal enforcement actions relative to State activity since the implementation of the timely and appropriate criteria in FY 85?			
5. Non-NPDES Enforcement	(A) Have the Region/States taken any enforcement actions to protect water, including wetlands, from unpermitted discharges of solid waste? (B) What criteria does the Region use in determining where Spill Prevention Control and Countermeasure Plan inspections should be conducted? Does the Region always require that the plan be amended after a spill of 1,000 gallons or more?			
6. Increase Use of PCS as the Primary Source of NPDES and Pretreatment Program Data	(A) Describe the use of PCS by the States and the Region and explain what steps are or need to be taken to comply with the PCS Policy?	(a) Track, by Region, against targets, the percent of data entry of WENDB elements for pretreatment and NPDES.	No/OW	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTIN FREQUENC
6. Increase Use of PCS as the Primary Source of NPDES and Pretreatment Program Data (continued)	(B) What actions are Region/States taking to improve the quality of PCS data?			
	(C) Do the Region/States use the preprinted DMR form to minimize compliance tracking problems and PCS entry workload? What is the Region doing to encourage the States to use preprinted DMRs? If the States are not using preprinted DMRs, why?			
	(D) How is the Region encouraging direct State use of PCS? Is the Region giving priority in assistance and program grant funding to States that are direct users of PCS? If States are not using PCS consistent with the PCS Policy Statement are grant conditions being imposed to expedite compliance?			
7. Improve Effectiveness of Inspection Activities	(A) Do the Region/States have annual compliance inspection plans for each States? How does the Region provide its States with advance notice of inspections? Discuss how Regional and State efforts are coordinated. Discuss use of independent and joint inspections and State file reviews to overview the State inspection program.	(a) Track, by Region, against targets, the number of major permittees inspected at least once (combine EPA and State inspections and report as one number).	Yes/SPMS WQ/E-12	Second an Fourth Quarters

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
7. Improve Effectiveness of Inspection Activities (continued)	(B) How do Regions/States determine which facility and what type of inspection to conduct?	(b) # of inspections: --permittee inspections (list separately: major, minor; municipal, non-municipal, Federal; EPA, State) --toxic inspections --biomonitoring inspections	No/No	Quarterly
	(C) Why are total number of inspections large, yet all majors are not inspected at least once?	(c) Identify the number of Regional and State inspection plans.	No/No	October 1, 1988
	(D) How do Regions/States determine the need for toxic/toxicity inspections/TREs?			
	(E) Do the Regions/States prepare quarterly lists of facilities to be inspected? Is the inspection mix consistent with the "primary use" criteria included in the NPDES Inspection Strategy?			
	(F) How do the Regions/States use DMR/QA performance sample results for targeting compliance inspections?			
	(G) What mechanism is used to assure that inspection results are provided to the Regions/States in a timely manner? Are the data entered into PCS only after the report has been completed and signed by the reviewer or supervisor?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
7. Improve Effectiveness of Inpsection Activities (continued)	(H) How does the Region/State follow-up when inspection results are unsatisfactory? When Region uncovers problems, does the Region/State follow-up with a more intensive inspection? (I) Have the Region/States verified that Reconnaissance Inspections of major permittees counted for coverage purposes were conducted at major permittees meeting the requirements specified in the definition section?			
8. Update and Use EMS Enforcement Procedures	(A) For each State/Region which still do not have written EMS procedures, when will the Region/States have written updated procedures? (B) Have the Region/States implemented use of the Violation Review Action Criteria included in the FY 1986 EMS as the basis for determining when violations should receive professional review? Do Regions/States follow the Enforcement Response Guide (ERG)? If not, when will the Region/States begin to use these criteria or equivalent criteria and the ERG?			

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
8. Update and Use EMS Enforcement Procedures (continued)	(C) What kinds of formal enforcement actions are the Region/States using? Has the Region reviewed each States enforcement instruments to ensure that they meet the definition of formal action? Have the States made any necessary statutory or regulatory changes to ensure equivalency of State administrative mechanism equivalent to EPA section 309 AOs? (D) What kinds of informal actions (if any) are the Region/States using in lieu of formal enforcement action? Are these actions documented properly? Are they effective?			
9. Use Guidance Criteria and Milestones for Response to Noncompliance	(A) What is the screening process used by the Region and States for identifying violations and applying SNC criteria? How are short term violations requiring Regional/State judgement handled? Does the Region use the Exception List as a way of tracking State programs?	(a) EXCEPTION LIST UNIVERSE (1) Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters. (List separately: municipal, industrial, Federal facilities.)	Yes/No WQ/E-6	Quarterly (Data lagged one quarter.)

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)	(B) What management level reviews the Exception List and how is it used? How do the Region and States use the Exception List to establish a priority for committing compliance/enforcement resources? (C) What problems have the Region/States been facing that would prevent them from meeting the timeliness prescribed? Which States consistently miss commitments?	(2) Identify by name and NPDES number major permittees appearing on two or more consecutive QNCRs as being in significant noncompliance with: --final effluent limits (FEL) --construction schedules (CS); --interim effluent limits (IEL) without being returned to compliance or addressed with a formal enforcement action. (List separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	No/No	Quarterly (Data lagged or quarter.
	(D) Is there consistent application of the criteria/milestones from State to State within the Region? If not, what steps is the Region planning to take to improve consistency?	(b) EXCEPTION LIST TRACKING (1) Report, by Region, the number of major permittees that are on the previous exception list which have returned to compliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action, and the number that were unresolved as of the end of the quarter. (List municipal, industrial, Federal facilities separately.)	Yes/No WQ/E-7	Quarterly (Data lagged or quarter.)

WATER ENFORCEMENT AND PERMITS

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)		(2) Identify the names and total number of major permittees listed in the Exception List universe for the previous quarter for which one of the following has occurred: --# returned to compliance --# not yet in compliance but addressed with a formal enforcement action --# that are unresolved as of the end of the quarter, and the number of consecutive quarters each facility has appeared on the QNCR. (List separately: municipal, industrial, Federal facilities; SNC with FEL, CS, IEL; NPDES States, non-NPDES States).	No/No	Quarterly (Data lagged on quarter.)

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

VII.16

"FY 1990 Office of Water Operating Guidance," dated March, 1989. Selected portions ONLY.

United States
Environmental Protection
Agency

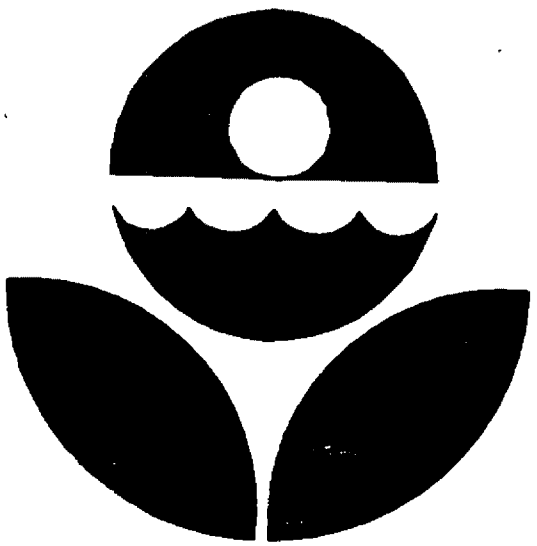
Office of
The Administrator
Washington DC 20460

March 1

EPA

Agency Operating Guidance

FY 1990



2325

TABLE OF CONTENTS

Office of
Water

TABLE OF CONTENTS

FY 1990 WATER PROGRAMS AGENCY OPERATING GUIDANCE

ASSISTANT ADMINISTRATOR'S OVERVIEW

The Water portion of the Agency's FY 1990 Operating Guidance provides national direction to EPA, States, Indian Tribes, and the regulated community in carrying out programs mandated under Federal water protection statutes.[1] These statutes include: the Safe Drinking Water Act (SDWA), as amended by the Lead Contamination Control Act of 1988; the Clean Water Act (CWA); and the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended by the Ocean Dumping Ban Act of 1988. The Agency and the States also implement programs to protect groundwater quality through provisions under several different statutes.

The Office of Water (OW) uses a management accountability system to set priorities, define performance expectations and track and assess EPA and State performance. This system is vital to the effective functioning of the Water programs because it links a number of organizations at the Federal and State level (and, in some programs, local governments as well) to a common set of objectives and expectations when they are operating under these Federal statutes. The Office of Water Accountability System (OWAS) includes the OW portion of the Guidance, the accompanying SPMS measures, the OW program evaluation guide with quantitative and qualitative measures, and the OW mid-year Regional evaluations.

During the FY 1990 mid-year review process, the Regions provide the OW Assistant Administrator with their projected operating strategy and plan for FY 1991, including an overview of Regional and State priorities and their relationship to national priorities. This is done before FY 1991 commitments are made to set the context for negotiation of State work programs and those commitments. The mid-year evaluations also provide the Regions the opportunity to present and discuss Region-specific initiatives. These initiatives are directed at correcting Region-specific problems that will result in significantly increased environmental protection or substantially reduced health/environmental risks.

---

[1] The term **State** does not include Indian Tribes. The terms **Indian Tribes, Indian Tribes treated as States, and Indian Tribes with Primacy** are inserted after the term State where it is appropriate to do so.

Activities with associated SPMS measures are denoted by [SPMS] appearing at the end of the activities. Additionally, in line with the Agency format, activities increased from the FY 1989 Operating Guidance are indicated by a plus (+) in the left margin, new activities are indicated by the letter (N), and decreased activities are indicated by a dash (-). No notation indicates that the level of activity is the same as in FY 1989.

PROGRAM DIRECTIONS AND PRIORITIES

As a Nation, we have made impressive gains in the battle for Clean Water. Many of America's rivers, streams and lakes have been restored through the Federal, State, and local investment in science, regulatory actions, wastewater treatment. Generally the Nation has drinking water that is abundant and safe. The price for this level of quality is perpetual vigilance to ensure that our protection systems are maintained. Wastewater treatment systems must be constantly operated, maintained, and upgraded. New industry and municipal discharges must be stringently regulated. Drinking water sources must be protected, treated, and monitored to deal with a growing list of contaminants.

Despite our progress, we have not eliminated the underlying causes of contamination. In fact, they are growing with our population and economy. Habitat loss, especially wetlands and coastal areas threatens the ecological values we are struggling to protect. Nonpoint source pollution remains a serious problem and is now attracting more Congressional and public attention because our point sources are largely controlled. The plight of our near coastal waters and beaches is under scrutiny by the Congress, press, and public. Preventing the contamination of our underground sources of drinking water is an increasing concern of Congress and the public. Clearly, our job is not done.

Our arsenal of water program tools and responsibilities is abundant and public support for our programs is strong. New programs like Wellhead Protection, Nonpoint Source and the National Coastal and Marine Policy give us even greater opportunities to be effective through stimulating use of environmentally sound land management practices that augment and reinforce traditional pollution control approaches.

In FY 1990 we face the major challenge of maintaining the integrity of our base programs and taking advantage of our new opportunities, while facing substantial shortages in funding.

The programs we put forward in this Guidance are ambitious. Our operating policy is to demand as much Federal and State performance as the system can generate, to stimulate increasing cost-effectiveness in carrying out many of our repetitive tasks,

to advocate creative work-sharing arrangements among Federal, State, local and private programs, and to evaluate tradeoffs within a context of broad, basin-wide or State-wide strategies to address areas of greatest risk and benefit.

Both the Clean Water Act and the Safe Drinking Water Act programs are largely delegated to the States; thus effective State as well as EPA performance is critical to achieve success under these laws. In addition, EPA and States are increasingly dependent on local governments in newer geographic-based water programs such as Class V Underground Injection Control, Nonpoint Source, Wellhead Protection and National Estuary Programs through consensus-building. This leads to some competition between Federal and State priorities, as well as tension between the decentralized structure and the need for national consistency, which must be managed within a climate of work-sharing and mutual respect.

A sound Federal/State partnership is essential to implement national programs in a comprehensive, coordinated fashion. In 1990, as a result of new and continuing demands from Federal Water statutes, EPA and States must take a leadership role in building public awareness and support to address Federal, State, and local funding needs in order to continue to:

- Reduce human health risks posed by drinking water and protect ground-water resources that serve as drinking water supplies;
- Protect and maintain critical aquatic habitats, including wetlands, from point and nonpoint sources of pollution; and
- Protect and maintain the Nation's surface waters from point source discharges, especially hazardous and toxic pollutants.

In addition, Water programs will participate in EPA's strategic effort to bring about a long-term shift towards pollution prevention through source reduction and environmentally sound recycling. EPA will develop its Pollution Prevention Strategy in 1989, with each program, including Water, formulating its own plan in conjunction with the States and Regions. In 1990 EPA headquarters, Regions, and States will begin implementing a Water Programs' Pollution Prevention Plan.

EPA's Water programs will work with Indian Tribes on a government-to-government basis to take all appropriate actions, consistent with available resources, and to assist Indian Tribes in improving and maintaining the quality of their water resources. In 1990, as EPA completes pertinent enabling guidance and regulations, EPA will place emphasis on awarding grants to

Indian Tribes. In this regard, EPA will be reviewing and approving Indian Tribe applications for treatment as States as required by statute. In addition, emphasis will be placed on improving communications with Indian Tribes and States to encourage cooperative working arrangements.

A. Protecting Drinking Water Sources

EPA and State Drinking Water programs face many new challenges in 1990 in protecting drinking water at the tap and preventing contamination of ground waters and surface waters that serve as drinking water supplies. In 1990, EPA places high priority on States accepting primacy for the new EPA regulations, implementing the new program requirements, and enforcing against violators of existing standards. In accordance with this priority:

- EPA and EPA Regions will continue to develop safe drinking water standards in accordance with the requirements of the 1986 SDWA Amendments.

- States will need to increase enforcement substantially, master new program capabilities, and adopt new regulations to implement many new provisions of the 1986 Safe Drinking Water Act. Specifically, States will be expected to:

  - Enforce the first new Maximum Contaminant Levels (MCLs);

  - Expand monitoring requirements for volatile organic compounds;

  - Assume primacy for the new requirements in the surface water treatment, coliform, and lead/corrosion rules;

  - Initiate assessments of more than 9,000 surface water systems pursuant to the new treatment rule with emphasis on approximately 4,000 unfiltered systems;

  - Enforce the ban on plumbing materials containing lead and lead public notification regulations; and

  - Implement the provisions of the Lead Contamination Control Act.

+ o Regions/States will reopen permits for organic chemical plants, bleached kraft pulp mills, and others to incorporate technology-based and water quality-based limits based on studies required at the time of permit issuance, and will modify other major permits as needed to impose necessary and appropriate toxic controls. There will be more focus on developing limits to protect human health. (Ongoing)

+ o Regions/States will follow the interim sludge permitting strategy by including sludge monitoring and existing national sludge regulatory requirements in NPDES and State sludge permits. (Ongoing) [SPMS]

o Regions/States will implement the RCRA permit-by-rule requirement and establish corrective action requirements where necessary for POTWs that are receiving hazardous wastes not mixed with domestic sewage. (Ongoing)

N o Regions/States will prepare permit strategies addressing all CSO discharges by January 15, 1990. (Second Quarter)

N o Regions/States will focus increased attention on permit issuance to NPDES permittees discharging to marine/estuarine waters, especially to control the discharge of bioaccumulative and persistent toxicants. (Ongoing) [SPMS]

6. NPDES Enforcement

The goals for the NPDES enforcement program in FY 90 are to expand upon the success of the National Municipal Policy by ensuring continued municipal compliance and to increase our enforcement presence in emerging program areas such as toxic controls and sludge. Specifically, in the municipal area emphasis will shift from construction of facilities to improving compliance of constructed facilities with final effluent limits. EPA will develop a Municipal Compliance Maintenance Strategy which will provide guidance for identifying the cause(s) of POTW noncompliance through diagnostic inspections and establishing compliance correction plans utilizing section 308 letters, administrative orders, or where necessary judicial actions.

In support of this municipal compliance emphasis, EPA will increase attention to the enforcement of pretreatment implementation requirements for POTWs, improve monitoring/inspections to evaluate compliance with toxic requirements in NPDES permits, and increase the use of diagnostic inspections and tracking to identify and correct chronic noncompliance. Administering agencies will coordinate

pretreatment and municipal enforcement actions so that, when an action is taken in response to noncompliance in one program, consideration is given to the other.

In FY 90, the enforcement program will become more involved in emerging program areas. EPA will place a high priority on identifying and enforcing toxic permit requirements. EPA, in cooperation with the States, will implement the Compliance Monitoring and Enforcement Strategy for Toxics Control. The strategy focuses on inspections to monitor acute and chronic toxicity; criteria targeting enforcement responses to violations that pose the greatest potential risk to aquatic life and human health; lab performance evaluation criteria for toxicity analysis; and an updated DMR/QA program to meet new and expanded needs for toxicity controls. EPA will also initiate enforcement of permits for combined sewer overflows and enforcement of sludge requirements in permits.

Headquarters

- o Headquarters will evaluate the use of available enforcement mechanisms to ensure the optimum use of enforcement authorities. Headquarters/Regions will assess State penalty practices. (Fourth Quarter)

N o Headquarters will provide guidance to set priorities for monitoring and enforcement of sludge requirements. (First Quarter)

N o Headquarters/Regions will revise NPDES Oversight Guidance to establish criteria for more effective oversight of approved States. (Second Quarter)

N o Headquarters will provide a full range of assistance to States and Regions to assure that PCS is being utilized effectively and efficiently. (Ongoing)

N o Headquarters will take the necessary steps to assure that PCS has the elements to allow for effective linking to other information systems. This requires entry of latitude/longitude data in PCS; identifying other environmental information systems with relevant information; and designing, distributing and using specially designed programs to facilitate system linkages, data download and uploads and data analyses.

N o Headquarters (OWEP/ORD) will expand the DMR QA program to include a reference toxicant to test permittees' ability to conduct whole effluent toxicity tests. (Second Quarter)

N o OWEP will coordinate with the Office of Municipal Pollution Control in the development and implementation of the Municipal Compliance Maintenance Program. (Ongoing)

N o Headquarters will continue to encourage Regions to deliver inspector training and ensure that both new and experienced inspectors receive program-specific training. (Ongoing)

+ o Headquarters will work to implement the new EPA Federal Facility Compliance Strategy, signed by the Administrator on November 8, 1988. (Ongoing)

Regions/States/Indian Tribes

o Regions and States, using the entire spectrum of enforcement mechanisms, will ensure compliance with all formal enforcement actions (AOs, civil and criminal) by tracking cases from initiation of referrals to entry of consent decrees or court orders, and by prompt follow up action when deadlines are missed. (Ongoing)

o Regions will provide technical support for criminal investigations and prosecutions in program priority areas. Regions shall refer to the Office of Criminal Investigation matters involving suspected criminal violations, including significant unpermitted discharge and false reporting, or other fraud to the Agency. (Ongoing)

o Regions will ensure that EPA judicial referrals/consent decrees and final administrative penalty orders contain appropriate civil penalties consistent with the CWA Penalty Policy; NPDES States will comply with penalty provisions in the National Guidance for Oversight of NPDES Programs. (Ongoing)

o Regions/States will take timely and appropriate enforcement against SNC violations, including those involving toxic pollutants. (Ongoing) [SPMS]

o Regions/States will increase the use of inspections to assess permittee biomonitoring capabilities and evaluate permittee procedures/techniques for toxicity reduction evaluations. (Ongoing) [SPMS]

o Regions/States will continue to ensure timely and accurate data entry of WENDB data elements for pretreatment and for administrative penalty orders. (Ongoing)

N o Regional enforcement staff will coordinate with Near Coastal program staff to determine whether enforcement action is required for less than significant noncompliance. (Ongoing)

N o Regions/States will monitor compliance with sludge requirements in NPDES permits. (Ongoing)

N o Regions/States will develop and implement Municipal Compliance Maintenance programs for anticipating when a POTW will reach design capacity. (1st Quarter)

7. Pretreatment

The goal is to assure that POTWs[1] fully implement and enforce pretreatment controls for conventional, nonconventional and toxic pollutants and hazardous wastes that are necessary to protect human health, the environment, and the treatment works. Administering Agencies should give priority to: 1) modifying the requirements of the approved program and NPDES permit to incorporate new requirements resulting from new or revised regulations and to correct inadequacies identified in the operations of the POTW pretreatment program, and 2) identifying those POTWs that meet the criteria for reportable noncompliance and report them on the Quarterly Noncompliance Report. Where the POTW also meets the new definition of significant noncompliance, formal enforcement action should be initiated when the POTW does not return to compliance within a timeframe consistent with the definition.

Administering Agencies, as they oversee local program implementation, should continue to give emphasis to the following three key areas to ensure effective implementation:

o Program Modification: Regions and States will formally modify approved pretreatment programs to incorporate new requirements or correct inadequacies. Modification and approval will follow the October 17, 1988, amendments to the General Pretreatment Regulations, and focus on the following four areas:

a. Local Limits - In accordance with the 1985 policy memorandum and the FY 88 Local Limits Guidance Manual, site specific technically-based local limits must be developed for each approved program and periodically re-evaluated.

---

[1]Throughout this section, wherever POTWs are cited, the same requirements apply to States or EPA acting as Control Authority in lieu of local program.

7324

b. Legal Authority - Consistent with section 403.8 of the Pretreatment Regulations, particularly as revised by the PIRT rule, POTWs, and in some cases States, will need to modify their legal authorities.

c. Control Mechanisms - Based on the FY 89 IU Permitting Guidance Manual, and the PIRT amendments POTWs may need to develop and issue stronger IU control mechanisms for significant industrial users (SIUs).

d. Enforcement Procedures - POTWs are responsible for ensuring the compliance of industrial users with pretreatment standards, including taking effective enforcement actions within reasonable time frames. Where approved programs do not specify detailed enforcement response procedures, they should be modified to include them consistent with the 1986 Pretreatment Compliance Monitoring and Enforcement Guidance (PCME).

- Enforcement: Regions and States will assure that POTWs operate their approved programs and comply with reporting requirements. Where POTWs fail to successfully implement their program as measured by the guidance on significant noncompliance, Administering Agencies should take timely enforcement action to address the problem. Where the POTW does not act promptly to correct the situation, formal enforcement action should be initiated against the POTW to address the noncompliance.

  Where there is an approved program, and the POTW has not taken all actions available under its authority, to secure the compliance of the IU, action against both the POTW and the IU will usually be appropriate. Where EPA or the State is the Control Authority, enforcement action should be taken against those IUs which have not complied with categorical standards, giving priority to IUs where the POTW has been identified as having interference or pass-through problems.

- Data Management: Regions and States will assure that POTWs have in place and employ appropriate mechanisms to track and determine compliance rates for SIU's, using the definition of significant noncompliance when it is promulgated, and that POTWs report such data at least annually. States and Regions will employ PCS to track pretreatment information and assist in identifying POTWs which meet the criteria for reportable non-compliance and significant noncompliance. Regions and States should also use PCS to identify the compliance of IUs where EPA or the State is the Control Authority.

For State-run pretreatment programs, special attention will be given to monitoring and evaluating performance. Regions should ensure that States are inputting data into existing tracking

systems as appropriate and should monitor the overall performance of the program to ensure that industrial users are in compliance.

Where there is no approved local program Regions/States should evaluate the need to develop local programs consistent with section 403.8.

Headquarters

- o Headquarters (OWEP) will promulgate changes to the NPDES and General Pretreatment regulations based on the recommendations of DSS. (Second Quarter)

N o Headquarters will propose changes to the NPDES regulations on the Quarterly Noncompliance Report to incorporate reporting requirements for pretreatment implementation. (Fourth Quarter)

N o Headquarters will provide guidance defining the definition of significant noncompliance for POTWs which fail to implement their approved programs. (First Quarter)

Regions/States/Indian Tribes

+ o Regions/States will assess and provide technical assistance to POTWs as they implement/enforce their programs and adopt new regulations resulting from the findings of the DSS. (Ongoing)

+ o Regions/States will continue to place highest priority on enforcement against POTWs consistent with the guidance to be issued on significant noncompliance. Regions should continue to report all POTWs on the QNCR which meet the criteria for reportable noncompliance. (Ongoing)

- o Regions will use criminal enforcement authorities against appropriate industrial users with special attention on knowing/negligent introduction into a POTW of toxic pollutants/hazardous wastes (as defined by CWA sections 311(b)(2)(A) and 307(a); CERCLA section 102; RCRA section 3001; TSCA section 7) in excess of legal limits. Regions will provide technical support for criminal investigations and prosecutions in pretreatment cases. (Ongoing)

+ o Regions/States that act as control authorities will implement/enforce the pretreatment program consistent with national guidance, and will be held to the same standards of implementation as local authorities. (Ongoing)

- o Regions/States will ensure that all approved pretreatment programs are inspected or audited annually. (Ongoing) [SPMS]

+ o Regions/States will assure that all POTWs with approved programs for more than two years have in place and are implementing adequate and enforceable control mechanisms for at least 95% of SIUs. (Fourth Quarter)

N o Regions/States will ensure that approved POTWs implement the definitions for significant noncompliance and significant industrial users as soon as they are promulgated. (Ongoing)

8. NPDES and Pretreatment State Program Approval, Review, and Oversight

In FY 90, the goal is to further strengthen the Federal/State partnership by conducting effective oversight to ensure sound, consistent implementation of State programs, improving the legal and regulatory basis of current State programs, and approving new State NPDES, pretreatment and sludge programs. As State NPDES and pretreatment programs mature and as more States assume these responsibilities, these activities continue to grow in importance. In addition, EPA will work with any Indian tribes seeking to administer the NPDES program as authorized by the WQA. Regions will continue to negotiate agreements with their States on managing and overseeing NPDES programs consistent with the Oversight Guidance and applicable NPDES/pretreatment regulations. By 1990, many of the initiatives begun in earlier years will be institutionalized into other documents and agreements, and more emphasis will be placed on follow up by Headquarters and by Regions to ensure the sound, consistent application of these principles and practices.

The Regions, with Headquarters assistance, will continue to review State programs to ensure that current State laws and regulations provide adequate authority to administer and enforce the national NPDES/pretreatment program requirements under the CWA, as amended. Continued emphasis will be given to following up on Action Plans established by States and Regions in FY 1988/89 to strengthen water quality based permitting for toxic pollutants and toxicity.

The Regions will continue to encourage NPDES States to assume authority for the pretreatment program, and will continue to condition section 106 grants accordingly. Regions should accelerate efforts to encourage State program modifications for general permitting authority, since this will be a key to successful implementation of stormwater program activities for all NPDES States. In addition, the CWA amendments are expected to produce increased activity with respect to State program

assumptions, including development of approvable State NPDES or other federally authorized programs to include sludge requirements, and treatment of Indians as States.

Headquarters

- o Headquarters will provide guidance/assistance to all Regions in conducting legal reviews, correcting program deficiencies, and responding to litigation/administrative petitions from third parties seeking withdrawal of State programs. (Ongoing)

N o Headquarters will promulgate changes to NPDES Regulations to incorporate requirements of the Water Quality Act of 1987, including the treatment of Indian tribes as States, and to clarify existing regulatory provisions. (Fourth Quarter)

N o Headquarters will work with the Regions to assist Indian tribes seeking to administer the NPDES program. (Ongoing)

Regions/States/Indian Tribes

- o Regions will increase their oversight of State-run pretreatment programs, and will take appropriate steps to correct problems where States are not adequately implementing/enforcing program requirements. (Ongoing)

- o Regions will continue to review/approve programs/program modification requests for NPDES (including pretreatment, general permits and sludge) and review and approve partial NPDES programs. (Ongoing)

\+ o Regions will work with States to implement their toxic control action plans. (Ongoing)

9. State Revolving Fund Management

In the implementation of the State Revolving Fund program authorized under Title VI of the Clean Water Act, FY 1990 will be the key to the future of the program. Almost 40 States are projected to receive their initial capitalization grants by the end of FY 1989 and the remainder during FY 1990. Most States will therefore be completing their first SRF annual cycle by the end of FY 1990. It is crucial to the success of the SRF program that EPA and the States provide the necessary technical and financial resources. This is vital to ensure that each State's program is developed to effectively deal with municipal wastewater financing needs of both large and small communities.

U.S ENVIRONMENTAL PROTECTION AGENCY

Office of Water

FY 1990 SPMS Measures and Definitions

OFFICE OF WATER
FY 1990
Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Assess toxicity control needs and reissue major permits in a timely manner.	Track, against targets, the number of permits reissued to major facilities during FY 90 (report NPDES States and non-NPDES States separately).	WQ-11	Q 1,2,3,4
	Identify the number of final permits reissued and the number modified during FY 90 that include water quality based limits for toxics. Of these, report number that are Individual Control Strategies (NPDES States, non-NPDES States; report major and minors separately.)	WQ-12	Q 1,2,3,4
Assure NPDES permits are fully in effect and enforceable.	Identify, by Region, the number of pending evidentiary hearing requests and track, by Region, progress against quarterly targets for the evidentiary hearing requests for major permits pending at the beginning of FY 90 resolved by EPA and for the number resolved by NPDES States.	WQ-13	Q 1,2,3,4
Effectively implement approved local pretreatment programs.	Track, by Region, against quarterly targets, for approved local pretreatment programs: 1) the number audited by EPA and the number audited by approved pretreatment States; and 2) the number inspected by EPA and the number inspected by States.	WQ-14	Q 1,2,3,4
Reissuance of priority municipal permits which contain interim sludge conditions.	Track, against targets, total number of permits issued to priority sludge facilities containing sludge conditions necessary to meet the requirements of CWA section 405(d)(4).	WQ-15	Q 1,2,3,4
Encourage permitting efforts in near coastal waters.	Identify the number of permits reissued in near coastal waters (report separately: NPDES States and non-NPDES States).	WQ-16	Q 1,2,3,4

WQ-6 Nonpoint Sources (cont.)

This measure begins the process of shifting the nonpoint source management and control program from the development stage in FY 1989 to implementation. Because the long-term focus of the nonpoint source program is on watershed and site-specific clean-up projects, this measure will be modified in FY 1991 to place highest priority on identifying and tracking major watershed and site-specific nonpoint source pollution control programs and projects.

WQ-7 Indian Tribe Program Grants

This measure assesses Agency progress in awarding CWA program grants to qualified Indian Tribes as required by the WQA of 1987. Specifically, it tracks (by Region) the number of Indian Tribes qualified to be treated as a State, the number of Tribes that submit grant applications, and the list of Tribes that receive CWA program grants (include major activities and funding sources). Describe Regional procedures for reviewing and ranking Indian Tribe grant proposals and for evaluating performance.

OFFICE OF WATER
FY 1990
Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Achieve and maintain high levels of compliance in the NPDES program.	Track, by Region, the number of major permittees that area: on final effluent limits and not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	WQ/E-4	Q 1,2,3,4
	Track, by Region, the number and percentage of major permittees in significant noncompliance with: final effluent limits; construction schedules; interim effluent limits; reporting violations; pretreatment implementation requirements (list separtely; municipal, industrial, Federal facilities; NPDES States, non-NPDES State).	WQ/E-5	Q 1,2,3,4
	Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters. (Report separately: municipal, industrial, Federal).	WQ/E-6	Q 1,2,3,4
	Report, by Region, the number of major permittees that are on the previous exception list which have returned to copliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action by the QNCR completion data, and the number that were unresolved (not returned to compliance during the quarter or addressed by a formal enforcement action by the QNCR completion date). (Report separately: municipal, industrial, Federal facilities).	WQ/E-7	Q 1,2,3,4

OFFICE OF WATER
FY 1990
Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Achieve and maintain high levels of compliance in the NPDES program. (continued)	Report, by Region, the total number of (a) EPA Administrative Compliance Orders and the total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatement; (b) Class I and Class II proposed administrative penalty orders issued by EPA for NPDES violations and pretreatment violations; and (c) Administrative penalty orders issued by States for NPDES violations and pretreatment violations.	WQ/E-8	Q 1,2,3,4
	Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorneys General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts	WQ/E-9	Q 1,2,3,4
Effectively enforce the pretreatment program.	Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and tract by State the number of POTWs in that universe where action taken either resolved or established an enforceable schedule to resolve RNC. report separately by State for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	WQ/E-10	Q 1,2,3,4

OFFICE OF WATER
FY 1990
Water Enforcement and Permits

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
Identify compliance problems and guide corrective action through inspections.	Track, by Region, against targets, the number of major permittees inspected and least once (combine EPA and State inspections and report as one number).	WQ/E-12	Q 1,2,3,4

5252

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

WQ 11/12 Permit Reissuance; Toxic Permits

The universe for measure WQ-11 is the total number of major permits with expiration dates before October 1, 1990, according to PCS data on October 10, 1989 (i.e., the number of major permits that have or will expire by the end of FY 90). Measure WQ-11 is the total number of major permits issued with issuance dates (i.e., date signed by permit authority) during FY 90. Status as of the close of each quarter will be taken from PCS on the 10th of the month following the end of the quarter.

Measure WQ-12 is all permits (major and minor) that include water quality based limits on specific chemicals or whole effluent toxicity and with issuance (modification) dates (i.e., date signed by EPA or State permit authority) during FY 90. Of those permits, the number that are ICSs is to be identified. This measure deals only with final permits; however, because ICSs may also be draft permits with a schedule for final issuance, this number of ICSs will not include all ICSs. WQ-12 is specifically designed to count water quality-based permits issued in FY 1990. ICSs are a subset of this universe. Since "limit" is specifically designed to exclude permits which only include monitoring requirements, such permits would not be counted as ICSs.

A water quality-based permit limit is a limit that has been developed to ensure a discharge does not violate State water quality standards. Such limits are expressed as maximum daily and average monthly values in Part I of the NPDES permit. They can be expressed as concentration values for individual chemicals and/or pollutant parameters such as effluent toxicity. Effluent toxicity can also be expressed in toxic limits. Limits should be reflective of data available through water quality-based assessments and should protect against impacts to aquatic life and human health.

As a matter of policy, EPA regards the new statutory requirements to control point sources as a component of the ongoing national program for toxics control. In the national toxics control program, all known problems due to any pollutant are to be controlled (using both new and existing statutory authorities) as soon as possible, giving the same priority to these controls as for controls where only 307(a) pollutants are involved. Known toxicity problems include violations of any applicable State numeric criteria or violations of any applicable State narrative water quality standard due to any pollutant (including chlorine, ammonia, and whole effluent toxicity), based upon ambient or effluent analysis. States and Regions will continue to issue all remaining permits, including those requiring the collection of new water quality data where existing data are inadequate to assess WQ conditions.

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

Performance Expectation: The goal of the State and EPA NPDES program is to have reissued major and minor permits in effect on the date the prior permit expires. Permit applications are due and should be acted upon during the last six months of a permit's term. Most States and Regions, should be able to reissue 100% of their expiring major permits except where unusual, complex and difficult issues prevent timely permit reissuance.

Regional quarterly reports for these measures will be reported to the Director of the Office of Water Enforcement and Permits.

WQ 13 Evidentiary Hearings

The term "evidentiary hearing" is meant to encompass not only EPA issued permit appeals pursuant to 40CFR 124 but also any NPDES State issued permit appeals (whether adjudicatory or non-adjudicatory in nature). The meaning includes any and all administrative appeals to permit conditions for major facilities, whether the appeals stay or do not stay permit conditions. Evidentiary hearings for EPA issued permits are not considered to be pending if they are on appeal to the Administrator as of the beginning of FY 1990.

An evidentiary hearing should be regarded as resolved once a final decision has been issued, a negotiated settlement has been reached, or the appeal of an initial decision has been denied.

Performance Expectation: Evidentiary hearings should be resolved as expeditiously as possible. The target should reflect resolution of all pending hearings. Although the measure is intended to reduce the backlog of pending hearings, consideration should be given to new hearings requests made during FY90 that have priority over pending requests. Such requests may be counted against commitments where they are priority cases (based on Regional/State evaluation).

WQ 14 Pretreatment Audits and Inspections

A local pretreatment program audit is a detailed on-site review of an approved program to determine its adequacy. The audit report identifies needed modifications to the approved local program and/or the POTW's NPDES permit to address any problems. The audit includes a review of the substantive requirements of the program, including local limits, to ensure protection against pass through and interference with treatment works and the methods of sludge disposal. The

auditor reviews the procedures used by the POTW to ensure effective implementation and reviews the quality of local permits and determinations (such as implementation of the combined wastestream formula). In addition, the audit includes, as one component, all the elements of a pretreatment compliance inspection (PCI).

In certain cases, non-pretreatment States will be allowed to conduct audits for EPA. If a non-pretreatment State has the experience, training, resources and capabilities to effectively conduct audits, these audits could be counted. A determination of whether a non-pretreatment State could conduct the audit for EPA will be worked out between EPA HQ and the Region during the commitment negotiation process on a case-by-case basis.

The pretreatment compliance inspection (PCI) assesses POTW compliance with its approved pretreatment program and its NPDES permit requirements for implementation of that program. The checklist to be used in conducting a PCI assesses the POTW's compliance monitoring and enforcement program, as well as the status of issuance of control mechanisms and program modifications. A PCI must include a file review of a sample of industrial user files. Note that this measures tracks "coverage" of approved pretreatment programs, not the number of audits or inspections conducted, which may be greater than the number of programs since some programs may be inspected/audited more than once a year.

Performance Expectation: At a minimum, audits should be performed at least once during the term of the POTW's permit. Although an audit includes all the elements of a PCI, as one component, the activity should not be counted as both an audit and a PCI; it should be counted as an audit. In any given year, all POTWs that are not audited should have a PCI as part of the routine NPDES inspection at that facility, i.e. audits plus inspections should equal 100 percent of approved POTWs, except where mitigating circumstances prevent this (mitigating circumstances will be approved during negotiation process). For purposes of reporting, both audits and pretreatment compliance inspections should be lagged by one quarter, i.e. same as NPDES inspections. Also, where both an audit and an inspection are conducted for a POTW, for purposes of coverage, only that audit will be counted.

WQ-15: Sludge Permitting

Priority sludge facilities are: 1) pretreatment POTWs; 2) POTWS that incinerate their sludge; and 3) any other POTWs with known or suspected problems with their sludge quality or disposal practices. Pretreatment POTWs and POTWs that incinerate sludge may be considered to be non-priority if such decision is supported by information showing no cause for concern. The sludge conditions are to be included in permits as the NPDES pern. xpires and is reissued. The sludge

conditions may be incorporated in another permit (such as a permit issued under the Clean Air Act, or a State permit pursuant to an agreement between EPA and the State) and referenced to the NPDES permit.

WQ-16: Near Coastal Waters Permitting

In accordance with EPA's near coastal waters initiative and the Marine Policy, Regions with coastal dischargers will accelerate actions for reissuing permits to these facilities. A near coastal water is one with measurable salinity and tidal influences. Permits should contain water quality based limits based on available wasteload allocations and should be analyzed for persistent, bioconcentratable toxicants. EPA's Permit Writers Guide for Marine and Estuarine Waters should be followed. This measure includes all expired or expiring permits (major and minors) reissued in FY 90 (not modifications).

WQ E-4/5 NPDES Compliance

A facility is considered to be on final effluent limits when the permittee has completed all necessary construction (including all start-up or shakedown period specified in the permit or enforcement action) to achieve the ultimate effluent limitation in the permit reflecting secondary treatment, BPT, BAT, or more stringent limitations, such as State required limitations or water quality based limitations, or limitations established by a variance or a waiver. A facility on a "short-term" schedule (one year or less) for corrections such as composite correction plans, where compliance can be achieved through improved operation and maintenance (rather than construction) is considered to be on final effluent limits. A facility is reported to be in significant noncompliance with its final effluent limits when it exceeds the criteria for unresolved significant noncompliance found in the combinations of violations:

-- final effluent limit
-- compliance schedule (short term/non-construction)
-- final effluent limit and compliance schedule
-- final effluent limit and reporting requirements
-- final effluent limit, compliance schedule and reporting requirements
-- compliance schedule and reporting requirements

A facility is reported to be in significant noncompliance with its reporting requirements when it exceeds the criteria for unresolved significant noncompliance for reporting violations only.

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

A facility is reported to be in significant noncompliance for failure to comply with pretreatment implementation requirements when it meets the criteria identified in the guidance defining significant noncompliance for pretreatment implementation.

A facility is considered to be "not on final effluent limits" if the permittee does not meet the definition of a "facility on final effluent limits" or when a permit, court order/consent order or an Administrative Order require construction such as for a new plant, an addition to an existing plant or a tie-in to another facility. A facility is reported to be in significant noncompliance with its construction schedule when it exceeds the criteria for unresolved significant noncompliance violations of:

— construction schedule
— construction schedule and interim effluent limits
— construction schedule and reporting requirements
— construction schedule, interim effluent limits and reporting requirements.

A facility is reported to be in SNC with its interim effluent limits when it exceeds the criteria for unresolved SNC violations of:

— interim effluent limits
— interim effluent limits and reporting requirements

A facility is reported to be in SNC with its reporting requirements when it exceeds the criteria for unresolved SNC violations of reporting requirements only.

Major P.L.92-500 permittees are tracked as part of the major municipals.

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

rmal enforcement actions against non-federal permittees include any statutory remedy such as Federal Administrative der or State equivalent action, a judicial referral (sent to HQ/DOJ/SAG), or a court approved consent decree. A ction 309(g) penalty administrative Order (AO) will not, by itself, count as a formal enforcement action since it only sesses penalties for past violations and does not establish remedies for continuing noncompliance. Unless the cility has returned to compliance, a 309(a) compliance order should accompany the 309(g) penalty order. Formal forcement actions against federal permittees include Federal Facility Compliance Agreements, documenting the dispute d forwarding it to Headquarters for resolution, or granting them Presidential exemption.

E-8 Administrative Orders

adquarters will report EPA Administrative Compliance Orders (AOs) and State equivalent actions from PCS. All AOs must entered into PCS by the 2nd update of the new quarter to be counted in the report. (Include: POTW implementation pe pretreatment AOs; IU AOs under pretreatment section 2(a)). The number of proposed EPA administrative penalty ders should be tracked by Class I and Class II. For State-issued orders, proposed or initial orders should be counted ere there is a two step process (i.e., proposed and final).

E-9 Referrals

e active case docket consists of all referrals currently at the State Attorney General and the number of referrals led in State Court. A case is concluded when a signed consent decree is filed with the State Court; the case is smissed by the State Court; the case is withdrawn by the State Attorney General after it is filed in a State Court; or e State Attorney General declines to file the case. OECM will report the same data for Federal referrals; State ferrals will be reported to the Regions.

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

WQ E-6/7 Exceptions List

NOTE: For SPMS report the number only. As part of OWAS, report both the number and the name and the number of quarters the facility has been in SNC.

Also, the name list must be submitted with the numbers; only the fact sheet, with justification, will be reported by the 15th day of the beginning of the next quarter. In regard to all major permittees listed in significant noncompliance on the Quarterly Noncompliance Report (QNCR) for any quarter, Regions/NPDES States are expected to ensure that these facilities have returned to compliance or have been addressed with a formal enforcement action by the permit authority within the following quarter (generally within 60 days of the end of that quarter). In the rare circumstances where formal enforcement action is not taken, the administering Agency is expected to have a written record that clearly justifies why the alternative action (e.g.,enforcement action, permit modification in process, etc.) was more appropriate. Where it is apparent that the State will not take appropriate formal enforcement action before the end of the following quarter, the States should expect the Regions to do so. This translates for Exceptions List reporting as follows:

Exception Lists reporting involves tracking the compliance status of major permittees listed in significant noncompliance on two or more consecutive QNCRs without being addressed with a formal enforcement action. Reporting begins on January 1, 1990 based on permittees in SNC for the quarters ending June 30, and September 30, that have not been addressed with a formal enforcement action by November 30. Regions are also expected to complete and submit with their Exception List a fact sheet which provides adequate justification for a facility on the Exception List. The fact sheet should be submitted by the 15th day of the beginning of the next quarter. After a permittee has been reported as returned to compliance or addressed by a formal enforcement action, it should be dropped from subsequent lists.

Reporting is to be based on the quarter reported in the QNCR (one quarter lag).

Returned to compliance (refer to the QNCR Guidance for a more detailed discussion of SNC and SNC resolution) for Exception List facilities refers to compliance with the permit, order, or decree requirement for which the permittee was placed on the Exception List (e.g., same outfall, same parameter). Compliance with the conditions of a formal enforcement action taken in response to an Exception List violation counts as an enforcement action (rather than return to compliance) unless the requirements of the action are completely fulfilled and the permittee achieves absolute compliance with permit limitations.

2250

2357

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

Compliance Evaluation Inspection (CEI), Compliance Sampling Inspection (CSI), Toxic Inspection (TOX), Biomonitoring spection (BIO), Performance Audit Inspection (PAI), Diagnostic Inspection (DIAG), or Reconnaissance Inspection (RI). connaissance Inspections will only count toward the commitment when they are done on facilities that meet the llowing criteria:

- The facility has not been in SNC for any of the four quarters prior to the inspection.
- The facility is not a primary industry as defined by 40 CFR, Part 122, Appendix A.
- The facility is not a municipal facility with a pretreatment program.

mmitments for major permittee inspections should be quarterly targets and are to reflect the number of major rmittees inspected at least once. The universe of major permittees to be inspected is defined as those listed as jors in PCS. Multiple inspections of one major permittee will count as only <u>one</u> major permittee inspected (however, l multiple NPDES inspections will be included in the count for the measure that tracks the total number of all spections, see next paragraph).

e measure for tracking total inspection activity will not have a commitment. CEI, CSI, TOX, BIO, PAI, RI, and DIAG of jor and minor permittees will be counted. Pretreatment inspections for IUs and POTWs will be counted only toward etreatment inspection commitments. Multiple inspections of one permittee will be counted as separate inspections; connaissance Inspections will be counted. It is expected that up to 10% of EPA resources will be set aside for atral inspections of minor facilities.

en conducting inspections of POTWs with approved pretreatment programs, a pretreatment inspection component (PCI) ould be added, using the established PCI checklist. An NPDES inspection with a pretreatment component will be unted toward the commitments for majors, and the PCI will count toward the commitment for POTW pretreatment spections. (This will be automatically calculated by PCS.) Regions are encouraged to continue CSI inspections of TWs where appropriate. Industrial user inspections done in conjunction with audits or PCIs or those done independent POTW inspections will be counted as IU inspections. Tracking of inspections will be done at Headquarters based on trievals from the Permit Compliance System (PCS) according to the following schedule:

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

WQ E-10 Reportable Noncompliance

Regions and/or States should apply reportable noncompliance (RNC) criteria to all approved POTW pretreatment programs at least twice between July 1989 and June 1990. All reporting should be a summary of information that is listed and updated on the QNCR on a quarterly basis.

Report POTWs in RNC by EPA State (non-pretreatment State) or pretreatment State. Refer to the Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Requirements (Reportable Noncompliance Guidance) for a definition of reportable noncompliance by pretreatment POTWs. The second quarter report should include the number of POTWs that met RNC between July and December 1989. If a POTW was identified as RNC before July, 1989 and still meets the criteria, it should be counted on the second quarter report. For the fourth quarter report include POTWs in RNC between January and June 1990 and POTWs reported for the second quarter that were not resolved or resolved pending. Credit is given for any of the three actions, listed in the measure, that resolves RNC (i.e., results in resolved pending or resolved status). However, if technical assistance is the chosen approach, a schedule for compliance should be established. If the schedule is 90 days or longer, it should be incorporated into an enforceable document. End of year compliance status should be reported for all POTWs that were identified as RNC between July 1989 and June 1990. Report the total number of POTWs that are considered reportable noncompliance (RNC), resolved pending (RP), or resolved (RE) as of the final report. POTWs that are in compliance with enforceable administrative or judicial schedules to resolve RNC as of the final report date should be counted as RP.

WQ E-11 Pretreatment Referrals

The active case docket consists of all referrals currently with the State Attorney General and the number of referrals filed in State Courts. OECM will report the same data for Federal referrals; State referrals will be reported to the Regions.

WQ E-12 Inspections

As the inspections strategy states, all major facilities should receive the appropriate type of inspection each year by either EPA or the State. As part of the NPDES inspection, verification of sludge management practices should be conducted as appropriate. EPA and States collectively commit to the number of major permittees inspected each year with

OFFICE OF WATER
FY 1990
Water Enforcement and Permits Definitions

INSPECTIONS	RETRIEVAL DATE The First working day after the second update in:
July 1, 1989 through Sep. 30, 1989	Jan. 1990
July 1, 1989 through Dec. 31, 1989	April 1990
July 1, 1989 through March 31, 1990	July 1990
July 1, 1989 through June 30, 1990	Oct. 1990

*Inspections may not be entered into PCS until the inspection report with all necessary lab results has been completed and the inspector's reviewer or supervisor has signed the completed 3560-3 form.

Note: SPMS only tracks the number of major permittees inspected. OWAS tracks the number of inspections.

6582

OFFICE OF WATER
FY 1990
Municipal Pollution Control

OBJECTIVE	MEASURE	SPMS CODE	FREQUENCY
State Revolving Fund Management	Track, by Region, progress against quarterly targets for (1) net outlays for combined construction grants and SRF, (2) net outlays for construction grants, and (3) net outlays for State Revolving Fund (SRF) program.	WQ-8	Q 1,2,3,4
	Track, by Region, progress against quarterly Regional Headquarters targets for the number of States, by name, which have been awarded an SRF capitalization grants (cumulative by quarter).	WQ-9	Q 1,2,3,4
Management of On-going Construction Grants Program	Track, by Region, progress against quarterly targets for the number of Step 3, Step 2+3, Step 7, Marine CSO and PL 87-660 projects administratively completed.	WQ-10	Q 1,2,3,4

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(M) What is the level of coordination between the NPDES States enforcement program and the state Attorney General's Office? Are there established procedures for coordination and communication? If less than satisfactory, what steps is the State taking to improve coordination? Are State AGs generally filing cases within the goal of 60-90 days? (N) Have the Region and approved States negotiated a basis for Regional evaluation of the States' penalty program, including identification of sanctions which might be used in lieu of penalties and the documentation which must be maintained by the State for review? Are States complying with the provisions of the agreement on penalties? To what extent are States calculating economic benefit? Are States seeking penalties in the majority of cases? Are States getting the penalty amounts they are seeking? ... review process to speed up (O) What problems is the Region encountering in assessing penalties using the CWA Penalty Policy? Is the Region experiencing problems/delays with Headquarters reviews? Explain. Is the Region generally getting the penalty amounts identified in the referral? What improvements could be made to the review process to speed up the referral process?			

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

A GUIDE TO THE OFFICE OF WATER ACCOUNTABILITY SYSTEM AND MID-YEAR EVALUATIONS

Fiscal Year 1990

Office of Water
U.S. Environmental Protection Agency
Washington, D.C. 20460

2365

TABLE OF CONTENTS

2366

State Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Review Approved NPDES State Statutory and Regulatory Authority (continued)	Office of Regional Counsel participate in reviews? In what way? Do they participate in the process of reaching States for review and making commitments? Do they follow through with their work? In a timely manner? Are priorities a problem? If so, how are conflicts resolved? (C) Does the Region have a routine mechanism for learning of changes to State laws and regulations? If so, describe the process.			
3. Execute EPA/State NPDES Agreements	(A) What problems have arisen in the development of EPA/State NPDES agreements? How are they resolved? Are there any particular elements of national policy and guidance on State overview that have been difficult to implement? Do all the agreements include provisions for EPA evaluation of State penalty practices?			

State Program Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Provide Effective Oversight of Approved NPDES State Programs	(A) To what extent has the Region implemented the "Guidance on Oversight of NPDES Programs"? (B) Does the Region carry out a program of regularly scheduled assessments of each approved NPDES State to assure the adequacy of authorities, funding and staffing and to assure a demonstrated ability to set program priorities and effectively implement the NPDES program? What is the frequency; who is involved; and how is it done for each delegated State? What is the nature and timing of follow-up? Does this include identification of State needs and problems, evaluation of performance and providing of technical assistance?			

State Program Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Provide Effective Oversight of Approved NPDES Programs (continued)	(C) How frequently does the Region conduct PCR, PTCR and WQPCRs? How many permits/ programs are reviewed? How many industrial permits and what industrial categories? How many municipal permits? How are results provided to States and describe how Region verifies that the problem/deficiency is corrected. (D) Does oversight of State compliance monitoring include an assessment of new toxic/toxicity monitoring requirements? Does the Region check the States compliance inspection activity with particular emphasis on toxic problems?			

State Program Approval/Review/Oversight

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Provide Effective Oversight of Approved NPDES Programs (continued)	(E) Where the pretreatment program is run by the State (in whole or in part), how does the Region overview the performance of the State? Does the Region's review include an evaluation of legal authorities, procedures, personnel and funding? What corrective actions are taken to correct identified deficiencies? (F) How are 106 grants and the work program development process used to assure effective implementation of NPDES State programs? What enforcement and permitting priority areas identified in the FY 90 Operating Guidance are specifically addressed? (Which ones are not and why)			

7-21-89

RCRA Activities for NPDES Facilities

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Implement Corrective Action Requirements	(A) Has the Region/State updated their information on POTWs who receive hazardous wastes by dedicated pipe or manifested hazardous waste delivered by truck or rail? (B) What is the status of RCRA 3007 information gathering letters? Do any remain to be issued by EPA/States to municipalities? (C) What is the status of POTW notifications received and reviews completed? (D) Has the Region/State established a RCRA permit by rule for each subject POTW? (E) How many POTWs stopped receiving hazardous waste by truck, rail or dedicated pipe since the Regional/State notification of RCRA?	(a) Identify number of POTWs for which a RCRA permit by rule has been established. (b) Of those POTWs which receive hazardous wastes by truck, rail or dedicated pipe, report the total number of determinations made. Report determinations by: 1) number of determinations made that there is no need for corrective actions; and 2) number of determinations that there is a need for corrective actions.	No/No No/No	Quarterly Quarterly

RCRA Activities for NPDES Facilities

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Implement Corrective Action Requirements (continued)	(F) Has the Region/State begun the corrective action process for each POTW subject to the RCRA permit by rule, and established appropriate corrective action requirements? How were appropriate requirements established (e.g., RCRA RIDER permits, amendments to NPDES permits, other)? Is the first stage of the corrective action process, the RCRA Facility Assessment, specifically addressed? (G) How are the Regions, States, POTWs coordinating with RCRA/CERCLA staff in evaluating off-site removal of RCRA/CERCLA wastes into POTW collection systems?	(c) Identify number of POTWs for which the corrective action process has been established to implement 3004(u) of RCRA. The corrective action process includes any or all of the specific steps of a RCRA facility assessment, remedial investigations, and corrective measures. (d) List RCRA/CERCLA clean up projects in which a decision is made to discharge to a POTW. Specify control measure or pretreatment requirements in place.	No/No No/No	Quarterly Quarterly

RCRA Activities for NPDES Facilities

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Implement Regulatory/Programmatic Changes Based on the Domestic Sewage Exemption Study	(A) Describe the Region's strategy State by State for implementing the regulatory changes in the DSS rulemaking. (B) Has the Region worked with POTWs to implement regulatory/-programmatic changes (e.g., new local limits)? (C) Has the Region worked with NPDES States to initiate State regulatory/programmatic changes?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Develop and Approve/Modify Local Pretreatment Programs	(A) What rationale does the Region/States use to add/delete municipalities from the list of required local programs? (B) What are the Region/States doing to encourage local program modifications where deficiencies are identified? Is the Region/State relying solely on the POTW to identify deficiencies? (C) How does the Region identify needed POTW program modifications, determine whether they constitute a major modification and review and approve, disapprove major modifications? D) When a local program submitted for approval is not acceptable, what follow-up action is taken by the Region/State if the local program is not resubmitted in the time prescribed by the Approval Authority?	(a) Identify the local pretreatment programs requiring approval but not yet approved at the beginning of the fiscal year and distinguish between those newly identified in FY 90 and those previously required. (List separately: non-pretreatment States, approved pretreatment States). (b) Track progress against targets for the programs approved during FY 90 (list separately: non-pretreatment States, approved pretreatment States).	No/No No/OW	10/31/89 Quarterly

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements	(A) How do the Region/States ensure that local pretreatment programs are fully implementing NPDES permit pretreatment requirements? Other pretreatment program requirements?	(a) Report, by Region, the number of pretreatment administrative compliance orders issued by EPA to IUs and the number of pretreatment equivalent actions issued by States to IUs.	No/No	Quarterly
	(B) What criteria do the Region/States use to decide to refer a POTW for failure to implement as opposed to using administrative enforcement action?	(b) Pretreatment Referrals (1) Report, by Region, the number of State pretreatment civil and criminal referrals sent to State Attorneys General and the number of State civil and criminal cases filed.	Yes/SPMS WQ/E-11	Quarterly
	(C) What is the level of coordination for pretreatment cases between the compliance section and ORC in the Region and the respective agencies in the States? If less than satisfactory, what steps is the Region taking to improve coordination?	(2) Report the number of EPA and State pretreatment referrals sent to HQ/DOJ/SAG by: o POTW pretreatment violations; o industrial user pretreatment violations (list separately EPA, States).	No/No	Quarterly
	(D) How do the Regions and States identify and respond to industrial noncompliance with categorical pretreatment standard deadlines in a municipality where there is an approved pretreatment program?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
2. Take Actions as Required to Obtain Compliance with Pretreatment Requirements (continued	(E) Is the Region/State using the Guidance on Reportable Noncompliance for Pretreatment Implementation to identify POTWs which should be listed on the QNCR? Is the Region/State having any difficulty in interpreting or using the Guidance? If so, in what areas? Have the Region/States successfully implemented the new definition of significant noncompliance for POTWs which fail to implement their programs? What problems are the Region/States experiencing?	(c) Identify, by State, the number of POTWs that meet the criteria for reportable noncompliance (RNC) and track by State the number of POTWs in that universe where action taken either resolves or establishes an enforceable schedule to resolve RNC. Report separately, by State, for each action taken: technical assistance, permit/program modification, or formal enforcement. Report, by State, the compliance status (RNC, resolved pending, resolved) of each POTW in the universe as of the end of the year.	Yes/SPMS WQ/E-10	Second and Fourth Quarters
	(F) Has the Region/State provided training/assistance to legal staff of the POTWs or pretreatment authorities? What other steps have the Region/States taken to improve POTW enforcement of pretreatment requirements?			

2-91

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation	(A) How do Regions/States establish priorities for pretreatment oversight of POTWs? (B) How do Regions independently assess the effectiveness of POTW program implementation in pretreatment States? (C) Does the Region/State use the Audit/PCI checklist in conducting POTW pretreatment reviews? If the checklist is modified, describe the modifications.	(a) Track, by Region, against quarterly targets, for approved local pretreatment programs, 1) the number audited by EPA and the number audited by approved pretreatment States; and (2) the number inspected by EPA and the number inspected by States.	Yes/SPMS XD-14	Quarte
		(b) Report number of EPA and State pretreatment inspections of IUs where EPA or the State is control authority. (list separately: EPA/State)	No/No	Quarterly
		(c) Identify number of POTWs that need to conduct local limits headworks loading analysis (non pretreatment States; approved pretreatment States.)	No/No	Quarterly
		(d) Track number of POTWs requesting changes to local limits (nonpretreatment States; approved pretreatment States)	No/No	Quarterly

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(D) What are the criteria used by EPA/States to select industrial users to be inspected? Do the Region/-States place a priority on inspecting IUs subject to federal categorical standards which are located where there is no local program? What do the results of these inspections indicate? What use is being made of IU results? Does the Region/State include personnel from the approved POTW in the IU inspection? (E) How are audits used by Regions/States to overview implementation? What are the findings from these audits? What follow-up actions are taken when problems are identified? Do the Regions review State audits and reports? How often? Do Regions keep copies of State audits, reports and follow-up documents on file?	(e) Identify, separately, the number of pretreatment POTWs which have adequate control mechanisms and the number of pretreatment POTWs on enforceable schedules that do not yet have adequate control mechanisms in place (non-pretreatment States, pretreatment States).	No/No	10/31/89
		(f) Track, by Region, against quarterly targets, the number of POTWs which comply during FY 90 with their enforcement schedules to assure adequate control mechanisms.	No/CM	Quarterly

2772

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(F) How are inspections used by Regions/States to overview implementation? What are the findings from these inspections? What follow-up actions are taken when problems are identified? (G) Are inspections used to track follow-up actions required by an earlier audit? If not, how is audit follow-up determined? (H) Aside from audits and/or inspections, what other oversight mechanisms are the Regions/States using to evaluate POTW performance year to year? (I) Are annual report submissions by POTWs reviewed by the Region/State? What criteria are used for these reviews? Are all POTWs using the definition of significant noncompliance (PCME guidance, July 1986) to evaluate and report IU performance?			

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(J) Are POTWs considering all appropriate factors in developing local limits, including protection of water quality (State numeric standards and narrative "free from" standards, Federal criteria), sludge quality and worker heath and safety? Characterize the changes being made to local limits. What is the Region/State strategy for assuring POTWs develop/implement adequate local limits? Do NPDES permits include toxicity limits and numeric limits for organic chemicals that may be used to establish local limits? Are they being reflected in local limits?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Oversee Effectiveness of Local Pretreatment Program Implementation (continued)	(K) Are control mechanisms adequate? Are POTW enforcement procedures adequate? How is adequacy determined and what follow-up is taken when deficiencies are found? Are control mechanisms updated regularly to address new pollutant levels? Do mechanisms address organic pollutants, hazardous constituents or toxicity? (L) What mechanisms are being used by approval authorities to determine if local programs are properly applying categorical standards to IUs? To what extent are local programs failing to properly apply categorical standards? What problems are being encountered? (M) Are POTWs taking necessary enforcement actions against industrial users when they are in noncompliance? Where POTWs do not act expeditiously, what actions are the Regions/States taking?			

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Enforce Pretreatment as a Control Authority	(A) Have Region/States completed an inventory of categorical industrial users in cities without required pretreatment programs? How were the inventories conducted? How will the inventory be maintained? (B) Does the Region/State take appropriate enforcement action to ensure that baseline monitoring reports, compliance reports, and periodic reports on compliance are submitted by IUs in non-pretreatment cities? Does the Region/State use the appropriate mechanism to ensure that compliance reports representative of the actual discharge are submitted by IUs in non-pretreatment cities? (C) Does the Region/State receive and evaluate baseline monitoring reports, compliance reports, and periodic monitoring reports from IUs in non-pretreatment cities? How does the Region establish compliance schedules and monitoring frequencies?	(a) Identify # of categorical IUs in nonpretreatment cities (report non-pretreatment States and pretreatment States separately). (b) Report the percent of significant noncompliance by categorical IUs in non-pretreatment cities where EPA is the Control Authority and where the State is the Control Authority.	No/No No/No	Second and Fourth Quarters Second and Fourth Quarters

Pretreatment

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
5. Oversee Effectiveness of State-run programs	(A) Are State-run programs putting data into existing systems on the performance of IUs and on local programs where there are approved programs? (B) What mechanisms does the Region use to oversee the effectiveness of State-run programs? (C) Are these States taking necessary enforcement actions to ensure that IUs are in compliance with pretreatment standards?	(a) Report by State for each State run program the percent of IUs in significant noncompliance.	No/No	Second and Fourth Quarters

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
1. Identify Compliance Problems	(A) Do the Regions'/States' compliance rates show improvement in FY 1990? (B) Is the QNCR regulation/guidance being properly applied in the Region/States? Is the Region reviewing State QNCRs to ensure proper reporting? If reviews identify inadequate QNCRs what action is the Region taking? (C) Are there new reasons for municipal/nonmunicipal noncompliance in the Region/States? What is the Regions/States strategy for dealing with such noncompliance?	(a) Track, by Region, the number of major permittees that are: —on final effluent limits and —not on final effluent limits (list separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States.	Yes/SPMS WQ/E-4	Majors: Quarterly (Data lagged one quarter)
		(b) Track, by Region, the # and % of major permittees in significant noncompliance with: —final effluent limits; —construction schedules; —interim effluent limits; —reporting violations —pretreatment implementation requirements (list separately: municipal, industrial, Federal facilities, NPDES States, non-NPDES States).	Yes/SPMS WQ/E-5	Majors: Quarterly (Data lagged one quarter)

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	DI SPMS/ COMMITMENT	REPORTING FREQUENCY
2. Follow Through on National Municipal Policy Implementation	(A) Have the Region/States completed filed enforcement cases against major POTWs? If not, what is delaying action?	(a) Identify, by Region, the number of major municipals on MCPs and the # that are not in compliance with their schedule (report EPA/State separately).	No/No	Quarterly
	(B) To what extent are the Region/States still establishing permit/compliance schedules for all remaining POTWs?	(b) Report, by Region, the number of major facilities addressed by formal enforcement actions against municipalities that are not complying with their schedules (report EPA/State separately).	No/No	Quarterly
	(C) How are the Region/States tracking and documenting noncompliance with all interim milestones (non-SNC) in permits/enforceable schedules? How are the Region/States responding to noncompliance with interim milestones in permits/enforceable schedules? How are schedules adjusted following slippage? Where no action is taken, what is the rationale?	(c) Report, by State, the percent reduction in major POTW SNC with FEL.	No/No	Quarterly
		(d) Report, by State, the number of major POTWs required to develop composite correction plans.	No/No	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	DI SPMS/ COMMITMENT	REPORTING FREQUENCY
2. Follow Through on National Municipal Policy Implementation (continued)	(D) If there is major slippage in a construction schedule, is the Region/State seeking judicially imposed schedules? If not, why not?			
	(E) Are the Region and the States enforcing MCP schedules for affected minors? When will this be completed?			
	(F) What are the Regions/States doing to decrease the level of SNC with FEL for major POTWs?			
	(G) Have Regions/States developed a Municipal Compliance Maintenance Strategy and a system for identifying when a POTW will reach design capacity?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
3. Ensure Industrial Compliance with BAT and Water Quality Based Toxic Requirements	(A) How do the Region and each State direct compliance monitoring efforts to enforce BAT and water quality based toxic requirements? (B) Do the Region and each State have sufficient laboratory and biomonitoring capability to conduct the necessary analysis to support toxic inspections? (C) Are Regions/States implementing the Compliance Monitoring and Enforcement Strategy for Toxics Control? (D) Do the Regions/States have sufficient expertise to evaluate TREs? If not, what steps are being taken to assure expertise?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses	(A) How has the mix of enforcement actions for the Region (AOs, penalty orders) changed since gaining authority to assess administrative penalties? Has the Region used the administrative penalty authority against the full range of facilities in noncompliance?	(a) ADMINISTRATIVE ORDERS (1) Report, by Region, the total number of (a) EPA Administrative Compliance Orders and total number of State equivalent actions issued; of these report the number issued to POTWs for not implementing pretreatment; (b) Class I and Class II proposed administrative penalty orders issued by EPA for: —NPDES violations; —pretreatment violations; (c) Administrative penalty orders issued by States for NPDES violations and pretreatment violations.	Yes/No MQ/E-8	Quarterly

7377

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)		(2) Of those reported in (1) above, break out by the following categories: —municipal permittees (major/minor) —non-municipal permittees (major/minor) —Federal permittees (major/minor) —unpermitted facilities 402 —section 311 actions —SPCC (list separately: EPA, NPDES States). Note: We recognize that in some Regions these responsibilities are split between Divisions, in which case each Division should submit data for its appropriate piece.	No/No	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(B) Has the Region experienced any problems in effectively implementing administrative penalty authority? If so, what kind of problems?	(b) Track the total amount of EPA administrative penalties assessed and the amount of State administrative penalties assessed.	No/No	Quarterly
	(C) Is the Region conforming to the Guidance on the use of Penalty Orders, including the addendum on the Penalty Policy?	(c) CLOSE OUT TARGETED # of EPA AOs with final compliance dates between July 1 1989 through June 30, 1990.	No/No	10/15/89
	(D) Has the Region experienced any problems in carrying out the Class I or Class II hearing process? How frequently are hearings requested in each class?	(d) Track, against targets, the # and % of EPA AOs in effect June 30, 1989, with final compliance dates between July 1, 1989 and June 30, 1990 which are successfully closed out.	No. OW	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(E) How frequently are comments from the public received on penalty orders? Have any consent decrees been modified by the RA as a result of public petition? Are there any final penalty orders for which the penalty is overdue and uncollected for more than 60 days?	(e) REFERRALS (1) Report, by Region, the active State civil case docket, the number of civil referrals sent to the State Attorneys General, the number of civil cases filed, the number of civil cases concluded, and the number of criminal referrals filed in State courts.	Yes/No WQ/E-9	Quarterly
		(2) # of 309 referrals generated: —civil referrals sent to HQ/DOJ; —civil referrals filed; —criminal referrals filed	No/No	Quarterly
		(3) Track the number of referrals (EPA and State) with penalties proposed.	No/No	Quarterly
		(4) Track by permit name and NPDES number State judicial cases with penalties assessed and amount collected.	No/No	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(F) Does the Region routinely use 309(a) administrative orders in combination with penalty orders when compliance has not yet been achieved? (G) Do the NPDES States have administrative penalty authority? If not, is such authority under consideration in any of the State legislatures? Does the State authority meet criteria for pre-emption of Federal action? (H) How frequently does the Region have to institute collection actions to collect administrative penalties assessed?	(5) Report the name and amount of time lapsed from the time of initiation of the case to filing and the amount of time lapsed from filing to signing of the consent decrees for each case. Report by State respectively.	No/No	Second and Fourth Quarters
		(f) Identify by name and NPDES number all permittees with active consent decrees and report their compliance status as follows: —in compliance with decrees; —in violation of decree, but remedial action taken; and —in violation of decree, no remedial action taken (list separately: major, minor, municipal, non-municipal, Federal).	No/No	Quarterly
		(g) Track, by Region, the total number of settlements of Judicial Consent Decrees filed in Federal Courts.	No No	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(I) Are the Regions/States working effectively with Federal facility coordinators to improve enforcement response times to instances of noncompliance by Federal facilities? If not, what is the nature of the problem? Are approved States using their full range of enforcement authority against Federal facilities? If so, what are the results? If not, why not? (J) Do Region/States track AO requirements closely? Have all close-outs been reported to Headquarters? Are they reported promptly upon close-out? (K) How do the Region and States ensure that violations of Court Orders/AOs get prompt enforcement action?	(h) # of follow-up actions on DMR/QA performance sample results: —nonrespondents; —permittees requiring corrective action; —major permittees with incomplete reporting.	No/No	Semi-annually: April 1, 1990 and October 1, 1990

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(L) What is the level of coordination between the compliance section and CRC in the Region? Are there any problems in implementing the administrative penalty authority? If less than satisfactory, what steps is the Region taking to improve coordination? (M) What is the level of coordination between the NPDES States enforcement program and the state Attorney General's Office? Are there established procedures for coordination and communication? If less than satisfactory, what steps is the State taking to improve coordination? Are State AGs generally filing cases within the goal of 60-90 days?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(N) Have the Region and approved States negotiated a basis for [illegible]ional evaluation of the States' penalty program, including identification of sanctions which might be used in lieu of penalties and the documentation which must be maintained by the State for review? Are States complying with the provisions of the agreement on penalties? To what extent are States calculating economic benefit? Are States seeking penalties in the majority of cases? Are States getting the penalty amounts they are seeking? (O) What problems is the Region encountering in assessing penalties using the CWA Penalty Policy? Is the Region experiencing problems/delays with Headquarters reviews? Explain. Is the Region generally getting the penalty amounts identified in the referral? What improvements could be made to the review process to speed up the referral process?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(P) Do Regions/States use PCS to track compliance with consent decree schedules? If not, why not? (Q) What types of action are being taken in response to violations of consent decrees? Are stipulated penalties collected? Are civil contempt proceedings initiated? Are the decrees modified? Are additional compliance monitoring requirements imposed? (R) What are the reasons for the Regions/States failure to take remedial action against permittees that violate their consent decrees? (S) What problems still need to be addressed by the Region/States to make the CMR/QA program more effective? Should it cover pretreatment?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	DI SPMS/ COMMITMENT	REPORTING FREQUENCY
4. Improve Quality and Timeliness of Enforcement Responses (continued)	(T) How do Regions/States ensure the quality of data collected by permittees and subsequent data transfer, and data storage in PCS? (U) How do Regions/States promote better quality of future DMR data when drafting new permits? (V) What procedures does the Region have in place to identify criminal cases? What role does the Office of Regional Counsel play in identification and case development? Has the staff provided technical support for criminal investigations and prosecutors? How has the Region made use of the new CWA criminal enforcement authorities?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	DI SPMS/ COMMITMENT	REPORTING FREQUENCY
5. Non-NPDES Enforcement	(A) Have the Region/States taken any enforcement actions to protect water, including wetlands, from unpermitted discharges of solid waste? (B) What criteria does the Region use in determining where Spill Prevention Control and Countermeasure Plan inspections should be conducted? Does the Region always require that the plan be amended after a spill of 1,000 gallons or more?			
6. Increase Use of PCS as the Primary Source of NPDES and Pretreatment Program Data	(A) Describe the use of PCS by the States and the Region and explain what steps are, or need to be, taken to comply with PCS Policy. (B) Do the Region/States use the preprinted DMR form to minimize compliance tracking problems and PCS entry workload? What is the Region doing to encourage the States to use preprinted DMRs? If the States are not using preprinted DMRs, why?	(a) Track, by Region, against targets, the percent of data entry of NEEDS elements for pretreatment and NPDES.	No.CW	Quarterly

2382

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
6. Increase the use of PCS as the Primary Source of NPDES and Pretreatment Program Data (continued)	(C) What actions are Region/States taking to improve the quality of PCS data? (D) How is the Region encouraging direct State use of PCS? Is the Region giving priority in assistance and program grant funding to States that are direct users of PCS? If States are not using PCS consistent with the PCS Policy Statement are grant conditions being imposed to expedite compliance?			
7. Improve Effectiveness of Inspection Activities	(A) Do the Region/States have annual compliance inspection plans for each State? How does the Region provide its States with advance notice of inspections? Discuss how Regional and State efforts are coordinated. Discuss use of independent and joint inspections and State file reviews to overview the State inspection program.	(a) Track, by Region, against targets, the number of major permittees inspected at least once (combine EPA and State inspections and report as one number).	Yes/SPMS WQ/E-12	Quarterly

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
7. Improve Effectiveness of Inspection Activities	(B) How do Regions/States determine which facility and what type of inspection to conduct? (C) Why are total number of inspections large, yet all majors are not inspected at least once? (D) How do Regions/States determine the need for toxic/toxicity inspections/TREs? (E) Do the Regions/States prepare quarterly lists of facilities to be inspected? Is the inspection mix consistent with the "primary use" criteria included in the NPDES inspection strategy? (F) How do the Regions/States use DMR QA performance sample results for targeting compliance inspections?	(b) # of inspections: —toxic inspections —biomonitoring inspections —permittee inspections (list separately: Federal, EPA, State; major, minor; municipal, non-municipal) (c) Identify the number of Regional and State inspection plans.	No/No No/No	Quarterly October 1989

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	CI SPMS/ COMMITMENT	REPORTING FREQUENCY
7. Improve Effectiveness of Inspection Activities (continued)	(G) What mechanism is used to assure that inspection results are provided to the Regions/States in a timely manner? Are the data entered into PCS only after the report has been completed and signed by the reviewer or supervisor? (H) How does the Region/State follow-up when inspection results are unsatisfactory? When Region uncovers problems, does the Region/State follow-up with a more intensive inspection? (I) Have the Region/States verified that Reconnaissance Inspections of major permittees counted for coverage purposes were conducted at major permittees meeting the requirements specified in the definition section?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	CI SPMS/ COMMITMENT	REPORTING FREQUENCY
8. Update and Use EMS Enforcement Procedures	(A) Does each approved State have written EMS procedures? If not, what is being done to get those procedures in place? (B) Have the Region/States implemented use of the Violation Review Action Criteria included in the FY 1986 EMS as the basis for determining when violations should receive professional review? Do Regions/States follow the Enforcement Response Guide (ERG)? If not, when will the Region/States begin to use these criteria or equivalent criteria and the ERG?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
8. Update and Use EMS Enforcement Procedures (continued)	(C) What kinds of formal enforcement actions are the Region/State using? Has the Region reviewed each States enforcement instruments to ensure that they meet the definition of formal action? Have the States made any necessary statutory or regulatory changes to ensure equivalency of State administrative mechanism equivalent to EPA section 309 AOs? (D) What kinds of informal actions (if any) are the Region/States using in lieu of formal enforcement action? Are these actions documented properly? Are they effective?			

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance	(A) What is the screening process used by the Region and States for identifying violations and applying SNC criteria? How are short term violations requiring Regional/State judgement handled? Does the Region use the Exception List as a way of tracking State programs?	(a) EXCEPTION LIST ANALYSIS (1) Identify, by Region, the number of major permittees in significant noncompliance on two or more consecutive QNCRs without returning to compliance or being addressed by a formal enforcement action (persistent violators). Of these numbers, identify how many are in significant noncompliance for three quarters and how many for four or more quarters. (List separately: municipal, industrial, Federal facilities.	Yes/No MO/E-6	Quarterly (Data lagged one quarter.)

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)	(B) What management level reviews the Exception List and how is it used? How do the Region and States use the Exception List to establish a priority for committing compliance/enforcement resources? (C) What problems have the Region/State been facing that would prevent them from meeting the timeliness presented? Which States consistently miss commitments? (D) Is there consistent application of the criteria/milestones from State to State within the Region? If not, what steps is the Region planning to take to improve consistency?	(2) Identify by name and NPDES number major permittees appearing on two or more consecutive QNCRs as being in significant noncompliance with: —final effluent limits (FEL) —construction schedules (CS); —interim effluent limits (IEL) without being returned to compliance or addressed with a formal enforcement action. (List separately: municipal, industrial, Federal facilities; NPDES States, non-NPDES States).	No/No	Quarterly (Data lagged one quarter.)

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)		(b) EXCEPTION LIST TRACKING (1) Report, by Region, the number of major permittees that are on the previous exception list which have returned to compliance during the quarter, the number not yet in compliance but addressed by a formal enforcement action by the DNCR completion date, and the number that were unresolved (not returned to compliance during the quarter or addressed by a formal enforcement action by the DNCR completion date). (Report municipal, industrial, Federal facilities separately.)	Yes/No MQ/E-7	Quarterly (Data lagged one quarter)

Enforcement

ACTIVITIES	QUALITATIVE MEASURES	QUANTITATIVE MEASURES	IN SPMS/ COMMITMENT?	REPORTING FREQUENCY
9. Use Guidance Criteria and Milestones for Response to Noncompliance (continued)		(2) Identify by name and total number of major permittees listed in the Exception List universe for the previous quarter for which one of the following has occurred: — # returned to compliance; — # not yet in compliance but addressed with a formal enforcement action; — # that are unresolved as of the end of the quarter; and the number of consecutive quarters each facility has appeared on the QNCR. (List separately: municipal, industrial, federal facilities; SNC with FEL, CS, IEL; NPDES States, non-NPDES States)	No/No	Quarterly (Data lagged one quarter)
10. Take Enforcement as Required to Obtain Compliance with POTW Sludge Requirements	(A) What criteria are used by Regions and States to select POTWs for sludge compliance inspections? (B) What are the overall findings of these inspections?	(a) Track the number of formal enforcement actions taken by EPA and States to address violations of sludge requirements.	No/No	Second and Fourth Quarters

Enforcement

ACTIVITIES	QUALITATIVE MEASURES
10. Take Enforcement as Required to Obtain Compliance with POTW Sludge Requirements	(C) Are there any special problems in taking enforcement action against POTWs for sludge operations? (D) When IUs are the source of sludge violations, what actions are being taken to stop IU violations?

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

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

MAR 13 1990

OFFICE OF WATER

MEMORANDUM

SUBJECT: Use of Administrative Penalty Orders (APOs) in FY 89

FROM: Richard G. Kozlowski, Director
Enforcement Division

Robert G. Heiss
Associate Enforcement Counsel for
Water Enforcement

TO: Compliance Branch Chiefs (Regions I - X)
Regional Counsels (Regions I - X)

The purpose of this memorandum is to transmit for your information a report on the use of administrative penalty orders in FY 89.

FY 89 was a significant year for implementation of the Clean Water Act administrative penalty authority. The number of proposed orders increased 61% over FY 88 and the number of final orders increased by 417%. As you will see from the report there were improvements in other indicators as well.

While data for FY 90 indicates that performance to-date is at approximately the same level as in FY 89, there are at least four Regions which have not yet issued a proposed order this year. We would be interested in comments as to why this is the case and whether it may suggest a lower level of administrative penalty issuance overall in FY 90.

Attachment

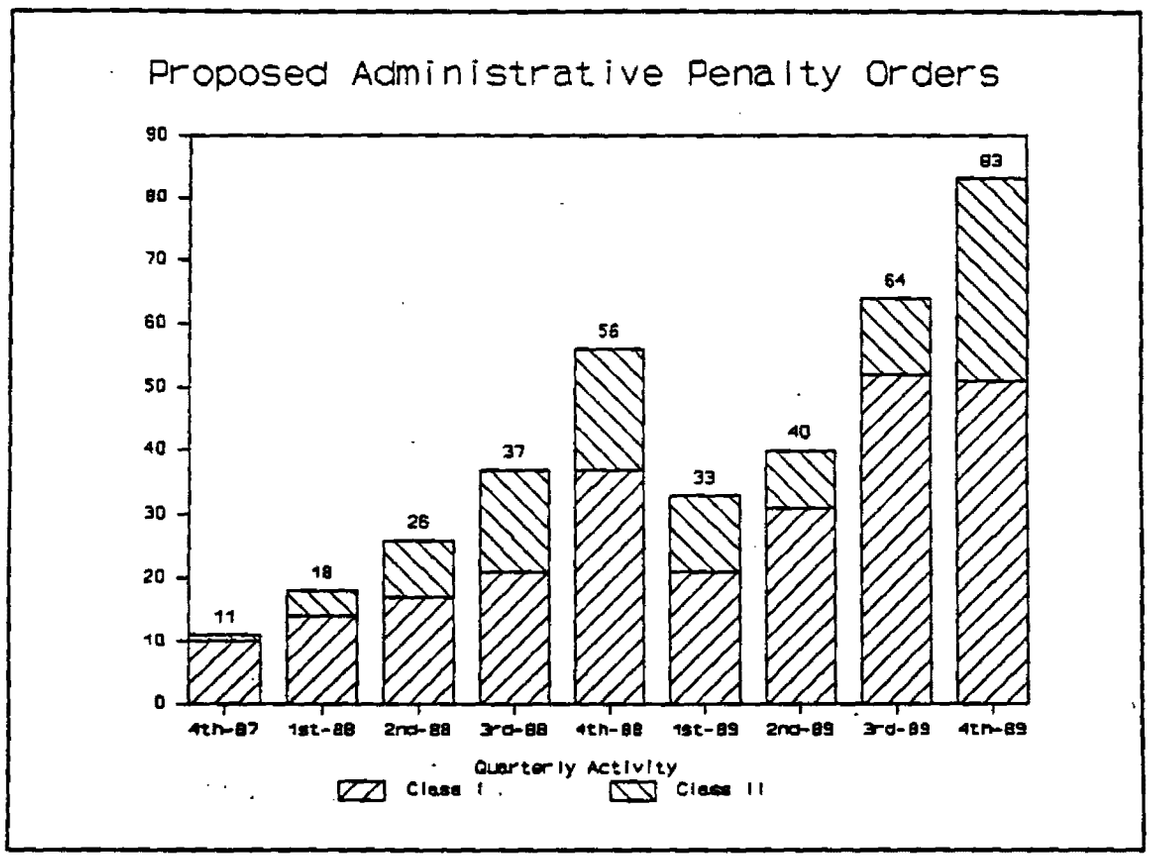
ADMINISTRATIVE PENALTY ORDERS

IN FY89

This report summarizes use of administrative penalty orders for NPDES and pretreatment violations during FY89. The data is drawn from the Permit Compliance System (PCS), supplemented by hard copy records as maintained on a dBASE data base management system, and for final orders has been reviewed by the Regions in the penalty data review process.

Proposed Orders

EPA proposed a total of 220 administrative penalty orders in FY89. This was an increase of 61% over the 137 proposed orders in FY88. The number of proposed administrative penalty orders by quarter is shown in Figure 1 below. Each quarter of FY89 showed significant



increases over the corresponding quarter in FY88. Also, the pattern established in FY88 of proposing significantly more administrative penalty orders in the third and fourth quarters continued. This uneven quarterly distribution of APO enforcement activity may represent higher productivity in the third and fourth quarters caused by SPMS (now STARS) measurements, mid-year reviews,

and other EPA organizational and administrative considerations or seasonal patterns in regional office enforcement activity where inspections and enforcement planning occupy more of the first two quarters and actual enforcement proposals the rest of the fiscal year. In any event, the third and fourth quarters continue to produce the most administrative penalty orders.

The increase in the number of proposed orders was across the board against municipals, non-municipals and industrial users. Figure 2 shows that the greatest increase was against industrial users (84%); second greatest increase was against municipals (65%); and the third greatest against non-municipals (51%).

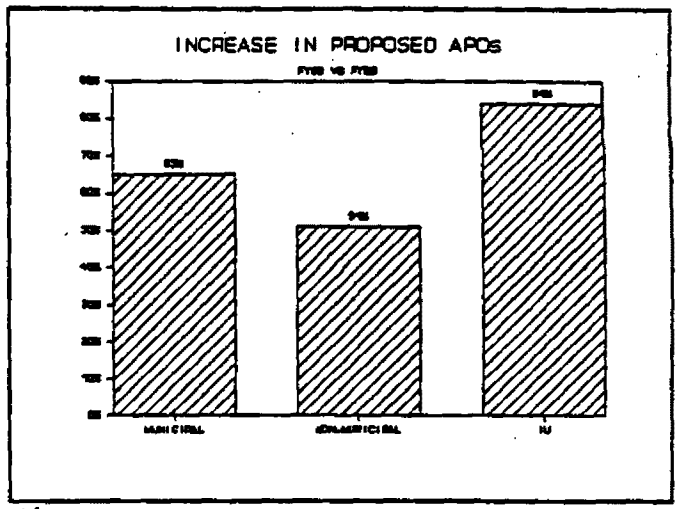


Figure 2

The proportion of proposed orders which were Class II decreased from 35% of all orders in FY88 to 30% in FY89. The reasons for this decline are not clear. Some regions have expanded the use of Class I actions against selected groups of violators and thus reduced the proportion of Class II actions. These groups have included feed lot operators, categorical IUs with reporting violations (where the POTW is not the control authority), coastal seafood processors, small oil well drillers and placer miners.

In FY89 six regions expanded the total number of proposed administrative penalty orders. Figure 3 indicates the increase/decrease in APOs relative to FY88. 55% of all proposed administrative penalty orders were issued in undelegated States. For the 12 undelegated States a total of 121 administrative penalty orders were proposed. Figure 4 shows use of administrative penalty orders in the

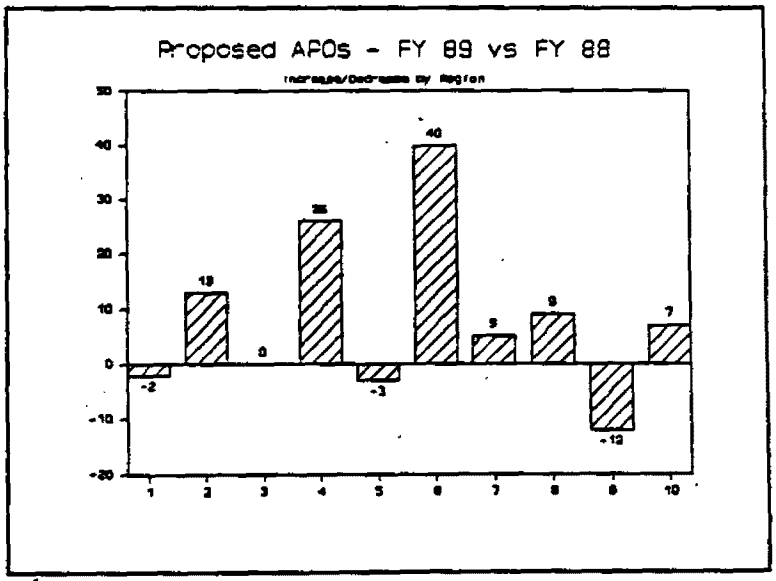


Figure 3

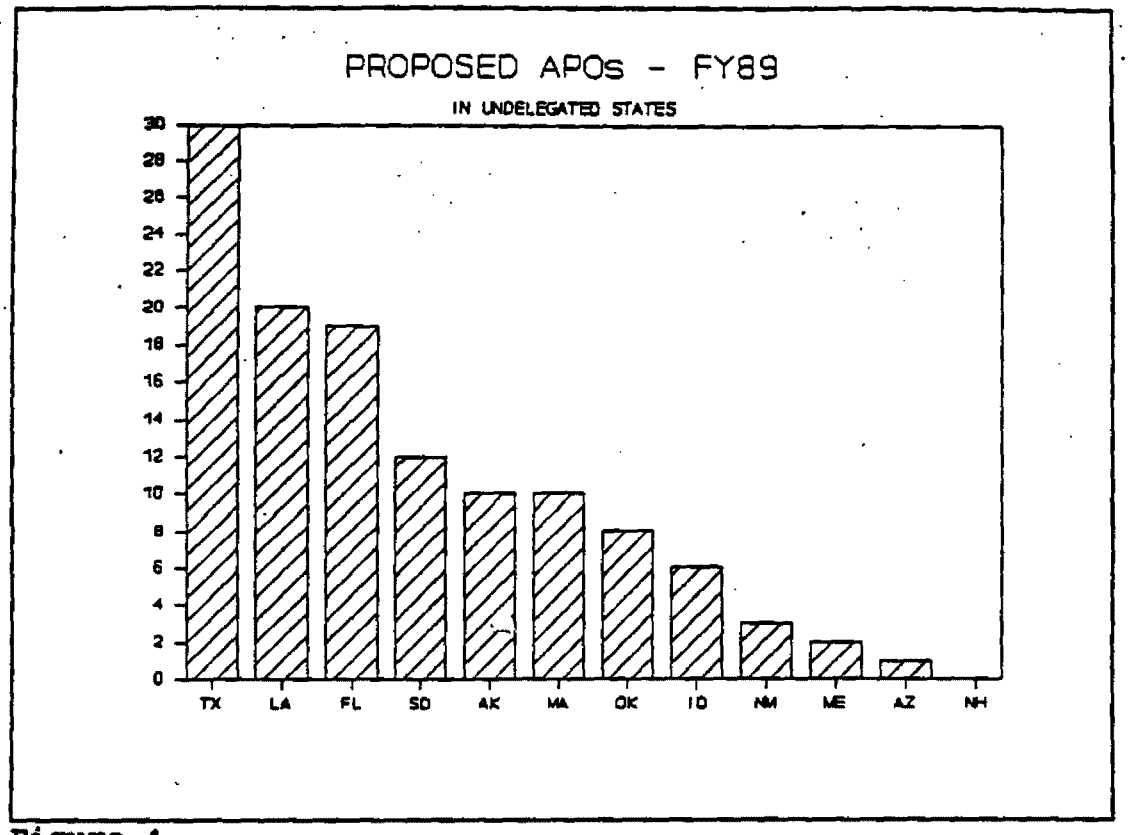


Figure 4

undelegated States.

In terms of the types of violations cited in the proposed administrative penalty orders, there was a 162% increase relative to FY88 in pretreatment APOs. Increases over FY88 were also shown for administrative penalty orders with effluent violations (54%), unpermitted and/or unauthorized discharges (39%), and operations and maintenance violations (800%). The number of facilities cited for schedule and non-reporting violations decreased slightly from FY88.

Proposed administrative penalty orders for pretreatment shifted significantly between FY88 and FY89. As a result of the Pretreatment Initiative, actions against municipals (POTW's) increased significantly. Class 1 APOs against municipals increased fivefold over FY88; Class 2 APOs increased sevenfold. (See Figure 5 on the next page). In FY88 a majority of the proposed pretreatment APOs against municipals were Class 1; in FY89 Class 2 APOs were in the majority.

Administrative penalty orders against industrial users were in sharp contrast. For proposed administrative penalty orders against industrial users the overwhelming proportion were Class 2 (79%) in

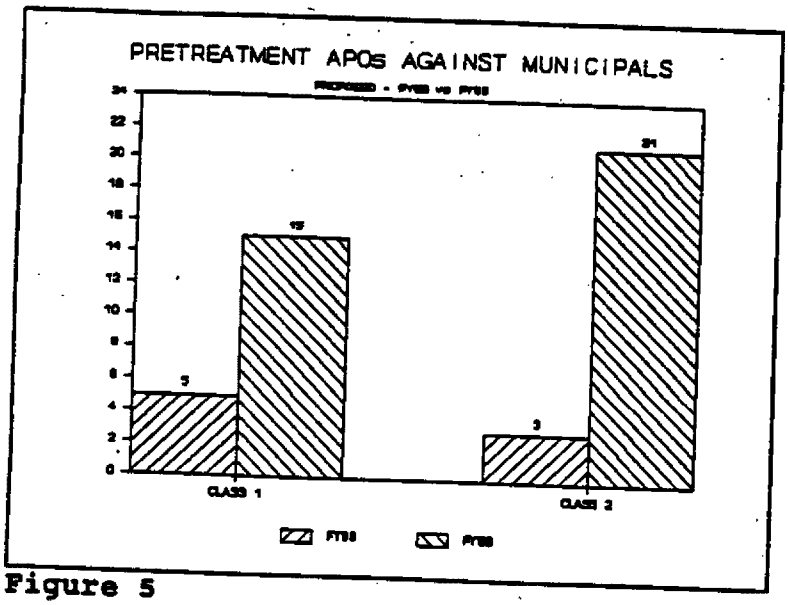


Figure 5

FY88. In FY89, the proportion shifted significantly with 80% being Class 1 actions. The reason for this shift away from Class 2 usage against IUs appears to be a result of a shift in the type of violations cited. In FY88 the Class 2 actions tended to be against categorical IUs with serious violations of their standards. FY89 Class 1 administrative penalty orders against IUs tended to be for failure to submit periodic reports.

Final Orders

The total penalties for all concluded NPDES administrative penalty orders in FY89 were $2,801,525. This is an increase of more than 500% over FY88 which was the first full year of implementation. The total number of final administrative penalty orders was 166, a fourfold increase over 40 final administrative penalty orders in FY88. Of the 166 final orders, 120 were Class I penalty orders and 46 were Class II penalty orders. The final penalty orders were issued for a variety of violations: 83 for effluent violations (50% of total); 39 for pretreatment violations (24%); 11 for failure to submit discharge monitoring reports or submission of late reports (7%); 25 for unpermitted facilities or unauthorized discharges (15%); four for failure to start or complete scheduled construction (these are frequently NMP violations) (2%); and four for operations and maintenance violations (2%).

Average Penalty Amounts for Final Orders

The average penalty amount for all (166) administrative penalty orders which became final during FY89 is $16,877. This is a 25% increase over the FY88 average of $13,545. This significant increase reflected the greater proportion of Class 2 orders among the final FY89 APOs. Class 2 orders were 28% of the total final orders in FY89 and 20% of those in FY88. The average penalty for Class 1 penalty orders rose slightly to $8,369 from $8,212. The average penalty for Class 2 orders increased 12% to $39,097 from $34,875.

The average penalty against municipals increased 48% to $16,343 from $11,067 in FY88. The average penalty against non-municipals

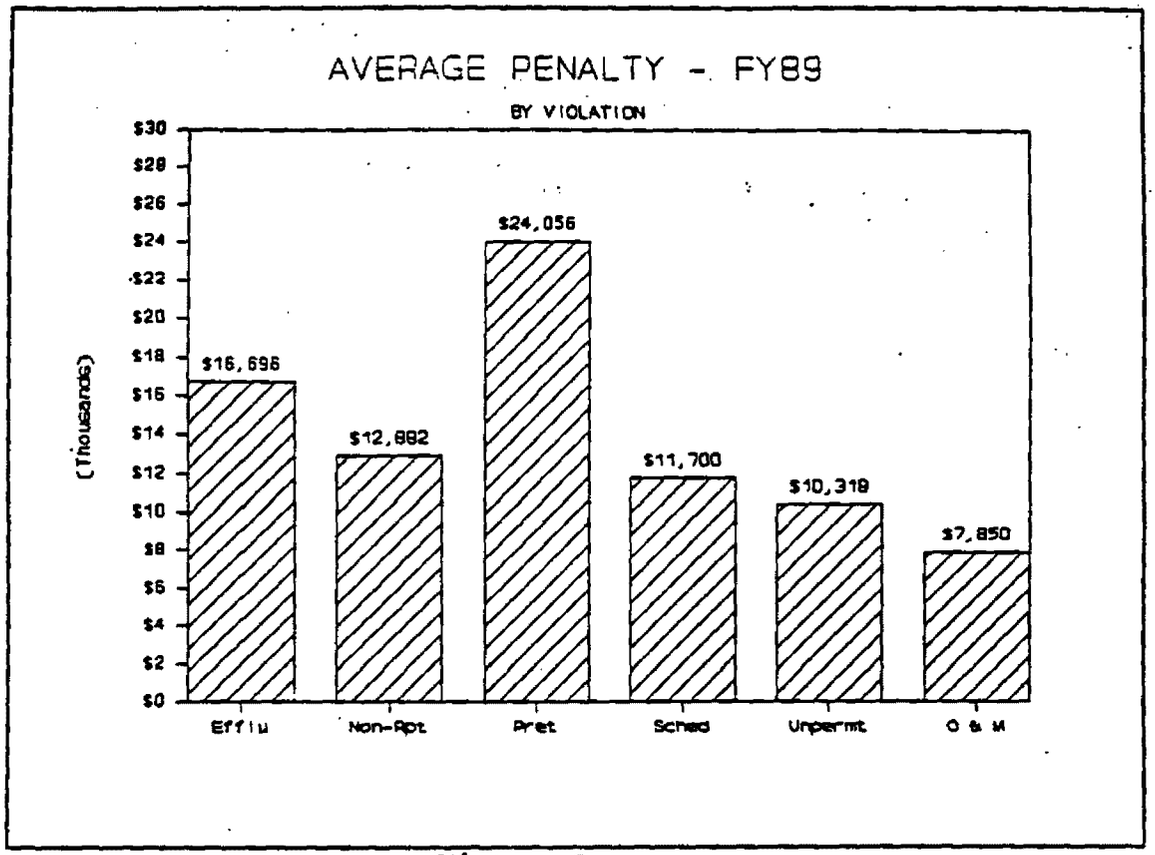


Figure 6

increased 32% to $15,311 from $11,627 in FY88. Thus, municipal violators incurred slightly higher penalties on average than non-municipal violators (excluding industrial users). In FY88 there were no final Class 1 penalties against industrial users. The average Class 2 penalty against industrial users in FY89 was $41,583 compared with $40,000 in FY88.

Among the categories of violations for which data is available, the highest average penalty was for pretreatment violations. (See Figure 6). The pretreatment average penalty was $24,056. The second highest and most frequent penalty was for effluent violations ($16,696). The average penalty for other types of violations for which data are available are: non-reporting ($12,882), schedule ($11,700), unpermitted or unauthorized discharges ($10,318) and operations and maintenance violations ($7,850).

Use Against Majors

Over one-half of all final Class 2 administrative penalty orders were assessed against facilities classified as Majors. For Class 1 final cases, 27% were assessed against Majors. The overall percentage for all final orders was 34%. The percentage of final cases issued to majors by region is shown in Figure 7.

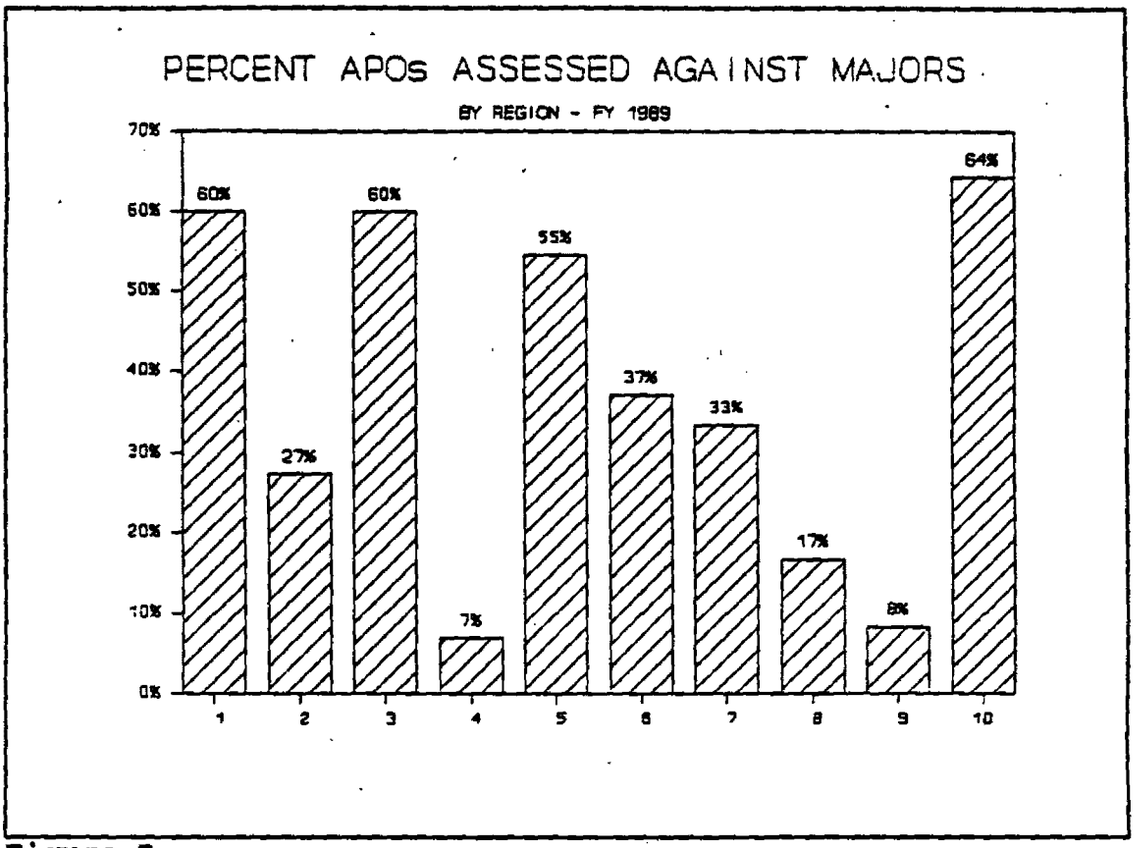


Figure 7

Efficiencies of Use

The average penalty order in FY89 was concluded within 156 days of being issued. Class 1 cases, on an average, took 136 days to conclude; Class 2 cases, 210 days. In FY88 the average for all final orders was 136 days; for Class 1 orders, 129 days; and for Class 2 orders, 152 days. Thus the average number of days to settlement increased for both Class 1 and 2 orders in FY89. The average for FY89 Class 1 cases increased 7 days or 5% while the average for FY89 Class 2 cases increased 58 days or 38%. (Technically, the averages of days to settlement for the FY88 and FY89 are not comparable since the possible worst case differs by 365 days between FY88 and FY89.)

125

An analysis of the FY89 Class 1 cases indicates that the average penalty for the cases concluded in less than 136 days (the average for Class 1 cases) was $8,715. This compares with the average penalty of $7,651 for those concluded after 136 days. For Class 2 final cases, the same analysis was done. For the cases concluded in less than 210 days (the average for all Class 2 cases) the average penalty was $49,631. For the cases concluded after 210 days the average penalty was $30,200.

Summary and Conclusions

Significant increases were achieved in FY89 for most major indicators on administrative penalty orders. The number of proposed orders increased 61% to 220; the number of final orders increased 415% to 166; total penalties increased 518% to $2,801,525; and the average penalty increased 25% to $16,877. It appears, however, that increases of this magnitude for some of these indicators were as a result of gaining succesful experience and use. The level of increase achieved may not be sustainable in the years to come.

Three major observations were made regarding the proposal of administrative penalty orders: First, a disproportionate number of administrative penalty orders were proposed in the third and fourth quarters. Secondly, there was a decrease in the use of Class 2 administrative penalty orders in general and against industrial user violators, specifically. Third, 45% of the administrative penalty orders were issued in delegated States.

For final orders the major observations were: Increases in average penalty for both Class 1 and Class 2 final orders; a significant increase (48%) in the average penalty against municipals so that the average penalty for municipals exceeded that of non-municipals; use against majors for over one-third of the APOs; and an increase in the number of days between proposal and the final date to an average of 156 days. Also, it appears that the longer a case takes to conclude, on average, the lower the penalty.

Strategies for using administrative penalty orders seem to vary by region. Most obviously, Region IV uses predominantly Class 1 orders; while Regions V and VII predominantly use Class 2 orders. Three regions did not increase their use of APOs in FY89; the rest did. Three regions settle orders, on average, much faster than others. For pretreatment violations six regions issued APOs against Industrial Users; nine Regions issued them against municipals.

In summary, FY89 was a year of major increases in the use of administrative penalty orders. Its predominant use continues to be against violators of permit effluent limits but its flexibility as an enforcement tool was shown in the sharp increase in use against pretreatment violators. The number of APOs proposed in the

first quarter of FY90 increased over the first quarter of FY89. However, use in the first quarter was limited to only six regions.

Attachments

Additional graphs and information on FY89 administrative penalty orders is provided in the following attachments: (1) the number of administrative penalty orders proposed by Region; (2) average penalty by Region; (3) average time to settlement; (4) highest penalty by Region; (5) number of proposed pretreatment APOs by Region a list of final administrative penalty orders by Region and State; (6) a list of proposed and final orders by Region and State; and (7) a list of final administrative penalty orders by violation and type.

2AR0

a. Total Penalties and Number and Type of Cases

In FY89 the total penalties for all concluded NPDES administrative penalty orders was $2,801,525. This was an increase of 500% over FY88 which was the first full year of implementation. The total number of final administrative penalty orders was 166, a four-fold increase over the 40 final administrative penalty orders in FY88. Of the 166 concluded administrative penalty orders, 120 were Class I penalty orders and 46 were Class II penalty orders. The penalty orders were issued for a variety of violations: effluent violations (83); pretreatment violations (39); failure to submit discharge monitoring reports or submission of late reports (11); unpermitted facilities or unauthorized discharges (25); failure to start or complete scheduled construction (these are frequently National Municipal Policy violations) (4); and operations and maintenance violations (4).

b. Efficiencies of Use

The administrative penalty orders in FY89 were concluded, on an average, within 156 days of being issued. Class I cases, on an average, took 136 days to conclude; Class II cases, 210 days. All of the penalty orders concluded in FY89 were achieved by consent order; none of the concluded cases were decided as a result of a formal hearing.

c. Typical Penalties

The median penalty for administrative penalty orders concluded in FY89 was $10,000. This was in increase of 18% over the FY88 median penalty. The median for Class I actions was $5,750 and for Class II actions $35,000. Ninety cases were concluded with penalties of $10,000 or more.

d. Penalties Issued to Municipalities

Sixty-one of the 166 respondents were municipalities. The median penalty assessed against municipalities ($10,000) was identical to the median penalty for all administrative penalty orders concluded in FY89.

e. Pretreatment Penalties

Thirty-nine penalties were issued for pretreatment violations, 27 to industrial users (IUs) and 12 to municipalities for failure to implement all or part of a pretreatment program. The median penalty assessed against IUs was $14,000; the median penalty assessed against a municipality was $18,750.

f. Highest Penalties

The largest penalty order concluded in FY89 was issued by Region I against an industrial user, Imperial Pearl Company,

for $100,000. The next highest, issued by Region VI, was for $98,000 against AT&T Information Systems Inc. The highest penalty against a municipality was for $65,000, issued to the City of McAllen, Texas.

g. Comparison of Regional Use and Level of Penalties

Region VI issued almost one-third (54) of the administrative penalty orders concluded in FY89. In Region VI authority for the NPDES program is vested in EPA for all but one State. Regions IV and X had the second and third largest number of final administrative penalty orders (29 and 14 respectively).

Region VI obtained the highest amount of penalties ($921,825). Region V had the second highest amount of penalties ($336,000).

TABLE I
CWA-NPDES
Total Civil Judicial Penalties
For All Cases Concluded in FY 1989

Total Dollars	No. Cases w/Penalty	No. Cases w/o Penalty	Total Cases	% of total w/Penalty	Average Penalty	Average All Concl. Cases	Median Penalty	Median All Concl. Cases	Highest Pena
9,744,000	55	1	56	98%	177,164	174,000	55,000	50,000	1,540,000

TABLE 2
CWA-NPDES
Total Civil Judicial Penalties
By Size of Penalty FY1989

Zero $	≤ $5,000	< $10,000	< $25,000	< $50,000	< 100,000	<$1 Million	≥ $1 Million
1	4	3	7	9	15	15	2

TABLE 3
CWA-NPDES
Total Civil Judicial Penalties

Region	Total Dollars	No. Cases w/Penalty	No. Cases w/o Penalty	Total Cases	% of Total w/Penalty	Average Penalty	Average All Concl. Cases	Median Penalty	Median All Concl. Cases	Highest Pena
1	206,500	4	0	4	100%	51,625	51,626	53,250	53,250	90,000
2	388,000	6	0	6	100%	64,667	64,667	50,000	50,000	170,000
3	1,616,500	5	1	6	83%	323,300	269,417	180,000	333,750	800,000
4	1,356,000	15	0	15	100%	90,400	90,400	40,000	40,000	500,000
5	3,389,000	9	0	9	100%	376,556	376,556	50,000	50,000	1,540,000
6	1,011,000	6	0	6	100%	168,500	168,500	63,500	63,500	750,000
7	137,000	1	0	1	100%	137,000	137,000	137,000	137,000	137,000
8	1,355,000	4	0	4	100%	338,750	338,750	80,000	80,000	1,125,000
9	80,000	2	0	2	100%	40,000	40,000	40,000	40,000	60,000
10	205,000	3	0	3	100%	68,333	68,333	50,000	50,000	150,000
TOTAL	$9,744,000	55	1	56	98%	177,164	174,000	55,000	50,000	1,540,000

"FY 1990 Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements", dated September 27, 1989. Reproduced at VI.B.33. this compendium.