IV. CIVIL LITIGATION

A. GENERAL

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

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

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

25 JAN 1983

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Clearance of Significant Enforcement Pleadings

FROM: Robert M. Perry
Associate Administrator and General Counsel

TO: All Regional Counsels

All Attorneys
Office of Enforcement Counsel

1983 JAN 27 PM 2:57
OLEC

Attached are copies of memoranda dated December 2 and October 27, 1982, setting forth procedures for clearance of significant pleadings in defensive cases. These procedures ensure that the Deputy General Counsel and I have an opportunity to review all such pleadings before they are filed.

The Office of Legal and Enforcement Counsel must speak with one legal voice. Accordingly, I have decided to extend similar review procedures to significant enforcement pleadings. A revised concurrence request form is attached which will be used for all pleadings, whether filed in defensive or enforcement cases. Please follow the procedures outlined below.

1. Michael Brown's October 27 memorandum describes defensive pleadings which require review. The same pleadings require review in enforcement cases.

2. The time deadlines in paragraph 2, and the procedures in paragraph 3, of the October 27 memorandum apply to enforcement pleadings. However, a copy of the draft pleading and the concurrence request form should be forwarded to the Senior Litigator through the appropriate Associate Enforcement Counsel rather than through the Associate General Counsel. The Senior Litigator will submit the pleadings to me through the Enforcement Counsel.

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3. As with defensive pleadings, these procedures apply to significant enforcement pleadings drafted in regional offices as well as in headquarters. The December 2 memorandum applies, except that Regional Counsels will deal with the appropriate Associate Enforcement Counsel rather than the Associate General Counsel. Complaints need not be cleared under this system, because they are already subject to review as part of the referral process.

Attachments

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

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

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

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

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

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

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

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

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

SEP 27 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Issuance of Guidance Interpreting "Single Operational Upset"

FROM: Robert G. Heiss
Associate Enforcement Counsel
for Water

Keith A. Onsdorff
Associate Enforcement Counsel
for Criminal

James R. Elder
Director
Office of Water Enforcement
and Permits

TO: Addressees

Attached is the final guidance document presenting the Agency's interpretation of the "Single Operational Upset" (SOU) provisions that were added to the Clean Water Act by Congress via the Water Quality Act of 1987, now codified as CWA §§ 309(c)(5), (d), and (g)(3), 33 U.S.C. §§ 1319(c)(5), (d), and (g)(3). It is the purpose of this Guidance to provide EPA enforcement personnel with an Agency interpretation of the SOU provisions for use in determining under what circumstances SOU will apply to reduce the statutory liability of a CWA violator.

This Guidance document was distributed in draft for comment on April 21, 1989. Comments were received from nine EPA Regional offices, the National Enforcement Investigations Center, the Office of Criminal Enforcement Counsel, the Office of General Counsel, and the Department of Justice, Land and Natural Resources Division. The comments were generally very favorable and the Guidance has been revised pursuant to those comments. In particular, there was nearly unanimous agreement with the approach to the interpretation of SOU set forth in the Guidance. Agreement was unanimous that SOU may <u>not</u> be limited to violations of technology-based effluent limitations.

Printed on Recycled Paper

The Guidance set out in the attached document represents the Agency's authoritative interpretation of the Single Operational Upset provisions contained in the Water Quality Act of 1987. It is intended primarily for the use of government personnel. It is 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 change this guidance at any time without public notice.

We encourage all Regions to discuss any instance in which SOU arises in an enforcement context with us. Please call either Daniel Palmer, OECM-Water, (LE-134W), FTS 382-2849, Richard Kinch, OWEP, (EN-338), FTS 475-8319, or, for potential criminal cases, call Bette Ojala, OCEC, (LE-134X), FTS 475-9663.

Attachment

Addressees: Regional Counsels, Regions I-X
Water Division Directors, Regions I-X
ORC Water Branch Chiefs, Regions I-X
Regional Water Management Compliance Branch Chiefs, Regions I-X
Ed Reich, OECM
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GUIDANCE INTERPRETING

CLEAN WATER ACT SECTIONS 309(c)(5), 309(d), and 309(g)(3):

SINGLE OPERATIONAL UPSET

I. Introduction and Summary of Contents

Congress, in amending the Clean Water Act in 1987 (via the Water Quality Act of 1987), qualified the administrative, civil, and criminal enforcement sections of the statute with the following language:

> For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

Clean Water Act §§ 309(c)(5), 309(d), and 309(g)(3), 33 U.S.C. §§ 1319(c)(5), 1319(d), and 1319(g)(3). The effect of this language is to limit, under certain circumstances, the penalty liability of violators of the Clean Water Act. "Simultaneous" violations of multiple pollutant parameters, established by an NPDES permit, categorical standards, or local limits, each of which is attributable to the same "single operational upset," are to be counted as only one violation.

The term "upset" has been defined by regulation, 40 C.F.R. § 122.41(n), as an affirmative defense which, if affirmatively raised and proved, completely relieves a regulatee of liability. However, the term "single operational upset" ("SOU") has absolutely no history predating its use in the Water Quality Act. It is therefore the purpose of this guidance to interpret single operational upset (SOU) for purposes of application by the Environmental Protection Agency in pursuing penalties under Sections 309(c), (d) and (g) of the CWA.

Following are the chief conclusions reached in this guidance:

1. A "single operational upset" is defined in this guidance as:

> An exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include Clean Water Act violations involving discharge without an NPDES or locally issued permit or noncompliance to the extent caused by improperly designed or inadequate treatment facilities.

2. At the sentencing stage in a criminal prosecution, or at the remedy stage in a civil enforcement proceeding (judicial or administrative), violations of multiple pollutant parameters, resulting from a single operational upset, will be taken together in the aggregate in determining the maximum criminal fine, the maximum term of imprisonment, or the maximum civil penalty, which may be imposed or assessed, for each day during which the defendant has been found guilty of a criminal offense, or during which the defendant (or respondent) has been found liable for civil violations.

3. This definition of Single Operational Upset applies equally in the civil judicial, administrative, and criminal contexts. Nonetheless, the extent of the availability of SOU to limit penalty liability is less extensive in the criminal context due to the requirement that the exceedance must have been unintentional and unknowing. This requirement eliminates the availability of SOU for "knowing" criminal violations, CWA § 309(c)(2), (3), and (4).

4. Unintentional and unknowing operator error that results in the occurrence of an SOU event may justify a limitation on liability. SOU differs in this regard from the upset defense, which does not recognize operator error as a basis for raising the defense. The availability of SOU for exceedances caused by unintentional operator error and for negligent acts or omissions is necessary in order to give SOU any practical application in the criminal enforcement context.

5. "Simultaneous" is defined in this guidance as all pollutant parameter exceedances attributable to a specific single operational upset that occur during a single day. Each day that such exceedances continue is considered to be an additional day of violation subject to additional penalties.

6. "Pollutant parameter" is defined as all effluent limitations and non-numeric limitations regulating the content or amount of a regulatee's direct or indirect discharge. These parameters may be contained in an NPDES permit, a locally issued permit or other control mechanism established in accordance with the pretreatment regulations, 40 C.F.R. Part 403, categorical pretreatment standards, etc. The basis upon which the pollutant parameter is established is irrelevant, i.e., one may claim SOU to limit liability for exceedances of water quality-based, technology-based, or otherwise derived pollutant parameters.

7. SOU serves to limit a CWA regulatee's potential liability for exceedances of multiple pollutant parameters

in situations where a regulatee who usually complies with applicable effluent limits experiences an extraordinary, temporary, and unintended "upset" event, i.e., some kind of unusual interference with the industrial or municipal treatment system, that results in noncompliance with more than one effluent limitation. Under these circumstances, EPA enforcement personnel, in calculating the maximum allowable statutory penalty, will treat violations of multiple pollutant parameters on a single day, attributable to a specific SOU event, as one violation. It must be stressed that an event will not constitute an upset for purposes of the SOU limitation on liability unless the regulatee can demonstrate a norm of compliance with his permit effluent limitations.

8. In order to claim SOU, the "upset" event must be exceptional, i.e. a non-routine, unusual malfunction of a facility's usual proper and adequate operation. The event must not be business as usual.

9. SOU is not available to limit liability where pollutant parameter exceedances result from the installation of inadequate treatment facilities or faulty design of the treatment facilities. SOU is also not available to limit liability of those who violate the CWA by discharging without a permit, where a permit is legally required.

10. SOU is not available to limit the liability of any regulated entity who, personally or by its agents or any persons in any way associated with the regulated entity, intentionally or knowingly causes violations of pollutant effluent parameters.

11. The regulatee subject to a CWA enforcement action bears the burden of coming forward with the claim that an SOU event occurred causing the exceedances in question. The regulatee also bears the burden of proving, by a preponderance of the evidence, the occurrence of the SOU event and its relationship to the effluent limitation exceedances in question.

12. A regulatee may not claim SOU if he/she fails to take timely corrective and/or mitigative action where possible or practicable to reduce the effect of the upset event.

II. Deriving a Definition of "Single Operational Upset"

The term "single operational upset" has no history prior to its use in the Water Quality Act of 1987. It has no history as a statutory or regulatory term of art, nor does the term have a single, precise, or authoritative common meaning. Therefore, in

interpreting the meaning of SOU, EPA looks to three sources: legislative history of the Water Quality Act, the regulatory definition of "upset," and the plain meaning of the words in the SOU provisions. We will look first to the legislative history.

A. The Legislative History of the Water Quality Act of 1987

Although the Clean Water Act was not amended until February 4, 1987, in the 100th Congress, the evolution of the Water Quality Act to its final form took place primarily in the 99th Congress. Representative Howard introduced H.R. 8, the Water Quality Renewal Act of 1985, on January 3, 1985. The Senate bill, S. 1128, was introduced May 14, 1985. Neither the House nor the Senate bill as originally presented contained a provision similar to the single operational upset provision. However, the amended H.R. 8 reported out of the House Committee on Public Works and Transportation contained the following language in its administrative penalties provision:

> The Administrator or the Secretary may not assess a civil penalty under this subsection against any person with respect to a violation if the Administrator or the Secretary, as the case may be, has assessed a civil penalty under this subsection against such person with respect to the same violation or a violation having substantially the same cause or arising out of substantially the same conditions.

The Committee report on H.R. 8 contained the following discussion:

> If a series of closely related violations occurs due to a single operational upset which leads to simultaneous violations of several pollutant parameters over a period of several days, EPA may bring one enforcement action, subject to the $125,000 maximum. EPA may not seek to evade the $125,000 maximum by, for example, bringing separate enforcement actions for each of these simultaneous violations. However, EPA is free to bring separate actions for individual violations (or groups of violations) which are not of this nature. H.R. Rep. No. 189 at 33, 99th Cong., 1st Sess. (July 2, 1985)

However, the House Committee bill and report are not, strictly speaking, part of the legislative history of the Water Quality Act, because the 100th Congress, which actually passed

the legislation, did not incorporate them by reference, as it did various other bills, reports, and debates.[1]

On September 4, 1985, Congress passed a motion to agree to a conference. The conference report was filed on October 15, 1986. The bill reported out of committee contained the single operational upset provisions, affecting civil, administrative and criminal penalty assessment, as they appear in the Water Quality Act as finally passed. The Conference report provides the following discussion:

> The [House] amendment provides that a civil penalty may not be assessed with respect to a violation if a penalty has been assessed with respect to the same violation or a violation having substantially the same cause. (bracketed word inserted) H.R. Rep. No. 1004, 99th Cong., 2d Sess., 132 Cong. Rec. H10569 (Oct. 15, 1986).... For all three classes of penalties covered by the conference substitute--criminal, judicial civil, and administrative civil - the conference substitute provides that a single operational upset which leads to simultaneous violations of more than one pollutant parameter in an NPDES permit shall be treated as a single violation. H.R. Rep. No. 1004, 99th Cong., 2d Sess., 132 Cong. Rec. H10570 (Oct. 15, 1986).

Representative Snyder, a ranking minority member of the House Committee on Public Works and Transportation, referring to the SOU provisions, stated, "Under these penalty provision [sic], multiple violations which stem from a single cause should be considered as one 'violation' for penalty assessment purposes." H.R. Rep. No. 1004, 99th Cong., 2d Sess., 132 Cong. Rec. H10932 (October 15, 1986). Rep. Snyder did not identify the nature of the "single cause" in this statement but from the plain language of the statute it is clear that it must be an "operational upset."[2]

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[1] See "Guidance on 'Claim-Splitting' in Enforcement Actions Under the Clean Water Act," August 28, 1987, for a discussion of the application of the $125,000 statutory cap on administrative (class II) penalties in the context of a series of violations.

[2] Rep. Snyder could not have meant that <u>any</u> single cause that results in multiple violations is to be considered as one violation for penalty assessment purposes. If <u>any</u> cause would suffice to limit penalty liability, then failure to install necessary wastewater treatment equipment would constitute a single cause for which penalty liability could be limited. Failure to install treatment equipment is not an "operational

Subsequently, S. 1128 was signed in both the House and the Senate on October 23, 1986. The bill was vetoed by President Reagan on November 6, 1986. In the 100th Congress, the identical bill, redesignated H.R. 1, was again passed by both houses of Congress and was again vetoed by the President, on January 30, 1987. However, five days later, on February 4, 1987, Congress voted to over-ride the President's veto and the Water Quality Act of 1987 became law.

Since H.R. 1 was identical to the conference bill placed before the President in the 99th Congress, the legislative history pertaining to that legislation was incorporated by reference. Sen. Chafee stated:

> Therefore, the statement of managers on that bill [S. 1128], which is found in Report No. 99-1004, contains the primary legislative history on this bill. That statement of managers, as explained by conferees on the floor of the House and Senate last October, should be viewed by courts as the most authoritative statement of congressional intent. 133 Cong. Rec. S746 (daily ed. Jan. 14, 1987) (statement of Sen. Chafee).

Specifically, the legislative history includes the conference report, and the Senate debate on the conference report, as well as the report of the Environment Committee on the committee bill S.1128 and the Senate debate on the committee bill. 133 Cong. Rec. S734-735 (daily ed. Jan. 14, 1987) (statement of Sen. Mitchell).

The legislative history is thus largely a restatement of the single operational upset provision. No discussion is found in Congressional debate. At most, the discussion in the conference report shows that the Conference Committee restated the previous House concept of penalty limitation as a single operational upset concept. Congress deleted the term "substantially the same cause" at the same time. The change indicates that it was Congress's intent that only a cause related to a single operational upset could operate to limit liability. The Conference Committee also incorporated the concept of simultaneity, which operates to further limit the violations which may be treated as a single violation.

The new wording added by the Conference Committee indicates the importance of the term "single operational upset" and of the

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upset," nor is it at all likely that Congress would have desired to limit a polluter's liability in this situation. The statute must be construed as written, limiting liability where the cause of multiple violations was single "operational upset."

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simultaneity concept. Nonetheless, Congress provided no guidance on what it meant by these terms. It is therefore, primarily, the regulatory definition of upset and the plain statutory language that form the basis for EPA's interpretation of the SOU provisions.

B. Regulatory Definition of Upset and the Upset Defense

The term "upset" has been defined by regulations promulgated by the Environmental Protection Agency. 40 C.F.R. § 122.41(n). These regulations were developed in response to the Federal Circuit Court decision in Marathon Oil v. Environmental Protection Agency, 564 F.2d 1253 (9th Cir. 1977). In Marathon Oil, the court held that EPA was required to insert a special "upset" provision into the permit of each of the defendants in the case. The court concluded that a facility using proper technology operated in an exemplary fashion would not necessarily be able to comply with its technology-based effluent limitations one hundred percent of the time. Further, the Act only required dischargers to meet effluent limitations by application of "best available technology." Therefore, lack of a mechanism providing an excuse from liability for those rare circumstances when a violation occurs that the discharger could not avoid set a standard higher than that set by the Clean Water Act.

Based on the decision in Marathon Oil, EPA elected to require by regulation that all federally-issued NPDES permits[3] afford dischargers who have violated technology-based effluent limitations in their permit a limited "upset defense." The regulation defining upset states:

> "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations [or categorical Pretreatment Standards] because of factors beyond the reasonable control of the permittee [or Industrial User]. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities,

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[3] States are not required to include an upset provision in state-issued pollution discharge elimination system permits under § 510 of the Act, 33 U.S.C. §1370, which allows states to adopt or enforce more stringent standards. Sierra Club v. Union Oil Co., 813 F.2d 1480 (9th Cir. 1987). See also U.S. v. BP Oil, Inc., No. 86-0792 (E.D.Pa. July 29, 1988)(order granting government's motion for partial summary judgment)("Absent incorporation by either [defendant's federal or state issued] permit of the upset defense . . . , the defense is unavailable to defendant.")

inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

40 C.F.R. §§ 122.41(n) and 403.16(a).

The intent of the upset defense, as defined in the regulations, is to provide those who violate technology-based effluent limitations (contained in a federally-issued NPDES permit or categorical pretreatment standards) with an affirmative defense to allegations of permit noncompliance, if the exceedance results from an exceptional, unintentional incident which is beyond the control of the party who discharges in violation of his permit. A party who successfully claims upset is not legally liable for the exceedances at issue, and has not violated the CWA, his NPDES permit, or categorical pretreatment standards.

An analysis of the SOU provisions in the Water Quality Act and their application to the various enforcement sections to which they were appended, makes it doubtful that Congress intended single operational upset to have exactly the same definition as regulatory upset. If SOU and regulatory upset are given the same definition, two major problems arise. First, the regulatory upset defense would render SOU almost meaningless, providing a complete defense in the same situations where SOU would serve only to limit a violator's liability. Second, the regulatory definition of upset is inapplicable in the criminal context. Criminal liability is predicated on proving certain levels of culpability, either negligent or knowing. The regulatory upset defense, by definition, is unavailable in those situations where the event causing the violations is attributable to negligence or greater culpability on the part of the regulatee. Therefore, if one applies the regulatory definition of upset to SOU in the 309(c) criminal context, no criminal defendant will ever be able to avail himself of the SOU limitation on liability.

Because the regulatory definition of upset cannot effectively apply to SOU, it is necessary to interpret this statutory provision based primarily upon the plain meaning of the words in the provision and a determination of how the provision can effectively be interpreted to limit the extent of statutory liability for certain violations of the CWA.

C. <u>Plain Meaning of the Words in the Single Operational Upset Provisions</u>

1. The phrase "single operational upset," simply construed, refers to a singular event, arising from some kind of <u>operational failure</u>, that results in an "upset." An upset, in industry terms, is an unusual event that temporarily disrupts the usually satisfactory operation of a system. In the context of SOU, an event, to constitute an upset, must disrupt the system in

such a way that it results in violation of multiple pollutant parameters.

2. "Simultaneous violations," resulting from an SOU, are violations that occur at precisely (or nearly) the same time, and result from the same cause, i.e., the same upset event.

3. "Pollutant parameters" are the effluent limitations established in an NPDES or state-issued pollutant discharge permit or categorical standards or other standards (i.e. local limits) applying to indirect dischargers (industrial users).

III. Definitions

A. "Single Operational Upset"

Following is the definition of Single Operational Upset which EPA enforcement personnel should use in the Civil Judicial and Administrative, and Criminal contexts (CWA §§ 309(d), 309(g)(3), and 309(c)(5)):

> An exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include Clean Water Act violations involving discharge without an NPDES or locally issued permit or noncompliance to the extent caused by improperly designed or inadequate treatment facilities.

B. "Exceptional"

In order to qualify as an SOU event, an incident must be "exceptional," i.e., the incident must not be business as usual, but must be a non-routine malfunctioning of an otherwise generally compliant facility. The regulatee must normally be in compliance with applicable effluent limitations. See Section IV.D. below.

C. "Simultaneous": Counting Violations Where a Single Operational Upset is Involved

The statutory language refers to "simultaneous violations" of more than one pollutant parameter. For purposes of the SOU provisions, violations of more than one pollutant parameter shall be considered to be simultaneous if they occur during a single day, and result from the same operational upset event. In other words, all violations attributable to a specific SOU that occur during a single day will be counted as only one violation for purposes of determining the maximum penalty allowed under the

CWA. Therefore, if an SOU results in the exceedance of more than one permit pollutant parameter, and these exceedances continue for only one day, only one violation will be counted. If a violation attributable to one SOU continues for two days, two violations will be counted, and so on.

Congress, in establishing statutory penalty limits, set those limits on a per day, per violation basis. See CWA §§ 309(c) (1)(B) and (2)(B), 309(d), and 309(g)(2). Under the CWA, each day that an effluent limitation exceedance or other CWA violation continues is a new day of violation, for which the regulatee may be assessed an additional day's statutory maximum penalty. The SOU provisions do not breach this "per day, per violation" rule. SOU does not seek to limit the counting of violations so that multiple days of violation caused by an SOU event is counted as only one violation, but rather, that the violation of multiple parameters is counted as only one violation for the purpose of determining the maximum allowable penalty. Therefore, in defining "simultaneous," it is correct and in compliance with Congress's desire that each day of violation caused by an SOU event be counted as a separate violation.

D. "Unintentional"

The requirement that the noncompliance with effluent parameters have been "unknowing and unintentional" restricts the availability of the SOU limitation on liability to upset events other than those caused by the regulatee or his agents or other associated with the regulatee who knowingly intend to commit the act that caused or led to violations of the CWA. For the purpose of defining SOU, there is no distinction drawn between a violation "intentionally" caused and a violation "knowingly" caused. See IV.C. below.

E. "Temporary"

The requirement that noncompliance with effluent limitations be "temporary" concerns the requirement that the regulatee takes corrective and/or mitigative action on an expedited basis following the SOU event. See IV.B. below.

F. "Pollutant Parameter"

For purposes of the SOU provisions, the term "pollutant parameter" shall include all pollutant[4] numerical effluent limitations and non-numerical limitations regulating the content or amount of a regulatee's discharge, such as flow limitations, visible solids, etc. The term does not include permit or

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[4] "Pollutant" is defined at § 502(6) of the Act, 33 U.S.C 1362(6).

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regulatory conditions not directly relating to pollutant regulation, such as requirements to report, monitor, perform studies, complete tasks on schedule, pretreatment program implementation, etc.

The statute itself restricts the application of SOU to violations of pollutant parameters. Therefore, liability for violations involving discharge without a permit may not be limited by a claim of SOU.

SOU, unlike the regulatory upset defense, is not limited to violations of technology-based effluent parameters and applies equally to water quality-based effluent parameters. Congress, in enacting the three SOU provisions, did not make any distinction between the bases upon which effluent limitations are formulated, and there appears to be no basis upon which to make this distinction in this guidance.

IV. Application of Single Operational Upset to Limit Liability

A. To Claim SOU, the Incident Must be Exceptional

To qualify for the SOU limitation, the "upset" incident must be exceptional: a non-routine, unusual malfunction, breakdown or disruption of a facility's usual proper and adequate operations. It follows from Congress's use of the words "single" and "upset" that a single operational upset cannot be business as usual. (The concept of single operational upset is similar to that of regulatory upset in this regard.)

B. To Claim SOU, a Discharger Must Normally Achieve its Effluent Limitations

Several exceedances stemming from the same cause may constitute evidence that the underlying cause or event was not an "upset," i.e. an unusual or exceptional malfunction of an ordinarily well functioning operation. Such a series of exceedances indicates that proper equipment may not have been installed, that the facility might be, as a matter of course, improperly operated, or that the design of the facility is deficient. It would also indicate that the discharger/violator had notice that there was a problem with its treatment facility and failed to take action to mitigate and avoid further breakdowns leading to exceedances. Therefore, violations of the CWA by dischargers who are frequently, repeatedly, ordinarily or predictably not in compliance are not due to an "upset" within the meaning of "single operational upset," even if associated with an equipment breakdown or operational failure.

C. To Claim SOU, the Exceedance of Effluent Parameters Must Have Been Unintentional and Unknowing

Only noncompliance with pollutant effluent parameters that were unintended and unknowing are subject to the SOU limitation on liability. This conclusion has a limiting effect on the availability of SOU to limit liability, particularly in the criminal context.

CWA § 309(c)(1) makes certain "negligent" violations criminal misdemeanor offenses. CWA § 309(c)(2), (3), and (4) make certain "knowing" violations criminal felony offenses.

The position of the Agency is that the state of mind a defendant must have had in order to be convicted of a felony is "general intent," not "specific intent." This means that the United States need not prove that a defendant specifically intended by his acts or omissions to violate the law, but that he must have consciously or knowingly committed (or omitted) an act that caused or led to the violation. (Of course, intentional violations committed by one who has "specific intent" are also punishable under the Clean Water Act penalty provisions.)

Congress could not have intended that knowing violations could be mitigated at sentencing through use of the single operational upset provision. In addition, it is contrary to the ordinary meaning of the word "upset" to include events which are intentionally or knowingly caused. Finally, in cases in which the felony provisions apply, it is the "knowing" acts or omissions which "cause" or "lead to" the violations, not any equipment breakdown which may have been associated with such illegal acts. Thus, the SOU provision does not apply to mitigate sentencing of felony violations of the Clean Water Act, although it may apply to sentencing for misdemeanor violations (negligence).

D. An Upset Event Caused by Unintentional Operational Error or Careless or Improper Operation is Subject to the SOU Limitation on Liability

The upset defense is defined by regulation so that it may not be raised if either operational error (intentional or unintentional) or careless or improper operation was the cause of the effluent limitation exceedances at issue. SOU, on the other hand, is defined so that it may be claimed where operational error or careless or improper operation was unknowingly or unintentionally committed.

This deviation from the regulatory upset definition is necessary in order to give SOU practical application in the criminal enforcement context. Criminal liability under the Clean Water Act is premised on either a "negligent" or "knowing" level

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of culpability. CWA § 309(c)(1) and (2). If any exceedance that is either intentional or knowing or caused by "error," or "careless" or "improper" operation were to be excluded from the definition of SOU, no situation in which one could be both criminally culpable (minimally negligent) and able to raise the SOU limitation on liability (less than negligent) would exist. In order to give SOU meaning in the CWA criminal context as set forth in the Act, its application has been expanded to cover effluent parameter exceedances that are caused by negligence attributable to the regulatee.

E. To Claim SOU, the Facility Must be Properly Designed and Provide Adequate Treatment

Violations which occur because adequate treatment technology has not been installed is not an upset as defined in the regulations, particularly because poor design and inadequate treatment do not constitute the type of exceptional circumstances that qualify an event as an SOU or upset. EPA enforcement personnel should take the same approach to interpreting the SOU provisions. Any other result improperly limits the penalty liability of those who have not installed proper treatment equipment and indirectly penalizes those who have done so. Therefore, to successfully claim SOU, a violator must demonstrate that a facility is properly designed and that it provides adequate treatment.

F. SOU May Not Be Claimed Where the Clean Water Act Violation is Discharge Without a Permit

Because it is a prerequisite to claiming the SOU limitation on liability that violations of multiple pollutant parameters have been exceeded, SOU can not be available to a respondent or defendant in an enforcement action brought for discharge without a permit. Absent a permit (or some other similar control mechanism), there are no pollutant parameters established for the respondent or defendant to have exceeded.

G. Requirement That the Violator Take Timely Corrective and/or Mitigative Measures Where Possible or Practicable in Order to Claim SOU

The regulatory upset defense is not available where a noncompliance situation exists or is allowed to continue to exist, when corrective or mitigative measures were possible or practicable but were not taken. 40 C.F.R. § 122.41(n)(3)(iv). EPA enforcement personnel should take the same approach to interpreting single operational upset. The SOU provisions shall not be construed to provide relief to regulatees who fail to take timely mitigative or corrective measures to minimize the effects caused by the SOU nor shall continuing days of violations, originally caused by an SOU, be equitably attributable to the SOU

if the violator has not taken whatever corrective or mitigative actions are necessary to prevent the continuing violations. See 40 C.F.R § 122.41(d) (duty to mitigate). This requirement is necessary to compel regulatees who experience an upset event to immediately correct the problem and not allow the violations to continue for an entire day (a day during which no additional penalties will accrue, if additional violations are attributable to the upset event). Congress certainly did not intend to establish a limitation on liability that grants a regulatee the right to violate at will, even for a single day. Implying such an intent on Congress is contrary to the logic and purpose of the Clean Water Act and would make a mockery of Congress's carefully devised regulatory scheme.

H. Procedural Requirements

1. The Nature of Single Operational Upset

The SOU provisions create a) a sentencing factor, in the criminal context, to be considered by the sentencing judge; and b) an equitable factor pertaining to appropriate relief, in the civil (judicial or administrative) context, to be considered by the judge or presiding officer. As such, the issue of whether an SOU provision applies is not a matter which should be presented to or considered by a jury in a criminal or civil judicial case, and it need not be addressed in a charging document or civil complaint.

2. Establishing the Elements of SOU

If a respondent or defendant in an administrative, civil or criminal enforcement action believes that certain simultaneous violations of more than one pollutant parameter were caused by a single operational upset, respondent or defendant is responsible for asserting this claim. Respondents and defendants are in the best position to produce information relating to whether given violations resulted from an SOU event. A claim of occurrence of an SOU is relevant to the size of the penalty imposed, not the liability of an alleged violator, therefore SOU need not be raised until the assessment of the penalty or sentencing phase of the proceeding.

The respondent or defendant, to successfully assert the SOU limitation on liability, must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence, that:

a) A single operational upset occurred;

b) The permittee or violator has taken, in a timely fashion, all corrective and/or mitigative

measures where possible or practicable. (See Section IV(G) above.)

Where a respondent or defendant has provided EPA with prior notice of an SOU condition (e.g., in accordance with the 24 hour notice requirements of 40 C.F.R. 122.41(l)(6)) presumably administrative and judicial decision-makers will give appropriate weight to such prior notice in determining whether the occurrence of an SOU has been proved.

3. Burden of Proof on Respondent/Defendant

Where a respondent or defendant desires to claim the protection of a statutory exception or exemption, such as SOU, it is fair, reasonable, and within the Constitutional Due Process Clause to require the claimant to come forward with some evidence of its applicability, and to require the defendant to bear the burden of proof. Although the "burden of persuasion" is not often placed on defendants or respondents, particularly in criminal cases, it does not offend notions of fundamental fairness to place such a burden on defendants in this context, to prove "by a preponderance of the evidence" that SOU should apply. The information required to establish the occurrence of an SOU event is within the possession and control of the claimant. Further, the NPDES regulations already require reporting of many noncompliance incidents. To require that the Agency determine whether a single operational upset has occurred, and whether the prerequisites to its assertion have been met would be quite burdensome and would be contrary to the intent of Congress that enforcement actions should not be bogged down in administrative determinations or showing of fault. See A Legislative History of the Clean Water Act of 1977, 95th Cong., 2d Sess. (1978) at 464-5.

I. Counting Violations Where a Single Operational Upset is Involved

When an SOU results in the exceedance of multiple daily maximum pollutant parameters, only one violation will be counted for each day that the exceedance attributable to the SOU continues. Thus, an SOU that results in three days of noncompliance with one or more permit effluent parameters will be counted as three violations in determining the statutory maximum penalty.

The counting of violations becomes more complicated when, for example, a permit contains both daily maximum effluent discharge limits and monthly (or weekly) average discharge limits. The violation of a monthly average limitation is counted as one day of violation for each day in the month, e.g. 30 days of violation in a 30 day month. See Gwaltney of Smithfield v. Chesapeake Bay Foundation, 791 F.2d 304, 314-15 (4th Cir.

1986), vacated on other grounds, 484 U.S. 49 (1987). The question therefore arises about how to count the number of violations where an SOU event causes exceedance of multiple monthly averages or a combination of daily maximums and monthly averages.

In counting monthly average violations in the SOU context, EPA enforcement personnel should abide by these rules:

1) If a monthly average limitation would not have been exceeded but for the effluent limitation exceedances caused by a specific SOU event, then that monthly average violation merges with violations of any other pollutant parameter exceedances caused by the same SOU event. This rule applies to daily maximum parameter exceedances that are caused by the SOU and to each day of each monthly average parameter exceedance that would not have occurred but for the exceedances caused by the SOU event. For example, if monthly average parameters for pollutants A and B are exceeded during the same month, as a result of the same SOU event, and neither parameter would have been exceeded but for discharges resulting from that SOU event, then only one violation per day will be counted during that entire month (assuming no other violations occurred during the month). Further, if daily maximum violations are also attributable to the same SOU event, still only one violation per day is counted for each day in the month; and

2) If the monthly average pollutant parameters in the above example would have been exceeded regardless of discharges caused by an SOU event, the number of violations are counted differently because multiple monthly average exceedances do not merge, and multiple violations per day are still to be counted for purposes of calculating the statutory penalty. This is true of both daily maximum parameter exceedances and days of monthly average exceedance. For example, if monthly average parameters for pollutants A and B are exceeded during the same month, and these monthly average exceedances would have occurred regardless of any SOU event that occurred during that month, two violations will be counted for each day during that month. If daily maximum exceedances occur during that month and are attributable to the SOU event, they do not merge with the corresponding days of monthly average violation either.

For further examples of counting violations on the context of an SOU, see Appendices 1 and 2, below.

V. Single Operational Upset Versus Regulatory Upset: How the Two Concepts Differ

Because the regulatory upset defense and single operational upset are similar concepts, it is helpful to compare them and to examine the ways in which they substantively and procedurally differ. Following is a comparison of the two concepts focusing on their differences:

A. The purpose and effect of single operational upset differs from the purpose and effect of the regulatory upset defense. SOU provides that EPA, in determining the maximum penalty liability of a regulatee, is to count as one violation all those violations of multiple pollutant parameters stemming from a single operational upset. The result is that a regulatee's liability is limited to $25,000 per day ($10,000 per day administratively), regardless of the number of pollutant parameters violated.

Regulatory upset (as defined in EPA regulations, 40 C.F.R. § 122.41(n)) differs in that its successful assertion constitutes a complete affirmative defense (rather than a mere limitation on total liability) to noncompliance with effluent limitations.

B. Single operational upset is available as a limitation on liability for noncompliance with both technology-based and water quality-based effluent limitations. This is not true of the regulatory upset defense, which applies only to violations of technology-based effluent discharge limitations.[5]

C. Single Operational Upset need not be mentioned in an NPDES permit, either federal or state issued, for a violator to claim this limitation on liability in a federal enforcement action for penalties.[6] The regulatory upset defense, on the

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[5] But see Natural Resources Defense Council v.EPA, 859 F.2d 156 (C.A.D.C. 1988). In this decision the circuit court has compelled EPA to conduct further proceedings to determine whether to extend the upset defense to violations of water-quality based effluent limitations. Id., 210. The court explicitly states that EPA need not extend the upset defense to violations of water-quality based effluent limitations if it chooses not to do so. Id., 209. While EPA is making this determination, the upset regulations, as they apply to violations of technology-based standards, remain in effect. Id., 210.

[6] In a state enforcement action, brought in accordance with a state water protection statute, an upset defense will only be available if provided for by state law, regulation, or as a NPDES permit provision. Similarly, the SOU limitation on liability does not apply to enforcement actions brought in accordance with

contrary, must be expressly included in a state issued permit to be raised as an affirmative defense in a federal enforcement action. This limitation on raising the regulatory upset defense does not apply to a holder of a federally issued permit.[7]

D. The regulatory upset defense is not available where the noncompliance is caused by operational error, improperly designed or inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation. The upset regulation also requires that the incident or event leading to the exceedances be exceptional and that the resultant noncompliance be both unintentional and temporary.

"Upset," in the context of single operational upset, picks up some of these limitations based on the common understanding of the type of event that constitutes an industrial operational upset. The event must be exceptional or unusual, and it must be unintentional and unknowing. Further, pollutant parameter exceedances caused by failure to properly design and failure to install adequate treatment facilities can not constitute an SOU. Unlike the upset defense, in the SOU context operator error may be the basis of an SOU claim. See IV.D, infra.

E. To assert the regulatory upset defense, a regulatee must give prior notice to EPA or the state in accordance with 40 C.F.R. §§ 122.41(n)(3)(iii) and 122.41(l)(6). A regulatee is required to give prior notice of the SOU event in order to lat assert the SOU limitation on liability.

F. Respondents and defendants may claim, in the same judicial or administrative action, both regulatory upset and single operational upset. If the upset defense is successfully claimed, single operational upset is not applicable to those violations since the respondent or defendant would be absolved of liability for the violations at issue.

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state law, unless the state law contains an SOU provision. States may provide for more strict enforcement, including greater penalty liability, than is provided by federal law.

On the contrary, the federal government, even when it enforces against violations of state issued NPDES permits, must allow an SOU claim because the federal government always sues under the Clean Water Act which contains the SOU provision.

[7] See Marathon Oil v. EPA, 564 F.2d 1253 (9th Cir. 1977); but see U.S. v. BP Oil, Inc., No. 86-0792 (E.D.Pa. July 27, 1988)(order granting government's motion for partial summary judgment) ("Absent incorporation ... of the upset defense [into either an EPA or state issued NPDES permit], the defense is unavailable to defendant").

VIII. Conclusion

Single Operational Upset operates to limit the statutory liability of Clean Water Act regulatees under a strictly defined set of circumstances. If a regulatee's usually well functioning process is somehow "upset" resulting in exceedances of multiple pollutant parameters, the statutory liability for those exceedances will be calculated as if only one pollutant parameter had been exceeded. The "upset" must be an extraordinary event, not routine or if any way usual, it must not have been an intended result of the regulatee's action or inaction, and it must not be attributable to inadequate treatment facilities or faulty design of those facilities.

The regulatee who chooses to assert SOU in order to limit his potential CWA liability has the burden of raising this claim. In so doing, the regulatee must demonstrate that he/she took timely corrective and/or mitigative measures if possible or practicable to limit the environmental effect of the SOU event.

IX. Effect of Guidance

This guidance establishes the Agency's authoritative interpretation of the Single Operational Upset provisions set forth in the Water Quality Act of 1987. It is primarily intended for the use of government personnel. It is 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 change this guidance at any time without public notice.

In addition, the Agency's application of this guidance in formulating an appropriate Clean Water Act penalty, done in anticipation of litigation, is 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.

X. Contact

For further information, please contact Daniel Palmer, Attorney/Advisor in the Office of Enforcement and Compliance Monitoring - Water Division (FTS 382-2849).

APPENDIX I

EXAMPLES OF THE APPLICATION OF SINGLE OPERATIONAL UPSET: CALCULATING PENALTIES

A metal finisher encounters an operational problem--a chelating agent is released to the wastewater in excess of enforceable effluent limitations. The release of the pollutants was an exceptional and unintended event and was not attributable to faulty design or inadequate treatment facilities, and the violator took timely corrective action. Consequently, the violator in this case may claim SOU to limit his liability. Because the wastewater contains significant concentrations of chelated chromium, copper, and nickel, effluent parameters for all three pollutants are violated. These violations continue for 3 days. Assume that EPA is seeking civil penalties at $25,000 per day for each violation.

A. Daily Maximum Violations

No SOU Limitation on Liability

The above example displays 3 violations (one for each pollutant parameter violated), each violation continuing for 3 days. The statutory maximum penalty is calculated by multiplying 3 violations x 3 days x $25,000 per day for each violation--for a total of $225,000.

SOU Limitation on Liability

Where the SOU limitation on liability applies, the three pollutant parameter violations are counted as one violation for purposes of calculating statutory penalties. This would not impact "per day" penalties. The statutory maximum penalty in this context is therefore calculated by multiplying 1 violation (due to the single operational upset) x 3 days x $25,000 per day for each violation--a total of $75,000.

B. Monthly Average Violations

In addition to the daily maximum violations, monthly average violations may also be counted. Assume the exceedances attributable to the SOU also resulted in the violation of the monthly average discharge limitation for each of the three pollutants.

No SOU Limitation on Liability

Where no SOU is involved, the penalty for monthly average violations is calculated by multiplying the number of parameters violated (3) x 30 days per month x $25,000 per day--a total of $2,250,000. To this number is added the penalty

calculated for the daily maximum violations ($225,000), for a grand total of $2,475,000.

Single Operational Upset Limitation

Application of SOU to limit liability for monthly average violations turns on the question of whether the monthly average pollutant parameter would not have been violated but for the daily maximum exceedances that resulted from the SOU event. If all of the monthly average parameters would not have been violated but for the exceedances resulting from the SOU event, then only one violation is counted for each day during the month that the monthly averages were violated, e.g. 30 days x 1 violation/day x $25,000/violation = $750,000 penalty. The daily maximum violations that resulted from the SOU are not counted separately.

If the monthly average pollutant parameter exceedances would have occurred regardless of the SOU event, then the violations of the monthly average parameters do not merge. Rather than counting one violation per day for each day in the month for the monthly average exceedances, three violations are counted. The penalty for the daily maximum parameter exceedances, still limited by the SOU, is added to the penalty calculated for the monthly average violations. Therefore, in this example, the statutory maximum penalty equals 30 days x 3 monthly average violations/day x $25,000/violation + 3 days x 1 daily maximum violation/day x $25,000, for a total penalty of $2,325,000.

C. Changes in parameters violated

Modify the example by having the "single operational upset" cause the following: one chromium violation on day 1, one chromium and one copper violation on day 2, and one nickel violation on day 3, as well as a violation of the monthly average for chromium.

No Single Operational Upset Limitation on Liability

To calculate this penalty, the penalties for daily maximum and average violations for each parameter are added together. For chromium there is 1 daily maximum violation x two days x $25,000 per day for each violation--a total of $50,000. In addition, for chromium there is 1 monthly average violation x 30 days x $25,000 per day for each violation--a total of $750,000. For copper there is 1 daily maximum violation x 1 day x $25,000 per violation for each day--a total of $25,000. Likewise, for nickel there is 1 daily maximum violation x 1 day x $25,000 per violation for each day--a total of $25,000. This results in a grand total of $850,000.

Single Operational Upset Limitation

Again, the calculation of the penalty where an SOU is involved depends on whether the monthly average violation would not have been violated but for the exceedance attributable to the SOU event. If this violation would not have occurred but for the SOU related exceedances, all of the days of daily maximum exceedance merge with the days of monthly average exceedance, therefore the penalty is equal to 30 days x 1 violation per day x $25,000, for a penalty of $750,000.

If the monthly average violation would have occurred regardless of the SOU related exceedance, then the days of daily maximum exceedances do not merge with the days of monthly average exceedance. In this example, the penalty, in this instance, is computed by adding to the 30 days of monthly average violation the three daily maximum violations (the two violations on day two counted as one due to the SOU limitation) for a total penalty of $750,000 + $75,000 = $825,000.

D. Violations not Associated With a Single Operational Upset

Assume that an SOU occurs resulting in violations as described in part A, above. In addition to the violations described above, on day 2 the cyanide treatment system fails, due to some cause other than a single operational upset, resulting in a one day violation of the cyanide limit.

In this situation, the cyanide exceedance would not merge with any other exceedance, either daily maximum or monthly average, and would be counted as an additional $25,000 to be added to the penalty.

Fig. 1

APPENDIX 2

More Examples of Calculating Penalties in the Context of a Single Operational Upset

Consider the following scenario: during a single month, Regulatee X, who owns and operates Facility X, and who possesses an NPDES permit regulating discharges from Facility X, experiences five separate and distinct SOU events. These events occur on days 1-2, 10, 17, 23,and 29. The SOU events cause all of the permit effluent limitation exceedances that take place during this month. All the procedural preconditions for claiming SOU have been satisfied including efforts to mitigate.

Regulatee X's NPDES permit controls discharges for two pollutants, but establishes two parameters for each pollutant, a daily maximum and a monthly average. The sampling for pollutant A is taken daily, but for pollutant B samples are taken weekly.

On day 1, SOU Event I causes two days of violation of the daily maximum effluent limitation for pollutant A, but not pollutant B. (Pollutant B was sampled on these days. The quantity of the discharge on both days was 77 lbs/day). Although Regulatee X takes all feasible mitigative steps the violation continues for two days. On each of these days the daily maximum limitation for pollutant A is violated. On day one the concentration of the discharge is 40 mg/l; on day two it is 35 mg/l. These violations are so severe that, at month's end, averaging the 30 pollutant A samples taken during the month, it is determined that the monthly average would not have been exceeded BUT FOR these two days of exceedance, caused by this SOU event.

It is also determined at month's end that the monthly average limit for pollutant B has been exceeded but, in this case, the monthly average would have been exceeded regardless of the exceedances caused by the SOU event that occurred on days one and two.

On day 10, SOU Event II causes a violation of the daily maximum effluent limitation for pollutant B (105 lbs/day). This is known because a sample was taken on this day. At month's end, it is determined that the monthly average limitation for pollutant B would not have been exceeded but for the exceedance of Pollutant B caused by this SOU event.

On day 17, SOU Event III occurs. It does not cause an exceedance of either the daily maximum or monthly average limitations for pollutant A. It is unknown whether the daily maximum or monthly average limitations for pollutant B are exceeded because no sample of Pollutant B was taken on this day.

On day 23, SOU Event IV causes violations of the daily maximum limitations for both pollutants A (5.0 mg/l) and B (115

lbs/day), both of which were sampled. At month's end it is determined that the monthly averages for both of these pollutants would not have been violated but for the exceedances caused by this SOU event.

On day 29, SOU Event V occurs. It does not cause a violation of the daily maximum effluent limitation for either pollutant A or B but the levels of the pollutants exceed the monthly average limitation. As determined at month's end, the monthly average limitation for Pollutant A would have been violated regardless of this exceedance, as a result of the exceedances caused by SOU event I. The monthly average limitation for Pollutant B was exceeded by an amount such that the average for the month would not have been violated but for this discharge.

SOU Event	Day	Pollutant	Limit(Daily/Mthly)	Discharge Level
I	1	A	2.0/1.5 mg/l	40 mg/l
	2	A	2.0/1.5 mg/l	35 mg/l
	1	B	100/75 lbs/day	77 lbs/day
	2	B	100/75 lbs/day	77 lbs/day
II	10	A	2.0/1.5 mg/l	1.2 mg/l
	10	B	100/75 lbs/day	105 lbs/day
III	17	A	2.0/1.5 mg/l	1.0 mg/l
	17	B	100/75 lbs/day	NOT SA[illegible]
IV	23	A	2.0/1.5 mg/l	5.0 mg/l
	23	B	100/75 lbs/day	115 lbs/day
V	29	A	2.0/1.5 mg/l	1.6 mg/l
	29	B	100/75 lbs/day	98 lbs/day

Counting the Violations

SOU Event I: The only pollutant parameter violated is for Pollutant A. Therefore, there is one daily maximum violation on each of days one and two. In addition, the monthly average for Pollutant A is exceeded and would not have been exceeded but for the discharges related to SOU event I. In this case, for Pollutant A, the monthly average violation on days one and two merge with the daily maximum violation on those two days. The total number of days of violation of Pollutant A, for both the daily maximum and monthly average violations, is 30.

The daily maximum limitation for Pollutant B is NOT violated on either day that SOU Event I is ongoing. Further, the monthly

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average violation for Pollutant B would have been violated regardless of the violations attributable to SOU Event I. Consequently, these days of monthly average violation do not merge with the days of violation of Pollutant A.

SOU Event II: The daily maximum and monthly average parameters for Pollutant B are violated as a result of this SOU event. The monthly average parameter for Pollutant B would not have been violated BUT FOR the exceedance caused by SOU Event II. Therefore, the daily maximum violation on day 10 (the date of SOU Event II) and the day of monthly average violation for this date merge, leaving a grand total of 30 days of violation attributable to SOU event II. These days of monthly average violation do not merge with the days of monthly average violation of Pollutant A, caused by SOU Event 1, because the exceedances were caused by different SOU events.

SOU Event III: The only issue presented by SOU Event III is what effect, if any, does an SOU event whose consequences are unknown, have on the determination of which pollutant parameter exceedances merge. The answer is that without sampling data, a regulatee will not be able to limit its liability based on the occurrence of an SOU event.

SOU Event IV: The daily maximum and monthly average parameters for both Pollutants A and B are exceeded. Both monthly averages would not have been exceeded but for this SOU Event. As a result, all of these violations merge, for a total of 30 days of violation attributable to this SOU event. (Of course, the greatest number of days of monthly average violation that may occur in a given month is equal to the number of days in the month. Therefore, as is the case here, because the monthly average was already determined to have been violated for both pollutants, no additional days of monthly average violation actually accrue, although one more day of daily average violation is tallied for this month.

SOU Event V: The discharges caused by SOU Event V result in exceedance of the monthly average parameters for Pollutants A and B. As determined at month's end, the monthly average parameter for Pollutant A would have been violated regardless of the exceedance caused by this SOU event. The monthly average parameter for Pollutant B would not have been violated BUT FOR the exceedance caused by SOU Event V. Consequently, no days of violation for pollutant A and B merge as a result of SOU Event V.

APPENDIX 3

COMPARISON OF THE SINGLE OPERATIONAL UPSET LIMITATION ON LIABILITY AND THE REGULATORY UPSET DEFENSE

SINGLE OPERATIONAL UPSET DEFENSE	REGULATORY UPSET
EFFECT: In calculation of penalty liability, certain violations are counted as one violation.	EFFECT: Certain exceedances not considered to be violations.
Available by statute, no permit permit provision necessary in either state or federally issued permit.	Must be present as provision in state issued permit.
Available where violations are violations of either water quality or technology-based effluent limitations.	Available only where are of technology-based effluent limitations.
Proper pollution controls must be in place (including proper design and adequate treatment).	Same.
Available where permit limitations are based on water quality standards.	Not available where permit limitations are based on water quality standards.
Prior notice not an explicit requirement of proof.	Prior notice is explicitly required.
Incident must be exceptional and unintentional (unknowing), but not necessarily unavoidable.	Incident must be exceptional, unintentional, and unavoidable.
Condition must be temporary (i.e. necessity to take timely corrective and/or mitigative measures where possible or practical).	Same.
Lack of preventative maintenance may not be the basis for a claim of SOU.	Same.
Unless "knowing" or "intentional", contributing operator error and careless or improper operation may be the cause of a single operational upset.	Contributing operator error, and careless or improper operation may <u>not</u> be a cause of a single operational upset.

IV. CIVIL LITIGATION

B. ENFORCEMENT CASE MANAGEMENT PROCEDURES

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

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

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

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

December 14, 1979

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Allocation of Litigation Responsibilities Between Regional and Headquarters Components of Office of General Counsel

RECEIVED

FROM: David O. Bickart D.B.
Deputy General Counsel

DEC 19 1979

TO: Regional Counsels
Associate General Counsels
Deputy Associate General Counsels

REGION I
OFFICE OF REGIONAL COUNS

Allocation of litigating responsibility raises difficult issues of management and professional pride, both within the Office of General Counsel*/ and between our office and the Justice Department. Our experience during the past two years of operating under our Memorandum of Understanding with Justice convinced me that those issues are resolved better by discussions among peers who have a good deal of respect for each others abilities than by scriptural citation. Before I set out what I believe is the appropriate approach to this issue, I want to emphasize a number of factors that I have considered.

1. I expect all attorneys in this office to be technically equipped to write fileable briefs in the Federal Courts. By "fileable", I mean briefs that meet my standards of professional competence, and those of the Assistant Attorney General. In headquarters, the Associates and their Deputies are responsible for assuring that the standard is met; in the regions the Regional Counsels have that responsibility.

2. Regional Counsel staffs should be involved in any litigation arising out of decisions made in their regions.

*/ The Office of General Counsel includes the Regional Counsels and their staffs.

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3. Legal positions taken in the Courts must be consistent from region to region, and must be consistent with the Agency's overall legal position. The Associate General Counsels must be aware of, and must have an adequate opportunity to consider, what arguments we will be presenting to the Courts.

4. Determinations about the proper presentation and staffing of litigation matters are to be made after consultation between the relevant Regional Counsel and the relevant Associate (or a designee who has authority to speak for the Associate). I will resolve any unresolvable disputes, but I expect these to be kept to a minimum.

With these factors in mind, I believe the following procedures and principles should govern the allocation of litigation responsibility between our regional and headquarters components.

1. When EPA receives a complaint or petition for review in an action arising out of a regional action, the office served (i.e., regional or headquarters office) will within 24 hours transmit the pleadings to the other office and the Justice Department.

2. The Regional Counsel will telephone the Associate General Counsel in the affected Division (or vice versa) and will discuss who will be assigned to the case and the general allocation of responsibilities for its presentation.

3. As a general rule, regional personnel should ordinarily take the lead on issues concerning the propriety of the manner in which discretion was exercised in a particular instance. Headquarters attorneys should ordinarily take the lead on legal and policy issues that have a broad impact on the nationwide administration of EPA's programs. I expect that in the many cases where both elements are present, attorneys from both offices will be writing different sections of the brief.

4. The "general rule" will undoubtedly have many exceptions. I expect these to be developed on a case-by-case basis between the Associate General Counsel and the Regional Counsel in a common-sense manner. In particular,

I expect the Associates to be open-minded about asserting territorial rights on an issue merely because it is arguably "national". I will not look favorably upon appeals by Associates that a matter be handled out of headquarters, if the Associates can't demonstrate that a headquarters attorney, by familiarity with similar cases or by superior access to headquarters program people, will add significantly to the thoroughness with which our position will be presented to the Court.

5. Headquarters attorneys are not forbidden to contact regional program people directly. There are many occasions where this may be the most efficient means of gathering information. However, headquarters attorneys should recognize that regional counsel attorneys will frequently have a better feel for who the most knowledgeable or authoritative person is in the region. If the headquarters attorney has any doubt about who the best regional source of information is, he should call the Regional Counsel. In any event, when both headquarters and regional attorneys are assigned to a case, the regional attorney should know who has been contacted.

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

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

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

5.06

Subject	Date
Section Directives Concerning 60-Day Report and Processing New Referrals	June 22, 1982

To
All EES/EDS Attorneys

From
Stephen M. Ramsey
Chief, Environmental Enforcement Section

My recent review of selected hazardous waste enforcement cases, the 60-day report and attorney time records for the last 6-month period has been completed. My review has yielded much useful information and given me a better understanding of how attorneys are spending their time. It has also caused me serious concern about the number of cases which appear not to be proceeding in an organized fashion to any foreseeable conclusion. For example, I was shocked to learn that in a hazardous waste case which was filed more than 2 years ago and in which a partial settlement was obtained several months ago, that no amended complaint has been filed against non-settling parties nor has any discovery been conducted in the existing case. In another case, despite being aware of the existence and identity of generators for more than a year, no amended complaint has been prepared nor has any meaningful discovery been conducted against defendants or potential defendants.

I have also become increasingly concerned that cases referred to the Department by EPA have in some instances languished for no identifiable reason. It is incumbent on each attorney to manage his/her case docket so that cases are analyzed promptly and litigation is moved forward aggressively to an expeditious conclusion. Accordingly, I am instituting the following procedures which are to be followed in all enforcement cases.

Handling Cases on the 60-Day Report:

My review of the 60-day report and a random check of the accuracy of the entries leads me to the conclusion that the disparity which exists between our version and EPA's version of which cases are being held at EPA's request, for litigation strategy reasons or pending the receipt of additional information from EPA will not withstand close scrutiny. In a recent meeting, Mrs. Dinkins directed me to insure that all cases on the 60-day report should be filed or declined as soon as possible. She expressed her displeasure with our delay in filing and prosecuting EPA's cases

and instructed me to determine whether members of our staff have failed to prepare the necessary pleadings or put forth the neces effort to conduct EPA's enforcement litigation in a timely fashion

In short, it appears that despite my requests some staff attorneys have failed to manage their dockets or prosecute existing cases in a timely manner. Accordingly, the following general direct order is effective immediately for cases listed by category on the 60-day report as unfiled:

1. Cases under review in Division and in United States Attorneys' Offices - These cases are to be referred to United States Attorneys within 30 days of this memorandum and expeditiously filed in district court. Thereafter, they are to be vigorously prosecuted. Staff attorneys are responsible for notifying the Chief of the Environmental Enforcement Section in writing of the date of filing; the identity of the government attorney primarily responsible for handling the case; the relief the government seeks; the amount of section attorney time which will be required for the next one year.

2. Cases held at request or agreement of EPA for settlement discussions or reasons of litigative strategy - These cases are to be referred to United States Attorneys within 30 days and expeditiously filed in district court and the same information provided as required in item 1 above or a memorandum shall be provided to the Chief of the Environmental Enforcement Section within 30 days from the date of this memorandum indicating (a) the litigative /strategy reasons that the case has not been filed; (b) the identity of the EPA attorney who requested/ agrees with non-filing; (c) the date such request/ agreement was made; (d) written approval from EPA that this course continue, including the stated reason therefor; (e) the progress which is being made which in your view justifies continuing to withhold the case from filing.

3. Cases in which additional factual or legal information has been requested of EPA - Within 2 weeks from the date of this memorandum, a written memorandum shall be provided to the Chief of the Environmental Enforcement Section which shall contain (a) the information and a discussion of its necessity for the case; (b) the dates on which it has been requested; (c) copies of all written correspondence which has been sent/ received during the past year requesting and/or refusing to provide the information; (d) the identity of the EPA attorney.

Handling New Referrals:

EPA has set referral of new cases as one of its highest priorities. Since March 30, 1982, EPA has referred 20 new cases for filing and expects to send an additional 100 cases for filing before the end of this fiscal year. Department attorneys should give priorit to expeditious handling of new referrals. The following procedures are effective immediately:

1. Upon receipt of the informational copy of a referral package, a DOJ attorney will be assigned to the case and EPA will be informed of the attorney's identity.

2. The DOJ attorney should contact the EPA regional attorne assigned to the case within 7 days to determine the status of the case and any important factual or legal issues in the case.

3. Within 30 calendar days after DOJ receives the formal referral letter from EPA, the DOJ attorney is responsibl for analyzing the case, preparing appropriate pleadings (complaint; discovery; etc.) and recommending to the Assistant Attorney General that the case be filed or declined. A staff recommendation that the case be declined or that additional information requested must be approved by the Chief, Environmental Enforcement Section. All requests for additional information should be made orally and confirmed in writing to the Regional EPA attorneys and technical personnel with carbon copies of such correspondence provided to the appropriate EPA headquarters attorney and technical personnel.

4. Recommendations which will require more than 30 days to prepare should be brought to the attention of the appropriate Assistant Section Chief immediately. EPA should be informed in writing of the reason for the delay and given a date by which a recommendation will be made.

5. Wherever possible, complaints should be accompanied by appropriate discovery documents. The propriety of seeking a preliminary injunction should be considered in each case.

Filed Cases:

Cases which have been or will be filed are to be vigorously prosecuted. The goal in our cases is an expeditious settlement which is favorable to the United States consistent with EPA's policies and applicable law or a trial where resolution by settlement is not possible. Attorneys should remember that the United States is a plaintiff in these cases and should push cases forward to trial.

Attorneys should assume that when a case is referred to the Department by EPA, attempts at settlement have essentially failed and EPA intends that the case be filed promptly and actively litigated. This does not mean we will refuse to negotiate with defendants. It means that we will always prepare our cases for trial even while negotiations are proceeding.

One cannot proceed as a plaintiff without a case plan and strategy. Attorneys are responsible for the development of a case plan and strategy and for assignment of ongoing responsibilities to litigation team members to assure that the litigation strategy is followed. Attorneys are responsible for identifying and requesting all necessary assistance from EPA. If that assistance is not forthcoming, attorneys are responsible for bringing this to the attention of the Chief or Assistant Chief for expeditious resolution with EPA. Similarly, attorneys are responsible for familiarizing themselves with relevant statutory and regulatory provisions, understanding the technical issues which are presented, identifying policy or legal questions which arise in litigation and seeking early advice on the appropriate litigative/policy position from EPA and the section management.

Section attorneys must undertake and follow through on case preparation. There is no acceptable reason for failing to conduct necessary discovery or perform other phases of case preparation. Any request by EPA or a United States Attorney to stay trial preparation for any reason must be made in writing and be personally approved by the Chief of the Environmental Enforcement Section. Attorneys are responsible for identifying and requesting needed litigation support.

Attorneys are responsible for making maximum use of the Department's training and litigation support resources. The Chief and Assistant Chiefs are available for consultation and advice on all phases of case preparation and strategy. The Section possesses substantial form files, technical information and an expert witness file. The Department provides extensive training through the Attorney General's Advocacy Institute for trial preparation and techniques. EPA and other federal agencies have vast quantities of technical material which may be easily obtained and utilized in our cases. Attorneys should familiarize themselves with sources of information and utilize them.

In the future, Carol, Lloyd and I will undertake regular, periodic review of our docket to evaluate the progress of our litigation. This periodic review is not, however, a substitute for seeking our consultation on case specific or generic issues which arise in your cases.

It is my intention that this memorandum serve as a reminder to each section attorney that our primary obligation is the expeditious, satisfactory handling of EPA's enforcement

litigation. In most of our cases, section attorneys are doing good work. In others, substantial improvement is necessary to meet acceptable standards. I ask each of you to examine the amount and quality of your effort expended on your cases and to place increased emphasis on moving our cases forward for resolution by trial or settlement. Any questions about this memorandum should be addressed to me.

I am providing EPA management with a copy of this memorandum and the most recent 60-day report.

cc: Mrs. Carol E. Dinkins
Mr. Anthony C. Liotta
Ms. Mary L. Walker

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

ENTIAL PROTECTI

WASHINGTON, DC 2046

SEP 3 1982

OFFICE OF
LEGAL AND ENFORCEME

MEMORANDUM

SUBJECT: Requests to Department of Justice to Withhold Action in Referred Cases

FROM: Michael A. Brown
Acting Enforcement Counsel/
Deputy General Counsel

TO: Regional Counsels
Associate Enforcement Counsels

Robert Perry and I recently attended a meeting with officials of the Department of Justice to discuss the status of cases which had been referred to DOJ from the Agency. During that discussion, we were advised that in many cases, action is being withheld by DOJ at the request of Regional attorneys who are involved in the cases.

When a case has been referred to DOJ, it should have been investigated, prepared and developed so that suit can be filed and the case tried without inordinate delay. The Department of Justice should be requested to withhold action on a case only for good and sufficient reason.

I will be working closely with DOJ on a regular basis to assure that we refer quality cases, and that they are filed and prosecuted expeditiously. In order to avoid misunderstandings among DOJ, Headquarters and the Regional Offices as to the causes for particular cases not moving forward, henceforth, any requests to DOJ to withhold or delay action in referred cases must be concurred with in writing by the Enforcement Counsel.

If you have any questions regarding this, please let me know.

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

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

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Subject	Date
Procedure for Withholding Filing of Referred Cases	September 8, 1982

To
All Attorneys
Environmental Enforcement
and
Environmental Defense
Sections

From
Stephen D. Ramsey
Chief, Environmental Enforcement
Section

In a recent meeting with Bob Perry, Mike Brown, Mary Walker, Mrs. Dinkins and myself the subject of cases which have been referred by EPA but not filed by the Department was discussed. We have been instructed by Bob Perry, the Associate Administrator for Legal and Enforcement Counsel that instructions from Regional attorneys to the Department to abstain from filing refraining from or taking other action on referred cases may not be followed absent concurrence in writing by Headquarters EPA. Mr. Perry has sent the attached memorandum on this subject to all Regional Counsels.

Accordingly, in each referred case in which you have been requested by the EPA Regional attorney to withhold filing of the complaint or withhold other case activity; please contact the Regional attorney, inform him/her of Mr. Perry's instruction and request that the Regional attorney initiate and obtain written confirmation of any instructions not to file a referred case both from the Region and from Headquarters. Attorneys should, of course, be reasonable and provide a reasonable time for these instructions to be transmitted. However, hereafter, Department attorneys may not withhold filing of referred EPA cases without express instruction to do so from Headquarters EPA.

cc: Carol E. Dinkins
Mary Walker
Robert Perry
Michael Brown
Michael Alushin
Edward Kurent
Louise Jacobs

Attachment

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

27 OCT 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUN

MEMORANDUM

SUBJECT: Clearance of Briefs and Significant Pleadings

FROM: Michael A. Brown
Deputy General Counsel (A-130)

TO: All Attorneys
Office of General Counsel

Attached is a form that OGC will use for clearance of briefs and significant pleadings. It is designed to provide the background information which Mr. Perry and I need in order to review the pleadings. This memorandum sets out instructions for its use.

1. What pleadings require review by the General Counsel or Deputy General Counsel?

All significant pleadings must be submitted for review by me or the General Counsel. These include all dispositive pleadings, such as appellate briefs, motions to dismiss, motions for summary judgment, and the like. Other significant pleadings include appellate reply briefs and reply memoranda in district courts. In cases involving potential court-ordered deadlines for EPA action, answers, motions for amendment or extension of deadline orders, and any accompanying affidavits, should be forwarded for review.

Examples of matters ordinarily not requiring review include motions for extensions of time, motions to supplement (or oppositions to motions to supplement) the administrative record, notices of appearance, and other pleadings not directly related to the merits.

2. When should pleadings be submitted?

Whenever possible, pleadings must be submitted seven days before they are due to be filed. Sometimes, because of litigation deadlines or when a draft is prepared at the Department of Justice, less time is available. In that case, submit the pleading

as soon as possible. Do not delay submitting a pleading until it is letter-perfect. If a reasonably complete draft is available at the seven-day deadline, submit it, but note under "Comments" any changes which will be made. Reviewers can deal with hand-written inserts, cut-and-paste drafts, and the like, if necessary to assure early review.

3. How are pleadings submitted?

Fill out the attached form, have the Associate General Counsel initial it, and give the form and draft pleading to the Senior Litigator. The Associate's initials signify that he has read the draft and has approved it for filing, or that the draft will be acceptable for filing after the changes noted on the form under "Comments," or on the draft itself, are made. Please initial any comments.

Under "Draft Prepared by," be sure to note whether the draft was entirely prepared by the EPA attorney or at the Department of Justice, or, if drafting was shared, what portions were drafted by the EPA attorney.

When the form is returned following review, it should be retained permanently in the litigation file.

Attachment

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

DEC 2 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Civil Litigation Referral Packages

FROM : Louise D. Jacobs
Associate Enforcement Counsel
for Water

TO : All Water Enforcement Attorneys

At the staff meeting on November 23, Mike Brown requested that we add a new paragraph to each cover memo accompanying proposed civil referrals. The new paragraph should state when we received the litigation report in our division, and, if our review has exceeded 30 days, explain the reason for the extended review.

Please include such a paragraph in the cover memo for any new referral packages you may prepare.

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

2 DEC 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUN

MEMORANDUM

SUBJECT: Headquarters Review of Pleadings

FROM: Robert M. Perry
Associate Administrator and General Counsel

TO: All Regional Counsels

Attached is a copy of a memorandum recently distributed to attorneys in the Office of General Counsel regarding the requirement that I review and concur in all significant pleadings filed on behalf of the Agency in defensive cases. This memorandum sets out procedures for review of defensive pleadings filed in cases in which an Office of Regional Counsel has lead responsibility.

The attached memorandum describes which pleadings require review. Please follow the procedures it describes, ensuring that I have an opportunity to review and concur in all such pleadings before they are filed. You should work with the appropriate Associate General Counsel to make sure that a draft is ready for my review not less than seven days prior to the date on which a pleading must be forwarded for filing. If the brief must be filed by mail, be sure that the draft is submitted seven days before it must be mailed. You have met this obligation only if a draft satisfactory to both the Regional Counsel and the appropriate Associate General Counsel is available for my review within the seven day deadline. Regional Counsels must personally review and concur in all significant pleadings submitted for my review. Obviously, you will need to coordinate with the Associate General Counsel well before the deadline to assure that a satisfactory draft will be available on time.

The Associate General Counsel will be responsible for preparing a Concurrence Request form (attached) and submitting the pleadings for review. For pleadings submitted after the deadline, I have instructed the Associate General Counsels to indicate on the form the reasons for the delay.

Attachment

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The Administrator has affirmed that I urge OLEC staff at Headquarters and in the Regions to caution their "client" program offices and others within the Agency about the sensitivity contacts with persons or firms that are involved in cases referred to DOJ for filing. There are many matters unrelated to a specific enforcement action--e.g., processing of grants, development of rules--in which a party may be interested and which may be discussed without counsel present. Care should be taken, however, to determine the purpose(s) for which meetings are sought by defendants and potential defendants so that appropriate arrangements can be made. If matters related to a pending case are raised by such persons during the course of a meeting arranged for other purposes, any discussion of the case should be interrupted and continued only after consultation with an Agency attorney assigned to the case.

XIII. Enforcing Consent Decrees and Final Orders

Following the entry of a consent decree or final order, compliance assessment is the responsibility of the Regional Administrator, in the same way that the Regional Administrator assesses compliance with statutory or regulatory requirements.

In the event that a source violates a consent decree or order, a motion for contempt or modification of the decree may be appropriate. The decision to file for contempt or to negotiate a modification will normally be the Regional Administrator's, based upon the advice of the Regional Counsel and subject to national guidance issued by the responsible Assistant Administrator or OLEC. Since the violation would concern a filed case and a consent decree modification would involve a court order, DOJ and the U.S. Attorney's Office should be given the opportunity to take part in any of those discussions. Negotiations with affected parties should be conducted in the manner described previously in this document (with an opportunity for Assistant Administrator participation). All modifications to consent decrees must be approved in the same manner as the original consent decrees.

XIV. Appeals

General Counsel attorneys serve as the Agency's principal defense lawyers and are responsible for any matter before Courts of Appeals, including appeals of decisions relating to enforcement actions. In such cases, the lead General Counsel attorney will continue to be determined in accordance with a memorandum of December 14, 1979 on the subject from the Deputy General Counsel. The lead Agency attorney on the appeal will be responsible for

working closely with the lead Agency attorney appointed to the original enforcement case, as well as the appropriate Regional and Headquarters program office personnel. The lead Agency attorney originally appointed to an administrative enforcement action which is subsequently appealed normally will serve as co-counsel with the General Counsel attorney in the Court of Appeals.

With regard to hearings before an administrative law judge or appeals of administrative actions to the Administrator, the Regional Counsel will normally provide legal representation for the Agency on matters arising in the Regions, including permit conditions and administrative civil penalty decisions. However, in accordance with the OLEC memorandum of May 7, 1982, on regional reorganization, when issues of overriding national significance exist, or when Headquarters initiates the administrative action, the lead may be assigned to a Headquarters attorney, upon the agreement of the Regional Counsel and the appropriate supervisor in the Enforcement Counsel's office.

XV. Communications/Press Relations

Throughout the enforcement process, the Regional Administrator is responsible for ensuring that the appropriate information flows openly and smoothly to all parties with a legitimate interest in the final outcome. Once a matter is referred to DOJ, however, all Agency personnel should exercise care in releasing any information or statement, including press releases, in connection with the matter without previously consulting DOJ. The lead Agency attorney is responsible for the smooth and complete flow of information to supporting attorneys within the Agency and in DOJ.

The Regional Administrator and the Regional program managers are responsible for communicating with States, except if a State is a party to a filed judicial action. In that case, the U.S. Attorney and DOJ should participate in or be consulted about any such communications.

Likewise, the Regional Administrator will normally be responsible for handling any press inquiries or releases concerning an enforcement action. The Regional Counsel is available to provide legal advice on the handling of those matters. Upon occasion, such inquiries or press releases may be handled best by the Enforcement Counsel or the appropriate Assistant Administrator, but only when all parties and the press office agree that this procedure is the best course of action. For filed actions, DOJ or the U.S. Attorney's office should be consulted before interacting with the press.

Operating Procedures" memorandum therefore also stressed the need for OGC attorneys to work closely with OEC and Regional attorneys in developing an enforcement action on appeal. Today's memorandum provides greater detail on the respective roles for each of these OLEC offices.

Regional Counsels generally have the lead on advising program clients on contemplated enforcement actions, in developing an enforcement case for litigation, and for serving as in-house Agency legal representative in settlement discussions or litigation activities associated with that case. As a result, Regional Counsels are usually the OLEC officials most familiar with the facts and proceedings associated with a given action on appeal, as well as at the action's initial stages.

Associate Enforcement Counsels are responsible for ensuring that enforcement actions follow and promote Agency policy on a nationwide basis. Appeals of enforcement actions, even actions on which a Regional Counsel had initial lead responsibility, often involve fundamental enforcement program questions of national significance. Thus, OEC Associates have an important role to play in enforcement appeals.

Finally, the fundamental questions often at stake in enforcement appeals, whether or not initiated by EPA, typically relate to appropriate interpretations of EPA's legal authority. The OGC Associates possess the best expertise for addressing these issues of legal interpretation and for ensuring that the EPA position is consistent with and supportive of the positions EPA has assumed in other legal proceedings.

In light of these respective areas of responsibility and expertise, I believe it is important that each of these OLEC officials make appropriate contributions to EPA's activities in an appeal of an enforcement action. This means that all three OLEC officials should confer once EPA learns that a defendant has filed an appeal, or once EPA begins considering whether to pursue an appeal, to determine their respective roles and responsibilities on matters related to that appeal. Each of the OLEC officials must be involved from the start of the appeal process (including the decision on whether to file an appeal) to ensure that each can provide a meaningful contribution and to ensure that any issues are raised and resolved as early as possible.

For example, the OGC Associate as a general rule must participate in any Agency decision to file an appeal, since that decision and associated filings generally involve the development of legal theories which may affect other areas

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of EPA's programs. Similarly, the OGC Associate normally must participate in the development of any briefs to ensure that they appropriately articulate EPA's legal position without undermining the legal positions EPA may have adopted in other matters. In any case, the OGC Senior Litigator should have the opportunity to review any significant pleadings.*

OEC Associates and Regional Counsels also as a rule must participate in the area relating to their respective responsibilities and expertise. Thus, OEC Associates normally must participate in aspects of the appeal which significantly affect national enforcement policy or establish important precedents. Regional Counsels normally must participate on issues concerning the propriety of EPA's actions in the context of the particular case at issue.

Appropriate exceptions to these rules undoubtedly will arise on a case-by-case basis as the Regional Counsel, OEC Associate, and OGC Associate take a common sense approach to distributing responsibilities for appeal-related activities. In many instances, for example, different officials will be responsible for preparing different sections of the brief. I will be available to resolve any matters on which a consensus cannot be reached.

In any action on appeal, there must be a clear understanding among participants as to who holds lead responsibility. Consistent with the "General Operating Procedures" memorandum, the OGC Associate will have lead responsibility for the action as a whole unless the participants make other arrangements. If appropriate, the participants may agree to shift the lead on an action once it reaches a certain stage.

Let me conclude by emphasizing that each of the responsible OLEC officials must ensure that he or she is promoting coordinated OLEC participation on an enforcement appeal by keeping other appropriate OLEC officials involved and by making appropriate contributions to the group effort involved in that appeal. These measures are important to enable OLEC to provide the best legal counsel possible as the Agency pursues or defends appeals of enforcement actions.

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*Even before an enforcement case reaches the appeal stage, the appropriate OGC Associate should have at least an opportunity to review and comment on any dispositive pleadings which the Federal government plans to file in which the government lays out complete legal theories which are likely to form the basis of a judgment.

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF
LEGAL AND ENFORCEMENT COUN.

MEMORANDUM

SUBJECT: Responsibilities for Handling Judicial Appeals Arising under EPA's Civil Enforcement Program

FROM: Robert M. Perry, Associate Administrator and General Counsel

TO: Associate Enforcement Counsels
Associate General Counsels
Regional Counsels
OLEC Office Directors

This memorandum describes the distribution of responsibilities within OLEC for handling appeals which arise from EPA civil enforcement actions and in which a reviewing court bases its decision on the record of an earlier proceeding (judicial or administrative). The basic concept underlying this guidance is that enforcement appeals require the coordinated participation of the appropriate Regional Counsel, Associate Enforcement Counsel, and Associate General Counsel in order for EPA to receive proper legal advice and representation.

This guidance specifically is intended to clarify discussion of this matter in my July 6, 1982, memorandum on "General Operating Procedures for EPA's Civil Enforcement Program". In that document, I stated,

> "General Counsel attorneys serve as the Agency's principal defense lawyers and are responsible for any matter before Courts of Appeals, including appeals of decisions relating to enforcement actions".

Of course, appeals of enforcement actions clearly involve matters relevant to the responsibilities of the relevant Associate Enforcement Counsel and the Regional Counsel, as well as the Associate General Counsel. The "General

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

Subject	Date
Deferral in Filing Cases at the Request of EPA Attorneys	January 31, 1983

To	From
All Environmental Enforcement Section Attorneys	Stephen D. Ramsey, Chief Environmental Enforcement Section

In some recent instances EPA headquarters has complained that section attorneys were accedeing to requests from regional attorneys that cases not be processed or referred or filed. Attorneys are reminded that any request to defer the referral or filing of a case must come from headquarters and must be in writing. (See my memo of June 22, 1982.) If you receive a request from a regional staff attorney to defer a referral or filing of a case please communicate that request to the EPA staff attorney and to your Assistant Chief, however, you may not defer process of the case until such time that EPA has communicated that deferral in writing at the headquarter level.

cc: Michael Brown
Associate Enforcement Counsels
Regional Counsels

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

8:48

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

MAR 28 1983

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Case Management Procedures for Civil Water Referrals

FROM: Louise D. Jacobs
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Region I - X

As we approach the midpoint of Fiscal Year 83, I am sending you our March 5, 1983, status report for active water referrals and active cases. This report charts our current total active case load of 118 cases* under the Clean Water Act and the Safe Drinking Water Act. The chart is prepared on a Regional basis to allow you to check your records against ours, and to compare your enforcement status with that of other Regions.

I also want to take this opportunity to reemphasize the importance of Michael Brown's memorandum on case referrals dated September 7, 1982 (copy attached). In addition, I wish to discuss several matters specifically affecting water referrals.

1. Early Notice of Planned Referrals

Page 2 of the September 7 memorandum stresses the importance of informing Headquarters "of new cases which are under develpment as soon as sufficient information is acquired about the cases to enable a determination to be made that they have potential for referral." Early notice to this Division allows for better coordination between Regional and Headquarters staff attorneys. It also helps to project this Division's upcoming workload and to plan accordingly. Proper planning should facilitate the processing of referrals when they are received.

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* Cases in which a consent decree has been filed are not included.

I am asking my staff to emphasize the importance of notice of planned referrals in contacts with their Regional counterparts. I will also attempt to visit as many Regions as possible during the remainder of this fiscal year in order better to understand how this Division can work with each Region to develop high quality referrals and expedite processing. Staff attorneys will be available as needed to participate in individual cases. I urge that my attorneys be given the opportunity to work with you and the Regional program office on case development, especially where non-routine questions arise.

2. Program Office Coordination

This Division is working closely with its Headquarters program counterparts in processing referrals. We obtain concurrence from the Office of Water (OW) for all Clean Water Act and Safe Drinking Water Act referrals and consent decrees before forwarding them to the Associate Administrator, OLEC for final Agency concurrence.

We have found OW's technical review a valuable part of the referral process and encourage you to make full use of the Region's program office also in developing the referral package. I specifically urge that your office consult on referrals with the Regional water program office (1) to confirm existing permit requirements, if any, (2) to describe technically the precise nature of the violations and some specific methods for solving them, (3) to develop "first-cut" information about the ability of a municipality to pay for the Agency's proposed solution and (4) to provide information about other significant technical problems or issues.

3. Settlement Negotiations with the Defendant

Frankly, I have felt that too much time has been expended in prefiling negotiations with potential defendants. The matter breaks down into two areas (1) when to negotiate and (2) how long to negotiate.

A. When to Negotiate

Prior to referral, it is entirely up to you whether a Region should conduct negotiations with a potential defendant in an effort to seek compliance or compliance through warning letters or administrative orders. However, once you decide that court action is needed, this Division and DOJ should be, to some degree, involved in all subsequent actions on the case, including any efforts to negotiate a consent decree. Involvement by this Division and by DOJ is essential to facilitate approval of any consent decree, and to avoid embarrassement which may result from rejection of decrees negotiated by the Region alone. The

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involvement will probably not require Headquarters attendance at negotiation sessions. However, an attorney in this Division should be familiar with the general negotiation strategy and should review draft negotiation documents prior to transmittal to counsel for the potential defendant.

Once a referral has been made by the Region to Headquarters, negotiations should continue only with the concurrence (and usually with the participation) of this Division and DOJ. Negotiations after referral should not delay the filing of a complaint. Negotiations may continue of course after filing. They should (1) be extremely focussed, and (2) be coordinated with my Division and with DOJ.

B. How Long to Negotiate

Prior to referral of a case by the Region to Headquarters, the Region may negotiate for as long as seems appropriate to the Region. However, this Division may wish to consult with the Region if pre-referral negotiations are unnecessarily prolonged or if there is a serious environmental problem which requires immediate action.

Once a case has been formally referred by the Region to Headquarters, negotiations may continue, but it should be clearly understood (1) that the case is on a track to litigation and (2) that the filing of the complaint should not be delayed while negotiations continue. Obviously a consent decree can be filed subsequent to the filing of a complaint. If real progress is being made in the negotiations, the Court still will later be able to accept the consent decree. This is consistent with the Enforcement Counsel's memorandum of September 3, 1982, which requires prompt filing of cases. I have attached this memorandum and Stephen Ramsey's related memorandum of September 8, 1982, for your reference.

4. Transmittal of Case Litigation Report

The Regions have followed varying policies concerning transmittal of the case litigation report to Headquarters. We recommend that you send the original and one copy of the litigation report and attachments to the Associate Administrator, OLEC, and another copy to me. Immediately upon receipt, we coordinate with the water program office so that it may also begin its review of the referral. After OW concurrence on the referral package and the Associate Administrator's concurrence, OW returns its copy of the litigation report to us for transmittal to DOJ. Some Regions are already following this procedure, and it is working well.

I hope that this memorandum will expedite the referral process for water cases and answer some of the questions raised in recent months. I will continue to welcome your comments and suggestions.

Attachments

cc: Courtney M. Price
Michael A. Brown
Stephen D. Ramsey
Frederic A. Eidsness
Bruce R. Barrett
Victor J. Kimm

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

8.54

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

JUL 20 1983

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Program Concurrence on Civil Referrals

FROM: Louise D. Jacobs
Associate Enforcement Counsel
for Water

TO: Robert W. Zeller, Director
Office of Water Enforcement

I appreciated the opportunity to meet with you on July 11, concerning OWEP concurrences on civil case referrals to the Department of Justice. As we agreed, it is essential that cases submitted by the Regions be promptly referred to DOJ or rejected by Headquarters if inadequate. A recent delay in this process has suggested the desirability of putting an understanding in writing.

Accordingly, this memorandum confirms that the time for OWEP case concurrence is five days after submission to OWEP of the final referral package as prepared by my Division. We would hope to have your concurrence in less than that time, especially since OWEP has the Region's referral package one to two weeks in advance of the forwarding of it to you by my Division. In the absence of concurrence or comment at the close of five days, I will assume that OWEP has no comment on the referral. I will send the referral forward at that time for final approval by the Special Counsel for Enforcement.

I look forward to continuing to work with your office on the case referral process.

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

UNITED ‹TES ENVIRONMENTAL PROTECTION .GENCY

JUN 20 1983

MEMORANDUM

SUBJECT: Program Review of Civil Water Cases

FROM: Bruce R. Barrett, Director
Office of Water Enforcement and Permits

TO: Louise D. Jacobs
Associate Enforcement Counsel for Water

During the past several months my office has been reviewing and concurring in the referral of civil Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) cases to the Department of Justice (DOJ), modifications to consent decrees arising from such referrals, proposed settlements and the withdrawal of cases which no longer merit prosecution.

In light of completion of the OW/OLEC Flow Chart describing Compliance/Enforcement procedures for the NPDES program and the Acting Administrator's recent decisions regarding delegation of enforcement authority, I wish to formalize the concurrence process between our two Offices regarding the pre-referral review of cases, consent decrees, settlement proposals and case withdrawals by OW.

Based on the Office of Waters' responsibility as national program manager for the Agency's water activities, pre-referral review of cases performed by my Office will focus on the following subject areas:

1. Does the case involve complex technical issues that would require resources and/or technical expertise beyond that available in the Region?

2. Does the case involve national policy issues important to the Office of Water?

3. Will the case set a precedent which may impact on national programs managed by the Office of Water?

4. Does the case conform to existing Office of Water policies and guidance with respect to the initiation of judicial actions?

CONCURRENCES

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Reviews which conform each of the four areas to be reviewed will be concurred on by the Director of the Enforcement Division. The Enforcement Division Director will also concur on those cases involving issues in one or more of the four specified areas of interest if the Enforcement Division Director is able to resolve the key issues after consultation with Enforcement Counsel and the initiating Region. If the Division Director is unable to resolve the problem(s), such cases will be escalated to the Office Director and to the Assistant Administrator, if necessary, for resolution of key issues and for concurrence or non-concurrence.

I have assigned overall responsibility for program review of pre-referral packages to Robert W. Zeller, Ph.D., Director, Enforcement Division. Reviews involving violations of sections 301 and 402 (NPDES) of the CWA will be assigned to David Lyons and his staff. Reviews involving sections 311 and 404 of the CWA, the SDWA, and the Marine Protection Research and Sanctuaries Act (MPRSA) will be assigned to Don Olson and his staff. The person assigned to review each case will complete a review check sheet (copy atached) which will document for the file the reviewer's rationale for recommending concurrence/non-concurrence with the request for referral.

I have instituted two procedural changes in my Office which will help to ensure timely responses to your requests for concurrence. First, I have requested that the Water Division Directors send copies of all referral requests to my Office. Several Regions are currently following this procedure. With this procedure in place, program reviews will proceed simultaneously with legal reviews, and in most instances, be completed prior to the drafting of the referral memorandum to DOJ. This procedure has the advantage that OW can provide technical input into the referral memo if requested by your staff. Second, I have instituted an internal tracking system which will allow my staff to pin-point exactly where any case is in the review and concurrence process. Copies of the pre-referral packages and OLEC requests for concurrence will be logged in and out through the Division Secretary, Judy Howell. I have established a time limit of five workdays for review of pre-referral packages and two days for response to OLEC concurrence requests.

I believe that these procedures will enable us to work closely with your Office in the timely review and referral to DOJ of requests by the Regions for the initiation of civil actions.

Attachments

EN-338:D.SHEDROFF:dtc:R3109M:x58731:2/4/83
re-write-OLSON:dc:4-1-83/re-write OLSON-SHEDROFF-6-17-83

Attachment A

Procedures for Program Review of
Judicial Referral Request
Office of Water Enforcement & Permits
Enforcement Division

1. Copies of pre-referral packages and concurrence documents will be logged in and date-stamped when received by the Division Secretary.

2. The logged documents will be delivered to Don Olson for distribution to the appropriate reviewer. NPDES related reviews will be conducted by the Compliance Branch, and Technical Evaluation and Support Section staff. Non-NPDES, SDWA and MPRSA reviews will be conducted by the Drinking Water and Special Enforcement Branch staff.

3. Program reviews will be completed using the review form and returned to Don Olson within five workdays unless additional information not contained in the package is required to complete the review.

4. If the reviewer uncovers any factual/policy issues that would cause OWEP to non-concur in the Region's request for referral to DOJ, the reviewer should document his/her reason for recommending non-concurrence on the review form or in a separate memorandum and immediately raise the matter to the Division Director's attention thru Don Olson.

5. Completed review sheets and pre-referral packages will be checked by Don Olson and held until the concurrence documents are received.

6. Don Olson will review the concurrence documents for consistency with the pre-referral package and any comments from the reviewer, initial the official file copy and forward the referral package to the Division Director for Program Office concurrence.

7. Any issues that can not be resolved by the Division Director should be immediately brought to the attention of OLEC - Water so that they are aware of OWEP's concerns and recognize that there may be a delay in the concurrence process.

Note: This entire review process should take no longer than seven workdays unless additional information is required or the matter contains issues that can not be resolved at the Division level.

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

8.1A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OCT 17 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Direct Referral

FROM: Richard H. Mays
Senior Enforcement Counsel

TO: Associate Enforcement Counsels

Attached is a letter of agreement between the Deputy Administrator, on behalf of EPA, and the Acting Assistant Attorney General for Land and Natural Resources, on behalf of the Department of Justice, regarding the referral of certain types of cases from the Regional Offices directly to the Department of Justice for a period of one year on an experimental basis.

You will note that this agreement does not go into effect until December 1, 1983, and that Courtney Price will distribute a memorandum within EPA explaining this agreement and how it will be implemented within the Agency. Courtney would like to have the assistance of each of you and your staffs in developing the guidance memorandum which will implement this agreement. Please review the agreement in your respective offices and submit any suggestions you may have for its implementation.

This office needs to closely monitor both the efficiency and the effectiveness of this method of handling referrals. Therefore, it is an important responsibility to assure that this guidance memorandum receives careful and thoughtful consideration. Please have your respective comments submitted to me by Wednesday, October 26, 1983 to enable us to prepare and distribute a guidance memorandum to the Regions well in advance of December 1, 1983.

Attachment

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

Return: O.S.

SEPT 29 1983

OFFICE OF THE ADMINISTRATOR

Honorable F. Henry Habicht, II
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Hank:

As a result of our meeting on Thursday, September 8, 1983 and the subsequent discussions of respective staffs, we are in agreement that, subject to the conditions set forth below, the classes of cases listed herein will be referred directly from EPA's Regional Offices to the Land and Natural Resources Division of the Department of Justice in Washington, D.C.

The terms, conditions and procedures to be followed in implementing this agreement are:

1. The Assistant Administrator for Enforcement and Compliance Monitoring will waive for a period of one year the requirement of the Assistant Administrator's prior concurrence for referral to the Department of Justice for the following classes of judicial enforcement cases:

   (a) Cases under Section 1414(b) of the Safe Drinking Water Act which involve violations of the National Interim Primary Drinking Water Regulations, such as reporting or monitoring violations, or maximum contaminant violations;

   (b) The following cases under the Clean Water Act:

      (i) cases involving discharges without a permit by industrial dischargers;

      (ii) all cases against minor industrial dischargers;

      (iii) cases involving failure to monitor or report by industrial dischargers;

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(iv) referrals to collect stipulated penalties from industrials under consent decrees;

(v) referrals to collect administrative spill penalti under Section 311(j) of the CWA;

(c) All cases under the Clean Air Act except the following:

(i) cases involving the steel industry;

(ii) cases involving non-ferrous smelters;

(iii) cases involving National Emissions Standards for Hazardous Air Pollutants;

(iv) cases involving the post-1982 enforcement policy.

2. Cases described in Section 1, above, shall be referred directly from the Regional Administrator to the Land and Natural Resources Division of DOJ in the following manner:

(a) The referral package shall be forwarded to the Assistant Attorney General for Land and Natural Resources, U.S. Department of Justice (DOJ), with copies of the package being simultaneously forwarded to the U.S. Attorney (USA) for the appropriate judicial district in which the proposed case is to be filed (marked "advance copy-no action required at this time"), and the Assistant Administrator for Enforcement and Compliance Monitoring (OECM) at EPA Headquarters. OECM shall have the following functions with regard to said referral package:

(i) OECM shall have <u>no responsibility</u> for review of such referral packages, and the referral shall be effective as of the date of receipt of the package by DOJ; however, OECM shall comment to the Region upon any apparent shortcomings or defects which it may observe in the package. DOJ may, of course, continue to consult with OECM on such referrals. Otherwise, OECM shall be responsible only for <u>routine oversight</u> of the progress and management of the case consistent with applicable present and future guidance. OECM shall, however, retain final authority <u>to approve settlements on behalf of EPA</u> for these cases, as in other cases.

(ii) The referral package shall be in the format and contain information provided by guidance memoranda as may be promulgated from time to time by OECM in consultation with DOJ and Regional representatives.

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(iii) DOJ shall, within 30 days from receipt of the referral package, determine (1) whether the Lands Division of DOJ will have lead responsibility for the case; or (2) whether the USA will have lead responsibility for the case.

While it is agreed that to the extent feasible, cases in which the USA will have the lead will be transmitted to the USA for filing and handling within this 30-day period, if DOJ determines that the case requires additional legal or factual development at DOJ prior to referring the matter to the USA, the case may be returned to the Regional Office, or may be retained at the Lands Division of DOJ for further development, including requesting additional information from the Regional Office. In any event, DOJ will notify the Regional Office, OECM and the USA of its determination of the lead role within the above-mentioned 30-day period.

(iv) Regardless of whether DOJ or the USA is determined to have lead responsibility for management of the case, the procedures and time limitations set forth in the MOU and 28 CFR §0.65 et seq., shall remain in effect and shall run concurrently with the management determinations made pursuant to this agreement.

3. (a) All other cases not specifically described in paragraph 1, above, which the Regional Offices propose for judicial enforcement shall first be forwarded to OECM and the appropriate Headquarters program office for review. A copy of the referral package shall be forwarded simultaneously by the Regional Office to the Lands Division of DOJ and to the USA for the appropriate judicial district, the USA's copy being marked "advance copy-no action required at this time."

(b) OECM shall review the referral package within twenty-one (21) calendar days of the date of receipt of said package from the Regional Administrator and shall, within said time period, make a determination of whether the case should be (a) formally referred to DOJ, (b) returned to the Regional Administrator for any additional development which may be required; or (c) whether the Regional Administrator should be requested to provide any additional material or information which may be required to satisfy the necessary and essential legal and factual requirements for that type of case.

(c) Any request for information, or return of the case to the Region shall be transmitted by appropriate letter or memorandum signed by the AA for OECM (or her designee) within the aforementioned twenty-one day period. Should OECM concur in the proposed referral of the case to DOJ the actual referral shall be by letter from the AA for OECM (or her designee) signed within fourteen days of the termination of the aforementioned twenty-one day review period. Copies of the letters referred to herein shall be sent to the Assistant Attorney General for the Lands Division of DOJ.

(d) Upon receipt of the referral package by DOJ, the procedures and time deadlines set forth in paragraph No. 8 of the MOU shall apply.

In order to allow sufficient time prior to implementation of this agreement to make the U.S. Attorneys, the Regional Offices and our staffs aware of these provisions, it is agreed that this agreement shall become effective December 1, 1983. Courtney Price will distribute a memorandum within EPA explaining this agreement and how it will be implemented within the Agency. (You will receive a copy.)

I believe that this agreement will eliminate the necessity of formally amending the Memorandum of Understanding between our respective agencies, and will provide necessary experience to ascertain whether these procedures will result in significant savings of time and resources. In that regard, I have asked Courtney to establish criteria for measuring the efficacy of this agreement during the one year trial period, and I ask that you cooperate with her in providing such reasonable and necessary information as she may request of you in making that determination. At the end of the trial period--or at any time in the interval--we may propose such adjustments in the procedures set forth herein as may be appropriate based on experience of all parties.

It is further understood that it is the mutual desire of the Agency and DOJ that cases be referred to the USA for filing as expeditiously as possible.

I appreciate your cooperation in arriving at this agreement. If this meets with your approval, please sign the enclosed copy in the space indicated below and return the copy to me for our files.

Sincerely yours,

Alvin L. Alm

Alvin L. Alm
Deputy Administrator

Approved:

F. Henry Habicht, II
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

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

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

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

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

MAR 8 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Headquarters Review and Tracking of Civil Referrals

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

TO: Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Associate Enforcement Counsels

The Office of Enforcement and Compliance Monitoring is committed to working cooperatively with Regional Offices to track civil enforcement litigation and to generally improve management of EPA's enforcement litigation. The following procedures provide for expedited handling of case referrals which continue to be reviewed by Headquarters and for oversight of "direct" case referrals. They also clarify roles in the management of various classes of judicial actions. This guidance supplements and, where inconsistent, supersedes previous guidance on review and tracking of civil referrals.

I. CLASSIFICATION OF REFERRALS

Four distinct classes of cases have evolved in the Agency's civil judicial enforcement program. Those classes of cases and roles in handling each class may be described as follows:

Class I: Nationally managed cases involving highly significant and precedential issues of major importance in the particular program, or involving activities in more than one Region. The lead legal and/or technical responsibilities in such cases usually rest in Headquarters, with assistance from the Regional office(s).

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Class II: Cases involving issues of significance which may be unique or precedential, or which are important to establish or further Agency enforcement goals. The lead legal and technical responsibilities in such cases usually rest in the Regional offices, with substantial assistance and oversight from Headquarters.

Class III: Cases which are significant and important to Agency enforcement goals, but which are not likely to raise issues which are unique or precedential. The lead legal and technical responsibilities in such cases rest in the Regional offices. Headquarters involvement will be limited to general oversight to ensure that Agency policies are followed and that cases are being prosecuted in an expeditious manner. Routine communications should take place directly between Regional attorney staff and the Department of Justice or U.S. Attorneys.

Class IV: Cases which may be referred directly from the Regions to Department of Justice (DOJ) Headquarters pursuant to the September 29, 1983 letter agreement between Alvin L. Alm for EPA and F. Henry Habicht, II for DOJ (copy attached). Direct referrals are presently authorized for the more routine cases in the Air and Water programs. Headquarters attorney involvement in those cases will be limited to summary review and oversight as described herein. Routine communications should take place between Regional Attorney Staff and DOJ or U.S. Attorneys.

The classes of cases which fall within the Class IV are set forth with specificity in the letter agreement between Alvin Alm and F. Henry Habicht, II dated September 29, 1983. For all other cases, the initial determination of category and lead responsibilities will be made by the Regional Administrator at the time the referral package is forwarded to Headquarters for review. That determination should be included as a part of the cover memorandum accompanying and summarizing the referral package. Unless the Associate Enforcement Counsel for the appropriate OECM division disagrees, the case will be handled accordingly. Should the Associate Enforcement Counsel believe that the case has been miscategorized, he or she should consult with the Regional Administrator or the designated Regional enforcement contact

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regarding the classification of the case or decision on lead responsibilities. The Associate will also notify the Regional Counsel of the issue. If agreement cannot be achieved, I will determine the appropriate classification and lead responsibilities after consultation with all relevant parties within the Agency.

After the initial classification of a case, facts may develop or issues arise which will justify a reclassification. Either the Associate Enforcement Counsel or the Regional Administrator (or the designated Regional enforcement contact person) may suggest reclassification of a case or modification of lead responsibilities. The decision on reclassification will be made as described above for original classification.

II. EVALUATION OF DIRECT REFERRALS

On December 1, 1983 we started a one year trial period for direct referral of certain types of enforcement litigation to the Department of Justice. The types of civil enforcement cases for which I have waived the requirement of concurrence are listed in a September 29, 1983 letter from Alvin L. Alm to F. Henry Habicht, II (copy attached). Procedures for implementing the direct referral process were detailed in a November 28, 1983, memorandum I addressed to Regional Administrators, Regional Counsels and Headquarters staff (copy attached). As a point of clarification, it is my intent that contempt actions may also be handled as direct referrals if the original case would meet the current criteria for direct referral.

Headquarters will review and evaluate the information copy required to be furnished to EPA Headquarters when each direct referral is sent to the Department of Justice. Associate Enforcement Counsels for the programs where direct referrals are utilized will prepare checklists which, at a minimum, provide for review of the following criteria:

A. Appropriateness of direct referral

The case should be clearly within one of the categories enumerated in the September 29, 1983, letter from Alvin Alm to F. Henry Habicht, II for which direct referral may be used. Contempt actions in cases which fit the direct referral categories may also be handled through direct referral procedures.

B. Format of the cover memorandum

The referral package should include the Case Data and Facility Data forms and a cover memorandum which identifies and discusses at least the following subjects: nature of the case, cause of action, proposed remedy, issues of national or precedential significance, description of consultation for case development (including names of Headquarters and DOJ attorneys contacted), identification of Regional contact persons, and basis for treating case as a direct referral.

C. Substantive adequacy of direct referrals

Each direct referral package should contain the following elements:

1. An adequate cause of action;

2. Description of evidence sufficient to prove the violations (copies of documentary evidence should be attached, if possible, and the person(s) with custody of all evidence should be identified);

3. Evaluation of potential defendants and a discussion of why the named defendants were selected;

4. Discussion of State involvement in efforts to resolve the violations;

5. Evaluation of potential defenses and how they can be refuted;

6. Evaluation of issues of precedential significance in the case, including a discussion about how the positions proposed by the Regional Office are consistent with law and national policy;

7. Description of the environmental harm to be remedied or other reasons which justify prosecution of the case at the time of referral;

8. Description of the remedy to be sought or the specific discovery required to establish a remedy in the case;

9. Discussion of penalties to be sought (a) if the case proceeds to trial and (b) as an initial settlement position; and

10. Description of attempts made to settle the case, problems encountered in settlement discussions, and the date of the last contact with the source owner or other potential defendant.

Within 30 calendar days after receiving the information copy of a direct referral the Associate Enforcement Counsel will send a copy of the completed checklist to the Regional Office, maintaining a file copy to serve as a basis for periodic evaluation.

If a case which is not within the category for direct referral is erroneously sent through the direct referral process, the Associate Enforcement Counsel will prepare a response ranging from a simple notice to the Region indicating why the direct referral was erroneous to a withdrawal from the Department of Justice. If a case which should have been directly referred to the Department of Justice is erroneously sent to Headquarters for concurrence, the Associate will, after consultation with the Region, forward it to the Department of Justice as a direct referral. A copy of the memorandum forwarding the case to the Department of Justice will be sent to the Region.

III. TRACKING ALL REFERRALS IN THE COMPUTER DOCKET

All civil cases must be entered and tracked in the Enforcement Docket System. Guidance on responsibilities for docket procedures is contained in memoranda dated April 21, 1983, November 23, 1983, and November 28, 1983 (copies attached). The following docket guidance supplements and, where inconsistent, supersedes those memoranda.

Each Regional attorney has primary responsibility for updating all of his or her active cases as part of the monthly update procedures. Headquarters attorneys will also continue to provide information to the system. Case Status Update reports will be sent on or about the first of each month to the Regional Docket Control or Regional Coordinator for distribution to the responsible Regional attorneys. By the 10th of each month, the Regional attorney must see that an update is submitted to the Regional data analyst (if the Region has one) or is mailed to Headquarters Docket Control, Bruce Rothrock (LE-130A).

As with all referrals, an information copy of direct referrals must be sent to Headquarters, directed to my attention, and must include completed Case Data and Facility Data Forms (copies of those forms are attached). The Correspondence Control Unit (CCU) will route the package to the appropriate

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OECM division, and will give the Case Data Form, the Facility Data Form, and a copy of the cover letter referral memorandum to Headquarters Docket Control for entry of the case into the Docket System. Regions with Regional Docket Control should give copies of the Case and Facility Data Forms and the referral memorandum directly to regional data analyst for entry into the system. Failure to attach those forms may result in the cases not being entered in the Docket System, and the Region not receiving credit for the case at the time of referral.

Copies of direct referral packages are to be sent simultaneously to the Department of Justice and EPA Headquarters. The "Date to EPA Headquarters" and the "Date Referred to DOJ" shown in the Case Docket System will be the date on the cover letter from the Regional Administrator. The System is being modified so that direct referrals will be identified and can be separately retrieved from the System. A new event for "Date Received EPA HQ" will also be added. This event will be used as an approximate date when the Land and Natural Resources Division, Department of Justice, receives the referral package and, consequently, when the thirty day clock begins to run for determining whether Headquarters DOJ or the U.S. Attorney will have the lead litigation responsibilities as provided in the September 29, 1983 letter agreement between Alvin Alm and Henry Habicht, II.

IV. REFERRALS REQUIRING CONCURRENCE

The review criteria for direct referrals contained in this memorandum also apply to cases which require Headquarters concurrence. Rather than incorporating the results of review in a file checklist, however, the results will be incorporated in the memorandum that Associates prepare for me recommending whether to refer the case to the Department of Justice or return the case to the Region. A copy of the memorandum will be sent to the Region. If the case represents a type that should be considered for direct referral in the future, the memorandum addressed to me should so indicate.

All settlements require Headquarters concurrence. Thus, referrals which include a consent decree to be filed with the complaint require Headquarters concurrence. Such referrals should contain the following elements:

1. A clear statement of a cause of action;

2. Identification and discussion of any issues of national significance;

3. Analysis justifying proposed penalties in terms of applicable penalty policies; and

4. An enforceable consent decree which (a) resolves the violation, (b) is in accordance with requirements of applicable statutes, regulations and policies and (c) includes an appropriate termination date or specifies some other process for concluding the court's jurisdiction. See "Guidance for Drafting Judicial Consent Decrees" (GM-17) issued October 19, 1983 for a complete description of consent decree requirements.

V. MANAGING THE CIVIL ENFORCEMENT DOCKET

Involvement by the Associate Enforcement Counsels in all cases, including those that do and do not require Headquarters concurrence, will provide a basis for developing national expertise and will identify areas where national guidance is needed. In addition it will prepare us to respond quickly when settlement proposals are submitted for approval. We must ensure that litigation is expeditiously prosecuted, that national policies are implemented and that statutory requirements are scrupulously observed. Whenever Headquarters identifies a problem, the Associate Enforcement Counsel should communicate with the Regional Counsel and Department of Justice. Where quick resolution cannot be informally achieved, the Associate should communicate in writing on the subject to the Regional Office and Department of Justice and place a copy of the memo in the Headquarters case file. I rely on the judgment of each Associate as to when a matter is of sufficient importance that it should be called to my attention.

The Associate Enforcement Counsels will monitor the activities of the Regions and the Department of Justice to make sure that all cases are vigorously prosecuted after referral. Extensive informal discussions and efforts at voluntary resolution normally occur prior to referral. We should move forward resolutely when litigation is required. Settlement discussions may, of course, proceed on a parallel track, but they generally should not result in suspension of litigation activities. My November 28, 1983 memorandum describing procedures for implementation of direct referrals specifically requires that I concur in any delay after a case has been referred to the Department of Justice. Whether

or not the case was directly referred, the Associates shoul identify and call to my attention any instance where the government has caused or agreed to delay in the filing or prosecution of any case without my consent.

The Associate Enforcement Counsels will use the computerized enforcement docket and other available information to monitor the overall litigation effort. In addition, they and their staffs will make periodic visits to Regional offices to fulfill this office's oversight role. Unless action is required to ensure that an Agency policy or a legal requirement is followed, or that a case is prosecuted expeditiously, this office will not interject itself into individual Class III or Class IV cases. Headquarters attorneys may, at the request of a Regional office to the Associate Enforcement Counsel, provide assistance, consistent with resource availability and other priorities.

My November 28, 1983 memorandum on direct referrals indicates that Regional offices should obtain Headquarters approval for settlement proposals before they are forwarded to the defendant. This procedure should apply to to all cases whether or not they were directly reffered. Each Associate Enforcement Counsel is authorized to approve settlements at this stage, using his or her judgment whether to confer with me on critical issues before agreeing to a proposal. The Associate will make sure the settlement meets the criteria set forth above for consent decrees, complies with all applicable policies and laws, and is consistent with national program objectives. I must approve all final settlements before they are filed in court.

Attachments

cc: Office Directors, OECM

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

March 19, 1984

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Delegation of Authorities to the Deputy Administrator

TO: Assistant Administrators
General Counsel
Inspector General
Associate Administrators
Regional Administrators
Staff Office Directors

In the interest of streamlining our management of the Agency, I have today delegated to the Deputy Administrator the authority to take certain actions relating to internal agency management and organization or routine regulatory matters. This delegation will be added to the EPA Delegations Manual which is currently under revision.

This action is designed to relieve me of the burden of acting on the volume of internal management decisions and other relatively routine or pro forma signature items. As experience suggests additional areas in which signature by the Deputy Administrator may improve our management performance, I will expand the scope of the current delegation. Beginning immediately, decision documents addressing the following matters should be prepared for Mr. Alm's signature:

-- Agency reorganizations;

-- Agency directives and internal delegations of authority;

-- Advisory Board letters and charter actions

-- Approval of Advance Treatment projects; and

-- Concurrence in modifications of State Plans under the Coal Mine Safety and Reclamation Act as petitioned by the Department of the Interior.

William D. Ruckelshaus

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

MAR 13 1984

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

MEMORANDUM

SUBJECT: General Delegation of Authority -- ACTION MEMORANDUM

FROM: Howard M. Messner Howard
Assistant Adminstrator

TO: The Administrator

THRU: AX
The Deputy Administrator AA

ISSUE

To allow the Deputy Administrator to exercise, at any time, certain delegable authorities of the Administrator.

BACKGROUND

Reorganization Plan No. 3 of 1970 states that, "The Deputy Administrator shall perform such functions as the Administrator shall assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator."

As a part of our analysis of the Agency's current delegations of authorities, my staff has identified a number of opportunities to streamline Agency action by delegating signature authority to the Deputy Administrator. Generally speaking, these matters involve routine administrative decisions, minor regulatory actions, and matters of internal management and organization. Examples of such actions include:

- Advisory Board letters and charter actions;
- Agency reorganizations;
- Agency directives and internal delegations;

- Approval of Advanced Treatment projects; and

- Concurrences in modifications of State Plans under the Coal Mine Safety and Reclamation Act as petitioned by the Department of the Interior.

The efficiencies associated with delegating signature authority to the Deputy Administrator could be obtained by two means. On one hand, you could delegate authority to act in these specific areas set forth in a narrowly-prescribed delegation. On the other hand, the delegation could be broadly drafted to authorize the Deputy Administrator to perform any act not statutorily required to be performed by the Administrator.

While our analysis favors the use of as broad a delegation as possible, the General Counsel has made the point that delegation language which is too general could cause confusion and possibly conflict with other delegations as published. Within the context of the attached delegation, you and the Deputy would determine those actions you wish the Deputy to take without prior consultation with you, and we would publish those in the delegation. As experience suggests additional areas in which you wish the Deputy to act, he could be delegated such actions by amending this single delegation.

The attached delegation authorizes the Deputy to exercise certain authorities not reserved to the Administrator by statute. It would give the Deputy full authority to act on your behalf at any time. This is designed to relieve you of the burden of signing or otherwise approving a volume of internal management actions or relatively routine, pro forma signature items. This delegation will become the initial delegation in the EPA Delegations Manual which is currently undergoing a major revision.

RECOMMENDATIONS

I recommend you indicate your approval of Delegation 1-1 by signing below.

Attachment

Approve: William D. Ruckelshaus

Date: 3/15

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GENERAL, ADMINISTRATIVE AND MISCELLANEOUS

1-1. GENERAL DELEGATION

1. AUTHORITY. To exercise certain delegable authorities of the Administrator including, but not limited to the following:

a. signature of Advisory Board letters and charter actions;

b. approval of internal Agency reorganizations;

c. approval of Agency directives and internal delegations of authority;

d. decisions on Advanced Treatment (AT) projects; and

e. concurrences in modifications of State Plans under the Coal Mine Safety and Reclamation Act as petitioned by the Department of Interior.

2. TO WHOM DELEGATED. The Deputy Administrator.

3. REDELEGATION. This authority may be redelegated with the concurrence of the Administrator.

4. ADDITIONAL REFERENCES. This delegation does not supersede any other delegation in this Manual. Delegation of other specific authorities will be documented in revisions of this delegation.

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

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

MAR 20 1984

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Races to the Courthouse

FROM: The Administrator William D. Ruckelshaus

TO: Assistant Administrators
Office Directors
Chief Judicial Officer

When EPA takes regulatory action, it is frequently sued. Many of the statutes governing our Agency provide for such suits to be filed only in one court, generally the United States Court of Appeals for the District of Columbia Circuit. However, a number of the statutes under which we operate allow the Agency to be sued in any United States Court of Appeals. This has led some litigants to sue in the court of appeals they believe will be most likely to rule in their favor, a practice known as forum shopping.

A federal statute, 28 U.S.C. 2112(a), requires all lawsuits filed against a federal agency in courts of appeals to be transferred to the court of appeals in which the first suit was filed. That court may then transfer all the suits to another court of appeals, but may, in its discretion, decide all the cases itself. This statute has led some forum shoppers to seek to be the first to file a lawsuit in the court of their choice. This practice is known as racing to the courthouse. Racers have adopted such measures as stationing staff members for months in government offices waiting for an action to be announced, maintaining open long distance telephone lines to distant courthouses, and establishing lengthy human signalling chains to let lawyers know when to file petitions for review.

EPA actions under the Clean Water Act are currently subject to rules (40 CFR Part 100) that eliminate the most abusive aspects of races to the courthouse by setting the date of agency action for judicial review purposes at two weeks after the date of publication in the Federal Register.

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However, races to the courthouse are possible under other EPA-administered statutes. Races were recently run to file lawsuits against two EPA regulatory actions under the Uranium Mill Tailings Radiation Control Act and the Federal Insecticide, Fungicide, and Rodenticide Act. The races resulted in interference with EPA work and in unnecessary litigation. Soon I expect to propose rules that will eliminate some of the abusive practices associated with such races. The rules, if adopted, will set the time and date of a number of EPA actions, for purposes of judicial review, two weeks or more after the action is signed or, for rules and similar actions, published in the Federal Register. In the meantime, I am asking each of you to take the following steps to prevent races on regulatory actions that are taken before these rules are adopted.

Rulemaking and Related Actions. In all final rules and related actions listed in Attachment A, include the following statement in the "DATES" section of the preamble to the final rule:

> These regulations shall be promulgated for purposes of judicial review at 1:00 p.m. eastern time on [two weeks after the date of publication in the Federal Register].

The bracketed material will be deleted by the Office of the Federal Register and the actual date substituted. The effective date should be changed to reflect this delay in promulgation. Most rules should be made effective 60 days after promulgation. In these cases, the following language should also appear in the "DATES" section:

> These regulations shall become effective on [74 days after the date of publication in the Federal Register].

Inclusion of an action in Attachment A does not constitute an Agency opinion that it is rulemaking for purposes of the Administrative Procedure Act.

Adjudication. All final orders in adjudications listed in Attachment B should include the following language:

> For purposes of judicial review, the date of issuance or entry of this order shall be fourteen days after the date it is signed.

Exceptions. The General Counsel, or the Judicial Officer, may shorten the deferral period or waive these requirements when special circumstances, such as the need to comply with a statutory or court-ordered deadline, so require.

Attachment A

Rulemaking and Related Actions

Clean Water Act

Apply the requirements of 40 C.F.R. Part 100.

Resource Conservation and Recovery Act

Authorization and interim authorization of state Hazardous Waste Management programs.

Toxic Substances Control Act

All final rules.

Safe Drinking Water Act

All final direct federal implementation underground injection control programs.

Approval or disapproval of state-submitted underground injection control programs.

Final agency action on petitions for designation of aquifers under Section 1424(e).

Uranium Mill Tailings Radiation Control Act

All final rules.

Atomic Energy Act

All final rules.

Federal Food, Drug, and Cosmetic Act

All final rules.

Attachment B

Adjudications

Clean Water Act

Decisions on appeal to the Administrator under 40 C.F.R. §§124.91 or 124.125.

Resource Conservation and Recovery Act

Final decisions on EPA-issued or denied permits for hazardous waste management facilities.

Federal Insecticide, Fungicide, and Rodenticide Act

Final orders following a public hearing in pesticide cancellation or suspension proceedings.

Safe Drinking Water Act

Decisions on applications for variances or exemptions under Sections 1415 or 1416

Federal Food, Drug, and Cosmetic Act

Final decisions on pesticides tolerances that are reviewable under 21 U.S.C. 346a(i) or 348(g).

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

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

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

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

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

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

SEP 11 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Direct Referrals Clean Water Act - "No Permit" Cases

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring (LE-133)

TO: Henry L. Longest, II
Acting Assistant Administrator for Water (WH-556)

Regional Administrators

Regional Counsels

Tom Gallagher, Director
National Enforcement Investigation Center

Assistant Attorney General, F. Henry Habicht has recently requested that all Clean Water Act "no permit" cases be carefully evaluated for possible criminal prosecution. As Henry Habicht explains, the permit requirement has been in effect for 14 years; thus, it is highly unlikely that dischargers would be unaware of the statute, and likely that any discharge without a permit might be the result of a willful act. Furthermore, the permit requirement is central to EPA's Water program.

I therefore am recommending that you implement the following procedures to address his concerns.

1. The Regional Water Division Director in consultation with the Regional Criminal Attorney and the Special/Resident-Agent-in-charge, should carefully scrutinize all "no permit" Clean Water Act cases for potential criminal action prior to their referral for civil action.

2. If they decide to bring a criminal enforcement action, the case will be developed and referred as provided in the General Operating Procedures for Criminal Enforcement.

9/23/85

3. If, however, it is decided not to proceed with a criminal prosecution, then that particular "no permit" case will be directly referred for civil action to the Department of Justice in accordance with existing procedures.

These procedures will take effect on October 1, 1985. If there are any questions, please contact Randall Lutz, Director, Office of Criminal Enforcement. He may be reached at FTS 557-7410; E-Mail Box EPA 2372.

Attachment

cc: Glenn Unterberger
Terrell Hunt
Randall M. Lutz

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"Direct Referrals", dated August 28, 1986.

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

AUG 28 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Honorable F. Henry Habicht, II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Direct Referrals

Dear Hank:

During the past year OECM has been holding discussions with the Headquarters program offices and with the 10 Regional Counsels on how to improve and expand the direct referral program, wherein certain cases are referred directly from the Regional Administrator to your office. Because the program is working well, the consensus of the Associate Enforcement Counsels, the program compliance division directors and the Regional Counsels is to expand the classes of cases subject to direct referral. We have also consulted with members of your staff and understand that they acquiesce in this concept insofar as the classes of cases set forth herein are concerned.

This letter, when signed by you, will serve as an amendment to our September 29, 1983, agreement which set forth the conditions of the initial direct referral pilot project. It will also amend the June 15, 1977, Memorandum of Understanding between our respective Agencies.

The following 8 classes of cases will be added to the direct referral program:

1. All collection actions in which the relief requested is solely for unpaid administratively or judicially assessed penalties under any statute, except for actions to assess penalties under CERCLA and cases where there is little prior experience in civil judicial enforcement (i.e., the Ocean Dumping Act, underground injection control regulation under RCRA/SDWA, Clean Air Act NESHAPs other than vinyl chloride and asbestos).

2. All actions in which the only relief sought is contempt for violation of any consent decree or other enforceable order, and/or to enforce the terms of any consent decree or other enforceable order.[1] The preceding types of actions against governmental entities shall continue to be referred to OECM.

3. Clean Air Act cases involving asbestos and vinyl chloride National Emissions Standards for Hazardous Air Pollutants.

4. All Clean Air Act post-1982 state cases except those involving steel producers, smelters, and lead sources. [2]

5. All Clean Water Act cases involving NPDES permit violations by industrial dischargers, except those involving violations relating to or determined by biological methods or techniques measuring effluent toxicity.

6. All judicial actions alleging interim status violations under RCRA §3008(a) except cases involving loss of interim status or closure. This authority will take effect in each Region upon the successful referral by the Region of two cases in order to demonstrate the requisite experience. This authority does not include corrective action cases under §3008(h).

7. All RCRA judicial actions seeking penalties only, except for underground injection control regulation cases.

8. All actions to enforce final federal orders issued under RCRA §3008(a). This authority will take effect in each Region upon the successful referral by the Region of two cases in order to demonstrate the requisite experience.

We will add these expansion cases to the 5 classes of cases currently included in the direct referral program listed below:

1/ All modifications of consent decrees which result from any action (direct referral) in this paragraph shall continue to require OECM approval and program office approval, where appropriate, prior to submission to DOJ for entry by the court.

2/ OECM approval will also be required when major changes are made to SIPs due to a future change in the related NAAQS.

1. Cases under Section 1414(b) of the Safe Drinking Water Act which involve violations of the National Interim Primary Drinking Water Regulations, such as reporting or monitoring violations or maximum contaminant violations. (Note: This category does not include any causes of action under section 1414(b) established by the SDWA Amendments of 1986.)

2. The following cases under the Clean Water Act:

   a. cases involving discharges without a permit by industrial dischargers;

   b. all cases against minor industrial dischargers;

   c. cases involving failure to monitor or report by industrial dischargers;

   d. referrals to collect stipulated penalties from industrials under consent decrees;

   e. referrals to collect administrative spill penalties under Section 311(j) of the CWA.

3. All stationary source cases under the Clean Air Act except the following:

   a. cases involving the steel industry;

   b. cases involving nonferrous smelters;

   c. cases involving NESHAPs;

   d. post - 1982 date cases.

4. All TSCA & FIFRA collection actions for unpaid administratively assessed penalties.

5. All mobile source tampering and fuels cases (except governmental entity cases) arising under the Clean Air Act, Sections 203 and 211 respectively.

OECM will continue to play a substantive role in these cases, especially in view of the increased size of the Agency's case load and the need to ensure that our cases reflect the Agency's priorities. OECM and DOJ will simultaneously review these referrals.

Within 35 days of receipt of a copy of the direct referral package, the appropriate AEC will comment on the merits of the referral to DOJ and to the originating regional office. He may ask the Assistant Administrator of OECM to recommend to DOJ

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that the case be further developed before filing or returned to the regional office. OECM will also continue to oversee the progress and development of these direct referral cases and will continue to approve all judicial settlements on behalf of EPA. All other agreed-upon conditions and procedures regarding direct referrals and case management will remain in effect.

In order to allow sufficient time prior to implementation of the expansion and to make the U.S. Attorneys, the regional offices and our staffs aware of its provisions, it is agreed that this agreement shall become effective for cases referred from a Region on or after September 2, 1986. I will distribute a memorandum to the Regions, the Headquarters program offices and within OECM explaining the expansion and how it will be implemented.

I appreciate your cooperation in arriving at this amendment to our agreement. If this direct referral case expansion meets with your approval, please sign in the space provided below and return a copy of the letter to me for our files.

Sincerely,

Thomas L. Adams, Jr.
Assistant Administrator

Approved:

F. Henry Habicht, II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

cc: Richard H. Mays
Senior Enforcement Counsel

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

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

AUG 28 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Expanded Civil Judicial Referral Procedures

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Regional Administrators
Program Office Enforcement Division Directors

Purpose

The purpose of this memorandum is to provide guidance on several issues regarding the procedures by which the Agency refers civil judicial referrals to the Department of Justice (DOJ). They are as follows: 1) expansion of the current direct referral program, 2) pre-referral negotiations, 3) hold action requests to DOJ for referred cases, and 4) filing proofs of claim in bankruptcy by regional attorneys.

Expansion of Direct Referral Program

Last summer the Direct Referral Program[1/] was expanded to include, in the second year of operation, all TSCA and FIFRA

1/ As used here the term "direct referral" denotes case referrals sent directly from the Regional Administrators to the Assistant Attorney General for Land and Natural Resources of the Department of Justice, with simultaneous review by OECM and DOJ. The current DOJ address for direct referrals is: U.S. Department of Justice, Environmental Enforcement Section, Box 7415, Ben Franklin Station, Washington, D.C. 20044, or, if express delivery is used, U.S. Department of Justice, Land and Natural Resources Division, Environmental Enforcement Section, Room 1521, 9th. St. and Pennsylvania Ave, N.W., Washington, D.C. 20530.

collection actions and all non-governmental mobile source tampering and fuels cases. That expansion has been successful in helping to expedite the judicial referral process. Effective for cases referred on or after September 2, 1986, OECM with DOJ encouragement is further expanding the categories of direct referrals by adding the following 8 classes of cases (see attached copy of my letter of August 28, 1986, to F. Henry Habicht, Assistant Attorney General for Land and Natural Resources):

1. All collection actions in which the relief requested is solely for unpaid administratively or judicially assessed penalties under any statute, except for actions to assess penalties under CERCLA and cases where there is little prior experience in civil judicial enforcement (i.e., the Ocean Dumping Act, underground injection control regulation under RCRA/SDWA, Clean Air Act NESHAPs other than vinyl chloride and asbestos).

2. All actions in which the only relief sought is contempt for violation of any consent decree or other enforceable order, and/or to enforce the terms of any consent decree or other enforceable order.2/ The preceding types of actions against governmental entities shall continue to be referred to OECM.

3. Clean Air Act cases involving asbestos and vinyl chloride National Emissions Standards for Hazardous Air Pollutants.

4. All Clean Air Act post-1982 date cases except those involving steel producers, smelters and lead sources.3/

5. All Clean Water Act cases involving NPDES permit violations by industrial dischargers, except those involving violations relating to or determined by biological methods or techniques measuring effluent toxicity.

6. All judicial actions alleging interim status violations under RCRA §3008(a) except cases involving

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2/ All modifications of consent decrees which result from any action (direct referral) in this paragraph shall continue to require OECM approval and program office approval, where appropriate, prior to submission to DOJ for entry by the court.

3/ OECM approval will also be required when major changes are made to SIPs due to a future change in the related NAAQS.

loss of interim status or closure. This authority will take effect in each Region upon the successful referral by the Region of two cases in order to demonstrate the requisite experience. This authority does not include corrective action cases under 3008(h).

7. All RCRA judicial actions seeking penalties only, except for underground injection control regulation cases.

8. All actions to enforce final federal orders issued under RCRA §3008(a). This authority will take effect in each Region upon the successful referral by the Region of two cases in order to demonstrate the requisite experience.

We will add these expansion cases to the 5 classes of cases currently included in the direct referral program listed below:

1. Cases under Section 1414(b) of the Safe Drinking Water Act which involve violations of the National Interim Primary Drinking Water Regulations, such as reporting or monitoring violations or maximum contaminant violations. (Note: This category does not include any causes of action under Section 1414(b) established by the SDWA Amendments of 1986.)

2. The following cases under the Clean Water Act:

   a. cases involving discharges without a permit by industrial dischargers;

   b. all cases against minor industrial dischargers;

   c. cases involving failure to monitor or report by industrial dischargers;

   d. referrals to collect stipulated penalties from industrials under consent decrees;

   e. referrals to collect administrative spill penalties under Section 311(j) of the CWA.

3. All stationary source cases under the Clean Air Act except the following:

   a. cases involving the steel industry;

   b. cases involving non-ferrous smelters;

   c. cases involving NESHAPs;

d. post - 1982 date cases.

4. All TSCA & FIFRA collection actions for unpaid administratively assessed penalties.[4]

5. All mobile source tampering and fuels cases (except governmental entity cases) arising under the Clean Air Act, sections 203 and 211 respectively.

Attached for your convenience in Appendix A is a list of all cases now covered under the direct referral program.

OECM will continue to play a substantive role in these cases, especially in view of the increased size of the Agency's case load and the need to ensure that our cases reflect the Agency's priorities. The Regions should continue to send copies of the case referral reports directly to OECM, and where appropriate, to the program office for review. OECM and DOJ will concurrently review these referrals. Within 35 days of receipt of a copy of the direct referral package, the appropriate AEC will comment on the merits of the referral to DOJ and to the originating regional office. He may ask the Assistant Administrator of OECM to recommend to DOJ that the case be further developed before filing or returned to the regional office. OECM will also continue to oversee the progress and development of these direct referral cases. It should be noted that in all direct referral cases, as with all other enforcement cases, the Regions still must coordinate settlement terms with Headquarters and submit consent decrees to OECM for review and approval. (See memorandum of November 28, 1983, entitled, "Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983" at page 5 (GM-18).) All other existing policies and procedures regarding direct referrals and case management will remain in effect.

Pre-referral Negotiations

OECM has concluded that Headquarters should not establish mandatory requirements for pre-referral negotiations. Nevertheless, use by the Regions of pre-referral negotiations, when and where appropriate, is to be encouraged by the Regional Counsels. Also note that the Regions should continue to follow current applicable guidance set forth in Frederick F. Stiehl's July 30, 1985, memorandum entitled "Preparation of Hazardous Waste Referrals" wherein pre-referral negotiations for hazardous waste cases are discussed. In addition, refer to the

4/ This class is now included in actions for unpaid administratively or judicially assessed penalties arising under any statute. See expansion category number 1 above.

memorandum entitled "Enforcement Settlement Negotiations," GM-39, dated May 22, 1985, which requires AEC review of draft consent decrees before they are sent to the defendant. Draft consent decrees must be reviewed by an Assistant Chief or senior lawyer in the DOJ Environmental Enforcement Section before they are sent to the defendant.

"Hold Action" Requests

With a more decentralized management of the Agency's enforcement program, greater responsibility is placed on the regional offices to develop and manage cases, particularly in the pre-referral stage. The Regions are called upon to sufficiently investigate, prepare and develop civil cases so that DOJ can file them without delay. When EPA refers a case, the referral results in the expenditure of time and resources by OECM and DOJ. A request from the Region to hold action on the filing of a case that results from inadequate case preparation or from the desire to conduct negotiations that could have been conducted prior to referral severely undercuts our enforcement efforts and results in inefficient use of valuable time and resources in the Regions, in OECM and at DOJ.

Therefore, it is OECM policy that hold action requests should be used only for strategic or tactical reasons, such as where the defendant has made a significant settlement offer after referral, or where settlement prior to filing will be advantageous to the government. A hold action request should be in the form of a memorandum from the Regional Counsel to the Assistant Administrator for OECM requesting and explaining its use and the length of delay requested. The Assistant Administrator, OECM, will determine whether the request is justified, and if so, will ask DOJ to delay the filing of the suit for a specified period of time.

OECM will grant hold action requests only where there is a clear benefit to the Agency resulting from the delay. In those cases where there is no reasonable justification for the requested delay, OECM will ask DOJ to proceed with filing or consider recommending that the case be withdrawn from DOJ and possibly will disallow credit for the referral.

Filing Proofs of Claim in Bankruptcy

EPA's judicial bankruptcy docket has grown enormously in the last two years. OECM and DOJ are very concerned about the handling of these cases and future bankruptcy matters. The law in this vital area is not well developed; little favorable precedent exists on the issues of concern to us. Moreover, we

must be very careful to avoid risking large resource expenditures in bankruptcy cases where there may be little realistic chance of obtaining material recoveries, even if we prevail on legal issues. These concerns make it imperative that bankruptcy cases be especially well prepared and that management review time be adequate at both OECM and DOJ prior to filing. See, e.g., OECM (Draft) Revised Hazardous Waste Bankruptcy Guidance, May 23, 1986, at 1-4. In the past, numerous cases have been referred with very little or no lead time for review and without litigation reports. Although we appreciate the difficulties of obtaining notice that bankruptcy proceedings have been initiated by a regulated entity, it is still important that EPA claims be forwarded for OECM review and referral to DOJ at the earliest possible time. These claims will be referred by the Assistant Administrator, OECM and approved in writing by the Assistant Attorney General, Land and Natural Resources, prior to filing.

If you have any questions regarding these procedures, please contact Jonathan Libber who can be reached at FTS 475-8777.

Attachments

cc: Administrator
Deputy Administrator
Assistant Administrators
Senior Enforcement Counsel
General Counsel
Associate Enforcement Counsels
Regional Counsels
Regional Enforcement Contacts
Regional Program Division Directors
F. Henry Habicht II, Assistant Attorney General for Land and Natural Resources, Department of Justice

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

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

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

NOV 14 1986

MEMORANDUM

SUBJECT: Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Addressees

On July 17, 1986, this Office circulated a draft EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements. I am pleased to report that Agency comments were almost uniformly supportive of the draft as written. Attached please find a final version of the policy, including summaries of the known auditing settlements that Agency personnel have achieved to date and several model audit provisions that Agency negotiators may use as a starting point in fashioning settlements that address the circumstances of each case.

I believe that the inclusion of environmental auditing provisions in selected settlements offers EPA the ability to accomplish more effectively its primary mission, namely, to secure environmental compliance. Accordingly, I would like to renew last July's call for EPA's Offices of Regional Counsel and program enforcement offices to consider including audit provisions in settlements where the underlying cases meet the criteria of the attached policy statement.

Inquiries concerning this policy should be directed to Neil Stoloff, Legal Enforcement Policy Branch, FTS 475-8777, E-Mail box 2261, LE-130A. Thank you for your consideration of this important matter.

Attachments

Addressees:

Assistant Administrators
Associate Administrator for Regional Operations
General Counsel
Associate Enforcement Counsels
Director, Office of Criminal Enforcement and Special Litigation
Director, Office of Compliance Analysis and Program Operations
Headquarters Compliance Program Division Directors
Director, NEIC
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Regional Compliance Program Division Directors, Regions I-X
Principal Regional Enforcement Contacts, Regions I-X
Enforcement Policy Workgroup

cc: Administrator
Deputy Administrator
John Ulfelder
David Buente, Department of Justice (DOJ)
Nancy Firestone, DOJ

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

EPA POLICY ON THE INCLUSION OF ENVIRONMENTAL AUDITING PROVISIONS IN ENFORCEMENT SETTLEMENTS

I. Purpose

The purpose of this document is to provide Agency enforcement personnel with general criteria for and guidance on selecting judicial and administrative enforcement cases in which EPA will seek to include environmental auditing provisions among the terms of any settlement. This document supplements the "Guidance for Drafting Judicial Consent Decrees."1/

II. Background

On July 9, 1986, EPA announced its environmental auditing policy statement (Attachment A) which encourages the regulated community's use of environmental auditing to help achieve and maintain compliance with environmental laws and regulations.2/ That policy states that "EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future."3/

In recent years, Agency negotiators have achieved numerous settlements that require regulated entities to audit their operations. (Attachment B is a representative sample of the auditing settlements that the Agency has achieved to date.) These innovative settlements have been highly successful in enabling the Agency to accomplish more effectively its primary mission, namely, to secure environmental compliance. Indeed, auditing provisions in enforcement settlements have provided several important benefits to the Agency by enhancing its ability to:

- Address compliance at an entire facility or at all facilities owned or operated by a party, rather than just the violations discovered during inspections; and identify and correct violations that may have gone undetected (and uncorrected) otherwise.

- Focus the attention of a regulated party's top-level management on environmental compliance; produce corporate policies and procedures that enable a party to achieve and maintain compliance; and help a party to manage pollution control affirmatively over time instead of reacting to crises.

- Provide a quality assurance check by verifying that existing environmental management practices are in place, functioning and adequate.

III. Statement of Policy

It is the policy of EPA to settle its judicial and administrative enforcement cases only where violators can assure the Agency that their noncompliance will be (or has been) corrected.4/ In some cases, such assurances may, in part, take the form of a party's commitment to conduct an environmental audit of its operations. While this would not replace the need for correction of the specific noncompliance that prompted an enforcement action, EPA nonetheless considers auditing an appropriate part of a settlement where heightened management attention could lower the potential for noncompliance to recur. For that reason, and as stated in the Agency's published policy, "[e]nvironmental auditing provisions are most likely to be proposed in settlement negotiations when:

- A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or

- The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity."5/

This policy is particularly applicable in cases involving the owner or operator of extensive or multiple facilities, where inadequate environmental management practices are likely to extend throughout those facilities.6/ Nevertheless, even small, single-facility operations may face the types of compliance problems that make an audit requirement an appropriate part of a settlement.

The environmental statutes provide EPA broad authority to compel regulated entities to collect and analyze compliance-related information.7/ Given this statutory authority, and the equitable grounds for imposing a requirement to audit under the circumstances outlined in this policy statement, such a requirement may be imposed as a condition of settlement or, in the absence of a party's willingness to audit voluntarily, sought from a court or administrative tribunal.

EPA encourages state and local regulatory agencies that have independent jurisdiction over regulated entities to consider applying this policy to their own enforcement activities, in order to advance the consistent and effective use of environmental auditing.8/

a. Scope of the Audit Requirement

In those cases where it may be appropriate to propose an environmental audit as part of the remedy, negotiators must decide which type(s) of audit to propose in negotiations. This

determination will turn on the nature and extent of the environmental management problem, which could range from a specific management gap at a single facility 9/ to systematic, widespread, multi-facility, multi-media environmental violations.10/ In most cases, either (or both) of the following two types of environmental audits should be considered:

1. Compliance Audit: An independent assessment of the current status of a party's compliance with applicable statutory and regulatory requirements. This approach always entails a requirement that effective measures be taken to remedy uncovered compliance problems and is most effective when coupled with a requirement that the root causes of noncompliance also be remedied.11/

2. Management Audit: An independent evaluation of a party's environmental compliance policies, practices, and controls. Such evaluation may encompass the need for: (1) a formal corporate environmental compliance policy, and procedures for implementation of that policy; (2) educational and training programs for employees; (3) equipment purchase, operation and maintenance programs; (4) environmental compliance officer programs (or other organizational structures relevant to compliance); (5) budgeting and planning systems for environmental compliance; (6) monitoring, recordkeeping and reporting systems; (7) in-plant and community emergency plans; (8) internal communications and control systems; and (9) hazard identification and risk assessment.12/

Whether to seek a compliance audit, a management audit, or both will depend upon the unique circumstances of each case. A compliance audit usually will be appropriate where the violations uncovered by Agency inspections raise the likelihood that environmental noncompliance exists elsewhere within a party's operations. A management audit should be sought where it appears that a major contributing factor to noncompliance is inadequate (or nonexistent) managerial attention to environmental policies, procedures or staffing.13/ Both types of audits should be sought where both current noncompliance and shortcomings in a party's environmental management practices need to be addressed.14/

In cases where EPA negotiators determine that an acceptable settlement should include an audit provision, the attached model provisions 15/ may be used as a starting point in fashioning a settlement tailored to the specific circumstances of each case. The model provisions are based on settlements addressing a broad range of circumstances that give rise to audits.

3. Elements of Effective Audit Programs. Most environmental audits conducted pursuant to enforcement settlements should, at a minimum, meet the standards provided in "Elements of Effective Environmental Auditing Programs," the Appendix to

the Agency's published policy on auditing. Those elements include:

- Explicit top management support for environmental auditing and commitment to follow-up on audit findings.
- An environmental audit team separate from and independent of the persons and activities to be audited.
- Adequate team staffing and auditor training.
- Explicit audit program objectives, scope, resources and frequency.
- A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.
- A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.
- A process which includes quality assurance procedures to ensure the accuracy and thoroughness of environmental audits.16/

Agency negotiators may consult EPA's program and enforcement offices and the National Enforcement Investigations Center, which can provide technical advice to negotiators in fashioning auditing provisions that meet the needs of both the party and the regulatory program(s) to which it is subject. Additional information on environmental auditing practices can be found in various published materials.17/

A settlement's audit requirements may end after the party meets the agreed-upon schedule for implementing them. Nevertheless, the Agency expects that most audit programs established through settlements will continue beyond the life of the settlement. After the settlement expires, the success of those programs may be monitored indirectly through the routine inspection process.

b. Agency Oversight of the Audit Process

In most cases, resource and policy constraints will preclude a high level of Agency participation in the audit process. Several successful audit settlements indicate that the benefits of auditing may be realized simply by obtaining a party's commitment to audit its operations for environmental compliance or management problems (or both), remedy any problems uncovered, and certify to the Agency that it has done so.18/ Other recent Agency settlements, also successful, have entailed full disclosure of the auditor's report of findings regarding noncompliance,

and even access to the company records which the auditors examined.19/ Audit settlements that require either self-certification or full disclosure of audit results may require a party to submit to the Agency an environmental management or compliance plan (or both) that addresses identified problems, to be implemented on an enforceable schedule.20/

These approaches require the Agency neither to devote significant resources to oversight of the audit process nor to depart from its traditional means of enforcing the terms of consent decrees and agreements. Although it may--and will--evaluate audit proposals in terms of the elements described in §III.a.3. above, in all but the most extreme cases 21/ the Agency will not specify the details of a party's internal management systems. Rather, an independent audit represents one step a violator can take toward assuring the Agency that compliance will be achieved and maintained.22/

Considerations such as the seriousness of the compliance problems to be addressed by an audit provision, a party's overall compliance history, and resource availability will dictate the extent to which the Agency monitors the audit process in particular cases. Thus, it will usually be appropriate to withhold approval of an audit plan for a party with an extensive history of noncompliance unless the plan requires:

- Use of an independent third-party auditor not affiliated with the audited entity;
- Adherence to detailed audit protocols; and
- More extensive Agency role in identifying corrective action.23/

c. Agency Requests for Audit-Related Documents

The various environmental statutes provide EPA with broad authority to gain access to documents and information necessary to determine whether a regulated party is complying with the requirements of a settlement.24 Notwithstanding such statutory authority, Agency negotiators should expressly reserve EPA's right to review audit-related documents.25/

d. Stipulated Penalties for Audit-Discovered Violations

Settlements which require a party to report to EPA audit-discovered violations may include stipulations regarding the amount of penalties for violations that are susceptible to prediction and are promptly remedied, with the parties reserving their respective rights and liabilities for other violations.26/ This policy does not authorize reductions of penalty amounts below those that would otherwise be dictated by applicable penalty policies, which take into account the circumstances

surrounding violations in guiding the calculation of appropriate penalty amounts. It is therefore important that stipulated penalties only apply to those classes of violations whose surrounding circumstances may be reasonably anticipated. The application of stipulated penalties to violations discovered during an audit is consistent with Agency policy.27/

e. Effect of Auditing on Agency Inspection and Enforcement

1. Inspections

The Agency's published policy on auditing states that "EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental practice. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit."28/

Consistent with stated Agency policy, the inclusion of audit provisions in settlements will not affect Agency inspection and enforcement prerogatives. On the contrary, a party's incentive to accept auditing requirements as part of a settlement stems from the Agency's policy to inspect and enforce rigorously against known violators who fail to assure the Agency that they are taking steps to remedy their noncompliance. Auditing settlements should explicitly provide that Agency (and State) inspection and enforcement prerogatives, and a party's liability for violations other than those cited in the underlying enforcement action (or subject to stipulated penalties), are unaffected by the settlement.29/

2. Civil Penalty Adjustments

Several audit settlements achieved to date have mitigated penalties to reflect a party's agreement to audit. In view of EPA's position that auditing fosters environmental compliance, EPA negotiators may treat a commitment to audit as a demonstration of the violator's honest and genuine efforts to remedy noncompliance. This may be taken into account when calculating the dollar amount of a civil penalty.30/ In no case will a party's agreement to audit result in a penalty amount lower than the economic benefit of noncompliance.

For judicial settlements where penalties are proposed to be mitigated in view of audit provisions, negotiators should coordinate with the Department of Justice (DOJ) to ensure consistency with applicable DOJ settlement policies.

3. Confidentiality

EPA does not view as confidential per se audit-related documents submitted to the Agency pursuant to enforcement settlements. Such documents may, however, contain confidential

business information (CBI). Auditing provisions should indicate that EPA will treat such information in the same manner that all other CBI is treated.31/ Where appropriate, negotiators may consider defining in advance which categories of audit information will qualify for CBI treatment.32/ Such determinations shall be concurred in by the Office of General Counsel, in accordance with 40 CFR Part 2.

The Freedom of Information Act (FOIA) may provide additional bases for protecting privileged information from disclosure.33/ However, determinations under FOIA are within the sole discretion of the Agency and therefore are not an appropriate subject of negotiation.

IV. Coordination of Multi-Facility Auditing Settlements

When negotiating with a party over facilities located in more than one EPA region, Agency personnel should consult with affected regions and states to ensure that pending or planned enforcement actions in other regions will not be affected by the terms of an audit settlement. This may be done directly (e.g., pursuant to existing State/EPA Enforcement Agreements) or with the assistance of OECM's Legal Enforcement Policy Branch (LEPB), which will serve as a clearinghouse for information on auditing in an enforcement context (contact: Neil Stoloff, LEPB, FTS 475-8777, LE-130A, E-Mail Box EPA 2261).

In most cases, however, auditing settlements that embrace facilities in more than one region will affect neither the Agency's inspection and enforcement prerogatives nor a party's liability for violations other than those which gave rise to the underlying enforcement action.34/ Accordingly, inter-office consultation in most cases will be necessary only for informational purposes. Some multi-facility settlements will fall within the scope of the guidance document, "Implementing Nationally Managed or Coordinated Enforcement Actions."35/ Such settlements should be conducted in accordance with that document and the memorandum, "Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement 'Agreements.'"36/

Attachments

FOOTNOTES

1. EPA General Enforcement Policy No. GM-17, October 19, 1983.

2. 51 Fed. Reg. 25004 (1986).

3. 51 Fed. Reg. 25007 (1986).

4. See "Working Principles Underlying EPA's National Compliance/ Enforcement Programs," at 7 (EPA General Enforcement Policy No. GM 24, November 22, 1983).

5. 51 Fed. Reg. 25007 (1986).

6. See, e.g., Owens-Corning Fiberglas Corp., Attachment B, p. 1; and Attachments D-F.

7. See, e.g., the Clean Air Act (CAA) §§113 and 114, the Clean Water Act (CWA) §§308 and 309, and the Resource Conservation and Recovery Act (RCRA) §§3007 and 3008.

8. See 51 Fed. Reg. 25008 (1986).

9. See, e.g., BASF Systems Corp., Attachment B, p. 3.

10. See Attachment F.

11. See Attachment C.

12. See Attachment D.

13. See Chemical Waste Management, Inc., Vickery, Ohio and Kettleman Hills, California facilities, Attachment B, pp. 1 and 2 respectively; and Attachment D.

14. See Attachments E and F.

15. Attachments C-G.

16. See 51 Fed. Reg. 25009 (1986).

17. See, e.g., "Current Practices in Environmental Auditing," EPA Report No. EPA-230-09-83-006, February 1984; "Annotated Bibliography on Environmental Auditing," September 1985, both available from EPA's Office of Policy, Planning and Evaluation, Regulatory Reform Staff, PM-223, FTS 382-2685.

18. See, e.g., Crompton and Knowles Corp., Attachment B, p. 1; and Attachments C-E).

19. See, e.g., Chemical Waste Management, Inc., Vickery, Ohio and Kettleman Hills, California facilities, Attachment B, pp. 1 and 2 respectively; and Attachment E.

20. See, e.g., United States v. Georgia Pacific Corp., Attachment B, p. 2; Attachment D, §B.3; and Attachment F, §§6(1) and 9.

21. See, e.g., Attachment G.

22. See, e.g., Potlatch Corp., Attachment B, p. 1; and Attachment C.

23. See Attachment F.

24. See, e.g., CAA §114, CWA §308, RCRA §3007, CERCLA §103, the Toxic Substances Control Act §8, and the Federal Insecticide, Fungicide and Rodenticide Act §8.

25. See, e.g., Attachment F, §IV, "Access to Documents."

26. See Attachment F, §§22, 23, 24, 34, and Appendix 2.

27. See "Guidance for Drafting Judicial Consent Decrees," at 22 (EPA General Enforcement Policy No. GM-17, October 19, 1983).

28. 51 Fed. Reg. 25007 (1986).

29. See Attachment C, §A.3; Attachment D, §B; Attachment E, §C.3; and Attachment F, §34.

30. See 51 Fed. Reg. 25007 (1986); EPA's Framework for Statute-Specific Approaches to Penalty Assessments, General Enforcement Policy No. GM-22, at p. 19; and applicable medium-specific penalty policies, e.g., TSCA Settlement with Conditions, November 15, 1983.

31. See "Guidance for Drafting Judicial Consent Decrees," at 28 (EPA General Enforcement Policy No. GM-17, October 19, 1983).

32. See Attachment F, §§5(2), 14, and 15.

33. See, e.g., 5 U.S.C. §552(b)(4), which encompasses voluntarily submitted information the disclosure of which would impair a Government interest such as EPA's interests in the settlement of cases and in ensuring compliance with statutes under its authority.

34. See Attachment F, §25.b.

35. General Enforcement Policy No. GM-35, January 4, 1985.

36. General Enforcement Policy No. GM-41, June 26, 1984.

SUMMARY OF ATTACHMENTS

ATTACHMENT A: Environmental Auditing Policy Statement, 51 Fed. Reg. 25004, July 9, 1986.

ATTACHMENT B: Representative Sample of Environmental Auditing Settlements Achieved to Date, revised 10/9/86.

Attachment C: Model Environmental compliance audit provision, with requirement for certification of compliance.

Attachment D: Model Environmental management audit provision, with requirement for submission of plan for improvement of environmental management practices, to be completed on an enforceable schedule.

Attachment E: Model Environmental compliance and management audit provision, with all audit results submitted to EPA, all Agency enforcement prerogatives reserved.

Attachment F: Model Environmental compliance and management audit provision, with extensive Agency oversight, audit results disclosed, stipulated penalties applied to most prospective violations, and all Agency enforcement prerogatives reserved for other violations. [Most appropriate for party with an extensive history of noncompliance.]

Attachment G: Model Emergency environmental management reorganization provision. [Appropriate for cases where a party's environmental management practices are wholly inadequate and action is necessary without waiting for the results of an audit.]

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

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

FEB 4 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Correction to the December 24, 1986 Interim Guidance on Joining States as Plaintiffs

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Regions I - X

Attached is the corrected Interim Guidance on Joining States as Plaintiffs.

The second line in the first paragraph under the heading Intervention by the State as Plaintiff under Rule 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedures, page 3, was inadvertantly dropped from the December 24, 1986, copy of the guidance. I believe that this line, which reads "in the litigation, EPA will support a State's motion to intervene", is important to the understanding of EPA's position on State intervention. I am, therefore, reissuing a corrected copy of the Guidance.

Attachment

cc: Jim Elder
Bill Jordan
David Buente
OECM/Water Attorneys
Cheryl Wasserman

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CORRECTED COPY

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

DEC 24 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Interim Guidance on Joining States as Plaintiffs

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels, Regions I - X

Summary

This memorandum provides interim guidance on the conditions under which States may participate as plaintiffs in Federal lawsuits against municipalities for civil violations of the Clean Water Act. EPA generally encourages State participation as plaintiff in Federal Clean Water Act municipal enforcement actions.

Background

Section 309(e) of the Clean Water Act requires the Federal government to join the State as a party in all civil actions brought against a municipality for violations of the Clean Water Act or the municipality's NPDES permit. The State is a necessary party in such litigation because Section 309(e) further provides that the ". . . State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment."

In the past, the usual procedure has been to name the State as a party defendant in a Federal suit against a municipality under the Clean Water Act.[1] In many instances,

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[1] Courts have uniformly held that joining the States as a party under Section 309(e) is mandatory, regardless of whether the Federal government has alleged that a specific State law (Continued)

however, States have expressed a desire to participate in the Federal action as a party plaintiff and have requested guidance on procedures for doing so. The easiest way for the Federal government to achieve this result is to file a complaint naming the State as a defendant, then support the State's motion for realignment as a plaintiff.

In a number of instances, however, a State will be particularly interested in not being named as defendant at the beginning of a municipal enforcement lawsuit. As will be explained below, the Federal government will actively support a State's participation as a plaintiff from the outset in municipal enforcement litigation under the Clean Water Act, and can agree not to name the State as a defendant in the complaint, as long as the following general conditions are met: (1) The Federal and State governments should jointly reach the decision to support State participation as a plaintiff early in the referral process and well before filing suit. If no such decision is made, a State must be named as a defendant under Section 309(e). (2) When the State intends to intervene as a plaintiff, the State should agree in writing, to file an appropriate pleading to intervene within 30 days after the United States files the lawsuit, and agree not to assert as a defense, the United States' failure to assert a claim against it under Section 309(e).

Because problems as to State liability still may arise, the Federal government should assert a crossclaim against the State co-plaintiff to preserve the State's liability under Section 309(e) for payment of any judgment or expenses of complying with any judgment which State law prevents the municipality from paying.

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prevents a municipality from raising revenues to comply with a judgment. See: United States v. City of Geneva, No. 85 C 3917 (N.D. Ill., June 27, 1986) at 14 and; United States v. City of Guymon, Oklahoma and the State of Oklahoma, No. 84 C 2368 (W.D. Okla., March 18, 1985) (order denying the State's motion to dismiss).

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Procedural Options for State Alignment As a Plaintiff

The State has two procedural options for becoming a plaintiff. Those options are (1) intervention under Rule 24 of the Federal Rules of Civil Procedure and (2) realignment under Rule 21 of the Federal Rules.[2]

Intervention by the State as Plaintiff under Rule 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure

In those situations where a State will participate actively in the litigation, EPA will support a State's motion to intervene as of right under Rule 24(a)(2), or permissive intervention under Rule 24(b)(2). In addition, EPA will support a State's right to share in civil penalties, where the State has actively and publicly litigated the case and the State's claim to penalties is founded on State law. See: EPA Guidance On The Division Of Penalties With State And Local Government (October 30, 1985).

In order to meet the test for intervention of right, a State must be able to satisfy the following Rule 24(a)(2) requirements: (1) it must have an interest relating to the property or transaction; (2) it must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (3) its interest may be inadequately represented by existing parties. In most cases, a State which files a timely motion should be able to make the necessary demonstrations.

Appropriate demonstrations (particularly in light of the State's status as a necessary party under Section 309(e)) might be (1) that the State, especially one delegated to administer the NPDES program, has an interest in having its laws and regulations upheld; (2) that a Federal court's disposition of the matter may, as a pratical matter, impair or impede the State's ability to protect this interest; and (3) that the Federal Government's representation of the State's interest may

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2 It has also been suggested that EPA and the State initiate the suit jointly as co-plaintiffs, citing both Federal and State law in the complaint. This guidance is not intended to preclude joint filings. However, due to the extensive coordination needed to arrange a joint filing, it is not recommended as the mechanism of first choice where timely filing of enforcement actions is desired.

be inadequate since these interests are not identical. Inadequacy of representation by the Federal Government is the most difficult part of the test for the State to meet. If the State can assert related State law claims, it has a better chance of prevailing. At least one district court has held, however, that in order to have subject matter jurisdiction over a State claim, it must derive from a common nucleus of fact or a single transaction or occurrence. See U.S. v. Dow Chemical Company, CA No. 85-294-A (M.D. La., February 25, 1986) where the district court denied the State's right to assert a State Clean Air Act claim which was based on violations of the State's clean air laws which occurred after the violations alleged in the Federal Complaint.

In order to meet the test for permissive intervention under Rule 24(b)(2), a State must be able to satisfy the following two Rule 24(b)(2) requirements: (1) its motion for intervention must be timely; and (2) its claims and the main action must have a question of law or fact in common.

In our view, a State would normally be able to meet the test for permissive intervention with regard to its claims under the test of common question of law or fact, keeping in mind the discussion of U.S. v. Dow Chemical Company, supra. It is, however, entirely within the discretion of the Court to grant such intervention, as well as to rule whether the tests for intervention of right are met.

A recent case construing Section 309(e) and how it impacts Rule 24 is United States v. City of York, 24 E.R.C. 1637 (M.D. Pa., 1986). In the York opinion (copy attached) Pennsylvania's motion to intervene under Rule 24 as a party plaintiff was granted. The Court found that Section 309(e) required the State to participate as a party, but that such participation could be either as a plaintiff or defendant. In ruling that the State could intervene as a plaintiff, the Court declined to follow United States v. City of Hopewell, 508 F.Supp. 526 (E.D. Va. 1980), which had held that a State could only be a defendant under Section 309(e). The Court in York (1) found no legislative history to support the Hopewell decision and (2) noted that the requirement of State participation as a "party" under Section 309(e) could be met by the State as either plaintiff or defendant.

In granting the State's motion to intervene under Rule 24, the Court in York in effect found that Section 309(e) created (1) an obligation of the State to be a party and (2) a corresponding right of the State to intervene under Rule 24 so that it might fulfill its Section 309(e) obligation. Ultimately, the Court determined that in this case the State's interests were more closely aligned with the plaintiff. The Court did

not explain whether it was granting intervention by right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(2).

Realignment of Parties Under Rule 21 of the Federal Rules of Civil Procedure

As a practical matter, the State (once named as a party defendant) may also attain plaintiff status by filing a motion "of its own initiative, at any stage of the action . . . on such terms as are just," to be realigned as a plaintiff under Rule 21 of the Federal Rules of Civil Procedure. In U.S. v. City of Joliet, CA. No. 86 C 2512 (N.D. Ill., June 5, 1986), the Court granted Illinois' motion to realign in a Clean Water Act pretreatment case. In granting the motion, the Court ruled that (1) realignment does not preclude later submission of evidence of the State's liability; (2) Section 309(e) does not require a State to be joined as a defendant; and (3) realignment is proper where the defendant is a nominal defendant, and the party's true interests lie with those of the plaintiff. See also Securities and Exchange Commission v. Quing N. Wong, et al., 42 F.R.D. 599 (D.P.R. 1967).

Recommendation

Regional Counsels should work with States subject to Section 309(e) claims to use whichever of the above methods appears appropriate when the Agency determines that a State merits status as a plaintiff in a civil lawsuit against a publicly-owned treatment works under the Clean Water Act.

If you have any questions regarding this interim guidance, please contact Elyse DiBiagio-Wood of my staff at 475-8187.

Attachment

cc: Jim Elder
Bill Jordan
David Buente
OECM/Water Attorneys
Cheryl Wasserman

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

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

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

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

APR 8 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Enforcement Docket Maintenance

FROM: Edward E. Reich
Acting Deputy Assistant Administrator
for Civil Enforcement

TO: Regional Counsels, Regions I - X
Associate Enforcement Counsels

As was discussed in Tom Adams' memo of February 8, entitled "Responsibilities for Assuring Effective Civil Judicial Enforcement" primary responsibility for the timeliness, accuracy and completeness of information contained in the Enforcement Docket lies with the Offices of Regional Counsel. Specifically:

(1) Regions are responsible for accurate updates, at least monthly;

(2) Headquarters is responsible for accurate monthly update of Headquarters - initiated data fields (e.g., "checklist completed");

(3) Headquarters will <u>not</u> amend regional data entry;

(4) Headquarters will continue to monitor overall data quality, on a monthly basis for the balance of FY'88, and thereafter on a quarterly basis; discrepancies will be brought to the attention of the Regional Counsel;

(5) Docket maintenance will be considered as part of the annual performance assessment discussion with Regional Counsels.

To insure that all parties understand their responsibilities, we have developed detailed procedures, which are attached. I request that you distribute copies to all attorneys in your office.

If you or your staff have any comments or questions, please let me know, or contact Sally Mansbach or Bruce Rothrock at 8-382-3125.

My thanks for your cooperation.

Attachments

GUIDELINES AND PROCEDURES FOR THE ENTRY AND UPDATE OF CIVIL JUDICIAL CASES IN THE ENFORCEMENT DOCKET SYSTEM

I. INTRODUCTION

"Responsibilities for Assuring Effective Civil Judicial Enforcement" is the subject of a Tom Adams memorandum, FEB 08, 1988, which gives the Regions increased authority and responsibility in the judicial enforcement process. One of these responsibilities pertains to the maintenance of the Enforcement Docket System.

> The Regions also will take the lead in the criticalfunction of maintaining the Agency's Enforcement DocketSystem. Except in national lead case or where this responsibility is undertaken by a Headquarters attorney and this is so noted in the case management plan, Offices of Regional Counsel will be solely responsible for ensuring that accurate and up-to-date information on each caseis maintained in the System. OECM attorneys will no longer make separate docket entries as a matter of course; instead we will rely on the Regionally-entered casestatus information. OECM will retain an oversight responsibility to ensure, to the extent possible, thataccurate information, consistent across the Regions,is available from the Docket System....

This document describes the procedures and responsibilities for entering cases in the DOCKET and for the regular, monthly review and update of the Case Status Report. As stated in Mr. Adams' memorandum, this responsibility is almost entirely that of the Regional Attorney, who in most instances is designated the Lead EPA Attorney.

II. DEFINITION OF A CASE

A. DOCKET Design and Assigning a Case Number.

The Enforcement Docket has been designed primarily as a system for tracking civil judicial enforcement cases. A case is a matter which is developed and referred with the intent that it will be filed in court as a separate and independent entity, will receive its own court docket number and not be joined with any other case. With this in mind, an enforcement matter which involves multiple facilities, multiple statutory violations, or multiple defendants is entered as one case if it is intended and believed at the time of case development and case referral that it should be handled as one action, filed in court as one case,

and negotiated or litigated as one case. The Docket system has been designed to handle and report on multiple law/section violations, multiple facilities and multiple defendants, all linked to the parent case.

B. Amendments to Ongoing Cases.

It may be necessary once a case has been initiated to prepare and refer a related matter with the intent of amending the original case. An example might be an additional statute violation or other defendants. These matters should not be entered as separate cases but as amendments. There is a separate record in the Docket System that allows for entry and tracking of amendments.

C. Use of DOCKET for SPMS, Accountability, and with the Workload Model.

The numbers used in the SPMS and Accountability process are based on cases, the fundamental ingredients of the Docket System. These are the numbers that we also report to Congress and the public. The numbers used in the workload model are based on cases <u>and</u> their component parts, such as amendments, number of facilities, etc. The Docket structure allows for tracking all these separate activities for workload model counts, even though they are included under a single case name and number.

III. <u>INITIAL CASE ENTRY</u>

A case should be entered in the system (Opened) as soon as possible after the Regional program office refers the matter to the Regional Counsel for civil litigation, and an attorney is assigned and begins case development. The Regional Attorney is responsible for completing the following and giving them to the Regional data analyst for assignment of a case number and initial data entry:

1. Case Data Form (APPENDIX A). Complete all items as required.

2. Facility Data Form (APPENDIX B). Complete a separate form for each violating facility.

3. Case Summary (APPENDIX C). Develop a case summary that contains the following information:

   - Case Name: The name of the case as specified in the litigation report.

   - Facility Name: The name of the facility and location where the violation(s) occurred.

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- Nature of case and violations(s) upon which the case is based. Include the laws and sections violated.

- Proposed relief and remedy, including injunctive and proposed penalty to be sought at settlement. Enter penalty fields on the Case Data Form.

- Significant national or precedential legal or factual issues.

- Previous enforcement actions (date, type).

- Recent contacts with defendant(s) (nature, outcome).

- Other significant aspects.

These paragraphs will be entered in the DOCKET as narrative under the heading "Case Summary." See APPENDIX C for an example.

The Regional Attorney is responsible for entering a new case as soon as possible after case development is begun. While the case is under development and prior to being referred (Initiated) the case is in an overall status of "Opened." The earlier the case is entered as an "Opened" case the sooner it will appear on the DOCKET for use in case management. This procedure reduces the end-of-quarter data entry crisis to record cases initiated (a large proportion of which appear at the very end of the quarter). If the case has been entered during case development it is necessary to enter only the "Date Initiated" at the time the case is referred. This eliminates the risk that a case might not be counted because all of the appropriate information could not be entered before accountability reports are run. Entry of "opened" cases also facilitates management of actions which are the subject of pre-referral negotiation.

IV. CASE STATUS REVIEW PROCEDURES

The Lead EPA Attorney has primary responsibility for the review and update of all active cases. This is done at a minimum monthly by reviewing the Case Status Report and making any changes or updates directly on the report. The Lead EPA Attorney receives update forms for all his/her cases from the Regional data analyst once each month. The Lead EPA Attorney is responsible for annotating the update forms. These forms are returned by the Lead EPA Attorney to the data analyst for entry by the last work day of the month. The data analyst completes corrections and updates and returns revised forms within five work days to the Lead EPA Attorney for the next month's review and update.

The Lead EPA Attorney should pay particular attention to the

following areas:

Case Information
Major Milestone and Miscellaneous Events
Staff, Attorney Names
Results
Penalties
Case Status Comments

An entry must be made in the attorney comment area every month. Any issues which have been discussed or significant events which occurred during the past month since the last update must be included in the comments. An example of the nature and method of entering status comments is contained in APPENDIX D. If there has been no development or no activity in the case, "No Change" must be entered by the Lead EPA Attorney. The lead EPA attorney gives the annotated monthly reports to the data analysts for data entry and data base update. If the analyst does not receive an update for an active case by the time the review period has ended, he/she will enter "NO UPDATE RECEIVED."

Except in cases where the Headquarters attorney is the Lead EPA Attorney, Headquarters attorneys will be responsible <u>only</u> for updating HQ-specific data (e.g., received at EPA HQ, checklist completed, for direct referrals and referred to DOJ for other than indirect referrals).

A chart display of roles and responsibilities is contained in Appendix E. Summary "case code" tables are included in Appendix F.

V. QUALITY ASSURANCE

The Lead EPA Attorney is responsible for assuring the accurate, complete, and timely entry of all cases and for the ongoing, monthly update and verification of case data. Regional Counsel are responsible for periodic review of the Docket for accuracy and completeness of all data elements, including Attorney Comments.

Repeated problems with accuracy of data entry should be brought to the attention of the Regional Counsel. The Regional Counsel should notify Sally Mansbach or Bruce Rothrock if problems merit further attention.

OECM Headquarters will review the overall Docket for accuracy and completeness, on a monthly basis for the balance of FY 1988 and quarterly thereafter. Obvious errors or omissions will be brought to the attention of the Regional Counsel, for appropriate Regional action. Headquarters data entry will be restricted to those data elements which are Headquarters responsibility. No amendment of Regional data will be made by

Headquarters staff.

Comments or questions regarding Docket update and maintenance procedures should be addressed to Sally Mansbach or Bruce Rothrock.

ENFORCEMENT CASE DATA FORM

APPENDIX A

CASE NO.: _____-_____- E _____ Date Entered: ____/____/____
(Assigned by Docket Control

* CASE NAME: _____

* TYPE CASE: _____ CIV - Civil BNK - Bankruptcy
(See Back for Adm.) CIT - Citizen Suit

* HQ DIVISION: _____ AIR - Air MOB - Mobile
HAZ - Hazardous Waste WAT - Water
PES - Pesticides and Toxics

* LAW/SECTION:
1. _____/_____
2. _____/_____
3. _____/_____
4. _____/_____
5. _____/_____

* (Please use the section of the law VIOLATED, NOT the section that authorizes the action)

CFR/SECTION:
1. _____/_____
2. _____/_____
3. _____/_____

* TECHNICAL CONTACT: _____ PHONE: FTS - ____ - _____

* REGIONAL ATTORNEY: _____ PHONE: FTS - ____ - _____

* DEFENDANTS: NAMED IN COMPLAINT?
(Y/N)
1. _____ _____
2. _____ _____
3. _____ _____
4. _____ _____

* STATE: _____

VIOLATION TYPE: _____ POLLUTANT: _____

DATE OPENED: ___/___/___

* DATE INITIATED: ___/___/___ * REFERRAL INDICATOR ___ RH: Region to HQ
(Civil) ___ RD: Region to DOJ
DATE ISSUED: ___/___/___ (Direct Referral)
(Adj. Adm.) Direct Referral Lead: DOJ_____ USA____
DATE CONCLUDED: ___/___/___

DATE VIOLATION DETERMINED: ___/___/___ DATE DOCUMENTS RECEIVED BY ORC: ____/____/____

PROPOSED PENALTY: _____

* Required fields - must be filled out for case entry

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Appendix B

FACILITY DATA FORM

PLEASE USE THE ADDRESS OF THE SITE OF VIOLATION (NOT THE COMPANY MAILING DDRESS).

A SEPARATE FORM MUST BE COMPLETED FOR EACH FACILITY CITED IN THE CASE.

CASE NO.: _____-_____-E _____ (Assigned by DOCKET analyst)	EPA ID #: _____ (Assigned by FINDS analyst)

FACILITY NAME: _____

STREET ADDRESS: _____

CITY: _____ * STATE _____ ZIP: _____

TYPE OWNERSHIP: _____

- P: Private industry or individual
- F: Federal Government
- S: State
- C: County
- M: Municipal
- D: District

IC CODE(s): _____ , _____ , _____ , _____ _
(one required)

---------- OPTIONAL ----------

ARENT COMPANY: _____

PDES PERMIT NO. _____

UPERFUND SITE: _____ (Y or N)

ATITUDE: _____ _____ _____

ONGITUDE: _____ _____ _____

APPENDIX C

CASE SUMMARY CONTENT AND FORMAT

The following is an example of a Case Summary. The summary is written by the Regional Attorney and provided to the Regional Data Analyst along with the Case Data Form and Facility Data Form at the time the case is initially entered. The summary includes: Case Name, Facility Name, Nature of case and violation(s) upon which the case is based, Proposed relief and remedy, Significant national or precedential legal or factual issues, Previous enforcement actions, Recent contacts with defendants, Other significant aspects.

- EXAMPLE -

CASE SUMMARY:

THIS IS A PROPOSED ACTION AGAINST THE ACME DISPOSAL CORP (ADC) ET AL., UNDER SECTION 107 OR CERCLA TO RECOVER PAST COSTS AND TO ESTABLISH LIABILITY AS TO FUTURE COSTS TO BE INCURRED UNDER SECTION 104.

THIS CASE INVOLVED THE ADC SITE, LOCATED IN MODELTOWN, MA. THE SITE WAS LISTED ON THE NPL ON 04/01/84. THE SITE IS A 100-ACRE LANDFILL WHICH HAS BEEN OWNED BY ADC SINCE 03/05/75. NUMEROUS INDUSTRIAL WASTES HAVE BEEN DISPOSED OF AT THIS FACILITY SINCE 1942.

EPA CONDUCTED ON-SITE GROUNDWATER SAMPLING ON 05/01/85. ANALYSIS REVEALED THE PRESENCE OF HAZARDOUS SUBSTANCES INCLUDING METHYL ISOBUTYL, KETONE, AND TOLUENE. A NOTICE LETTER WAS SENT TO THE SITE OWNER/OPERATOR AND TO THE TEN KNOWN GENERATORS ON 05/20/87. NO RESPONSES WERE RECEIVED.

THE 1ST IMMEDIATE REMOVAL WAS COMMENCED ON 06/01/85 AND WAS COMPLETED ON 06/25/85. ONE HUNDRED DRUMS AND 500 CU YDS OF SOIL WERE REMOVED AND DISPOSED OF AT A RCRA-APPROVED FACILITY. THE 2ND IMMEDIATE REMOVAL ACTION WAS STARTED ON 08/01/85. FIFTY DRUMS AND 100 CU YDS OF SOIL WERE REMOVED AND DISPOSED OF AT A RCRA-APPROVED FACILITY. TOTAL FEDERAL GOVT COSTS AS OF 11/01/87 ARE $1,524,000.

A DEMAND LETTER FOR PAST COSTS WAS SENT TO ADC ON 12/01/87. THE STATUTE OF LIMITATIONS MAY RUN ON 06/25/88. GENERAL NOTICE LETTERS WERE SENT TO 143 PRP GENERATORS ON 09/01/87.

APPENDIX D

CASE STATUS COMMENTS

The following are examples of attorney case status comments, provided as part of the monthly review of active cases. Comments are written by the attorney directly on the Case Status Report directly below or in the margin beside the previous months entry.

- EXAMPLE -

HEADQUARTERS CASE STATUS:

REGIONAL CASE STATUS:

01-30-88: COMPLAINT FILED IN DIST. CT (EDMA) ON 01/15/88 AGAINST ADC, CITY OF MODELTOWN, GENERAL DISPOSAL CORP,, ET AL.
02-28-88: ADC FILED ANSWER ON 02/15/88; GENERAL DENIALS. ADC FILED MOTION TO DISMISS ON 02/15/88.
03-30-88: ADC MOTION TO DISMISS DENIED ON 03/20/88. STATUS CONF SCHEDULED TO BE HELD ON 04/18/88.
04-29-88: STATUS CONF HELD ON 04/18/88. GENERAL DISPOSAL CORP REQUESTED TREATMENT AS DE MINIMIS GENERATOR. LITIGATION TEAM PLANS TO MEET ON 05/20/88. GOVT PLANNING TO FILE MOTION FOR SJ.

(1) It is important to add precise dates to update comments both to be specific and to avoid confusion between the date of the docket entry and the date of the event.

(2) It is important to follow up on stated planned events in subsequent monthly updates with comments as to whether or not the planned event took place and, if so, when.

(3) Case status comments should reflect the general content of settlement proposals and draft and final consent decrees, <u>including</u> final construction deadlines, final compliance deadlines, penalties, duration of the decree, and whether or not stipulated penalties are included.

(4) If there are no updates during a month, enter "NO CHANGE".

CIVIL JUDICIAL ENFORC[illegible] DOCKET
DATA ENTRY MAINTENANCE [illegible]FICATION
RESPONSIBILITIES AND PROCEDURES

APPE[illegible]E
03/[illegible]/88

ACTIVITY	WHO	WHAT	When	HOW
Open a Case	Regional Attorney assigned to Case development or Lead EPA Atty	Completes: Case Data Form, Facility Data Form for each violating Fac., Case Summary. Case is a matter which is filed, settled or litigated separately from any other Case.	Optional; When case is opened or any time up to but no later than when case is referred to HQ or directly to DOJ	Attorney completes forms and Case Summary. All items marked with '*' must be completed. Gives to Regional data analyst.
Initial Case Entry	Regional Data Analyst	Assign Case Number: Enter data from Case Data and Facility Data Forms, Case Summary	At time Regional Attorney Completes Forms.	On-line from Case Data and Facility Data Forms, Case Summary
Case Review and Case Update of all Active Cases	a. Lead EPA Atty	Maj. Milestones/Misc. Events, Dates, Staff, Status Comments and Signficant Case events	Monthly, Completed and given to Regional Analyst by 1st work day of each month	Review & edit as appropriate Case Update Report (using clear notations in bright colored ink)
	b HQ Attorney	HQ data fields (e.g. checklst complete, HQ Comments if appropriate)	Monthly	Case Update Report, as above, delivered by HQ data analyst
Data Entry, Data Base Update	a. Reg. Analyst	Case Update Report as reviewed and annotated by Lead Attorney	Monthly, Beginning the 1st of the month, completed by the 5th work day. Run new Update Reports and distribute by 8th work day.	On-line, directly from Case Update provided by Regional Attorney. Update all active cases even if no change made or no update received.
	b. HQ Analyst	As appropriate		
Case/Data Verification	HQ Attorney	Major milestone Dates, Over-all Status (see 3b), other Case Level Data; Regular Status Comment Update by Lead Attorney	Monthly for FY'88 quarterly thereafter	Scan Case Update Report provided by HQ Analyst. Any obvious errors or omissions are brought to the attention attention of Associate and then Regional Counsel for Lead EPA Atty to supply corrections to Regional data analyst

DATA ENTRY MAINTENANCE VERIFICATION
RESPONSIBILITIES AND PROCEDURES

ACTIVITY	WHO	WHAT	WHEN	HOW
king lements Litigation its	Lead EPA Atty	Significant events related to settlement negotiation or Litigation as required by RC	Monthly	Part of monthly review of Case Update Report.
	HQ Attorney	HQ Events, as appropriate	Monthly	monthly case review.
luding a (CD/Judge- Entered	Lead EPA Atty	Enter data about settle-ment/Judgement Results, Date, Penalty	Monthly	Part of monthly review of Case Update Report, or as events occur.
ing a Case l Compli-, Case drawn, lined, Dis-sed or oined	Lead EPA Atty	Enter Data for Closed Case - when final compliance achieved or case is with-drawn, declined or dismissed	Monthly	Part of monthly review of Case Update Report, or as events occur.
e Returned Region	Lead EPA Atty	Enter "Date Returned"	Monthly	Part of Monthly Update, or as returns occur by proper notification of data analyst.
e Rereferred	Lead EPA Atty	Enter "Date Re-referral"	Monthly	Part of Monthly Update
itor Case urned to ion	Lead EPA Atty	Determine cases returned and pending > 60 days. Deter-mine action to be taken: Refer or close. Update Docket	Monthly	Analyst produces report of all cases returned to Region and pending >60 days for Lead EPA Attorney review
	HQ Attorney	Assess need to discuss cases with Region	Quarterly	HQ analyst prepares quarterly report on cases rtd to Region >60 days
nding a e	Lead EPA Atty	Add amendments to existing case when matter is part of on-going case and will not be filed as a separate matter for litigation	When matter is referred	Monthly Case Update, or on amendment data form, to Regional Analyst, when amendment occurs
cking CD pliance	ad EPA Atty	Monitor Compliance with terms of CD or Court Order	arterly	Contact with Regional Program Office and rev of

VIOLATION TABLE

VIOLATION TYPE	DESCRIPTION
AOVIOL	Administrative Order Violation
CLO	Closure and Post-Closure Plan
FIFRA	FIFRA
FIN	Financial Responsibility
GFR	General Facilities Requirements
GRANT	P.L. 92-500 Facility
GWM	Groundwater Monitoring
IMP	Imports
IND	Industrial Source
INFO	CAA/114 (INFO)
LDT	Land Disposal & Treatment
MPRSA	MPRSA
NESHAP	National Emission Stds. for Haz. Air Pollutants
NOPRMT	Discharge w/o Permit
NORPTG	No Reporting or Monitoring
NSPS	New Source Performance Standards
NSR	New Source Review
PMN	Pre-manufacturing Notice
PRETMT	Pretreatment
PRMTVL	Permit Violation
PSD	Prevention of Significant Deterioration
PWSM/R	PWS Monitoring/Reporting
PWSMCL	PWS Maximum Containment Level
PWSNP	PWS Notification to Public
PWSSA	PWS Sampling & Analyzing
REC	Required Records Maintenance
REP	Reporting Violations
SIP	State Implementation Plan
SPILL	311/CWA
UIC	UIC/SDWA
UICCAC	UIC Casing & Cementing
UICMFL	UIC Fluid Movement in Underground Source of Drinking Water
UICMIN	UIC Mechanical Integrity
UICMON	UIC Monitoring
UICNPA	UIC No Approved Plugging & Abandonment Plan
UICOIN	UIC Injection Between Outermost Casing
UICPRS	UIC Injection Beyond Authorized Pressure
UICUNI	UIC Unauthorized Injection
UICUNO	UIC Unauthorized Operation of a Class IV Well
UICVPA	UIC Compliance w/Plugging & Abandonment Plan
VHAP	Volatile Hazardous Air Pollutants
404PMT	404/CWA

POLLUTANT TABLE

POLLUTANT TYPE	DESCRIPTION
ARSN	Arsenic
ASB	Asbestos
BENZ	Benzene
BERY	Berylium
CO	Carbon Monoxide
COE	Coke Oven Emissions
CON	Containers (Drums, Tanks)
LEAD	Lead
MERC	Mercury
NOX	Nitrogen Oxides
OP	Opacity
PCB	Polychlorinated Biphenyls
PM	Particulate Matter
RADON	Radon
RDNC	Radionuclides
SO2	Sulfur Dioxide
VNCL	Vinyl Chloride

** If you would like to see any more pollutants added to the table, please contact Bruce Rothrock at FTS-382-2614

RESULT TABLE

RESULT LEVEL	RESULT CODE	RESULT REASON
1- Before Referral to DOJ	WR - Withdrawn by Region	
	DE - Declined by HQ	
2- After Referral to DOJ/US Atty, Before filing of Complaint or CD	WE - Withdrawn by HQ	
	DJ - Declined by DOJ	
	DA - Declined by US attorney	
3- After filing of Complaint or CD	LN - Litigated w/no Penalty	
	CN - CD w/no Penalty	
	CP - CD w/Penalty	*RO - Penalty under RCRA
	LP - Litigated w/Penalty	*CO - Penalty under CERCLA
		*BO - Penalty under both RCRA & CERCLA
	*CR - CD/Cost Recovery	*OC - Cost Recovery under CERCLA
	*LR - Litigated/Cost Recovery	*OT - Cost Recovery w/treble damages under CERCLA
	*CB - CD w/Penalty & Cost Recovery	*RC - Penalty under RCRA & Cost Recovery under CERCLA
	*LB - Litigated w/Penalty and Cost Recovery	*CC - Penalty and Cost Recovery under CERCLA
		*CT - Penalty under CERCLA, Cost Recovery w/treble damages under CERCLA
		*RT - Penalty under RCRA, Cost Recovery w/treble damages under CERCLA
		*BC - Penalty under both RCRA & CERCLA, Cost Recovery under CERCLA
		*BT - Penalty under both RCRA & CERCLA, Cost Recovery w/ treble damages under CERCLA
	DC - Dismissed by Court	
	VD - Voluntarily Dismissed	
	CO - Combined	

* Result code and Result reason apply only to RCRA/CERCLA cases

REFERRAL INDICATOR TABLE

REFERRAL INDICATOR	DESCRIPTION
RH	Region to Headquarters
RD	Region to DOJ
RU	Region to US Attorney
HD	Headquarters to DOJ

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

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

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

MAY 2 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Criteria for Active OECM Attorney Involvement in Cases

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators
Deputy Regional Administrators
Regional Counsels

The following criteria have been developed for evaluating what cases warrant active OECM attorney involvement. Taken together with the guidance on the pre-referral negotiation process and on the use of case management plans, the following guidelines will significantly contribute to our efforts to enhance the enforcement process.

Cases that meet one or more of the criteria listed below are appropriate for active involvement by OECM attorneys. The extent and nature of an OECM attorney's involvement in any given case will depend on a number of factors, including availability of legal resources in the Region, the expertise and workload of the OECM attorney involved, and the reason involvement is considered appropriate. OECM management, in consultation with the Regional Office, will take all of these factors into account in determining the level of active involvement, if any, by the OECM attorney.

Cases which warrant active involvement by the OECM attorney include those cases:

1. that are nationally-managed or nationally-coordinated;

2. raising issues whose resolution may set a legal or policy precedent of national significance;

3. which have unusually significant environmental impacts or in which there is a particularly high level of Congressional interest;

4. jointly selected with the Regional Office which are well-suited to serve as training vehicles for newer attorneys or as a refresher for other attorneys in need of exposure to particular elements of the negotiation or litigation process related to their responsibilities;

5. where OECM's involvement would facilitate or support a special enforcement initiative;

6. requiring the specialized expertise of an OECM attorney that is not currently possessed within the Region;

7. for which the Region or DOJ has requested OECM attorney involvement (e.g., where the Region cannot adequately staff the case or where OECM's presence is desired for tactical reasons) and it is OECM's judgment that its involvement is warranted; and

8. where OECM's participation would directly further its evaluation of the effectiveness of a particular national policy and the need for modification or supplementation of that policy.

Assuming that active involvement by the OECM attorney is deemed warranted, the process for initial determination of the degree of involvement will be based upon whether the case is undergoing pre-referral negotiations. For cases that are the subject of pre-referral negotiations, the initial 21-day review process will be the vehicle for making the determination. For cases that are not the subject of pre-referral negotiations, the review within OECM of the case management plan will be the vehicle for determining the degree of involvement. The role of the OECM attorney may subsequently be modified as the case evolves, through consultation with the Region and DOJ, to increase or decrease the level of involvement in light of changing circumstances.

Please feel free to contact Ed Reich (FTS-382-4137) if you have any questions regarding the implementation of these guidelines.

cc: Associate Enforcement Counsels
OECM Attorneys
Program Office Enforcement Directors
Roger J. Marzulla, Assistant Attorney General,
Land and Natural Resources Division,
U.S. Department of Justice
David T. Buente, Chief, Environmental Enforcement Section,
Land and Natural Resources Division,
U.S. Department of Justice

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

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 24 1989

MEMORANDUM

SUBJECT: Withdrawal of Referrals and Issuance of "Hold" Letters

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Regional Administrators
Deputy Regional Administrators
Regional Counsels

There has been some recent confusion about the process for withdrawing directly referred cases from the Department of Justice (DOJ) and the issuance of "hold" letters for cases pending at DOJ. For clarification, please note the January 14, 1988, memorandum from Tom Adams entitled "Expansion of Direct Referral of Cases to the Department of Justice." In accordance with that memorandum:

(a) In the unusual circumstance necessitating a withdrawal of a directly referred case, the Regions are required to consult with OECM prior to requesting a withdrawal. If a withdrawal is determined to be appropriate, the Region should then send a written request for withdrawal of the referral to DOJ with a copy to the Assistant Administrator for OECM and the appropriate program office; and

(b) In accordance with the December 24, 1987 Adams to Marzulla letter attached to the January 14 memorandum, all "hold" letters must continue to be requested in accordance with the procedures contained in the memorandum entitled "Expanded Civil Judicial Referral Procedures" dated August 28, 1986. Those procedures outline at page 5 the narrow basis on which "hold" actions will be considered and require the Regional Counsel to submit a memorandum to the Assistant Administrator for OECM to request a delay in filing. DOJ will not recognize a "hold" request not coming from the AA for OECM in accordance with these procedures.

Please let me know if you have any questions about this memorandum.

cc: Associate Enforcement Counsels
David Buente, DOJ

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

IV. CIVIL LITIGATION

C. PENALTIES AND TERMS OF SETTLEMENT

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

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

OFFICE OF ENFORCEMENT

CIVIL PENALTY POLICY

JULY 8, 1980

For application of Section 309(d) of the Clean Water Act and Section 113(b) of the Clean Air Act to Certain Water Act Violators and Air Act Stationary Source Violators

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I. Preamble

The objective of this civil penalty policy is to assist in accomplishing the goals of environmental laws by deterring violations and encouraging voluntary compliance.

The elements of the policy reflect years of experience by federal, state and local enforcement officials, adapted to present conditions and needs. The policy has had the benefit of much informed comment in meetings of federal, state, and local officials in every region, in written comments, and in a working group of federal and state enforcement officials.

The policy is based upon the main themes of the Clean Air and Water Acts, in which Congress required all citizens, private firms and public bodies to join in a common effort to restore and maintain the quality of the nation's air and waters, and to do so consistently in all parts of the country, in accordance with statutorily mandated time schedules. The theme of national consistency has been reinforced by the Clean Air Act Amendments of 1977, which directed the Administrator of the Environmental Protection Agency to promulgate regulations designed to assure fairness and uniformity in implementing and enforcing the Act by the EPA Regional Offices and the states (Clean Air Act, Section 301).

The national response to the Air and Water Acts is encouraging. The overwhelming majority of citizens, private firms and public bodies have met the deadlines and complied with what was required of them. A minority have not. This penalty policy will keep faith with those who joined the common effort. It will help maintain the voluntary compliance on which achievement of our environmental goals depends.

The Clean Air and Water Acts authorize civil penalties up to stated maximums. This policy enunciates general principles for determining appropriate penalties that the government will seek in individual cases. It is based primarily on four considerations--the harm done to public health or the environment; the economic benefit gained by the violator; the degree of recalcitrance of the violator; and any unusual or extraordinary enforcement costs thrust upon the public. The policy recognizes appropriate mitigating circumstances or factors. Each of these penalty considerations and each of the mitigating factors is well founded in law and is consistent with statutory requirements.

While fulfilling its primary objective to deter violations and encourage compliance, this policy has very significant additional justifications and benefits as well:

A. The policy is fair:

1. in an ethical sense, because it will assure that violators of the law do not economically benefit from their violation,

2. in an economic sense, because it will assure that violators do not gain an economic advantage over others who incurred costs to obey the law, and

3. in a geographic sense, for it will assure that no area of the country can offer lenient enforcement as an advantage to its industries or a lure to the industries of other areas.

B. The policy seeks to improve the operation of the market sector of our economy by more fully imposing onto polluting firms costs otherwise thrust upon the public. By internalizing more of the social costs of producing goods or services, it makes prices of goods or services better reflect the resources used in their production, and allows the market system to better allocate resources.

C. The policy seeks to compensate the public for harm done to public health or the environment, or for unusual or extraordinary enforcement expenses.

D. The policy seeks to make efficient use of government resources by removing economic incentives to violate environmental laws, thus maintaining high voluntary compliance rates. Because there are hundreds of thousands of pollution sources, even a small decline in compliance rates brings major new requirements for enforcement resources.

Because this policy is to be used by many federal, state and local enforcement officials throughout the country, it has been drafted in general form. It is a policy for determining what civil penalties the government will seek when civil actions are taken, not a policy to determine which enforcement actions should be taken. Enforcement strategy or priorities are determined elsewhere, not by this policy.

II. Statutory Basis for Civil Penalty under Water and Air Acts

Civil penalties are provided for in Section 309(b) of the Clean Water Act, which subjects violators to civil penalties of up to $10,000 per day of such violation. The Water Act has no further statutory criteria for determining the precise amount of the penalty, leaving that to be determined by the court. Authority for such civil penalties has been in the Act since its passage in 1972.

Since 113(b)of the Clean Air Act provides for civil penalties of up to $25,000 per day of violation and requires courts to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business and the seriousness of the violation." The authority for civil penalties was added by the Amendments of 1977. There was no authority for civil penalties in the Air Act prior to these amendments, at least for violations such as the ones within the scope of this policy.

In addition to adding civil penalty authority in Section 113, the Clean Air Act Amendments of 1977 also established, in Section 120, mandatory administratively imposed, noncompliance penalties.

Regulations implementing Section 120 noncompliance penalties have now been promulgated. Such noncompliance penalties are not covered by this civil penalty policy, and nothing stated in this policy should be taken to refer to them in any way, except that provision has been made in this civil penalty to avoid duplication of penalties based upon the economic benefit of delayed compliance during the same time period (see discussion in part X below.)[1]

III. Types of Violations to Which Policy Applies

The civil penalty policy is to be used by federal, state and local officials in enforcement actions involving certain violations of the Clean Air Act, as amended, and certain violations of the Clean Water Act, as amended.

---

1 The preamble to EPA's final noncompliance penalty regulations provides that no notices of noncompliance will be issued, or penalties assessed, prior to January 1, 1981. For purposes of determining an appropriate civil penalty, EPA will only calculate the economic benefit of delayed compliance prior to this date.

The policy applies to major and minor water pollution sources which violate those requirements of the Water Act made subject to civil penalties by Section 309(d),[2] and to major and minor stationary air pollution sources which violated those requirements of the Clean Air Act made subject to civil penalties by Section 113(b).[3]

The application of this civil penalty policy to situations in which full compliance is required prior to operation (as, e.g., under the New Source Performance Standards under Section 111 of the Clean Air Act) should not be interpreted as suggesting that noncompliance can be tolerated if penalties are paid.

---

1 cont.

With respect to any emission limitation or other requirement approved or promulgated by the Administrator after August 7, 1977, which is either more stringent than those in effect at that time or which establishes a requirement where none existed before, Section 120(g) of the Act provides that the effective date for noncompliance penalties will be the date that full compliance is required with such limitation or requirement (though not later than three years from such approval or promulgation, nor earlier than the effective date that noncompliance penalties begin with respect to violations of existing limitations).

2
i.e., violators of effluent limitations under Section 301 of the Clean Water Act; water quality related effluent limitations under Section 302; national standards of performance under Section 30 toxic and pretreatment standards under Section 307; monitoring under Section 308; aquaculture under Section 310; disposal of sewage sludge under Section 405; violators of permit conditions or limitations under Section 402 and 404; and violators of orders issued under Section 309(a).

3
i.e., violators of an administrative order issued under Section 113(of the Clean Air Act; a state implementation plan requirement approved under Section 110; a New Source Performance Standard under section 111; National Emission Standards for Hazardous Air Pollutants under Section 112; a compliance date extension issued to a source converting to coal under 119(g) (as in effect prior to August 7, 1977 a delayed compliance order issued to a source converting to coal unde 113(d)(5); a nonferrous smelter order under Section 119; certain requirements relating to monitoring under Section 114; a requirement imposed in a delayed compliance order under Section 113(d) and attempts to construct or modify a major stationary source in any area for which the Administrator has found, under Section 113(a)(5), that the state is not acting in compliance with applicable requirements for issuance of permits to construct or modify sources in nonattainment areas.

This policy applies to past and future violations of the above-mentioned requirements of the Clean Air and Water Acts where the violation results from the source's failure to make capital or operation and maintenance expenditures necessary to bring itself into initial compliance with the requirements (e.g., failure to install equipment, buy and use complying fuel, carry out a process change, etc.).

The policy does not apply to violations following initial compliance or to violations of an intermittent or transient kind, such as spills, violations of emission or discharge limits through accidents or when attributable solely to the failure to adequately operate or maintain pollution control equipment. Civil penalties are probably desirable in most actions against such violations, but the appropriate amount of such penalties is not set by this policy.

This policy does not apply, of course, to penalties for criminal violations, nor for violations of court decrees. In most cases that are settled, it will be desirable to include stipulated contempt penalty amounts in the consent decree. Such amounts are not subject to the civil penalty statutory limits and are not covered by this policy.

While this policy has been limited at this time to circumstances where its application is clearly appropriate, experience will undoubtedly indicate other circumstances to which it should be extended. Such situations will be considered on a case-by-case basis. Penalties appropriate for other violations under the Clean Air and Water Acts, and under other Acts, will be the subject of future guidance.

IV. Use of the Penalty Policy in Enforcement Actions

This civil penalty policy is intended to be used by federal and state enforcement officials and, in appropriate cases, by local officials (e.g., local air pollution control agencies operating under authority of state air pollution laws). It is to be used in civil actions in state and federal courts, and in state and local administrative proceedings.

Enforcement actions must seek both expeditious compliance and adequate civil penalties. The penalties to be sought in accordance with this policy are in no way a substitute for compliance nor do they preclude injunctive relief or other non-duplicative remedies.

The goal of an enforcement action where this policy applies is both compliance (including interim controls) and appropriate penalties. Compliance and penalties should not be in any way traded off against each other. Compliance with the law is mandatory, and whereas details of technology or schedules may differ, enforcement officials should not bargain for compliance (or interim controls) by offering any reduction in penalties.

Even in the period before the statutory deadlines, the Clean Water and Air Acts required compliance immediately or as expeditiously as practicable. After the deadline has passed, it is even more urgent that violators be brought quickly into compliance.

The penalty policy, moreover, already is structured to provide a strong economic incentive for rapid compliance, for the more rapid the compliance the lower the penalties under this policy. Such an effect is automatically built into the method of calculating the economic benefit of delayed compliance, for one of the major factors of the formula is the length of the period of noncompliance. The penalty factors of harm to the environment and recalcitrance of the violator may also lead to penalty reductions as the speed of compliance increases. In the case of major source violators of the Air Act moreover, the requirement of mandatory, administratively assessed noncompliance penalties adds additional economic incentive for rapid compliance.

Additionally, it must be kept in mind that penalties are authorized and intended to deter violations and encourage compliance. Penalties are not effluent or discharge fees. Payment of penalties does not give any right or privilege to continue operation in violation of law or to slow down compliance.

When civil enforcement actions are brought in courts, the question of penalties will arise in three contexts--filing the civil complaint, determining the minimum amount acceptable in settlement, and presenting argument to the court (and possibly affidavits or testimony, as well) for its consideration in setting penalties at trial.

The Agency is prepared to settle enforcement actions brought under this policy. Where settlement is not possible, the Agency is obviously free to claim penalty amounts up to the statutory maximum, which will generally be the amount claimed in the complaint.

The methodology of this penalty policy will be used to determine a "minimum civil penalty" which would typically be presented to the court as an appropriate penalty to be imposed.

In addition, the methodology will be used to determine a lower "minimum civil penalty acceptable for settlement" (set out in Part VI) to be used for settlement negotiations.

This policy will allow enforcement officials to arrive at fair, consistent and rationally based penalty sums while providing a lower minimum figure as an encouragement to settlement if enforcement officials believe that settlement is desirable.

By providing them with a minimum settlement figure, this policy gives the enforcement officials responsible for the action a range in which to exercise their discretion to settle or not to settle (i.e., between the statutory maximum and the minimum sum acceptable in settlement as determined by this policy).

Where the state or local administrative bodies are taking enforcement actions and have authority to administratively impose civil penalties, the minimum penalty figure determined for settlement purposes in civil actions should also serve as the minimum to be imposed in the administrative action. The administrative body, however, will want to consider its statutory maximum penalty authority and the minimum civil penalty and will probably want to impose penalties above the settlement amount. This is particularly the case since the administrative body will probably have already decided the case regarding the violation, and reductions for settlement will no longer be relevant.

V. Determining the Amount of the Statutory Maximum Penalty and of the Minimum Civil Penalty

The minimum civil penalty should be determined by the factors and method set out below. The civil penalty so determined will, in most cases, be lower than the statutory maximum sum. Where the civil penalty sum so determined is higher, this information may be used in settlement negotiations or litigation but the statutory maximum is, of course, all that may be requested by the government or imposed by the court.

The amount of the minimum civil penalty should be determined as follows:

Step 1 - Factors Comprising Penalty

Determine and add together the appropriate sums for each of the four factors or elements of this policy, namely:

the sum appropriate to redress the harm or risk of harm to public health or the environment,

the sum appropriate to remove the economic benefit gained or to be gained from delayed compliance,

the sum appropriate as a penalty for the violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and

the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public.

Step 2 - Reductions for Mitigating Factors

Determine and add together sums appropriate as reductions for mitigating factors, of which the most typical are the following:

the sum, if any, appropriate to reflect any part of the noncompliance attributable to the government itself,

the sum appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's control (floods, fires, etc.).

Step 3 - Summing of Penalty Factors and Mitigating Reductions

Subtract the total reductions of Step 2 from the total penalty of Step 1. The result is the minimum civil penalty. If no settlement can be reached with the defendant, this sum would typically be presented to the court as an appropriate penalty to be imposed.

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In some unusual cases, the penalty amount determined in this manner may be larger than the violator can reasonably be expected to pay while bringing itself expeditiously into compliance and continuing to do business. In such cases, enforcement officials may recommend that the penalty be postponed or forgiven in part or in total.

VI. Determining the Minimum Penalty Acceptable for Settlement

Many cases may, of course, be settled prior to trial and result in consent decrees or orders, rather than being litigated to conclusion. The objectives of the enforcement action are still the same, however -- full and expeditious compliance (including interim controls), and penalties. In cases in which enforcement officials think settlement is appropriate, they may, as an encouragement to settlement, reduce the penalty below the lesser of the statutory maximum and the sum determined to be the minimum civil penalty. This reduction, however, may not be greater than the percentage which reflects the likelihood of being unable to establish the violation or violations.

Example:

Assume statutory maximum penalty = $5,000,000

(200 days of violation @ $25,000/day)

Assume minimum civil penalty = $2,000,000

Assume estimate of government's chance of proving violation at trial = 80% (or, chance of being unable to prove violation = 20%)

The maximum reduction permitted for settlement is, therefore, $400,000 (20% X $2,000,000)

The minimum civil penalty acceptable for settlement is, therefore, $1,600,000 (80% X $2,000,000 or $2,000,000 - $400,000) (i.e., range for settlement negotiation = $5,000,000 to $1,600,000)

It is assumed that enforcement actions will not be taken unless the evidence of violation is strong; therefore, in most cases, the percentage of reduction should not be large--probably not more than 25%. Unusual circumstances may, however, exist where larger reductions are appropriate.

It is not required, of course, that enforcement officials handling an enforcement action reduce the penalty for settlement, or that they reduce it in any given amount. Defendants who settle quickly will undoubtedly stand better chances of receiving such reductions than those who do not.

It should be noted, moreover, that the reduction relates only to the degree of uncertainty of proving that the violation or violations resulted from the source's failure to make capital or operation and maintenance expenditures necessary to bring itself into initial compliance. It does not relate to uncertainty as to the court's decision on compliance schedules and penalties. Enforcement officials should carefully and thoroughly prepare the facts and reasoning supporting their penalty request, and should not be reluctant to present these arguments to the court. Judges are accustomed to deciding such matters, and will make better decisons after receiving well-reasoned recommendations based on fair principles consistently applied.

There may be extraordinary instances where the minimum settlement penalty amount is more than the violator is able to pay. In such cases, it may be appropriate to agree to a postponement of the penalty or payment over time, or, in an extreme case, to a further reduction of the penalty. Further guidance on handling these extraordinary instances is set out below.

VII. Explanation of Factors Considered in Determining Minimum Amount of Civil Penalty

A. Harm or Risk of Harm to Health or the Environment

The extent that the violation harms or poses risks of harm to public health or the environment must be carefully considered in setting the appropriate penalty, for violations which involve such harm or risk are certainly very serious. For example, a violation involving discharges of toxic chemicals into waters which enter or threaten to enter public drinking water supplies certainly causes or threatens serious harm to public health. It may also destroy or threaten valuable fishing or recreational resources.

Similarly, a violating air pollution source in an area which has not attained the primary (i.e., health protective) ambient air standard is contributing to a health hazard or is actually causing harm to residents of the area.

All pollutants introduced into the environment create some harm or risk, of course, and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question. The penalty amount attributable to such public harm or risk will have to be determined on the facts of each specific case.

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Estimated costs of environmental restoration may be useful in quantifying harm to the public, and traditional personal injury damage concepts may be helpful in quantifying injuries to public health. It may also be possible to use the recreational values developed by various public agencies to assist in quantifying environmental harm.

B. Economic Benefit of Delayed Compliance

Violations which are the subject of this policy usually consist of a failure to install and operate required pollution control equipment within time limits set by law, or a failure to utilize fuels or raw materials with lower pollutant content.

Delaying the purchase and operation of pollution control equipment results in economic savings or gains to the owner or operator of a facility. These savings or gains arise from two distinct sources:

> the opportunity to invest the capital funds not spent to purchase and install pollution control equipment during the period of noncompliance, and
>
> the avoidance of the operation and maintenance expenses associated with the pollution control equipment during the period of delayed compliance (labor, materials, energy, etc.). These costs avoided represent a permanent savings to the owner or operator; they may, of course, also be invested in income-producing ways.

The economic benefits attributable to delaying capital expenditures and avoiding operation and maintenance expenses have been combined in a single formula. Because these benefits occur over a period of time, both past and future in some cases, the formula reduces these benefits to a present dollar value by standard accounting methods, and also takes into account tax effects, and other appropriate economic factors. The formula is further described in a technical support document dated September 27, 1978, subject: Computation of Economic Benefit of Delayed Compliance under Civil Penalty Policy. The formula described in that memorandum should be utilized in calculating economic benefit for the purpose of arriving at appropriate penalty amounts. It is recognized, however, that there may be unusual circumstances in which a different method of measuring economic benefit may be appropriate. The acceptability of any such method will have to be determined on a case-by-case basis.

C. Violator's Recalcitrance, Defiance, or Indifference to the Requirements of the Law

Good faith efforts to obey the law are expected of all subject to its jurisdiction. Except as provided below in Sections E and F (pp. 13 and 14) assertions of "good faith" should not be considered as a basis for reducing the otherwise appropriate penalty. Courts traditionally consider the degree of the violator's recalcitrance, defiance, purposeful delay or indifference to its legal obligations in setting penalties. Enforcement officials should do so also, and should not hesitate to include a sum in the civil penalty to reflect such factors where they exist.

Care should be exercised, however, not to seek to add such an element of penalty on a person, firm, or entity for exercising, without purpose of delay, its lawful rights to challenge agency determinations in administrative or court proceedings. A violator which has complied with all requirements that were not disputed while challenging the rest has not been, on these grounds alone, recalcitrant, defiant or indifferent. Such a violator is on a different footing from one which used a challenge of one aspect of its compliance requirement to delay all compliance, or which made frivolous challenges for purposes of delay. This latter mode of behavior may indeed constitute recalcitrance, defiance, or indifference so as to justify adding an element of penalty.

If a violator, in good faith, did challenge agency determinations without purpose of delay, but did not prevail, and by virtue of the litigation has missed a deadline, or otherwise failed to comply, it is nevertheless in violation, and subject to the civil penalty factors other than the one related to the recalcitrance, defiance, or indifference of the violator -- i.e., harm or risk to public health or the environment, economic benefit of delayed compliance, and extraordinary enforcement costs. When a source decides to challenge an agency requirement, it assumes the risks of not prevailing in its challenge. Violators "litigate on their own time." U.S. Steel v. Train, 556 2d 822, (7th Cir. 1977).

D. Extraordinary Costs of Enforcement Action

Although attorney's fees and court costs cannot be recovered by the federal government in civil enforcement actions, there are situations when it is appropriate to consider unusual expenses incurred in detecting the violation, defining its extent, and in bringing the enforcement action.

Where, for example, a source has disregarded its obligation to identify its own pollutant discharges and apply for a permit, and the government, as a result, must undertake such work, the government's costs in identifying the discharges may be included in the amount sought. Or, for example, where the violator's sampling and analytical procedures are so deficient that the government must conduct significant sampling on its own to confirm discharge levels, the expense of such sampling may be added to the sum of civil penalties sought. Those costs which are routinely incurred by state and federal enforcement officials need not, however, be sought as part of a civil penalty.

E. Mitigation for Noncompliance Caused by the Government Itself

When failure to comply or compliance delay was caused by, requested by, or attributable to the government, civil penalties are not appropriate. When the failure to delay was partially caused by the government, the penalties may be reduced in proportion to the relative share of government responsibility or in proportion to the period of delay caused by the government. It is expected that mitigation on this basis will only be permitted when the government was clearly responsible for the delay, as, for example, it may have been in a small number of cases under the Water Act. In these instances, a discharger challenged conditions of an NPDES permit, requested an adjudicatory hearing, prosecuted its request expeditiously and in good faith, and may have been delayed by the Agency's lack of resources to provide prompt hearings for all those who challenged their permits.

States and the federal government are not bound by the acts of the other, but they will, of course, want to be informed of and consider carefully the acts of the other in connection with penalty decisions.

F. Mitigation for Impossibility

Where delayed compliance was, in fact, attributable to causes absolutely beyond the control of the violator (such as floods, fires, and other acts of nature) and was not due to fault or negligence, a civil penalty is not required--even in instances where as a result of the impossibility the violator has enjoyed an economic benefit. If only a portion of the period of delayed compliance is attributable to such factors beyond the violator's control, a civil penalty should be sought only for that period of noncompliance that was not attributable to such factors.

G. Other Bases for Mitigation

There may also be other unforeseeable mitigation circumstances because of which all or a part of the otherwise appropriate civil penalty should not be sought, as, for example, when it was not technically possible to comply. Acceptability of such a situation as a mitigating circumstance will have to be considered on a case-by-case basis, keeping in mind also the "technology forcing" aspects of the laws. Another instance in which all or part of an otherwise appropriate civil penalty might not be sought would be where emergency needs require that sources be operated even though they fail to comply with discharge or emission limitations. Obviously, situations involving unusual mitigating circumstances must be looked at individually since the full range of such circumstances cannot be predicted.

Since the Water Act and the Air Act impose absolute duties of compliance, requiring sources to take whatever measures are possible to come into compliance by the legally established dates, the burden is clearly upon the violator to establish a compelling reason why a civil penalty should be mitigated. This burden should only be considered satisfied where urgent efforts are made to comply but actual impossibility or government conduct alone precluded compliance, or where a similar mitigating circumstanc caused the delay. Only in these instances have violators really made what should be considered a "good faith" effort that excuses noncompliance. All dischargers must be held to a standard that requires careful and diligent planning and an urgent, serious effort to come into compliance in a timely manner.

H. Specified Clean Air Act Factors

The civil penalty policy factors described above include consideration of the three factors specified in Section 113 of the Clean Air Act. The "size of the business" is reflected in the economic benefit of delayed compliance since less expensive control equipment is typically required for smaller businesses and the benefit of delaying installation of such equipment is correspondingly less. The "economic impact of the penalty on the business" is considered by the penalty deferral or reduction that is allowable where violators lack the ability to immediately pay the full amount of the penalty (see section IX below). The third factor, the "seriousness of the violation," is taken into account by looking at the harm done to public health and the environment (violations may, though, be considered as serious, even though they do no measurable or quantifiable harm to the environment) and the violator's recalcitrance, defiance or indifference to the requirments of the law.

VIII. Approved Environmentally Beneficial Expenditures In Lieu of Payment of Penalty Sum to State or Federal Treasury (i.e., "Credits Against Penalty")

A. Use of Credit to Satisfy or Offset Penalty

Occasions have arisen in enforcement actions where violators have offered to make expenditures for environmentally beneficial purposes above and beyond expenditures made to comply with all existing legal requirements, in lieu of paying penalties to the treasury of the enforcing government. Courts have sometimes accepted such payments, and in some circumstances such arrangements are acceptable under this penalty policy. For ease of reference (but without characterizing them for any other legal purposes--e.g., tax deductibility) such alternative ways for a violator to satisfy the penalty instead of paying the penalty sum to the federal, state, or local treasury are referred to herein as "credits" against the penalty.

Examples of possible credits against a penalty might be:

(1) construction and operation of approved pollution control equipment in addition to that required for compliance with existing requirements which will achieve a significant further increment of environmental benefit above all present requirements of federal, state or local law.

(2) financial contributions to a private or governmental body or agency for environmentally approved uses--e.g., restoring fish and wildlife resources, carrying out environmental studies or research of a high priority need, improving the ability of citizen or public interest groups to monitor and assist in enforcing the law. Credits, however, will not be given for expenditures that would properly be required as part of equitable relief being sought for the violations, such as cleaning up the pollution, restoring the areas affected, or reimbursing the government's costs of doing so, unless these costs have been included in the penalty sum. In all events, the financial contributions must be acceptable to the enforcing agency. Credits for high priority research are desirable, but the research must be closely scrutinized to insure it is beneficial from the point of view of the enforcing agency, not merely from the point of view of the violator.

B. Criteria for Acceptable Credits

In determining whether a proposed expenditure is creditable against the penalty, the following criteria must be satisfied:

(1) The penalty sum itself will generally be stated in the order, decree or judgment as determined, before any credits are allowed, and this amount should be clearly identified as a penalty.

(2) The expenditure proposed for credit must be approved by enforcement officials in advance of the entry of the decree, order, or judgment in the case, must be clearly delineated therein, and must be enforceable along with other elements of the decree, e.g., subject to stipulated contempt penalties or to the court's continued contempt authority for the full length of time over which expenditures are to be made.

(3) The item to be acquired by additional expenditure for which credit is given must be described with sufficient precision to bind the violator to the agreed expenditure level. Where the credit is for the construction and operation of additional pollution control equipment that will bring about a greater degree of control than that required by law (and a considerably reduced discharge or emission level) an agreement should be obtained from the violator that it will treat the reduced discharge or emission, in all respects, as a requirement of law for the period that it has agreed to operate such equipment.

(4) The proposed expenditure must be clearly for environmental benefits above and beyond the requirements of law. Interim controls and expeditious compliance are required by law (not just waiting for the last day before the statutory deadline) and are not appropriate for credit.

(5) Environmental laws require compliance at all times. Good engineering practice, therefore, includes design of pollution control systems with sufficient capacity and reliability to provide a margin of safety to ensure such continuous compliance. Expenditures for this margin of safety are to assure compliance with the requirements of law and are not eligible for credits.

(6) If in accomplishing the required level of pollution control, the violator necessarily will accomplish a higher level of control, there can be no credit for such incidental benefit. (e.g., to accomplish 80% removal of a pollutant, the violator must necessarily purchase and operate equipment which removes 85% of the pollutant.)

(7) Studies or research and development which are necessary parts of compliance with legal requirements are not eligible for credits (e.g., studies assessing the feasibility and costs of alternative methods of compliance or prototype research and development). Research and development work eligible for credit should be work from which the public in general can benefit. To insure this, the following measures should be required:

(a) the enforcing agency should insure that adequate reporting procedures are required. These procedures should include an initial research and development plan, periodic progress reports, and a comprehensive final report that documents startup and the first year of operations if a facility was involved;

(b) the enforcement agency or its contractors should be given the right to obtain first hand information about the work by inspecting all documents associated with it and by making on-site inspections; and

(c) the source should agree that all domestic patents, design rights and trade secrets that result from the work will be placed in the public domain.

In most instances the research and development should be related to the violation, but other instances can be considered on a case-by-case basis. As stated above, credits for research or studies will be closely scrutinized.

(9) Expenditures accepted for credit may only be expenditures that the violator agrees it may not later use (or sell to anyone else to be used) as a credit against any other existing provisions of environmental law (such as emission offset to allow the construction or modification of a major stationary source in an area where national air quality standards are not being satisfied) and the decree must so provide.

C. Constraints on Federal Enforcement Officials With Respect to Payment of Penalties and Use of Credits In Lieu of Penalties

The Air and Water Acts both authorize civil penalties which are payable only to the United States Treasury. State statutes may differ, but most provide for payment of the penalties to the State Treasury.

Civil enforcement actions to enforce the Air or Water Acts whether settled or litigated to conclusion will end in orders, decrees, or judgments of a court. In such actions there are limitations governing the positions to be taken by federal enforcement officials. In settling cases, federal enforcement officials may accept proposals for expenditures as credits against penalties and recite them, as well as the penalty sum, in the proposed consent decree, but it must be kept in mind that such provisions as well as the entire decree are subject to approval by the court.

With respect to credit for proposed contributions to third parties, federal enforcement officials may not agree with defendants as to such payments in lieu of paying the penalty to the United States Treasury, for that prefers a third party as recipient of the payment over the United States, and prefers one third party potential recipient over another.

State and local enforcement officials may or may not be as constrained with respect to proposing contributions to third parties. Accordingly, the appropriateness of state or local government officials proposing credits for contributions to third parties must be governed by their own policies.

D. Discretionary Nature of Credit

Acceptance of a proposed credit is purely discretionary with federal, state, and local enforcement officials. Enforcement officials may, of course, insist on payment of the penalty into the treasury. The statutes provide for penalties. Violators have no "rights" to credits against these penalties.

E. Consideration of After-Tax Effects of Credit Expenditures

The amount of the credit to be given for proposed expenditures is governed by the rule that it must have the same after-tax effect on the violator as payment of the penalty sum would have. Since the penalty sum is immediately payable up entry of the order, decree or judgment, any proposed credit whic includes other than immediate payment of the full sum must be

reduced to an equivalent present value by standard accounting methods. Where the expenditure proposed for credit is construction and operation of additional pollution control equipment, the formula for computing economic benefit of delayed compliance (see paragraph VII.B. above) should be used to compute the present value of the credit. It should be noted that this formula assumes that the expenditures will receive normal tax treatment (deductibility or credit against tax) and accounts for that. The present value resulting from use of this formula may, therefore, be used dollar-for-dollar as credit against the penalty.

IX. Penalty Postponement or Forgiveness Based Upon Inability To Pay

In some instances, the indicated appropriate civil penalty may be so severely disproportionate to the resources of the owner or operator of the violating facility that its imposition would cause the owner or operator very serious economic hardship. In such unusual cases, enforcement officials may recommend to the court that it postpone or forgive the otherwise appropriate penalty, in part or in total as circumstances may indicate.

While the appropriate civil penalty amount may be postponed or reduced in such circumstances, no such concession may be made with respect to the cost of coming into compliance. Except as the Air and Water Acts may themselves provide, compliance is required in every case, regardless of cost and regardless of the violator's financial situation.

Clearly the burden is on the violator to establish its inability to pay. This burden can only be satisfied when the violator has produced adequate evidence to establish its financial condition and when the enforcement officials involved have obtained a competent review of the violator's financial condition. Mere statements of inability to pay are not enough, and a violator making such a claim must be willing to make full disclosure of its financial affairs to enforcement officials and the court under circumstances that assure such disclosure is accurate and complete.

If review by persons competent to assess the violator's financial condition and prospects indicates that the violator's resources would not permit it to finance its compliance, and also pay the penalty, then, if adequate interest can be arranged, the penalty may be paid over time.

If even payment over time is not possible, then the penalty may be reduced to an amount commensurate with the resources of the violator (taking into account the cost of compliance).

In making a determination of the violator's ability to pay, it is important to insure that the economic condition of the violator has not been distorted by transactions with parent companies or shareholders or by unusual or unconventional accounting practices. Where such distortion has taken place, parent company and shareholder or other owners' resources should be considered in determining whether or not the violator is able to pay the civil penalty. In all cases, review of financial information by persons competent in financial affairs should be obtained.

X. Time Period for Application of Civil Penalty Policy

In general, this civil penalty policy would appropriately apply to violations of the kinds covered which have occurred since enactment of the Air Act in 1970 and the Water Act in 1972. In determining the penalty sum, both with respect to the statutory maximum and the minimum civil penalty, the period of violation should begin with the earliest provable date of violation and continue until the violator has installed and operated the required equipment, made the required process change or converted to the complying fuel and thus brought itself into compliance.

Under the Water Act, this general rule will be applied in this civil penalty policy, since authority for civil penalties has existed since 1972. Consequently, the period covered and the noncompliance period commence on the date when the schedule requirements of a National Pollutant Discharge Elimination System (NPDES) permit were violated or on July 1, 1977, (the statutory deadline for best practicable control technology or secondary treatment), whichever is earlier. The period of noncompliance ends when the violator has brought itself into full compliance with statutory (including permit) requirements.

Under the Air Act, there are other considerations which, as a matter of policy, lead to application of a different rule regarding the time period for application of this civil penalty policy. The Air Act has had authority for criminal or civil injunctive relief since 1970, but general authority for civil penalties was not added until the amendments of 1977, which took effect August 7, 1977. Whether, as a matter of law, civil

penalties are authorized in civil enforcement actions commenced or amended after August 7, 1977, for violations occurring before August 7, 1977, may be debated, but regardless of that, and without conceding any issue of law, as a decision of policy, this civil penalty policy will be applied by federal enforcement officials only to those violations of the Air Act occurring after August 7, 1977.

Accordingly, under the Air Act, for purposes of computing the statutory maximum penalty, the period of noncompliance will commence with August 7, 1977, or the date of earliest provable violation, whichever is later. For purposes of computing the minimum civil penalty, the period of noncompliance used will also be as stated in the previous sentence, except that when considering the sum to be included for the violator's recalcitrance, defiance, or indifference to its legal obligations, the entire record of the violator should be considered.

When determining a civil penalty under the Air Act a special consideration also applies concerning the end date of the period of noncompliance, but only with respect to the element of the penalty based on removing the economic benefit of delayed compliance.

As indicated earlier, Section 120 of the Air Act requires EPA to assess and collect noncompliance penalties against certain categories of stationary sources. The purpose of these administratively imposed penalties is to recapture the economic value which a delay in compliance may have to the source owner or operator. EPA will not issue any notices of noncompliance or assess and collect any noncompliance penalties prior to January 1, 1981. While the authority to collect noncompliance penalties (Section 120) is independent of and additional to the authority to seek civil penalties (Section 113), federal enforcement officials will not seek double recovery of any portion of the economic value attributable to delayed compliance. Accordingly, when the period of noncompliance will extend beyond January 1, 1981, the economic benefit element of the civil penalty should be based only upon the noncompliance that will have occurred prior to that date.

Sources subject to judicial orders or that have negotiated consent decrees with EPA, will not have their civil penalties recalculated. Additionally, even if a consent decree has not been approved by the court, the amount of the penalty need not be recomputed if it is clear that agreement has been reached on all material terms, including the penalty amount, and among all parties including EPA where it is a party. In all other settlements, the economic benefit components of the civil penalty will be based

upon noncompliance which will occur up to January 1, 1981, or the date for final compliance specified in the consent decree, whichever is earlier. In this way the policy will provide an incentive for expeditious and fair settlements, while honoring the Agency's commitment not to seek double recovery of any portion of the economic benefit element attributable to delayed compliance.

In all other respects, however, in Air Act cases, both when computing the statutory maximum penalty and when determining the minimum civil penalty (or the minimum acceptable for settlement), the period of noncompliance continues until the violator has brought itself into full compliance with the requirements of the law.

Where state or local government civil penalty authority existed prior to August 7, 1977, then that additional authority might, of course, be used by the state to extend the period of noncompliance.

XI. Application of Civil Penalty Policy to Different Types of Sources - Private, Public, Regulated Utilities, etc.

Congress, in enacting the civil penalty provisions of the Air and Water Acts, and in the Air Act's (Section 120) administratively imposed noncompliance penalties, made no exemptions or distinctions for classes or types of violators on the basis of ownership or form of organization. This civil penalty policy seeks to carry out Congress' fair, evenhanded, consistent approach, but recognizes obstacles in a few situations.

A. Privately-Owned or Operated Sources (other than Regulated Utilities)

This penalty policy, as described above, applies in full in civil enforcement actions against privately-owned and operated sources other than regulated utilities. Extraordinary situations, if any, can be handled on a case-by-case basis.

B. Publicly-Owned Utilities and Investor-Owned, Regulated Utilities

Publicly-owned utilities and investor-owned, regulated utilities are to be treated equally.

Penalties will be sought from utilities whose violations come within the scope of this policy. The focus of these penalties will be on deterrence. That is, penalties should be in sufficient amounts to deter future violations. Penalties should include appropriate amounts for environmental harm or risk of harm caused by the source's violations and recalcitrance or indifference of the source to its legal obligations as well as any extraordinary enforcement costs which the government has been forced to pay.

C. State and Municipal Facilities

In enforcement actions against state or municipal facilities, including publicly-owned treatment works, this civil penalty policy applies, except with respect to the penalty element for economic benefit of delayed compliance.

Because state and municipal budgeting and financial decisions are generally concerned with the allocation of tax derived public funds to provision of public services, rather than the sale of goods or services for profit, recovering the economic benefit of delayed compliance is somewhat less applicable. In all such cases, the economic benefit of delayed compliance should be calculated and considered as a guide, but in determining the minimum civil penalty and the minimum civil penalty acceptable for settlement, enforcement officials may recommend that this factor be discounted or eliminated in cases where they think it is appropriate. Because the other elements (harm or risk; recalcitrance; extraordinary enforcement expense) are not always susceptible to precise quantification, the appropriate minimum civil penalty or the minimum civil penalty acceptable in settlement for such facilities can only be determined on a case-by-case basis.

The only further guidance with respect to penalties in such cases is as follows:

1. Enforcement officials should not excuse all civil penalties except in extraordinary situations, for that would create a double standard of more lenient treatment for public agencies than private individuals or firms.

2. Civil penalties for violations by state or municipal facilities should be in sufficient amounts to deter future violations, considering the elements of this penalty policy, size of the facility, and the duration of the violation, and in a municipal case, the size and the resources of the municipality. To achieve a deterrent effect, civil penalties for violations by state or municipal facilities should bear some relationship to the population served by the violating facility and upon which the burden of the penalty will fall.

D. Federal Facilities (Other than Utilities)

Because of recent amendments to the Air Act and the Water Act and the federal mechanism that exists for the payment of penalties, federal facilities present a significantly different problem from other violating sources. Accordingly, guidance as to them will be provided elsewhere.

XII. Federal-State Cooperation in Implementing this Policy

As part of their efforts to enforce air and water pollution laws, many federal, state, and local enforcement officials will be using this penalty policy. To assist in achieving consistency in its application, a method of consultation among federal, state and/or local enforcement officials has been devised to insure that appropriate penalties will be sought in specific cases.

XIII. Effective Date of this Civil Penalty Policy

Many of the factors comprising this penalty policy have been used by federal and state enforcement officials for years. EPA's civil penalty policy has been more fully articulated over the last year.

On June 3, 1977, guidance was provided to EPA regional offices by the Office of Enforcement regarding criteria for settlement of civil penalty aspects of enforcement cases under the Water Act. This guidance included most of the factors now more fully explained in this document, including, for example, recovery of the economic benefit of delayed compliance, harm to the public, and recalcitrance of the violator. EPA's intention to take enforcement action against major source violators of the Water Act and to seek civil penalties, including sums to take away the economic benefit of delayed compliance, was announced at a press conference on June 21, 1977, by Assistant Administrator Thomas C. Jorling.

Further elaboration of this Water Act civil penalty policy was provided by an Office of Enforcement memorandum to EPA regional offices dated June 28, 1977.

The Air Act Amendments became effective on August 7, 1977, including authority for civil penalties, and regions were advised on September 2, 1977 that civil penalties should only be sought for violations occurring or continuing after August 7, 1977.

The first comprehensive version of this consolidated Air and Water Act civil penalty policy was distributed to federal and state enforcement officials on November 23, 1977, and took effect on that date.

In addition to these general communications, this civil penalty policy was explained at meetings and workshops of federal, state, and local officials, at press conferences and other gatherings at Washington, D.C., and in all regions of the country in the last half of 1977 and early 1978. This policy has had the benefit of comments, discussion and analysis over many months.

The civil penalty policy (including its predecessors as explained above) covers all Air and Water Act cases within its scope, as follows:

> all Water Act cases not concluded prior to June 3, 1977, and
>
> all Air Act cases not concluded prior to August 7, 1977.

The application to Water Act cases concluded after June 3, 1977 and Air Act cases concluded after August 7, 1977, but prior to the date of this memorandum, is governed by the guidance extant and in effect at the time the case was concluded, including any case-by-case guidance given.

For purposes of this policy, a case was concluded if it is clear that agreement had been reached on all material terms, including penalties, and among all the parties, including EPA where it was a party. Where the agreement had been reduced to writing so as to memorialize its terms, it was clearly concluded. Other situations will have to be individually considered.

Enforcement officials aware of civil enforcement actions which they believe should not be included within the coverage of this policy or its predecessors should present the facts or circumstances for consideration.

XIV. Previous Civil Penalty Policy Superseded

This civil penalty policy supersedes all previous Air Act stationary source and Water Act civil penalty policy, including the following, but only to the extent that such previous policy was inconsistent herewith:

> (1) U.S. Environmental Protection Agency, Office of Enforcement guidance letter entitled "Settlement of Section 309(d) Enforcement Cases for Monetary Amounts" dated June 3, 1977, signed by Stanley W. Legro, Assistant Administrator for Enforcement.
>
> (2) U.S. Environmental Protection Agency, Office of Enforcement guidance letter entitled "Settlement of Section 309(d) Enforcement Cases for Monetary Amounts--Policy Background" dated June 28, 1977 signed by Stanley W. Legro, Assistant Administrator for Enforcement.

(3) U.S. Environmental Protection Agency, Office of Enforcement guidance letter entitled "Civil Penalties under Section 113(b) of the Clean Air Act Amendments of 1977," dated September 2, 1977, signed by Richard D. Wilson, Acting Assistant Administrator for Enforcement.

Jeffrey G. Miller
Acting Assistant Administrator for Enforcement
U.S. Environmental Protection Agency

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

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

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

FEB 16 [illegible]

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: New Civil Penalty Policy

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

TO: Associate Administrators
Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Staff Office Directors

Attached is the Agency's new civil penalty policy. This new penalty policy will establish a consistent Agency-wide approach to the assessment of civil penalties while allowing substantial flexibility for individual cases within certain guidelines. It is designed to promote the goals of deterrence, fair and equitable treatment of the regulated community and swift resolution of environmental problems. No attempt is made to address issues specific to each statute the Agency administers. Instead, this will be left to guidance developed by each program.

The policy consists of two documents: Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty Assessments. The first document focuses on the general philosophy behind the penalty policy. The Framework provides guidance to each program on how to develop medium-specific penalty policies.

The new penalty policy will not be truly effective until the medium-specific penalty policies are completed. Thus it is important that work begin on the medium-specific policies as soon as possible. I am therefore requesting that each program office meet with their counterparts in OECM and develop workplans for the development of those policies. Please submit

those workplans to me by March 31, 1984. The Deputy Administrator has requested that we add the workplans to the Action Tracking System as we receive them. If you have any questions regarding this memorandum or the new civil penalty policy, please contact Jonathan Libber of the Office of Legal and Enforcement Policy. He may be reached at 426-7503.

Attachment

cc: Enforcement Policy Workgroup Members
Associate Enforcement Counsels
OECM Office Directors

1A21.

Introduction

This document, Policy on Civil Penalties, establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions. These goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - are presented here in general terms. An outline of the general process for the assessment of penalties is contained in Attachment A.

A companion document, A Framework for Statute-Specific Approaches to Penalty Assessments, will also be issued today. This document provides guidance to the user of the policy on how to write penalty assessment guidance specific to the user's particular program. The first part of the Framework provides general guidance on developing program-specific guidance; the second part contains a detailed appendix which explains the basis for that guidance. Thus, the user need only refer to the appendix when he wants an explanation of the guidance in the first part of the Framework.

In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty actions should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented. Documentation for deviations from the Framework in program-specific guidance should be located in that guidance. Documentation for deviations from the program-specific guidance in calculating individual penalties should be contained in both the case files and in any memoranda that accompany the settlements.

The Agency will make every effort to urge administrative law judges to impose penalties consistent with this policy and any medium-specific implementing guidance. For cases that go to court, the Agency will request the statutory maximum penalty in the filed complaint. And, as proceedings warrant, EPA will continue to pursue a penalty no less than that supported by the applicable program policy. Of course, all penalties must be consistent with applicable statutory provisions, based upon the number and duration of the violations at issue.

Applicability

This policy statement does not attempt to address the specific mechanisms for achieving the goals set out for penalty assessment. Nor does it prescribe a negotiation strategy to achieve the penalty target figures. Similarly, it does not address differences between statutes or between priorities of different programs. Accordingly, it cannot be used, by itself, as a basis for determining an appropriate penalty in a specific

action. Each EPA program office, in a joint effort with the Office of Enforcement and Compliance Monitoring, will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework.

Until new program-specific policies are issued, the current penalty policies will remain in effect. Once new program-specific policies are issued, the Agency should calculate penalties as follows:

- For cases that are substantially settled, apply the old policy.

- For cases that will require further substantial negotiation, apply the new policy if that will not be too disruptive.

Because of the unique issues associated with civil penalties in certain types of cases, this policy does not apply to the following areas:

- CERCLA §107. This is an area in which Congress has directed a particular kind of response explicitly oriented toward recovering the cost of Government cleanup activity and natural resource damage.

- Clean Water Act §311(f) and (g). This also is cost recovery in nature. As in CERCLA §107 actions, the penalty assessment approach is inappropriate.

- Clean Air Act §120. Congress has set out in considerable detail the level of recovery under this section. It has been implemented with regulations which, as required by law, prescribe a non-exclusive remedy which focuses on recovery of the economic benefit of noncompliance. It should be noted, however, that this general penalty policy builds upon, and is consistent with the approach Congress took in that section.

Much of the rationale supporting this policy generally applies to non-profit institutions, including government entities. In applying this policy to such entities, EPA must exercise judgment case-by-case in deciding, for example, how to apply the economic benefit and ability to pay sanctions, if at all. Further guidance on the issue of seeking penalties against non-profit entities will be forthcoming.

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Deterrence

The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, <u>at a minimum</u>, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the "benefit component" of the penalty.

Where the penalty fails to remove the significant economic benefit, as defined by the program-specific guidance, the case development team must explain in the case file why it fails to do so. The case development team must then include this explanation in the memorandum accompanying each settlement for the signature of the Assistant Administrator of Enforcement and Compliance Monitoring, or the appropriate Regional official.

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to

achieve general deterrence. These extra assessments should balance the other goals of this policy, particularly equitable treatment of the regulated community.

This approach is consistent with the civil penalty provisions in the environmental laws. Almost all of them require consideration of the seriousness of the violation. This additional amount which reflects the seriousness of the violation is referred to as the "gravity component". The combination of the benefit and gravity components yields the "preliminary deterrence figure."

As explained later in this policy, the case development team will adjust this figure as appropriate. Nevertheless, EPA typically should seek to recover, at a minimum, a penalty which includes the benefit component plus some non-trivial gravity component. This is important because otherwise regulated parties would have a general economic incentive to delay compliance until the Agency commenced an enforcement action. Once the Agency brought the action, the violator could then settle for a penalty less than their economic benefit of noncompliance. This incentive would directly undermine the goal of deterrence.

Fair and Equitable Treatment of the Regulated Community

The second goal of penalty assessment is the fair and equitable treatment of the regulated community. Fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility. The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

But any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Methods for quantifying the benefit and gravity components are explained in the Framework guidance. These methods significantly further the goal of equitable treatment of violators. To begin with, the benefit component promotes equity by removing the unfair economic advantage which a violator may have gained over complying parties. Furthermore, because the benefit and gravity components are generated systematically, they

will exhibit relative consistency from case to case. Because the methodologies account for a wide range of relevant factors, the penalties generated will be responsive to legitimate differences between cases.

However, not all the possibly relevant differences between cases are accounted for in generating the preliminary deterrence amount. Accordingly, all preliminary deterrence amounts should be increased or mitigated for the following factors to account for differences between cases:

- Degree of willfulness and/or negligence
- History of noncompliance.
- Ability to pay.
- Degree of cooperation/noncooperation.
- Other unique factors specific to the violator or the case.

Mitigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation.

The preliminary deterrence amount adjusted prior to the start of settlement negotiations yields the "initial penalty target figure". In administrative actions, this figure generally is the penalty assessed in the complaint. In judicial actions, EPA will use this figure as the first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels that it is appropriate. The initial penalty target may be further adjusted as negotiations proceed and additional information becomes available or as the original information is reassessed.

Swift Resolution of Environmental Problems

The third goal of penalty assessment is swift resolution of environmental problems. The Agency's primary mission is to protect the environment. As long as an environmental violation continues, precious natural resources, and possibly public health, are at risk. For this reason, swift correction of identified environmental problems must be an important goal of any enforcement action. In addition, swift compliance conserves Agency personnel and resources.

The Agency will pursue two basic approaches to promoting quick settlements which include swift resolution of environmental problems without undermining deterrence. Those two approaches are as follows:

1. Provide incentives to settle and institute prompt remedial action.

EPA policy will be to provide specific incentives to settle, including the following:

- The Agency will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation.1/ This would be considered in the adjustment factor called degree of cooperation/noncooperation discussed above.

- The Agency will consider accepting additional environmental cleanup, and mitigating the penalty figures accordingly. But normally, the Agency will only accept this arrangement if agreed to in pre-litigation settlement.

Other incentives can be used, as long as they do not result in allowing the violator to retain a significant economic benefit.

2. Provide disincentives to delaying compliance.

The preliminary deterrence amount is based in part upon the expected duration of the violation. If that projected period of time is extended during the course of settlement negotiations due to the defendant's actions, the case development team should adjust that figure upward. The case development team should consider making this fact known to the violator early in the negotiation process. This will provide a strong disincentive to delay compliance.

1/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or

- for judicial actions - when an Assistant United States Attorney files a complaint in court.

Intent of Policy and Information Requests for Penalty Calculations

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

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

Attachment

ATTACHMENT A

Outline of Civil Penalty Assessment

I. Calculate Preliminary Deterrence Amount

A. Economic benefit component and

B. Gravity component

(This yields the preliminary deterrence amount.)

II. Apply Adjustment Factors

A. Degree of cooperation/noncooperation (indicated through pre-settlement action.)

B. Degree of willfulness and/or negligence.

C. History of noncompliance.

D. Ability to pay (optional at this stage.)

E. Other unique factors (including strength of case, competing public policy concerns.)

(This yields the initial penalty target figure.)

III. Adjustments to Initial Penalty Target Figure After Negotiations Have Begun

A. Ability to pay (to the extent not considered in calculating initial penalty target.)

B. Reassess adjustments used in calculating initial penalty target. (Agency may want to reexamine evidence used as a basis for the penalty in the light of new information.)

C. Reassess preliminary deterrence amount to reflect continued periods of noncompliance not reflected in the original calculation.

D. Alternative payments agreed upon prior to the commencement of litigation.

(This yields the adjusted penalty target figure.)

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

A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS:

IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

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Introduction

This document, A Framework for Statute-Specific Approaches to Penalty Assessment, provides guidance to the user of the Policy on Civil Penalties on how to develop a medium-specific penalty policy. Such policies will apply to administratively imposed penalties and settlements of both administrative and judicial penalty actions.

In the Policy on Civil Penalties, the Environmental Protection Agency establishes a single set of goals for penalty assessment. Those goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - will be substantially impaired unless they are pursued in a consistent fashion. Even different terminology could cause confusion that would detract from the achievement of these goals. At the same time, too much rigidity will stifle negotiation and make settlement impossible.

The purpose of this document is to promote the goals of the Policy on Civil Penalties by providing a framework for medium-specific penalty policies. The Framework is detailed enough to allow individual programs to develop policies that will consistently further the Agency's goals and be easy to administer. In addition, it is general enough to allow each program to tailor the policy to the relevant statutory provisions and the particular priorities of each program.

While this document contains detailed guidance, it is not cast in absolute terms. Nevertheless, the policy does not encourage deviation from this guidance in either the development of medium-specific policies or in developing actual penalty figures. Where there are deviations in developing medium-specific policies, the reasons for those changes must be recorded in the actual policy. Where there are deviations from medium-specific policies in calculating a penalty figure, the case development team must detail the reasons for those changes in the case file. In addition, the rationale behind the deviations must be incorporated in the memorandum accompanying the settlement package to Headquarters or the appropriate Regional official.

This document is divided into two sections. The first one gives brief instructions to the user on how to write a medium-specific policy. The second section is an appendix that gives detailed guidance on implementing each section of the instructions and explains how the instructions are intended to further the goals of the policy.

Writing a Program Specific Policy

Summarized below are those elements that should be present in a program-specific penalty policy. For a detailed discussion of each of these ideas, the corresponding p ions of the appendix should be consulted.

I. Developing a Penalty Figure

The development of a penalty figure is a two step process. First the case development team must calculate a preliminary deterrence figure. This figure is composed of the economic benefit component (where applicable) and the gravity component. The second step is to adjust the preliminary deterrence figure through a number of factors. The resulting penalty figure is the initial penalty target figure. In judicial actions, the initial penalty target figure is the penalty amount which the government normally sets as a goal at the outset of settlement negotiations. It is essentially an internal settlement goal and should not be revealed to the violator unless the case development team feels it is appropriate. In administrative actions, this figure generally is the penalty assessed in the complaint. While in judicial actions, the government's complaint will reques the maximum penalty authorized by law.

This initial penalty target figure may be further adjusted in the course of negotiations. Each policy should ensure that the penalty assessed or requested is within any applicable statutory constraints, based upon the number and duration of violations at issue.

II. Calculating a Preliminary Deterrence Amount

Each program-specific policy must contain a section on calculating the preliminary deterrence figure. That section should contain materials on each of the following areas:

- Benefit Component. This section should explain:

  a. the relevent measure of economic benefit for various types of violations,
  b. the information needed,
  c. where to get assistance in computing this figure and
  d. how to use available computer systems to compare a case with similar previous violations.

- Gravity Component. This section should first rank different types of violations according to the seriousness of the act. In creating that ranking, the following factors should be considered:

  a. actual or possible harm,
  b. importance to the regulatory scheme and
  c. availability of data from other sources.

In evaluating actual or possible harm, your scheme should consider the following facts:

- amount of pollutant,
- toxicity of pollutant,
- sensitivity of the environment,
- length of time of a violation and
- size of the violator.

The policy then should assign appropriate dollar amounts or ranges of amounts to the different ranked violations to constitute the "gravity component". This amount, added to the amount reflecting economic benefit, constitutes the preliminary deterrence figure.

III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure (Prenegotiation Adjustment)

Each program-specific penalty policy should give detailed guidance on applying the appropriate adjustments to the preliminary deterrence figure. This is to ensure that penalties also further Agency goals besides deterrence (i.e. equity and swift correction of environmental problems). Those guidelines should be consistent with the approach described in the appendix. The factors may be separated according to whether they can be considered before or after negotiation has begun or both.

Adjustments (increases or decreases, as appropriate) that can be made to the preliminary deterrence penalty to develop an initial penaly target to use at the outset of negotiation include:

- Degree of willfulness and/or negligence

- Cooperation/noncooperation through pre-settlement action.

- History of noncompliance.

- Ability to pay.
- Other unique factors (including strength of case, competing public policy considerations).

The policy may permit consideration of the violator's ability to pay as an adjustment factor before negotiations begin. It may also postpone consideration of that factor until after negotiations have begun. This would allow the violator to produce evidence substantiating its inability to pay.

The policy should prescribe appropriate amounts, or ranges of amounts, by which the preliminary deterrence penalty should be adjusted. Adjustments will depend on the extent to which certain factors are pertinent. In order to preserve the penalty's deterrent effect, the policy should also ensure that, except for the specific exceptions described in this document, the adjusted penalty will: 1) always remove any significant economic benefit of noncompliance and 2) contain some non-trivial amount as a gravity component.

IV. Adjusting the Initial Penalty Target During Negotiations

Each program-specific policy should call for periodic reassessment of these adjustments during the course of negotiations. This would occur as additional relevant information becomes available and the old evidence is re-evaluated in the light of new evidence. Once negotiations have begun, the policy also should permit adjustment of the penalty target to reflect "alternative payments" the violator agrees to make in settlement of the case. Adjustments for alternative payments and pre-settlement corrective action are generally permissible only before litigation has begun.

Again, the policy should be structured to ensure that any settlement made after negotiations have begun reflects the economic benefit of noncompliance up to the date of compliance plus some non-trivial gravity component. This means that if lengthy settlement negotiations cause the violation to continue longer than initially anticipated, the penalty target figure should be increased. The increase would be based upon the extent that the violations continue to produce ongoing environmental risk and increasing economic benefit.

Use of the Policy In Litigation

Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

should account for all the factors identified in the relevant statute and still allow for compromises in settlement without exceeding the parameters outlined in this document. (For each program, all the statutory factors are contained in the Framework either explicitly or as part of broader factors.) For administrative proceedings, the policy should explain how to formulate a penalty figure, consistent with the policy. The case development team will put this figure in the administrative complaint.

In judicial actions, the EPA will use the initial penalty target figure as its first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels it is appropriate. In judicial litigation, the government should request the maximum penalty authorized by law in its complaint. The policy should also explain how it and any applicable precedents should be used in responding to any explicit requests from a court for a minimum assesment which the Agency would deem appropriate.

Use of the Policy as a Feedback Device

Each program-specific policy should first explain in detail what information needs to be put into the case file and into the relevant computer tracking system. Furthermore, each policy should cover how to use that system to examine penalty assessments in other cases. This would thereby assist the Agency in making judgments about the size of adjustments to the penalty for the case at hand. Each policy should also explain how to present penalty calculations in litigation reports.

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

Attachment

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APPENDIX

Introduction

This appendix contains three sections. The first two sections set out guidelines for achieving the goals of the Policy on Civil Penalties. The first section focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty which reflects the seriousness of the violation. The second section provides adjustment factors so that both a fair and equitable penalty will result and that there will be a swift resolution of the environmental problem. The third section of the framework presents some practical advice on the use of the penalty figures generated by the policy.

The Preliminary Deterrence Amount

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it specifies that any penalty should, at a minimum, remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of economic benefit to reflect the seriousness of the violation. That portion of the penalty which removes the economic benefit of noncompliance is referred as the "benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section of the document provides guidelines for calculating the benefit component and the gravity component. It will also present and discuss a simplified version of the economic benefit calculation for use in developing quick penalty determinations. This section will also discuss the limited circumstances which justify settling for less than the benefit component. The uses of the preliminary deterrence amount will be explained in subsequent portions of this document.

I. The Benefit Component

In order to ensure that penalties remove any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues

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to be considered when computing the benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. This section concludes with a discussion of the proper use of the benefit component in developing penalty figures and in settlement negotiations.

A. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which fails to construct required settling ponds will eventually have to spend the money needed to build those ponds in order to achieve compliance. But, by deferring these one-time nonrecurring costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which result in savings from deferred cost are the following:

- Failure to install equipment needed to meet discharge or emission control standards.
- Failure to effect process changes needed to eliminate pollutants from products or waste streams.
- Testing violations, where the testing still must be done to demonstrate achieved compliance.
- Improper disposal, where proper disposal is still required to achieve compliance.
- Improper storage where proper storage is still required to achieve compliance.
- Failure to obtain necessary permits for discharge, where such permits would probably be granted. (While the avoided cost for many programs would be negligible, there are programs where the the permit process can be expensive).

The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date

compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate. The applicable medium-specific guidance should state what that method is.

The rule of thumb method can usually be used in making decisions on whether to develop a case or in setting a penalty target for settlement negotiations. In using this rule of thumb method in settlement negotiations, the Agency may want to make the violator fully aware that it is using an estimate and not a more precise penalty determination procedure. The decision whether to reveal this information is up to the negotiators.

The "rule of thumb" method only provides a first-cut estimate of the benefit of delayed compliance. For this reason, its use is probably inappropriate in situations where a detailed analysis of the economic effect of noncompliance is needed to support or defend the Agency's position. Accordingly, this "rule of thumb" method generally should not be used in any of the following circumstances:

- A hearing is likely on the amount of the penalty.
- The defendant wishes to negotiate over the amount of the economic benefit on the basis of factors unique to the financial condition of the company.
- The case development team has reason to believe it will produce a substantially inaccurate estimate; for example, where the defendant is in a highly unusual financial position, or where noncompliance has or will continue for an unusually long period.

There usually are avoided costs associated with this type of situation. Therefore, the "rule of thumb for avoided costs" should also be applied. (See pages 9-10). For most cases, both figures are needed to yield the major portion of the economic benefit component.

When the rule of thumb method is not applicable, the economic benefit of delayed compliance should be computed using the Methodology for Computing the Economic Benefit of Noncompliance. This document, which is under development, provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method will largely be a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and Title I of the Clean Air Act. It will also be consistent with the regulations

implementing Section 120 of the Clean Air Act. A computer program will be available to the Regions to perform the analysis, together with instructions for its use. Until the Methodology is issued, the economic model contained in the July 8, 1980, Civil Penalty Policy should be used. It should be noted that the Agency recently modified this guidance to reflect changes in the tax law.

B. Benefit from avoided costs

Many kinds of violations enable a violator to permanently avoid certain costs associated with compliance.

- Cost savings for operation and maintenance of equipment that the violator failed to install.
- Failure to properly operate and maintain existing control equipment.
- Failure to employ sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Improper storage, where commercial storage is reasonably available.
- Improper disposal, where redisposal or cleanup is not possible.
- Process, operational, or maintenance savings from removing pollution equipment.
- Failure to conduct necessary testing.

As with the benefit from delayed costs, the benefit component for avoided costs may be estimated by another "rule of thumb" method. Since these costs will never be incurred, the estimate is the expenses avoided until the date compliance is achieved less any tax savings. The use of this "rule of thumb" method is subject to the same limitations as those discussed in the preceding section.

Where the "rule of thumb for avoided costs" method cannot be used, the benefit from avoided costs must be computed using the Methodology for Computing the Economic Benefit of Noncompliance. Again, until the Metholology is issued, the method contained in the July 8, 1980, Civil Penalty Policy should be used as modified to reflect recent changes in the tax law.

C. Benefit from competitive advantage

For most violations, removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator clearly has gained from noncompliance. But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. Examples of such violations include:

- Selling banned products.
- Selling products for banned uses.
- Selling products without required labelling or warnings.
- Removing or altering pollution control equipment for a fee, (e.g., tampering with automobile emission controls.)
- Selling products without required regulatory clearance, (e.g., pesticide registration or premanufacture notice under TSCA.)

To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transactions (i.e. those transactions which would not have occurred if the party had complied). The case development team is responsible for identifying violations in which this element of economic benefit clearly is present and significant. This calculation may be substantially different depending on the type of violation. Consequently the program-specific policies should contain guidance on identifying these types of violations and estimating these profits. In formulating that guidance, the following principles should be followed:

- The amount of the profit should be based on the best information available concerning the number of transactions resulting from noncompliance.
- Where available, information about the average profit per transaction may be used. In some cases, this may be available from the rulemaking record of the provision violated.
- The benefit derived should be adjusted to reflect the present value of net profits derived in the past.

It is recognized that the methods developed for estimating the profit from those transactions will sometimes rely substantially on expertise rather than verifiable data. Nevertheless, the programs should make all reasonable efforts to ensure that the estimates developed are defensible. The programs are encouraged to work with the Office of Policy, Planning and Evaluation to ensure that the methods developed are consistent with the forthcoming Methodology for Computing the Economic Benefit of Noncompliance and with methods developed by other programs. The programs should also ensure that sufficient contract funds are available to obtain expert advice in this area as needed to support penalty development, negotiation and trial of these kinds of cases.

D. Settling cases for an amount less than the economic benefit

As noted above, settling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount. There are three general areas where settling for less than economic benefit may be appropriate. But in any individual case where the Agency decides to settle for less than enconomic benefit, the case development team must detail those reasons in the case file and in any memoranda accompanying the settlement.

1. Benefit component involves insignificant amount

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is not likely to be significant, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, the case development team has the discretion not to seek the benefit component where it appears that the amount of that component is likely to be less than $10,000. (A program may determine that other cut-off points are more reasonable based on the likelihood that retaining the benefit could encourage noncomplying behavior.) In exercising that discretion, the case development team should consider the following factors:

- Impact on violator: The likelihood that assessing the benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by

itself, to achieve the goals of this policy.

- The certainty of the size of the benefit component: If the economic benefit is quite well defined, it is not likely to require as much effort to seek to include it in the penalty assessment. Such circumstances also increase the likelihood that the economic benefit was a substantial motivation for the noncompliance. This would make the inclusion of the benefit component more necessary to achieve specific deterrence.

It may be appropriate not to seek the benefit component in an entire class of violation. In that situation, the rationale behind that approach should be clearly stated in the appropriate medium-specific policy. For example, the most appropriate way to handle a small non-recurring operation and maintenance violation may be a small penalty. Obviously it makes little sense to assess in detail the economic benefit for each individual violation because the benefit is likely to be so small. The medium-specific policy would state this as the rationale.

2. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider settling a case for less than the benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlements might be appropriate where the following circumstances occur:

- There is a very substantial risk of creating precedent which will have a significant adverse effect upon the Agency's ability to enforce the law or clean up pollution if the case is taken to trial.

- Settlement will avoid or terminate an imminent risk to human health or the environment. This is an adequate justification only if injunctive relief is unavailable for some reason, and if settlement on remedial responsibilities could not be reached independent of any settlement of civil penalty liability.

- Removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business.

Alternative payment plans should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

3. Litigation practicalities

The Agency realizes that in certain cases, it is highly unlikely the EPA will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty in litigation which would remove the economic benefit. The case development team then may pursue a lower penalty amount.

II. The Gravity Component

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should not only remove any economic benefit of noncompliance, but also include an amount reflecting the seriousness of the violation. This latter amount is referred to as the "gravity component." The purpose of this section of the document is to establish an approach to quantifying the gravity component. This approach can encompass the differences between programs and still provide the basis for a sound consistent treatment of this issue.

A. Quantifying the gravity of a violation

Assigning a dollar figure to represent the gravity of a violation is an essentially subjective process. Nevertheless, the relative seriousness of different violations can be fairly accurately determined in most cases. This can be accomplished by reference to the goals of the specific regulatory scheme and the facts of each particular violation. Thus, linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way.

Such a linkage promotes consistency. This consistency strengthens the Agency's position both in negotiation and before a trier of fact. This approach consequently also encourages swift resolution of environmental problems.

Each program must develop a system for quantifying the gravity of violations of the laws and regulations it administers.

This development must occur within the context of the penalty amounts authorized by law for that program. That system must be based, whenever possible, on objective indicators of the seriousness of the violation. Examples of such indicators are given below. The seriousness of the violation should be based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation. In some cases, the seriousness of the risk of harm will exceed that of the actual harm. Thus, each system should provide enough flexibility to allow EPA to consider both factors in assessing penalties.

Each system must also be designed to minimize the possibility that two persons applying the system to the same set of facts would come up with substantially different numbers. Thus, to the extent the system depends on categorizing events, those categories must be clearly defined. That way there is little possibility for argument over the category in which a violation belongs. In addition, the categorization of the events relevant to the penalty decision should be noted in the penalty development portion of the case file.

B. Gravity Factors

In quantifying the gravity of a violation, a program-specific policy should rank different types of violations according to the seriousness of the act. The following is a suggested approach to ranking the seriousness of violations. In this approach to ranking, the following factors should be considered:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required size would not normally be considered as serious.

- Availability of data from other sources: The violation of any recordkeeping or reporting requirement is a very serious

matter. But if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate. (E.g. a customer of the violator purchased all the violator's illegally produced substance. Even though the violator does not have the required records, the customer does.)

- Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by other factors.

The assessment of the first gravity factor listed above, risk or harm arising from a violation, is a complex matter. For purposes of ranking violations according to seriousness, it is possible to distinguish violations within a category on the basis of certain considerations, including the following:

- Amount of pollutant: Adjustments for the concentration of the pollutant may be appropriate, depending on the regulatory scheme and the characteristics of the pollutant. Such adjustments need not be linear, especially if the pollutant can be harmful at low concentrations.

- Toxicity of the pollutant: Violations involving highly toxic pollutants are more serious and should result in relatively larger penalties.

- Sensitivity of the environment: This factor focuses on the location where the violation was committed. For example, improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.

- The length of time a violation continues: In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm.

Although each program-specific policy should address each of the factors listed above, or determine why it is not relevant, the factors listed above are not meant to be exhaustive. The programs should make every effort to identify all factors relevant to assessing the seriousness of any violation. The programs should then systematically prescribe a dollar amount to yield a gravity component for the penalty. The program-specific policies may prescribe a dollar range for a certain category of violation rather than a precise dollar amount within that range based on the specific facts of an individual case.

The process by which the gravity component was computed must be memorialized in the case file. Combining the benefit component with the gravity component yields the preliminary deterrence amount.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. The medium specific policies should address this issue. One possible approach would be to direct the case development team to consider increasing the gravity component within a certain range to achieve general deterrence. These extra assessments should be consistent with the other goals of this policy.

Initial and Adjusted Penalty Target Figure

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the benefit component discussed above in a civil penalty assessment. This approach would prevent violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the preliminary deterrence amount when those facts occur. The application of these adjustments to the preliminary deterrence amount prior to the commencement of negotiation yields the initial penalty target figure. During the course of negotiation, the case development team may further adjust this figure to yield the adjusted penalty target figure.

Nevertheless, it should be noted that equitable treatment is a two-edged sword. While it means that a particular violator will receive no higher penalty than a similarly situated violator, it also means that the penalty will be no lower.

I. Flexibility-Adjustment Factors

The purpose of this section of the document is to establish additional adjustment factors to promote flexibility and to identify management techniques that will promote consistency. This section sets out guidelines for adjusting penalties to account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness and/or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, and other unique factors. Unless otherwise specified, these adjustment factors will apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors.

Within each factor there are three suggested ranges of adjustment. The actual ranges for each medium-specific policy will be determined by those developing the policy. The actual ranges may differ from these suggested ranges based upon program specific needs. The first, typically a 0-20% adjustment of the gravity component, is within the absolute discretion of the case development team. 1/ The second, typically a 21-30% adjustment, is only appropriate in unusual circumstances. The third range, typically beyond 30% adjustment, is only appropriate in extraordinary circumstances. Adjustments in the latter two ranges, unusual and extraordinary circumstances, will be subject to scrutiny in any performance audit. The case development team may wish to reevaluate these adjustment factors as the negotiations progress. This allows the team to reconsider evidence used as a basis for the penalty in light of new information.

Where the Region develops the penalty figure, the application of adjustment factors will be part of the planned Regional audits. Headquarters will be responsible for proper application of these factors in nationally-managed cases. A detailed discussion of these factors follows.

A. Degree of Willfulness and/or Negligence

Although most of the statutes which EPA administers are strict liability statutes, this does not render the violator's

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1/ Absolute discretion means that the case development team may make penalty development decisions independent of EPA Headquarters. Nevertheless it is understood that in all judicial matters, the Department of Justice can still review these determinations if they so desire. Of course the authority to exercise the Agency's concurrence in final settlements is covered by the applicable delegations.

willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:

- How much control the violator had over the events constituting the violation.
- The forseeability of the events constituting the violation.
- Whether the violator took reasonable precautions against the events constituting the violation.
- Whether the violator knew or should have known of the hazards associated with the conduct.
- The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute, where applicable.
- Whether the violator in fact knew of the legal requirement which was violated.

It should be noted that this last point, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied is also relevent in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and out of its control, the penalty may be reduced.

The suggested approach for this factor is for the case development team to have absolute discretion to adjust the penalty up or down by 20% of the gravity component. Adjustment in the ± 21-30% range should only be made in unusual circumstances.

Adjustments for this factor beyond ± 30% should be made only in extraordinary circumstances. Adjustments in the unusual or extraordinary circumstance range will be subject to scrutiny in any audit of performance.

B. Degree of Cooperation/Noncooperation

The degree of cooperation or noncooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Such adjustments are mandated by both the goals of equitable treatment and swift resolution of environmental problems. There are three areas where this factor is relevant.

1. Prompt reporting of noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, such behavior should result in the mitigation of any penalty.

The suggested ranges of adjustment are as follows. The case development team has absolute discretion on any adjustments up to ± 10% of the gravity component for cooperation/noncooperation. Adjustments can be made up to ± 20% of the gravity component, but only in unusual circumstances. In extraordinary circumstances, such as self reporting of a TSCA premanufacture notice violation, the case development team may adjust the penalty beyond the ± 20% factor. Adjustments in the unusual or extraordinary circumstances ranges will be subject to scrutiny in any performance audit.

2. Prompt correction of environmental problems

The Agency should provide incentives for the violator to commit to correcting the problem promptly. This correction must take place before litigation is begun, except in extraordinary circumstances.2/ But since these incentives must be consistent with deterrence, they must be used judiciously.

2/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or
- for judicial actions - when an Assistant United States Attorney files a complaint in court.

The circumstances under which the penalty is reduced depend on the type of violation involved and the source's response to the problem. A straightforward reduction in the amount of the gravity component of the penalty is most appropriate in those cases where either: 1) the environmental problem is actually corrected prior to initiating litigation, or 2) ideally, immediately upon discovery of the violation. Under this approach, the reduction typically should be a substantial portion of the unadjusted gravity component.

In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider. At the discretion of the case development team, the unadjusted gravity component may be reduced up to 50%. This would depend on how long the environmental problem continued before correction and the amount of any environmental damage. Adjustments greater than 50% are permitted, but will be the subject of close scrutiny in auditing performance.

It should be noted that in some instances, the violator will take all necessary steps toward correcting the problem but may refuse to reach any agreement on penalties. Similarly, a violator may take some steps to ameliorate the problem, but choose to litigate over what constitutes compliance. In such cases, the gravity component of the penalty may be reduced up to 25% at the discretion of the case development team. This smaller adjustment still recognizes the efforts made to correct the environmental problem, but the benefit to the source is not as great as if a complete settlement is reached. Adjustments greater than 25% are permitted, but will be the subject of close scrutiny in auditing performance.

In all instances, the facts and rationale justifying the penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement.

3. Delaying compliance

Swift resolution of environmental problems will be encouraged if the violator clearly sees that it will be financially disadvantageous for the violator to litigate without remedying noncompliance. The settlement terms described in the preceding section are only available to parties who take steps to correct a problem prior to initiation of litigation. To some extent, this is an incentive to comply as soon as possible. Nevertheless, once litigation has commenced, it should be clear that the defendant litigates at its own risk.

In addition, the methods for computing the benefit component and the gravity component are both structured so that the penalty target increases the longer the violation remains uncorrected. The larger penalty for longer noncompliance is systematically linked to the benefits accruing to the violator and to the continuing risk to human health and the environment. This occurs even after litigation has commenced. This linkage will put the Agency in a strong position to convince the trier of fact to impose such larger penalties. For these reasons, the Policy on Civil Penalties provides substantial disincentives to litigating without complying.

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

In deciding how large these adjustments should be, the case development team should consider the following points:

- How similar the previous violation was.
- How recent the previous violation was.
- The number of previous violations.
- Violator's response to previous violation(s) in regard to correction of the previous problem.

Detailed criteria for what constitutes a "similar violation" should be contained in each program-specific policy. Nevertheless a violation should generally be considered "similar" if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.

- A similar act or omission (e.g. the failure to properly store chemicals) was the basis of the violation.

For purposes of this section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g. notice of violation, warning letter, complaint, consent decree, consent agreement, or final order). It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation. In some situations the same persons or the same organizational unit had or reasonably should have had control or oversight responsibility for violative conduct. In those cases, the violation will be considered part of the compliance history of that regulated party.

In general, the case development team should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, the case development team should be wary of a party changing operators or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should probably apply unless the violator can demonstrate that the other violating corporate facilities are independent.

The following are the Framework's suggested adjustment ranges. If the pattern is one of "dissimilar" violations, relatively few in number, the case development team has absolute discretion to raise the penalty amount by 35%. For a relatively large number of dissimilar violations, the gravity component be increased up to 70%. If the pattern is one of "similar" violations, the case development team has absolute discretion to raise the penalty amount up to 35% for the first repeat violation, and up to 70% for further repeated similar violations. The case development team may make higher adjustments in extraordinary circumstances, but such adjustments will be subject to scrutiny in any performance audit.

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D. Ability to pay

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The financial ability adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, the case development team should assess this factor after commencement of negotiation with the source.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the case development team should disregard this factor in adjusting the penalty. The National Enforcement Investigations Center (NEIC) has developed the capability to assist the Regions in determining a firm's ability to pay. Further information on this system will be made available shortly under separate cover.

When it is determined that a violator cannot afford the penalty prescribed by this policy, the following options should be considered:

- Consider a delayed payment schedule: Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. This approach is a real burden on the Agency and should only be considered on rare occasions.

- Consider non-monetary alternatives, such as public service activities: For example, in the mobile source program, fleet operators who tampered with pollution control devices

on their vehicles agreed to display anti-tampering ads on their vehicles. Similar solutions may be possible in other industries.

- Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the case development team's conclusion as to the size of the necessary reduction should be made a part of the formal enforcement file and the memorandum accompanying the settlement. 3/

- Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is still expected to comply with the law.

E. Other unique factors

Individual programs may be able to predict other factors that can be expected to affect the appropriate penalty amount. Those factors should be identified and guidelines for their use set out in the program-specific policies. Nevertheless, each policy should allow for adjustment for unanticipated factors which might affect the penalty in each case.

It is suggested that there be absolute discretion to adjust penalties up or down by 10% of the gravity component for such reasons. Adjustments beyond the absolute discretion range will be subject to scrutiny during audits. In addition, they will primarily be allowed for compelling public policy concerns or the strengths and equities of the case. The rationale for the reducti must be expressed in writing in the case file and in any memoranda accompanying the settlement. See the discussion on pages 12 and 13 for further specifics on adjustments appropriate on the basis of either compelling public policy concerns or the strengths and equities of the case.

II. Alternative Payments

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to

3/ If a firm fails to pay the agreed-to penalty in an administrative or judicial final order, then the Agency must follow the Federal Claims Collection Act procedures for obtaining t penalty amount.

pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.

In addition, the acceptance of alternative payments for environmentally beneficial expenditures is subject to certain conditions. The Agency has designed these conditions to prevent the abuse of this procedure. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before alternative payments may be accepted:4/

- No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).

- The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.

- The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.

4/ In extraordinary circumstances, the Agency may choose not to pursue higher penalties for "alternative" work done prior to commencement of negotiations. For example, a firm may recall a product found to be in violation despite the fact that such recall is not required. In order for EPA to forgo seeking higher penalties, the violator must prove that it has met the other conditions herein stated. If the violator fails to prove this in a satisfactory manner, the case development team has the discretion to completely disallow the credit project. As with all alternative projects, the case development team has the discretion to still pursue some penalties in settlement.

- EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.5/

In all cases where alternative payments are allowed, the case file should contain documentation showing that each of the conditions listed above have been met in that particular case. In addition when considering penalty credits, Agency negotiators should take into account the following points:

- The project should not require a large amount of EPA oversight for its completion. In general the less oversight the proposed credit project would require from EPA to ensure proper completion, the more receptive EPA can be toward accepting the project in settlement.

- The project should receive stronger consideration if it will result in the abatement of existing pollution, ameliorate the pollution problem that is the basis of the government's claim and involve an activity that could be ordered by a judge as equitable relief.

- The project should receive stronger consideration if undertaken at the facility where the violation took place.

- The company should agree that any publicity it disseminates regarding its funding of the project must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.

5/ This limitation does not apply to public awareness activities such as those employed for fuel switching and tampering violatic under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these viola tions are often the result of public misconceptions about the economic value of these violations. Consequently, the public awareness activities can be effective in preventing others from violating the law. Thus, the high general deterrent value of public awareness activities in these circumstances obviates the need for the one-to-one requirement on penalty credits.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds which are to be spent at EPA's discretion unless the relevant statute specifically provides that authority. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe as precisely as possible the credit project the violator is expected to perform.

III. Promoting Consistency

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for settlement and for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on unifor approaches for applying adjustment factors to arrive at an initia penalty target prior to beginning settlement negotiations or an adjusted penalty target after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustment Only through such complete documentation can enforcement attorney program staff and their managers learn from each others' experien and promote the fairness required by the Policy on Civil Penaltie

To facilitate the use of this information, Office of Legal and Enforcement Policy will pursue integration of penalty information from judicial enforcement actions into a computer system. Both Headquarters and all Regional offices will have access to the system through terminals. This would make it possible for the Regions to compare the handling of their cases with those of other Regions. It could potentially allow the Regions, as well as Headquarters, to learn from each others' experience and to identify problem areas where policy change or further guidance is needed.

Use of Penalty Figure in Settlement Discussions

The Policy and Framework do not seek to constrain negotiations. Their goal is to set settlement target figures for the internal use of Agency negotiators. Consequently, the penalty figures under negotiation do not necessarily have to be as low as the internal target figures. Nevertheless, the final settlement figures should go no lower than the internal target figures unless either: 1) the medium-specific penalty policy so provides or 2) the reasons for the deviation are properly documented.

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

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

11.00

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

MAY 31 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Headquarters Approval of Proposed Civil Penalty Settlements in Water Cases

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: James Moore
Regional Counsel, Region X

This memorandum addresses what I understand to be the belief of certain Regional staff that, if preliminary settlement penalty figures in water cases are cleared with this office, any final settlement submitted with a higher figure may be disapproved by Headquarters as too high.

Let me clarify Headquarters policy in this area: OECM's explicit approval of a Regional preliminary settlement figure, whether in a Headquarters referral to the Department of Justice, a separate OECM letter to DOJ following a direct referral, or during negotiations with a water defendant, will not under any circumstances preclude the Region from negotiating or accepting a larger penalty settlement. What OECM approves is a minimum settlement amount, not a maximum or an exact amount. This office, for example, readily approved a $10,000 per day of violation settlement in the 1983 Mobil Oil case, and we would be happy to approve other settlements with similarly successful outcomes.

In order to facilitate clear and timely feedback from my office on proposed minimum settlement amounts, I strongly encourage Regional staff to include those proposed amounts in all litigation reports and to discuss informal settlement proposals with my staff prior to raising them with defendants, as called for by Agency policy. Under these circumstances, the Regional attorney can negotiate with a defendant confident that all elements of the Agency will stand behind his or her penalty proposals, so long as (1) they are at or greater than the figure previously approved by OECM and (2) no new, material

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information surfaces that requires a reconsideration of the Agency's minimum civil penalty settlement figure. The Regional attorney should routinely keep this office well informed on the progress of negotiations or litigation.

If new information indicates that a Headquarters-approved penalty settlement figure should be adjusted, the Region should inform this office to receive advance approval of a new figure before negotiations with the defendant continue.

I hope that this explanation will answer any questions Region X may have had on this subject. If you have any questions, please call me at 475-8180 or David Drelich of my staff.

cc: Richard H. Mays, OECM
Robert Burd, Water Division Director, Region X
Jim Dragna, DOJ
John Hohn, Region X

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

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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.

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However, penalty division should be approached cautiously because of certain inherent concerns, including:

1) increased complexity in negotiations among the various parties, and the accompanying potential for federal/state disagreement over penalty division; and

2) compliance with the Miscellaneous Receipts Act, 31 U.S.C. §3302, which requires that funds properly payable to the United States must be paid to the U.S. Treasury. Thus any agreement on the division of penalties must be completed prior to issuance of and incorporated into a consent decree.

As in any other court-ordered assessment of penalties under the statutes administered by EPA, advance coordination and approval of penalty divisions with the Department of Justice is required. Similarly, the Department of Justice will not agree to any penalty divisions without my advance concurrence or that of my designee. In accordance with current Agency policy, advance copies of all consent decrees, including those involving penalty divisions, should be forwarded to the appropriate Associate Enforcement Counsel for review prior to commencement of negotiations.

The following factors should be considered in deciding if penalty division is appropriate:

1) The state or local government must have an independent claim under federal or state law that supports its entitlement to civil penalties. If the entire basis of the litigation is the federal enforcement action, then the entire penalty would be due to the federal government.

2) The state or local government must have the authority to seek civil penalties. If a state or local government is authorized to seek only limited civil penalties, it is ineligible to share in penalties beyond its statutory limit.

3) The state or local government must have participated actively in prosecuting the case. For example, the state or local government must have filed complaints and pleadings, asserted claims for penalties and been actively involved in both litigating the case and any negotiations that took place pursuant to the enforcement action.

4) For contempt actions, the state or local government must have participated in the underlying action giving rise to the contempt action, been a signatory to the underlying consent decree, participated in the contempt action by filing pleadings asserting claims for penalties, and been actively involved in both litigating the case and any negotiations connected with that proceeding.[1]

The penalties should be divided in a proposed consent decree based on the level of participation and the penalty assessment authority of the state or locality. Penalty division may be accomplished more readily if specific tasks are assigned to particular entities during the course of the litigation. But in all events, the division should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties. Penalty division should not take place until the end of settlement negotiation. The subject of penalty division is a matter for discussion among the governmental plaintiffs. It is inappropriate for the defendant to participate in such discussions.

cc: F. Henry Habicht II, Assistant Attorney General
Land and Natural Resources Division

1/ If the consent decree contains stipulated penalties and specifies how they are to be divided, the government will abide by those terms.

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

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

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

NOV 5 1984

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment

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

TO: Regional Administrators
Associate Enforcement Counsels
OECM Office Directors

I. PURPOSE

This guidance amplifies the material in the Appendix of GM-22, "Framework for Statute-Specific Approaches to Penalty Assessment." The Appendix presents a description of how to calculate the economic benefit of noncompliance as part of developing a civil penalty. A new computer model, BEN, is a refinement of the methodology for calculating the economic benefit of noncompliance.

By refining the methods by which we calculate the economic benefit of noncompliance, we will:

1. Respond to the problems that enforcement and program offices identified concerning methods for calculating the economic benefit component of a civil penalty;

2. Ensure among the media programs appropriate consistency in calculating the economic benefit component of a civil penalty;

3. Ensure that the economic benefit of noncompliance continues to be a fairly valued, reasonable component of a civil penalty; and

4. Ensure that the assumptions and data used in BEN to calculate the economic benefit component can be defended at either an administrative hearing or a judicial proceeding.

II. SCOPE

This guidance describes BEN, the new computer model, in terms of how this model resolves the identified problems related to the use of CIVPEN. EPA personnel can use BEN to calculate the economic benefit a violator gains from delaying capital expenditures for pollution control equipment or from avoiding the costs of operating and maintaining pollution control equipment. Exhibit I summarizes BEN.

EPA personnel cannot use BEN to calculate the economic benefit component of a civil penalty if a violator's action does not involve a delayed or avoided expenditure. Under these circumstances, program offices may elect to develop statute-specific formulas as provided in GM-22 for calculating the economic benefit component of a civil penalty. These formulas would be used to develop civil penalties in response to actions such as certain TSCA marking/disposal violations or RCRA reporting violations. The rule of thumb in the general penalty policy would not be appropriate for these types of violations.

OPPE is considering the feasibility of developing a second computer model or rule of thumb formula that could be applied uniformly to violations that do not involve delayed or avoided expenditures.

III. NEW CIVIL PENALTY POLICY APPROACH

Regional personnel may use the rule of thumb described in GM-22 to develop a preliminary estimate of the economic benefit component of a civil penalty. The rule of thumb is for the convenience of EPA and is not intended to give a violator a lower economic benefit component in a civil penalty. Regional personnel should consider whether an estimate of economic benefit derived with the rule of thumb would be lower than an estimate calculated with BEN. For example, the longer the period of noncompliance, the more the rule of thumb underestimates the economic benefit of noncompliance.

If EPA proposes and a violator accepts the rule of thumb calculation, Regional personnel can develop the civil penalty without further analysis of economic benefits. If a violator disputes the economic benefit figure calculated under the rule of thumb, a more sophisticated method to develop the economic benefit component of the penalty is required.

In general, if the estimate under the rule of thumb is less than $10,000, the economic benefit component is not needed to develop a civil penalty;[1] the other factors in GM-22 still apply. If the rule of thumb estimate is more than $10,000, Regional personnel should use BEN to develop an estimate of the economic benefit component.

IV. USING BEN TO CALCULATE ECONOMIC BENEFIT OF NONCOMPLIANCE

EPA personnel should use the revised computer model BEN whenever:

1. the rule of thumb indicates that the economic benefit of noncompliance is greater than $10,000; or

2. the violator rejects the rule of thumb calculation.

BEN uses 13 data variables. At the option of the user, BEN substitutes standard values for 8 of the 13 entries, and the user only provides data for 5 variables. (See Exhibit I.)

BEN also has the capability for EPA personnel to enter for those 8 variables the actual financial data of a violator. In appropriate cases, EPA should notify a violator of the opportunity to submit actual financial data to use in BEN instead of the 8 standard values. If a violator agrees to supply financial data, the violator must supply data for all the standard values.

V. ADVANTAGES OF BEN OVER OTHER CALCULATION METHODS

The computer model BEN has advantages over previously used methods for calculating the economic benefit component of a civil penalty. BEN does not require financial research by EPA personnel. The five required variables are information about capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. Further, BEN has the flexibility to allow a violator who cooperates with EPA to provide actual financial data that may affect the penalty calculation.

1/ Although the general penalty policy cut off point is $10,000, each program office may establish a cut off point for the program's medium-specific policy.

An economic benefit component calculated with BEN can be defended in an administrative or judicial proceeding on the grounds that the standard values used in BEN are derived from standard financial procedures and the violator had an opportunity to provide financial data to help develop the civil penalty.

The use of BEN or statute-specific formulas when appropriate gives the Regional Offices flexibility in determining the economic benefit of noncompliance. Regional personnel have a consistent method for developing a civil penalty under several statutes for multiple violations that involve delayed capital costs and avoided operation and maintenance costs.

BEN is easy for a layman to use. The documentation is built into the program so that a Regional user always has updated documentation and can use the program with minimal training. States are more likely to follow EPA's lead in pursuing the economic benefit of noncompliance through civil penalty assessments because the method available from EPA to serve as a model does not require extensive financial research.

cc: Regional Enforcement Contacts
Program Compliance Office Directors

Exhibit I

BEN

A. Accessed via terminal to EPA's IBM computer in Durham, N.C.

B. Can be run in either of two modes:

1. Standard mode:

a) Requires 5 inputs:

i. Initial Capital Investment

ii. Annual Operating and Maintenance Expense

iii. First Month of Noncompliance

iv. Compliance Date

v. Penalty Payment Date

b) Relies on realistic standard values for remaining variables:

i. A set of standard values for private companies

ii. A set of standard values for municipally-owned or not-for-profit companies

c) Would be used for final calculation of economic benefit unless the violating firm objected and supplied all its own financial data

2. Specific mode:

a) Requires 13 inputs

b) Would be used if violating firm supplied data or if EPA staff researched data

C. Is easy to use

1. Optional on-line documentation will guide inexperienced users through each step of the model

2. Written documentation will be available by December 1984

D. Is based on modern financial principles

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

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

FEB 19 1985

MEMORANDUM

SUBJECT: Penalty Calculation and Compliance Schedules for Pretreatment Enforcement Initiative

FROM: J. William Jordan, Acting Director
Enforcement Division (EN-338)

Glenn L. Unterberger
Associate Enforcement Counsel
for Water (LE-134W)

TO: Water Management Division Directors
Regions I, III, V, and VI

Regional Counsels, Regions I, III, V and VI

During the week of February 4, staff from the Office of Water Enforcement and Permits, the Office of Enforcement and Compliance Monitoring, and the Department of Justice met with you to discuss the potential referral candidates and the scope of the referral packages for the Pretreatment Enforcement Initiative. We are pleased with the results of those meetings and expect to receive your referral packages shortly, and in all cases by February 28. We have committed to expedite our normal review process.

Two aspects of the referral package may need to be clarified. During the visits we distributed a draft penalty policy. The final version is attached for your use in calculating the penalty. As we noted in our visits and conference calls, we would advocate a penalty of at least $20,000.00 in these cases. Since this is an interim penalty policy, please feel free to call us if you have any questions as to its use for your cases. We also discussed the compliance schedule that should be sought in settlement. We would expect the POTW to submit a complete and approvable pretreatment program in six months or less. In addition, we recommend that you plan to negotiate milestones and stipulated

penalties for failure by the POTWs to prepare an annual report and for failure to implement the program (examples are attached).

If you have questions, please contact Ed Bender, OWEP, (475-8331) or Kim Pearson, OECM (475-8185).

Attachment

cc: Ross Connealy, DOJ

Attachment A

Penalty for Failure to Submit a Complete and Approvable Pretreatment Program

The basis for assessing a penalty in the Pretreatment Enforcement Initiative is to be determined by two factors. The first factor is the economic saving that a POTW received by failing to develop all or part of an adequate pretreatment program and the avoided costs of not implementing the program. The second factor is the penalty for the gravity of the failure to develop and implement a pretreatment program. This preliminary penalty figure can then be increased or decreased by considering appropriate adjustment factors. The basis for calculating the penalty for pretreatment violations is summarized by the equation below. If specific POTW costs are available for the economic or gravity component they should be used.

Settlement amount=(Economic component)+(Gravity component)+ (Adjustments)
I II III

NOTE: A minimum upfront penalty of $20,000 is advocated for all referrals.

I. Economic benefit component=(savings from delaying costs for program development)+ (avoided costs of program implementation)

A. Savings from delaying program development=(Program Development cost)(interest rate)(percent of program not yet developed)

1. Total cost to develop a complete program (including grants)
   a. Small POTW (1-5 MGD, IU flow 10% or less) $5,000 to $25,000
      Depends on the sampling needed for the IUs and whether developed in house or by consultant.
   b. Medium POTW (5-15 MGD, IU flow 10-20%, 50 IUs) $25,000 to 75,000
      same considerations as a. Needs local limits.
   c. Large POTW (over 15 MGD, 50 or more IUs, needs local limits, multijurisdictional) $50,000 to $300,000

2. Cost to develop each program element

Program Element	Typical Percent of Total Cost* Small	Medium	Large
1. Industrial Waste Survey	30	25	20
2. Legal Authority	8	5	7
3. Technical/Local limits	11	6	6
4. Compliance Monitoring Plan	8	5	7
5. Administrative Procedures	7	8	10
6. Resources	36	51	51

3. Interest rate assumed to be .12 annually for one year on borrowed capital.

4. Example calculation: POTW-10 MGD, 15% IU Flow, 30 IUs
   Incomplete program elements 2, 3, and 5 (19% of total)
   Program cost=$50,000; interest rate=.12;

   Economic benefit component=($50,000)(.12)(.19)=$1140.00

*JRB Associates. 1982. "Funding Manual for Local Pretreatment Programs" EPA Contract No. 68-01-5052. Tables 2.7 (manpower and GC/MS costs dropped) and Table 3.7.

B. Avoided Implementation costs=(annual salaries and operating costs) (number of years delayed)(percent of program not implemented)

1. Total Annual Implementation cost-range $10,000 to $250,000
   - Salaries based on work years shown under resources by the POTW
   - Can be drawn directly from the POTW program submission estimates.
   - Monitoring costs depends on number of IUs, inspections, and analyses.

2. Number years delayed-assume implementation by required July, 1983 unless other deadline is justified based on the permit.

3. Cost to implement each program activity
   - In some cases, a POTW may have implemented some pretreatment practices even though their program is not approved by the approval authority.

Activity	Typical Percent of Implementation Cost*		
	Small	Medium	Large
1. Sampling and Industrial Review	22	19	18
2. Laboratory Analysis	34	34	39
3. Technical Assistance	17	26	20
4. Legal Assistance	13	09	13
5. Program Administration	14	11	10

4. Example calculation

   Annual cost to implement=$60,000; activities not implemented 3 and 4; assume same POTW as A-4. Delayed 18 months.
   Avoided costs=($60,000)(.35)(1.5)=$31,500.00

II. Gravity Component

This component considers damage done to the POTW and its collection system, or potential harm to the environment that may have been allowed to continue as a result of the POTW not having an approved and implemented pretreatment program. Therefore, this aspect of the penalty should include any known costs which the POTW is incurring for O&M, sludge disposal, and collection system renovation which will be eliminated by implementing the pretreatment program. In addition, the penalty policy for the multi-case initiative includes the factor of "importance to the regulatory system." Penalties in these cases should reflect the importance that the Agency attaches to the prompt submission of approvable pretreatment programs. This factor would justify a minimum gravity component of $5,000 or 10% of the economic benefit, if it is higher, where actual environmental harm, significant risk of harm, or damage to the POTW is not shown. The factors that should be considered in this calculation are included in the equation below:

Gravity Component=($5000)+((length)(WQ impact))+(Loss of plant useful life)+(Increased costs for O&M and sludge disposal)+((Length of violation)(Nature of IU wastewaters))

A. Length of Violation-this value is used to weight toxic and water quality impacts, which are expressed as cost factors. The length of violation in months should be divided by 3.

B. Loss of useful life of the treatment plant that could be avoided by imp pretreatment. Any cost saving should be entered directly.

C. Excess costs for O&M and Sludge Disposal which could be avoided by implementin pretreatment. Include these costs directly.

D. Nature of the IU wastewaters that will be controlled.

1. Toxics
2. Corrosives-low/high pH
3. Explosives-organic solvents, history of in-plant problems, septic haulers, Multiply the percent IU flow times $1000 if no data are available. These data may include the costs of IU treatment, workmans compensation, or other damages from toxics.

E. Water Quality impacts, e.g.,

1. fish kills -economic value + replacement and maintenance costs
2. loss of habitat-cost/acre or cost/stream mile
3. drinking water contamination - cost of treatment

F. Example calculations

Length of violation=18 months/3 = 6 units
Loss of useful life- 1 year lost of design life, 20 years =.05
cost=.05(cost of damaged component=$10000)=$500
IU waste controlled=.2(1000);

Gravity component= $5000+$500+(6($200)=$6700

III. Adjustments

If the POTW has demonstrated good faith, the POTW may be penalized to recover a minimum of economic benefit plus 10% or $5,000, whichever is higher. The penalty should also consider other factors which are favorable to the POTW. These may include delays by EPA, ambiguous information given to the POTW by EPA, and other factors as may be appropriate, such as including inability to pay.

Example Calculations

No equities for the POTW. Region provided written guidance and issued an AO which POTW violated.

Adjustments

Recalcitrance (e.g., failure to comply with a previous administrative order)	$10000

Total Penalty for Example POTW

Component	Amount
Economic	$32640
Gravity	$ 6700
Adjustments	$10000
Total	$49340

Attachment B

Pretreatment
Compliance Schedule Elements

Milestones	Deadline
1. Submit complete program	Six months (maximum) after settlement
2. Submit program implementation status report	Six months after approval
3. Advise approval authority of program change	30 days after change occurs
4. Respond to noncompliance of industrial users through enforcement activities	Based on time frame for an appropriate enforcement response
5. Inspect all major industrial users	Within six months after settlement

Examples of Stipulated Penalties for Compliance Milestones for a Small POTW

1. Failure to submit complete program	$200 day	day 1-15
	$400 day	after day 15
2. Failure to submit annual report	$200 day	
3. Failure to notify approval authority of program changes	$200 day	
4. Failure to address IUs noncompliance through enforcement activities*	$150/informal action $200-$750/formal action	
5. Failure to inspect major industrial users	$100/Inspection	

* The control authority should, as part of its approved program, have procedures and time frames to respond to instances of IU noncompliance. The control authority must contact the IU for all instances of noncompliance (e.g., failure to report, failure to monitor, or violations of effluent limits and compliance schedules). The POTW should start with telephone calls for the initial minor violations and proceed to initiate formal written enforcement activities (i.e., NOVs, administrative orders, penalties, and lawsuits) for continued noncompliance. The POTW must maintain a log of IU violations and enforcement responses. When the IU noncompliance occurs and the control authority fails to initiate appropriate and timely enforcement action, the control authority has failed to enforce its pretreatment program and is subject to penalties. Additional guidance on appropriate and timely enforcement responses will be provided later in the guidance to Control Authorities.

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

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

FEB 11 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: New Clean Water Act Civil Penalty Policy

FROM: Lawrence J. Jensen
Assistant Administrator for Water

Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

TO: General Counsel
Regional Administrators
Regional Counsels
Regional Water Management Division Directors

Attached is the Agency's new Clean Water Act civil penalty policy to be used by EPA in calculating the penalty that the Federal government will seek in settlement of judicial actions brought under Section 309 of the CWA. This policy supersedes the CWA Civil Penalty Policy issued on July 8, 1980 and represents the Office of Water's guidance in response to EPA's Policy on Civil Penalties (GM-21) and A Framework for Statute-Specific Approaches to Penalty Assessments (GM-22) issued on February 16, 1984. This policy is effective as of the date of this memorandum and shall be applied to future enforcement actions and to pending enforcement actions in which the government has not transmitted to the defendant a proposed settlement penalty.

The attached document consists of the following three parts: (1) the CWA Penalty Policy; (2) the policy "methodology", which is a one-page description of each of the steps to be taken in a penalty calculation, along with one page of footnotes; and (3) the "worksheet", a proposed model sheet to be used to record the different numerical components of the final penalty.

This penalty policy is designed to promote a more consistent, Agency-wide approach to the assessment of civil penalties while allowing substantial flexibility for individual cases within certain guidelines. We believe that this penalty policy, when effectively applied, will promote the goals of increasing

recovery of economic benefit of non-compliance, providing substantial deterrence to noncompliance, providing a more fair and equitable treatment of the regulated community, and achieving a more swift resolution of environmental problems and of enforcement actions. In order to support the goals of this policy and EPA's enforcement efforts generally, application of this policy may result in EPA seeking higher civil penalties than it has in the past.

This CWA penalty policy tracks the basic concepts and procedures embodied in the general penalty policy and Framework. For example, the CWA policy directs the Regions to calculate the economic benefit of noncompliance, calculate the "gravity" (or seriousness) component, and then calculate adjustments to consider ability to pay, litigation factors, and other factors.

This policy includes the following minor deviations from the general penalty policy and the Framework which we believe, based upon our past experience with Clean Water Act enforcement, are reasonable:

(1) The first adjustment factor is "History of Recalcitrance." We believe that this factor should only result in an increase in the proposed penalty amount;

(2) The remaining two adjustment factors ("Ability to Pay" and "Litigation Considerations") should only be used to reduce the proposed penalty;

(3) A proposed section on "mitigation projects" has been included, although the Department of Justice and the Agency may make some additional refinements on this issue in the near future; and

(4) The economic benefit component will not be deleted merely because the component involves an "insignificant amount."

Substantial thanks are due to the Clean Water Act Penalty Policy Work Group for an excellent job in developing an initial draft, collecting comments, carefully considering all comments, and reconciling and balancing often disparate viewpoints regarding penalty assessment. Thanks also to staff in the Regional Offices and in a number of Headquarters offices and the Department of Justice for considerable assistance in providing review and comment on drafts.

During the upcoming months, we will carefully analyze and evaluate the application and effectiveness of this penalty policy. After that, we will issue appropriate refinements to the policy.

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In the near future, we will publish the policy in the Federal Register. In addition, we will soon distribute some example calculations and hold training workshops to provide further guidance on the application of this policy.

If you have any questions or comments on this policy, please contact Anne Lassiter, at 475-8307, or Jack Winder, at 382-2879.

Attachment

cc: Clean Water Act Penalty Policy Work Group
Associate Enforcement Counsel for Water
OECM Office Directors
OW Office Directors
Department of Justice, Environmental Enforcement

CLEAN WATER ACT

PENALTY POLICY FOR CIVIL SETTLEMENT NEGOTIATIONS

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

EFFECTIVE DATE: FEB 11 1986

Clean Water Act
Penalty Policy for Civil Settlement Negotiations

I. Introduction

Under Section 309 of the Clean Water Act (CWA), the Administrator is authorized to bring civil actions to enforce certain requirements of the Act and related regulations. In such actions, the Administrator may seek a civil penalty not to exceed $10,000 "per day of such violation." The Agency will vigorously pursue penalty assessments in judicial actions to ensure deterrence and to recover appropriate penalties.

In order to guide settlement negotiations on the penalty issue in actions under Section 309 of the CWA and Section 113 of the Clean Air Act for failure to meet statutory deadlines, the Agency issued a Civil Penalty Policy on July 8, 1980. During the next few years, the Agency identified the following four goals for improving its civil penalty assessment practices: (1) penalties should, at a minimum, recover the economic benefit of noncompliance; (2) penalties should be large enough to deter noncompliance; (3) penalties should be more consistent throughout the country in an effort to provide fair and equitable treatment to the regulated community; and (4) there should be a logical basis for the calculation of civil penalties for all types of violations, industrial and municipal, to promote a more swift resolution of environmental problems and of enforcement actions.

In an effort to address these and related penalty issues, on February 16, 1984, the EPA Office of Enforcement and Compliance Monitoring (OECM) issued the following two civil penalty guidance documents: The Policy on Civil Penalties (# GM-21), and the companion document entitled A Framework for Statute-Specific Approaches to Penalty Assessments, (# GM-22), as general guidance for settlements for violations of all statutes which EPA enforces. Although the 1984 penalty policy documents do provide basic conceptual guidance for penalty calculations, they were designed to be implemented further through medium-specific penalty guidance. The "Policy" document states in part, as follows:

> Each EPA program office, in a joint effort with [OECM], will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework. [Policy, at 1, 2]

II. Purpose

This penalty policy and attached methodology is the water-specific penalty guidance for certain CWA violations. This policy follows the major principles set out in the general penalty policy documents and also reflects considerations unique to CWA enforcement.

As the Framework directs, this CWA Penalty Policy provides "a system for quantifying the gravity of violations of the laws and regulations . . . ." Moreover, this policy provides a logical structure and a number of different ways (number of violations, duration, etc.) to quantify the severity of a defendant's noncompliance with the CWA. The policy also provides a number of ranges of weighting factors in order to allow the Regions flexibility in exercising their experienced judgment.

The calculated penalty figure should represent a reasonable and defensible penalty which the Agency believes it can and should obtain in a settlement in compromise of its claim for the statutory maximum penalty. This figure, and a discussion of the basis of calculation, must be included in all litigation reports. After referral, as more information becomes available, the penalty calculation should be modified to reflect relevant, new information. In those cases which proceed to trial, the government should seek a penalty higher than that for which the government was willing to settle, reflecting considerations such as continuing noncompliance and the extra burden placed on the government by protracted litigation.

III. Applicability

This penalty policy applies to Federal CWA civil judicial enforcement actions commenced after the effective date of this policy and to pending judicial enforcement cases in which the government has not transmitted to the defendant an approved oral or written proposed penalty. The policy applies to civil penalties sought under CWA Section 309 for violations including the following: violations of NPDES permits by industrial and municipal facilities; discharges without an NPDES permit; violations of general and categorical pretreatment requirements and local limits; monitoring and reporting violations; violations of Section 405 sludge use or disposal requirements; etc. The policy also applies to violations of Section 308 information requests and to violations of Section 309 administrative orders. This policy shall not be applied to CWA civil enforcement actions brought exclusively under §311 ("hazardous substance spills") or for violations related to requirements in §404 (disposal of "dredged or fill" material). The CWA and implementing regulations provide unique enforcement procedures and penalty provisions for §311 and §404 violations which are currently being followed in pursuing these types of cases.

IV. Penalty Calculation Methodology

The initial calculation shall be an estimate of the statutory maximum penalty in order, for comparison purposes, to determine the potential maximum penalty liability of the defendant. The penalty which the government seeks in settlement may not exceed this statutory maximum amount.

The Regional office shall then calculate a civil penalty figure for settlement purposes based upon the following formula: "Civil Penalty = (Economic Benefit Component) + (Gravity Component) +/- (Adjustments)."

The civil penalty settlement calculation involves the following four consecutive steps: (1) calculate the "Economic Benefit" of noncompliance; (2) calculate the monthly and total "Gravity Components"; (3) calculate the "Adjustment Factors"; and (4) calculate the total penalty.

(1) Economic Benefit. Consistent with the Agency-wide "Policy and Framework", every reasonable effort shall be made to calculate and recover the economic benefit of noncompliance. Note that the economic benefit should be calculated from the start of noncompliance up to the point when the facility was or will be in compliance. In a limited number of cases, based upon a defendant's inability to pay or "litigation practicalities", application of the "adjustment factors" may justify recovery of less than the calculated economic benefit. The economic benefit component shall be calculated by using the EPA computer program -- "BEN." This program produces an estimate of the economic benefit of delayed compliance, which is calculated to be the sum of the net present value of: delayed capital investment, one-time, non-depreciable expenditures, and avoided operating and maintenance expenses. (See "BEN Users Manual," OPPE/OECM, January 1985.)

(2) Gravity Component. The gravity calculation methodology is based upon a logical scheme and criteria which relate the gravity of the violations to the Clean Water Act and its regulatory scheme. Every reasonable effort should be made to calculate and recover a "gravity component" in addition to the economic benefit component. As the penalty Policy states:

> The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if [he] had obeyed the law. [Policy, at 3]

The following four gravity weighting factors should be considered for each month during which there was one or more violations and assigned values according to the attached "CWA Penalty Policy Calculation Methodology":

"A" -- "Significance of Violation." This factor is to reflect the degree of the exceedance of the most significant effluent limitation violation each month, and is weighted more heavily for exceedances of toxic effluent limitations. The attached outline contains a table indicating the range of "significance of violation" factor values for exceedances of effluent limitations (% over permit effluent limitation). Note that all exceedances, and all other violations of permit conditions in a given month, should be accounted for under gravity weighting factor "C" - "Number of Violations."

"B" -- "Health and Environmental Harm." A value between 1 and a value that results in the statutory maximum penalty may be applied to each month in which one or more violations present actual or potential harm to human health or to the environment.

"C" -- "Number of Violations." This factor allows consideration of the total number of violations each month, including all violations of permit effluent limitations, monitoring and reporting requirements, and standard and special conditions. It is important to account for each violation in assessing the significance of a defendant's violations, and this factor allows for flexibility in assessing penalties for multiple violations. Violation of a monthly average effluent limitation should be counted as 30 violations, a weekly average effluent limitation violation should be counted as 7 violations, violations of different parameters at the same outfall are to be counted separately, and violations at different outfalls are to be counted separately. The attached outline contains a range of weighting factor values between 0 and 5 to account for the total number of violations. In addition, this "number of violations" factor may be weighted more heavily to account for serious or significant violations other than the most significant effluent limit violation which was accounted for under factor "A."

"D" -- "Duration of Noncompliance." This factor allows consideration of continuing, long-term violations of an effluent limitation or other permit condition, and for extended periods of discharge without a permit. The attached outline contains a range of values between 0 and 5 for the "Duration of Noncompliance" factor which should be applied to each month of continuing violation of the same requirement. Generally, "long-term" violations are those which continue for three or more consecutive months.

The gravity component should be calculated from the date on which the violations at issue began up to the date when the violations ceased or the date of anticipated filing of the enforcement action. The monthly gravity component is the sum of the gravity weighting factors, plus one, multiplied by $1,000. The total gravity component is the sum of all monthly gravity components.

(3) Adjustment Factors. After the economic benefit component is added to the sum of all the " monthly gravity components," this total may be modified by the application of "adjustment factors." The consideration of "history of recalcitrance" may only result in an increased penalty. In addition, in some cases and when justified in writing, the following two factors may be applied for a penalty reduction: ability to pay and litigation considerations.

(A) History of recalcitrance (to increase penalty). The "recalcitrance" factor will allow for higher penalties for bad faith, unjustified delay in preventing, correcting or mitigating violations, violations of prior administrative orders or consent decrees, failure to provide timely and full information, etc. This factor should also be used to account for the relationship of the violations to the regulatory scheme, i.e. the significance of the recalcitrance. For example, higher values for this factor may be used to account for municipal violations which continue beyond July 1, 1988. This factor is to be applied one time, by multiplying a percentage (0 to 150%) times the sum of the "total gravity component" plus the economic benefit calculation and then adding this figure to the benefit and gravity total. The resulting figure is the "preliminary total," which shall not exceed the statutory maximum. The application of the recalcitrance factor to the total figure allows for a more logical relationship between recalcitrance and the actual significance of the violations. The recalcitrance factor may also be increased during negotiations if defendant continues to be recalcitrant with the remedy or with settlement efforts.

(B) Ability to pay (to decrease penalty). The Regional office should evaluate the ability of the defendant to pay the proposed civil penalty and to pay for the proposed injunctive relief. The government should carefully analyze this factor where it appears that the defendant can convincingly demonstrate an inability to pay a given penalty. The defendant has the principal burden of establishing a claim of inability to pay. The government typically should seek to settle for as high an amount which the government believes defendant can afford without seriously jeopardizing defendant's ability to continue operations and still achieve compliance, unless the defendant's behavior has been exceptionally culpable, recalci-

trant, or threatening to human health or the environment. The government should carefully assess the accuracy of the actual or anticipated claim. Evaluation by an outside expert consultant may be necessary to rebut the inability to pay claim. If securing an outside expert is impractical or impossible, the Region shall make its best estimate of ability to pay.

Many factors often have a significant impact on ability to pay and may justify a reduction of a penalty. For example, the Region may consider high user fees, high percentage of local funds spent on a POTW, low bond rating, low per capita income, low total of population served by the POTW, bankruptcy, etc., in evaluating an "inability to pay" claim.

(C) Litigation considerations (to decrease penalty). The government should evaluate every penalty with a view toward the potential for protracted litigation and attempt to ascertain the maximum civil penalty the court is likely to award if the case proceeds to trial. The Region should take into account the inherent strength of the case, considering for example, the probability of proving questionable violations, the probability of acceptance of an untested legal construction, the potential effectiveness of the government's witnesses, and the potential strength of the defendant's equitable defenses. (Also see GM-22, pp. 12 - 13; discussion of "compelling public concerns".

Examples of equitable considerations which may lead to adjustment of the penalty amount include the following: whether the defendant reasonably, conclusively, and detrimentally relied on EPA's or state or local agency's representations or actions; whether the defendant has requested modification of its final effluent limits (related to, for example, pending §301(h) decisions, pending industrial variance decisions, or new wasteload allocations); whether the defendant's violations are clearly attributable to accepting new discharges from nearby, noncomplying jurisdictions; and whether the defendant's compliance has been delayed in an unusual or unreasonable manner by other Federal requirements through no fault of the defendant.

These equitable considerations will justify mitigation only to the extent that they directly caused or contributed to the defendant's violations. The government may reduce the amount of the civil penalty it will accept at settlement to reflect these considerations where the facts demonstrate a substantial likelihood that the government will not achieve a higher penalty at trial.

V. Mitigation Projects

In the past, in a few cases the Agency has accepted consent decree provisions which allow the reduction of a civil penalty assessment in recognition of the defendant's undertaking an environmentally beneficial "mitigation project."

The following criteria are provided to guide the use of mitigation projects in settlements.

(1) The activity must be initiated in addition to all regulatory compliance obligations.

The project may not be an activity which is otherwise required by law. The project may not be a substitute for full compliance -- it must be designed to provide an environmental benefit beyond the benefits of full compliance.

(2) The activity is most likely to be an acceptable basis for mitigating penalties if it closely addresses the environmental effects of the defendant's violation.

Preferably, the project will address the risk or harm caused by the violations at issue. In general, qualifying activities must provide a discernible response to the perceptible risk or harm caused by defendant's violations which are the focus of the government's enforcement action.

(3) The defendant's cost of undertaking the activity, taking into account the tax benefits that accrue, must be commensurate with the degree of mitigation.

In order to attain the deterrent objectives of the civil penalty policy, the amount of the penalty mitigation must reflect the actual cost to the defendant. With consideration of tax benefits, the actual cost of the project may exceed the value of the mitigation.

(4) The activity must demonstrate a good-faith commitment to statutory compliance.

One test of good faith is the degree to which the defendant takes the initiative to identify and commence specific, potential mitigation projects. In addition, the project must be primarily designed to benefit the environment rather than to benefit the defendant.

(5) Mitigation based on the defendant's activity must not detract significantly from the general deterrent effect of the settlement as a whole.

The government should continue to consider mitigation projects as the exception rather than the rule. Efforts should be made to eliminate any potential perception by the regulated community that the government lacks the resolve to impose significant penalties for substantial violations. The government should seek penalties in conjunction with mitigation activities which deter both the specific defendant and also the entire regulated community. Accordingly, every settlement should include a substantial monetary penalty component.

(6) Judicially-enforceable consent decrees must meet the statutory and public interest criteria for consent decrees and cannot contain provisions which would be beyond the power of the court to order.

A proposed consent decree should not include provisions which would be beyond the power of the court to order under the particular statute which had been violated. Additional guidance on the appropriate scope of relief might be found in the statute, the legislative history or the implementing regulations.

The Agency should exercise case-by-case judgment in deciding whether to accept a mitigation project based upon the above criteria and, in addition, based upon consideration of the difficulty of monitoring the implementation of the proposed project in light of the anticipated benefits of the project.

VI. Intent of Policy; and Information Requests for Penalty Calculations

The policies and procedures set out in this document are intended solely for the guidance of government personnel. They are not intended, and cannot be relied upon, to create any rights substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice. When the Regions deviate from this policy they shall include in the litigation report a brief description of the nature of and justification for the deviation. In addition, any penalty calculations under this policy 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.

Clean Water Act Penalty Policy: Calculation Methodology

SETTLEMENT PENALTY[1,2] = (ECONOMIC BENEFIT) + (GRAVITY COMPONENT) ± (ADJUSTMENTS)

Step 1: Calculate the Statutory Maximum Penalty

Step 2: Calculate the Economic Benefit Using "BEN"[3,4]

Step 3: Calculate the Total Gravity Component[5]

- Monthly Gravity Component = ($1,000) x (1+A+B+C+D)
- Total = Sum of Monthly Gravity Components

GRAVITY CRITERIA — ADDITIVE FACTORS

A. Significance of Violation[6]

% Exceedence Monthly Avg.	% Exceedence 7-Day Avg.	% Exceedence Daily Max.	Toxic	Conventional/ Non-Toxic
0 - 20	0 - 30	0 - 50	0 - 3	0 - 2
21 - 40	31 - 60	51 - 100	1 - 4	1 - 3
41 - 100	61 - 150	101 - 200	3 - 7	2 - 5
101 - 300	151 - 450	201 - 600	5 - 15	3 - 6
301 - >	451 - >	601 - >	10 - 20	5 - 15

B. Health and Environmental Harm[7]

(i) Impact on Human Health; or — 10 - Stat. Max
(ii) Impact on Aquatic Environment — 1 - 10

C. Number of Violations[8] — 0 - 5

D. Duration of Noncompliance[9] — 0 - 5

Step 4: Include Adjustment Factors

A. History of Recalcitrance[10] (Addition)

- Penalty may be increased by up to 150 percent based upon the past and present recalcitrance of the defendant.

B. Ability to Pay (Subtraction)

- Penalty may be adjusted downward to represent the defendant's ability to pay.

C. Litigation Considerations (Subtraction)[11]

- Penalty may be adjusted downward to reflect the maximum amount which the court might assess if the case proceeds to trial.

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WATER CIVIL PENALTY POLICY CALCULATION METHODOLOGY: FOOTNOTES

1. In general, the Settlement Penalty amount shall be at least the Economic Benefit of Noncompliance plus a gravity component.

2. The maximum Settlement Penalty shall not exceed the amount provided by Section 309(d), $10,000 per day of such violation.

3. Calculate all economic benefits using BEN. There is no minimum amount triggering the use of BEN.

4. Economic benefit is to be calculated as the estimated savings accrued to the facility; i.e., it is to be based upon the total amount which should have been spent by the facility. (All capital and expense costs, direct and indirect, are to be considered.)

5. The Total Gravity Component equals the sum of each Monthly Gravity Component for a month in which a violation has occurred.

6. The Significance of Violation is assigned a factor based on the percent by which the pollutant exceeds the monthly or 7-day average or daily maximum permit limitation and whether the pollutant is classified as toxic, non-toxic or conventional.

7. Where evidence of actual or potential harm to human health exists, a factor from "10" to a value which results in the statutory maximum penalty should be assessed. Where the identified impact relates only to the aquatic environment, a factor from "1" to "10" should be used.

8. The Region has the flexibility to assign a high penalty factor where an excessive number of violations occur in any month (effluent limit, reporting, schedule, unauthorized discharge, bypass, etc.).

9. The Duration of Noncompliance factor allows the Region to increase the monthly gravity component for continuing, long-term violations of the same parameter(s) or requirement(s). Generally, a "long-term" violation is one which continues for three or more consecutive months.

10. A factor ranging from "0" (good compliance record, cooperation in remedying the violation) to 150 percent of the total of the Economic Benefit and Gravity Component may be added based upon the history of recalcitrance exhibited by the violator.

11. In addition, the penalty should be reduced by any amount which defendant paid as a penalty to a State or local agency on the same violations.

CWA Penalty Summary Worksheet

(1) No. of Violations = _____
x $10,000 = stat. max. = $ _____

(2) Economic Benefit ("BEN")
(period covered/
months) = _____ $ _____

(3) Total of Monthly Gravity
Components $ _____

(4) Benefit + Gravity TOTAL $ _____

(5) Recalcitrance Factor _____%
(0-150%) x Total (Line 4) = $ _____

(6) Preliminary TOTAL (Line 4 + Line 5) $ _____

ADJUSTMENTS

(7) Litigation Considerations
(Amount of reduction) $ _____

(8) Ability to Pay
(Amount of reduction) $ _____

(9) SETTLEMENT PENALTY TOTAL $ _____

Name and Location
of Facility _____

_____

Date of Calculation _____

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

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

OCT 21 1986

THE ADMINISTRATOR

Mr. James R. Borberg, President
Association of Metropolitan Sewerage Agencies
Suite 1002
1015 18th Street, N. W.
Washington, D.C. 20036

Dear Mr. Borberg:

Thank you for your letter of September 22, 1986, which reiterates some of the issues that you and other members of the Board of the Association of Metropolitan Sewerage Agencies (AMSA) raised during our meeting on September 10, 1986. We at the Environmental Protection Agency (EPA) thought the session was a productive exchange of ideas, and we certainly appreciate your endorsement of our proposal on stormwater and your willingness to communicate that support to Congress. I also welcome this opportunity to continue our dialogue.

The first issue you raise involves EPA's practice of assessing penalties for a municipality's past and future violations in conjunction with Federal judicial actions under the National Municipal Policy (NMP). You are correct that the NMP does not explicitly require us to seek penalties. However, the NMP--although it is a clear statement of Agency policy--is not intended to stand alone. All Agency policy documents, including the NMP, serve as a "master plan," and are buttressed by other policy and guidance; collectively, they direct our day-to-day activities to reach our goals. The NMP states our position with respect to the relationship between the Clean Water Act (CWA) provisions for Federal funding and for municipal compliance, and provides a general framework for accomplishing the Agency's goal of achieving as much compliance as possible by July 1, 1988.

Since your concern relates to what AMSA perceives as an "inconsistency" between penalties and the NMP, I will mention the three main foundation documents that we use in conjunction with the Policy statement to guide the NMP enforcement effort. First, we rely on the NMP Guidance (March 1984), which sets out our detailed action plan, including: 1) the use of judicial enforcement actions to establish schedules that extend beyond the July 1, 1988, deadline in the NMP; and 2) the use of appropriate civil penalties.

The second document that undergirds our municipal compliance program is the Agency's Uniform Civil Penalty Policy (February 1984), which superseded an earlier version (July 1980). This Policy is a statement of the Agency's position on the use of penalties. It sets out guidelines covering, among other things, the application of our statutory authority to assess penalties under §309 of the CWA. It also affirms our obligation to exercise that authority to ensure a consistent, common effort to deter violations of the laws of the United States and to promote equity and voluntary compliance among all parts of the regulated public.

Most recently, we have issued a third policy document: the Clean Water Act Penalty Policy (February 1986), which provides a detailed methodology on how to determine the appropriate amount of each penalty. It is important to note, however, that the CWA Penalty Policy in no way alters the Agency's policy on whether to seek penalties from municipalities, as originally enunciated back in 1980; both §309 of the CWA and EPA's CWA Penalty Policy simply do not distinguish between industrial and municipal violators. Rather, the 1986 CWA Penalty Policy provides technical guidance on how to best carry out the Agency's policy in an even-handed manner.

If you look at the law and at these expressions of Agency policy and guidance, I am confident you will see that our enforcement policies are faithful to both the CWA and the spirit of the NMP. For nearly three years, we have made an honest effort to work with States and with affected municipalities to establish reasonable schedules for compliance in administrative orders or NPDES permits--without penalties. Where the municipality is not willing to work with us to negotiate a reasonably expeditious schedule or where the schedule extends beyond July 1, 1988, we are seeking Court-sanctioned schedules and penalties consistent with the law and Agency policy. Thus far, the Courts have consistently upheld our interpretations of the law in this area, which indicates that we are complying with the intent of Congress as it appears in the CWA.

Perhaps some numbers would be helpful to put things into perspective. By the end of FY 1986, we had returned about 260 major facilities to compliance (generally as a result of schedules established in administrative orders (AOs)). We had also placed about 1000 other major facilities on enforceable schedules established in administrative orders (700) and in NPDES permits (300). Nationwide, since the issuance of the NMP, EPA has established about 40 schedules in Court Orders, and has filed another 30 cases; some schedules are established in State Court Orders as well.

After nearly three years of work and negotiation, however, we still have about 100 major municipalities that have not agreed to an enforceable schedule for achieving compliance, including some pending final §301(h) decisions. Every day that passes reduces the likelihood that these municipalities can meet the statutory deadline, which increases the prospects that we will have to establish their schedules in Court Orders including penalties for violations of the Act. Overall, however, Court Orders that assess penalties have constituted only a small part of our total effort, and penalty amounts are a very small percent of total construction costs (rarely in excess of one percent and often below that figure).

The second issue you raise on behalf of AMSA is the relationship between the Construction Grants program and the NMP. As we have said consistently, we see no conflict between the Construction Grants program and the municipal compliance effort under the NMP. Both are intended to achieve the same goal: municipal compliance with the requirements of the CWA. Moreover, we have provided clear guidance to the Regions and States that, where a municipality is ready and willing to initiate construction before its name comes up on the priority list for a grant award, this does not necessarily preclude that municipality's grant eligibility for the remainder of the project. This is intended to provide an incentive for communities to start construction as soon as possible so they can retain their grant eligibility <u>and</u> avoid Court Orders and associated penalties.

In summary, we have worked cooperatively with affected municipalities for the nearly three years since issuance of the NMP, and we will continue to do so. However, EPA has an obligation to Congress and to the public to carry out and enforce the law that protects the nation's waters, and we fully intend to do so through all the mechanisms the Act provides.

Moving to your final issue of EPA's response to the Third Circuit Court's decision on removal credits, I want to let you know that an appeal to the Supreme Court is still under consideration. Just recently, at EPA's request, the Department of Justice asked the Supreme Court for an extension of time to allow us to further consider the merits of an appeal. I know this is an important issue to AMSA members and to other

municipalities that administer local pretreatment programs, and I assure you that the Agency will continue to work with your removal credits subcommittee so that AMSA's views will be incorporated into our decision-making.

Again, I valued our recent discussions and appreciate hearing the views of your organization.

Sincerely,

Lee M. Thomas

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

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

OCT 28 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Calculating After Tax Net Present Value of Alternative Payments

FROM: Thomas L. Adams, Jr.
Assistant Administrator for
Enforcement and Compliance Monitoring

TO: Assistant Administrators
Regional Administrators

PURPOSE

This guidance provides a methodology for calculating the after tax net present value of an environmentally beneficial project proposed by a violator to mitigate a portion of a civil penalty. We developed this guidance in reponse to requests from both the Regions and Headquarters on how to evaluate a project's real cost to a violator. The Associate Enforcement Counsels, Regional Enforcement Contacts, Regional Counsels, and the Chief of the Environmental Enforcement Section at Department of Justice have reviewed this guidance. In addition, the Tax Litigation Division of the Internal Revenue Service and the Corporate Finance Division of the Securities and Exchange Commission reviewed pertinent language in this document. We hope it will be useful. The policy on alternative payments is set forth in the February 16, 1984, uniform civil penalty policy.

BACKGROUND

The 1984 civil penalty policy provides flexibility for EPA to accept, under specified conditions, a violator's investment in environmentally beneficial projects to mitigate part of a civil penalty. The policy allows the use of these alternative payments as an incentive for settlement. The policy does not contemplate a dollar-for-dollar reduction in the civil penalty equal to the cost of an acceptable alternative payment project. Furthermore, EPA will not accept more than the after tax net present value

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of an alternative payment project. The Agency also can choose to accept less than that amount. 1/

EPA must carefully balance the benefits of fostering settlements by approving alternative payment projects against the benefits of achieving the broadest deterrent impact from enforcement actions. Allowing these projects to mitigate part of a penalty may reduce the deterrent effect of an action on the regulated community.

A civil penalty is not tax deductible under 26 U.S.C. §162(f); therefore, the full amount of the penalty is a liability to a violator.2/ Conversely, if a violator invests in an alternative payment project, that investment may be tax deductible. EPA must use the after tax value of a proposed investment when determining whether and by how much to mitigate a civil penalty.3

In addition to considering the tax effects of an alternative payment project, EPA must evaluate the cost of the project in terms of its present value. An alternative payment project usually requires expenditures over time.4/ Therefore, the Agency also must reduce the after-tax value of the cash flows invested in an alternative payment project to its net present value at

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1/ Proposed alternative payment projects may not be used to mitigate the entire amount of a civil penalty. The Agency plans to issue further policy clarifying the use of alternative payments in settlement negotiations.

2/ A written agreement specifiying the tax implications of the civil penalty is essential. The agreement should be a legally binding contract. The agreement should state that the civil penalty is punitive and deterrent in purpose and is a non-deductible expense.

3/ In addition to tax benefits, a firm also can generate positive, image-enhancing publicity from the project developed for the alternative payment; however, the penalty policy requires that any publicity a violator generates about the project must include a statement that the project is undertaken in settlement of an enforcement action by EPA or an authorized state.

4/ A dollar today is worth more than a dollar a year from now for two reasons: 1) if a dollar today is held in a no-interest checking account, inflation erodes the value of that dollar over the year; and 2) if a dollar today is invested at a rate higher than the rate of inflation, that dollar increases in value by the amount of earnings in excess of the inflation rate.

The BEN computer model can calculate the after tax net present value of a violator's proposed alternative payment. Appendix A of the BEN User's Manual provides the procedure for calculating after tax net present value of capital investment, operation and maintenance costs, and one-time costs.

USING BEN TO CALCULATE THE AFTER TAX NET PRESENT VALUE OF ALTERNATIVE PAYMENTS

To use BEN to calculate after tax net present value of an alternate payment project, respond to the BEN questions as follows:

1. Enter the case name (variable 1);

2. For variables 2 through 4, enter the incremental costs for the alternative payment project of:

   a. Pollution control equipment;

   b. Operation and maintenance;

   c. One-time expenditure;

3. Substitute the date of settlement of the enforcement action for the first month of non-compliance (variable 5);

4. Enter the compliance date or completion date of the alternative investment for variables 6 and 7;

5. Select standard values for variables 8 through 13;5/

6. Select output option 2.

5/ Decreasing the tax rate used in BEN increases the amount of a civil penalty and also increases the after-tax cost of an alternative investment. Therefore, a violator has an incentive to provide a lower marginal tax rate for an alternative payment project than the one used to calculate the civil penalty. Both the civil penalty calculation and the alternative payment calculation must use the same tax rate. The annual inflation rate and the discount rate should be the same as the rates used in the civil penalty calculation.

Calculation C in output option 2 expresses the after tax net present value of the alternative payment on the date of settlement, which is the date substituted for the first month of noncompliance (variable 5). This figure is the maximum amount by which EPA may mitigate a civil penalty. Attachment A is an example of a proposed alternative payment project with the BEN output showing the after tax net present value of the investment.

If you have any questions about calculating the after tax net present value of a proposed alternative payment, call Susan Cary Watkins of my staff (FTS 475-8786).

Attachment

cc: Regional Counsels
Associate Enforcement Counsels
Compliance Office Directors

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ATTACHMENT A

ALTERNATIVE PAYMENT EXAMPLE

Suppose a violator offers to invest over the next 20 months $500,000 in pollution control equipment. The equipment will provide environmental benefits beyond those that result from meeting legal requirements for compliance. The after tax net present value in 1986 dollars of a $500,000 investment over a period of 20 months is $299,562. Therefore, the value of the alternative payment in this example is $299,562, although the violator must commit to investing $500,000. Exhibit 1 shows how the BEN model displays the data.

If EPA approves the alternative payment project in the example, the Agency may propose an adjusted penalty target figure that is as much as $299,562 less than the initial penalty target figure.1/ Other adjustment factors also may reduce the initial penalty target figure.

The effects of inflation and return on a dollar are smaller over shorter periods of time. Consequently, the difference between the after tax net present value of an alternative payment and the total amount of the alternative payment decreases as the time between the date of settlement and the date of the final alternative payment decreases. If the violator in the example could invest $500,000 in pollution control equipment in less than 2 months after settlement, the net present value of the investment would be $76,742 greater (See Exhibit 2).

For using the BEN model to calculate the after tax net present value of the proposed alternative payment for this example the data required are:

1.	Case Name:	Alternative Payment Example	
2.	Capital investment:	500000	1986 dollars
3.	One-time nondepreciable expenditure:		0
4.	Annual O&M expense:	7000	1985 dollars
5.	Month of settlement:		4, 1986
6.	Compliance date:		12, 1987
7.	Penalty payment date:		12, 1987

1/ The Agency is never obligated to mitigate a civil penalty by the full amount of the after tax net present value of an alternative payment project. For example, EPA might mitigate a civil penalty by only half of the after-tax net present value of the project.

EXHIBIT 1

OUTPUT OPTION 2

ALTERNATIVE PAYMENT EXAMPLE APRIL 16, 1986

A.	PRESENT VALUE COST OF PURCHASING THE INITIAL POLLUTION CONTROL EQUIPMENT ON TIME AND OPERATING IT THROUGHOUT ITS USEFUL LIFE	$	236478
B.	PRESENT VALUE COST OF ON-TIME PURCHASE AND OPERATION OF INITIAL POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$	[illegible]
C.	PRESENT VALUE COST OF DELAYED PURCHASE AND OPERATION OF POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$	299562
D.	ECONOMIC BENEFIT OF A 20 MONTH DELAY AS OF INITIAL DATE OF NONCOMPLIANCE (EQUALS B MINUS C)	$	58620
E.	THE ECONOMIC BENEFIT OF A 20 MONTH DELAY AS OF THE PENALTY PAYMENT DATE, 20 MONTHS AFTER THE INITIAL DATE OF NONCOMPLIANCE	$	77252

->->->->-> THE ECONOMIC SAVINGS CALCULATION ABOVE <-<-<-<-<-<-
USED THE FOLLOWING VARIABLES:

USER SPECIFIED VALUES

1.	CASE NAME= ALTERNATIVE PAYMENT EXAMPLE		
2.	INITIAL CAPITAL INVESTMENT =	$ 500000	1986 DOLLARS
3.	ONE-TIME NONDEPRECIABLE EXPENDITURE =	$ 0	
4.	ANNUAL O&M EXPENSE=	$ 7000	1986 DOLLARS
5.	FIRST MONTH OF NONCOMPLIANCE=	4, 1986	
6.	COMPLIANCE DATE=	12, 1987	
7.	PENALTY PAYMENT DATE=	12, 1987	

STANDARD VALUES

8.	USEFUL LIFE OF POLLUTION CONTROL EQUIPMENT =	15 YEARS
9.	INVESTMENT TAX CREDIT RATE =	10.00 %
10.	MARGINAL INCOME TAX RATE=	50.0 %
11.	ANNUAL INFLATION RATE=	6.0 %
12.	DISCOUNT RATE =	18.00 %
13.	AMOUNT OF LOW INTEREST FINANCING =	$ 0

EXHIBIT 2

OUTPUT OPTION 2

ALTERNATIVE PAYMENT EXAMPLE APRIL 24, 1986

A. PRESENT VALUE COST OF PURCHASING THE INITIAL POLLUTION CONTROL EQUIPMENT ON TIME AND OPERATING IT THROUGHOUT ITS USEFUL LIFE	$	303688
B. PRESENT VALUE COST OF ON-TIME PURCHASE AND OPERATION OF INITIAL POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$	379682
C. PRESENT VALUE COST OF DELAYED PURCHASE AND OPERATION OF POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$	376304
D. ECONOMIC BENEFIT OF A 1 MONTH DELAY AS OF INITIAL DATE OF NONCOMPLIANCE (EQUALS B MINUS C)	$	3378
E. THE ECONOMIC BENEFIT OF A 1 MONTH DELAY AS OF THE PENALTY PAYMENT DATE, 1 MONTHS AFTER THE INITIAL DATE OF NONCOMPLIANCE	$	3425

->->->->-> THE ECONOMIC SAVINGS CALCULATION ABOVE <-<-<-<-<-<-
USED THE FOLLOWING VARIABLES:

USER SPECIFIED VALUES

1. CASE NAME= ALTERNATIVE PAYMENT EXAMPLE
2. INITIAL CAPITAL INVESTMENT = $ 300000 1986 DOLLARS
3. ONE-TIME NONDEPRECIABLE EXPENDITURE = $ 0
4. ANNUAL O&M EXPENSE= $ 7000 1986 DOLLARS
5. FIRST MONTH OF NONCOMPLIANCE= 11, 1987
6. COMPLIANCE DATE= 12, 1987
7. PENALTY PAYMENT DATE= 12, 1987

STANDARD VALUES

8. USEFUL LIFE OF POLLUTION CONTROL EQUIPMENT = 15 YEARS
9. INVESTMENT TAX CREDIT RATE = 10.00 %
10. MARGINAL INCOME TAX RATE = 50.00 %
11. ANNUAL INFLATION RATE= 6.00 %
12. DISCOUNT RATE = 18.00 %
13. AMOUNT OF LOW INTEREST FINANCING = $ 0

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

1148

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

1150

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

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

NOV 24 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: November 4, 1987, Congressional Testimony on Proposed Amendments to the Clean Water Act

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Regional Enforcement Contacts
Regional Counsels
Associate Enforcement Counsels
Director, Office of Compliance Analysis and Program Operations
Director, Office of Criminal Enforcement

Attached are copies of Agency and Department of Justice testimony on environmental improvement projects as used in water enforcement case settlements. The testimony was given at a November 4 hearing before the House Subcommittee on Fisheries, Wildlife Conservation, and the Environment.

Jonathan Z. Cannon, Deputy Assistant Administrator for Enforcement and Compliance Monitoring - Civil, testified for the Agency. Raymond B. Ludwiszewski, Associate Deputy Attorney General, testified for DOJ. Other parties who testified were the Mayor of New Bedford, MA; a representative from the California Environmental Trust; Patrick Parenteau, Commissioner of the Vermont Department of Natural Resources and former Regional Counsel for Region I; and Donald Stever, law professor and former DOJ environmental enforcement official.

Also attached is a copy of proposed bill H.R. 3411 which addresses environmental improvement projects. I hope you find this material helpful.

Attachments

cc: Susan Lepow, OGC
Jim Elder, OWEP
Dave Davis, OWP
Tudor Davies, OMEP
Tai-Ming Chang, OCAPO
CECM-Water Attorneys

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STATEMENT OF
JONATHAN Z. CANNON
DEPUTY ASSISTANT ADMINISTRATOR FOR CIVIL ENFORCEMENT
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON FISHERIES, WILDLIFE CONSERVATION AND THE ENVIRONMENT
OF THE
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

November 4, 1987

Good afternoon, Mr. Chairman and Members of the Subcommittee. It is a pleasure to appear before you to discuss aspects of the Agency's water enforcement program and H.R. 3411, now before the Subcommittee. I am Jonathan Z. Cannon, Deputy Assistant Administrator for Civil Enforcement in the Office of Enforcement and Compliance Monitoring (OECM) at the Environmental Protection Agency. Seated beside me is Glenn L. Unterberger, Associate Enforcement Counsel for Water. Among other things, my office is responsible for approving settlements on behalf of EPA for civil enforcement cases to ensure they support national enforcement goals and policy before transmitting them to the Department of Justice (DOJ) for final approval and lodging in court. My office works closely with the Department of Justice and EPA's Regional offices to encourage prompt case filings by DOJ and to ensure proper resolution of cases.

More specifically, my responsibilities under the Clean Water Act include national management of EPA's legal enforcement

program implementing Section 309(d) and Section 309(g). Those sections authorize the Agency to bring judicial or administrative enforcement actions seeking civil penalties against owners and operators of facilities, both municipal and industrial, that violate the Clean Water Act. My office also provides legal enforcement counsel to EPA program officials charged with administering the Marine Protection, Research and Sanctuaries Act (MPRSA), including Section 105(a) of that Act, which authorizes the Agency to assess civil penalties administratively for violations of that statute. I will focus on the Clean Water Act today, but the same general principles also apply to the MPRSA.

EPA's Present Policies on "Environmental Improvement Projects"

As background for considering H.R. 3411, I want to review the Agency's current policies for approving environmental mitigation projects as part of settlement agreements in judicial or administrative enforcement actions. Many of the Agency's enforcement actions are settled without litigation or full administrative penalty proceedings. The Agency developed two civil penalty settlement policies to assist in treating the regulated community fairly and consistently during settlement negotiations and to ensure that settlements achieve a proper deterrent impact on potential violators. The Uniform Civil Penalty Policy (issued February 16, 1984) applies to all of

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the environmental statutes the Agency enforces. This policy provides a framework for developing policy and guidance for settlement negotiations. The Clean Water Act Penalty Policy (issued February 11, 1986) applies specifically to settlements of Clean Water Act enforcement actions. The two policies were developed in consultation with the Department of Justice, which strongly supports them.

Both policies contain provisions for considering "environmental improvement projects" as part of a settlement agreement. The Uniform Civil Penalty Policy calls these projects "alternative payment projects," while the Water Penalty Policy calls these projects "mitigation projects." Both policies contain specific criteria that the Agency applies to a defendant or respondent's proposed environmental project to determine whether to accept the project as part of the settlement agreement. I will focus on the criteria in the Clean Water Act Penalty Policy that we use to evaluate proposed mitigation projects during settlement negotiations. There are six criteria. Comparable criteria apply to settlements of EPA's administrative penalty actions under the MPRSA pursuant to our Uniform Civil Penalty Policy.

First, mitigation projects must not significantly reduce the deterrent effect of a settlement. Therefore, the Agency policy establishes an expectation of a substantial up front cash penalty to the U.S. Treasury as part of any settlement, which might also include a mitigation project. I cannot

emphasize too strongly that any mitigation project is only one element of a settlement that should include a requirement for a cash penalty payment by a violator.

Second, the project must provide an environmental benefit in addition to the benefits of full compliance with the law. For example, a proposal to upgrade a wastewater treatment plant would not be acceptable as a mitigation project if the upgrade were required to meet permit limitations.

Third, the project should correct or reverse the environmental harm caused by the violation. For example, a proposed project to install equipment that would result in a discharge of pollutants significantly below the permit requirements and thus reduce the pollutant load in the receiving waters might be allowed if the effect of the project also included a net improvement in the quality of the receiving waters which were affected by the violations.

Fourth, the Agency's evaluation of the effect the cost of a mitigation project will have on an acceptable penalty settlement amount must take into account the tax consequences of the project that can reduce the deterrent effect of the enforcement action. For example, an investment in pollution control equipment provides tax deductions for depreciation and operation and maintenance (O&M) costs. On occasion, violators seek tax deductions for payments to environmental trust funds. Part of the deterrent effect of a civil penalty is that it is not tax deductible.

other public relations benefits. Polluters have also displayed a natural eagerness to avail themselves of the potentially significant tax deductions possibly associated with credit projects. When violators take deductions for these "projects", they essentially force the United States' taxpayer to subsidize their unlawful pollution. Finally, an unrestrained statutory endorsement of environmental projects as substitutes for penalties may encourage the courts sua sponte to order undesirable credit projects, even where the expert technical agency, the Environmental Protection Agency, has rejected such projects as an appropriate component of a settlement agreement.

For these reasons, the extensive use of credit projects may have the damaging effect of undercutting the civil enforcement program, rather than supporting it. In light of these adverse effects, any mitigation of statutory penalties through credit projects must be carefully structured to preserve and enhance the operation of an effective judicial enforcement program and support the four basic goals discussed above.

The February 11, 1986, Clean Water Act civil penalty policy, issued by the Environmental Protection Agency (EPA) after extensive review and coordination with the Department of Justice, carefully delineates criteria to be used in considering "environmental improvement projects" as part of a settlement agreement. This policy is working. To date, according to information provided by the EPA, approximately 15% of our judicially-approved CWA settlements with publicly-owned treatment

works contain some kind of environmental improvement project. Any settlement which includes a mitigation project must have a substantial upfront monetary payment to the United States Treasury. The following discussion highlights the other criteria used by the EPA and the Department in determining whether to accept a credit project as part of a settlement agreement:

1. Mitigation of the penalty amount based on the defendant's activity must not detract significantly from the deterrent effect of the settlement as a whole. The Department of Justice is especially concerned that the expanded use of credit projects will undermine the deterrent impact of our environmental enforcement efforts. To avoid this, these projects should be the exception, rather than the rule. Moreover, any settlement including a credit project must also contain a substantial cash penalty component payable to the United States Treasury.

2. The credit project should closely address the environmental effects of the defendant's violations. The goal of all enforcement efforts is to prevent, remedy, and punish environmental pollution. Credit projects, to serve the ultimate enforcement objectives, should address the environmental risk or harm resulting from the defendant's violations.

3. The polluter's cost of undertaking the activity, taking into account <u>any</u> tax benefits that may accrue, must be commensurate with the degree of mitigation. Defendants often exploit tax benefits, corporate filing benefits and other advantages from credit projects. To maintain the proper

incentives, the violator's real costs, rather than the value of the project, must be considered.

4. The activity must demonstrate a good-faith commitment to statutory compliance. A defendant's commitment to future compliance is extremely relevant to a civil penalty calculation. It is appropriate to consider the type of mitigation project, the initiative of the defendant in identifying and commencing the project, and the environmental benefit provided by the project as demonstrating the defendant's commitment.

5. The activity must be initiated in addition to all regulatory compliance obligations. That is, the credit project must provide a benefit to the environment beyond those provided by full compliance with the law, and cannot be substituted for full compliance.

6. Under the CWA, the Department cannot accept, and the court cannot approve, provisions in a consent decree that are beyond the power of the court to order.

These criteria provide for a fair and equitable assessment of an environment improvement project in the context of the settlement decision.

II. COMMENTS ON H.R. 3411

First and foremost, the amendment is not necessary. While civil and criminal penalties and injunctive relief are the only presently authorized remedies under the CWA, the United States Attorney General, in settling claims for penalties, has

the inherent authority to consider a polluter's willingness and commitment to undertake activities that mitigate the harm caused by his violations. This authority is derived from the broad discretion vested in the Attorney General to settle and compromise litigation involving the United States. 1/ Since this authority is already being used in appropriate situations, the amendment may have the undesirable effect of fostering a much greater number of credit project proposals, many of which would prove to be unacceptable. Consideration of these proposals may delay settlement or prosecution of the government's case. In our cases, delay only helps the polluter at the expense of the environment. Moreover, the regulated community understands and abides by the existing civil penalty policy -- the "ground rules." This amendment will upset the existing status quo and provide incentives for violators to avoid civil penalties and engage in protracted negotiation and litigation until the new ground rules are again established.

At this point, let me clarify my earlier statement on the Attorney General's legal authority to use mitigation under the Clean Water Act. As indicated earlier, the CWA and MPRSA do not clearly authorize the use of credit projects as substitution for civil penalties. However, the government has broad discretion to mitigate civil penalties and permits this

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1/ The Attorney General's settlement authority is both inherent in the creation of his office, eg., Confiscation Cases, 74 U.S. at 457-459, and derived from the client agencies' authority to settle cases. United States v. Newport News Shipbuilding, 571 F.2d 1283, 1287 (4th Cir.), cert. denied, 439 U.S. 875 (1978).

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mitigation on the basis of a defendant's environmentally beneficial activities. Such authority must be exercised consistent with the terms of the Miscellaneous Fees Act, 31 U.S.C. § 3302, which provides that money received for the government must be deposited in the United States Treasury. We have interpreted this section to mean that the government is constrained in its ability to accept direct substitutes for civil penalties, but the Miscellaneous Fees Act does not entirely eliminate the authority of the government to mitigate the civil penalty based on an environmentally beneficial credit project. Thus, the United States currently has the legal authority to accept "credit projects" in certain circumstances as mitigation of civil penalties.

Direct substitution of a project for civil penalties, as well as unlimited credit projects, raise difficult enforcement issues. First, the amendment is unclear with respect to the Department's role in the approval of these credit projects under the amended section 309(d). As currently drafted, it has no role for the Attorney General. Yet, the Administrator or the Secretary alone cannot accept credit projects in settlement of federal enforcement actions without the involvement of the Attorney General, since ultimately the Attorney General must approve all consent decrees under the CWA to which the United States is a party. Therefore, the amendment should reflect the Attorney General's involvement.

Second, section 4(b) is most troubling as it raises the specter of judicially-imposed environmental improvement projects in situations where the EPA and the Department believe such projects are inappropriate. The courts and the defendants shouldn't be in business of selecting environmental improvement projects. That should be left to the Congress and the EPA. If Congress does not want these monetary recoveries to go into the United States Treasury, then it is incumbent upon Congress to establish a procedure that gives the Administrator some guidance in determining how and where the monies should be spent. A system that puts the polluter in the driver's seat unwisely rewards the outlaw for his illegal activity.

In conclusion, achieving compliance with environmental requirements in the first instance is the goal of our enforcement program. Any amendment that provides incentives to the regulated community to avoid compliance should be rejected. We all share the same goals -- quick, effective, and complete compliance with the nation's environmental laws -- the only question is the best means to reach them.

The Department of Justice looks forward to working closely with Members of this Subcommittee and the Environmental Protection Agency in this important area. I would be pleased to answer any questions you might have.

STATEMENT OF
RAYMOND B. LUDWISZEWSKI
ASSOCIATE DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE
BEFORE THE
SUBCOMMITTEE ON FISHERIES, WILDLIFE CONSERVATION,
AND THE ENVIRONMENT
OF THE
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 4, 1987

Mr. Chairman and Members of the Subcommittee:

On behalf of the Department of Justice, I am pleased to have this opportunity to present our views on issues related to H.R. 3411 and "environmental improvement projects" under the Clean Water Act (CWA) and the Marine Protection, Research and Sanctuaries Act (MPRSA). I am Raymond B. Ludwiszewski, Associate Deputy Attorney General, from the Department of Justice. For a period of two years, I was Special Counsel to the Assistant Attorney General, in the Land and Natural Resources Division. As Special Counsel, I was involved in all aspects of our civil environmental enforcement program, including enforcement under the CWA and the MPRSA. I am committed to helping the Congress work through these important issues and achieving our mutually desired goals of a forceful environmental protection program. I wish to stress at the very outset that the Justice Department, and the Lands Division in particular, is strongly committed to achieving the most effective environmental enforcement program possible. My testimony today will focus on the current federal

enforcement program under the CWA and the MPRSA, and the effects this amendment would have on those efforts.

In the last six years we have successfully prosecuted more people and corporations for criminal violations of the environmental laws than ever before, obtaining over 262 guilty pleas and convictions since 1981. The prosecutions have resulted in over $6 million in fines and over 175 years in jail sentences. Since 1981, we have also filed more than 1400 civil environmental enforcement suits -- more than ever before.

Specifically, with respect to the Clean Water Act, we have initiated over 225 cases and concluded more that 197 since FY 1985. Also, since FY 1985, we have recovered approximately $15 million in civil penalties paid to the United States Treasury under the Clean Water Act.

These civil penalties play a critical role in the Government's strong enforcement program. They are the foundation and the cement of the private compliance structure. It is often the fear of these penalties (which can be as high as $25,000 per day per violation) that discourages potential violators from polluting the environment. The imposition of civil penalties against the polluters of our nation's waterways, combined with the perseverance and aggressiveness that the EPA, the States, and the Department of Justice bring to bear on these problems, makes for a most effective and efficient enforcement program.

I. CIVIL PENALTY POLICY

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Enforcement actions initiated under the Clean Water Act use the Clean Water Act Civil Penalty Policy as the basic framework to calculate penalties which the United States would seek to recover in settlement in these actions. This policy, most recently amended in February 1986, reflects the four basic goals of an effective civil penalty enforcement program: (1) penalties should disgorge the economic benefits that the violator obtained through non-compliance; (2) penalties should act to deter non-compliance, not just for the individual violator subject to the penalty, but for the regulated community as a whole; (3) penalties should be applied throughout the nation consistently to provide fair and equitable treatment to all in the regulated community; and (4) penalties should promote swift resolution of environmental problems and enforcement actions by being rationally based and easily discernable to the regulated community.

At this point, I think it would be helpful to clear up any confusion over the scope of the United States' existing authority to accept "credit projects" in settlement of enforcement cases. The CWA and the MPRSA do <u>not</u> clearly authorize the use of credit projects <u>as substitution</u> for civil penalties. Nor do I believe that any such endorsement is necessary. The Acts do, however, allow the government to exercise its historically-recognized discretion to <u>mitigate</u> civil penalties where appropriate and permit this mitigation to be based on a defendant's environmentally beneficial activities.

Thus, the United States already has the legal authority to accept "environmental improvement projects" in certain circumstances as mitigation of civil penalties.

Where exercising our discretion to mitigate penalties because of environmentally beneficial activities by the defendant, the Department and EPA proceed with caution and attempt to keep the overarching interests of our enforcement programs in mind. In our view, the unfettered use of these projects would present serious potential dangers to the overall efficacy of the Department's civil enforcement program. First, such a practice circumvents the Congressional appropriations process. Second, with "credit projects", the polluter is often in the position of ultimately determining the need for, the appropriateness of, and the proper funding level for the specific project. This approach yields the anomalous result of having the violator determine the type of punishment it will suffer for breaking the law. Third, the use of credit projects, especially without clear standards, makes it more difficult to treat similarly-situated defendants in a consistent fashion. They lack the easy comparability of penalty assessments. Accordingly, settlement and resolution of the litigation may be prolonged and become more difficult. Fourth, the linchpin of the enforcement program -- voluntary compliance resulting from the deterrent effects of federal enforcement -- may be seriously undermined by allowing the violator falsely to cast the image of a "responsible environmental actor" or "model citizen", and by affording him

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Fifth, a proposed project must show the defendant's good faith commitment to statutory compliance and must be designed primarily to benefit the environment rather than the defendant. For example, adding additional treatment capacity to a wastewater treatment plant beyond what is required to achieve permit compliance may provide more production capacity for the defendant without generating additional water quality benefits for the local community as a whole.

Sixth, our policy is that the Agency cannot accept provisions in judicial Consent Decrees or administrative Consent Agreements that are beyond the equitable power of a court to order.

EPA uses the criteria in the 1986 Water Penalty Policy for evaluating proposed mitigation projects when negotiating settlements in enforcement actions brought under the authority of the Clean Water Act relating to the National Pollutant Discharge Elimination System (NPDES) program. Where the United States has, on occasion, accepted mitigation projects in recent years, most have been associated with settlements of enforcement actions against municipalities for Clean Water Act violations at publicly owned wastewater treatment works (POTWs). We have accepted fewer mitigation projects in settlements with industrial dischargers.

EPA issued the National Municipal Policy in January 1984 calling for expeditious compliance by POTWs with Clean Water

Act pollution control requirements. From that time through June of this year, the United States has filed 73 actions against POTWs. We have concluded 46 of those actions during that time period. Seven of those concluded cases (about 15 percent) included mitigation projects. Examples of these projects include a $100,000 stream restoration and a $625,000 investment in pollution control equipment to reduce degradation of Lake Erie.

There are a number of enforcement policy reasons why EPA applies the criteria in our penalty policies in determining the acceptability of a mitigation project in settlement of an enforcement case. The most important reason is to maximize the impact of the enforcement case in deterring future violations by the defendant or other members of the regulated community. Consistent with the goals of the statutes the Agency administers, EPA's enforcement program not only seeks to abate existing violations but also takes steps to prevent future violations.

To the extent that undertaking an environmental improvement project has some bearing on a defendant's good faith, and thus serves as some justification for accepting a lower cash penalty, settlement still should leave the defendant worse off economically than if it had complied in the first instance. Thus, we are not receptive to proposals in which a defendant seeks to perform projects which the defendant would be required to do by law or would otherwise choose to do on its own, or to perform projects

whose benefits accrue to the defendant rather than the public at large. Further, we are not receptive to proposals, however beneficial the project, that allow a defendant to avoid civil penalties entirely, nor do we believe that it is appropriate for a defendant to receive mitigated penalties and to benefit from the favorable publicity or organizational goodwill that the defendant might gain from performing the mitigation projects it proposes, particularly when it was defendant's probable lack of responsibility on environmental matters which engendered the enforcement action in the first place.

There are other policy reasons for being careful about the kinds of mitigation projects which the government should accept in an enforcement case, specifically:

1. Some proposed mitigation projects raise serious questions about whether the project actually will produce any direct or indirect environmenatally beneficial result;

2. Accepting a proposed credit project creates a resource burden on EPA to monitor and enforce performance of the project; and

3. Certain proposed projects may raise fairness or propriety questions (e.g., agreeing to payments to one designated trust fund or organization as opposed to another).

Even with these reservations, I believe that the Agency has developed a policy to ensure that any environmental improvement projects proposed during settlement negotiations are given fair consideration and evaluated in terms of how the projects will further the intent of the Clean Water Act.

Observations on H.R. 3411

In the context of our present policies on environmental improvement projects, I have reviewed H.R. 3411. It appears that we are already fulfilling the objectives of H.R. 3411 under the existing Agency penalty policies that I earlier described by giving consideration to proposed mitigation projects in appropriate situations. I understand the intent of H.R. 3411 is to provide legal support for the use of environmental improvement projects as part of civil enforcement settlements. We are already using our policies in the judicial context. Mitigation projects also are included as part of settlements of judicial actions for illegal dredge and fill activities, and are available in settlement of EPA's penalty claims under MPRSA §105(a), which authorizes the Administrator to mitigate penalties "for good cause shown." The relationship of H.R. 3411 to administrative penalty litigation under §309(g) of the Clean Water Act would require further study if the bill were enacted, particularly in light of Congress' intent that administrative penalty proceedings serve as an expeditious vehicle for civil penalty assessment.

It appears to us that H.R. 3411 would not require any significant change to our existing reasoned approach to evaluating environmental improvement projects. Therefore, we believe H.R. 3411 is not necessary. Should the Subcommittee proceed with this legislation, we have a few further observations you may wish to consider.

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1. You may wish to clarify whether H.R. 3411 gives a court the authority unilaterally to order a defendant to perform an environmental improvement project, or simply to ratify the agreement between the parties to the action. Our experience suggests that these projects are most likely to succeed if defendants, rather than EPA or a court, are clearly made responsible both for devising and implementing an acceptable project.

2. You may wish to provide explicit authority for the government to enforce compliance with the terms of an environmental improvement project to ensure that the intended results of the initial enforcement action actually are achieved.

3. You may wish to ensure that EPA retains the authority to determine in its discretion what environmental improvement projects are acceptable so as to avoid litigation over that issue in individual cases. Our concern is the effect on the efficiency of our national enforcement program if defendants could propose mitigation projects directly to a court without approval by the plaintiffs.

We would be happy to provide more specific language on these points if it would help the Subcommittee in its deliberations.

In closing, I want to assure the Subcommittee that the Agency supports the use of appropriate environmental improvement projects which are consistent with our overall enforcement goals as part of selected case settlements. At the same time, we believe it appropriate to continue to rely on the up front cash penalty to the U.S. Treasury as the principal deterrent in environmental cases, including those settled and those tried.

Again, thank you for this opportunity to testify. I would be happy to respond to any questions the Subcommittee may have.

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

JAN 24 '90

MEMORANDUM

SUBJECT: Use of Stipulated Penalties in EPA Settlement Agreements

FROM: James M. Strock
Assistant Administrator

TO: Addressees

Attached is final guidance on the use of stipulated penalties in EPA settlement agreements. This guidance was developed with the help of a workgroup, which consisted of representatives from other Headquarters offices, Regional Counsel offices, and the Department of Justice. It also reflects comments made on a draft of the guidance which was circulated for review on August 16, 1989.

Several commenters made procedural suggestions such as recommending an expedited referral process for referring cases for collection of stipulated penalties to DOJ, requesting more specifics on the role of OECM, ORC, and DOJ in decisions to compromise stipulated penalties, and requesting specific regional procedures for demanding and compromising stipulated penalties. All these issues will be addressed in the Manual on Monitoring and Enforcing Administrative and Judicial Orders, to be issued in final form soon.

Several commenters objected to the language in section I of the guidance cautioning against attaching stipulated penalties to violations of the consent agreement which are also violations of a statute or regulation. This language has been modified in the final version. The guidance now states that agency attorneys should consider the advantages and disadvantages of attaching stipulated penalties to a requirement for which the agency could get statutory maximum penalties.

Several commenters also disagreed with the language in section IV discouraging caps. This language has been revised to reflect these comments. Only caps on the amount of penalties are now discouraged. Caps on the number of days for which stipulated penalties can accrue combined with a reservation of all enforcement responses available to the government for violation of the consent agreement eliminate the problems associated with caps on penalty amounts and are now mentioned as an option to consider.

One commenter asked that the guidance address the practice of forgiving stipulated penalties for violation of interim milestones where the final deadline for compliance is met. It is now addressed in section VI of the guidance and allowed in situations where minimal environmental degradation results from missing the interim milestones and the accrued penalties are kept in escrow until compliance is achieved.

Two commenters objected to the language in the first paragraph regarding the applicabilty of the guidance to administrative cases. This language has not been changed because in fact the agency does not have legal authority to assess stipulated penalties in all administrative cases. The legal determination of whether the government has authority to assess stipulated penalties in a given administrative case is a threshold issue to be determined by ORC, OECM, and DOJ based on their legal expertise concerning the particular statute involved.

Finally, one commenter suggested that the language in section VI restricting compromise of stipulated penalties to "rare, unforeseen circumstances" was too strong. The intent of this section and the guidance in general is that stipulated penalties should be set at levels and attached to provisions that the government is ready to vigorously enforce dollar for dollar except in "rare, unforeseen circumstances." Stipulated penalties should never be set at levels higher than we intend to enforce or attached to provisions we are not prepared to enforce. This practice sends the regulated community the wrong message, namely that accrued stipulated penalties are only a starting point or opening offer and are subject to negotiation.

If you have any questions concerning this guidance, please contact Elise Hoerath of the Air Enforcement Division of OECM, FTS 382-4577.

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Attachment

Addressees:

Regional Administrators
Regions I-X

Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Associate Enforcement Counsels

Headquarters Enforcement Office Directors

Mary T. Smith, Acting Director
Field Operations and Support Division
Office of Mobile Sources

E. Donald Elliott
General Counsel

David Buente, Chief
Environmental Enforcement Section
U.S. Department of Justice

Workgroup Members

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

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

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

JAN 19 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act

FROM: Edward E. Reich
Deputy Assistant Administrator for
Civil Enforcement, OECM

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

David G. Davis, Director
Office of Wetlands Protection, OW

TO: Deputy Regional Administrators
Regional Counsels
Water Management Division Directors
Environmental Services Division Directors,
Regions III and VI
Assistant Regional Administrator for Policy
and Management, Region VII

Attached you will find a major guidance on the subject of how to develop CWA civil penalty demands under many different circumstances. We have found a certain amount of confusion in this area, with the creation of new administrative remedies and subsequent use of the CWA penalty settlement policy in inappropriate situations.

Upon circulation of a draft of this guidance to NPDES contacts, a few commenters noted that they believed the CWA penalty policy should be applied in setting penalty amounts in administrative complaints, and that the CWA penalty policy should also be explained to and considered by administrative judges in their assessment of penalties. We understand this approach, which the Agency does follow in other enforcement programs, but have decided to follow the majority sentiment that we place ourselves in a stronger negotiating position by pleading for penalties without direct reference to our bottom-line settlement calculations and retaining the option of litigating for civil penalties well in excess of settlement policy amounts. (We have

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found that administrative judges more often lower a penalty policy amount requested in an administrative complaint than maintain it, even though in these other programs judges are to take such policies into account when assessing civil penalties under 40 C.F.R. §22.27[b].)

We also received a number of comments noting some ambiguity in the draft's discussion of how high a penalty to plead for in an administrative complaint. The final guidance clarifies that we cannot plead for a penalty greater than we could justify to an administrative judge under the relevant statutory assessment factors, but that in many, if not most cases, this amount will be the same as the statutory maximum "cap."

Because the points discussed in this guidance apply in principle equally to the §404 program, we have widened the scope of the guidance to encompass wetlands judicial and administrative enforcement cases.

Attachments

cc: Regional Counsel Water Branch Chiefs
Regional Water Management Division
Compliance Branch Chiefs
Regional Wetlands Coordinators
OECM-Water Attorneys
Susan Lepow, OGC
David Buente, DOJ
Margaret Strand, DOJ
Administrative Law Judges

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CLEAN WATER ACT

DISTINCTIONS AMONG PLEADING, NEGOTIATING AND LITIGATING CIVIL PENALTIES FOR ENFORCEMENT CASES

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Effective Date: _____

Clean Water Act
Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases

Summary

This policy provides guidance on some of the distinctions for determining appropriate penalty amounts to pursue at three different stages of a Clean Water Act enforcement action -- pleading for penalties in a judicial or administrative complaint, settling penalty claims in a judicial or administrative action, and litigating for penalties in a legal proceeding before a judge or hearing officer where a case does not settle.

Specifically, this guidance emphasizes the following points:

1. EPA's Clean Water Act civil penalty policy governs only the bottom-line dollar amount which EPA will accept in settlement of civil penalty claims in a judicial or administrative NPDES enforcement case.

2. The CWA civil penalty policy is not intended to be used to calculate either the amount which EPA requests a judge or a hearing officer to assess in a judicial or administrative complaint, or the amount which EPA argues a judge or hearing officer should assess in a litigated proceeding where a case does not settle. Those amounts will be significantly higher than the CWA penalty policy indicates for settlement purposes.

3. In litigating a claim for CWA civil penalties either judicially or administratively, counsel representing EPA typically should argue for assessment of a penalty amount which is well above the internal bottom-line settlement amount derived through application of the CWA penalty policy.

4. Counsel should support its arguments for the "litigation amount" based upon reasoned application of the statutory penalty assessment criteria and citation of precedent, not through arithmetic calculations derived according to the CWA penalty settlement policy.

5. In judicial complaints, as has been the practice to date, the United States typically will continue to request civil penalties of "up to $10,000 per day of such violation for violations occurring before February 4, 1987, and up to $25,000 per day per violation for violations occurring thereafter."

6. In an administrative penalty complaint initiating a Class I or Class II proceeding, EPA enforcement officials should request assessment of a penalty amount which is:

a) Within statutory ceilings;

b) Justifiable based on the statutory penalty assessment criteria of CWA §309(g)(3); and,

c) Set at a level which will facilitate negotiation of an appropriate settlement amount and recovery of an appropriate amount through litigation if the case does not settle (since we cannot litigate for a higher figure than we request in the administrative complaint).

Application of these principles should, among other things, help EPA obtain adequate CWA civil penalty judgments if judicial or administrative cases do not settle. At the same time, they will help preserve EPA's leverage to obtain satisfactory civil penalties through settlement of these enforcement actions.

Effect of Guidance

To the extent there may be any conflict with existing Agency CWA policy, this guidance supersedes any such policy regarding the pleading, negotiating, or litigating of Clean Water Act civil penalties in NPDES and §404 judicial and administrative enforcement cases. This guidance does not apply to cases brought under §311 of the Clean Water Act. This guidance does not apply to CWA administrative or judicial enforcement cases in which a complaint or equivalent document has been served, but shall apply to every case initiated after the date of this guidance.

Pleading Civil Penalties

An administrative complaint[1] typically only opens and describes the Agency's case, just as a complaint in federal

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[1] These are sometimes titled per the August 28, 1987, guidance as "Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Receive a Hearing Thereon." In order to avoid confusion over the role of the complaint in an administrative penalty action, Regional enforcement officers have the discretion to modify the caption of the §309(g) pleading to read "Administrative Complaint."

Although the longer caption accurately recites the statutory functions the Agency implements in an enforcement action, that title may contribute to the existing confusion over the particular role we play as Agency prosecutors initiating a case. A change in caption will more accurately describe to the general public our action, which is often described in press releases as the actual imposition of a fine.

District Court opens a judicial enforcement case. To the extent possible, we intend to treat administrative and judicial enforcement complaints the same, both procedurally and substantively.

It is Agency and Department of Justice practice in civil judicial cases to paraphrase the Clean Water Act in pleading for penalties. At the present time, our Prayers for Relief typically include the request for "$10,000 per day of such violation before February 4, 1987, and $25,000 per day per violation thereafter." This formulation has worked well and will continue as our usual judicial policy.[2] At the outset of a case, the government often does not have complete information on the number or extent of violations, but as a litigant, it preserves its rights by pleading for the statutory maximum penalty by using this phrasing.

Similarly, EPA's interests as a plaintiff in an administrative penalty complaint are best served by pleading for an administrative penalty which is high enough to facilitate negotiation of a settlement which is based on the CWA penalty policy for settlements or an approved §404 settlement amount. Moreover, the penalty amount pled in the administrative complaint also must be high enough to permit the Agency to obtain an appropriate penalty under statutory assessment criteria if the case must be litigated.

In many cases, it will be necessary to name the statutory maximum amount (i.e., $25,000 for Class I cases and $125,000 for Class II cases) in the administrative complaint to preserve EPA's ability to negotiate and litigate for as high a penalty as is possible under the facts of the case. Nevertheless, EPA Regions have discretion to plead for a lesser amount by weighing other case-by-case considerations such as what amount is likely to produce an adequate settlement, as well as a duty to consider what amount, taking into account the statutory penalty factors, is supported by the facts.

To ensure that CWA administrative complaints comply with the statute and present Class II rules of practice by explaining the basis for the penalty sought, Agency water enforcement staff are to follow the August 27, 1987, guidance by pleading:

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[2] For reasons peculiar to the present administrative penalty process, EPA staff should not use this formula in administrative complaints, but instead request a specific dollar amount (as more precisely described below). In case of a default, using a specific dollar amount in the complaint will result in a more enforceable penalty assessment.

> The proposed penalty amount was determined by EPA after taking into account the nature, circumstances, extent and gravity of the violation or violations, and Respondent's prior compliance history, degree of culpability for the cited violations, any economic benefit accruing to Respondent by virtue of the violations, and Respondent's ability to pay the proposed penalty, all factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3).

This statement should satisfy the requirement of 40 C.F.R. §22.14(a)(5) that "Each complaint for the assessment of a civil penalty shall include . . . [a] statement explaining the reasoning behind the proposed penalty." The Agency staff which drafts the administrative complaint in fact should consider the statutory penalty factors. This consideration satisfies the requirements of §309(g)(3) of the Act, in case the respondent defaults and the requested Class II penalty becomes an assessment.[3] In this context, EPA will best preserve its negotiation and litigation position by pleading for a civil penalty based on the statutory penalty factors and resolving all discretion in favor of the highest defensible penalty amounts. The facts supporting the reasoning -- but not itemized arithmetic calculations -- underlying the requested penalty (e.g., facts showing extent and history of violations, environmental impact, economic benefit, or good faith) should be incorporated in the case file which becomes part of the administrative record. These materials will form the basis for EPA penalty arguments before an Agency judge if the matter is litigated[4] and will form part of the necessary administrative record to support the assessment of the proposed civil penalty if the respondent defaults and the proposed penalty becomes final through operation of law.

In the event that an administrative judge in a Class II proceeding requires under 40 C.F.R. §22.14(a)(5) more information from EPA than the recitation of the statutory penalty factors, Agency enforcement personnel should provide those elements of the

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[3] Under the present default procedures for Class II penalties (see 40 C.F.R. §22.17), the administrative complaint can become an assessable order without the intercession of an administrative law judge.

[4] The materials are not directly applicable, however, to settlement negotiations, which are governed by the methodology of the CWA penalty policy. See discussion below.

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case file which support the penalty pleading based upon the statutory factors in §309(g)(3).[5]

This analysis to support EPA's administrative penalty pleading based on the statutory penalty assessment factors should not be derived by applying the Clean Water Act penalty policy, which EPA uses specifically for determining appropriate penalty settlement amounts for NPDES cases. Unlike other Agency enforcement programs, such as FIFRA or TSCA, which operate under penalty policies that control Agency administrative pleading practices, the NPDES program's penalty policy does not encompass how to plead administrative penalty complaints. The Agency's settlement position, although based on concepts similar to the Agency's or a district court's assessment criteria, almost always will differ from (and presumably will be less than) the figure or formulation requested in a complaint. These two calculations we make in an administrative case serve entirely different purposes, and should not be confused.

Negotiating Civil Penalty Settlements

The February 11, 1986, Clean Water Act penalty policy, as amended for administrative penalty cases in the August 18, 1987 guidance, governs Agency negotiators in settling both administrative and judicial NPDES enforcement cases. The principles of the policy and its use are well known, and we will not repeat them here. We believe this policy has succeeded both in raising Agency penalty settlements consistent with the policy and goals of deterrence and providing incentives for quick correction of violations, and in achieving a greater national consistency. Agency negotiators should continue using this policy in all NPDES settlements. Similarly, Agency negotiators should continue to use approved bottom-line settlement amounts in wetlands cases.

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[5] If the request comes at the outset of the administrative enforcement action, before the parties have exchanged information or even before the respondent has answered the complaint, Agency prosecutors often will not possess complete information on some relevant issues. Such an incomplete information base is usual and normally sufficient for pleading and charging purposes, but may be of limited use to an administrative judge making decisions during contested litigation. Under these circumstances, enforcement staff should consider whether it is advantageous to EPA to urge the judge to delay the inquiry until a later stage in the litigation when all available information can be considered. See discussion below on Litigating Penalties.

Litigating Civil Penalties

When EPA or DOJ attorneys provide written or oral arguments to a federal District Court judge or an administrative judge on the issue of an appropriate civil penalty, they are not governed by the calculation methodology of the 1986 Clean Water Act penalty policy or the 1987 addendum. The 1986 policy itself notes:

> In those cases which proceed to trial, the government should seek a penalty higher than that for which the government was willing to settle, reflecting considerations such as continuing noncompliance and the extra burden placed upon the government by protracted litigation.

CWA Penalty Policy at p.2. It is inherent to the concept of settlement negotiations that respondents will risk a higher civil penalty in the event settlement talks fall through. Without this leverage, defendants or respondents will not have strong incentive to settle on terms acceptable to the government under the penalty policy. Agency negotiators then would either have to agree to civil penalties lower than those presently being attained, or spend a lot more time litigating cases that are currently being settled. In order to promote settlements, it is necessary to restrict the scope of the penalty policy and its specific calculation methodology to settlements alone.

Government litigators are to argue for the highest civil penalty appropriate under the law, considering the applicable statutory factors,[6] our ability to prove the allegations in the

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[6] These are, for judicial actions,

> "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."

CWA § 309(d). The virtually identical statutory factors in administrative enforcement proceedings are

> "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit

complaint, and whatever financial burdens may be placed upon the government by continuing litigation.[7]

Government litigators must provide legal arguments and may introduce testimony or other evidence supporting facts related to the application of statutory penalty criteria to a violator's conduct to advance EPA's claims for civil penalties. We should draw on favorable civil penalty precedents, such as Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F. Supp. 1542 (E.D.Va. 1985), aff., 791 F.2d 304 (4th Cir. 1986), rev. on other grounds and remanded, 108 S.Ct. 376 (1987) (for the total amount assessed), Sierra Club v. Simkins Industries, Inc. 617 F.Supp. 1120 (D.Md. 1985), aff., 847 F.2d 1109 (4th Cir. 1988) or United States v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166 (D.Mass. 1986), aff., 826 F.2d 1151 (1st Cir. 1987)(§404 case in which defendant was assessed a civil penalty of $150,000 and required to pay an additional $390,000 if restoration of wetlands not carried out). See also Attachments A and B. We strongly advise you to adopt the approach used in the attached Regional materials -- recommend a total penalty amount, after discussion of the appropriate statutory factors,[8] but do not provide specific amounts (other than for economic benefit, where applicable) for each factor. Attachments A and B. The penalty we recommend should be one supportable by the evidence and available legal arguments, but also one that resolves any penalty discretion or factual ambiguity in terms most favorable to the United States or the Environmental Protection Agency. The amount that we recommend to a judge should in all instances be more than we were proposing in settlement negotiations. In administrative penalty cases in which there is a significant record of violations, it is likely that the facts of a case will often justify EPA seeking the maximum penalty authorized by the Act -- either $25,000 or $125,000 -- assuming also that EPA requested that maximum assessment in its administrative complaint. An important distinction to note here is that in pursuing a Clean Water Act civil penalty in litigation, the government should support its claim through application of the statutory penalty factors rather than the Agency's civil penalty policy

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or savings (if any) resulting from the violation, and such other matters as justice may require."

CWA §309(g)(3).

[7] At this point in an enforcement case, such financial costs will typically be minimal.

[8] The judges in our enforcement cases need this information to support their decisions imposing civil penalties under the Water Quality Act amendments.

methodology. Indeed, government litigators shall not argue before a judge or neutral decisionmaker for a civil penalty based upon the specific methodology set out in the CWA penalty policy, nor should they offer evidence, including expert testimony, as to how specific CWA penalty policy gravity component calculations apply to a given case.

The analysis of the economic benefit accruing to the violator remains the same (after accounting for a potentially longer period of noncompliance if settlement is not reached), and is to be considered according to the terms of §309(d) and (g) of the Act, so the BEN program may and should be used in litigating penalties.[9] The existence and extent of economic benefit is a factual matter which may be objectively measured in dollar terms. Therefore, to support the United States' figure on economic benefit government litigators may introduce a witness expert in the application of financial analysis as used in the BEN program.

The penalty policy's settlement gravity analysis, however, must be abandoned in favor of a more stringent, statutorily-grounded approach if penalties in a case are litigated. Specifically, the government should then offer into evidence facts that are related to the gravity-oriented statutory criteria, such as the magnitude and duration of the violations, the actions available to the defendant to have avoided or mitigated the violations, or any environmental damage. The government should argue as an advocate that the presence of these facts warrant assessment of a civil penalty of a given amount.[10]

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[9] Although the application of BEN to the facts of violation will remain the same in settlement or litigation, government prosecutors may well take a more stringent position in litigation than settlement regarding, for example, days in violation. This tactical shift may influence the economic benefit analysis by changing material inputs into the computer program. We do not address here special issues that may arise over how to apply the BEN program to a given set of facts.

The BEN program generally does not apply to wetlands cases under §404 of the Act.

[10] This amount should correspond to the penalty requested in the administrative or judicial complaint, adjusted to reflect any new information received since the filing of the case (keeping in mind that the government cannot argue for penalties higher than initially requested), and should always be significantly greater than the bottom-line penalty derived from application of the CWA penalty policy.

The results of our gravity analysis of the Clean Water Act penalty policy, although applicable in NPDES settlement discussions, are irrelevant to our litigation approach and should never be introduced into evidence by the United States or advanced as representing Agency litigation penalty policy. This is the case because the penalty policy quantifies gravity calculations in a way which takes into account government resources and priorities relevant to deciding whether to litigate or settle a case.

If the defendant in a judicial case attempts to depose EPA personnel on the gravity calculations for settlement purposes under the CWA penalty policy, either in the case at hand or other cases, this should be vigorously opposed by government counsel under Rule 26(b) as not "being reasonably calculated to lead to the discovery of admissible evidence." If the defendant in a judicial case attempts to introduce the CWA Penalty Policy into evidence, this should be opposed as irrelevant.[11] In administrative litigation in which formal rules of evidence may not apply, EPA prosecutors should resist the respondent's introduction of the policy as irrelevant and potentially misleading.

40 C.F.R. §22.27(b)'s mandate that administrative law judges "consider any penalty guidelines issued under the Act" when assessing a penalty does not apply in Clean Water Act cases, because there are no applicable guidelines.[12] The February 1986 NPDES settlement policy, as amended, does not and cannot govern or even apply to the decision which an adjudicator must make to resolve an administrative or judicial claim for civil penalties. If it did, the policy most likely would be designed to quantify penalties differently so as to produce acceptable amounts to achieve through litigation, rather than settlement. Furthermore, if the settlement policy governed adjudications respondents could have too little incentive to settle with Agency negotiators and administrative judges would face much lengthier dockets. EPA litigators should make this point to any administrative judge who misconstrues the scope of the NPDES penalty policy.

Attachments

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[11] Tactically, exceptions may apply here. But in no case should government prosecutors represent to the Court that the CWA penalty policy binds the Court, the hearing officer, or the United States in litigating civil penalties.

[12] The Agency has not issued §404 program penalty guidelines applicable to administrative judges.

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

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

JAN 24 1990

MEMORANDUM

SUBJECT: Use of Stipulated Penalties in EPA Settlement Agreements

FROM: James M. Strock
Assistant Administrator

TO: Addressees

This memorandum provides guidance on the use of stipulated penalties in settlement of enforcement actions. For each issue discussed, a preferred approach is stated along with its rationale. These preferred approaches should be followed absent unusual circumstances dictating an alternative approach. The guidance applies to judicial settlements except that it does not supersede the September 21, 1987 Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees. It also applies to administrative cases where EPA has legal authority to assess stipulated penalties.

Stipulated penalties are penalties agreed to by the parties to a settlement agreement for violation of the agreement's provisions. These penalties are then made a part of the agreement, and are enforceable if it is violated. In EPA settlement agreements, the primary goal of a stipulated penalty is to act as an effective deterrent to violating the settlement agreement.

I. Types of Requirements to Which Stipulated Penalties Should Apply

Any clearly definable event in a settlement agreement may be appropriate for stipulated penalties in a given case. Such events include testing and reporting requirements, interim and final milestones in compliance schedules, and final demonstration of compliance. The government litigation team assigned to a case should carefully consider which

consent agreement provisions are appropriate for stipulated penalties and be prepared to vigorously enforce them. Stipulated penalties can even be attached to consent agreement provisions requiring payment of up-front penalties so long as the stipulated penalties are higher than the interest, computed at the statutory interest rate, on the underlying amount. Every consent agreement requirement to which stipulated penalties are attached should be drafted to ensure that the standards for determining compliance are clear and objective, and that any information required to be submitted to EPA is clear and unequivocal.

In general, stipulated penalties are particularly important for requirements of the consent agreement which do not represent regulatory or statutory violations for which the agency could potentially get statutory maximum penalties. Such provisions may include a requirement to install specific control equipment where the regulations and statute involved require only compliance with a discharge or emissions standard, or environmental auditing or management requirements designed to ensure future compliance. Without stipulated penalty provisions, penalties for violation of such provisions in judicial cases are only available at the judge's discretion in a contempt action under the court's inherent authority to enforce its own order.

Attaching stipulated penalties to violations of consent agreement provisions which are also violations of a statute or regulation with a specified statutory maximum penalty has advantages and disadvantages which Agency attorneys should consider carefully in the context of a particular case. The advantage is ease of enforcement. The Agency can pursue violations without having to bring a new enforcement action or, in the judicial context, a contempt action. The disadvantage is where stipulated penalties for such violations are set at less than the statutory maximum, parties may argue that the government has bargained away some of its enforcement discretion.

If a particularly egregious statutory or regulatory violation occurs for which the government feels the applicable stipulated penalties are not adequate, sources may claim the government is equitably estopped from pursuing other enforcement responses. Sources may argue in the context of a contempt action or new enforcement action that the government has already conceded in the consent agreement that a fair penalty for this type of violation is the stipulated penalty, and therefore, the court should not require any

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additional penalty. Sources may make this argument even if the government has reserved all rights to pursue various enforcement responses for consent agreement violations.[1]

II. Level of Stipulated Penalties

Because the statutes EPA is charged with enforcing vary so widely, penalty schedules for all media or types of violations are not practical. There are, however, several important criteria which should always be considered in setting stipulated penalty amounts. Each program office, in concert with the appropriate OECM Associate Enforcement Counsel, may want to consider providing further, more specific guidance on appropriate levels or ranges for stipulated penalties based on the criteria below.

One key element which applies to setting the levels of all stipulated penalties for violation of a consent agreement provision is that the defendant is by definition a repeat offender when the provision is violated. For this reason, such stipulated penalties should be higher on a per day basis than the initial civil penalties imposed. See Guidelines for Enforcing Federal District Court Orders in Environmental Cases (GM-27).

The economic benefit accruing to a source due to a violation should be recovered in order for the stipulated penalty to be an effective deterrent. For some types of violations, such as notice provisions, the economic benefit of noncompliance may be minimal, though significant stipulated penalties may be appropriate based on other criteria as discussed below. For these types of violations, no formal BEN analysis is necessary. For violation of provisions which involve quantifiable delayed or avoided costs, such as installation of control equipment as part of a compliance schedule, the minimum stipulated penalty should be the economic benefit of noncompliance. However, the recidivism factor will nearly always justify a penalty well above this minimum, which often serves as the point of departure for a minimum initial penalty.

The source's ability to pay can be another important criterion to consider. How much of a deterrent a stipulated penalty is will depend on how financially significant it is to the source. The same stipulated penalty may be

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[1] In considering whether to attach penalties to violations uncovered by an environmental audit, the November 14, 1986 Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52) should be consulted.

financially crippling to one source, while merely a routine business expense for another. However, the burden is always on the defendant to raise such issues during negotiations and to justify lower stipulated penalties than the government has proposed. Financial ability to pay a penalty can be determined using the ABEL computer program for corporate violators and the MABEL computer program for municipal violators.

It should be emphasized that this factor should not be considered a reason for lowering the level of stipulated penalties below the level equal to the economic benefit. It would mainly affect the degree to which this base minimum amount is increased to account for the recidivist nature of the violation. The key concern is that stipulated penalties should be set at levels which are significant enough to deter violations rather than resulting in a "pay-to-pollute" scheme.

Another criterion which should be considered in setting stipulated penalty amounts is the gravity of the violation, i.e., how critical is the requirement to the overall regulatory scheme and how environmentally significant is the violation. The environmental significance factor should include consideration of potential and actual harm to human health and the environment. In general, consent agreement provisions which are central to a particular regulatory scheme should have higher stipulated penalties than provisions that are considered less significant. It is up to each enforcement program to make judgments about the relative importance of respective requirements. As previously noted, some consent agreement requirements such as notice provisions may have little or no associated economic benefit, but may nevertheless be critical to the regulatory program in question and would warrant high stipulated penalties.

Another consideration related to the gravity component is the source's history of compliance. If the source has a record of previous violations, a higher stipulated penalty may be necessary because earlier enforcement responses were ineffective in deterring subsequent violations.

Another option to consider whenever setting stipulated penalty levels is an escalating schedule, in which the stipulated penalty increases with the length of the violation. For example, violations of up to two weeks might have stipulated penalties of $1000 per day while violations of two to four weeks might have stipulated penalties of $2000 per day, and so on.

III. Method of Collection

Settlement agreements should state the method by which stipulated penalties will be collected. Two options are for the settlement agreement to provide that the penalty is automatically due upon the occurrence or non-occurrence of a specified event, or it may make the penalty payable only on demand by the government.

Automatic payment is the preferred approach. It saves resources which would otherwise be devoted to making demands for payment and may put the government in a more advantageous position should the source declare bankruptcy. If payment is made on demand, the consent agreement should make it clear that the legal liability of the source for the stipulated penalty attaches immediately upon violation, and it is only payment of the penalty to the Agency which is not due until demand is made.

Settlement agreements should always state where and how the penalty should be paid and how the check should be drafted. See EPA Manual on Monitoring and Enforcing Administrative and Judicial Orders for additional guidance. In addition, settlement agreements should not agree to pre-enforcement review of accrued stipulated penalties.

IV. Timing of Enforcement Responses

Prompt action to collect stipulated penalties due under any consent agreement is crucial. If stipulated penalties are due on demand, it is very important such demands be timely. The government encounters significant difficulty collecting stipulated penalties if it sits on its rights. Delay allows penalties to increase to levels parties may argue are inequitable. Sources may also raise equitable defenses such as laches or estoppel, arguing that the government cannot fail to exercise its rights for extended periods of time allowing stipulated penalties to continue to accrue and then move to collect unreasonably high penalties. The government, of course, can and should always rebut such claims by arguing it is simply enforcing the decree or agreement as agreed to by defendant, and is not subject to such equitable defenses. However, this unnecessary complication should be avoided.

A cap on the amount of stipulated penalties which can accrue is generally not a preferred solution to this problem. The stipulated penalty would lose its deterrent value once the cap is reached. Also, the main goal of any enforcement action must be compliance with the law so that public health and welfare is protected. If consent agreement provisions

are allowed to be violated long enough for a cap to be reached, serious environmental consequences may have occurred.

Providing that stipulated penalties only apply for a specific, reasonably short period of time in conjunction with reserving to the government all available enforcement responses for violation of the consent agreement, however, solves many of the problems mentioned above. By its own terms, stipulated penalties will not accrue to levels defendants can argue are inequitable. The government will be in a strong position when it pursues other enforcement options, such as contempt actions or a new enforcement action to get additional penalties, because it can argue that the penalties in the original consent agreement were not enough to deter the defendant from further violations and the possibility of additional penalties was clearly contemplated.

V. Reservation of Rights

All consent agreements must contain a provision which reserves to the government the right to pursue any legally available enforcement response for violation of any consent agreement provision. These enforcement responses would include civil contempt proceedings and injunctive relief, and criminal contempt proceedings for particularly egregious violations. However, for provisions mandated by statute or regulation and which have stipulated penalties attached, a reservation to pursue statutory penalties is suggested but not required. For model language, see the October 19, 1983 Guidance for Drafting Judicial Consent Decrees (GM-17).

VI. Collection of Stipulated Penalties

The government should be prepared to collect the full amount of stipulated penalties due under a consent agreement. No agreement should ever anticipate compromise by specifying instances where it will be allowed, aside from a standard force majeure clause. In rare, unforeseeable circumstances, however, the equities of a case may indicate that the government may compromise the amount it agrees to collect. For penalties payable on demand, the government may also exercise prosecutorial discretion by declining to proffer a demand for stipulated penalties for minor violations of a consent agreement.

It may also be appropriate to provide that stipulated penalties for violation of interim milestones in a compliance schedule will be forgiven if the final deadline for achieving compliance is met. This is clearly inappropriate where there is significant environmental harm caused by the defendant missing the interim deadlines. If such a provision is used,

the defendant should generally be required to place accrued penalties in an escrow account until compliance by the final deadline is achieved.

In judicial cases, the Attorney General and his delegatees in the Department of Justice (DOJ) have plenary prosecutorial discretion to compromise stipulated penalties. This authority stems from 25 U.S.C. § 516, which reserves to DOJ authority to conduct the litigation of the United States, including cases in which an agency of the United States is a party, and the cases and regulations broadly interpreting this authority.

In administrative cases handled solely by EPA, stipulated penalties should be collected pursuant to the enforcement authority granted to EPA under the statute governing the case. This authority to collect and compromise stipulated penalties varies from statute to statute.

Separate from the process for collecting stipulated penalties, EPA must keep track of money owed the federal government (accounts receivable) resulting out of the activities of the Agency, including administrative penalty assessments. A stipulated penalty becomes an account receivable when the appropriate Agency official determines that a violation of a consent agreement provision with an attached penalty has occurred. Under Agency financial regulations and policies for monitoring accounts receivable, stipulated penalties due and owing must be reported within three days to the Regional Financial Management Office (FMO). The FMO is responsible for entering the stipulated penalty as an accounts receivable into the Agency's Integrated Financial Management System (IFMS). The "appropriate agency official" who determines the existence of a stipulated penalty account receivable is responsible for keeping the FMO updated on the status of enforcement penalty collection efforts. A more detailed account of these procedures is included in the Manual on Monitoring and Enforcing Administrative and Judicial Orders.

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1206

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

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

FEB 6 1990

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Multi-Media Settlements of Enforcement Claims

FROM: James M. Strock
Assistant Administrator

TO: Regional Administrators, Regions I - X
Regional Counsel, Regions I - X
Associate Enforcement Counsel
Program Compliance Office Directors

A. PURPOSE

The purpose of this memorandum is to provide guidance which explains 1) EPA policy strongly disfavoring judicial and administrative settlements of enforcement cases which include releases of potential enforcement claims under statutes which are not named in the complaint and do not serve as the basis for the Agency bringing the enforcement action, and 2) how approval for any multi-media settlements of enforcement claims should be obtained in civil judicial enforcement cases in the Region and at Headquarters.

B. DISCUSSION

As a general rule, a settlement of a hazardous waste enforcement action, for example, may include a covenant not to sue providing the settling party with protection from subsequent civil enforcement action under some or all provisions of CERCLA and/or RCRA. [1] Similarly, a Clean Water Act enforcement settlement may expressly settle EPA claims under some or all provisions of the Clean Water Act. A settlement which extends to potential EPA enforcement claims under any statute(s) outside of the program medium under which the case was brought, e.g., a CWA release in a CERCLA case, or a release in a CERCLA case under all

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[1] The United States generally gives covenants not to sue, not releases, in the CERCLA context. This guidance, however, uses the terms "covenant not to sue" and "release" interchangeably. Use of the word "release" is not intended to signify any differing effect of the settlement but is merely used for ease of exposition.

statutes administered by EPA, should not be given except under exceptional circumstances, because it is standard EPA policy that releases, when granted, should be no broader than the causes of action asserted in the complaint. [2]

Although defendants often seek releases broader than the specific medium at issue in the case, multi-media releases for single-medium enforcement cases are strongly discouraged and will be granted only in exceptional cases. A proposal to enter into such a settlement will undergo close scrutiny at both the Regional and Headquarters level. When deciding whether to entertain a request for a multi-media release, the Region should consider the following factors:

1) The extent to which EPA is in a position to know whether it has a cause of action warranting further relief against the settling party under each of the statutes included in the release. If, after investigation, it is determined that no cause of action exists, then it is somewhat more likely that the release might be considered;

2) Whether the settlement provides adequate consideration for the broader release. If the relief to be obtained under the settlement includes appropriate injunctive relief and/or penalties for any actual or potential violation/cause of action under the other media statutes, then it is somewhat more likely that the release might be considered; and

3) Whether the settling party is in bankruptcy. If the relief obtained through the settlement is all the Agency can obtain from the settling party, and the settling party will be ceasing operations, then it is somewhat more likely that the multi-media release might be considered if the settlement is otherwise favorable to the Government. This rationale is far more persuasive in the Chapter 7 or Chapter 11 liquidation context than in the Chapter 11 reorganization context.

In addition, the only possible statutory releases or covenants not to sue that EPA will grant are for statutes administered by EPA. Multi-media settlements should not grant releases phrased in broad terms such as "all statutes

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[2] If multi-media causes of action have been asserted in the United States' complaint, then settlement of and releases under all statutes involved in the action would not be unusual, provided that appropriate relief is obtained under each statute. Such settlements would, however, require the concurrence of all Regional and Headquarters media offices involved, as described in Part C below.

administered by EPA." Rather, all such releases should specifically name the EPA statutes included in the release. Further, releases should not include broad statements reaching beyond EPA-administered statutes such as "all claims or causes of action of the United States." A settlement should also not release any common law claims EPA may have, because it is not clear what, if any, Federal common law exists in the environmental area, and thus a release of this kind is of undefined scope. Similarly, State law claims should not be released by the Federal government, since it is unclear what, if any, Federal causes of action derive from State law. Moreover, as a matter of practice and policy, we should not purport to bind States when they are not directly involved in our enforcement cases. [3] As always, releases may be granted only for civil liability, not for criminal liability. [4]

C. PROCEDURES

All settlements involving multi-media resolution of enforcement claims require the approval of the appropriate EPA official(s) consistent with Agency delegations of authority. For civil judicial enforcement cases specifically, all multi-media settlements, including all CERCLA settlements resolving claims under other EPA-administered statutes, require the approval or concurrence of the AA-OECM. [5] In any case in which the Region wishes to propose to the AA-OECM that EPA enter into such a settlement, certain procedures must be followed.

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[3] Ordinarily, State claims are independent of Federal enforcement authorities and are not compromised by settlement under the Federal authorities.

[4] Releases should also be drafted in accordance with the policy and practice of each medium involved. In most enforcement actions, this means that the release is based upon information known to EPA at the time of the settlement and does not extend to undefined future violations or site conditions.

[5] For administrative enforcement cases which include multi-media releases, the Regions similarly should obtain the concurrence of all EPA officials (at Headquarters or in the Region, as the case may be) consistent with the relevant EPA delegations covering administrative settlements under each statute included within the release. (If all authorities included within the release are delegated to the Regions, then no Headquarters concurrence is needed.) Of course, some administrative settlements with multi-media releases will also require approval by the Department of Justice when a DOJ role is established by statute.

First, cross-media consultation among all affected Regional program offices and Office of Regional Counsel branches must be undertaken. This consultation should involve joint investigation as to whether there are any actual or potential causes of action under any statute under which a release is contemplated. An appropriate investigation, for example, is likely to include a check of all relevant files, a determination of whether a field inspection is warranted, and, if so, an inspection, and an inquiry to State program and legal counterparts to ensure that EPA is not unknowingly settling or waiving any potential claims it may have based upon relevant and available information. In the event that an appropriate cross-media investigation cannot be undertaken, a release for any uninvestigated medium cannot be given.

Second, when the settlement is referred to Headquarters for approval or concurrence, the Regional Administrator's cover memorandum to the AA-OECM should highlight the existence of the multi-media settlement or release. It should also include a statement by the Regional Administrator (or any other Regional official delegated responsibility to approve the settlement on behalf of the Region) that the Region has evaluated all possible claims under all EPA-administered statutes included within the release and, after diligent inquiry, has determined that, to the best of its knowledge, no claims exist, or, if any claims do exist, that it is in the best interest of the Agency to settle the claims in the manner included in the proposed settlement. If claims do exist, the RA's memorandum should explain why the settlement is in the best interests of the Agency.

Lastly, the OECM Division for the program area that has the lead in the settlement must take certain steps to ensure that the other affected OECM Divisions and their program counterparts at Headquarters do not object to the multi-media release. The lead Associate Enforcement Counsel should provide a copy of the settlement, the RA's cover memorandum, and any other relevant supporting material from the Region (e.g., in the case of a CERCLA settlement, the Ten Point Settlement Analysis) to all other OECM Associates who are responsible for any statutes included in the release with a request for written concurrence within 21 days. Each Associate should in turn consult with, and, if part of standard procedure, obtain the concurrence of, his/her Headquarters program counterpart on the settlement. The lead Associate and his/her staff should coordinate all OECM comments or requests for additional information from the Region to help avoid presenting the Region with conflicting comments or requests.

After all necessary concurrences have been received, the lead Associate Enforcement Counsel will transmit the settlement to the AA-OECM for final action, with a copy of all Headquarters concurrences attached to the package. Although OECM will strive

to meet its standard 35-day turnaround time for civil judicial settlement referrals, because multiple Headquarters offices are involved, the Regions should expect that multi-media release settlements may take greater time to be reviewed and approved by Headquarters than single-medium settlements. To assist OECM in obtaining concurrences as expeditiously as possible, the Region should actively consult with the lead OECM Division during negotiations so that OECM will have advance notice of the cross-media release issue and will be able to consult with other OECM Divisions before the settlement is referred to the AA-OECM.

D. DISCLAIMER

This memorandum and any internal office procedures adopted for its implementation is intended solely as guidance for employees of the U.S. Environmental Protection Agency. It does not constitute a rulemaking and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

If your staff has any questions on this matter, please ask them to contact Sandra Connors of OECM-Waste at 382-3110.

cc: Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice
David T. Buente, Chief, Environmental Enforcement Section, Land and Natural Resources Division, U.S. Department of Justice

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

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

AUG 9 1990

MEMORANDUM

SUBJECT: Documenting Penalty Calculations and Justifications in EPA Enforcement Actions

FROM: James M. Strock
Assistant Administrator

TO: Addressees

This memorandum institutes a uniform system for documenting penalty calculations and explaining how they are consistent with the applicable penalty policy in all EPA enforcement actions. It expands on the September 14, 1987 Guidance on Processing of Consent Decrees (GM-64) and requirements in several media specific penalty policies. The system will allow regional and OE management to assure that EPA settlement agreements comply with applicable penalty policies, and will provide documentation for our actions for purposes of oversight review. The memorandum sets out the information regarding the penalty which must be discussed at each stage of litigation. The exact format of the discussion is left to the discretion of each program. All discussions of the agency's settlement position regarding penalties are, of course, strictly enforcement confidential workproduct, should be clearly labeled as such and should not be released.

Effective immediately, every settlement package transmitted from the Regional Administrator or Regional Counsel to Headquarters for concurrence must include a written "Penalty Justification." This should include an explanation of how the penalty, including the economic benefit and gravity component, was calculated. The Region should then discuss in detail the justification for any mitigation of either component. In particular, reference should be made to the factor or language in the penalty policy that is relied upon to justify the mitigation, and a discussion must be included detailing why mitigation is warranted in the particular case. For administrative cases, a Penalty Justification should be prepared for circulation within the Office of Regional Counsel with a final consent agreement or order. It may not be circulated to the agency official who signs the final order as the presiding agency official, usually the Regional Administrator, because it could constitute ex parte communication which would have to be shared with defendants under 40 C.F.R. Part 22.

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When the factor relied upon to justify mitigation is litigation risk, the Region should state the probable outcome of litigation along with legal and factual analysis which supports its conclusion. For judicial cases, this should be done in consultation with the Department of Justice. Specific discussion of the evidentiary problems, adverse legal precedent, or other litigation problems in the case should be included. If the required discussion of the penalty is contained in the litigation report or subsequent correspondence between the ORC and OE, the settlement package from the Region may reference this discussion along with an attachment of the previous documentation.

A similar discussion of Penalty Justification should also be included in every settlement package transmitted from the Associate Enforcement Counsels for the signature of the Assistant Administrator. The Headquarters staff may, however, reference the discussion in the regional memorandum when it is sufficient. Seriously deficient Penalty Justifications will be returned to the Region to allow a proper analysis to be prepared before the Assistant Administrator for Enforcement reviews a consent decree for signature.

In addition, each Office of Regional Counsel case file and all OE files in cases in which OE is involved should contain at all times during the course of an enforcement action documentation of the current bottom line agreed upon by the litigation team. For civil administrative cases, this will begin with the filing of the administrative complaint. For civil judicial cases, this will begin with the litigation report, which should include the penalty proposed by the Region initially. The litigation report should clearly indicate how the gravity and economic benefit components were calculated under the applicable penalty policy and discuss in detail any mitigation that is proposed. Significant uncertainties which could result in further mitigation should also be identified.

The OE attorney assigned to the case will then determine if OE concurs with the penalty proposed by the Region in reviewing the referral. OE concurrence will be documented in writing, placed in the OE case file and provided to the Region. If OE does not concur with the penalty proposed by the Region in the referral, the assigned OE attorney will prepare a memorandum to the Region stating with specificity the basis(es) of the nonconcurrence.

Once the enforcement action is initiated or pre-filing negotiations begin, the litigation team should document any agreed upon changes to the bottom line penalty based upon new information or circumstances which arise during the course of the enforcement action. This documentation must, at a minimum,

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include a memorandum to the file recording how both the gravity and economic benefit components were calculated, the basis in the applicable penalty policy and in the specific facts of the case for any mitigation, and the changed circumstances or new information which justify modification of the bottom line. This will be especially beneficial in cases where there are changes in the litigation team over time. It will enable new attorneys assigned to the case to know what the current bottom line penalty is and how that has been determined over the course of the case.

These requirements will serve several functions. It will ensure that management has adequate information to judge consistency with the applicable penalty policies in specific cases and in the various enforcement programs overall. It also will ensure that every regional case file and all OE files in cases in which OE is involved have written documentation of how the penalty obtained was calculated and justified in terms of the penalty policy. This is essential for reviews or audits of our settlements.

Addressees:

Regional Administrators
Regions I-X

Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

E. Donald Elliott
General Counsel

Headquarters Compliance Program Division Directors

Associate Enforcement Counsels

Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

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

AUG 9

MEMORANDUM

SUBJECT: Documenting Penalty Calculations and Justifications in EPA Settlement Agreements

FROM: James M. Strock
Assistant Administrator
Office of Enforcement

TO: Addressees

Attached is final guidance on documenting penalty calculations and justifications in all EPA enforcement actions. We have made several revisions to the draft memorandum in response to Regional comments.

Two Regions pointed out that the requirement to include the discussion of the penalty in settlement packages which go to the Regional Administrator in administrative cases violates the prohibition against ex parte communication in 40 C.F.R. Part 22 where the Regional Administrator is acting as the presiding agency official. The memorandum has been changed to reflect this. The penalty documentation requested is still required in administrative cases. However, it should be circulated only within the Office of Regional Counsel and the program office where the Program Office Director is not the presiding agency official. This discussion should not be circulated to the Regional official who acts as the presiding official.

Some commenters expressed concern as to the level of detail and length of explanation required. What is contemplated by the memorandum is a document which calculates the unmitigated penalty and discusses the factors relied upon for any mitigation. This should generally take only a page or two. It is not acceptable to simply say, for example, that the gravity component was mitigated by 30% due to defendant's inability to pay without some explanation of what the Region did to ascertain the defendant's financial status, consistent with the ABEL program and agency guidance.

One Region expressed concern that, with regard to mitigating penalties with reference to municipalities, there is no agency guidance on this issue and, therefore, no policy they can reference to justify mitigation. We are not addressing this

issue in this memorandum, but OE will consider future guidance on this topic. Several commenters expressed concern that the required penalty documentation be marked and treated as enforcement confidential work product. A caution to this effect has been added.

Several commenters were also concerned that the memorandum will cause a significant paperwork burden with its requirement that every time a bottom line penalty changes, a new justification needs to be drafted. What is required by the memorandum is only that changes since the last penalty justification be discussed. Points which are already adequately discussed in previous documentation need not be repeated. Previous documentation which fully discusses an aspect of the penalty can simply be referenced. One commenter suggested that penalty documentation only be required at the end of the litigation in the settlement package. This is not acceptable because it invites post hoc rationalizations.

Finally, one commenter suggested that a similar requirement be applied to injunctive relief. This is not a subject which will be addressed in this memorandum, but OE will consider it for future guidance.

If you have any questions concerning this memorandum, please contact Elise Hoerath of the Air Enforcement Division of OE at FTS 382-2843.

Addressees:

Regional Administrators
Regions I-X

Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Associate Enforcement Counsels

E. Donald Elliott
General Counsel

Headquarters Compliance Program Division Directors

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Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

IV. CIVIL LITIGATION

D. ENFORCING JUDGEMENTS AND DECREES

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

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

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

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

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

FEB 6 1990

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Manual on Monitoring and Enforcing Administrative and Judicial Orders

FROM: James M. Strock JMS
Assistant Administrator

TO: Assistant Administrators
Regional Administrators, I-X

This memorandum transmits the EPA Manual on Monitoring and Enforcing Administrative and Judicial Orders. The Manual provides general guidance to EPA enforcement staff on their roles and responsibilities in monitoring and enforcing final order requirements. The Manual applies to all regulatory enforcement programs with the exception of the CERCLA (Superfund) Program. The term "order" includes judicial consent decrees and administrative consent orders. The Manual also outlines a process for working with the EPA Financial Management Offices (FMOs) and the Department of Justice for monitoring and collecting penalties.

The Manual was prepared in response to recommendations in several Office of Inspector General (OIG) audit reports that OE, the Program Offices and the OARM Financial Management Division (FMD) develop clearer guidance and management systems for ensuring that administrative and judicial order requirements are aggressively monitored until compliance is achieved. A major concern of the OIG was the failure of enforcement staff to notify the Regional Financial Management Offices (FMOs) when administrative or judicial penalties have been assessed so that these "accounts receivables" can be entered into and tracked in the Agency's Integrated Financial Management System (IFMS).

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The Manual has received two Agency-wide reviews, in May 1987 and October 1988. Both reviews surfaced gaps and deficiencies in the Manual's attempt to designate areas of responsibility and information sharing. The final Manual contains procedures designed to address the deficiencies.

The OARM FMD has drafted revisions to Chapter Nine of its Resource Management Directives to conform with the guidance agreed to in this Manual. These Directives will soon undergo green border review and may require some adjustments to the FMD-related sections of the Manual. Accordingly, the Manual will be updated as necessary. A summary of the major provisions of the Manual, including the latest revisions, is contained in Attachment A.

OE is available to assist you in implementing the revised procedures. Questions should be directed to Renelle Rae, Chief of the Program Development Branch, at 475-8777.

Attachments

cc: Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Regional Financial Management Offices

Associate Enforcement Counsels

Associate General Counsels

Headquarters Enforcement Office Directors

Financial Management Division Director

Deputy Assistant Administrator for Criminal Enforcement

Acting Director, National Enforcement Investigations Center

Chief, Environmental Enforcement Section, DOJ

Attachment #1

MANUAL ON MONITORING AND ENFORCING ADMINISTRATIVE AND JUDICIAL ORDERS

SUMMARY OF PROVISION AND RESPONSE TO COMMENTS

Chapter 1 - Monitoring and Reporting the Status of Orders.

Roles and Responsibilities

The Regional Program Office (RPO) is responsible for monitoring (i.e. routinely checking) compliance with the technical requirements in administrative and judicial orders. The Regional Financial Management Office (FMO) is responsible for monitoring and collecting administrative penalties as "accounts receivables". The Department of Justice (DOJ) is responsible for monitoring and collecting judicial penalties and for reporting the status of penalty collection to the EPA Headquarters Financial Management Division (HQ-FMD).

Reporting on Penalty Payments

While the RPO is not responsible for monitoring collection of administrative or judicial penalties, RPO is responsible for verifying that penalties have been paid before terminating an order or reporting a violator in full compliance. Therefore, RPO data systems should include the amount of penalties assessed in a final order and be able to report on a "yes/no" basis whether the total amount of the administrative or judicial penalty has been collected. The OE Docket also will report the amount of the judicial penalty assessed and contain a yes/no statement on whether the total amount assessed has been collected. The Integrated Financial Management System (IFMS) maintained by the Headquarters and Regional FMOs will be the official EPA system for reporting the numerical (dollar) amounts of enforcement penalties collected.

EPA Enforcement Payment Accounts Receivable Control Number

In order to cross-walk between program office systems and the IFMS, the Manual recommends that all programs enter into their program data system the assigned IFMS accounts receivable control number for the penalty assessed in each final order. When the Regional FMO receives a copy of a final order and establishes the accounts receivable in IFMS, the FMO will provide the RPO, the ORC and the Regional Hearing Clerk with the accounts receivable control number. The goal is to have the IMFS accounts receivable control number be the common identifier number in all data systems that report penalty information.

Several of the comments received on the Manual expressed concern that some program office data systems do not have the ability to report penalty payments on a "yes/no" basis or to include the IFMS accounts receivable control number. These additions would require modifications to their systems. Program Offices should follow the Manual's guidance, wherever possible including these penalty tracking modifications as they make other improvements to their system. OE will work with the Program Offices to ensure that these changes are made. As of the date of the issuance of the Manual, the IMFS will be recognized as the official EPA record of the total amount of dollars collected on every penalty assessed in a final order.

Chapter 2 - Collecting Administrative Penalties.

Roles and Responsibilities

The RPO (or the ORC in some Regions) is responsible for sending a copy of the final order assessing a penalty to the FMO. The FMO is responsible for monitoring and collecting the penalty as an accounts receivable for the first 120 days. The ORC is responsible for collecting the penalty after 120 days in defaul The Regional Hearing Clerk is responsible for keeping the official administrative record for the case and including any penalty payment information received from the RPO, ORC or FMO in the record.

Notifying the FMO of Assessed Administrative Penalties

The 1989 OIG audits of the Regional Financial Management Offices found that the FMOs still are not receiving from enforcement offices all copies of final orders that assess penalties. The Manual adds a documentation procedure for ensuring that the responsible enforcement office sends to the FMO a copy of the order and the transmittal letter to the violator.

A new form entitled: "EPA Enforcement Payment Accounts Receivable Control Number Form", hereafter referred to as the Form (See last page of Attachment #1), will provide a record that the responsible EPA office has sent a copy of the final order to the FMO. The Form also will document that the FMO provided the offices designated on the Form with the IFMS accounts receivable control number for each assessed penalty. Under most enforcement programs, the RPO has been delegated the responsibility for administrative enforcement, so the Manual presumes the RPO is the responsible party ("originating office") for filling out the Form, and sending the Form with a copy of the final order and transmittal letter to violator to the FMO. In some Regions, the ORC may have assumed the "originating office" responsibility. A copy of the completed Form that includes the IFMS accounts

receivable control number should be included in the case file and available for review in the context of an audit.

Collecting, Enforcing and Terminating Administrative Penalty Payments

The procedures for coordinating among the FMO, RPO and ORC in collecting, enforcing and terminating administrative penalty payments also have been refined. At the request of FMD, the time frames have been added for ORC review of enforcement options regarding penalties that have not been paid within 120 days. The process for collecting, enforcing or terminating orders is as follows:

Once the FMO receives a copy of the final order and establishes the accounts receivable, the FMO will monitor and collect the receivable using standard debt collection practices. The FMO will send the RPO, ORC and Regional Hearing Clerk a copy of payments received. These payments will be identified by the IFMS Accounts Receivable Control Number.

Uncollected penalties, at the end of 120 days and after three demand letters have been issued, will be referred by the FMO to the ORC for review and option selection. The ORC, after consulting with the RPO, must notify the FMO, in writing within 30 days from receipt of debt from the FMO, of the collection option the ORC will pursue. Options include referring the penalty debt to DOJ for judicial collection, pursuing additional FMO collection activities such as outside collection agencies, or requesting termination of the debt. However, to uphold EPA's enforcement authority, administrative penalty debts should be terminated only under exceptional circumstances. The ORC's written response to the FMO should be included in the official case file.

Several reviewers of the draft Manual suggested that EPA and DOJ institute a direct referral process from the ORC to the U.S. Attorneys' Office (USAO) for administrative penalty debt collection. The current delegation of authority by the Attorney General to the Land and Natural Resources Division precludes a direct referral to the USAO of EPA enforcement cases including administrative penalty collection cases.

Chapter 3 - Collecting Judicial Penalties.

Roles and Responsibilities

The Manual recognizes that the DOJ Land and Natural Resources Division, Environmental Enforcement Section, hereinafter referred to as LNRD-EES, is responsible for

monitoring judicial penalty payments and the U.S. Attorneys' Office is responsible for collecting payments through the DOJ lockbox system and pursuing uncollected debts. While EPA is not responsible for collecting judicial penalty payments, it is the policy of EPA Financial Management Division that all judicial penalty payments that are the result of an EPA enforcement action be recorded in the IFMS as "accounts receivables". As EPA receivables, these debts must be monitored by the Regional FMO until collected or terminated. This requires all DOJ offices and all EPA offices involved with the penalty to have a common identifier number--the IFMS accounts receivable control number.

Superfund cost recovery payments (debts) obtained through judicial actions (court orders or consent decrees) are collected differently than judicial penalties. All cost recovery payments (administrative or judicial) are collected by the EPA Regional FMOs through the EPA Regional Superfund lockbox depositories. Even though a judicial cost recovery case has been handled by the USAO, Agency resource management directives (RMDS 2550) governing financial management of the Superfund Program require that EPA FMOs monitor and collect Superfund debts.

Obtaining Copies of Final Orders and Notifying the FMO of Penalties Assessments and Superfund Cost Recovery Payments

A major concern raised in the review on the draft Manual is that the ORC and the Regional FMOs do not consistently get copies of the final (entered) judicial orders (enforcement penalty or Superfund cost recovery) from the USAO. Under the guidance specified in Chapter Three, the LNRD-EES will be responsible for ensuring that the USAO sends a copy of the entered final order including all consent decrees to the appropriate ORC. The ORC is responsible for following up with the LNRD-EES or USAO if an order is not received. Unless another office is designated in a Region, the ORC is responsible for sending to the FMO a copy of the final order with the attached EPA Enforcement Payment Accounts Receivable Control Number Form.

The FMO will fill in the IFMS accounts receivable control number on the Form and send a copy of the Form to the parties designated on the Form, including the DOJ LNRD-EES. The Form containing the IFMS accounts receivable control number will be retained in the case file as documentation.

Reporting the Status of Penalty Payments

DOJ LNRD-EES will enter the IFMS accounts receivable control number in its Lands Docket Tracking System (LDTS) and will provide quarterly reports to the Headquarters FMD on the status

of EPA penalty payments using the IFMS number. The Headquarters FMD will distribute copies of these reports to the Regional FMOs. The FMOs will update the IFMS with the data received from LNRD-EES. The IFMS will be the official EPA system for reporting the dollar amounts of judicial enforcement penalties collected. Other EPA data systems will, as with administrative penalty payments, provide information on judicial penalty collection in a "yes/no penalty paid" format only. To interface with the IFMS, other EPA program offices can include the IFMS accounts receivable control number in their data systems.

Chapter 4 - Enforcing Orders.

This chapter remains unchanged and contains existing guidance on available enforcement tools such as motions for specific enforcement, contempt actions, contractor listing, etc. The Appendix contains procedures for working with DOJ Land and Natural Resources Division on modifying judicial orders or collecting stipulated penalties under judicial consent decrees.

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MANUAL ON MONITORING AND ENFORCING ADMINISTRATIVE AND JUDICIAL ORDERS

January 1990

Office of Enforcement
U.S. Environmental Protection Agency

INTRODUCTION

This Manual provides guidance to EPA enforcement staff on monitoring and enforcing administrative and judicial orders. The procedures described in this Manual apply to all EPA statutes that provide authority to issue administrative and judicial orders requiring compliance with Agency requirements with the exception of the CERCLA (Superfund) program. The procedures set forth herein will supersede general guidance in program case development manuals that address the topics in this Manual. Each program, however, may have more specific guidance on monitoring and tracking orders that supplements this manual.

The Manual focuses on the activities of Regional Offices in monitoring and enforcing penalties since the majority of the cases are initiated by the Regional programs. Some Headquarters offices, such as the Office of Toxic Substances, have national programs where enforcement cases are initiated, concluded and settlements monitored by Headquarters staff. These Headquarters offices have program, legal, administrative hearing clerk and financial management functions comparable to the Regional structure described in this Manual. Headquarters offices involved in monitoring and enforcing orders should substitute their office functions for the comparable Regional functions described and follow the guidance set forth in this Manual.

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

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

JAN 11 1990

MEMORANDUM

SUBJECT: Agency Judicial Consent Decree Tracking and Follow-up Directive

FROM: James M. Strock
Assistant Administrator

TO: Assistant Administrators
Regional Administrators, I-X

This memorandum transmits the Agency Judicial Consent Decree Tracking and Follow-up Directive. The Directive specifies Agency requirements for how EPA Regional Offices track compliance with judicial consent decree requirements and for how Regions select and document decisions on appropriate Agency follow-up responses to consent decree violations (for the purposes of this Directive, the use of the term "consent decree" also includes judicially imposed court orders). Each Region should develop and execute a plan to implement this Directive so that all elements will be in place by April 30, 1990. By no later than May 30, each Region should submit to me a memorandum detailing the steps they have taken to implement the Directive. In addition, we intend to review its implementation during this year's audits of the Offices of Regional Counsel.

The Directive was developed after an extensive review of current Agency requirements and practices conducted, over the last nine months, in consultation with the Enforcement Management Council and the Enforcement Office Directors. We appreciate the efforts of the Regional and Headquarters offices, which made significant contributions to the study and to the development of the requirements outlined in this Directive. The resultant Directive outlines the basic requirements that are necessary to effectively manage our consent decree tracking and follow-up responsibilities and should be used as a supplement to the Agency "Manual on Monitoring and Enforcing Administrative and Judicial Orders", which OECM will soon be publishing.

There are a few requirements from the Directive that I would like to highlight. The Directive emphasizes the need for adequate documentation of each violation and the selection of the Agency's enforcement response in response to a violation. The documentation requirement is handled through the use of a form which has been kept basic so as to not cause a resource drain on Regional resources. The Directive also lays out a requirement for database management but provides each Region with maximum flexibility on selecting the appropriate method of maintaining its database based on its caseload and computer capabilities. Finally, the Directive requires that the Regional Program Division and the Office of Regional Counsel jointly select the Agency response to a consent decree violation, with the decision made at the Branch Chief or higher level in keeping with the seriousness associated with consent decree violations.

Fulfilling the requirements of the Directive should allow us to successfully address the increasing workload associated with the growing number of judicial consent decrees. We will soon be discussing with the Headquarters Enforcement Office Directors the appropriateness of applying elements of these judicial Directive requirements to at least some classes of administrative enforcement orders.

Each Region currently reports quarterly on the status of each active consent decree as part of the Agency's STARS system. OECM would like to move to oversight of Regional consent decree tracking and follow-up implementation through our existing Regional audits, rather than through the STARS system. We will assess the Regions' success in implementing this Directive with the goal of dropping this activity as a STARS reporting measure in FY 1992. We will also be working with the Headquarters Enforcement Office Directors to include consent decree tracking and follow-up activity in their Regional audit programs. As we move to drop the STARS reporting requirements, Regions must assure that their consent decree tracking systems have the capacity to provide timely information or reports on the compliance status of their consent decrees to respond to information requests that might occasionally be made by Agency management or in response to outside inquiries.

OECM is available to provide assistance to you in implementing this Directive. Rick Duffy, Chief of the Compliance Evaluation Branch, or Bill Watt of his staff are available to assist the Regions on the technical and management requirements and can be reached at 382-3130. Regions interested in exploring the option of using the consent decree tracking database management system developed by the National Enforcement Investigation Center (the NEIC-CDETS) should contact Rob Laidlaw at 776-3210.

Attachment

cc: Headquarters Enforcement Office Directors
Deputy Regional Administrators, I-X
Regional Counsels, I-X
Associate Enforcement Counsels
Acting Director, NEIC
Regional Program Division Directors, I-X

Judicial Consent Decree Tracking and Follow-up Directive

January 1990

Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

Questions concerning this Directive or requests for additional copies can be directed to:

Chief, Compliance Evaluation Branch
Office of Compliance Analysis and Program Operations
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

401 M Street S.W.
Washington, D.C. 20460
(202 - 382-3130)

U.S. EPA Mail Code LE-133

JUDICIAL CONSENT DECREE TRACKING AND FOLLOW-UP DIRECTIVE

PURPOSE

This directive is provided to clarify and supplement existing Agency requirements and guidance for judicial consent decree tracking and follow-up. Agency managers responsible for consent decree tracking and follow-up activities must implement the requirements of this directive. Managers are also responsible for fulfilling any additional requirements for consent decree tracking and follow-up that are issued by National Program Managers. This Directive is effective April 30, 1990. For purposes of this Directive, the term "consent decree" includes judicially imposed court orders.

This directive prescribes judicial consent decree tracking and follow-up requirements for the following areas:

1. Implementing the Agency Guidance on Certification of Compliance with Enforcement Agreements
2. Regional consent decree tracking and follow-up database management
3. File documentation of consent decree violations
4. Decisions on Agency follow-up to violations
   A. Responsibility for decision
   B. General criteria for making follow-up decisions
   C. File documentation of follow-up decisions
5. Maintaining data on the current status of EPA consent decrees
6. Termination of consent decrees and closing cases

BACKGROUND

Consent Decree Tracking Responsibilities:

Consent decree tracking and follow-up is conducted by each Regional Office under the direction of the Regional Administrator. Within each Region, most responsibilities are shared between the Office of Regional Counsel (ORC) and the Regional Divisions responsible for program compliance activity. Generally, the responsibilities are divided within each Region as follows:

Regional Program Divisions

Regional Program Divisions are responsible for the overall management and direction of the Regional compliance program in accordance with the policies and procedures of the Agency and each National Program Office. In that role, they are responsible for the following regional consent decree tracking and follow-up activities:

1. Assuring, along with ORC, that proposed consent decree agreements contain provisions/milestones that maximize the Region's ability to determine compliance status.

2. Determining compliance with the consent decree requirements through the use of announced and unannounced inspections and the receipt and review of deliverables.

3. Determining whether there are violations of the consent decree and notifying the ORC of each violation.

4. Maintaining a database of consent decree status which tracks completion of consent milestones and denotes violations. (*Can be a component of a Region-wide consent decree database system.*)

5. Determining (jointly with the ORC) the appropriate Agency response to each violation.

6. In concert with the ORC, maintaining complete file documentation of consent decree violations and the subsequent follow-up activity, including documentation of all consent decree violations and follow-up decisions. (File documentation must be maintained in whatever file or files the Region uses as the official case file, whether in a separate Program file, ORC file or a common Program-ORC file.)

7. Notifying the ORC when all the requirements of the consent decree have been met so that the ORC can track and assist in the termination of the decree according to the terms of the decree.

Offices of Regional Counsel:

The Office of the Regional Counsel in each Region is responsible for the following Regional Office consent decree tracking and follow-up activities:

1. Assuring that each settlement agreement complies with the "Guidance on Certification of Compliance with Enforcement Agreements" (July 25, 1988 memorandum from Thomas L. Adams to AAs, RAs, and RCs).

2. Obtaining a copy of the entered decree and providing it to the appropriate regional program compliance office and to the NEIC Central Depository in a timely manner. A copy must also be provided to the Financial Management Office (FMO) in the Region when the decree requires a penalty payment.

[The regional FMO, after receiving a copy of the entered decree, will enter the penalty amount into the Integrated Financial Management System (IFMS). EPA policy requires that all judicial penalty amounts be recorded in the IFMS as "accounts receivable" and that they be tracked as receivables until collected or terminated. The Land and Natural Resources Division at DOJ is the responsible entity for monitoring judicial penalty debts and notifying EPA's Financial Management Division of the status of penalty payments. This information is placed in the IFMS so that Regions can determine if penalties requirements of the decree have been met. The program database as well as the Enforcement DOCKET database should contain a milestone/requirement for tracking penalty payment.]

3. Determining (jointly with the Regional Program Divisions) the appropriate follow-up action the Region will take in response to a violation of the decree

4. Providing legal support and services to the programs, as necessary, to enforce the consent decree.

5. In concert with the Program Division, maintaining complete file documentation of consent decree violations and the subsequent follow-up activity, including documentation of all consent decree violations and follow-up decisions. (File documentation must be maintained in whatever file or files the Region uses as the official case file, whether in a separate ORC file, Program file, or a common Program-ORC file.)

6. Maintaining and reporting data on the status of active consent decrees as might be required by the Agency management and accountability systems.

7. Assisting in obtaining the termination of consent decrees which have been successfully fulfilled, including updating the Agency DOCKET database to reflect current status.

CONSENT DECREE TRACKING REQUIREMENTS

1. IMPLEMENTING THE AGENCY GUIDANCE ON CERTIFICATION OF COMPLIANCE WITH ENFORCEMENT AGREEMENTS

Background:

Certification requirements were prescribed in the July 25, 1988 memorandum from Thomas L. Adams Jr. to Assistant Administrators, Regional Administrators and Regional Counsels, "Guidance on Certification of Compliance with Enforcement Agreements." This Guidance addresses the inclusion of compliance certification language (in which a responsible official personally attests to the accuracy of information contained in compliance documents made available to EPA pursuant to the terms of a settlement agreement) and the need for including precise documentation requirements for self-certifying provisions of the decree.

Requirements:

Each Region must take steps to insure that all staff involved in drafting and negotiating consent decrees are fully aware of the requirements of the July 25, 1988 guidance memorandum and this Policy. (While that guidance applies more broadly than to consent decrees, the discussion in this Policy will refer only to consent decrees, consistent with the scope of the rest of the document.)

Staff involved in drafting consent decrees must incorporate the guidance for documentation of compliance and for certification by a responsible official unless

they affirmatively determine and document that the policy is not applicable to a specific case. Therefore, each consent decree should specify that all future reports the settling party to the Agency, which purport to document compliance with the terms of the decree, shall be signed by a responsible official. The need for certification and documentation requirements should be raised early in the negotiation and drafting process.

Regional managers who review and approve drafted consent decrees must assure that the Guidance has been adequately incorporated or determine that the Guidance is not applicable for the specific case.

Staff and managers within the OECM Associate Enforcement Counsel Offices must also review drafted consent decrees for inclusion and/or applicability of the Guidance. Implementation of the certification and documentation requirements will be a component of the ongoing oversight and periodic reviews conducted by OECM.

2. REGIONAL CONSENT DECREE TRACKING DATABASE MANAGEMENT

Background:

Regional Program Divisions are responsible for tracking compliance with active consent decrees once the decree has been entered by the Court. The ORC is responsible for obtaining a copy of the entered decree and providing it to the Program Division and the Financial Management Office (for penalty tracking). If the decree has been entered but a copy has not yet been made available, the program can use the lodged decree during the interim, if it is known that the final decree was not changed.

Compliance tracking is accomplished through the receipt of reports and other deliverables from the consent decree parties and through the use of announced and unannounced inspections. In order to determine whether a party is currently in compliance with the consent agreement, the program compliance staff must compare the requirements of each decree with the information gathered through inspections and deliverables. In the case of deliverable items, the compliance staff should determine if the submission adequately meets the decree requirements.

Good database management is an important element for effective and timely tracking and reporting of case status. This policy outlines requirements for the consent decree databases that are used to track consent decrees for each Regional program. Additional elements may be required by each of the National Program Offices.

Requirements:

Each program responsible for tracking consent decree compliance status must maintain a consent decree database (file/record). Each program database must

include the following information for each active decree: case name and enforcement civil judicial docket number, statute/program, all required milestones and their due dates, and a block for inserting the date each milestone was completed

The consent decree database can be manual, on a personal computer or included as a part of a national compliance database such as the CDS of the Air Program. The database could also be maintained centrally, as in Region II, where the ORC maintains a database of all regional consent decrees using the NEIC - CDETS capability. Each Region can choose what database type system(s) to use. For programs with only a few consent decrees to track, a manual system may be sufficient. Regional programs may opt to use the national compliance database depending on its specific capabilities.

The consent decree database must be maintained in three ways for it to be used effectively. Milestones for all decrees must be entered (and revisions, if applicable, in the case of amended decrees). On a regular schedule (not less than quarterly), all currently due (and overdue) milestones must be extracted from the system and made available to staff and supervisors. This use as a tickler system will alert staff as to what actions are required to be checked on. Finally, the dates for completed milestones must be put into the database on a regular basis (suggested monthly updates).

Maintaining this database in a central location will allow a program easy access to the status of all its decrees, the ability to retrieve all due milestones and a complete historical record of each decree as staff turnover and assignment changes occur. It will also provide documentation of case history for audits or other oversight activity.

3. FILE DOCUMENTATION OF VIOLATIONS

Background:

Program Divisions are responsible for determining if a consent decree violation has occurred. Any milestone not complied with by the due date of the consent decree constitutes a violation, regardless of the substantive impact of the deviation from the consent decree requirement. In certain cases, Program Divisions may need to consult with the ORC in determining whether a violation has occurred (e.g., where a claim of force majeure has been made).

Requirements:

Regional Program Divisions must notify the ORC of each violation of an active consent decree. A violation occurs when any milestone is missed (i.e. a report that is one day late is a violation), although there may be instances where, as a matter of priority, no formal enforcement action is taken. In addition, a record of the violation must be placed in the official Regional case file (see copy of form attached).

4. DECISIONS ON AGENCY FOLLOW-UP TO VIOLATIONS

Background:

When a violation occurs, the Region must determine the appropriate Agency response. In some cases, the violation may not pose a threat to public health or the environment or jeopardize the party's ability to meet subsequent milestones or the final compliance date. In such instances, after a review including the criteria discussed in subsection C below, the program office and ORC may jointly decide that no follow-up action is required or that a non-formal response may be appropriate. Other violations will be more serious and the program and ORC may decide to take a formal enforcement action such as seeking stipulated penalties or initiating a contempt action. For all violations it is important for the Agency to document the decision process within the case record. For all violations, the responsibility for determining the appropriate response action is shared by the Regional Program Division and the Office of Regional Counsel.

Requirements:

A. Responsibility for decision:

Once a violation occurs, the Program and the ORC must jointly determine the Agency response. Given the seriousness of consent decree violations, concurrence must occur at no lower than the Branch Chief level in both Offices. Disagreements should be elevated to senior management. On the rare occasion when the two offices cannot agree, the issue will be resolved at the RA or DRA level.

B. File documentation of follow-up decisions:

The decision concerning how the Agency will respond to a violation must be documented in the official Regional case file. The documentation (copy of form attached) must include the decision made and the reason for the decision. The documentation must also include the signatures of the responsible Program Office and ORC Branch Chiefs (or higher level).

C. General Criteria for follow-up decisions:

When the Agency enters into a consent decree we expect the defendant to comply. We take compliance with the decree very seriously and expect all parties to take all steps necessary for timely compliance. As a result, if they are in violation, we will normally respond for the purpose of remedying the violation, obtaining a penalty, or both. However, given the need to set priorities, we may not choose to take a formal action in every instance. The Region is delegated authority to decide what follow-up action, if any, to take. The decision not to take a formal action is a serious judgment required to be made jointly by the Regional Program Division and the Office of Regional Counsel at the Branch Chief or higher level.

In selecting the appropriate response, the following factors/criteria might be considered.

Environmental Harm Caused by Violation: What is the level of risk to human health and to the ambient surroundings for continuing noncompliance?

Duration of the Violation: How long has the violation continued? Has the violation been continuous or interrupted? Has the violation been corrected?

Good Faith/Bad Faith (Compliance history): Was the violation deliberate? Has the party been notified that it was in violation and continued to violate? Has the party demonstrated good or bad faith in its past efforts to comply or respond to Agency efforts? Is there a pattern of violations which suggests inattention to its compliance obligations, even though the individual violations are not, in themselves, of major concern?

Deterrence Value: Will an action deter future violations?

Ability to Respond: Will the enforcement action result in compliance? Will the facility meet its final compliance date, even though it missed an interim date?

Economic Gain: Has the violator gained an economic advantage over its competitors as a result of the violation?

Violations for which a decision not to take a formal action based on competing priorities might be appropriate would generally find the party on the positive side of the factors above (i.e. no or limited environmental harm from the violation, good compliance record, etc.). Situations where the Agency might exercise its discretion not to take an action might include:

- Late reporting with no environmental consequence and without a past pattern of delay or noncompliance.

- Missed milestone, not a major requirement, with expectation they will be in compliance with/by the next milestone.

- Violation of an interim limit, magnitude of the exceedence is minor, with compliance now achieved or anticipated shortly.

5. MAINTAINING REGIONAL CONSENT DECREE TRACKING STATUS

Background:

Currently, each ORC is responsible for providing consent decree status reports each quarter to OECM as part of the Agency SPMS system. In most Regions, the information for this report is collected from each program and combined into a Regional report.

Requirements:

The ORCs will continue to be responsible for maintaining information on regionwide status of consent decrees and providing Regional reports to OECM, as required. The specific nature of these reports may change from the current STAR measure. Regional Program Divisions are responsible for supplying program-specific information or reports to ORC that might be needed to fulfill national reporting requirements in addition to meeting the requirements of their National Program Office.

6. TERMINATION OF CONSENT DECREES AND CLOSING OF CASES

Background:

A judicial enforcement case with a consent decree is successfully completed when all the requirements of the consent decree, including penalty payments, have been met and the termination clause satisfied. At that point, the consent decree should be terminated in accordance with the terms of the decree. Agency databases and status reports need to accurately reflect the current status of cases (including cases where the requirements of the decree have been fully met, cases for which termination of the decree is due, and cases which have been closed after consent decree termination). Accurate data are needed to report the status of active decrees and for planning, budgeting and other management purposes.

Requirements:

Program Divisions, as part of their responsibility for tracking consent decree compliance status, must notify the ORC when all the requirements of the consent decree have been satisfied.

The ORC is responsible for working with DOJ to effect the termination of the consent decrees, in accordance with the termination clause of the decree (timeframe, automatic, plaintiff or defendant motion). The ORC is responsible for tracking the termination status of inactive decrees and assisting the completion of plaintiff responsibilities, as appropriate. The ORC is responsible for maintaining the current status of these decrees in the Agency DOCKET system and closing cases after termination.

CONSENT DECREE VIOLATION AND FOLLOW-UP FORM

PART A: REPORT OF VIOLATION

Program/Statute: _____ _____

Case Name: _____ EPA Docket # _____

Requirement(s) in violation: _____

_____

_____

Requirement due date: _____

Requirement was completed late: _____ (when) Requirement not completed: _____ (check)

Comments: _____

_____

_____

_____

Violation documented by: Signature/date: _____

Print name: _____

Title/organization: _____

PART B: DECISION ON RESPONSE TO VIOLATION (check appropriate box)

☐ Type of enforcement action planned: _____

_____

☐ Enforcement action determined not to be appropriate for the following reason(s): _____

_____

_____

Concurrences by:	Program Division	Office of Regional Counsel
Name /signature:	_____	_____
Organization title:	_____	_____
Date:	_____	_____

EPA-OECM Form

V. CRIMINAL LITIGATION/ENFORCEMENT

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

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

V.3.

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

1274

Memorandum

Subject	Date
Analysis of Existing Law Enforcement Emergency Authorities	March 6, 1984 SST:EHF:JIF:lsp

To Distribution

From SST Stephen S. Trott
Assistant Attorney General
Criminal Division

As you are aware, the Law Enforcement and Public Safety Working Group (LEPSWG), which I chair, was directed by the President to compile existing emergency law enforcement authorities, analyze them, and propose measures which could improve law enforcement agency preparedness to respond to severe regional or national emergencies. The purpose of this exercise is to provide the nation with the legal means to confront the disruptions that would result from a wide range of severe national security and domestic emergencies.

The Federal Emergency Management Agency (FEMA) recently completed a compilation (attached) of emergency authorities. As we enter upon the second and third phases -- analysis and recommendation, respectively -- of our assignment, I request your assistance. Your participation will also present an opportunity to assure that your agency will be in a position to act efficiently and with lawful authority in responding to regional or national emergencies.

I would appreciate your determination whether the compilation accurately reflects your agency's existing emergency authority. (The LEPSWG determined that only authorities which take effect in emergency situations should be included in the compilation.) Even if your agency has already had an opportunity to review and comment upon an earlier draft of this compilation, it would be appreciated if you would bring any current errors or omissions to our attention.

I would also appreciate your suggestions regarding statutes, Executive Orders, or other authorities that need to be enacted to provide your agency with jurisdiction that would be necessary or useful in meeting foreseeable emergencies. In this regard, it is the Working Group's belief that a review should be conducted by both your legal staff and by officials with operational

responsibilities. It would be most helpful if your staff considered both hypothetical situations that might develop and actual incidents which have already occurred. If your agency has created after-incident reports following previous law enforcement emergencies, such reports could be very useful in this endeavor. We are only looking for outlined suggestions, not meticulous legislative drafts. The attached sample would be an ample response.

Finally, as it may be necessary for us to discuss specific issues in greater detail with members of your legal or operational staffs, please identify for me, by name, title, and phone number, the persons whom we can contact for further information. At this time it has not been determined whether such interviews will be necessary, or how they can be most productively conducted, if necessary.

Consistent with the Presidentially mandated milestone deadlines for completion of this project, it is requested that you provide us with the requested information within one month of receipt of this memorandum. The responses should be addressed to the Emergency Mobilization Preparedness Board Support Group (Room 2252, Main Justice Building, 10th and Pennsylvania Avenue, NW., Washington, D.C. 20530). Mr. Ezra Friedman, Chairman of the Emergency Law Enforcement Authorities Sub-Working Group, may be contacted directly at 724-6971 if your staff has any questions regarding this project.

Attachments

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EMERGENCY AUTHORITIES RECORDS FOR SECTION: LAW ENFORCEMENT

MASTER KEY: 8 USC 1182(F) -001

RECORD TITLE:

SUSPENSION OF IMMIGRATION

LEGAL CITATION:

8 USC 1182(F)

ABSTRACT:

WHENEVER THE PRESIDENT FINDS THAT THE ENTRY OF ANY ALIENS OR OF ANY CLASS OF ALIENS INTO THE UNITED STATES WOULD BE DETRIMENTAL TO THE INTERESTS OF THE UNITED STATES, HE MAY BY PROCLAMATION, AND FOR SUCH PERIOD AS HE SHALL DEEM NECESSARY, SUSPEND THE ENTRY OF ALL ALIENS OR ANY CLASS OF ALIENS AS IMMIGRANTS OR NONIMMIGRANTS, OR IMPOSE ON THE ENTRY OF ALIENS ANY RESTRICTIONS HE MAY DEEM TO BE APPROPRIATE.

MASTER KEY: 10 USC 332 -001
RECORD TITLE:
USE OF MILITIA AND ARMED FORCES TO ENFORCE FEDERAL LAW
LEGAL CITATION:
10 USC 332

ABSTRACT:
AUTHORIZES THE PRESIDENT TO CALL INTO FEDERAL SERVICE SUCH OF THE MILITIA OF ANY STATE, AND USE SUCH OF THE ARMED FORCES AS HE CONSIDERS NECESSARY TO ENFORCE THE LAWS OF THE UNITED STATES OR TO SUPPRESS REBELLION WHEN HE CONSIDERS THAT LAWFUL OBSTRUCTIONS, COMBINATIONS, OR ASSEMBLAGES, OR REBELLION AGAINST THE AUTHORITY OF THE UNITED STATES MAKE IT IMPRACTICAL TO ENFORCE THE LAWS OF THE UNITED STATES OR A STATE OR TERRITORY BY THE ORDINARY COURSE OF JUDICIAL PROCEEDINGS. SEE POSSE COMITATUS ACT (18 USC 1385).

MASTER KEY: 10 USC 333 -001
RECORD TITLE:
USE OF MILITIA AND ARMED FORCES TO SUPPRESS INTERFERENCE W/ FED & ST LAWS
LEGAL CITATION:
10 USC 333

ABSTRACT:
AUTHORIZES THE PRESIDENT TO USE THE MILITIA OR ARMED FORCES OR BOTH TO SUPPRESS, IN A STATE, ANY INSURRECTION, DOMESTIC VIOLENCE, UNLAWFUL ASSEMBLAGE OR CONSPIRACY IF IT (1) SO HINDERS THE EXECUTION OF STATE OR FEDERAL LAW THAT ANY PART OR CLASS OF PEOPLE IS DEPRIVED OF A RIGHT, PRIVILEGE, IMMUNITY OR PROTECTION NAMED IN THE CONSTITUTION AND CONSTITUTED AUTHORITIES OF THAT STATE UNABLE, FAIL, OR REFUSE TO PROTECT THAT RIGHT, PRIVILEDGE, OR IMMUNITY, O GIVE THAT PROTECTION; OR (2) OPPOSES OR OBSTRUCTS THE EXECUTION OF THE LAWS OF THE UNITED STATES OR IMPEDES THE COURSE OF JUSTICE UNDER THOSE LAWS.

MASTER KEY: 10 USC 371 -001
RECORD TITLE:
USE OF INFO COLLECTED DURING MILITARY OPERATIONS FOR CIV LAW ENFORCEMENT
LEGAL CITATION:
10 USC 371

ABSTRACT:
AUTHORIZES THE SECRETARY OF DEFENSE TO PROVIDE FEDERAL, STATE OR LOCAL CIVILIAN LAW ENFORCEMENT OFFICIALS ANY INFORMATION COLLECTED DURING THE NORMAL COURSE OF MILITARY OPERATIONS THAT MAY BE RELEVANT TO A VIOLATION OF ANY FEDERAL OR STATE LAW WITHIN THE JURISDICTION OF SUCH OFFICIALS.

MASTER KEY: 10 USC 372 -001
RECORD TITLE:
USE OF MILITARY EQUIPMENT/FACILITIES FOR CIVILIAN LAW ENFORCEMENT
LEGAL CITATION:
10 USC 372

ABSTRACT:
AUTHORIZES THE SECRETARY OF DEFENSE TO MAKE AVAILABLE, IN ACCORDANCE WITH OTHER APPLICABLE LAW, TO CIVILIAN LAW ENFORCEMENT OFFICIALS ANY ARMY, NAVY, AIR FORCE OR MARINE CORPS EQUIPMENT, BASE FACILITY OR RESEARCH FACILITY FOR LAW ENFORCEMENT PURPOSES.

MASTER KEY: 10 USC 373; DOD DIRECTIVE-001
RECORD TITLE:
USE OF MILITARY PERSONNEL TO TRAIN AND ADVISE CIVILIAN LAW ENFORCEMT O[redacted]S
LEGAL CITATION:
10 USC 373; DOD DIRECTIVE 5525.5

ABSTRACT:
AUTHORIZES SECRETARY OF DEFENSE TO ASSIGN MILITARY PERSONNEL TO TRAIN FEDERAL, STATE AND LOCAL LAW ENFORCEMENT OFFICIALS IN THE OPERATION AND MAINTENANCE OF EQUIPMENT MADE AVAILABLE UNDER SECTION 372 OF TITLE 10 AND TO PROVIDE EXPERT ADVISE RELEVENT TO THE PURPOSES OF THIS CHAPTER.

MASTER KEY: 10 USC 374(C) -001
RECORD TITLE:
USE OF MILITARY PERSONNEL FOR CIVILIAN LAW ENFORCEMENT OUTSIDE THE U.S.
LEGAL CITATION:
10 USC 374(C)

ABSTRACT:
UPON A JOINT DETERMINATION BY THE SECRETARY OF DEFENSE AND THE ATTORNEY GENERAL THAT EMERGENCY CIRCUMSTANCES EXIST, EQUIPMENT OPERATED BY OR WITH THE ASSISTANCE OF MILITARY PERSONNEL MAY BE USED OUTSIDE THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AS A BASE OF OPERATIONS BY FEDERAL LAW ENFORCEMENT OFFICIALS TO FACILITATE ENFORCEMENT OF THE LAWS LISTED IN 10 USC 374(A) AND TO TRANSPORT LAW ENFORCEMENT OFFICIALS IN CONNECTION WITH SUCH OPERATIONS PROVIDED SUCH EQUIPMENT IS NOT USED TO INTERDICT OR INTERRUPT THE PASSAGE [redacted]F VESSELS OR AIRCRAFT.

MASTER KEY: 10 USC 374 -001
RECORD TITLE:
USE OF MILITARY PERSONNEL TO OPERATE AND MAINTAIN EQUIPMENT
LEGAL CITATION:
10 USC 374

ABSTRACT:
AUTHORIZES THE SECRETARY OF DEFENSE TO ASSIGN MILITARY PERSONNEL TO OPERATE AND MAINTAIN EQUIPMENT MADE AVAILABLE UNDER SECTION 372 OF TITLE 10 TO THE EXTENT THAT THE EQUIPMENT IS USED FOR MONITORING AND COMMUNICATING THE MOVEMENT OF AIR AND SEA TRAFFIC UPON REQUEST OF THE HEAD OF AN AGENCY WITH JURISDICTION TO ENFORCE FEDERAL DRUG, IMMIGRATION OR CUSTOMS LAWS. CAVEAT: SEE 10 USC 374(C)(1) (PROVISION OF AN ISDINE OUTSIDE THE UNITED STATES LIMITED TO CERTAIN EMERGENCY SITUATIONS).

MASTER KEY: 10 USC 376 -001
RECORD TITLE:
RESTRICTION ON USE OF MILITARY RESOURCE FOR CIVILIAN LAW ENFORCEMENT
LEGAL CITATION:
10 USC 376

ABSTRACT:
ASSISTANCE MAY NOT BE PROVIDED TO ANY CIVILIAN LAW ENFORCEMENT OFFICIAL UNDER UNDER ANY PROVISION IN THIS CHAPTER IF THE PROVISION OF SUCH ASSISTANCE WILL ADVERSELY AFFECT THE MILITARY PREPAREDNESS OF THE UNITED STATES.

MASTER KEY: 10 USC 906 (ART. 106, UCM-001

RECORD TITLE:

SPYING

LEGAL CITATION:

10 USC 906 (ART. 106, UCMJ)

ABSTRACT:

ANY PERSON WHO IN TIME OF WAR IS FOUND LURKING AS A SPY OR ACTING AS A SPY IN OR ABOUT ANY PLACE, VESSEL, OR AIRCRAFT, WITHIN THE CONTROL OR JURISDICTION OF ANY OF THE ARMED FORCES, OR IN OR ABOUT ANY SHIPYARD OR ANY MANUFACTURING OR INDUSTRIAL PLANT ENGAGED IN AID OF THE PROSECUTION OF THE WAR BY THE UNITED STATES SHALL BE TRIED BY A GENERAL COURT-MARTIAL OR BY A MILITARY COMMISSION AND ON CONVICTION SHALL BE PUNISHED BY DEATH.

MASTER KEY: 12 USC 3414(B) -001

RECORD TITLE:

EMERGENCY GOVERNMENTAL ACCESS TO FINANCIAL RECORDS

LEGAL CITATION:

12 USC 3414(B)

ABSTRACT:

EXEMPTS GOVERNMENT FROM PROHIBITION IN 12 USC 3401 ET SEQ AGAINST OBTAINING FINANCIAL RECORDS FROM A FINANCIAL INSTITUTION WITHOUT A SEARCH WARRANT OR JUDICIAL SUPOENA IF THE GOVERNMENT AUTHORITY DETERMINES THAT DELAY IN OBTAINING ACCESS WOULD CREATE IMMINENT DANGER OR PHYSICAL INJURY TO ANY PERSON, SERIOUS PROPERTY DAMAGE OR FLIGHT TO AVOID PROSECUTION. GOVERNMENT AUTHORITY MUST ALSO (1) SUBMIT TO THE FINANCIAL INSTITUTION THE CERTIFICATE REQUIRED IN 12 USC 3403(B), WITHIN FIVE DAYS OF OBTAINING ACCESS TO RECORDS, (2) FILE WITH THE APPROPRIATE COURT A SIGNED SWORN STATEMENT OF DESIGNATED SUPERVISORY OFFICIALS SETTING FORTH THE GROUNDS FOR EMERGENCY ACCESS; (3) COMPILE AN ANNUAL TABULATION OF OCCASIONS WHEN AUTHORITY EXERCISED.

MASTER KEY: 14 USC 88 -001
RECORD TITLE:
SAVING OF LIFE AND PROPERTY BY COAST GUARD
LEGAL CITATION:
14 USC 88

ABSTRACT:
THE COAST GUARD IS AUTHORIZED TO RENDER AID TO DISTRESSED PERSONS, VESSELS AND AIRCRAFT ON AND UNDER THE HIGH SEAS AND ON AND UNDER WATERS OVER WHICH THE UNITED STATES HAS JURISDICTION, AND TO PERSONS AND PROPERTY IMPERILED BY FLOOD BY-
(1) PERFORMING ANY AND ALL ACTS NECESSARY TO RESCUE AND AID PERSONS AND PROTECT AND SAVE PROPERTY;
(2) TAKING CHARGE OF AND PROTECTING ALL PROPERTY SAVED FROM SUCH DISASTERS UNTIL SUCH PROPERTY IS CLAIMED BY PERSONS LEGALLY AUTHORIZED OR UNTIL DISPOSED OF IN ACCORDANCE WITH LAW, AND CARING FOR BODIES OF THOSE WHO MAY HAVE PERISHED IN SUCH CATASTROPHES;
(3) FURNISHING CLOTHING, FOOD, LODGING, MEDICINES, AND OTHER NECESSARY SUPPLIES AND SERVICES;
AND
(4) DESTROYING OR TOWING INTO PORT SUNKEN OR FLOATING DANGERS TO NAVIGATION.

MASTER KEY: 14 USC 652 -001
RECORD TITLE:
REMOVAL OF COAST GUARD RESTRICTIONS
LEGAL CITATION:
14 USC 652

ABSTRACT:
ANY LAW REMOVING ANY RESTRICTION CONTAINED IN ANY THEN-EXISTING LAW AS APPLIED TO THE NAVY, FOR THE DURATION OF THE WAR OR NATIONAL EMERGENCY PROCLAIMED BY THE PRESIDENT, INCLUDING BUT NOT LIMITED TO RESTRICTIONS RELATING TO THE MANNER IN WHICH PURCHASES MAY BE MADE AND CONTRACTS AWARDED, FISCAL OPERATIONS, AND PERSONNEL, SHALL IN THE SAME MANNER AND TO THE SAME EXTENT, REMOVE SUCH RESTRICTIONS AS APPLIED TO THE COAST GUARD.

STER KEY: 18 USC 2153(A) -001
ORD TITLE:
DESTRUCTION OF WAR MATERIAL
EGAL CITATION:
18 USC 2153(A)

BSTRACT:
WHOEVER, WHEN THE UNITED STATES IS AT WAR, OR IN TIMES OF NATIONAL EMERGENCY AS DECLARED BY THE PRESIDENT OR CONGRESS, WITH INTENT TO INJURE OR OBSTRUCT THE UNITED STATES OR ITS ALLY IN PREPARING FOR OR CARRYING ON THE WAR OR DEFENSE ACTIVITIES, WILLFULLY INJURES, DESTROYS, OR CONTAMINATES ANY WAR MATERIALS, OR ATTEMPTS TO DO SO, SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN 30 YEARS OR BOTH.

MASTER KEY: 18 USC 2153(B) -001
RECORD TITLE:
CONSPIRACY TO DESTROY WAR MATERIALS
LEGAL CITATION:
18 USC 2153(B)

ABSTRACT:
IF TWO OR MORE PERSONS CONSPIRE TO DESTROY WAR MATERIALS, AS OUTLINED IN 18 USC 2153(A), AND ONE OR MORE OF SUCH PERSONS DO ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY, EACH PARTY SHALL BE PUNISHED AS PROVIDED FOR IN 18 USC 2153(A).

MASTER KEY: 18 USC 2154(A) -001
RECORD TITLE:
PRODUCING DEFECTIVE WAR MATERIALS
LEGAL CITATION:
18 USC 2154(A)

ABSTRACT:
WHOEVER, WHEN THE UNITED STATES IS AT WAR, OR IN TIMES OF NATIONAL EMERGENCY AS DECLARED BY THE PRESIDENT OR CONGRESS, WITH INTENT TO INJURE OR OBSTRUCT THE UNITED STATES OR ITS ALLY IN PREPARING FOR OR CARRYING ON THE WAR OR DEFENSE ACTIVITIES, WILLFULLY MAKES, CONSTRUCTS, OR CAUSES TO BE MADE OR CONSTRUCTED, ANY WAR MATERIAL, WAR UTILITY OR TOOL IN A DEFECTIVE MANNER, SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN 30 YEARS OR BOTH.

MASTER KEY: 18 USC 2154(B) -001
RECORD TITLE:
CONSPIRACY TO PRODUCE DEFECTIVE WAR MATERIALS
LEGAL CITATION:
18 USC 2154(B)

ABSTRACT:
IF TWO OR MORE PERSONS CONSPIRE TO PRODUCE DEFECTIVE WAR MATERIALS, AS OUTLINED IN 18 U.S.C. 2154(A), AND ONE OR MORE OF SUCH PERSONS DO ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY, EACH PARTY SHALL BE PUNISHED AS PROVIDED FOR IN 18 U.S.C. 2154(A).

MASTER KEY: 18 USC 2155(A) -001
RECORD TITLE:
DESTRUCTION OF NATIONAL DEFENSE MATERIALS, PREMISES OR UTILITIES
LEGAL CITATION:
18 USC 2155(A)

ABSTRACT:
WHOEVER, WITH INTENT TO INJURE OR OBSTRUCT THE NATIONAL DEFENSE OF THE UNITED STATES, WILLFULLY DESTROYS OR CONTAMINATES ANY NATIONAL DEFENSE MATERIAL, PREMISES OR UTILITIES SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN 10 YEARS, OR BOTH.

MASTER KEY: 18 USC 2155(B) -001
RECORD TITLE:
CONSPIRACY TO DESTROY NATIONAL DEFENSE MATERIALS, PREMISES OR UTILITIES
LEGAL CITATION:
18 USC 2155(B)

ABSTRACT:
IF TWO OR MORE PERSONS CONSPIRE TO DESTROY NATIONAL DEFENSE MATERIALS, PREMISES OR UTILITIES AS OUTLINED IN 18 U.S.C. 2155(A), AND ONE OR MORE OF SUCH PERSONS DO ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY, EACH OF THE PARTIES TO SUCH CONSPIRACY SHALL BE PUNISHED AS PROVIDED FOR IN 18 U.S.C. 2155(A).

MASTER KEY: 18 USC 2156(A) -001
RECORD TITLE:
PRODUCTION OF DEFECTIVE NATIONAL DEFENSE MATERIALS OR PREMISES
LEGAL CITATION:
18 USC 2156(A)

ABSTRACT:
WHOEVER, WITH INTENT TO INJURE OR OBSTRUCT THE NATIONAL DEFENSE OF THE UNITED STATES, WILLFULLY CONSTRUCTS, OR MAKES ANY NATIONAL DEFENSE MATERIAL OR PREMISES IN A DEFECTIVE MANNER, OR ATTEMPTS TO DO SO, SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN 10 YEARS OR BOTH.

MASTER KEY: 18 USC 2156(B) -001
RECORD TITLE:
CONSPIRACY TO PRODUCE DEFECTIVE NATIONAL DEFENSE MATERIALS OR PREMISES
LEGAL CITATION:
18 USC 2156(B)

ABSTRACT:
TWO OR MORE PERSONS CONSPIRE TO PRODUCE DEFECTIVE NATIONAL DEFENSE MATERIALS OR PREMISES AS OUTLINED IN 18 USC 2156(A), AND ONE OR MORE OF SUCH PERSONS DO ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY, EACH OF THE PARTIES TO SUCH CONSPIRACY SHALL BE PUNISHED AS PROVIDED FOR IN 18 USC 2156(A).

MASTER KEY: 18 USC 2381 -001
RECORD TITLE:
TREASON
LEGAL CITATION:
18 USC 2381

ABSTRACT:
WHOEVER, OWING ALLEGIANCE TO THE UNITED STATES, LEVIES WAR AGAINST THEM OR ADHERES TO THEIR ENEMIES, GIVING THEM AID AND COMFORT WITHIN THE UNITED STATES OR ELSEWHERE, IS GUILTY OF TREASON AND SHALL SUFFER DEATH, OR IMPRISONMENT NOT LESS THAN 5 YEARS AND FINED NOT LESS THAN $10,000; AND SHALL BE INCAPABLE OF HOLDING ANY OFFICE UNDER THE UNITED STATES.

MASTER KEY: 18 USC 2382 -001
RECORD TITLE:
MISPRISION OF TREASON
LEGAL CITATION:
18 USC 2382

ABSTRACT:
WHOEVER, OWING ALLEGIANCE TO THE UNITED STATES AND HAVING KNOWLEDGE OF THE COMMISSION OF ANY TREASON AGAINST THEM, CONCEALS AND DOES NOT DISCLOSE THE SAME TO THE PRESIDENT OR SOME FEDERAL JUDGE OR STATE JUDGE OR GOVERNOR, IS GUILTY OF MISPRISION OF TREASON AND SHALL BE FINED NOT MORE THAN $1,000 OR IMPRISONED NOT MORE THAN 7 YEARS, OR BOTH.

MASTER KEY: 18 USC 2383 -001
RECORD TITLE:
REBELLION OR INSURRECTION AGAINST THE UNITED STATES
LEGAL CITATION:
18 USC 2383

ABSTRACT:
WHOEVER INCITES, ASSISTS OR ENGAGES IN ANY REBELLION OR INSURRECTION AGAINST THE AUTHORITY OF THE UNITED STATES, OR GIVES AID OR COMFORT THERETO, SHALL BE FINED NOT MORE THAN $10,000, OR IMPRISONED NOT MORE THAN 10 YEARS, OR BOTH; AND SHALL BE INCAPABLE OF HOLDING ANY OFFICE UNDER THE UNITED STATES.

MASTER KEY: 18 USC 2384 -001
RECORD TITLE:
SEDITIOUS CONSPIRACY
LEGAL CITATION:
18 USC 2384

ABSTRACT:
IF TWO OR MORE PERSONS IN ANY STATE OR TERRITORY, OR IN ANY PLACE SUBJECT TO U.S. JURISDICTION, CONSPIRE TO OVERTHROW, PUT DOWN, OR DESTROY BY FORCE THE U.S. GOVERNMENT, OR TO LEVY WAR AGAINST THEM, OR TO OPPOSE BY FORCE THE EXECUTION OF ANY LAW OF THE U.S., OR TO TAKE ANY U.S. PROPERTY BY FORCE, SHALL BE FINED NOT MORE THAN $20,000 OR IMPRISONED NOT MORE THAN TWENTY YEARS, OR BOTH.

MASTER KEY: 18 USC 2385 -001
RECORD TITLE:
ADVOCATING THE OVERTHROW OF THE GOVERNMENT
CITATION:
18 USC 2385

ABSTRACT:
WHOEVER KNOWINGLY OR WILLINGLY ADVOCATES, ABETS, ADVISES OR TEACHES THE PROPRIETY OR NECESSITY OF OVERTHROWING OR DESTROYING THE U.S. GOVERNMENT OR THE GOVERNMENT OF ANY STATE OR TERRITORY, OR GOVERNMENT OF ANY POLITICAL SUBDIVISION THEREOF, BY FORCE OR VIOLENCE, OR BY THE ASSASSINATION OF ANY OFFICER OF ANY SUCH GOVERNMENT SHALL BE FINED NOT MORE THAN $20,000 OR IMPRISONED NOT MORE THAN 20 YEARS, OR BOTH.

MASTER KEY: 18 USC 2387 -001
RECORD TITLE:
INTERFERENCE WITH ARMED FORCES
LEGAL CITATION:
18 USC 2387

ABSTRACT:
WHOEVER, WITH INTENT TO INTERFERE WITH, IMPAIR OR INFLUENCE THE LOYALTY, MORALE OR DISCIPLINE OF THE MILITARY OF THE UNITED STATES ADVISES, COUNSELS OR IN ANY MANNER CAUSES OR ATTEMPTS TO CAUSE INSUBORDINATION, DISLOYALTY, MUTINY OR REFUSAL OF DUTY BY ANY MEMBER OF THE MILITARY SHALL BE FINED NOT MORE THAN $10,000, OR IMPRISONED NOT MORE THAN 10 YEARS, OR BOTH.
(CF. 18 USC 2388).

MASTER KEY: 18 USC 2388 -001
RECORD TITLE:
INTERFERENCE WITH ARMED FORCES DURING TIME OF WAR
LEGAL CITATION:
18 USC 2388

ABSTRACT:
WHOEVER DURING A TIME OF WAR WILLFULLY MAKES OR CONVEYS FALSE REPORTS OR STATEMENTS WITH INTENT TO INTERFERE WITH THE U.S. MILITARY OR TO PROMOTE THE SUCCESS OF ITS ENEMIES SHALL BE FINED NOT MORE $10,000 OR IMPRISONED NOT MORE THAN TWENTY YEARS OR BOTH.
WHOEVER DURING TIME OF WAR WILLFULLY CAUSES OR ATTEMPTS TO CAUSE INSUBORDINATION, DISLOYALTY, MUTINY OR REFUSAL OF DUTY IN THE U.S. MILITARY OR WILLFULLY OBSTRUCTS RECRUITMENT OR ATTEMPTS TO DO SO TO THE INJURY OF THE U.S. SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN TWENTY YEARS OR BOTH. (CF. 18 USC 2387).
WHOEVER HARBORS OR CONCEALS A PERSON WHO HE KNOWS OR HAS REASON TO SUSPECT HAS COMMITTED OR IS ABOUT TO COMMIT AN OFFENSE UNDER THIS SECTION SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN TWENTY YEARS OR BOTH. THIS SECTION ALSO APPLIES WITHIN THE ADMIRALTY AND MARITIME JURISDICTION OF THE UNITED STATES AND ON THE HIGH SEAS.

MASTER KEY: 18 USC 2389 -001
RECORD TITLE:
RECRUITING FOR SERVICE AGAINST THE UNITED STATES
LEGAL CITATION:
18 USC 2389

ABSTRACT:
WHOEVER RECRUITS SOLDIERS OR SAILORS WITHIN THE U.S. OR ANY PLACE SUBJECT TO U.S. JURISDICTION, TO ENGAGE IN ARMED HOSTILITY AGAINST THE SAME SHALL BE FINED NOT MORE THAN $1,000 OR IMPRISONED NOT MORE THAN 5 YEARS, OR BOTH.

MASTER KEY: 18 USC 2390 -001
RECORD TITLE:
ENLISTMENT TO SERVE AGAINST THE UNITED STATES
LEGAL CITATION:
18 USC 2390

ABSTRACT:
WHOEVER ENLISTS WITHIN THE U.S. OR IN ANY PLACE SUBJECT TO U.S. JURISDICTION, WITH INTENT TO SERVE IN ARMED HOSTILITY AGAINST THE U.S. SHALL BE FINED $1000 OR IMPRISONED NOT MORE THAN 3 YEARS, OR BOTH.

MASTER KEY: 18 USC 2511 -001
RECORD TITLE:
INTERCEPTION & DISCLOSURE OF WIRE OR ORAL COMMUNICATIONS
LEGAL CITATION:
18 USC 2511

ABSTRACT:
ANY PERSON WHO,
(1) WILLFULLY INTERCEPTS OR ENDEAVORS TO INTERCEPT ANY WIRE OR ORAL COMMUNICATION OR,
(2) WILLFULLY USES ANY ELECTRONIC, MECHANICAL, OR OTHER DEVICE TO INTERCEPT ANY ORAL COMMUNICATION, OR
(3) WILLFULLY DISCLOSES, OR ENDEAVORS TO DISCLOSE, TO ANY OTHER PERSON THE CONTENTS OF ANY WIRE OR ORAL COMMUNICATION OBTAINED IN VIOLATION OF THIS SUBSECTION, OR
(4) WILLFULLY USES OR ENDEAVORS TO USE, THE CONTENTS OF ANY WIRE OR ORAL COMMUNICATION OBTAINED IN VIOLATION OF THIS SUBSECTION,
SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN FIVE YEARS, OR BOTH.

MASTER KEY: 18 USC 3287 -001
RECORD TITLE:
WARTIME SUSPENSION OF STATUTE OF LIMITATIONS
LEGAL CITATION:
18 USC 3287

ABSTRACT:
WHEN THE UNITED STATES IS AT WAR THE RUNNING OF ANY STATUTE OF LIMITATIONS APPLICABLE TO ANY OFFENSE,
(1) INVOLVING FRAUD AGAINST THE UNITED STATES, OR
(2) COMMITTED IN CONNECTION WITH REAL OR PERSONAL PROPERTY OF THE UNITED STATES, OR
(3) COMMITTED IN CONNECTION WITH CONTRACT, SUBCONTRACT, OR PURCHASE ORDER CONNECTED WITH OR RELATED TO THE PROSECUTION OF WAR,
SHALL BE SUSPENDED UNTIL THREE YEARS AFTER THE TERMINATION OF HOSTILITIES AS PROCLAIMED BY THE PRESIDENT OR BY A CONCURRENT RESOLUTION OF CONGRESS.

MASTER KEY: 18 USC 793 -001
RECORD TITLE:
GATHERING, TRANSMITTING OR LOSING DEFENSE INFORMATION
LEGAL CITATION:
18 USC 793

ABSTRACT:
WHOEVER OBTAINS INFORMATION RELATING TO THE NATIONAL DEFENSE,
(A) BY SECRETLY INSPECTING A DEFENSE RELATED INSTALLATION, OR
(B) BY COPYING, TAKING OR OBTAINING DOCUMENTS RELATED TO NATIONAL DEFENSE, OR
(C) BY RECEIVING DOCUMENTS RELATING TO NATIONAL DEFENSE, OR
(D) BY HAVING LAWFUL POSSESSION OF A DOCUMENT RELATED TO NATIONAL DEFENSE, AND THEN TRANSMITS OR CAUSES IT TO BE COMMUNICATED, OR
(E) BY HAVING UNAUTHORIZED POSSESSION OF A DOCUMENT RELATED TO NATIONAL DEFENSE, AND THEN TRANSMITS OR CAUSES IT TO BE COMMUNICATED, OR
(F) BY HAVING LAWFUL POSSESSION OF A DOCUMENT RELATED TO NATIONAL DEFENSE, AND THEN THROUGH GROSS NEGLIGENCE, PERMITS IT TO BE REMOVED FROM ITS PROPER PLACE OF CUSTODY,
WITH INTENT OR REASON TO BELIEVE THAT THE INFORMATION IS TO BE USED TO THE INJURY OF THE UNITED STATES, OR TO THE ADVANTAGE OF ANY FOREIGN NATION, SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED MORE THAN 10 YEARS OR BOTH.
IF TWO OR MORE PERSONS CONSPIRE TO VIOLATE ANY SUBPART OF 18 U.S.C. 793,
ABSTRACT (CONTINUED):
AND ONE OR MORE OF SUCH PERSONS DO ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY, EACH OF THE PARTIES TO SUCH CONSPIRACY SHALL BE SUBJECT TO THE PUNISHMENT PROVIDED IN 18 U.S.C. 793.

MASTER KEY: 18 USC 793(G) -001
RECORD TITLE:
CONSPIRE TO GATHER, TRANSMIT OR LOST DEFENSE INFORMATION
LEGAL CITATION:
18 USC 793(G)

ABSTRACT:
IF TWO OR MORE PERSONS CONSPIRE TO VIOLATE ANY SUBPART OF 18 U.S.C. 793, AND ONE OR MORE OF SUCH PERSONS DO ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY, EACH OF THE PARTIES TO SUCH CONSPIRACY SHALL BE SUBJECT TO THE PUNISHMENT PROVIDED IN 18 U.S.C. 793.

MASTER KEY: 18 USC 794 -001
RECORD TITLE:
GATHERING & DELIVERING DEFENSE INFORMATION TO A FOREIGN GOVERNMENT
LEGAL CITATION:
18 USC 794

ABSTRACT:
(A) WHOEVER COMMUNICATES, OR ATTEMPTS TO COMMUNICATE TO A FOREIGN GOVERNMENT, A DOCUMENT RELATING TO NATIONAL DEFENSE, WITH THE INTENT OR REASON TO BELIEVE THAT IT IS TO BE USED TO THE INJURY OF THE UNITED STATES OR TO THE ADVANTAGE OF A FOREIGN NATION SHALL BE PUNISHED BY DEATH OR BY IMPRISONMENT FOR ANY TERM OF YEARS OR FOR LIFE.
WHOEVER, IN TIME OF WAR, WITH INTENT TO COMMUNICATE TO THE ENEMY COLLECTS, PUBLISHES OR COMMUNICATES ANY INFORMATION WITH RESPECT TO MILITARY OR NAVAL MOVEMENTS, NUMBERS AND PLANS OR PUBLIC DEFENSE, WHICH MIGHT BE USEFUL TO THE ENEMY, SHALL BE PUNISHED BY DEATH OR BY IMPRISONMENT FOR ANY TERM OF YEARS OR FOR LIFE.
(C) CONSPIRACY PENALTY FOR ABOVE CRIMES.

MASTER KEY: 18 USC 796 -001
RECORD TITLE:
USING AIRCRAFT TO PHOTOGRAPH DEFENSE INSTALLATIONS/EQUIPMENT
LEGAL CITATION:
18 USC 796

ABSTRACT:
WHOEVER USES OR PERMITS THE USE OF AN AIRCRAFT OR ANY CONTRIVANCE USED, OR DESIGNED FOR NAVIGATION OR FLIGHT IN THE AIR, FOR THE PURPOSE OF MAKING A PHOTOGRAPH, SKETCH, PICTURE, DRAWING, MAP, OR GRAPHICAL REPRESENTATION OF VITAL MILITARY OR NAVAL INSTALLATIONS OR EQUIPMENT, IN VIOLATION OF (18 USC 795), SHALL BE FINED NOT MORE THAN $1,000 OR IMPRISONED NOT MORE THAN ONE YEAR, OR BOTH.

MASTER KEY: 18 USC 795, 797 -001
RECORD TITLE:
PHOTOGRAPHING AND SKETCHING DEFENSE INSTALLATIONS/EQUIPMENT
LEGAL CITATION:
18 USC 795, 797

ABSTRACT:
THE PRESIDENT IS AUTHORIZED TO DEFINE CERTAIN VITAL MILITARY AND NAVAL INSTALLATIONS, AS VITAL TO THE INTERESTS OF NATIONAL DEFENSE, AS REQUIRING PROTECTION AGAINST THE GENERAL DISSEMINATION OF INFORMATION RELATIVE THERETO. IT IS IT IS UNLAWFUL TO MAKE ANY PHOTOGRAPH, SKETCH, PICTURE, DRAWING, MAP, OR GRAPHICAL REPRESENTATION OF SUCH INSTALLATIONS OR EQUIPMENT DEFINED AS VITAL WITHOUT FIRST OBTAINING THE PERMISSION OF THE COMMANDING OFFICER OF THE MILITARY INSTALLATION. VIOLATORS OF THIS SECTION SHALL BE FINED NOT MORE THAN $1,000 OR IMPRISONED NOT MORE THAN ONE YEAR, OR BOTH.
IT IS ALSO UNLAWFUL TO REPRODUCE, PUBLISH, SELL OR GIVE AWAY ANY PHOTOGRAPH, SKETCH, PICTURE, DRAWING, MAP, OR GRAPHICAL REPRESENTATION OF THE VITAL MILITARY OR NAVAL INSTALLATION OR EQUIPMENT SO DEFINED, WITHOUT OBTAINING THE PROPER PERMISSION, UNLESS SUCH REPRESENTATION CLEARLY INDICATES THAT IT HAS BEEN CENSORED BY THE PROPER AUTHORITY. VIOLATORS SHALL BE FINED NOT MORE THAN $1,000 OR IMPRISONED NOT MORE THAN ONE YEAR, OR BOTH.

MASTER KEY: 18 USC 798 -001
RECORD TITLE:
DISCLOSURE OF CLASSIFIED INFORMATION
LEGAL CITATION:
18 USC 798

ABSTRACT:
WHOEVER KNOWINGLY AND WILLFULLY COMMUNICATES, FURNISHES, TRANSMITS, OR OTHERWISE MAKES AVAILABLE TO AN UNAUTHORIZED PERSON, OR PUBLISHES, OR USES IN ANY MANNER PREJUDICIAL TO THE SAFETY OR INTEREST OF THE UNITED STATES OR FOR THE BENEFIT OF ANY FOREIGN GOVERNMENT TO THE DETRIMENT OF THE UNITED STATES ANY CLASSIFIED INFORMATION CONCERNING THE CRYPTOGRAPHIC SYSTEMS OR THE COMMUNICATION INTELLIGENCE ACTIVITIES OF THE UNITED STATES OR INFORMATION KNOWINGLY OBTAINED FROM THE COMMUNICATIONS OF ANY FOREIGN GOVERNMENT BY COMMUNICATIONS INTELLIGENCE PROCESSES, SHALL BE SUBJECT TO A FINE OF NOT MORE THAN $10,000 OR IMPRISONMENT OF NOT MORE THAN 10 YEARS, OR BOTH.

MASTER KEY: 18 USC 963 -001
RECORD TITLE:
DETENTION OF ARMED VESSELS
LEGAL CITATION:
18 USC 963

ABSTRACT:
DURING A WAR IN WHICH THE UNITED STATES IS A NEUTRAL NATION, THE PRESIDENT, OR ANY PERSON AUTHORIZED BY HIM, MAY DETAIN ANY ARMED VESSEL OWNED WHOLLY OR IN PART BY CITIZENS OF THE UNITED STATES, IN ANY VESSEL, DOMESTIC OR FOREIGN, WHICH IS BUILT OR HAS BEEN ADAPTED FOR WARLIKE PURPOSES UNTIL THE OWNER OR PERSON IN CHARGE SATISFACTORILY PROVES THAT THE VESSEL WILL NOT BE USED TO COMMIT HOSTILITIES UPON THE CITIZENS OR PROPERTY OF A FOREIGN STATE WITH WHICH THE UNITED STATES IS AT PEACE OR SOLD TO A BELLIGERENT NATION. VIOLATION OR OR ATTEMPTED VIOLATION SHALL CARRY A FINE OF NOT MORE THAN $10,000, OR TEN YEARS IMPRISONMENT, OR BOTH.

MASTER KEY: 18 USC 967 -001
RECORD TITLE:
FORBIDDING DEPARTURE OF VESSELS IN AID OF NEUTRALITY
LEGAL CITATION:
18 USC 967

ABSTRACT:
DURING A WAR IN WHICH THE UNITED STATES IS A NEUTRAL NATION, THE PRESIDENT, OR ANY PERSON AUTHORIZED BY HIM, MAY FORBID DEPARTURE OF A VESSEL WHENEVER THERE IS REASONABLE CAUSE TO BELIEVE THAT SUCH VESSEL IS ABOUT TO CARRY FUEL, ARMS, AMMUNITION, MEN, SUPPLIES OR INFORMATION TO A WARSHIP OR SUPPLY SHIP OF A FOREIGN BELLIGERENT NATION IN VIOLATION OF THE LAWS, TREATIES OR OBLIGATIONS OF THE UNITED STATES. WHOEVER TAKES OR ATTEMPTS TO TAKE A VESSEL OUT OF A PORT IN VIOLATION OF THIS SECTION SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED NOT MORE THAN TEN YEARS, OR BOTH.

ASTER KEY: POSSE COMITATUS ACT, 18 U-001
ECORD TITLE:
USING MILITARY EQUIPMENT/PERSONNEL FOR CIVILIAN LAW ENFORCEMENT
EGAL CITATION:
POSSE COMITATUS ACT, 18 USC 1385

BSTRACT:
GENERAL PROHIBITION AGAINST THE USE OF MILITARY SERVICES IN CIVIL LAW ENFORCEMENT UNLESS SPECIFICALLY AUTHORIZED BY CONGRESS. SEE STATUTORY EXCEPTIONS TO 18 USC 1385 AT 10 USC 371-378 AND SPECIFIC GRANT OF AUTHORITY TO THE PRESIDENT FOR UTILIZATION OF MILITIA AND/OR ARMED FORCES DOMESTICALLY AT 10 USC 331-333.

MASTER KEY: 19 USC 2603 -001

RECORD TITLE:

EMERGENCY IMPLEMENTATION OF IMPORT RESTRICTIONS

LEGAL CITATION:

19 USC 2603

ABSTRACT:

AUTHORIZES THE PRESIDENT TO IMPOSE IMPORT RESTRICTIONS OF 19 USC 2606 UPON A DETERMINATION THAT AN EMERGENCY CONDITION EXISTS WITH RESPECT TO ARCHEOLOGICAL OR ETHNOLOGICAL MATERIAL OF ANY STATE PARTY. AN EMERGENCY CONDITION IS DEFINED AS INVOLVING MATERIAL WHICH IS--

(1) NEWLY DISCOVERED IMPORTANT TO UNDERSTANDING THE HISTORY OF MANKIND, AND IN JEOPARDY OF PILLAGE, DESTRUCTION ETC;

(2) IDENTIFIABLE AS COMING FROM ANY SITE RECOGNIZED TO BE OF HIGH CULTURAL SIGNIFICANCE IF SUCH SITE IS IN DANGER FROM PILLAGE, DESTRUCTION ETC; OR A PART OF THE REMAINS OF A PARTICULAR CULTURE, THE RECORD OF WHICH IS IN JEOPARDY FROM PILLAGE, DESTRUCTION ETC.

MASTER KEY: 21 USC 952 19 CFR 162.0 -001

RECORD TITLE:

WAIVER OF CONTROLLED SUBSTANCE IMPORTATION RESTRICTIONS

LEGAL CITATION:

21 USC 952 19 CFR 162.0

ABSTRACT:

IMPORTATION INTO THE UNITED STATES OF CONTROLLED SUBSTANCES (SCHEDULE I OR II) OR NARCOTIC DRUGS (SCHEDULE III, IV OR V) IS PROHIBITED EXCEPT DURING AN EMERGENCY IN WHICH DOMESTIC SUPPLIES OF ANY CONTROLLED SUBSTANCE IN SCHEDULE I OR II (21 USC 812) OR ANY NARCOTIC DRUG IN SCHEDULE III, IV, OR V (21 USC 812) ARE FOUND BY THE ATTORNEY GENERAL TO BE NECESSARY TO PROVIDE FOR MEDICAL, SCIENTIFIC OR OTHER LEGITIMATE PURPOSES, AND ARE INADEQUATE, SUCH SUBSTANCES MAY BE SO IMPORTED UNDER SUCH REGULATIONS AS THE ATTORNEY GENERAL SHALL PRESCRIBE.

IMPORTATION OF NONNARCOTIC CONTROLLED SUBSTANCES IN SCHEDULE III, IV OR V IS ALSO UNLAWFUL UNLESS THE SUBSTANCE IS IMPORTED FOR MEDICAL, SCIENTIFIC, O[redacted] OTHER LEGITIMATE USES PURSUANT TO REGULATION OF THE ATTORNEY GENERAL.

THE ATTORNEY GENERAL MAY PERMIT IMPORTATION OF COCA LEAVES IF THE COCAINE THEREIN IS DESTROYED UNDER HIS SUPERVISION.

MASTER KEY: 26 USC 5561, 27 CFR 19.70-001
RECORD TITLE:
EXEMPTIONS FROM TAX LAWS TO MEET NATIONAL DEFENSE REQUIREMENTS
LEGAL CITATION:
26 USC 5561, 27 CFR 19.70

ABSTRACT:
THE DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, & FIREARMS MAY TEMPORARILY EXEMPT DISTILLED SPIRITS PLANT PROPRIETORS FROM ANY PROVISION OF THE INTERNAL REVENUE LAWS RELATING TO DISTILLED SPIRITS, EXCEPT THOSE REQUIRING PAYMENT OF THE TAX THEREON, WHENEVER HE DEEMS IT EXPEDIENT TO DO SO TO MEET NATIONAL DEFENSE REQUIREMENTS. THE DIRECTOR MAY PRESCRIBE ANY NECESSARY REGULATIONS.

MASTER KEY: 26 USC 5562; 27 CFR 19.64-001
RECORD TITLE:
DISASTER EXEMPTIONS FROM TAX LAW REQUIREMENTS
LEGAL CITATION:
26 USC 5562; 27 CFR 19.64

ABSTRACT:
THE DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS MAY, WHENEVER HE FINDS THAT IT IS NECESSARY OR DESIRABLE, BY REASON OF DISASTER, TEMPORARILY EXEMPT ANY DISTILLED SPIRITS PLANT PROPRIETORS FROM ANY PROVISION OF THE INTERNAL REVENUE LAWS RELATING TO DISTILLED SPIRITS, EXCEPT THOSE REQUIRING PAYMENT OF THE TAX THEREON, TO THE EXTENT HE MAY DEEM NECESSARY OR DESIRABLE.

MASTER KEY: 42 USC 5157(A) -001
RECORD TITLE:
PENALTIES FOR MISREPRESENTATION UNDER DISASTER RELIEF ACT(DRA)
LEGAL CITATION:
42 USC 5157(A)

ABSTRACT:
ANY INDIVIDUAL WHO FRAUDULENTLY OR WILLFULLY MISSTATES ANY FACT IN CONNECTION WITH A REQUEST FOR ASSISTANCE UNDER THE DRA SHALL BE FINED NOT MORE THAN $10,000 OR IMPRISONED FOR NOT MORE THAN ONE YEAR OR BOTH FOR EACH VIOLATION.

MASTER KEY: 42 USC 5157(B) -001
RECORD TITLE:
VIOLATION OF DISASTER RELIEF ACT ORDERS & REGULATIONS
LEGAL CITATION:
42 USC 5157(B)

ABSTRACT:
ANY INDIVIDUAL WHO KNOWINGLY VIOLATES ANY ORDER OR REGULATION UNDER THIS ACT SHALL BE SUBJECT TO A CIVIL PENALTY OF NOT MORE THAN $5,000 FOR EACH VIOLATION.

MASTER KEY: 42 USC 5157(C) -001
RECORD TITLE:
MISAPPLICATIONS OF LOANS & CASH BENEFITS UNDER DISASTER RELIEF ACT
LEGAL CITATION:
42 USC 5157(C)

ABSTRACT:
WHOEVER KNOWINGLY MISAPPLIES THE PROCEEDS OF A LOAN OR OTHER CASH BENEFIT OBTAINED UNDER ANY SECTION OF THE DRA SHALL BE SUBJECT TO A FINE IN AN AMOUNT EQUAL TO ONE AND ONE-HALF TIMES THE ORIGINAL PRINCIPAL AMOUNT OF THE LOAN OR CASH BENEFIT.

ASTER KEY: 43 USC 1811(4), 1816(A), -001

RECORD TITLE:

PENALTIES FOR VIOLATIONS OF OIL SPILL NOTICE REQUIREMENTS

LEGAL CITATION:

43 USC 1811(4), 1816(A), 1822(b); 33 CFR 135.305, 307

ABSTRACT:

ANY PERSON IN CHARGE OF A VESSEL OR OFFSHORE FACILITY WHO IS SUBJECT TO U.S. JURISDICTION AND WHO FAILS TO GIVE IMMEDIATE NOTICE TO THE SECRETARY OF TRANSPORTATION OF AN OIL POLLUTION INCIDENT AS SOON AS HE HAS KNOWLEDGE THEREOF SHALL, UPON CONVICTION, BE FINED NOT MORE THAN $10,000 OR IMPRISONED FOR NOT MORE THAN ONE YEAR, OR BOTH.

STER KEY: 49 USC 1472(I)(1)(3) -001
ECORD TITLE:
AIR PIRACY
EGAL CITATION:
49 USC 1472(I)(1)(3)

ABSTRACT:
WHOEVER COMMITS OR ATTEMPTS TO COMMIT AIRCRAFT PIRACY SHALL BE PUNISHED BY IMPRISONMENT FOR NOT LESS THAN 20 YEARS, OR IF THE DEATH OF ANOTHER RESULT FROM THE COMMISSION OR ATTEMPTED COMMISSION OF THE OFFENSE, BY DEATH OR BY LIFE IMPRISONMENT. AIRCRAFT PIRACY MEANS ANY SEIZURE OR EXERCISE OF CONTR BY FORCE OR VIOLENCE OR THREAT THEREOF AND WITH WRONGFUL INTENT OF AN AIRC WITHIN THE SPECIAL AIRCRAFT JURISDICTION OF THE U.S. 49 USC 1472(O) PROVI THAT VIOLATIONS OF THIS SECTION SHALL BE INVESTIGATED BY THE FBI.

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MASTER KEY: 49 USC 1472(P) -001
RECORD TITLE:
INTERFERENCE WITH AIRCRAFT ACCIDENT INVESTIGATION
LEGAL CITATION:
49 USC 1472(P)

ABSTRACT:
ANY PERSON WHO KNOWINGLY AND WITHOUT AUTHORITY REMOVES, CONCEALS, O
ANY PART OF A CIVIL CRAFT INVOLVED IN AN ACCIDENT, OR ANY PROPERTY
AS ON BOARD SUCH AIRCRAFT AT THE TIME OF SUCH ACCIDENT, SHALL BE SUBJECT A FINE OF NO LESS THAN $100 NOR MORE THAN $5000 OR IMPRISONED FOR NOT MORE ONE YEAR, OR BOTH.

MASTER KEY: 49 USC 1514 -001
RECORD TITLE:
SUSPENSION OF FOREIGN AIR SERVICE BY PRESIDENT
LEGAL CITATION:
49 USC 1514

ABSTRACT:
AUTHORIZES THE PRESIDENT TO SUSPEND WITHOUT NOTICE OR HEARING THE RIGHT O ANY PERSON OR AIR CARRIER TO ENGAGE IN FOREIGN TRANSPORTATION WHENEVER TH PRESIDENT DETERMINES THAT A FOREIGN NATION IS ACTING IN A MANNER INCONSIS WITH THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT O IF HE DETERMINES THAT A FOREIGN NATION PERMITS THE USE OF TERRITORY UNDER JURISDICTION AS A BASE OF OPERATIONS, TRAINING OR SANCTUARY OR IN ANY WAY AIDS ANY TERRORIST ORGANIZATION WHICH KNOWINGLY USES SEIZURE OF AIRCRAFT AN INSTRUMENT OF POLICY.

1302

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

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

APR 18 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidelines on Sampling, Preservation, and Disposal of Technical Evidence in Criminal Enforcement Matters

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

TO: Assistant Administrators
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Associate Enforcement Counsels
Director, NEIC

Introduction

This guidance describes procedures to be used for technical evidence related to cases which have been assigned to, and are being managed by, the Office of Criminal Investigations of the National Enforcement Investigations Center (NEIC) of the Office of Enforcement and Compliance Monitoring. This guidance, and the internal office procedures adopted in accordance with the guidance, are not intended to, do not, and may not be relied upon to create a right or benefit--substantive or procedural--enforceable at law by a party in litigation with the United States. Attempts to litigate any portion of this guidance should be brought to the attention of the Criminal Enforcement Division, Office of Enforcement and Complaince Monitoring, EPA Headquarters.

I. SAMPLING GUIDELINES

Background

In any criminal prosecution, the government must prove each element of each offense beyond a reasonable doubt. The evidence that the government chooses to use to meet this burden is left to the prosecutor's discretion subject to the standard limitations of probativity and relevancy. Prosecution under environmental statutes poses particularly interesting

questions because of the need to prove the identity (and often quantity) of pollutants, and because of the need for experts (i.e., technicians, environmental engineers, etc.) to establish aspects of the government's case. The facts upon which the expert relies must impress a jury, meet defense challenges, and establish the criteria necessary for the expert opinion.

Only by considering issues of proof before evidence is collected can the government be assured that violations discovered can be proved when the case goes to trial. A determination of what evidence should be taken, how it is to be taken and how much should be taken must be done on a case-by-case basis. As will be discussed below, the general principle will be to take representative samples and to refer clean up problems for civil and/or administrative remedies.

Issue

What level of pollutant sampling will suffice to support a criminal case?

Guidelines

Technical support operations conducted as part of investigations assigned to the Office of Criminal Investigations will, with few exceptions, be evidence-gathering rather than remedial or response operations, and will be limited accordingly. Samples taken in support of a criminal investigation normally will be limited to those considered necessary to confirm the occurence of illegal activity, and to prove the government's case at trial. Any overall remedial response required by the situation will then become the responsibility of existing administrative or civil response authorities within the Agency.

It will be the policy of the Agency to use representative samples as evidence for criminal cases. Occasionally, the only evidence available for a significant environmental offense will be a small amount of material. In that event, the entire amount of material which can be collected will be retained for testing and for defense requests. Most cases assigned to the Office of Criminal Investigations will involve large amounts of pollution or hazardous substances and, in those cases, representative samples will be gathered.

Before any decisions are made or any samples obtained, agents, technical personnel, and, where possible, prosecuting attorneys should collaborate to decide what evidence will be necessary and desirable to prove each charge. When samples are obtained without a search warrant and prior to a referral to the Justice Department or to the U.S. Attorney's office, a prosecutor may not be working on the case. When this is the case, the legal, investigative and technical personnel at the Agency will make the evidence decisions.

If the evidence is to be obtained pursuant to a search warrant, this discussion (concerning evidence collection) must be prior to the submission of the affidavit for the warrant. The magistrate or judge issuing the warrant will inquire as to the duration of the "on-site" time, the area to be searched, and the subject(s) of the search. These questions can only be answered if the government has formulated an investigative plan for obtaining the evidence in advance of the request for the warrant.

In some cases, the Office of Criminal Investigations will be notified of environment offenses which must be documented immediately if the evidence is to be preserved. In such situations, the necessarily quick response time precludes lengthy collaborate discussions. However, the guidelines concerning quality control, chain-of-custody and representative sampling apply even in these situations.

Discussion

Evidence decisions must start with the technicians, environmental engineers and other experts who are familiar with the evidence necessary to form a basis a for their scientific opinions. Attorneys and agents should then add information concerning the tangible evidence that is most likely to clarify the government's case for the jury and what evidence is likely to best reflect the seriousness of the charges. Thought should be given to defense arguments concerning whether the samples are truly representative and whether they were obtained, preserved and tested in an accurate, scientific manner. Consideration must also be given to reducing the "on-site" time and the practical difficulties of proper storage

and safekeeping. Finally, under certain statutory provisions [for example, the CERCLA reporting requirement for "reportable quantities" found at Section 103(b)(3)], the government will be obliged to demonstrate that a specified amount of a hazardous substance was released. This will also affect the amount of sampling that is conducted on-site.

The question of what is a representative sample can only be answered in the context of the case. All the parameters of the potential evidence should be sampled, photographed or documented in some fashion. See, NEIC Policies and Procedures Manual. For instance, if drums are located at a plant which does not have a permit to store hazardous wastes, the necessary proof will include establishing the nature of the drum contents. The total number of drums should also be determined and documented. Unless the number is extremely large, samples can be obtained from each drum. If this is impractical, samples should be obtained from all apparent categories (size, content, appearance, state of deterioration or exposure to the environment, etc.). If the soil under and around the drums appears contaminated, then soil samples should be taken at different points and at different depths. Keeping in mind that the concentration of the substances as well as the gross amount of the substance may be relevant, the technicians should be prepared to take samples which can answer these questions. See, United States v. Gonzalez, 697 F. 2d 155 (6th Cir. 1983).

If it is anticipated that a screening procedure will be used, either at the site or in the laboratory, it is recommended that the prosecuter be made aware of this. A screening procedure is a preliminary analysis used to determine whether further analysis would be useful.

Because criminal prosecutions must be proved "beyond a reasonable doubt", care must be taken to ensure thorough and complete testing and sampling procedures. Recognizing the storage limitations of the Agency, it cannot be denied that the seriousness of the offense is emphasized when the Government can visually prove its case with a multitude of samples and physical evidence. It is expected that the technical personnel who testify in criminal cases will be able to state that a thorough and scientific procedure was used to obtain the evidence, that no further samples or tests would be necessary to confirm the results, and that strict chain of custody and quality control procedures were employed.

II. DISPOSAL OF EXTRA SAMPLE EVIDENCE

Background

There will be occasions when EPA technicians and agents take more evidence samples than are necessary to prove a case. The storage and preservation expense as well as potential dangerousness of the items might make it advisable to dispose of the evidence in advance of trial. At the same time, courts look with disfavor upon the disposal of material that may be characterized as potential evidence in a criminal trial. Thus, destruction of samples and remains of samples must occur in a manner that does not jeopardize the subsequent prosecution.

Finally, once a prosecution has been concluded, decisions must be made concerning all remaining evidence stored on behalf of the Office of Criminal Investigations.

Issue

When and how may the Agency dispose of surplus sampling evidence collected on behalf of the Office of Criminal Investigations?

Guidelines

Court permission must be obtained before surplus samples obtained in the course of a criminal investigation are disposed of by the government. Disposal procedures will vary depending on the stage of the criminal case. Where a defendant has been formally charged, the government can file a pre-trial motion for disposal of evidence that will be considered in an adversarial proceeding. If charges have not been filed, the same type of motion filed ex parte may be used. This ex parte motion would be made pursuant to the All Writs Act, 28 U.S.C. §636(b)(1)(A). (A copy of a sample destruction motion is attached to this guidance.)

Following termination of the criminal case (by trial, plea, dismissal or other means), the prosecutor should be contacted to discuse appropriate precedures for evidence disposal.

Discussion

It should be noted at the outset that an evidence destruction motion will not always succeed. For example, it is not certain that a court will give permission for such destruction in the context of a criminal case involving non-contraband materials. The majority of cases which discuss destruction of evidence before trial involve destruction of contraband (i.e., drugs, counterfeit money, illegal weapons). It would be understandable for a court to refuse permission to dispose of chemicals, soil, capacitors, or drums when it has not been

conclusively established -- by plea or trial -- that these items were illegally held or stored by the defendant(s). If the jury acquits the defendant(s), they would have the right to repossess the evidence seized, for whatever value it might have.

In United States v. Ramsey, 490 F. Supp. 96 (E.D. Tenn. 1980) the court issued an opinion on the government's motion to destroy certain chemicals. The court would not authorize the disposal of chemicals which the government had seized even though the government documented a reasonable concern over the hazardous nature of the substances. The government alleged that the chemicals were flammable and explosive and "constitute a present danger to property and a threat of personal injury or death to people in or near the storage area." Id. at 97. But, the court reasoned, how could it authorize destruction of non-contraband, unforfeited property when there has been "no showing that the chemicals have been used or intended to be used by anyone in any significant way in a criminal enterprise?" Id. at 96. Presumably, that is what the government intended to prove at trial, but until then, the prosecutor was admonished by the court to use extreme care and caution with the chemicals, but to keep them.

When a court is petitioned, either pursuant to the All Writs Act, or by way of a pre-trial motion, for permission to destroy evidence, the court should be informed whether the targets of the investigation have been notified of the motion, whether the targets have been offered split samples (see Section III, infra) and whether the targets have been offered the opportunity to view the evidence before destruction. Of course, before such a motion is made, the effect of disclosing the existence of a previously secret criminal investigation must be analyzed. However, if the defendants have been formally charged or otherwise made aware of the criminal investigation, EPA will encourage the prosecutor assigned to the case to obtain court authorization to destroy sample evidence which goes beyond that necessary to prove the case or evidence which the defense has declined.

In any event, any evidence obtained on behalf of the Office of Criminal Investigations shall not be disposed of until the investigation has foreclosed the possibility of criminal charges; or until the criminal case has been concluded by trial, plea, dismissal or otherwise and the prosecutor and, if necessary, the court have approved disposal.

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III. SPLIT SAMPLES/DOUBLE SAMPLES

Background

Many environmental statutes require the Agency to split samples taken in the exercise of statutory inspection rights. When a site search is conducted pursuant to a criminal search warrant, no such requirement exists. However, offering samples at the time of the execution of the warrant is an expeditious method of assuring the defense access to the samples while not burdening the Agency with storeage problems.

Issue

Should samples be split in the context of a criminal investigation?

Guidelines

All samples taken by EPA technical personnel on behalf of the Office of Criminal Investigations should be taken in large enough quantities so that if the defense requests part of the sample at any time prior to trial, a portion of the sample may be turned over to the defense or to a defense-designated laboratory.

If sample collection is authorized by a court as part of a search warrant, it is appropriate to inform the court (at the time the warrant is obtained) of the Agency's plan to offer split samples to authorized persons at the site of the warrant. Prior court approval of the transfer of hazardous substances is helpful, even if not necessary. Once the court has authorized the collection of samples and the splitting of such samples, an offer to turn over split samples should be made to an authorized person at the site, even without such a request having been made by the defense.

An alternative which may be used is to ask the defendant to designate a laboratory to analyze the sample. Thus, instead of giving the sample to an authorized person at the site, the sample would be sent to a laboratory named by the defendant(s).

If the split sample is refused or no one is available to accept it, extra amounts of the sample must be retained by the Agency. Whether or not the extra amounts are kept in separate containers should be a laboratory decision. There may be subsequent requests for samples so that independant testing can be administered on behalf of the defense in preparing for trial. Courts will normally honor such requests.

Finally, the return on the search warrant should document whether a sample split is accepted, refused or not offered because no one was available to accept it.

Discussion

Although convictions have been affirmed where the government has lost or destroyed an evidentiary sample, the courts have begun to sympathize with a defendant's request to independently inspect and test. For instance, in Banks v. F.A.A., 687 F.2d 92 (5th Cir. 1982) the courts reversed the dismissal of two air traffic controllers who were fired after drugs were found in their urine. The defendants claimed that their due process rights were violated because F.A.A. allowed the private lab which had tested the urine to destroy it after it was analyzed. The court agreed that it was "crucial" that the samples were not available for independent testing and discounted the government's claim that cross examination of the independent testing chemist and challenging the testing methods were sufficient. Citing the principles of United States v. Gordon, 580 F.2d 827 (5th Cir.), cert. denied, 439 U.S. 1051 (1978), the court stated:

> The laboratory tests here were the only meaningful evidence resulting in the discharges. The accuracy of those tests, including the possibility that the samples were mixed up, damaged, or even inaccurately tested, was the likely determinant of the entire case. Id. at 94. (emphasis in original)

In Gordon, even though the government made available samples of the three seized chemicals to the defense, the court found that it was error not to also have turned over the chemical which the government chemist made from the three seized chemicals. The reasoning of this and other similar cases is that if the government intends to introduce secondary evidence (i.e., photographs, testimony, test results), then it should retain the primary evidence for defense inspection and testing.

One more case widely cited is U.S. v. Loud Hawk, 628 F2d 1139 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980). In this case, state law enforcement officers destroyed seized dynamite after thoroughly examining it and photographing it. The defense argued that the material was not dynamite and that they were not notified of the state's intention to destroy it and therefore, did not get a chance to test it. The court held that even though the dynamite was destroyed for "public safety considerations," it was evidence and it should have been preserved for the defense.

The Fifth (U.S. v. Gordon, supra.), Ninth (U.S. v. Loud Hawk, supra.), Third (Government of the Virgin Islands v. Testamark, 570 F.2d 1162, 1978), Eleventh (U.S. v. Nabors, 707 F.2d 1294, 1983) and First (U.S. v. Picariello, 568 F.2d 222, 1978), Circuits are not sympathetic to the argument that

evidence which has been destroyed is not "suppressed." Under Brady v. Maryland, 373 U.S. 83 (1963) and following the reasoning of U.S. v. Bryant, 439 F2d 642 (D.C. Cir. 1971), courts have found that a right to discover implies a duty to preserve. Therefore, sufficient quantities of the evidence should be obtained and preserved so that both the government and the defense can perform tests.

IV. TECHNICAL SAMPLES WHICH DEGENERATE

Background

Samples taken by the government may, no matter how scientifically preserved, degenerate with the passage of time. Thus, even if there is an adequate amount of the material for defense testing, it may no longer be suitable for testing by the time the defense is notified or by the time a defendant is identified. This will only be an issue when the defense has not obtained a split sample at the time the sample was taken by the Government.

Issue

What steps should the government take when it has possession of evidence which degenerates?

Guidelines

Under no circumstances will samples, residues, or sample containers used in cases assigned to the Office of Criminal Investigations be destroyed, regardless of their condition, without following disposal procedures established in Section II above. If the chemical and/or biological properties of the evidence seized remains stable for only a short period of time, the Office of Criminal Investigations should be notified by the laboratory personnel. Agency personnel and/or a prosecutor will then notify the defense. The notification should state that the government has a sample and that the defense has until a certain date to inspect or obtain the sample for independent testing. The target must be notified as soon as possible after formal charges have been brought. Whenever the target is notified, court approval to destroy after the stated date, whether or not the defense responds to the notice, must be obtained. This can be accomplished by way of the All Writs Act or by a motion to the court which has jurisdiction over the case.

iscussion

This is a difficult and sensitive area because of the time considerations when evidence is likely to self-destruct. To avoid an allegation of bad faith, it will be important that the government give notice as soon as possible, so that the defense has adequate time to retain their own experts and to start their own testing.

Notice should include a technical person's preliminary assessment of what the sample contains, when it was obtained and the rate of anticipated degeneration. The Agency has good technical information upon which to make sound assessments of how long a sample may be held and still retain its integrity for its intended purpose. The name and phone number of the prosecutor and agent to contact should also be included. If the defense responds to the notice, the U.S. Attorney's office should be contacted and the arrangements for the transfer of a portion of the sample should be coordinated with that office.

V. Laboratory Procedures

Issue

What procedures should be used in the laboratory in handling evidence for criminal enforcement cases?

Guidelines

All evidence obtained on behalf of the Office of Criminal Investigations will be obtained, tested and preserved by Agency laboratories. Unless unavoidable, no contract laboratories will be employed. Until further guidance is issued, each Agency laboratory will institute its own procedures to ensure the security of the paperwork and the samples. These procedures will supplement those already in force in this this area.

Discussion

Because of superior quality control and simplified chain of custody, technical samples collected in criminal cases should be analyzed whenever possible in EPA laboratories, rather than contract laboratories. In addition, samples and paperwork (on these samples) should not be tampered with or discussed with persons who are not assigned to work on the case. A premature disclosure, even inadvertant, to a company, the media, or other individuals can jeopardize the success of the investigation and the safety of the investigators.

Furthermore, the "tighter" the chain of custody, the easier it will be to prove the case in court. Since it may be necessary to bring into court each individual who handled, tested or packaged the samples, the fewer individuals involved, the better. Because of the complexity of the sampling and testing procedures, the laboratories are authorized to determine their own methods for making sure that no "unnecessary" personnel handle the evidence.

It is assumed that the quality control guidelines and methods already in use by the laboratories will be applied with particular care in the development of criminal cases.

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

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

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

V.8.

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

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

V.8

MAR 8 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance Concerning Compliance with the Jencks Act

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

TO: Assistant Administrators
Regional Administrators
Regional Counsels
Associate Enforcement Counsels
Director, NEIC

Background

The Jencks Act (18 U.S.C. §3500) provides that in a federal criminal prosecution, after a witness called by the United States has testified on direct examination, the court, on motion of the defendant, shall order the United States to produce any "statement", as defined in the Act, in the possession of the United States that relates to the subject matter as to which the witness has testified. Any witness called by the United States is subject to the Jencks Act. Therefore, the "statements" of environmental engineers, technicians, laboratory personnel, criminal investigators, inspectors, and EPA lawyers may be ordered turned over to the defense if any of these individuals testifies for the Government. The need for a complete understanding of the requirements of the Jencks Act, by all EPA personnel, cannot be underestimated. The identity of government witnesses cannot be accurately predicted in advance, and the sanctions for losing, destroying or misplacing "Jencks Act material" can be severe.

The Act (the text of which is set forth in Appendix A) has generated a considerable amount of case law. Litigation has mainly concerned questions as to what is a "statement" and what sanctions should be imposed should the Government fail to produce Jencks Act material. This memorandum will discuss these points and the procedures which must be used to preserve the material.

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Issue

What written materials will be considered "statements" subject to production to the defense during the course of criminal litigation?

Discussion

A "statement" is defined in part in 18 U.S.C. §3500(e) as (1) a written statement made by the witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement.

"(e)(1) Statements": Under subsection (e)(1), a written statement can be a report written by an agent and adopted by the witness. That is, if an agent writes up a report and either reads it back to the witness or lets the witness read it and then has the witness, in writing or orally, approve what has been written, then the witness has "adopted" the statement and it becomes the witness's statement. This statement or report does not have to be written at the time of the interview of the witness. If an agent talks to a witness, types up a report a few days later and shows the report to the witness who approves it, it is an "(e)(1) statement" of the witness. A document written by a witness, whether signed or unsigned, is also a statement and, if turned over to an agent, must be retained as Jencks Act material.

Criminal investigators or agents intentionally obtaining statements from potential witnesses are not the only EPA personnel who may create "(e)(1) statements." If an EPA technician or inspector writes a report which a facility manager reads and certifies as being accurate, then this report may be considered the "statement" of the facility manager. The manager has "adopted" the report. Also, the notes or laboratory reports of a technician or inspector are "(e)(1) statements" as to that technician or inspector. If the technician or inspector testifies, then these notes or reports must be turned over to the defense if they relate to the subject matter of the direct testimony. It does not matter who records the statement or for what purpose; it remains Jencks Act material. EPA technical personnel must keep any notes that they have made of interviews with facility personnel (or other potential witnesses) as well as notes recording actions which may later be the subject of a criminal prosecution.

"(e)(2) Statements": Statements which are "(e)(2) statements" include not only tape recordings, but any notes which can be considered a "substantially verbatim recital" of a witness's oral statement. If an agent takes notes quoting, or writing down in a substantially verbatim form, the words of a witness and these notes are taken either at or near the time of the witness's oral statement, these notes become the witness's "(e)(2) statement". The agent taking the notes is viewed in the manner of a stenographer who accurately memorializes the witness's words. The witness does not have to approve or adopt the agent's notes. He does not have to even know that notes were being taken. If the agent has captured the witness's words on paper, then these words are the witness's statement even if he is unaware that he is making a statement.

Agents who testify in court become witnesses whose statements also must be turned over to the defense. Investigative reports, written interpretations or impressions of a case, and written analyses of case problems and issues may all be "statements" of an agent. For instance, a report of a witness interview may not be a witness's "(e)(1)" or "(e)(2)" statement because it does not directly quote the witness or capture the witness's words in a substantially verbatim form. However, it may be the "(e)(1) statement" of the agent who wrote the report. "The written report of the agent, however, is just as much a verbatim statement of the agent who prepares it as a written statement of an informer, incorporated in the report, is the statement of the informer." Holmes v. United States, 271 F.2d 655, 658 (4th Cir. 1959).

"Running resumes" of F.B.I. agents, detectives or EPA agents are "(e)(1) statements" of the agent and may be producible. If a Special Agent testifies, it can be anticipated that his/her notes, reports to SAICs, case referral reports, and investigative reports will be producible if the direct testimony covers areas which are discussed in these previously written documents. United States v. Sink, 586 F.2d 1041 (5th Cir. 1978), cert. denied, 443 U.S. 912 (1979); Holmes v. United States, supra. Although it is incumbent upon the trial judge to separate out personal evaluations and "discussions of legal and practical problems of a prosecution" from the "running resumes" (or from any document which contains Jencks Act material), the writer who includes extraneous material always runs the risk of a judge deciding against excision. United States v. Pfingst, 377 F.2d 177, 195 (2d Cir.), cert. denied, 412 U.S. 941 (1973). Material in an agent's report which is sensitive or which might affect the security of EPA's investigative techniques is not exempt from Jencks Act requirements. West v. United States, 274 F.2d 885 (6th Cir. 1960), cert. denied, 365 U.S. 819 (1961).

Notes, reports, etc., in the hands of any EPA employee--including criminal investigators, lawyers and technical persons--are considered "in the possession of the government." Therefore, if an EPA employee fails to disclose Jencks Act material to the prosecutor, that failure will be held against the Government even though it is the agent rather than the prosecutor who has failed to preserve something. United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975); United States v. Niederberger, 580 F.2d 63 (3d Cir. 1978); United States v. Williams, 604 F.2d 1102 (8th Cir. 1979). As soon as a case is opened by the Office of Criminal Investigations, the agent assigned to the case should inventory all existing notes and reports concerning potential government witnesses in the possession of, or known to, all Agency personnel involved in the case, and inform them of their obligation to retain such material. Copies of this Agency's guidance on the Jencks Act should also be distributed to such personnel.

Courts will require the Government to turn over any material which fits the "statement" definition if it relates to the subject matter of the witness's direct testimony. Any material which either is not a statement of the witness or does not relate to the subject matter of the witness's direct testimony will be excised from the document. A judge may not exercise his or her own judgment as to what material is important, helpful or necessary for the defense. If it is a statement that relates to the direct testimony, it must be turned over.

Courts have broadly interpreted the phrase "relates to the subject matter as to which the witness has testified," in Section (b) of the Act. However, courts have more restrictively defined "statements" under Section (e). Acknowledging that it is unfair to cross-examine a witness using material which does not represent what the witness in fact said, courts have excluded material that is really the agent's words or impressions rather than those of the witness. In Palermo v. United States, 360 U.S. 343 (1959), the Court affirmed the denial of the production of a 600-word memorandum in which the Government agent summarized a three and a half hour interrogation of a witness who testified at trial. In one of the first Supreme Court decisions discussing the "statement" definition of the Jencks Act, the Court attempted to clarify what courts may exclude:

> [S]ummaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions.

360 U.S. at 353. If a court describes an agent's notes as "rough", "random" or "brief", it will be signaling its finding that the notes are not "statements" as to the witness referred to in the notes.

To determine whether notes accurately reflect a witness's words, courts will consider the extent to which the writing conforms to the witness's language (e.g., "I dumped it because I thought the load was hot."); 1/ the number of pages of notes in relation to the length of the interview (e.g., one page of notes after three hours of interviewing); 2/ the lapse of time between the interview and its transcription; 3/ the appearance of the substance of the witness's remarks (i.e., are they in quotation marks? in sentence form?); 4/ and the presence of comments or ideas of the interviewer. 5/

The Jencks Act clearly gives the court the authority to determine, after an in camera inspection, what is Jencks Act material and what is not. It is not the Government's function to excise material; rather, any notes or memoranda which conceivably could be viewed as Jencks Act material should be provided to the prosecutor for review by the courts.

1/ Palermo v. United States, supra.

2/ United States v. Judon, 581 F.2d 553 (5th Cir. 1978); United States v. Durham, 587 F.2d 799 (5th Cir. 1979); Goldberg v. United States, 425 U.S. 94 (1976); Palermo v. United States, supra.

3/ Campbell v. United States, 365 U.S. 85 (1961).

4/ United States v. Muckenstrum, 515 F.2d 568 (5th Cir.), cert. denied, 423 U.S. 1032 (1975); United States v. Pennett, 496 F.2d 293 (10th Cir. 1974); United States v. Hines, 455 F.2d 1317 (D.C. Cir. 1971).

5/ United States v. Pfingst, supra.

Issue

When must Jencks Act material be made available to the defense and what are the sanctions if it is not made available?

Discussion

If a prosecutor decides to follow strictly the letter of the law, he or she need not turn over Jencks Act material until after the witness has testified at trial for the Government. However, because of the delay which this creates (while the defense reviews the material), most courts expect that a prosecutor will agree to turn over Jencks Act material either at the start of each day of trial or before the witness testifies on direct examination. Some prosecutors even allow the defense to examine the material before trial.

As in any area of the law, different courts interpret the Jencks Act differently. Prosecutors who are aware of previous rulings by a court on Jencks Act issues will conform their practice accordingly. Therefore, what one prosecutor considers Jencks Act material, another may not. EPA personnel must accommodate themselves to the practice of the prosecutor within their jurisdiction.

The Congressional purpose of the Act is to allow the defendant to have, for impeachment purposes, "relevant and competent statements of a governmental witness in possession of the Government touching the events or activities as to which the witness has testified at trial." Campbell v. United States, supra, 365 U.S. at 92. If the defense's ability to cross-examine is impeded by the deliberate or inadvertent loss, by the Government, of Jencks Act material, the Court may decide not to allow the witness to testify at all or to strike the witness's entire testimony. Of course, the effect of completely excluding the testimony of a Government witness may be significant.

Although the Act does not require the automatic imposition of sanctions for failure to preserve potential Jencks Act material, courts have warned law enforcement agencies of their duty to promulgate procedures to ensure preservation.

> [S]anctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced, and attempted in good faith to follow rigorous and systematic procedures designated to preserve all discoverable evidence gathered in the course of a criminal investigation. The burden, of course, is on the Government to make this showing. Negligent failure to comply with the required procedures will provide no excuse.

United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) (footnote omitted)(emphasis in original).

In light of the sanctions that can flow from a failure to preserve Jencks Act material, as well as Government's inherent responsibility to preserve discoverable evidence, it is incumbent upon EPA to develop procedures that will ensure this end.

Issue

What procedures should be implemented throughout the Agency to preserve Jencks Act material?

Discussion

As a general rule, after a matter is referred to EPA's Office of Criminal Investigations, the case agent, will be responsible for reports written to document factual developments in ongoing cases. This would include, for example, interview write-ups, surveillance reports, documentation of the receipt of physical evidence, etc. One clear exception to this general rule will be Agency technical personnel who will continue to draft reports documenting sampling data and analysis, chain of custody information, etc.

If more than one investigator is involved in an investigation, only one report should be written documenting a specific event unless circumstances mandate otherwise.

All work notes should be retained by Agency personnel working on the criminal investigation until the final disposition of the case. This potential Jencks Act material must be kept in secured files when not in immediate use. Any notes taken at the time of the event, or at the time of the interview, as well as reports composed from the notes must be retained. Intermediate drafts need not be retained.

Investigative reports and technical reports should not include the writer's subjective thoughts, impressions or general opinions concerning a case. If it is thought necessary to reduce to writing information that is not strictly factual, this should be kept separately in secured files. It is more likely that material which is arguably not producible under the Act will be withheld from the defense if it is kept apart from material which is clearly Jencks Act material. Rather than disputing in court which portions of reports should be excised, everything within a report should be relevant and objective material. Extraneous material which does not directly relate to a case should not be included in investigative reports on that case.

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-- DAA Civil, who, in conjunction with the DAA-Criminal, will coordinate final discussions with and input from the Department of Justice (and, as necessary, State enforcement personnel.)

-- Assistant Administrator, Office of Enforcement and Compliance Monitoring.

Time limits will be met. Extensions of time limits will be allowed only for good cause and required approval by the DAA Civil and should not exceed five (5) working days. Routine preparation of analyses or implementing memoranda shall not be appropriate reasons for delay or extensions of time in the review process.

9. When the referral package and implementing memorandum have been signed by the Assistant Administrator, the package will be returned to the preparing office. The office assigned responsibility for preparation of the referral must assure distribution of copies of the referral memorandum to the persons named in paragraph 4.

Emergency Clearances

10. When the public health or the environment is significantly endangered, and in the judgment of the Region immediate civil or administrative action is required to stabilize or to control an emergency fact situation when there would otherwise be need for approval of parallel proceedings, the Region may seek emergency clearance. Prior to seeking emergency clearance, the Region shall consult with the Special (Resident) Agent in Charge of that Region. Emergency clearance may be requested by telephonic contact between the Regional Administrator or Deputy Regional Administrator and Regional Counsel with the Assistant Administrator - Office of Enforcement and Compliance Monitoring for limited civil or administrative action. This Emergency Request will then be memorialized by the Region in accordance with the procedures outlined above.

Emergency approval will be limited to an immediate need to stabilize a fact situation or protect against significant environmental harm or public endangerment, and -- not a substitute for final, formal approval of parallel proceedings.

cc: Gerald H. Yamada

Upon Receipt of the Request at Headquarters:

6. Upon receipt by the Assistant Administrator, the request for parallel proceedings will first be sent to the Deputy Assistant Administrator for Civil Enforcement (DAA Civil). The DAA Civil will assign and delegate the preparation of the referral package.

7. Upon receipt of their information copies, each Deputy Assistant Administrator will assign a staff attorney to work on the request. The staff attorney should begin preliminary issue exploration immediately after receiving the assignment. Preliminary issue exploration includes having discussions and conferences with other attorneys and EPA or Regional staff. This is necessary to prepare the matter for speedy review when the request is actually received from the DAA Civil. Note: It is anticipated that before there is discussion of a parallel proceeding request with the Department of Justice by headquarters, all affected programs will exchange information and views, and discuss the merits of the request to establish an Agency consensus before seeking information or comment from outside sources, departments, agencies or individuals.

8. The office assigned responsibility for the request shall process the request into a referral package within eight (8) working days. Within the eight day limit for and during preparation of the referral package, the office assigned responsibility for the package preparation is expected to confer with all affected media representatives during its preparation of the package. The referral package shall include a memorandum drafted to the Regional Counsel from the Assistant Administrator, reflecting approval or disapproval of the request. The final referral package should reflect the concurrence of each Associate Enforcement Counsel for each medium identified as affected by the request for parallel proceedings. The final package will then be forwarded to each of the following offices in turn, which will each complete its review within five (5) working days of receiving the package:

-- Deputy Assistant Administrator for Civil Enforcement (DAA Civil)

-- Office of Criminal Enforcement Counsel (OCEC), who will discuss the referral with the Regional criminal enforcement contact.

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

APPENDIX A

§3500 Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion hereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interest interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

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

12214

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

JUN 15 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Procedures for Requesting and Obtaining Approval of Parallel Proceedings

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Regional Counsels, Regions I-X
Associate Enforcement Counsels

This memorandum supersedes and replaces a prior OECM policy document, dated April 2, 1987, entitled "Handling Requests for Parallel Proceedings."

Although not favored as a general matter, the parallel proceeding occasionally is necessary or desirable as the best way to achieve EPA goals and objectives. Parallel administrative or civil proceedings which conform to Agency policy may be approved by the Assistant Administrator, Office of Enforcement and Compliance Monitoring, before or after the initiation of a criminal proceeding. Use of the following procedural steps will ensure the most expeditious treatment of a Regional request for parallel proceedings:

Initiation of the Parallel Proceedings Request:

1. A Region initiates a request for parallel proceedings by memorandum directed to the Assistant Administrator, Office of Enforcement and Compliance Monitoring. The memorandum request for parallel proceedings should include the following:

-- background information including a statement concerning the status of administrative or civil evidence or information gathering with respect to the matt - for which approval is being sought, and a statement that the Region has made inquiry and is not pursuing any administrative or civil proceeding for any purpose other than the one for which the approval is being sought.

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-- a brief factual outline of each proposed civil or administrative action;

-- a brief description of the existing criminal investigation or action; and,

-- a specific statement explaining why simultaneous actions are necessary and the specific aspects of the Agency parallel proceedings policy which justify this request.

2. The memorandum request for parallel proceedings should be prepared by the Regional Counsel. The memo should be signed by the Office of Regional Counsel and by affected Regional Program Manager(s).

3. All factors affecting potential enforcement actions -- criminal, civil and administrative -- should be coordinated within the Region before the decision to request approval for parallel proceedings. However, once the decision is made, in advance of sending the memorandum request, the Office of Regional Counsel should call the Special (Resident) Agent in Charge in that Region and the Office of Criminal Enforcement Counsel (OCEC) in Headquarters that the request is coming.

4. Simultaneous information copies of the request for approval together with any supporting attachments should be sent to the following persons:

A. Deputy Assistant Administrator for Criminal Enforcement;

B. Deputy Assistant Administrator for Civil Enforcement;

C. Regional Criminal Enforcement Counsel for the requesting Region;

D. Special (or Resident) Agent in Charge in the requesting Region;

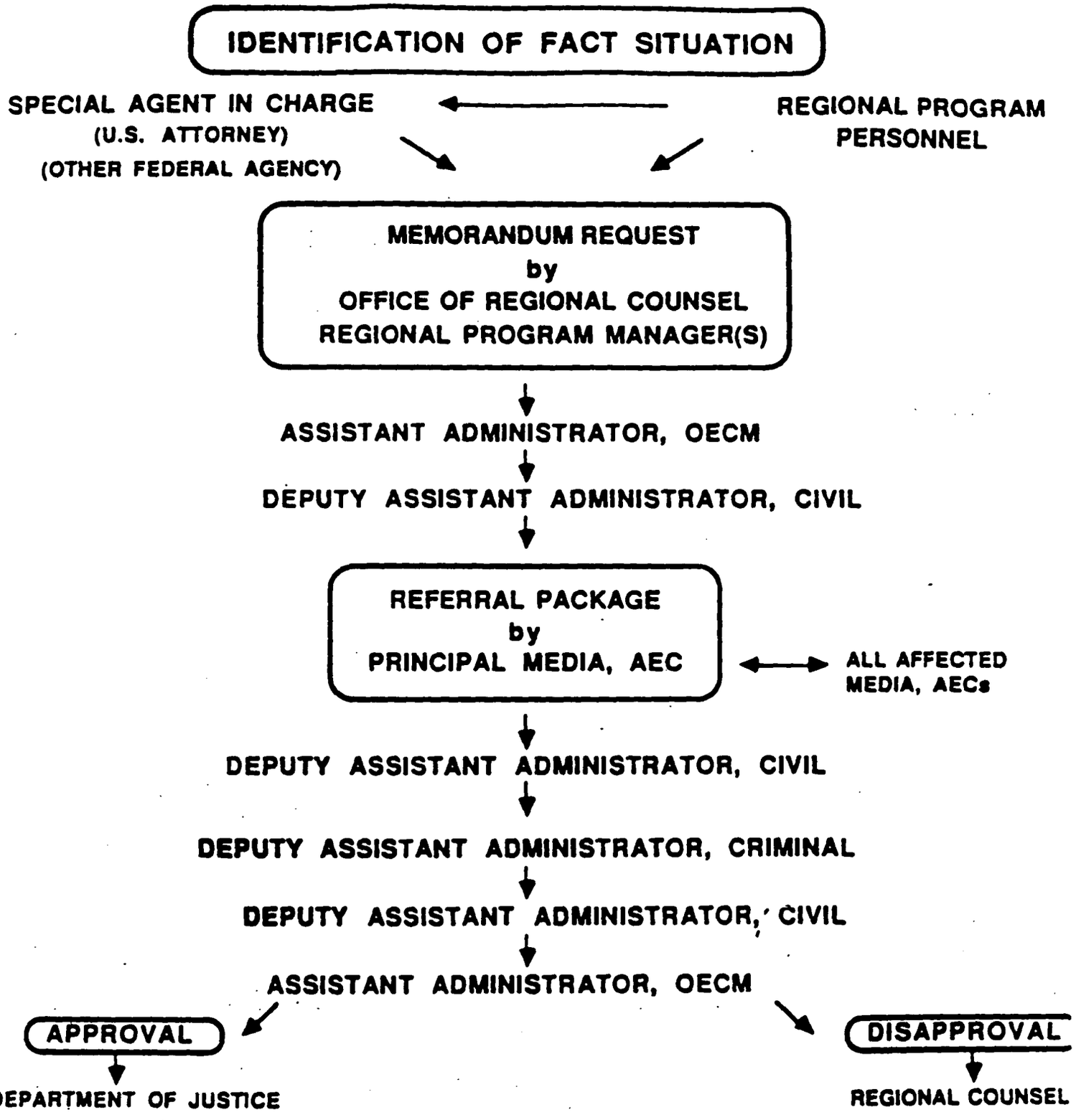
E. Chief of the Environmental Enforcement Section (EES), Department of Justice; and,

F. Chief of the Environmental Crimes Section (ECS), Department of Justice.

5. While awaiting approval of requests for parallel proceedings, Regional personnel may continue good faith inspection and monitoring activities, but Agency policy with respect to separation of civil and criminal staff shall be followed in anticipation of approval of the request.

U.S. ENVIRONMENTAL PROTECTION AGENCY

PROCEDURES FOR APPROVAL OF PARALLEL PROCEEDINGS



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

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

JUN 21 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Revised EPA Guidance for Parallel Proceedings

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Assistant Administrators
Associate Administrators
Headquarters Enforcement Program Office Directors
Regional Administrators, I-X
Deputy Regional Administrators, I-X
Regional Counsel, I-X

Attached for your use and distribution is the revised guidance on parallel proceedings. Copies of the "Guidelines on Investigative Procedures for Parallel Proceedings" should be made available at once to all affected enforcement personnel, program managers, and senior staff. Also included in the Guidelines is a short form, two-page "Easy Access to Parallel Proceedings Guidance by Five Rules of Thumb" which you may wish to post prominently in all civil enforcement offices.

Effective immediately, these Guidelines constitute Agency policy with respect to parallel proceedings. These Guidelines, taken together with the June 15, 1989 memorandum, "Procedures for Requesting and Obtaining Approval of Parallel Proceedings", (attached) supersede and replace the following five memoranda dealing with parallel proceedings:

--"Policies and Procedures on Parallel Proceedings at the Environmental Protection Agency," dated January 23, 1984;

--"The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations," February 16, 1984;

--"The Role of EPA Supervisors During Parallel Proceedings," March 12, 1985;

--"Implementation of Guidance on Parallel Proceedings," February 3, 1986; and,

--"Handling Requests for Parallel Proceedings," April 2, 1987.

This final guidance reflects all of the comments received upon the several prior drafts circulated over the past several months. These Agency Guidelines also reflect the comments of the Department of Justice and correlate with their October 13, 1987, "Guidelines for Civil and Criminal Parallel Proceedings." Your comments were very helpful, and we appreciated your assistance in making the guidance useful as a field reference tool.

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

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

JUL 18 1990

OFFICE OF
ENFORCEMENT

MEMORANDUM

SUBJECT: Supplement to Parallel Proceedings Guidance and Procedures for Requesting and Obtaining Approval of Parallel Proceedings

FROM: James M. Strock
Assistant Administrator

TO: Regional Counsels, Regions I-X
Associate Enforcement Counsels
Director, Office of Criminal Enforcement
Director, Office of Civil Enforcement

As a result of the recent reorganization of and realignments within the Office of Enforcement, changes must be made to the parallel proceedings policy and to procedures for requesting and obtaining approval of parallel proceedings requests. This memorandum supplements prior memoranda dated June 15, 1989, "Procedures for Requesting and Obtaining Approval of Parallel Proceedings," and June 21, 1989, "Revised EPA Guidance for Parallel Proceedings," which transmitted "Guidelines on Investigative Procedures for Parallel Proceedings," to the degree necessary to change certain references and terms used in those memoranda. The procedures, policy and guidance provided by the memoranda dated June 15 and 21, 1989, remain fully effective, except as revised as follows:

1. Two revised flow charts, which replace the one previously supplied with the memorandum dated June 15, 1989, are attached. These charts should be used instead of the earlier one as an aid in routing the parallel proceeding request.

2. Requests for parallel proceedings will continue to be submitted by memoranda from the Office of Regional Counsel, directed to the Assistant Administrator, OE. Information copies should also be sent simultaneously to the Office of Criminal Enforcement and to the attention of the Associate Enforcement Counsel for the principal media affected by the parallel proceeding request (Chart I).

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3. Upon receipt in the Office of the Assistant Administrator, the Deputy Assistant Administrator will assign the request to an Associate Enforcement Counsel for preparation of the package, which will then be routed for concurrence and action within Headquarters as provided by the existing policy and procedures (Chart II). (A request for parallel proceedings which involves a request for suspension or debarment or discretionary listing and for which there is an ongoing environmental criminal investigation will be routed to the Office of Criminal Enforcement for preparation of the package for internal OE concurrence and AA approval.)

4. The following titles and terms, used in prior memoranda, have been changed as indicated:

"Office of Enforcement and Compliance Monitoring (OECM)" to "Office of Enforcement (OE)"

"Deputy Assistant Administrator, Civil" to "Director, Office of Civil Enforcement"

"Deputy Assistant Administrator, Criminal" to "Director, Office of Criminal Enforcement"

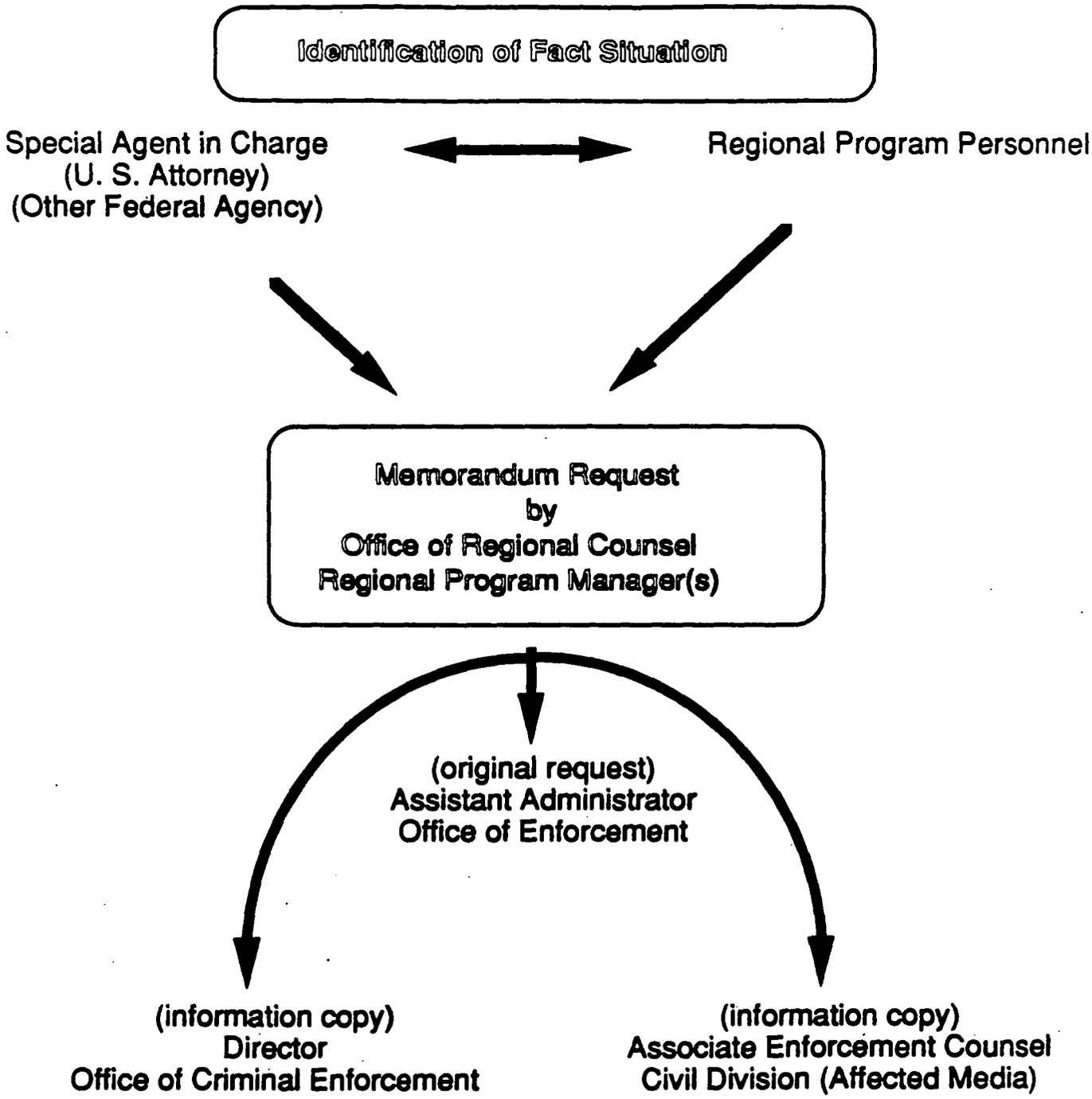
Attachments

cc: Gerald H. Yamada, Deputy General Counsel

U. S. Environmental Protection Agency

Procedures for Approval of Parallel Proceedings

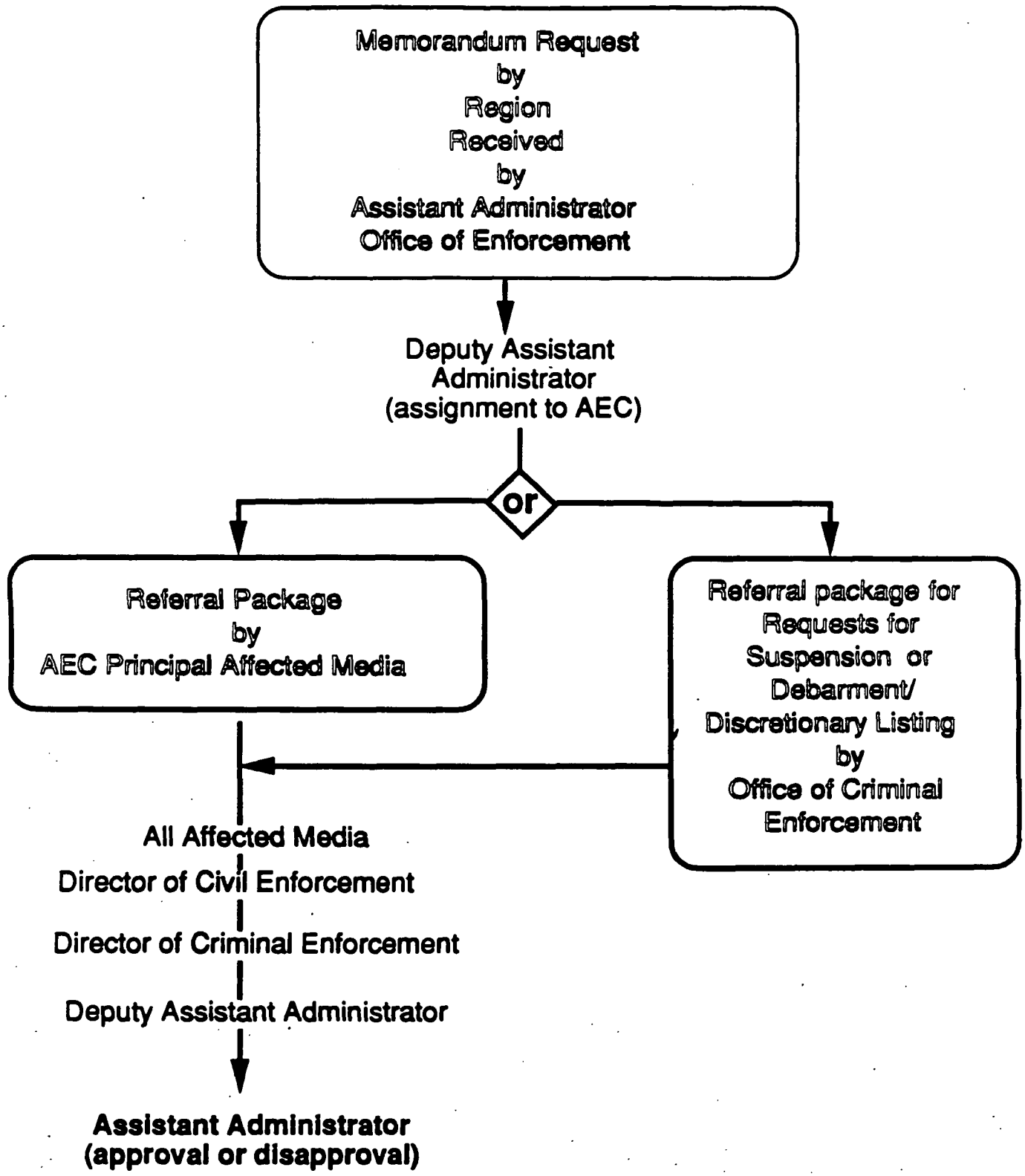
Flow Chart for Regional Request to Headquarters



U. S. Environmental Protection Agency

Procedures for Approval of Parallel Proceedings

Flow Chart for Headquarters



VI. SPECIALIZED ENFORCEMENT TOPICS

A. NATIONAL MUNICIPAL POLICY

21.9

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

DEC 14 1982

OFFICE OF
LEGAL AND ENFORCEMENT C

MEMORANDUM

SUBJECT: Municipal Enforcement Case Requirements

FROM : Louise D. Jacobs
Associate Enforcement Counsel for Water

TO : All Attorneys
Water Enforcement Division, OLEC

Please ensure that the following information is contained in all referrals sent to the Department of Justice for prosecution of municipal violations:

- Confirmation of the municipality's permit requirements;
- Listing of precise nature of violation of the requirements;
- Information about alternatives for solving the problem which are likely, in the opinion of an informed individual, to be successful. The informant should be someone who knows the plant and violation, is familiar with the kind of violations occurring, is knowledgeable about sewage treatment systems in general, and is of the opinion that these particular violations are possible to solve by one of several alternatives posited. The informant should be identified in the referral. A JRB report may ordinarily suffice to meet this requirement;
- "First-cut" information indicating that the cost of a probably feasible solution is one which this municipality will not find it totally impossible to pay. We will discuss at a later date some sources for this "first-cut" conclusion. One source of such information might be the OW test (Longest office) for whether a given munipality can support a grant. Another source might be the economists on staff in Region III.

You will note that the tests listed are broad and general. This is purposeful, particularly in the case of the financial information requests. The purpose of collecting this information

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is to provide the Department of Justice with a rough, prediscovery screening of the case, containing enough information to indicate to a sensible lawyer that filing is warranted, but certainly not enough to make a conscientious lawyer comfortable at the time he/she enters the courtroom for the first day of trial.

It is my opinion that too often we have tried to meet the first-day-of-trial test in our prefiling efforts, and that this has slowed the rate of filing beyond what might be desirable.

If after providing the information listed above you find that further information is being requested by the Department of Justice, please call this to my attention. It may be that in a given case further information might be desirable. However, I would like to keep abreast of these requests and to discuss them with Steve Ramsey if necessary.

The elements listed above as materials sufficient for an average filing have been discussed by me with Steve, and generally agreed upon.

In addition to meeting these internal requirements for a municipal referral, each attorney should impress upon his/her regional counterpart, to the extent possible, that we prefer to use scarce agency resources to develop cases against larger municipalities, or those presenting otherwise significant problems.

Examples of "otherwise significant" might include damage to water quality or threat to public health caused by violations by any-sized municipality, violations having unusual precedential significance, or responses to an unusual show of recalcitrance.

I am sending a copy of this memo to Steve so that he may make any corrections he desires in this statement of my understanding of our agreement.

cc: Mike Brown
Steve Ramsey

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

Subject	Date
CWA Municipal Enforcement Cases	January 3, 1983

To
All EES Attorneys

From
Stephen D. Ramsey
Chief, EES

As you know, EPA is in the process of developing a municipal water enforcement policy. Although the policy is not yet final, we have said we will consider filing cases against a municipality where the agency can identify what the municipality must do to achieve compliance and that the municipality has the financial wherewithal to implement the remedy.

Mike Brown and Louise Jacobs have agreed that EPA will provide the following information to assist us in reviewing these cases:

1. Violation

Information about the precise nature and duration of the violation, including confirmation of the municipality's permit requirements.

2. Remedy

An explanation of what the municipality must do to achieve compliance, basically a particularized plan of action identifying practical alternatives we can propose to the court.

3. Financial Capacity

Information which reflects that the proposed remedy will not be impossible for the municipality to fund. EPA's economists are putting together a test which identifies the kinds of information relevant to this inquiry (e.g., bond rating, assessment of staff economists, user charges).

We also expect that the referral will identify an individual who has been to the plant, is familiar with the violations, and can explain how the violations can be remedied.

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The referral should indicate the civil penalty the agency seeks including the penalty calculation and what amount EPA will acce[redacted] as a bottom line.

If any of the municipal enforcement cases which you are reviewing lack this information, please advise Carol, Lloyd, or Chip immediately and prepare a letter to the EPA staff attorney requesting this information. These cases are important to EPA and I would appreciate your expediting your assessment of them.

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

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federal register

Monday
January 30, 1984

Part V

Environmental Protection Agency

Publicly-Owned Treatment Works; National Municipal Policy; Notice

ENVIRONMENTAL PROTECTION AGENCY

[WH-FRL 2515-6]

Notice of National Municipal Policy on Publicly-Owned Treatment Works.

AGENCY: Environmental Protection Agency.

ACTION: Notice of National Municipal Policy.

SUMMARY: This notice sets forth the Environmental Protection Agency's policy on ensuring that all publicly-owned treatment works (POTW) comply with the statutory requirements and compliance dead-lines in the Clean Water Act (CWA). The policy describes the Agency's intention to focus its efforts on POTWs that previously received Federal funding assistance and are not in compliance, on all other major POTWs, and on minor POTWs that are contributing significantly to an impairment of water quality. It also describes how the Agency expects EPA Regions and States to carry out the intent of the policy. The purposes of the policy are to achieve maximum improvement in water quality in accordance with the goals of the CWA, and to protect the public's investment in wastewater treatment facilities.

The Agency has recently proposed a regulation that redefines secondary treatment pursuant to the 1981 amendments to section 304(d) of the CWA, 48 FR 52258, November 16, 1983. This related action will help provide reasonable certainty regarding POTWs applicable effluent limits and will facilitate implementation of this policy.

EFFECTIVE DATE: This policy will be effective January 30, 1984.

FOR FURTHER INFORMATION CONTACT: Robert W. Zeller, Ph. D., U.S. Environmental Protection Agency, EN-338, 401 M Street, SW., Washington, D.C., 20460 (202) 475-8304.

Dated: January 23, 1984.

William D. Ruckelshaus,

Administrator.

Statement of Policy

When the Clean Water Act (CWA) was passed in 1972, Congress gave municipalities until 1977 to comply with its requirements. Congress authorized the Environmental Protection Agency (EPA) to extend the deadline to 1983 and then again to July 1, 1988, for some municipalities. In addition, Congress amended the Act in 1981 to modify the basic treatment requirements. Therfore, Congress has authorized EPA to give some municipalities several additional years to achieve compliance and has also provided more reasonable treatment requirements for certain types of facilities.

The CWA requires all publicly-owned treatment works (POTWs) to meet the statutory compliance deadlines and to achieve the water quality objectives of the Act, whether or not they receive Federal funds. The EPA will focus on POTWs that previously received Federal funding assistance and are not currently in compliance with their applicable effluent limits; on all other major POTWs, and on minor POTWs that are contributing significantly to an impairment of water quality. EPA's goal will be to obtain compliance by POTWs as soon as possible, and no later than July 1, 1988. Where there are extraordinary circumstances that preclude compliance of such facilities by July 1, 1988, EPA will work with States and the affected municipal authorities to ensure that these POTWs are on enforceable schedules for achieving compliance as soon as possible thereafter, and are doing all they can in the meantime to abate pollution to the Nation's waters.

Implementation Strategy

The Agency is committed to pursuing a clear course of action that fulfills the intent of Congress and results in the maximum improvement in water quality. The Agency is also committed to protecting the public's financial investment in wastewater treatment facilities. To meet these objectives, the Agency expects EPA Regions and States to adhere to the National policy stated above and to use the following mechanisms to carry out the intent of this policy.

EPA Regions will cooperate with their respective States to develop strategies that describe how they plan to bring noncomplying facilities into compliance. These strategies should include a complete inventory of all noncomplying facilities, should identify the affected municipalities consistent with the National policy, and should describe a plan to bring these POTWs into compliance as soon as possible. Regions and States will then use the annual State program grant negotiation process to reach agreement on the specific activities they will undertake to carry out the plan.

Based on the information in the final strategies, the permitting authority (Region or approved NPDES State) will require affected municipal authorities to develop one of the following as necessary:

Composite Correction Plan: An affected municipality that has a constructed POTW that is not in compliance with its NPDES permit effluent limits will be required to develop a Composite Correction Plan (CCP). The CCP should describe the cause(s) of noncompliance, should outline the corrective actions necessary to achieve compliance, and should provide a schedule for completing the required work and for achieving compliance.

Municipal Compliance Plan: An affected municipality that needs to construct a wastewater treatment facility in order to achieve compliance will be required to develop a Municipal Compliance Plan (MCP). The MCP should describe the necessary treatment technology and estimated cost, should outline the proposed sources and methods of financing the proposed facility (both construction and O&M), and should provide a schedule for achieving compliance as soon as possible.

The permitting authority will use information in these plans and will work with the affected municipality to develop a reasonable schedule for achieving compliance. In any case where the affected municipal authority is unable to achieve compliance promptly, the permitting authority will, in addition to setting a schedule for achieving full compliance, ensure that the POTW undertakes appropriate interim steps that lead to full compliance as soon as possible. Where there are extraordinary circumstances that make it impossible for an affected municipal authority to meet a July 1, 1988 compliance date, the permitting authority will work with the affected municipality to establish a fixed date schedule to achieve compliance in the shortest, reasonable period of time thereafter, including interim abatement measures as appropriate. The general goal is to establish enforceable compliance schedules for all affected municipalities by the end of FY 1985. Once schedules for affected municipalities are in place, the permitting authority will monitor progress towards compliance and will take follow-up action as appropriate. Nothing in this policy is intended to

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impede or delay any ongoing or future enforcement actions.

Overview

EPA Headquarters will overview the implementation of this policy to ensure that actions taken by Regions and States are consistent with National policy and that the Agency as a whole is making progress towards meeting the statutory deadlines and achieving the water quality objectives of the Act.

Dated: January 23, 1984.

William D. Ruckelshaus,

Administrator.

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

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

FEB 17 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Municipal Enforcement: the Financial Ability Question

FROM: Louise D. Jacobs
Associate Enforcement Counsel
for Water

TO: Addressees: Headquarters Water Program, Department of Justice, and OECM (Water)

I was delighted with progress made in our meeting Thursday morning on this subject. Efforts made to discuss this subject among departments and among disciplines were worth the effort in my opinion, and we should do it more often.

Following are some of the more important conclusions reached, as I understood them.

- The Office of Water will make clear to the Regions that priorities in municipal cases lie first in correcting the substantial noncompliance among funded facilities.

- OECM will participate with the Office of Water in developing and sending to the Regions a statement of other qualifications which should be viewed as having high priority for litigation. (Regions should be cautioned not to view the development of this formula as a reason for delay in developing other cases which they presently consider important.)

- For cases referred against POTWs built with Federal funds, no financial impossibility defense should be anticipated, and no special financial information will be requested from the Regions.

- For cases dealing with POTW noncompliance where compliance can be achieved through proper O & M, no special financial information will be requested from the Regions.

- When a Region refers a case against a POTW which was not federally funded, and in regard to which construction is needed, the amount of financial information requested from the Region will depend on the stage the case has reached and other relevant circumstances. While we have not had sufficient experience with municipal enforcement to define this with precision, we can make the following agreement, based to some extent on past partial agreements:

    1. To justify filing a complaint, information listed in the attached exchange of memos (Ramsey and Jacobs) will be requested from the Region, to make a prima facie showing that construction expenditure proposed is not an impossibility for the municipal defendant.

    2. If the case proceeds into early stages of discovery and shows signs of being contested, information contained in the attached "Longest" questionnaire will be requested from the Regions. (It should be noted that this is information to be supplied in other contexts for other purposes and may in some cases already be on file in the Regions.) This information is intended to result in a balance sheet which shows municipal assets and liabilities and therefore the relative financial health of the municipality.

    3. If discovery is extended, and there is indication of a seriously contested case which may well lead to full trial, an expert will be hired by the Agency to provide direction on any further financial information needed from the Region or from elsewhere. Funds are available in the FY84 OW budget for this purpose. OW and OECM can assist in locating and hiring experts.

- OW will provide OECM with information on ways in which financial data gathered for grants purposes has been applied in making grants decisions, to assist the Agency in maintaining a consistent position.

- OECM will gather examples of some successful municipal cases for OW to use in encouraging the Regions to prioritize cases properly and refer them promptly.

These agreements, in my opinion, give us a good starting point for moving agressively into the implementation of enforcement aspects of the Administrator's municipal policy. As we encounter new problems, or as the Regions make us aware of new questions, I will hope to reconvene the participants for similarly constructive solutions.

Again, thanks for your cooperation.

Attendees:

Rebecca Hanmer, OW
Betsy LaRoe, OW
Robert Zeller, OW
Don Olson, OW
Stephen Ramsey, DOJ
Lloyd Guerci, DOJ
John Lyon, OECM
Jack Winder, OECM
Elyse DiBiagio-Wood, OECM

Attachment

cc: Courtney Price
Richard Mays

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

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Environmental Protection Agency
Programs Operations (WH-547)
Washington DC 20460
March 1984

EPA

Financial Capability Guidebook

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

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

APR 11 1984

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Eligibility for Variances under Section 301(i)(1) of the Clean Water Act

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

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

Bruce Barrett requested my legal opinion on a set of five issues relating to the eligibility of publicly owned treatment works (POTWs) for compliance extensions under Section 301(i)(1) of the Clean Water Act (CWA). This memorandum responds to that request.

QUESTION 1

(1) Can EPA (or an approved NPDES State) issue a Section 301(i)(1) compliance extension to a municipal permittee that will not be receiving Federal funds to construct its treatment facility?

ANSWER

Yes, if the permittee is otherwise eligible. In order to be eligible a POTW would have to establish that it applied by June 26, 1978 and meets a variety of substantive criteria discussed below.

Discussion

Under Section 301(b)(1)(B) and (C) of the CWA, enacted in 1972, all POTWs were required to comply with secondary

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treatment, as well as a variety of other requirements, 1/ by July 1, 1977. To assist POTWs to meet the 1977 compliance deadline, Congress also enacted in 1972 Title II of the CWA, which provided Federal grant assistance for POTW construction. Congress did not, however, condition the applicability of the compliance deadline upon the timely receipt of Federal funds. See State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977).

Many POTWs failed to meet the 1977 deadline, in part because of delays in Federal funding. Therefore, in the 1977 Amendments to the CWA, Congress enacted a new Section 301(i)(1) granting EPA the authority to extend the compliance deadline for particular POTWs in appropriate circumstances. 2/ Section 301(i)(1) as originally enacted read as follows:

> Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection. The Administrator (or if appropriate the State)

1/ These consist of "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations (under authority preserved by section 510), or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." Section 301(b)(1)(C).

2/ Congress also granted EPA authority to extend compliance deadlines for direct dischargers that had planned to discharge into POTWs that were not yet fully constructed and were granted Section 301(i)(1) extensions. See Section 301(i)(2).

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> may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsection (b) through (g) of section 201 of this Act, section 307 of this Act, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.

On December 29, 1981, Congress again amended the Clean Water Act by enacting the "Municipal Wastewater Treatment Construction Grant Amendments of 1981," P.L. 97-117 ("1981 Amendments"). The 1981 amendments reduced Federal funding of POTWs, both in aggregate terms and in the maximum percentage of construction costs that may be borne by EPA.

The 1981 Amendments also extended the compliance deadline for recipients of Section 301(i) extensions to July 1, 1988. The remainder of the section was unchanged. Thus, the criteria that previously applied to obtaining and granting extensions have remained in effect. Congress did, however, restrict the availability of extensions beyond July 1, 1983:

> The amendment shall not be interpreted or applied to extend the date for compliance with section 301(b)(1)(B) or (C) of the Federal Water Pollution Control Act beyond schedules for compliance in effect as of the date of enactment of this Act, except in cases where reductions in the amount of financial assistance under this Act or changed conditions affecting the rate of construction beyond the control of the owner or operator will make it impossible to complete construction by July 1, 1983.

1981 Amendments, Section 21(a).

The criteria set forth in Section 301(i)(1) and in Section 21(a) of the 1981 Amendments are designed to assess

whether a POTW has justifiably failed to achieve compliance with the relevant compliance deadline. 3/ These include the POTW's ability to physically construct by the deadline; the impact of Federal failure to provide funding in a timely manner upon the POTW's schedule; and changed conditions that have affected the rate of construction beyond the POTW's control. None of these statutory criteria makes a POTW's eligibility for an extension contingent upon the likelihood that the POTW will receive Federal funds in the future.

Likewise, nothing in the legislative history prevents EPA from granting a Section 301(i) extension to an otherwise eligible POTW that will not receive Federal funds. The relevant legislative history consists of the following brief discussion in the Senate Report:

> The 1972 Act originally required municipal plants to comply with effluent limitations based on secondary treatment by 1977. This deadline proved to be difficult, and in many cases impossible to meet, largely because of insufficient Federal funding. The 1977 amendments, therefore, permitted extension of the deadline to municipalities acting in good faith which were unable to meet this requirement. Such extensions were to be in no case later than July 1, 1983.
>
> With the projected shortfall in Federal expenditures, and the reduced Federal share for the construction grant program, it is once more apparent that many communities will be unable to meet the 1983 deadline. The legislation thus extends the deadline to 1988 for communities which cannot meet earlier deadlines because Federal funds are not available. The Committee emphasizes that the same good faith requirements now in existing law are also extended to facilities seeking the new extension.
>
> * * * * *
>
> The Committee is aware that a number of communities are under court orders to comply with certain pollution control deadlines. These communities will not be helped by the further program limitations and reduced funding imposed by this legislation. This provision

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3/ The relevant compliance deadline at present is either no later than July 1, 1977, or, for POTWs that were granted Section 301(i)(1) extensions, no later than July 1, 1983.

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> expresses the sense of the Congress that courts in supervision of court orders for such non-complying municipalities take cognizance of the amendments contained in this legislation in their consideration of modifications to such deadlines.

Senate Report No. 97-204, 97th Cong., 1st Sess. (1981), at 17 (emphasis added).

Under no circumstances, however, may a POTW delay compliance beyond July 1, 1988. Section 301(i) provides that any extension "shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988" (emphasis added) and must contain interim limitations or other necessary requirements. Thus, even if the POTW does not anticipate receiving any Federal funds, it is required to construct and achieve compliance. 4/ The quoted language does indicate, however, that the scheduled availability of Federal funding is a relevant factor in establishing a schedule of compliance for POTWs that are granted extensions under Section 301(i).

QUESTION 2

Can a Section 301(i)(1) compliance extension beyond July 1, 1983 be issued to a permittee that applied for an extension by June 26, 1978, if EPA (or an approved NPDES State) never acted on the request?

ANSWER

Yes.

DISCUSSION

The 1977 Amendments to the CWA provide that EPA may grant an extension to any eligible POTW that applied in a timely manner. There is no deadline by which EPA is required to grant or deny the extension. The 1981 Amendments and legislative history did not alter this conclusion.

4/ Moreover, we note that the 1981 amendments cut back on the Federal grants program without providing a waiver for unfunded POTWs. Therefore, POTWs do not have a reasonable basis to expect that Congress will provide further relief from compliance deadlines in the future.

QUESTION 3

Is a permittee that requested a Section 301(i)(1) compliance extension upon which EPA (or the approved State) did not act in violation of the Act or NPDES regulations?

ANSWER

Yes, if the permittee has not achieved compliance with the requirements of Section 301(b)(1)(B) and (C) by the deadline set forth in its permit.

DISCUSSION

Initially, all POTWs should have been issued permits requiring compliance with Section 301(b)(1)(B) and (C) not later than July 1, 1977. This permit deadline remains in effect unless the permit is modified by EPA (or the approved State) under Section 301(i)(1). If EPA (or the approved State) has not modified the permit to extend the deadline and the permittee has not achieved compliance by the deadline, then the permittee is in violation of its permit. 5/

QUESTION 4

Can EPA bring an enforcement action against a POTW where EPA has not yet acted upon the POTW's timely Section 301(i)(1) request?

ANSWER

Yes.

DISCUSSION

EPA may bring an enforcement action under Section 309 of the Act against any permittee that is violating its permit. If a POTW has not complied with the compliance deadline in its permit, it is subject to an enforcement action.

The statute does not provide any defense against enforcement based upon the pendency of a request for an extension, variance, or other permit modification. While the

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5/ The Senate Report described the reported bill as extending the 1983 deadline. However, like the enacted amendment, the bill itself did not extend the deadline. Rather, it authorized EPA to do so on a case-by-case basis, thereby assuring, as noted in the Senate Report, that only good-faith actors receive such extensions.

issue has yet to arise in any Clean Water Act case, it has been held that enforcement actions may proceed, and compliance orders may be issued, under the Clean Air Act against violators of State Implementation Plans (SIPs), despite the pendency of variance requests. Train v. Natural Resources Defense Council, 421 U.S. 60,92 (1975); Ohio Environmental Council v. U.S. District Court, 565 F.2d 393, 397 (6th Cir. 1977); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972).

None of the Clean Air Act cases cited above involved delays as lengthy as EPA's six-year delay in deciding many 301(i) extension requests. However, the principle that valid existing requirements are enforceable remains true in any case. If a POTW believes that the Agency is unduly delaying its Section 301(i) decision to the POTW's detriment, the POTW can challenge the Agency delay, as discussed below. Such delay is not, however, a defense against enforcement of the existing requirement.

This does not mean that a court would ignore a pending variance request. If EPA were to bring an enforcement action against a POTW without having acted upon the POTW's 301(i) request, the POTW may seek (by asserting a counterclaim or initiating a separate lawsuit) to compel EPA to act upon the request. Under the Administrative Procedure Act (APA), 5 U.S.C. §706(1), a reviewing court 6/ may "compel agency action unlawfully withheld or unreasonably delayed." Furthermore, the APA generally requires agencies to conclude matters "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 U.S.C. §555(b).

A claim to compel agency action might also be asserted under Section 505(a)(2) of the CWA, which provides for an action in district court against the Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." A court might accept a POTW's argument that the duty to act upon a 301(i) request within a reasonable time is not discretionary. See, e.g., Rite-Research Improves the Environment v. Costle, 650 F.2d 1312, 1322 (5th Cir. 1981). See also FTC v. Anderson 631 F.2d 741 (D.C. Cir. 1979); Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975).

6/ "Reviewing court" is undefined. However, Section 702 of the APA provides that unless prior, adequate and exclusi opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

If the POTW asserts a claim, a court may well stay the enforcement proceeding pending an agency decision on the Section 301(i) request. In an extreme case where agency delay has prejudiced the POTW's ability to defend itself (e.g., if POTW employees with pertinent knowledge have left its employ and are unavailable), the court might even dismiss the lawsuit. See, e.g., EEOC v. Liberty Loan Corp., 584 F.2d 853 (8th Cir. 1978) and cases cited therein at 855.

Finally, even if the court allows the case to proceed to judgment in EPA's favor, either before or after a final agency action on the 301(i) request, the court maintains a great deal of equitable discretion to fashion appropriate remedies for violations of Clean Water Act requirements. Weinberger v. Romero-Barcelo. 456 U.S. 305 (1982). Moreover, a court would likely be mindful of the admonition in the Senate Report, supra at 17, that courts take cognizance of the 1981 amendments to Section 301(i) in addressing instances of municipal non-compliance and fashioning new court-ordered deadlines. If a POTW submitted a Section 301(i) request in good faith, and EPA has finally denied the request only after years of delay, a Court may well exercise its discretion by declining to impose substantial penalties or a burdensome compliance schedule upon the POTW.

QUESTION 5

Can EPA use the Administrative Order process (Section 309(a)(3)) to issue compliance schedules in lieu of modifying or reissuing permits for municipalities that are eligible for Section 301(i)(1) compliance extensions?

ANSWER

Administrative orders can be used, but not "in lieu" of Section 301(i)(1) compliance extensions.

DISCUSSION

Administrative orders under Section 309(a)(3) and (5)(A) 7/ cannot be used "in lieu" of Section 301(i)(1) extensions

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7/ Section 309(a)(3) provides:

Whenever on the basis of any information available to him the Administrator finds that any person is in violation of

(FOOTNOTE CONTINUED ON NEXT PAGE)

because the two processes are functionally distinct. A Section 301(i)(1) extension is set forth in a permit, which thereby establishes a new compliance deadline for the POTW. An administrative order is an enforcement action. Compliance with the order does not relieve the POTW from its legal obligation to comply with the permit deadline. See Montgomery Environmental Coalition v. EPA, 19 E.R.C. 1169, 1171 (D.C. Cir. 1983). The order merely assures the POTW that EPA will exercise its discretion not to enforce against the permit violation if the POTW complies with a specified set of requirements.

The distinction between Section 301(i) extensions and administrative orders may be important from the POTW's point of view. If the POTW is issued a permit containing a Section 301(i) extension and complies with that permit, the POTW has a good defense to citizens' suits. If the POTW does not receive such an extension, it will be subject to citizens' suits alleging a permit violation; compliance with an administrative order is no defense to such a lawsuit. See Montgomery Environmental Coalition v. EPA supra, at n. 6. Therefore, if EPA would attempt to use administrative orders on a broad scale "in lieu of" 301(i) extensions, it would be

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(FOOTNOTE 7 CONTINUED)

sections 301, 302, 306, 307, 308, 313, or 405 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act . . ., 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(a)(5)(A) provides:

Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

placing those POTWs at risk despite Congress' clear intent to afford them relief. 8/

Nonetheless, the use of administrative orders under Section 309(a)(5) is a permissible means of issuing enforceable compliance schedules to POTWs that are not complying with their permits. While an administrative order does not shield a POTW from citizens suits, it does provide governmental assurances of non-enforcement if the order is complied with. Furthermore, if a citizen suit is brought, the Administrative order is likely to be assigned significant weight by a reviewing court. 9/

8/ As noted above, the failure to act upon requests for Section 301(i) extensions gives rise to potential actions by POTWs or others to compel Agency action. Moreover, in a recent case decided under the Resource Conservation and Recovery Act (RCRA), the Court held that a general agency policy not to issue RCRA permits to certain types of facilities jeopardized the rights and interests of parties and was therefore a rule reviewable in the U.S. Circuit Court of Appeals. Environmental Defense Fund v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983). Extending this line of reasoning, a petitioner might argue that an EPA "decision" not to act upon Section 301(i)(1) applications is a rule and challenge this "rule" in the U.S. Circuit Court of Appeals, alleging that the rule is arbitrary and capricious or is otherwise without legal basis.

9/ The issuance of A.O.s with reasonable compliance schedules also might help EPA defend against a Section 505 action seeking to compel Agency action on the Section 301(i) application.

cc: Louise Jacobs

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

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

APR 17 1984

OFFICE OF WATER

MEMORANDUM

SUBJECT: Regional and State Guidance on the National Municipal Policy

FROM: Jack E. Ravan
Assistant Administrator for Water

TO: Regional Administrators
State Program Directors

On January 23, 1984, the Administrator signed the National Municipal Policy. The release of the signed Policy was preceded by a series of public briefings and other announcements to alert our various constituencies that we intend to carry out the Policy immediately. The issuance of this Policy signaled a new era in municipal compliance and enforcement, and we must now move forward to carry out its objectives.

Since the release of the Policy, we have tracked the development of State municipal strategies through the Regional Offices. The target date for completion of those strategies was April 1, 1984. Thus far, only Region VI has submitted strategies for its States, and we appreciate their timeliness. I expect the remaining State strategies, including the categorized list of noncomplying facilities, to be completed immediately, as they are an essential element of your §106 program planning for FY85. We must adhere to this schedule to ensure our ability to establish enforceable schedules by the end of FY85 for all noncomplying POTWs that need construction to meet the requirements of the Clean Water Act.

In order to facilitate the coordination between Regions and States in this critical early period, we are providing the attached guidance for carrying out the Policy. This product was jointly developed over a long period by Regions, States, and representatives of ASIWPCA. We consider this our operational guidance, but it has been forwarded to OMB for clearance under the Paperwork Reduction Act, and it will become final upon OMB clearance (30-60 days). You will note that we have withheld the sample financial capability

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REGIONAL AND STATE GUIDANCE
on the

NATIONAL MUNICIPAL POLICY

U.S. Environmental Protection Agency

Office of Water

March 1984

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NATIONAL MUNICIPAL POLICY

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REGIONAL AND STATE GUIDANCE

ON THE

NATIONAL MUNICIPAL POLICY

BACKGROUND

The Clean Water Act (CWA) originally established July 1, 1977, as the statutory deadline for publicly-owned treatment works (POTWs) to comply with both water quality-based and technology-based permit requirements. Congress later authorized the Agency to extend the compliance deadline for certain municipalities. In order to receive an extension under §301(i) of the CWA, a municipality had to apply by June 1978 and to demonstrate in its application that construction could not be completed by the July 1, 1977 deadline, or that the Federal Government had failed to provide grants in time to allow the POTW to meet the deadline. EPA or the State was authorized to extend the compliance date for such POTWs to the earliest date by which grants would be made available and construction could be completed, but no later than July 1, 1983.

In 1981, Congress recognized the need to provide additional time for some POTWs to achieve compliance and amended §301(i) to allow eligible facilities additional time to comply with their applicable effluent limits. EPA or the State is authorized to extend the compliance date for eligible POTWs to the earliest date by which grants are available and construction can be completed, but no later than July 1, 1988. A POTW is eligible for an extension beyond 1983 only where reductions in the amount of financial assistance under the CWA or changed conditions affecting the rate of construction, beyond the control of the owner or operator, made it impossible to complete construction by July 1, 1983. Any municipality that is not currently in compliance with its permit requirements and has not received a §301(i) extension, is in violation of the July 1, 1977, statutory compliance deadline. There are, however, many §301(i) applications that have never been acted upon.

In 1981, Congress also amended other sections of the CWA to provide significant reform and redirection to the Federal Construction Grants Program. Congress, for example, amended §201 of the CWA to reduce both the number of categories of POTW construction costs that are eligible for Federal funding after September 1984, and the Federal share of the total eligible costs. These changes indicate a Congressional intent to reduce local dependence on Federal funding assistance and to increase local accountability for achieving compliance with the requirements of the CWA.

Also in 1981, §304(d) of the CWA was amended to specify certain less costly treatment technologies that are the equivalent of providing secondary treatment. The Agency has published a proposed regulation that establishes a class of equivalent secondary treatment works. The issuance of the National Municipal Policy has been timed to follow the proposal of the new definition of secondary treatment.

Because of historic and current problems with municipal compliance, the Agency developed the National Municipal Policy, which places renewed emphasis on improving municipal compliance rates in order to protect the Nation's water quality. The policy basically reaffirms that municipalities must comply with the statutory deadlines in the CWA, whether or not they receive Federal funds. While the deadlines in the CWA apply to all POTWs, the policy states that the Agency will focus its compliance efforts on 1) fully constructed POTWs that previously received Federal funding assistance and are not currently meeting their permit limits, 2) on all other major POTWs, and 3) on minor POTWs that are contributing significantly to an impairment of water quality. The policy also recognizes that there may be extraordinary circumstances that make it impossible for some municipalities to comply even by 1988. In such cases, provided that the municipality has acted in good faith, the Agency will work with the States and the affected municipalities to establish enforceable schedules for achieving compliance as soon as possible thereafter. These schedules will also require such municipalities to undertake appropriate, interim abatement measures. Nothing in the Policy is intended to impede or delay any ongoing or future enforcement actions.

This guidance sets forth a logical approach for implementing the National Municipal Policy. The document is divided into four main sections: an introduction, which presents a tiered approach for addressing the problem of municipal noncompliance, as well as guiding principles for implementation; a section that describes Regional/State strategies, which are the basic planning documents that permitting authorities should use to carry out the policy; a section that discusses specific problems that permitting authorities may encounter in implementing the policy, as well as suggested mechanisms for addressing particular kinds of noncompliance; and a final section that describes how Regions and States should use the annual §106 program planning process to reach agreement on the specific activities that States and EPA will undertake to carry out the policy.

INTRODUCTION

The National Municipal Policy identifies certain planning and program management activities that are considered essential in carrying out the Policy. State-specific strategies are the primary planning mechanisms for coordinating Regional and State efforts and resources to accelerate effective regulatory action across the broad front of municipal noncompliance. To develop comprehensive strategies, Regions and States need to coordinate carefully their

permit, grant, and compliance/enforcement programs to provide the mutual assistance necessary to meet the goals of the Policy. The content of State strategies is discussed on page six of this guidance.

The Policy also sets forth clear National priorities for action. In support of these priorities, this guidance presents a three-tiered approach for Regions and States to use in addressing the POTW noncompliance problem. It places primary importance on completed facilities that are not in compliance, especially those that used EPA funds for construction. The goal here is to achieve maximum pollution abatement through effective operation, and to realize the full water quality benefits of construction grant funding.

As this first universe is addressed, Regions and States should next consider affected municipalities that are already in the grants process; this includes those municipalities that have already received a construction grant and those on the fundable portion of the State's priority list. The goal here is simply to move these projects through the grants and construction phases as quickly as possible, and to manage the grants and the schedules so that the completed plants will meet certification requirements one year after initial operation.

Next are those affected municipalities that need construction to meet statutory requirements and will not, or are not likely to, receive EPA grant assistance. This group poses the most difficulty in designing reasonable schedules, and will require the most sensitivity on the part of Regions and States. The goal here will be to work with these affected municipalities to develop schedules that enable them to achieve compliance as soon as it is technically and financially possible. Within this group, the focus should be on major POTWs and on minors that are contributing significantly to an impairment of water quality.

The following principles should be used by the Regions and the States as a guide in developing State-specific strategies and compliance schedules for affected municipalities.

<u>Responsibility for compliance rests with each municipality</u>.

Municipalities should make every effort to comply expeditiously with the requirements of the CWA, whether or not they receive Federal funds. Local governments should select an appropriate treatment technology and explore the full range of alternative financing methods available to them not only to construct these treatment works, but also to provide for adequate operation, maintenance, and replacement (OM&R).

<u>Funding decisions should be based on the potential for water quality improvement</u>.

States should dedicate available EPA funds on a priority basis toward those POTW construction projects with the greatest potential

for environmental benefits as provided by the CWA, EPA regulations, and priority list guidance.[1] This may be accomplished by sound State management of construction grant project priority systems and lists, and State review and revision, as appropriate, of water quality standards (WQS) and waste load allocations (WLA).

Special emphasis should be placed on compliance by POTWs that have completed construction of the necessary treatment facilities.

Municipalities with fully constructed POTWs must achieve and maintain compliance with their permit limits. EPA and the States will exercise all available administrative and judicial options needed to assure that noncomplying POTWs achieve and maintain compliance with their NPDES permits.

Construction grant agreements must be honored, and grant and permit schedules must be coordinated.

Municipalities that receive EPA construction grant assistance are responsible for meeting the terms of their grant agreements. EPA will enforce grant conditions, if necessary, to assure that POTWs constructed with EPA funds achieve compliance with final effluent limits. EPA and the States will ensure that compliance schedules in construction grant agreements are consistent with compliance schedules in NPDES permits (when a §301(i) extension has been granted), and also Administrative Orders (AOs), judicial orders, or comparable State actions. Any changes in grant schedules should be justified and coordinated with the others.

EPA and States should provide municipalities with as much certainty as possible regarding applicable permit limits prior to requiring commitments to major capital investments.

EPA will provide technical information on the redefinition of secondary treatment (consistent with the 1981 CWA Amendments) and will issue tentative §301(h) variance decisions as quickly as possible. EPA and the States are responsible for the review and, where appropriate, modification of permits to accommodate revised WQS, WLAs, and secondary treatment criteria in accordance with EPA regulations. In this context, States should act quickly to notify municipalities of any proposed secondary treatment changes or modifications to WLA for POTWs. However, municipalities are accountable for POTW compliance with statutory requirements at all times.

Compliance schedules should be reasonable.

Regions and States will reissue permits to those municipalities eligible under §301(i) of the CWA, or will issue AOs (or will obtain judicial orders in appropriate cases) with fixed-date compliance schedules. These schedules should provide municipalities with

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1 §216 of the CWA and EPA's construction grant regulations, 40 CFR 35.2015(b).

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sufficient time to design and construct needed treatment facilities, and to achieve compliance with applicable effluent limits and other enforceable requirements; schedules should generally require municipalities to be in compliance with their applicable effluent limits as soon as possible and no later than July 1, 1988.

Where extraordinary circumstances preclude compliance by July 1988, EPA will work with the State and the affected municipal authorities to ensure that these POTWs are on enforceable schedules for achieving compliance as soon as possible thereafter; the presumption is that any extension beyond July 1988, will be through a judicial enforcement action. These municipalities should be asked to explain how they plan to finance interim abatement measures, as well as how they plan to finance any construction necessary to meet statutory requirements by the earliest possible date after July 1, 1988.[2]

Where compliance cannot be achieved promptly, POTWs should take appropriate, interim steps toward compliance with applicable effluent limits.

At any time, EPA and the State may establish compliance schedules that require interim steps toward compliance (phased reduction of pollutant discharges). Such interim steps may be appropriate when final resolution of permit limits or final compliance will be significantly delayed and there are logical abatement measures that can be accomplished promptly, or where EPA or the State determines that final compliance cannot be achieved by 1988. However, resolution of final or applicable permit effluent limits and the setting of appropriate final compliance schedules should remain the highest priority.

Phased reductions may also be warranted where States are revising secondary treatment standards, WQS, or WLA, or are conducting studies to determine water quality-based effluent limits and the need for related advanced treatment (AT) facilities. Finally, EPA or the States may establish interim effluent limits and associated compliance schedules, on a case-by-case basis, as noncomplying POTWs move toward compliance with final (applicable) effluent limits. The use of Federal grant assistance may not allow phased or segmented projects in some cases (see 40 CFR 35.2108).

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2 The Agency will be providing additional guidance showing how the information necessary to demonstrate financial capability might be displayed. In addition, the municipality may use any format it chooses, a capital improvement plan, a financial plan, a separate chapter in the Facility Plan, or procedures prescribed by an approved State, provided that the information required is adequately addressed.

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STATE STRATEGIES: THE FRAMEWORK FOR CARRYING OUT THE POLICY

The National Municipal Policy requires Regions and States to develop long-range planning documents or "strategies" that describe how they plan to bring noncomplying facilities into compliance by the target dates. These documents should be the long-term plans for achieving compliance based on the specific circumstances that face affected municipalities and the laws and regulations that govern each State's actions. The process of developing a strategy provides each Region and State with an opportunity to establish the proper protocol and control mechanisms, consistent with the Policy, for carrying out the goals and intent of the Policy.

From a National program management perspective, development of strategies will promote uniform, consistent implementation of the Policy. From the Regional and State manager's point of view, the strategies will provide a hierarchy of work priorities, a phased approach to implementation, a reasonable schedule of target dates, and a convenient way to track accomplishments. Properly prepared, the strategies will provide contingency plans in the event of circumstances beyond the control of the regulatory agency.

Regions and the States should form a partnership to develop State-specific strategies so that the interests of both agencies are served in reaching a common goal. These strategies should:

1. Describe the basis and method for setting priorities consistent with the National Policy.

2. Identify (list) all municipalities that are out of compliance with their statutory requirements.[3]

3. Develop a schedule for working with affected municipalities to provide final decisions on applicable effluent limits and compliance schedules by the end of FY 1985. Wherever possible, such schedules should generally require compliance with statutory requirements as soon as possible, and no later than July 1, 1988, unless extraordinary circumstances make compliance by July 1, 1988, impossible.

4. Describe the procedures and coordinating mechanisms to ensure program consistency, especially between compliance schedules in permits, AOs or judicial orders, and construction grants schedules.

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[3] It is recommended that Regions and States review the attached "Permit Issuance and Compliance Development Table," and the accompanying sequence of activities. This will help organize the universe of noncomplying municipalities into manageable subcategories and to identify the basic steps to take in determining applicable effluent limits and establishing compliance schedules.

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Examples of such activities include[4]:

a. Criteria development for setting priorities for permit, grant, and compliance actions to carry out the State strategy.
b. Information gathering for making decisions on applicable effluent limits.
c. Case-by-case technical review and decision making.
d. Management and information systems, including policies and procedures.
e. State/EPA coordinating mechanisms to develop and modify permit and grant schedules, and to track and report compliance improvement activities.
f. Integration with §106 program planning, leading to the establishment of firm commitments for each fiscal year.
g. Periodic adjustment of State strategies, if appropriate, during §106 program reviews.

5. Describe a general schedule, by fiscal year, for achieving compliance with all statutory requirements as soon as possible, and no later than July 1988. Where extraordinary circumstances preclude compliance by July 1, 1988, describe a contingency plan for achieving compliance beyond that date and develop criteria and schedules for achieving compliance by the earliest possible date thereafter, including interim abatement measures as appropriate. The presumption is that all schedules that go beyond 1988 should be established through a judicial enforcement action.

Data to establish applicable effluent limits and compliance schedules for many noncomplying POTWs should be available immediately; the schedules for these and many other POTWs can be developed and included in State strategies by March 31, 1984. The general goal is to establish enforceable compliance schedules for all affected municipalities by the end of FY 1985.

State activities associated with developing and carrying out the strategies are eligible for EPA funding under §106 and §205(j) of the CWA. States with delegated construction grant programs under the CWA may also receive grant funds to carry out this policy under §205(g) of the CWA.

EXECUTING THE STATE STRATEGIES

The State strategies described above will provide Regions and States with a complete inventory of all noncomplying facilities,

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4 The guidance established in the "Enforcement Management System" (EMS), March 1977, is recommended in developing State strategies. Use of the Permit Compliance System (PCS) as the primary data management system will facilitate effective coordination, communication, and data management. States will also benefit from increased participation in PCS.

will identify affected municipalities consistent with the National policy and guidance, and will establish the most appropriate way to achieve compliance given the particular circumstances facing each affected municipality.

As stated earlier in this guidance, noncomplying municipalities should be addressed in three tiers: completed facilities that are not in compliance with their final effluent limits; municipalities that have or will receive Federal grant assistance for needed construction by September 30, 1985; and municipalities that are not expected to be funded. The following sections describe the special problems that the permitting authority may encounter in dealing with each of these categories of noncompliers, as well as the mechanisms that should be used to achieve compliance. The final section presents some special considerations related to routine compliance monitoring and enforcement activities.

Approach to Take with Completed POTWs

Municipalities that have completed POTW construction, but are failing to achieve final effluent limits, may be required to perform an in-depth, diagnostic evaluation (analysis) of the causes of noncompliance and to develop a detailed Composite Correction Plan (CCP) for bringing the POTW into compliance as soon as possible. The permitting authority can require a CCP through an AO or through other appropriate enforcement mechanisms. The affected municipality may choose to complete the CCP with its own in-house expertise or may use an outside consultant.

Based on the results of the diagnostic evaluation, the CCP should:

1. Discuss/explain the cause(s) of noncompliance.
2. Discuss the corrective steps required to achieve compliance, their cost, and the proposed method of financing those steps, including whether there is:

    a. A plan of operation that identifies annual O&M costs.
    b. A financial management system that adequately accounts for revenues and expenditures.
    c. A user charge/revenue system that generates sufficient revenues to operate, maintain, and replace the treatment works.

3. Provide an expeditious schedule for completing the required steps and for achieving compliance.

Once the CCP is completed, it should be submitted to the Region or the State for review. If the CCP appears technically and financially sound, the permitting authority should use an AO or judicial Consent Decree to require the municipality to carry out the plan at its own expense.

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While CCPs will be the most common mechanism for returning constructed facilities to compliance, there are two other kinds of situations that Regions and States will encounter. First, section 204(d)(2) of the CWA, as amended in 1981, requires municipalities that construct POTWs with EPA grants made after May 12, 1982, to certify the performance of those POTWs one year after initial operation. Grantees that cannot certify compliance with both performance and design standards are required to submit a Corrective Action Plan (CAP) and to correct the operating deficiencies promptly at other than EPA expense. EPA will place a high priority on tracking the performance certifications, the CAPs, and the resulting corrective actions. Since the CCP and CAP are similar documents, the CAP should be used in lieu of the CCP where appropriate. The required elements of a CAP are described in EPA regulation 40 CFR 35.2218(c)(1).

Once a plant has been certified as operational, it must continue to meet its final limits or it is subject to any of the enforcement mechanisms available to the permitting authority. The requirements under §204(d)(2) are designed to protect the public's investment in the project. If a plant cannot meet certification requirements, the grant program can enforce grant conditions. Appropriate enforcement actions may also be taken under §309.

The second situation involves the special circumstances associated with enforcement actions against completed POTWs that were not originally planned, designed or constructed to meet the current secondary treatment requirements, e.g., P.L. 84-660 facilities. Since POTWs previously funded under P.L. 84-660, or otherwise funded prior to the August 17, 1973, secondary treatment regulation, may be incapable of meeting secondary treatment, State strategies must make a conscious determination of whether such facilities will be treated as completed (tier one) or unfunded (tier three) facilities.

Finally, Regions and States should exercise sound judgment in dealing with any Federally funded facility. Since enforcement actions against these facilities can raise issues affecting the EPA Construction Grants Program, proposed actions against these municipalities should be thoroughly discussed and continuously coordinated between the compliance and Construction Grants Programs before the action is taken.

Approach to Municipalities in the Grants Process

Affected municipalities that are currently in the grants process, and that have approved §201 facility plans, do not need to develop other plans that describe how they plan to come into compliance. This includes municipalities that already have an approved construction grant and those that are on the fundable portion of the State project priority list. The goal is to move these projects through the grant and construction phases as quickly as possible, which has the dual benefit of improving compliance plus reducing unliquidated balances in the Construction Grants Program.

Many of these municipalities are currently operating on expired permits and/or compliance schedules. Consequently, the permitting authority should reissue the permit and/or use AOs or §301(i) extensions, if eligible, to establish final compliance dates in these schedules, and to establish appropriate interim effluent limits for existing facilities that achieve the maximum degree of pollution abatement possible in the meantime. Construction grant schedules should always be coordinated at critical milestones with any related permit compliance schedules in §301(i) permit modifications or other enforceable EPA/State mechanisms. If either document is modified, the change should be reflected in the other so that the POTW receives a unified response from the regulatory agency.

Approach to Unfunded Municipalities

Any municipality that requires construction of a wastewater treatment facility in order to achieve compliance should be required to develop a Municipal Compliance Plan (MCP) to show how it plans to meet the enforceable requirements of the CWA. State strategies should identify the affected municipalities that need to develop MCPs, and the permitting authority should then work with these municipalities to establish reasonable compliance schedules based on the information supplied in the MCP.

MCPs for municipalities that have not constructed the appropriate treatment to meet the statutory requirements should identify:

1. The treatment technology needed to achieve compliance, as well as estimates of capital requirements and OM&R costs.[5]

2. The financial mechanisms (sources of revenue) to be used to fund construction and OM&R.

3. The proposed, fixed-date compliance schedule, including, at a minimum, the milestones by which the municipality plans to start and complete construction, to attain operational levels, and to achieve compliance with applicable effluent limits.

4. Any appropriate interim steps that will ensure progress toward compliance with statutory requirements, such as the completion of the secondary treatment component of an AT facility, improved O&M procedures, the implementation of an approved local pretreatment program, or the upgrade of the existing facility.

The permitting authority should require unfunded municipalities to develop MCPs through a §308 information request, an enforceable §309 AO, a judicial order, or an equivalent State action. EPA Headquarters has issued draft guidance on the form and content of these §309 AOs and §308 requests. These municipalities should be given a reasonable length of time to develop MCPs so they can real-

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5 See footnote on page five.

istically assess their compliance needs, examine their financing alternatives, and work out reasonable schedules for achieving compliance. In most cases six months from the notification of the requirement to submit an MCP should be adequate.

Within the group of noncomplying municipalities that will not receive Federal grant assistance, Regions and States should concentrate on major POTWs and then on minor POTWs that contribute significantly to an impairment of water quality. Finally, lowest priority for EPA or State action should be assigned to unfunded, minor POTWs that are not causing significant water quality problems.

EPA or the State agency should review each MCP and, if it is acceptable, should incorporate the schedule into a §301(i) permit (if the POTW is eligible), a §309 AO, or a judicial order. If the MCP is not acceptable, EPA or the State may establish an appropriate compliance schedule under its own authority or may initiate other appropriate enforcement actions.

In dealing with unfunded municipalities, Regions and States should exhibit great sensitivity to their special problems and needs. In working with these communities, for example, every effort should be made to provide them with available technical information on financial capability assessment and on alternative, less costly, wastewater treatment technologies. The objective is to help these municipalities develop reasonable and enforceable schedules, even though it may require a judicial enforcement action to extend the schedule beyond 1988 where extraordinary circumstances are shown.

For unfunded municipalities, Regions and States are encouraged to adopt a community-by-community strategy that involves advance discussion with each affected municipality before establishing a final schedule that requires a substantial capital investment. Since actions against these communities are likely to be controversial, the permitting authority should also inform its Regional Administrator or State Director, as appropriate, of the negotiations with the affected municipality and the proposed actions necessary to achieve compliance.

Compliance Monitoring and Enforcement

Regions and States should carefully monitor compliance with the requirements to develop and submit MCPs and CCPs, and should take follow-up actions as needed. They should also monitor enforceable compliance schedules that are established in §301(i) permits, §309 AOs, or judicial actions, and should initiate follow-up action where schedules are not being met. All activities should be consistent with the priorities in the Policy and the approaches outlined in this guidance.

Section 309 AOs (or equivalent State actions) should be used when such actions are necessary to obtain corrective actions, but civil enforcement actions should be initiated when necessary. Negotiated consent decrees can be a useful element of many EPA and

State civil enforcement actions. Appropriate civil penalties should be established to deter future violations. Sewer connection bans (§402(h), CWA) should be sought, when they are needed, to achieve and maintain compliance. Nothing in the Policy or the guidance is intended to impede or delay any on-going or future enforcement actions.

Since municipalities are ultimately responsible for meeting the contractual terms of construction grant agreements, grant conditions should be enforced, if necessary. If grantees fail to correct problems in a timely manner, the regulatory agency should take prompt action, which may include annulment or termination of the grant. If required, appropriate legal actions should also be taken, usually under §309 of the CWA or under comparable State authority.

PROGRAM MANAGEMENT ACTIVITIES AND OVERVIEW

Regions should use the annual State program grant negotiation process to reach agreement on the specific activities they will undertake to carry out the State strategies. EPA and State §106 work plans for FY 1985, for example, should include the necessary commitments to update State strategies, and to identify any remaining POTWs for which applicable effluent limits and compliance schedules need to be established. Such commitments should include those contained in the Office of Water Accountability System (OWAS) FY 85 guide and should cover the following areas:

- The identification of noncomplying POTWs (list) and those that need construction to meet statutory requirements.
- The review, approval and/or modification of §201 plans.
- The request, review, and approval of CCPs and MCPs.
- The establishment of compliance schedules.
- The issuance and reissuance of municipal permits.
- The taking of enforcement actions to obtain compliance.
- The return of POTWs to compliance (and the improvement in the level of municipal compliance).
- The termination of Step 1 and 2 grants.
- The physical and administrative completion and close out of active Step 3 or Step 2/3 grants.

By the end of FY 1985, to the extent possible, final decisions should be reached on applicable effluent limits and compliance schedules for all noncomplying POTWs and State strategies should be updated accordingly. Updating State strategies should be a continuous process from FY 1984 through FY 1988. Annual EPA permit, con-

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struction grant, compliance monitoring, and enforcement commitments will be included in the appropriate sections of EPA's annual Office of Water Accountability System (OWAS), and the Administrator's Strategic Planning and Management System (SPMS). This will help assure that EPA's actions under the Policy are conducted in coordination with related State actions and are consistent with the State strategies and annual §106 plans.

EPA Headquarters will overview implementation of the Policy and will prepare appropriate reports to the EPA Administrator and to Congress. Headquarters will also analyze the State strategies, PCS data, and other available information to determine the adequacy of EPA and State resource commitments, the need for additional guidance and/or technical assistance, and any need for mid-course corrective actions. During this process, the Agency will be looking for successful State and Regional approaches and management techniques in order to share them with other States and Regions. All Headquarters overview will be carried out within the context of OWAS and SPMS, and the EPA/State oversight protocol agreements, which will be individually negotiated with each State, consistent with the FY 85-86 Agency Operating Guidance.[6]

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[6] See FY 85-86 Agency Operating Guidance, February 1984, pp. 9-10.

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SEQUENCE OF ACTIVITIES
FOR
ISSUING PERMITS AND DEVELOPING COMPLIANCE SCHEDULES

A discussion of EPA and State actions that should be taken during the development of the State strategies is presented below. These actions may occur simultaneously or in sequence. This sequence is consistent with the attached Table.

1. Review available data and identify those POTWs that are not in compliance with statutory requirements. This includes those that need construction to meet the 1988 compliance deadline under §301(i).

2. Identify POTWs for which treatment requirements or compliance status may change as a result of revised WQS and WLA, the redefinition of secondary treatment, §301(h) variance decisions, §301(i) eligibility, or EPA's AT review and Federal funding decisions.

3. Identify POTWs that need construction to achieve compliance with statutory requirements.

4. Identify POTWs that have received, or are likely to receive, EPA construction grant funding. States are encouraged to review and revise their Project Priority Lists (PPL) in order to identify the optimum number of POTWs that can be funded.

5. Establish applicable effluent limits and tentative compliance schedules for noncomplying POTWs for which information is already available. For many POTWs, the applicable effluent limits have already been established in existing NPDES permits.

6. Establish deadlines by which POTWs must prepare and submit MCPs or CCPs. To the extent possible, Regions and States should work with affected communities to require such plans in phases through the end of FY 1985, with CCPs for constructed POTWs in noncompliance due in the near term, and MCPs for POTWs facing somewhat uncertain permit effluent limits or funding problems at the far end of the schedule.

7. Establish firm compliance schedules and incorporate them into §301(i) NPDES permits, if eligible, §309(a)(5)(A) AOs, judicial orders, or comparable State actions (see attached Table). If the Region or State agrees with the proposed schedule in the MCP or CCP, it may be incorporated by reference in the POTW's permit, AO, judicial order, or comparable State action. Otherwise, the Region or State should work with the POTW to develop a reasonable schedule for achieving compliance as soon as it is technically and financially possible.

8. Establish firm commitments in §106 workplans for actions on POTWs for which applicable effluent limits are already known or can readily be made, and action plans for POTWs for which decisions on applicable limits will be made (in stages) up to the target date, the end of FY 1985.

9. Carefully monitor compliance with all of the above requirements and take follow-up actions as provided for in State strategies, or as necessary to meet the intent of the Policy.

DRAFT PERMIT ISSUANCE AND COMPLIANCE SCHEDULE DEVELOPMENT TABLE

IN COMPLIANCE

NOT IN COMPLIANCE*

CONSTRUCTION NEEDED

CONSTRUCTION NOT NEEDED

NOT AFFECTED BY REVISED WQS, 2ndy OR § 301 (h) DECISION

AFFECTED BY REVISED WQS, 2ndy, OR 301 (h) § DECISION.

Constructed, not affected by revised WQS, 2ndy § 301 decision.	Constructed, affected by revised WQS, 2ndy, § 301(h) decision	Not affected by revised WQS, 2ndy, § 301(h) decision; violating FEL.	Affected by revised WQS, 2ndy, § 301(h) decision; violating FEL.	Authorized Federal funds available thru Step III to meet July 1988.	Authorized Federal funds uncertain to meet July 1988.	Federal funds not authorized for project[4].	Authorized Federal funds available thru Step III to meet July 1988.	Authorized Federal funds uncertain to meet July 1988.	Federal funds not authorized for project.[3]
• Reissue permit at time of application or extend thru APA.	• Delay reissuance until appropriate effluent limits estab.[2] • Reissue permit in accordance with appropriate effluent limits.	• If permit effective, issue AO which requires CCD and CCP. • Based on CCD and CCP, use appropriate enforcement action to establish compliance schedule. • If permit expired, reissue and take enforcement action as appropriate.	• Use appropriate enforcement action to establish compliance schedule. • Modify permit in accordance with appropriate effluent limits.	• If effective, reissue permit and modify under § 301(i), if eligible, or issue AO.[3] • If expired, reissue permit with § 301(i), if eligible, or issue AO.[3] • Coordinate grant schedule with enforcement schedule in permit/AO.[3]	• If State/EPA determines, based on authorized levels, funds will be available to meet 1988, reissue permit with § 301(i), if eligible, or issue AO.[3] • Coordinate grant schedule with enforcement schedule in permit/AO.[3] • If State/EPA determines, based on authorized levels, funds will not be available to meet 1988, issue AO or § 308 letter requiring MCP. • Based on MCP, establish specific milestone beyond which POTW completes w/own funds. • Reissue permit with § 301(i), if eligible, or new AO, including a compliance schedule.[3]	• Issue AO or § 308 letter requiring submission of MCP • Based on MCP, establish a schedule by which POTW completes w/ own funds. • Reissue permit w/ § 301(i), if eligible, or AO, including compliance schedule.[3]	• Delay permit reissuance until decision made on revised WQS, 2ndy, or § 301(h) application.[1] • Reissue permit in accordance with appropriate effluent limits. • If necessary, require MCP to establish an appropriate compliance schedule to use in § 301(i), if eligible, or AO.	• Delay reissuance until appropriate limits established.[2] • If construction not needed, reissue in accordance with appropriate effluent limits. • If construction is needed and funds are available, reissue w/ § 301(i), if eligible. • Coordinate grant schedule with enforceable schedule in permit/AO. • If State/EPA determines, based on authorized levels, funds won't be available to meet 1988, issue AO or § 308 letter requiring MCP. • Based on MCP, establish specific milestone beyond which POTW completes with own funds. • Reissue permit with § 301(i), if eligible, or AO, including a compliance schedule	• Delay reissuance until appropriate limits established.[2] • If construction not needed, reissue in accordance with appropriate effluent limits. • If construction is needed, issue AO or § 308 letter requiring MCP • Based on MCP, establish schedule by which POTW completes w/own funds. • Reissue permit w/ 301(i), if eligible, or AO, including a compliance schedule.

1 § 301(h) modifications may only be issued by EPA.

2 Where States do not have the legal authority to delay permit reissuance (under a mechanism similar to the APA), the permit should be reissued, and appropriate effluent limits and compliance schedules established no later than July 1, 1985. In some cases, stayed construction may be appropriate and should be decided on the merits of each case.

3 In appropriate cases, judicial orders will be used.

4 State Project Priority List (PPL) based on current authorizations.

Abbreviations:

WQS – Water quality standards and/or wasteload allocations.
2ndy – Redefinition of secondary treatment.
APA – Administrative Procedures Act.
FEL – Final (permit) effluent limits.
AO – Administrative Order.
CCD – Continuous compliance diagnostic (audit) inspection.
CCP – Composite Correction Plan (required by CCD—refer to Municipal Continuous Compliance Policy, August 1981).
MCP – Municipal Compliance Plan.

* Includes POTWs that need construction under §301(i)

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

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WASHINGTON, D.C. 20460

OFFICE OF WATER

SEP 13 1984

MEMORANDUM

SUBJECT: Available Techniques for Obtaining Compliance with National Municipal Policy by Unfunded POTWs Requiring Construction

FROM: Rebecca W. Hanmer, Director
Office of Water Enforcement & Permits

TO: Water Management Division Directors, Regions I - X

The Office of General Counsel (OGC) responded to our request for legal opinions concerning the applicability of the §301(i) compliance extension and the legality of various methods for obtaining compliance with the National Municipal Policy. Attached are copies of those responses dated April 11, 1984 and June 29, 1984. These memoranda address the legal basis for use of enforcement or permitting techniques in establishing compliance schedules for unfunded POTWs (those which will receive no Construction Grant funding) and the potential risks in the use of administrative enforcement techniques when an unfunded POTW proposes to meet the 1988 deadline and is eligible to receive a §301(i) extension. These memoranda should assist you in the implementation of the National Municipal Policy.

The first OGC memorandum, dated April 11, 1984, states:

(1) that an unconstructed and unfunded POTW which is capable of meeting the July 1, 1988 deadline in §301(i) of the Clean Water Act may receive an extension under that section if it is otherwise eligible (Questions 1 and 2, pp. 1 - 5);

(2) that such a POTW remains in violation of a permit issued using §301(b)(1)(B) or (C) deadline requirements until the extension is granted (Question 3, p. 6); and

(3) that such a violator may be subject to an EPA enforcement action (Question 4, pp. 6 - 8).

The second OGC memorandum, dated June 29, 1984, confirms that compliance with an Administrative Order does not preclude further enforcement action by EPA on the underlying violation.

If you have any questions concerning the memoranda, please contact David Shedroff at FTS - 475-8307 or Greg McBrien at FTS - 426-2970.

Attachments

cc: Regional Counsel, Regions I - X, with attachments
Associate Enforcement Counsel, Water, with attachments
Associate General Counsel, Water Division, w/o attachments

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

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

1221.

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

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

SEP 21 1987

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Environmental Criminal Conduct Coming To The Attention Of Agency Officials And Employees

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
Deputy Regional Administrators
Associate Enforcement Counsels
Program Enforcement Directors
Regional Counsels I-X

It is important that all acts of the regulated community exhibiting actual or suspected environmental criminal conduct which come to the attention of any employee of the Agency be referred to the Office of Criminal Investigations for review and possible investigation. I urge each of you to communicate this policy regularly to all of the employees under your supervision. It should also be included in any new employee orientation or training that you conduct.

It is not expected or desired that your staff attempt an in depth legal analysis of whether environmental criminal conduct occurred. The highly trained Special Agents in the Office of Criminal Investigations will do that with the help of attorneys in the Office of Criminal Enforcement Counsel, the Office of Regional Counsel and the Environmental Crimes Section of the Department of Justice. However, in order for employees to recognize possible environmental criminal conduct generally and whether the case is meritorious, the factors listed below should assist their efforts. In addition, my office will help provide training to your staff in this essential area of enforcement.

FACTORS TO CONSIDER IN DETERMINING WHETHER
A MATTER SHOULD BE REFERRED FOR CRIMINAL INVESTIGATION

1. Knowing or Willful Behavior. All federal environmental statutes require some degree of intent or voluntariness (usually expressed in the statute as "knowingly" or "willfully") before a criminal case can be proved. Prosecutions under the Clean Water Act can be prosecuted also for simple negligent acts (carelessness) without demonstrating intent, although such situations are generally of lower prosecutorial priority than are knowing

violations. Almost every federal environmental statute expres[illegible] the type of mental state required to be shown for an act to be criminally punishable.

When statutes, such as the environmental laws, are enacted for the purpose of protecting public health and welfare, and especially in subject areas where there is a strong likelihood of protective governmental regulation, the government generally only has to prove that a person knew what he was doing and he did it voluntarily, not accidentally, in order to establish the state of mind required for a conviction. It is not necessary to show that he actually knew what the law required or that he acted with the specific purpose of violating that law. Also, the knowledge necessary for a criminal conviction may be proven circumstantially; it need not always be shown directly. For example, while there may be no direct evidence (such as a statement by the defendant) that he knew a particular material was a hazardous waste, a document found in his file describing it as such would be good circumstantial evidence of knowledge. Thus employees should be alert to indirect indicators of knowledge and other elements of the offense.

2. Elements of the Offense. In addition to the required degree of intent, each statutory offense consists of a number of other elements, each one of which must be proved. For example, the crime of disposal of hazardous wastes without a permit in violation of RCRA § 3008 (d) requires the government to prove beyond a reasonable doubt that (1) a person (2) knowingly (3) disposed of (4) any hazardous waste listed or identified by characteristic (5) without a permit. Similarly, every environmental offense must be analyzed in terms of its component elements.

Determining whether the required degree of intent and each of the elements of the offense exists and can be proven sometimes entails a complex legal analysis which should be left to the investigators and their attorneys. When faced with a possible criminal case where the intent may be marginal, it is best to advise employees to err on the side of caution and refer the matter for the investigators and attorneys to analyze.

3. Impact on Government's Regulatory Function. Many of EPA's regulatory systems rely heavily on complete and accurate voluntary reporting from the regulated community. When information or documents required to be filed are falsified, concealed or intentionally destroyed, the integrity of the system is in danger. The degree to which an act may have threatened or damaged the system is another factor that can be weighed in the decision to prosecute, but is not a requirement.

4. Harm. The extent of harm or threat of harm to human health or the environment is another factor that is reviewed to determine whether a case should be prosecuted. Prosecutors may look at the duration of the harm or threat, the toxicity of the

pollutants involved, and the proximity to population centers, among others. Proof of harm is not a prerequisite to prosecution but is a factor considered in exercising prosecutorial discretion.

5. Patterns or Practices. It is useful to review a subject's historical record of noncompliance before prosecution. The past practices of a company, whether good or bad, can weigh heavily in sentencing, thereby effecting its deterrent value and prosecutorial merit.

6. Deterrence. A major value of criminal prosecution in an environmental enforcement context is its ability to deter others from doing the same type of act for fear of being prosecuted themselves. For the deterrence to be effective, others similarly situated must become aware of the prosecution. In some areas, one criminal conviction with appropriate penalties can motivate much of the regulated industry to be in compliance. Although this factor is considered, it is not a prerequisite for prosecution.

OTHER CONSIDERATIONS

The factors discussed above are not exclusive and are not in any particular order of importance. Many of the factors overlap. How to weigh the various factors in any given case will depend on the circumstances involved.

It is possible that an event involving environmental criminal activity will not be investigated further or prosecuted. There are innumerable reasons for this including, for example, lack of prosecutorial merit, inadequate proof, the matter would be better handled civilly or administratively, the state is prosecuting the matter, the matter is not commensurate with Agency priorities, and lack of resources. However, if the Office of Criminal Investigations determines that criminal activity occurred after formally opening a case investigation, only the United States Attorney (or his representative) in the District or the Department of Justice can decline to criminally prosecute the case.

If a potential environmental criminal matter comes to the attention of an employee, consultation with the Office of Criminal Investigation should be sought at the earliest opportunity. When in doubt, it is far better to consult with the Office of Criminal Investigations on matters that may be questionable than to risk the possibility of overlooking or failing to recognize serious environmental criminal conduct.

FINANCE MANUAL

FOR

WASTEWATER TREATMENT SYSTEMS

APRIL 1985

Prepared by:
Government Finance Research Center
Govenrment Finance Officers Association
Washington, D.C.

Prepared for:
U.S. Environmental Protection Agency
Office of Water Enforcement and Permits
Under Contract No. 68-01-7050

1435

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

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

APR 1 1985

OFFICE OF WATER

MEMORANDUM

SUBJECT: National Municipal Policy Implementation

FROM: Rebecca W. Hanmer, Director
Office of Water Enforcement and Permits (EN-338)
Rebecca W. Hanmer

TO: Water Management Division Directors
Regions I-X

During the past year, as we received State municipal strategies at Headquarters, the Enforcement Division attempted to create a national inventory of major POTWs (by name) affected by the Policy. This list is necessary to stabilize the universe of POTWs, as well as to track, with confidence, Regional and State progress. Due to the high visibility of the Policy, information is required that we cannot presently provide to Congress and other public institutions. The data we have obtained from the original strategies do not correlate well with data in PCS. In follow-up discussions with Regional staff we have been unable to verify, on a name basis, all the POTWs that are affected and their status with respect to compliance schedules, final limits, and financial capability.

The attached list has been prepared from the names and permit numbers of POTWs identified by Regions and States as of the end of January. In addition to the named permittees, we have succeeded in merging relevant data from the NEEDS and GICS information systems using a crossover file linking NPDES permit numbers and their related Authority/Facility numbers used in the 84 NEEDS survey. The data is presented to you for your review and use in enforcement decision making.

We are not certain if this printout represents all major NPDES permittees affected by the Policy. Late arriving State inventories indicate some of these POTWs may be incorrectly listed. Please review the attached printout to assure that it represents all major POTWs that: (1) are under construction, (2) need construction to meet statutory requirements, and (3) have a high probability for construction once decisions on final effluent limits are made. The corrected list should include all POTWs already on a schedule, regardless of compliance status.

Attached is an instruction sheet to explain the layout of the information and a sample page that highlights the critical elements that need verification immediately. Chuck Evans (FTS 475-8327) of the Enforcement Division will work with your staff to complete this inventory. I ask that you give this a high priority and submit the corrected information to the Enforcement Division by Monday, April 15, 1985. Regions may submit this data by telephone if the updates are not large.

Once we have stabilized the list of affected major POTWs, we intend to update the construction milestone dates quarterly through PCS. For the short term, we need your assistance to learn as many actual dates as possible. As Regions and States update facility and NEEDS data, we will amend the merged data set and continue to provide you with revised lists. At the recent PCS Steering Committee meeting in Washington, on March 19-20, 1985, we discussed a method for tracking final schedules and POTW funding capabilities. The use of the PCS data field to do this (RDF6) needs further evaluation and will be discussed in a Regional conference call on Thursday, April 4, 1985. When the codes have been established, our office will provide detailed guidance on their use and update.

Along with the corrected MCP inventory, Regions should also submit a list of completed, major POTWs that have been identified in original and updated State strategies as requiring Composite Correction Plans (CCP). Once this list is established, we will review it periodically with the Regions to follow trends.

I would also like to emphasize a few other developments that have a significant bearing on this program's success in FY85. At the National Branch Chief's meeting early in May, one of the main topics will be the National Municipal Policy. Our office sent a memorandum to you about this meeting on March 27, 1985. I encourage each of you, or your Compliance Branch Chief, to attend this meeting as there are some developing enforcement issues that must be resolved before all final schedules are established.

Recently, OWEP and the Office of Municipal Pollution Control (OMPC) have coordinated to present a series of workshops on financial capability analysis that will provide basic information on the review and evaluation of the financial components of MCPs and/or other demonstrations of affordability. Knowledge in this area is of increasing importance as we enter the enforcement phase of the National Municipal Policy. Bill Whittington and I have announced this under separate memo and urge you to make arrangements for the appropriate Regional and State personnel to attend.

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I realize we have given you a short time to review and update this information on your affected universe of POTWs. Please make every effort to work with our staff to complete this inventory so that we can summarize the data and prepare it for discussion at the National meeting in May. The workload and compliance implications of the current status of schedules will have a significant impact on our priorities for the remainder of the fiscal year. The emphasis placed on the Policy by the Administrator requires that we not lose any momentum gained in the States by our present activities.

For further assistance with these issues or plans, please call me (FTS 475-8488) or Bill Jordan, Director, Enforcement Division (FTS 475-8304).

Attachments

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

1/14/n

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

APR 12 [redacted]

OFFICE OF
WATER

MEMORANDUM

SUBJECT: National Municipal Policy Implementation

FROM: Jack E. Ravan Jack Ravan
Assistant Administrator
for Water (WH-556)

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

At the recent National Enforcement Conference, Administrator Lee Thomas publicly reaffirmed the Agency's intention to uphold the National Municipal Policy in its dealings with States and to enforce the statutory deadline of July 1, 1988. I made similar remarks during that Conference and during the Water Pollution Control Federation (WPCF) Government Affairs Seminar in March. Also, at the winter ASIWPCA National meeting, the Director of the Office of Water Enforcement and Permits (OWEP) again reconfirmed this Agency position.

Now that we are mid-way through the year, I would like to take this opportunity to discuss my current thoughts regarding implementation of the National Municipal Policy. We must be convinced and we must assure the States that FY 1985 is not a trial period. Each Region must have current, workable, and complete State strategies that reflect the underlying principles of the Policy. As you know, enforceable compliance schedules are required, with or without Federal grant assistance. It is presumed that all schedules beyond July 1988 will require judicial action. Strategies should contain updated inventories that present current compliance status with applicable effluent limits, as well as any technical or financial requirements for full compliance. Regional municipal strategies (or the State equivalent) should serve as a current work plan as well as the long-term framework for coordinating EPA and State activities to: (1) set as many schedules as possible by the target date of September 30, 1985, and (2) achieve as much compliance as possible before the final compliance date of July 1, 1988.

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Potential Implementation Problems

During our National Municipal Policy workshops in the spring of 1983, one of the main themes was that this program would not become "business as usual." Current commitments for FY 1985, for all facilities that need schedules, indicate that only 29% of the universe is being addressed, including only 67% of the majors that are not on enforceable schedules. Even if we achieve these commitments, much work will have to be done in the 33 months after FY 1985 to meet the goals of the Policy. Examination of the first quarter SPMS/OWEG results revealed that, although it appears we exceeded our commitments, we may not have achieved the solid compliance results we were seeking. For example, we have learned that some NPDES State Administrative Orders (AO) contain schedules that are reported as "final" by the State, but are considered to be interim schedules in many cases until final negotiations with the permittee are completed.

The compliance schedules established in FY 1985 should address facilities causing significant impacts to water quality or that need as much time as possible to meet the 1988 compliance date. Otherwise, we will experience even greater problems as we near the statutory deadline of July 1, 1988. I urge you to review your basic working agreements with the States to be certain that they are actively attempting to achieve the Municipal Policy goals, deadlines, and other enforcement requirements.

Special Issues Identified

Over the past several months, several questions have arisen as Regions and States move forward to establish enforceable schedules pursuant to the conditions of the Policy and its Regional and State Guidance. Since this is a critical step in the successful management of State strategies, there is a need for National consistency in the preparation and execution of these legal instruments. Regions need to make firm and consistent responses to the States on these issues. The questions raised include:

1. Can EPA or the States issue permits with final compliance dates past July 1, 1988?

Permits cannot contain a schedule to meet secondary treatment requirements later than July 1, 1988. In fact, only those POTWs that applied for and are eligible for a §301(i) extension may be issued a permit with a schedule to meet secondary treatment past July 1, 1977. In these cases, the requirement to meet final limits should be as soon as possible, but not later than July 1988. All other permits must contain a requirement to meet secondary limits at the time of issuance, since (as stated above) the final compliance date for these POTWs was July 1, 1977. Any POTW not meeting secondary treatment requirements and not eligible for a 301(i) extension is in violation of the Act and is subject to an enforcement action. Any compliance schedule to meet secondary effluent limits for POTWs <u>not</u> eligible for a §301(i) extension must be contained in an AO and not in an NPDES permit.

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2. Can EPA or the States issue an AO that contains a schedule to meet final effluent limits that extends beyond July 1, 1988?

The National Municipal Policy does not specifically require that schedules beyond July 1988 be sanctioned by a court. However, the Regional and State guidance on the Policy that I issued on April 17, 1984, presumes that all such extended schedules will be established through the judicial process. This is the Agency's enforcement policy with respect to the statutory compliance deadline.

Since the April 17, 1984, guidance is not binding on State NPDES programs, a State could choose to issue an AO with a schedule beyond July 1988, in direct conflict with the spirit of the Administrator's Policy and the letter of the subsequent guidance. In such cases, especially where the State's order does not involve imposition of administrative penalties, EPA Regions should consider: 1) issuing an AO that specifies a compliance date no later than July 1988, which then supercedes the State AO, or 2) filing a civil action to obtain a judicial order that contains a final compliance date deemed appropriate by the court.

3. What constitutes a "final" and "enforceable" schedule under the Policy?

One of the main principles upon which the Policy is based is the assurance of "certainty" prior to requiring commitments to major capital investments. In order to do this, Regions, States, and communities should strive to eliminate as many of the "unknowns" as possible, and as quickly as possible, with respect to final limits, correct treatment technology, actual costs, available funds, and revenue systems that are necessary to maintain the plant once it is completed. Schedules established by Regions and States must reflect the appropriate legal, technical, and economic circumstances. Additionally, enforceable schedules must contain sufficient interim milestones that require demonstrations of progress and allow for subsequent enforcement actions, if necessary, prior to the final compliance deadline.

Delays in eliminating the uncertainty of final effluent limits have focused on three situations. First, limit changes associated with the secondary treatment redefinition/percent removal should not cause major problems. The Office of Water Enforcement and Permits recently sent out draft guidance for Regional and State review and requested data on how many municipal permits appear to need alteration. Second, for those cities where 301(h) decisions are pending, Regions should continue to adhere to the direction contained in Al Alm's October 29, 1984 memorandum, "Expediting Achievement of Water Quality Improvement by 301(h) Applicants." And third, advanced waste treatment (AWT) may be needed to meet Section 101(a)(2) goals (fishable/swimmable) of the Act. The Water Quality Standards Regulation requires States to review water quality standards to assure that the standards do reflect these goals. If a State believes that AWT may be necessary, then priority should be given to completing those use attainability analyses first.

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In closing I want to reemphasize how essential it is for Regions and States to have as many noncomplying communities as possible on final, enforceable schedules by September 30, 1985. Unless we show outstanding results, we will not be able to achieve the statutory compliance deadline of July 1, 1988. If my office can be of assistance in resolving additional implementation issues, please contact us.

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

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

OFFICE OF
WATER

JUL 22 1985

Honorable Ed Jones
House of Representatives
Washington, D.C. 20515

Dear Mr. Jones:

Thank you for your letter of June 25, 1985, requesting our comments on a letter from James E. Word, Commissioner of the Tennessee Department of Health and Environment. Commissioner Word is concerned that no more Federal grants for sewage construction projects would be made for publicly-owned treatment works (POTW's) not in compliance with the Clean Water Act (the Act) effluent limitations by July 1, 1988.

The key to understanding the issue that Commissioner Word has raised is to distinguish between our enforcement policy and our policy for awarding grants to municipalities for construction of wastewater treatment facilities. Our enforcement policy is set forth in the National Municipal Policy (NMP), which was published in the Federal Register on January 30, 1984, and says that: "The Clean Water Act requires all publicly-owned treatment works to meet the statutory deadlines and to achieve the water quality objectives of the Act, whether or not they receive Federal funds." The policy also provides for flexibility in dealing with communities that face extraordinary hardships in meeting the statutory deadline for reasons of financial or physical incapability.

EPA grant policy with respect to funding construction of wastewater treatment facilities does not prohibit EPA (or a delegated State such as Tennessee) from awarding grants to municipalities that may not be able to complete construction by a statutory deadline. In fact, many municipalities that are now being addressed under the NMP were supposed to be in compliance with the earlier statutory deadline (1977), and we have continued to provide grant funds to these facilities.

Clearly, some of the facilities that are of concern to Commissioner Word may be eligible for extensions based on the finding of physical impossibility. These decisions have to be made on a case-by-case basis, however. In guidance we issued to the EPA Regions to help promote consistent nationwide implementa-

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tion of the NMP, we advised that the Region or State should work with any community that is seeking an extension based on a finding of either financial or physical impossibility. Where such a finding can be supported by the facts, we expect the Region/State to reach agreement on a compliance schedule that results in compliance as soon as possible after the July 1, 1988, deadline, and to incorporate this schedule into a consent decree that is sanctioned by a State or Federal court.

If I or my staff can provide further information or assistance on this issue or any other, please contact me.

Sincerely,

Acting Assistant Administrator
for Water

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the House of Representatives and the Committee on Environment and Public Works of the Senate.

"(7) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $25,000,000 per fiscal year for each of the fiscal years ending September 30, 1986, September 30, 1987, September 30, 1988, September 30, 1989, and September 30, 1990. Amounts appropriated under this subsection shall remain available until expended.".

Page 71, line 4, strike out "(e)" and insert in lieu thereof "(f)".

Page 74, line 13, strike out "and (d)" and insert in lieu thereof ", (d), and (e)".

Page 74, line 14, after "Act" insert "and under section 36 of this Act, relating to maintenance of water quality in estuaries,".

Mr. OBERSTAR (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

Mr. CHAIRMAN. Is there objection to the request of the gentleman from Minnesota?

There was no objection.

Mr. OBERSTAR. Mr. Chairman, this amendment is in concert with the previous amendment just adopted by the Committee. It would provide funding to States to establish surveys of their intrastate waters, surface waters, within their State to determine their condition of acidity, whether due to acid deposition of mine drainage to enable such States to set up programs for acid rain cleanup.

Mr. ROE. Mr. Chairman, will the gentleman yield?

Mr. OBERSTAR. I yield to the chairman of the subcommittee, the gentleman from New Jersey.

Mr. ROE. I thank the gentleman for yielding.

Mr. Chairman, this is a very fine amendment and it is really a technical amendment and we appreciate it. We accept the amendment.

Mr. SNYDER. Mr. Chairman, will the gentleman yield?

Mr. OBERSTAR. I yield to the gentleman from Kentucky.

Mr. SNYDER. I thank the gentleman for yielding.

Mr. Chairman, we accept the amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Minnesota [Mr. OBERSTAR].

The amendment was agreed to.

□ 1700

Mr. SOLOMON. Mr. Chairman, I move to strike the last word.

Mr. Chairman, earlier this afternoon the Committee of the Whole passed a committee amendment establishing a badly needed grants program to provide for the first time aid to localities where ground water supplies have been polluted. The same amendment was added to the Clean Water Act amendments in the House bill last year, but it was never passed, as we all know.

One of the most seriously affected municipality in the country was, and still is, the town of Moreau in a rural area of New York State. This was one of the top priorities of need communities, according to the debate last year. At this point, Mr. Chairman, I would like to ask the chairman of the subcommittee, the gentleman from New Jersey [Mr. ROE], if he would engage in a brief colloquy.

Mr. ROE. Yes, of course, if the gentleman will yield.

Mr. SOLOMON. Mr. Chairman, am I correct in my understanding that, as our discussion last year showed, a new water district for the town of Moreau is considered a top priority of the committee and would be eligible for full funding of up to $2 million under the terms of the Johnson legislation, as incorporated in your amendment this year?

Mr. ROE. Mr. Chairman, if the gentleman will yield, I think the gentleman has exactly articulated the entire issue involved. There is no question that under the Johnson language in the legislation the town of Moreau should receive top priority.

Mr. SOLOMON. Mr. Chairman, I thank the gentleman, and again I would like to commend the gentlewoman from Connecticut [Mrs. JOHNSON] and the other members of the committee for developing this workable approach to the problem of ground water contamination, and on behalf of all the people in this country I want to commend Chairman ROE for the outstanding job he has done on this subcommittee.

AMENDMENT OFFERED BY MR. MOODY

Mr. MOODY. Mr. Chairman, I offer an amendment, and I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

The text of the amendment is as follows:

Amendment offered by Mr. MOODY: In the matter inserted on page 80 after line 14 by Mr. Howard's amendment, insert at the end of subparagraph (B) the following:

A permit issued under this section may cover one or more than one municipal separate storm sewer.

Mr. MOODY. Mr. Chairman, this is a brief technical amendment to make clear the intent of a section of the Howard amendments to the committee amendment that were adopted earlier regarding the nonexemption of urban areas from requiring a permit for stormwater overflow.

Mr. ROE. Mr. Chairman, will the gentleman yield?

Mr. MOODY. I yield to the subcommittee chairman.

Mr. ROE. Mr. Chairman, we have reviewed this amendment. It is really a clarifying and an important amendment. We are prepared to accept the amendment on this side.

Mr. SNYDER. Mr. Chairman, will the gentleman yield?

Mr. MOODY. I yield to the gentleman from Kentucky.

Mr. SNYDER. Mr. Chairman, we are prepared to accept the amendment on this side.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Wisconsin [Mr. MOODY].

The amendment was agreed to.

Mr. YOUNG of Missouri. Mr. Chairman, I move to strike the last word.

Mr. Chairman, I will ask the gentleman from New Jersey [Mr. ROE], the subcommittee chairman, if he will engage in a colloquy.

Mr. ROE. I will, of course, Mr. Chairman, if the gentleman will yield.

Mr. YOUNG of Missouri. Mr. Chairman, it has been brought to my attention that EPA is contemplating a policy that would deny Federal grant funds to local treatment projects that will not be completed by the July 1, 1988 secondary treatment deadline. Apparently, this unwritten interpretation is based on the national municipal policy adopted in 1984 by EPA. Mr. Chairman, what concerns me is that we have numerous local agencies that have been working diligently and against substantial financial and other limitations to comply with the 1988 secondary deadline. Mr. Chairman, as you know, there are numerous projects now under construction to comply with this deadline. We also know that while some of these projects may not meet the July 1, 1988 deadline, an EPA policy as I described will gurantee that these projects will not meet the deadline.

Mr. Chairman, does the intent of Congress on this legislation support such a policy by EPA.

Mr. ROE. No, it is absolutely converse to the policy.

Mr. YOUNG of Missouri. Mr. Chairman, furthermore, it seems the whole intent of this legislation before us today, as well as the Senate bill now pending before this Chamber, recognizes that despite the best efforts of many agencies, completion of some projects will occur after the deadline. I cannot believe that the intent of Congress could be interpreted to support a policy to fund only those projects that would be completed by the July 1, 1988 deadline and then deny funds to a project slated for completion for August 1, 1988. Such a policy, it seems, negates the efforts of the Congress in developing legislation to assist communities in coming into compliance with this Federal requirement before and after the July 1, 1988 deadline.

Mr. Chairman, do you feel that additional statutory direction is necessary to guarantee that this policy will not be implemented.

Mr. ROE. Mr. Chairman, will the gentleman yield?

Mr. YOUNG of Missouri. I yield to the subcommittee chairman.

Mr. ROE. No; I think, as the gentleman has pointed out, that the provisions of our bill provide that sufficient funding will be available to complete

more projects than originally contemplated by the administration.

Mr. YOUNG of Missouri. Mr. Chairman, I thank the gentleman. I am pleased to know that our agencies can continue to expect Federal assistance in meeting these deadlines.

Mr. Chairman, I yield back the balance of my time.

Mrs. JOHNSON. Mr. Chairman, I move to strike the last word.

(Mrs. JOHNSON asked and was given permission to revise and extend her remarks.)

Mrs. JOHNSON. Mr. Chairman, I rise in very strong support of the passage of H.R. 8, and I want to take this opportunity to commend the chairman of the subcommittee, the gentleman from New Jersey (Mr. ROE), the chairman of the committee, the gentleman from New Jersey (Mr. HOWARD), and the ranking members, the gentleman from Kentucky (Mr. SNYDER) and the gentleman from Minnesota (Mr. STANGELAND). These gentlemen have together worked to craft for us a superior piece of legislation.

This is not merely a reauthorization of legislation that has gone far to clean the rivers and sources of water in America but is a refinement of that legislation. It represents the best in the legislative tradition of oversight, and it improves as well the ability of States to utilize their resources to implement more economically the requirements of this important legislation.

I also want to point out that it has in it three portions that are of particular importance to the Northeast area that I represent. I do want to call to the Members' attention that the combined sewer overflow program, which in the past was not eligible for ordinary sewer grant funds except on a limited basis, will, as a result of this thoughtful and thorough piece of legislation, be eligible for any amount of funding the State desires to make available to it. That is extremely important, especially to the older cities of America.

It also addresses the crying need for prevention of non-point-source pollution and for addressing the serious problem of ground water contamination.

Mr. Chairman, I merely want to commend the chairman of the committee and the chairman of the subcommittee for their thoughtful and able leadership, and I join them in supporting this reauthorization.

Mr. ROE. Mr. Chairman, will the gentlewoman yield?

Mrs. JOHNSON. I yield to the chairman of the subcommittee.

Mr. ROE. Mr. Chairman, we express to the gentlewoman our great appreciation for the superb job she has done and for having contributed to the legislation. It would not have been possible without her.

Mrs. JOHNSON. Mr. Chairman, I thank the gentleman.

AMENDMENT OFFERED BY MR. BREAUX

Mr. BREAUX. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. BREAUX: On page 80, strike out lines 7 through 14 and insert in lieu thereof the following:

"ing precipitation runoff and which do not come into contact with any overburden, raw material, intermediate product, finished product, by-product, or waste product located on the site of such operations. Any person discharging stormwater runoff not described in the preceding sentence from mining operations or oil or gas exploration, production, processing, or treatment operations or transmission facilities shall monitor the quality of water in such flows and shall report not less often than annually to the Administrator, or at such intervals as the Administrator or the State deems appropriate.".

Mr. BREAUX (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Louisiana?

There was no objection.

(Mr. BREAUX asked and was given permission to revise and extend his remarks.)

Mr. BREAUX. Mr. Chairman, I would say to the members of the committee that the amendment I am offering goes to a section of the bill, section 26, which sets up a procedure for various exemptions from the permitting of certain storm-water runoff. What we are dealing with, for instance, is rain water that runs across a field.

Mr. ROE. Mr. Chairman, will the gentleman yield?

Mr. BREAUX. I am glad to yield to my subcommittee chairman.

Mr. ROE. Mr. Chairman, we have looked at this amendment. We feel the amendment is reasonable, and we have no objection to it on this side.

Mr. SNYDER. Mr. Chairman, will the gentleman yield?

Mr. BREAUX. I am glad to yield to the gentleman from Kentucky.

Mr. SNYDER. Mr. Chairman, I want to say that this is a good amendment, and we are pleased to accept it.

Mr. BREAUX. Mr. Chairman, I am prepared to provide a further explanation of the amendment, but now, with the assurance of the chairman of the subcommittee and the ranking minority member, I ask for an aye vote on my amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Louisiana (Mr. BREAUX).

The amendment was agreed to.

AMENDMENT OFFERED BY MR. CRAIG

Mr. CRAIG. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. CRAIG: Page 56, line 10, before "Section" insert: "(a) IN GENERAL—".

Page 57, after line 4, insert the following:

(b) SENSE OF CONGRESS.—It is the sense of Congress that the Administration and the States, in developing, publishing, and revising water quality criteria under [illegible]on 304(a)(1) of the Federal Water P[illegible]on Control Act shc[illegible]

(1) consider the economic effects of implementation of the proposed water quality criteria;

(2) consider cyclical changes in the climate and environment; and

(3) take into account the recommendations of the concerned States and the findings and results of site specific and areawide research, tests, experiments, and demonstration programs conducted by the concerned States.

Mr. CRAIG (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Idaho?

There was no objection.

Mr. CRAIG. Mr. Chairman, in 1981, in concurrence with the Idaho Health and Welfare Department, the State legislature acted to modify proposed State water quality standards below hydroelectric facilities to establish a dissolved oxygen standard of 5 milligrams/litre (m/l) average during a 4-hour period between the months of May and October and a 6 m/l average during the remaining months. EPA later disapproved these standards siting that they would not adequately protect salmonid spawning a[illegible] the other life processes of these fi[illegible] lier this year, the EPA argued t[illegible] dissolved oxygen standard should be 6.5 m/l on a 30-day average, 5 m/l for a 7-day average, and a minimum of 4 m/l during nonspawning periods.

If the EPA's proposed standard was adopted, dams in Idaho would be forced to install monitoring devices and other expensive equipment to increase the level of oxygen in water below the dams. The issue to be addressed here is the legitimacy of EPA's claim that their standards are necessary. The EPA has testified before the Idaho Legislature that it cannot identify any areas of adverse impact to fisheries or aquatic life but all the same, they feel we should modify our standards in order to meet these arbitrary levels.

If the EPA and Idaho can't reach an agreement regarding the disputed standards, the EPA will promulgate its own and enforce them. If the State refuses to follow the EPA's standards, we would lose Federal funds for construction of city wastewater treatment plants.

In closing, Mr. Chairman, my amendment is a sense of the Congress that the Administrator and the States in developing, publishing, and revising water quality criteria under section 304(a)(1) of the Federal Water Po[illegible]tion Control Act should cons[illegible] economic impact of their dec[illegible] the impacted States.

Mr. ROE. Mr. Chairman, will the gentleman yield?

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

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

JUL 24 1985

OFFICE OF WATER

MEMORANDUM

SUBJECT: Implementation of the National Municipal Policy

FROM: Henry L. Longest, II
Acting Assistant Administrator
for Water

Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Regional Administrators
Regions I - X

The purpose of this memorandum is to reaffirm the Environmental Protection Agency's (EPA) commitment to implementing the National Municipal Policy and focus your attention on specific actions EPA must pursue in order to obtain compliance by the July 1, 1988, statutory deadline. All noncomplying facilities must achieve compliance as soon as possible, regardless of the availability of Federal grant assistance. Publicly-owned treatment works (POTW) that demonstrate their inability to meet requirements by the compliance deadline due to extraordinary circumstances may obtain reasonable schedules with final dates after July 1, 1988, with the presumption that all such schedules must be established through judicial orders.

On April 12, 1985, then Assistant Administrator for Water, Jack Ravan, issued a memorandum clarifying certain enforcement positions we are taking concerning the National Municipal Policy (the Policy) and urging that we strive to meet the interim goal of establishing enforceable schedules for all noncomplying POTWs by September 30, 1985. Since that time, we have reviewed the second and third quarter Strategic Planning and Management System/Office of Water Evaluation Guide (SPMS/OWEG) results, discussed our implementation progress at the Office of Water Enforcement and Permits (OWEP) National Branch Chief's meeting on May 2, 1985, and reviewed the findings of the Office of Management Systems Evaluation (OMSE) study on how the Regions and States are carrying out the Policy. You will recall that, at the recent Regional Administrators

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meeting, the Policy was one of the key items on the agenda. During this session, these matters were reviewed along with the status of the Policy. Lee Thomas also emphasized the role of enforcement in carrying out the Policy and the need for Regional leadership to assure equitable and consistent enforcement toward municipalities. Highlights of these activities are discussed below, including a POTW enforcement initiative scheduled for late FY 1985/early FY86. In addition, we have provided direction on five current enforcement issues related to the Policy in an attachment.

Status of Enforceable Schedules

As stated previously, one of the goals of the Policy is to have all noncomplying POTWs on final, enforceable schedules by the end of FY 1985. Despite good efforts by some EPA Regions, the combined efforts of Regions and States have addressed less than half the national workload for major POTWs as of the end of the third fiscal quarter. We will need a tremendous fourth quarter effort in order to meet our SPMS commitments, let alone the interim Policy goal for all noncomplying POTWs.

Obtaining Management Information

Additionally, we are concerned about the OMSE study finding that EPA Regions and States may not have all the necessary information to carry out their oversight and enforcement roles. Such information needs should have been a significant component of original State municipal strategies and deficiencies should have since been addressed in State/EPA agreements. OWEP is presently working with EPA Regions and States to automate fully the tracking of municipal data in the Permit Compliance System (PCS). Unfortunately, this cannot be accomplished until late FY 1985 or early FY 1986. In the interim, Regions and States must establish information sharing procedures so that administrative activities proceed smoothly. Regional Water Enforcement staff must also coordinate with Construction Grants staff to make better use of the available information on grant and funding status. Toward this end, OWEP and the Office of Municipal Pollution Control (OMPC) have initiated an effort to integrate PCS, NEEDS, and GICS files so that users can review pertinent compliance schedule, treatment, and construction grants information on POTWs by using the appropriate NPDES permit numbers.

Enforcement Initiative

In order to underscore EPA's resolve to enforce the July 1988 statutory deadline and the other National Municipal Policy requirements, EPA Headquarters, working with the Department of Justice, is developing a municipal enforcement initiative to supplement previous municipal referrals. The initiative will focus on major POTWs that need

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construction to comply with FELs. Regions should closely examine all POTWs that are possible candidates for this initiative; the more varied they are in terms of location and size, the more likely the initiative will achieve its desired impact. Each Region will be expected to prepare its best case(s) for referral early in FY86 so as to send a truly national message to the POTW community. Our offices are already in touch with Regional staff to identify appropriate candidates. In the near future, we will send you further information about this initiative by separate memorandum.

It is clear that Regions and States must act now in concert to address the backlog of uncompleted schedules and to establish an effective working relationship that will allow them to gain the momentum necessary to achieve full compliance by 1988. We believe this will take your personal support and involvement, as well as that of your program and legal staff, in order to maintain EPA's resolve that the Policy be carried out with equal determination by all partners in the NPDES program. We ask that you lend additional emphasis to this Policy and see that EPA/ State activities are coordinated in a way that assures the integrity of the Policy.

We have also asked the technical and legal staffs in our offices to work closely with you and your staff to resolve any matters of concern. Should you need assistance, please contact William Jordan, Director, Enforcement Division, OWEP at (FTS) 475-8304, or Glenn Unterberger, Associate Enforcement Counsel for Water, OECM, at (FTS) 475-8180.

Attachment

ATTACHMENT

Enforcement Issues†

Issue: Necessary EPA action where final, enforceable schedules are not in place by September 30, 1985.

Action: OWEP will prepare a summary report of the POTWs in this category for the Administrator. EPA Regions should work with their States now to develop individual action plans for each POTW, beginning with those that need long-term construction schedules. Where States do not take action to require schedules or to establish enforceable schedules, the Region should take independent actions to do so. FY86 SPMS commitments should reflect the most expeditious timetable for completing enforceable schedules for the remaining majors and a substantial percentage of the minors.

Issue: EPA's position concerning POTWs eligible for grants in FYs 1986, 1987, or beyond.

Action: In all cases, Regions and States are to continue to require POTWs to comply with orders to establish schedules and meet statutory requirements by July 1, 1988, regardless of future eligibility for Federal grant assistance. POTWs must begin the work now to achieve compliance.

Issue: EPA's response where States extend the 1988 compliance deadline in a manner inconsistent with the "extraordinary circumstances" provisions of the National Municipal Policy (and its associated Regional and State guidance), or extend the deadline by using nonjudicial actions.

Action: Approved States must obtain judicial orders to establish enforceable schedules beyond the 1988 deadline to be in conformance with the Policy. If not, they must defer to EPA enforcement. All extensions beyond the statutory deadline should receive judicial review, be sanctioned by a Federal or State court, and be based on a demonstration of physical or financial impossibility. If a State does not wish to use court actions, or subscribe to the physical or financial impossibility requirement for extensions, or will not accept the Agency's premise that all extensions must be sanctioned by a court, Regions should: 1) issue an Administrative Order (AO) that specifies a compliance date no later than July 1, 1988 (where compliance by the statutory deadline is possible), or 2) prepare referrals of these POTWs to the Department of Justice, starting with the most serious cases. Regions and States are to confer on all schedules that are expected to go beyond July 1, 1988, to assure consistency with the National Policy and the accompanying Regional and State guidance.

† Detailed discussion papers have been prepared on each issue and will be provided to your staff in the near future.

Issue: Treatment of §301(h) applicants within the Policy.

Action: In all cases where a §301(h) waiver is denied, the POTW should be placed on an enforceable schedule to achieve compliance as soon as possible, but not later than July 1, 1988. In cases where the POTW demonstrates it cannot achieve compliance by the statutory deadline, the schedule should be incorporated in a judicial order. If a final decision on the waiver application has not yet been made, the Region should continue to monitor the permittee for compliance with applicable requirements and act on those items which the POTW will have to do regardless of the decision on the application.

Issue: Treatment of wet-weather bypasses within the Policy.

Action: Wet weather bypasses are not a priority category within the Policy. The Policy does apply to dry weather bypasses and the Region should use appropriate enforcement action to eliminate such activities and assure compliance.

Issue: Up-front penalties for violations of the July 1988 compliance deadline.

Action: As a matter of policy, EPA will seek up-front penalties for violations of the July 1, 1988, deadline. These penalties should consider the economic benefit to the municipality from noncompliance and the fact that EPA could not obtain acceptable action by the municipality short of litigation. In addition, these penalties should result from the exercise of sound, case-by-case judgment which reflects past violations and mitigating circumstances such as good faith efforts to comply, other regulatory issues affecting the certainty of final limits (revised water quality standards, wasteload allocations, pending §301(h) decisions, or §208 studies), and the ability to pay.

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APR 12 1985

MEMORANDUM

SUBJECT: National Municipal Policy Implementation

FROM: Jack E. Ravan
Assistant Administrator
for Water (WH-556)

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

At the recent National Enforcement Conference, Administrator Lee Thomas publicly reaffirmed the Agency's intention to uphold the National Municipal Policy in its dealings with States and to enforce the statutory deadline of July 1, 1988. I made similar remarks during that Conference and during the Water Pollution Control Federation (WPCF) Government Affairs Seminar in March. Also, at the winter ASIWPCA National meeting, the Director of the Office of Water Enforcement and Permits (OWEP) again reconfirmed this Agency position.

Now that we are mid-way through the year, I would like to take this opportunity to discuss my current thoughts regarding implementation of the National Municipal Policy. We must be convinced and we must assure the States that FY 1985 is not a trial period. Each Region must have current, workable, and complete State strategies that reflect the underlying principles of the Policy. As you know, enforceable compliance schedules are required, with or without Federal grant assistance. It is presumed that all schedules beyond July 1988 will require judicial action. Strategies should contain updated inventories that present current compliance status with applicable effluent limits, as well as any technical or financial requirements for full compliance. Regional municipal strategies (or the State equivalent) should serve as a current work plan as well as the long-term framework for coordinating EPA and State activities to: (1) set as many schedules as possible by the target date of September 30, 1985, and (2) achieve as much compliance as possible before the final compliance date of July 1, 1988.

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Potential Implementation Problems

During our National Municipal Policy workshops in the spring of 1983, one of the main themes was that this program would not become "business as usual." Current commitments for FY 1985, for all facilities that need schedules, indicate that only 29% of the univers is being addressed, including only 67% of the majors that are not on enforceable schedules. Even if we achieve these commitments, much work will have to be done in the 33 months after FY 1985 to meet the goals of the Policy. Examination of the first quarter SPMS/OWEG results revealed that, although it appears we exceeded our commitment we may not have achieved the solid compliance results we were seeking For example, we have learned that some NPDES State Administrative Orders (AO) contain schedules that are reported as "final" by the State, but are considered to be interim schedules in many cases until final negotiations with the permittee are completed.

The compliance schedules established in FY 1985 should address facilities causing significant impacts to water quality or that need as much time as possible to meet the 1988 compliance date. Otherwise we will experience even greater problems as we near the statutory deadline of July 1, 1988. I urge you to review your basic working agreements with the States to be certain that they are actively attempting to achieve the Municipal Policy goals, deadlines, and other enforcement requirements.

Special Issues Identified

Over the past several months, several questions have arisen a Regions and States move forward to establish enforceable schedules pursuant to the conditions of the Policy and its Regional and Stat Guidance. Since this is a critical step in the successful manager of State strategies, there is a need for National consistency in t preparation and execution of these legal instruments. Regions nee to make firm and consistent responses to the States on these issu The questions raised include:

1. Can EPA or the States issue permits with final compliance da past July 1, 1988?

Permits cannot contain a schedule to meet secondary treatm requirements later than July 1, 1988. In fact, only those POTW that applied for and are eligible for a §301(i) extension may b issued a permit with a schedule to meet secondary treatment pa July 1, 1977. In these cases, the requirement to meet final l should be as soon as possible, but not later than July 1988. other permits must contain a requirement to meet secondary lim the time of issuance, since (as stated above) the final compl date for these POTWs was July 1, 1977. Any POTW not meeting treatment requirements and not eligible for a 301(i) ext sic violation of the Act and is subject to an enforcement a on. compliance schedule to meet final effluent limits for POTWs § 6301(i) extension must be contained in an AO

2. Can EPA or the States issue an AO that contains a schedule to meet final effluent limits that extends beyond July 1, 1988?

The National Municipal Policy does not specifically require that schedules beyond July 1988 be sanctioned by a court. However, the Regional and State guidance on the Policy that I issued on April 17, 1984, presumes that all such extended schedules will be established through the judicial process. This is the Agency's enforcement policy with respect to the statutory compliance deadline.

Since the April 17, 1984, guidance is not binding on State NPDES programs, a State could choose to issue an AO with a schedule beyond July 1988, in direct conflict with the spirit of the Administrator's Policy and the letter of the subsequent guidance. In such cases, especially where the State's order does not involve imposition of administrative penalties, EPA Regions should consider: 1) issuing an AO that specifies a compliance date no later than July 1988, which then supercedes the State AO, or 2) filing a civil action to obtain a judicial order that contains a final compliance date deemed appropriate by the court.

3. What constitutes a "final" and "enforceable" schedule under the Policy?

One of the main principles upon which the Policy is based is the assurance of "certainty" prior to requiring commitments to major capital investments. In order to do this, Regions, States, and communities should strive to eliminate as many of the "unknowns" as possible, and as quickly as possible, with respect to final limits, correct treatment technology, actual costs, available funds, and revenue systems that are necessary to maintain the plant once it is completed. Schedules established by Regions and States must reflect the appropriate legal, technical, and economic circumstances. Additionally, enforceable schedules must contain sufficient interim milestones that require demonstrations of progress and allow for subsequent enforcement actions, if necessary, prior to the final compliance deadline.

Delays in eliminating the uncertainty of final effluent limits have focused on three situations. First, limit changes associated with the secondary treatment redefinition/percent removal should not cause major problems. The Office of Water Enforcement and Permits recently sent out draft guidance for Regional and State review and requested data on how many municipal permits appear to need alteration. Second, for those cities where 301(h) decisions are pending Regions should continue to adhere to the direction contained in Al Alm's October 29, 1984 memorandum. "Expediting Achievement of Water Quality Improvement by 301(h) Applicants." And third, advanced waste treatment (AWT) may be needed to meet Section 101(a)(2) goals (fishable/swimmable) of the Act. The Water Quality Standards Regulation requires States to review water quality standards to assure that the standards do reflect these goals. If a State believes that AWT may be necessary, then priority should be given to completing those use attainability analyses first.

In closing I want to reemphasize how essential it is for regions and states to have as many noncomplying communities as possible on final, enforceable schedules by September 30, 1985. Unless we show outstanding results, we will not be able to achieve the statutory compliance deadline of July 1, 1988. If my office can be assistance in resolving additional implementation issues, please contact us.

03-26-85/EN-338/C.EVANS/mc/475-8310/3109M/
REVISED: 04-02-85

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

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

OFFICE OF WATER

JUL 26 1985

MEMORANDUM

SUBJECT: Relationship Between National Municipal Policy and Construction Grants Extending Beyond FY 1988

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

TO: Water Management Division Directors
Regions I - X

There has recently been some confusion about EPA's policy with respect to award of grant funds for construction of facilities that will not be completed until after the July 1, 1988 statutory deadline. This has prompted me to reinforce with you the importance of maintaining close coordination between the staffs assigned to implementation of the National Municipal Policy (NMP) and those working with Construction Grants for municipalities that are affected by the policy. Misinformation and poor coordination can seriously undermine our efforts to implement the NMP.

On the policy issue, we recently responded to a Congressional inquiry on behalf of a State official whose staff was verbally advised that no more Federal grants for sewage treatment construction projects would be made where construction would be completed past July 1, 1988. Furthermore, he believed that EPA was about to transmit this policy to the States in written form. Exactly the same issue was raised during the House of Representatives floor debate on the Clean Water Act earlier this week. I have enclosed a copy of the transcript of the colloquy between Congressman Young (Missouri) and Congressman Roe (New Jersey) so that you will better understand the nature of the concern.

Our enclosed response to Congressman Jones sets forth what has always been our position on this issue: neither the NMP nor EPA policy with respect to funding construction of wastewater treatment facilities prohibits EPA or delegated

States from awarding grants to municipalities that may not be able to complete construction by the statutory deadline. In fact, we have been doing it for years with respect to funding POTWs that missed the 1977 statutory deadline for compliance.

I urge you to distribute copies of this letter and the House debate to all members of your grants and enforcement staffs. Where there seem to be problems, I would also ask that you make every effort to set the record straight with your States as well. If we hear of similar problems in any other Regions, I have asked Jim Elder to get in touch with you personally.

Attachments

cc: Bill Whittington

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

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

AUG 8 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Speech by Assistant Administrator, OECM to Association of Metropolitan Sewerage Agencies

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels
Regions I - X

Attached is a copy of Courtney Price's recent enforcement speech on the National Municipal Policy and pretreatment. She gave the speech on July 31 at the summer meeting of the Association of Metropolitan Sewerage Agencies (AMSA) held at the Greenbrier Hotel in White Sulpher Springs, West Virginia. This forceful statement concerning the Agency's responsibilities for the National Municipal Policy and pretreatment should be of assistance to you in the Region's water compliance and enforcement program.

Attachment

cc: Water Management Division Directors,
Regions I - X

ADDRESS BY COURTNEY P CE, ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT A.D COMPLIANCE MONITORING
TO ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
JULY 31, 1985

Introduction

Thank you for inviting me here to speak today. Your timing is excellent, as we are into perhaps the most momentous task your organization and my Agency have undertaken since the passage of the Clean Water Act - implementation of the National Municipal Policy. I would also like to bring you up-to-date on pretreatment, a highly significant area which we think will strongly reinforce and supplement the National Municipal Policy. I believe you may be familiar with some of the things I am going to say, but since this is my first meeting with you, I want you to know where I am coming from.

EPA has set the National Municipal Policy and implementation of pretreatment requirements as the two highest priority objectives for the Agency in the water enforcement area for this year and probably for the rest of this Administration. These are the areas where the most remains to be done, and where the most can be accomplished. Let me turn first to the National Municipal Policy.

National Municipal Policy: background

As you know, the Clean Water Act has never distinguished between the fundamental obligations of municipal and industrial sources to comply with the terms of their NPDES permits. Congress set up various mechanisms for developing effluent guidelines and obtaining exceptions and waivers, and put in

different deadlines for different levels of technology. But once those requirements are incorporated into NPDES permits, the obligation to comply is absolute. As we lawyers say, the Clean Water Act is a strict liability statute. There are no defenses.

Aware that after decades of neglect, compliance would be very expensive for many municipalities in the 1970's, Congress appropriated billions of Federal dollars to get compliance going, and to work out what bugs there were in the technology. In the CWA amendments of 1981, however, Congress reduced appropriations, and made clear its view that ultimately compliance with the Act remained a State and local responsibility. As you know, whatever happens in this and subsequent Congresses, there is little likelihood that construction grant funding will go back to what it was, and will <u>never</u> be sufficient to pay for the whole program.

Therefore, in January 1984 Bill Ruckelshaus issued the National Municipal Policy. The policy was issued after a year of deliberation and extensive consultation with you, with cities, with states, and with other interested groups. It has been strongly endorsed in public testimony and many private meetings by our present Administrator, Lee Thomas. As you know, the National Municipal Policy sets forth two fundamental principles:

1. All municipalities must achieve compliance with their NPDES permit limits as soon as possible but no later than July 1, 1988, unless it is physically or financially impossible to do so; and

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2. Municipalities must comply on time whether or not they receive federal funds.

In a sentence, the National Municipal Policy decouples compliance from Federal funding.

As I mentioned at the outset, carrying out the National Municipal Policy has become - and probably will remain - the Agency's top priority in the water enforcement area for some time. It is particularly important because in none of the discussions of re-authorization of the Clean Water Act has anyone suggested that the 1988 date be extended. It is as firm a deadline as any I have seen.

National Municipal Policy: progress to date

When the Agency issued the National Municipal Policy in January 1984, we knew that we had set ourselves and the country a highly ambitious goal, one that would require a great deal of work, local money and determination to accomplish.

Nevertheless, eighteen months into the program, I can report some solid progress. Knowledge of the National Municipal Policy is virtually universal. Word of its requirements has reached every municipality that will have to take action. The Agency has received a good deal of support for its firm position from both States and localities despite the logistical difficulties that we all recognize.

EPA's immediate goal has been to put all cities required to construct on realistic, enforceable schedules by October 1, 1985. This is a big chunk of work for both the Agency and the thirty-six states that manage the NPDES program: we estimate

that there are about 1300 - 1400 major POTWs (out of a total of 3700) which will need construction. To date, schedules have been established for almost 50%. States and EPA Regional offices are at this very moment drawing up detailed strategies for finishing work with the rest.

In the meantime, the Agency is trying to expedite the process by removing as quickly as possible whatever obstacles remain to the determination of final effluent limits. We are, for example, trying to reduce the backlog of expired permits, resolve pending §301(h) waiver applications, and speed water quality decisions. We are also trying to anticipate problems in such areas as sludge and toxics. Rebecca Hanmer, the Director of EPA's Office of Water Enforcement and Permits, will discuss these areas later at your meeting. Pursuant to the 1981 amendments to the Clean Water Act, we revised the definition of secondary treatment to permit some relaxation of effluent limits, particularly for smaller cities that build trickling filters and waste stabilization ponds. Within our own organization, we in enforcement are trying to work more closely with the offices responsible for permits and construction grants in order to take advantage of their accumulated expertise. EPA's Office of Water, for its part, is revising the construction grant regulations to be sure that no one receives further funding until a schedule meeting the requirements of the National Municipal Policy is in place.

National Municipal Policy - most important message

In a few words, this is what we are doing. What do we

expect of you? If there is one message that I want you to take away from these brief remarks, it is this: we expect every municipality that is not in compliance with final NPDES permit limits now to begin work immediately to achieve compliance by July 1, 1988, or before. This applies to each municipality which is presently in violation of the Act, whether or not it received federal funds in the past, whether or not it is likely to receive a grant in the future, whether or not it knows if it will receive a grant. Even if you are certain you will receive a grant in 1986 or 1987, we expect you to begin construction as soon as you can and proceed as quickly as possible, using locally raised money if necessary. We will provide what assistance we can in suggesting methods to raise funds locally. However, I cannot sufficiently stress that the time for action is NOW. Many cities have already begun work on their own; indeed, many have completed secondary treatment and more, on their own. It can be done. Both the Clean Water Act and fundamental fairness require that the Agency not allow other cities to continue pollution unabated for years after the announcement of the National Municipal Policy, in the hopes that the law will be changed or new funds forthcoming. The best way for a city now in violation to avoid formal EPA enforcement action - a lawsuit, with penalties - is to agree to a federal or State administrative order with a schedule providing for compliance by July 1, 1988.

On the positive side, Agency analysis suggests that most major POTWs can finance adequate treatment on their own, without imposing undue burdens on local residents and ratepayers.

Moreover, there are real advantages to 100% local financing. Cities have found that they can often build projects faster, and at a significantly lower cost, when they are not subject to federal construction grant regulations. Some cities have found that they can meet all their permit limits with smaller, more practical, easier-to-operate facilities than those presently called for in their Facility Plans.

An active and effective pretreatment program, as now required by law, should reduce the size or the cost, or both, of facilities in municipalities with significant industrial contributors.

National Municipal Policy: enforcement

Enforcement is not a particularly upbeat subject: clearly the Agency prefers and expects voluntary compliance, and many cities are already complying as quickly as they are able. In addition, of course, the federal government is particularly reluctant to sue sister governments. I know too that municipalities often have fewer resources and more complicated management than a private corporation. Nonetheless, as the senior Agency official responsible for enforcement, I must tell you that the Agency plans to enforce the law vigorously against any municipality that fails to comply with the National Municipal Policy. The Administrator feels this is necessary to be fair to those cities that have already gone ahead on their own, often at significant expense. Stiff enforcement is also necessary to maintain the momentum of the policy so that the 1988 goal can be met. We plan to take action in all Regions and against

municipalities of all sizes that are violating the Clean Water Act. Indeed, about 50% of the cases filed by the Agency in the last two years under the Clean Water Act have been against municipalities, and frankly, I expect that percentage to grow.

Enforcement of the National Municipal Policy comes at a time when the Agency has increased its enforcement presence generally as measured by the total number of Clean Water Act cases filed. In fact, the number of water cases filed nearly doubled between FY83 and FY84. In addition, a multi-case initiative against municipalities is contemplated for FY86 to emphasize the importance we attach to compliance with the National Municipal Policy.

You should also know that the Federal courts have uniformly upheld the Agency's position in regard to municipalities under the Clean Water Act. Four courts - including the U.S. Court of Appeals for the 6th Circuit last year - have looked at the question of whether a city can be required to build if it fails to receive federal funds. These courts have decided that Federal funding (or lack of it) is irrelevant. The courts all held without qualification that a city's obligation to comply with its NPDES permit limitations is absolute. This responsibility does not and cannot depend on whether a city receives grant funds. In addition, in at least two recent cases where the courts issued written opinions [Providence, R.I., Woodbridge, N.J.], the courts upheld the imposition of stipulated penalties against municipalities for failure to meet compliance schedules established through judicial consent decree.

Finally, in the last two years, there have been at least five decided cases holding that Discharge Monitoring Reports disclosing effluent violations can be sufficient grounds for summary judgment on liability against a discharger. While these were all cases against private industry, there is no reason to think the result is not equally applicable to municipalities. A city that gets into difficulty complying with the National Municipal Policy should not look to the courts for relief.

National Municipal Policy: objectives in new enforcement cases

Therefore, you should know that in every case we file against a municipality from here on out, we will seek compliance by July 1, 1988, or sooner, unless it is physically or financially impossible. If ability to pay is raised as an issue, we will bring in financial consultants to scrutinize the numbers. We have also asked our Regional offices to take federal enforcement action - either an administrative action or a lawsuit - in the case of any state order which goes beyond July 1, 1988, without adequate justification [Price/Longest memo of July 24, 1985].

In addition, as a matter of policy, we plan to seek penalties in National Municipal Policy cases. Indeed, the Agency is presently drawing up a formal water penalty policy which will in part expressly address municipalities. The Agency's position on penalties stems at least in part from the fact that a municipality typically will have failed to respond to an opportunity to commit to an acceptable, enforceable compliance schedule in an Administratve Order without penalties before EPA takes the POTW to court. In each of 12 municipal cases

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recently concluded, the Agency has obtained signficant cash penalties in settlement, ranging from several thousand dollars to $250,000. In the future, the Agency will be looking particularly hard at whether a city started to take action to meet permit limits after the announcement of the National Municipal Policy, or whether it waited for a grant. The Agency is totally serious about the expeditious municipal compliance. Compliance is no longer dependent on any grant action.

Pretreatment

Let me now turn to pretreatment, where you and I should be on the same side - national, state and local governments working together to clean up the environment and spread the cost equitably.

In 1977, Congress revised the Clean Water Act to place the responsibility for developing, implementing and enforcing the pretreatment program with those most affected by disruptive industrial pollutants. And who is most affected by such disruption? It is you, the POTWs. That is why it is very appropriate for us to talk now about pretreatment.

After 1977, EPA adopted regulations to implement the pretreatment program enacted by Congress. We required all POTWs with a design flow greater than 5 million gallons per day, and other POTWs (as determined by the approved pretreatment State or EPA) to obtain approval of pretreatment programs no later than July 1, 1983. Generally, an approvable program will contain mechanisms for identifying the industrial users and the character of their effluent, and for establishing local

limits when necessary. The approvable program must also provide authority for the POTW to require effluent monitoring and to enforce both the categorical standards and applicable local limits.

The objectives of the pretreatment program are (1) to provide the POTW with a means of insuring its own operational integrity and (2) to place the financial burden of treating large amounts of toxic or hazardous pollutants which POTWs typically are not built to control where it belongs, with the industry which produces them.

Of course, in those instances where a POTW is capable of removing large amounts of industrial pollutants, the pretreatment program provides that POTWs with approved programs may apply for removal credits. If approved, removal credits allow the POTW some flexibility to relax the requirements for one or more of its industrial users so long as that relaxation does not cause the POTW to violate its National Pollutant Discharge Elimination System (NPDES) permit.

2. Prior Agency focus

In the last ten years, the Agency has sought to implement the pretreatment program by promulgating two types of pretreatment regulations. We issued "general" regulations which interpret statutory phrases such as prohibitions against "interference" and "pass-through" and set up procedures that apply to indirect dischargers. We also promulgated "categorical" standards, which set technology-based numerical limits on discharges of toxic pollutants from specified categories of industrial sources

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The Agency's most notable success is the establishment of categorical standards for the electroplating category. Electroplating, with approximately 10,000 dischargers, is by far the largest industrial category to be regulated.

For EPA's part, we have brought nationally coordinated cases against two major integrated electroplaters, Chrysler and General Motors, as well as against several smaller industrial dischargers. In a precedent setting settlement, Chrysler agreed to pay a penalty of $1.5 million in cash in addition to meeting interim and final compliance requirements. Pursuant to our Clean Water Act authority, we expect to maintain a national presence in enforcing the electroplaing standards as well as other categorical pretreatment standards as they take effect. Nevertheless, in the pretreatment provisions of the Clean Water Act, Congress clearly was looking for local municipalities such as yourselves to be the primary implementation and enforcement arm of this program. Just as clearly, EPA is ready to use the strong enforcement authorities Congress established to make sure that all parties, including municipalities, are pursuing their legal responsibilities to implement successful pretreatment programs.

3. <u>POTW emphasis (1983 - present)</u>

While the Agency was expending resources on establishing regulations and standards, very little was done beyond the issuance of a few guidelines between 1978 and late 1982 to establish the local POTW pretreatment programs as required by 40 C.F.R. §§403.8 and 403.9. As a result, in early 1983 about

73% of the 1455 POTW's required to develop pretreatment programs either had not submitted plans or had submitted incomplete plans. With the deadlines for the development of approved plans (July 1, 1983) and for compliance with categorical standards (April and June 1984 for electroplaters) rapidly approaching, the Agency became concerned that an indeterminate portion of these POTWs without approved plans were not prepared to enforce pretreatment requirements.

In February 1984, the Agency convened an advisory committee, the Pretreatment Implementation Review Task Force (PIRT), to assist the Agency with implementation of the pretreatment program. The committee was composed of representatives of industry, State regulatory agencies, POTW's, environmental groups and EPA personnel. In January 1985, PIRT submitted its Final Report to the Administrator. It recommended issuance of a strong Agency policy statement to support enforcement of the national pretreatment program. PIRT further recommended aggressive Agency enforcement action to compel the remaining 1152 affected POTWs (as of April 1, 1984) to submit approvable pretreatment programs.

Since April 1984, many POTWs have developed POTW pretreatment programs which have been approved. EPA has set as a national goal in this area to have all required POTWs obtain approval programs or be referred for court action by September 30, 1985. In support of this goal, EPA launched a Pretreatment Multi-Case Enforcement Initiative earlier this year. Lawsuits were filed simultaneously on April 18, 1985,

against eight non-complying POTWs that had failed to develop approvable programs. These cases are now in the negotiation stage, but EPA expects to obtain from each case a judicial decree requiring expeditious submittal of an approvable program, specific steps to ensure proper implementation of that program, and significant penalties because the POTW failed to meet responsibilities which many others pursued more seriously and effectively. If you read the trade press, you will also know that the Agency expects to file a second wave of similar cases against a number of remaining non-complying POTWs by our September 30 target date.

There is good news that emerges from all this. By combining your efforts with those of the State and Federal approval authorities, the list of POTWs without approved programs has dwindled from 1,152 as of April 1, 1984, to 377 as of June 30, 1985. The bad news is that 377 POTWs still do not have approved programs or schedules for submitting them. The Agency and States intend to make every effort to obtain approvable local pretreatment programs from this group by the end of FY 1985 by whatever means are necessary, including the use of judicial enforcement and the imposition of penalties. Indeed, we have made it clear to all levels within the Agency that "good progress" on program developments is no longer sufficient. If approvable programs are not forthcoming, it is time to take the action to court.

In addition, the Agency is hard at work developing a national strategy to insure effective implementation of approved

pretreatment plans through Federal State and local efforts. An important objective for FY86, and beyond, will be to help you to insure that your industrial contributors comply with the applicable pretreatment standards, both categorical standards and the highly important local standards. Again, EPa is quite prepared to use the enforcement authority provided to it, not only against your industrial users where a matter of Federal interest is at stake, but also against POTWs which are failing to implement or adequately enforce approved local pretreatment programs. Now that I have come on as the "heavy", let me offer that if we (the States, EPA and the POTWs) work together, we can jointly obtain three important things. We can ensure (1) that all industrial users comply with pretreatment standards, (2) that you are able to remain in compliance with your own NPDES limits, and (3) that the costs of compliance with the Clean Water Act are paid by the parties responsible for the pollution.

I have appreciated this opportunity to talk with you about pretreatment and the National Municipal Policy. I look forward to your help as we continue to implement these important programs.

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

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

AUG 27 1985

MEMORANDUM

SUBJECT: Highlights from Decided and Settled Cases under the National Municipal Policy

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels
Regions I - X

The Agency has accumulated considerable enforcement experience under the National Municipal Policy (49 FR 3832, January 30, 1984) during the past year and a half since the Policy was signed by the Administrator. I want to review some of the results of this experience with the hope that it will help you to enforce the National Municipal Policy during the months ahead. As I look at our enforcement track record, I find it most useful to review (1) relevant decided cases, (2) noteworthy consent decrees and (3) statistics on the amounts of municipal penalties obtained. Accordingly, I will briefly discuss each of these areas.

I. Case Law Has Established that POTWs Must Comply with the Clean Water Act in the Absence of Federal Funding

As you know, the most important principle established by the National Municipal Policy is that compliance by publicly owned treatment works (POTWs) with final effluent limits is independent of Federal construction grant funding. More simply put, the Policy decouples compliance and Federal funding. Case law, which establishes the appropriateness of compliance without funding, therefore becomes strong support for implementation of the Policy.

The most significant case establishing the requirement of compliance in the absence of Federal funding is State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977), an opinion seven years older than the National Municipal Policy itself. In that case, Virginia's Water Control Board sought a declaratory judgment that POTWs were not subject to certain effluent

limitations if those POTWs had not received Federal grant funding. The Fourth Circuit denied relief to Virginia and held the following:

> "Section 301(b)(1)'s effluent limitations are, on their face, unconditional, and no other provision indicates any link between their enforceability and the timely receipt of federal assistance." 559 F.2d at 924.

The Sixth Circuit has taken a position similar to the Fourth Circuit. In U.S. v. Wayne County (Mich.) Dept. of Health, City of Detroit, et al. 720 F.2d 443, 19 ERC 2091 (6th Cir. 1983), the District Court below had unilaterally reserved allocated but unobligated Federal construction grant funds to defendant City of Detroit. EPA appealed this action as unauthorized and prevailed before the Sixth Circuit. The Circuit Court held:

> "It is fundamental that Title III compliance may be sought by the EPA without a corresponding conditioning of Title II grant funds. State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977)." 720 F.2d at 446, ERC at 2091.
>
> ". . . it is fundamental that the compliance and grant provisions of the FWPCA are not mutually dependent. State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977). If the federal forum possessed the authority to mandate EPA contributions under Title II in Title III compliance actions, then the EPA would be pragmatically restricted to seeking compliance only in actions where it would guarantee federal funds to effect the compliance judgments obtained. This was patently not the intent of Congress. Train, supra." 720 F.2d at 451, 19 ERC at 2096.

The two cases above provide a background for several court orders which have discussed the legal question or the National Municipal Policy. In U.S. v. City of Kansas City, Kansas (Civ. Action No. KC-3628, D. Kan., April 25, 1984), the City sought to tie compliance with final effluent limits by July 1, 1988, to the availability of Federal grant funds. The Court rejected the City's position and required final compliance by June 30, 1988. The one limiting feature of the order is that the Court obtained signatures of counsel, as if it were a consent decree, subsequent to issuance of the decree. Nevertheless, the Court transcript shows that the matter was fully litigated.

The Court noted in its unpublished order in U.S. v. City of Kansas City at page one that

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> "the statutory obligation of publicly owned treatment works to comply with the July 1, 1977, deadline [subsequently extended by statutory amendments to July 1, 1988 for eligible municipalities] is not conditional on the receipt of federal grant funds or any other circumstance . . ."

The Court also quoted specifically from the National Municipal Policy, finding that only extraordinary circumstances are allowed under the Policy as a basis for compliance beyond July 1, 1988. Specifically, the Court wrote at page two of its order that:

> ". . . Defendant has not made or endeavored to make any showing concerning the existence of extraordinary circumstances that would preclude its compliance with the statutory July 1, 1988, deadline, and EPA has made no determination that such extraordinary circumstances either do or do not exist."

Although the order did not define extraordinary circumstances (which EPA considers to be <u>only</u> physical impossibility or financial incapability to complete construction by July 1, 1988), the Court did find that under the policy the POTW bears the burden of showing extraordinary circumstances, not EPA. The Court also implicitly affirmed the National Municipal Policy as an appropriate enforcement response by EPA. The order should be useful in future litigated cases or in settlement discussions.

There have also been a series of court orders in the case of <u>Township of Franklin Sewerage Authority</u> v. <u>Middlesex County Utilities Authority</u> (Civ. Action No. 80-4041, D.N.J., Feb. 24, 1984, Dec. 15, 1984, July 5, 1985) holding, and subsequently reaffirming, that a municipality's obligation to comply with its NPDES requirements is not contingent on Federal funding. Indeed, in the July 5, 1985 order at page 2, Judge Thompson held the Township of Woodbridge, N.J. in contempt for failing to comply with an earlier order and advancing lack of federal funding as a defense:

> "We will deny Woodbridge's motion. We have addressed the issue presented - whether the obligation to comply with the Act is contingent upon the receipt of funding from the United States - on two previous occasions. Woodbridge offers no new analysis or authority which would lead the court to modify its holdings on this issue. The specific argument advanced, that the 1981 amendment to 33 U.S.C. §1311 allows Woodbridge to avoid liability, has been explicitly

> rejected by the court. We find that Woodbridge's motion is without merit and borders on the abusive."

With this backdrop of (1) appellate holdings and judicial orders that funding and compliance are independent under the Clean Water Act and (2) a District Court order requiring compliance by July 1, 1988, while pointing to the requirements of the National Municipal Policy, I wish to turn to examples of recent case settlements.

II. Case Settlements Are Being Obtained Consistent with the National Municipal Policy

A detailed review of selected municipal compliance cases, including some settlements jointly obtained by EPA and DOJ and referenced in this memo, is being released by the Program Evaluation Division of EPA's Office of Management Systems and Evaluation. I urge you to study this excellent analysis. I wish here to mention several cases that indicate possible approaches to typical problems under the National Municipal Policy.

A. The Financial Incapability Defense

An excellent example of how to overcome a financial incapability defense is the Agency's 1984 consent decree with St. Bernard Parish, Louisiana. St. Bernard argued that it could not construct a secondary treatment plant due to financial incapability. EPA's Region VI and Headquarters engaged an outside financial consultant to make a detailed analysis of the finances of the parish (county). The consultant made an on-site analysis of parish financial records and completed a detailed report that was provided to the parish. At the same time, the Agency pressed for trial. Upon review of the financial analysis, the parish accepted its findings of financial capability to construct by 1987, without any federal funding, and agreed to pay a $40,000 upfront penalty, a substantial amount in light of the size and demographics of the parish. A final consent decree embodying these terms was entered on December 3, 1984.

The Agency continues to have contract funds available through the Office of Water Enforcement and Permits to hire outside financial consultants for cases where the POTW's financial capability to construct may be an issue.

B. From Counterclaim to Upfront Civil Penalty

Garland, a Texas suburb near Dallas, filed a counterclai against EPA when the Agency sued to obtain compliance with final effluent limits by July 1, 1988. Garland argued that Agency had given incorrect technical advice as to desi fo past POTW construction. The Agency aggressively moved di

the counterclaim, enlisting the assistance of construction grants attorneys in the Agency's Office of General Counsel, who wrote much of the brief. The Agency pursued extensive discovery and negotiations in the case, which also involved a number of private parties (contractors) who had participated in the POTW construction. In the end, Garland agreed to achieve compliance by July 1, 1988, and to pay an upfront civil penalty of $150,000 in a consent decree filed June 24, 1985.

C. Compliance Not Contingent on Federal Funding

The Wyoming Valley Sanitation Authority, located near Wilkes Barre, Pennsylvania and made up of some twenty municipalities, had been slow to comply for years. In fact, it took twenty-five years of State pressure to get the Authority to build a primary facility. EPA filed suit on May 3, 1983, to obtain secondary treatment by July 1, 1988.

Only after issuance of the National Municipal Policy did negotiations with the Authority become productive. The Authority tried to tie compliance to Federal funding. However, the Authority finally agreed to a consent decree that made compliance by 1988 independent of Federal funding, which is the standard language we like to see in all municipal consent decrees. EPA and Pennsylvania (also a party) did agree, however, to expedite consideration of the Authority's grant application. The authority also agreed to pay an upfront penalty of $66,000 to the Federal government and $56,500 to the State. The consent decree was filed on May 6, 1985.

D. Use of Environmental Security Account

One of the most difficult series of recent negotiations involved Cincinnati's Mill Creek POTW. This case involved negotiations with the Sewer District, the City of Cincinnati and Hamilton County in which the facility is located. Mill Creek had completed secondary treatment construction in 1978, but the POTW's sludge unit, heat exchangers and vacuum filters have never worked properly. Consequently, only a small portion of the effluent received secondary treatment. This made the Mill Creek POTW one of the worst polluters on the Ohio River. The case was complicated by State administrative action that could be construed as permit modification.

As negotiations continued, it became apparent that the penalty issue was a major obstacle to obtaining a settlement. In the end, the Agency obtained a commitment to final compliance by 1988, significant combined sewer overflow relief, and establishment of a $750,000 Environmental Security Account to be managed by a court-appointed trustee. The Account must be used to finance environmentally beneficial projects connected to the Clean Water Act which will benefit the general public. The account should address the particular type of environmental effect of the defendant's noncompliance and be in addition to any

legal obligation defendant might have. A final consent decree was lodged on March 11, 1985, and should be entered shortly. Although the Agency now generally requires, as a matter of policy, upfront penalties rather than environmental projects, a combination of a substantial upfront penalty (which as a matter of policy is now an Agency objective in all municipal cases) and an environmental security account may be acceptable in other municipal cases. In addition, stipulated penalties tied to a compliance schedule are required.

III. Penalties Assessed Against POTWs

We typically expect to obtain penalties in POTW cases. Penalties act as a substantial deterrent to noncompliance and speed the municipality's effort to comply. As explained below, in recent cases, penalties have had a demonstrable effect on securing POTW compliance.

Since the passage of the NMP, penalties have been sought and assessed against many POTWs violating the CWA. During the last three years, from 1983 to 1985, the Agency has obtained penalties in 17 of 27 cases brought against POTWs.

The two largest penalties are $170,000 and $150,000, assessed against two Region VI municipalities. There are also four cases with $100,000 penalties. Two of these cases are in Region VI, one is in Region III and one is in Region II. The remaining twelve cases have penalties under $100,000, the smallest being the Welch Sanitation Board, Welch, West Virginia, in Region III. Noting this community's depressed economy with 28% unemployment, the court advised the parties to work out a mutually agreeable solution in lieu of litigation. The Board agreed to pay a penalty of $1,000 each to the United States and the State for violations of the CWA. Finally, in four of the ten cases in which cities did not pay a cash penalty, they agreed to complete environmentally beneficial projects not required by law.

An example of a municipal case where a penalty was not imposed involved the City of Tallulah, Louisiana, in Region VI. The court informally advised the United States that no penalty would be assessed in this case due to the community's economic situation. (There is very low per capita income and many residents are on welfare.)

Another case where a penalty was not sought involved a small suburb of Louisville, in Okolona, Kentucky, Region IV. The POTW agreed to stop dumping the effluent into a creek and to hook into the County's Municipal Sewer District (MSD) line. In order to use the line, the POTW had to legally dissolve itself as an entity. An imposition of a penalty would have delayed the POTW's dissolution and MSD's ability to assume its responsibilities. In order to facilitate Okolona's prompt compliance, EPA did not seek penalties for past CWA violations.

A chart is attached listing all reported CWA cases during 1983 to 1985 including the amount of the penalties we obtained against certain POTWs. In some instances penalties were not obtained. As mentioned above, some settlements provided for environmental projects or trust funds rather than penalties. Most decrees also included stipulated penalties for future violations.

I trust the information in this memoradum will be helpful to you. If you have any questions or corrections to the information in this report, please feel free to call me or Maria Orozco of my staff at 475-8320. I anticipate issuing updates of this report on a periodic basis.

Attachment

cc: Rebecca Hanmer
Jim Elder
Bill Jordan
Regional Water Division Directors
OECM Water Attorneys
Cheryl Wasserman
David Buente
Carol Green

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CWA MUNICIPAL CASES CONCLUDED IN CALENDAR YEARS 1983-1985 WITH AND WITHOUT PENALTIES ASSESSED AGAINST POTWS

REGION	CASE NAME	STATE	DATE CONCL.	PENALTY AMOUNT
1	U.S. v. M.D.C. (City of Boston)	MA	3/20/84	$ 15,000, Offer of Judg.
1	U.S. v. City of Providence	RI	6/8/84	No cash. 250,000 Environ. credit, contempt action
2	U.S. v. PRASA (II PR Aqued. & Swr)	PR	3/1/85	100,000
2	U.S. v. City of Utica	NY	9/12/84	5,000
3	U.S. v. City of Philadelphia	PA	12/15/83	No cash. C.D. established an env. trust fund in the amount of $2,165,000
3	U.S. v. City of New Martinsville	WV	12/28/83	None. CD did not request penalties for past viol.; penalties for future viol. were sought but the POTW came into compl. w/its permit after the case was referred to DOJ
3	U.S. v. City of Welch (Welch Sanit. Bd)	WV	1/30/85	1,000 to USEPA and 1,000 to State
3	U.S. v. District of Columbia (Blue Plains WWTP)	DC	1/31/85	50,000 penalty and 200,000 env. credit
3	U.S. v. City of Wilkes Barre (Wyoming Valley Sanitary Authority)	PA	7/1/85	56,500 penalty to USEPA plus 66,000 to Penn.
4	U.S. v. City of Jacksonville (Dist. II WTP and Buckman Street WTP)	FL	5/20/83	No cash. 300,000 Environ. Credit
4	U.S. v. City of Okolona	KY	11/8/84	None. Dissolution of the POTW was required in order to use MSD's facilities

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REGION	CASE NAME	STATE	CONCL.	AMOUNT
4	U.S. v. City of Orlando (Iron Bridge WWTP)	FL	6/26/85	40,000
5	U.S. v. Gary Sanit. District	IN	6/15/83	None. Old case, filed 1/23/78, decree included stipulated penalties
5	U.S. v. City of Cincinnati (Mill Creek WTP)	OH	Lodged but not yet entered	No cash. 750,000 environ. security trust account
6	U.S. v. City of Baton Rouge	LA	1/7/83	100,000
6	U.S. v. City of Roswell	NM	6/3/83	20,000
6	U.S. v. City of Fort Smith	AR	6/20/83	100,000
6	U.S. v. St. Bernard Parish (Munster Treatment Facility)	LA	12/3/84	40,000
6	U.S. v. City of Tulsa (RMUA Haiky Crk)	OK	10/15/84	None. This was a contempt action. Original suit carried a penalty of $140,000
6	U.S. v. City of Tallulah	LA	12/12/84	None. City had insufficient resources with which to pay any penalty amount
6	U.S. v. City of West Memphis	AR	8/7/85	30,000
6	U.S. v. City of Vernon & Celenese Fibers, Inc.	TX	9/9/83	65,000
6	U.S. v. City of Garland (Duck Creek, Rowlett Creek WTP)	TX	6/1/85	150,000
	U.S. v. Jefferson Parish (West Bank Sewage District)	LA	Lodged but not yet entered	170,000

REGION	CASE NAME	STATE	CONCL.	AMOUNT
8	U.S. v. City of Richfield	UT	2/18/83	None. (old case) stip. penalties were sought
10	U.S. v. City of Twin Falls	ID	4/24/84	22,080
10	U.S. v. City of Twin Falls	ID	Lodged but not yet entered	50,000, contempt action

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

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

JAN 30 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Deadlines and the National Municipal Policy

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsel I - X

Introduction

Recently I have noticed, both in the Agency and outside, some imprecise language about "statutory deadlines" and the National Municipal Policy. I am afraid this may lead to some confusion, particularly among those who do not have to deal with the policy often. Therefore, I have prepared in this memorandum a brief summary of the legal basis for the July 1, 1988 deadline in the policy, and the legal consequences of that basis, for anyone who would like a more detailed background than is presented in the policy itself.

ISSUE NO. 1

There is no uniform July 1, 1988 statutory compliance deadline. The legal compliance deadline for a Publicly-Owned Treatment Work (POTW) is the date set in its permit.

The July 1, 1988 date is set forth in the Clean Water Act to address a single specific situation. In Section 301(i), Congress authorized NPDES permitting authorities (delegated States or EPA) to modify the permits of those POTWs that applied and qualified to extend the deadline for compliance with final effluent limits (as described in Sections 301(b)(1)(B) and (C)) until, but not beyond, July 1, 1988. For all other POTWs, the Congressional mandate of 301(b)(1) typically remains in effect: the permitting authority must issue them permits requiring compliance with statutory requirements by July 1, 1977. And under the Clean Water Act, the POTW is required to comply by whatever date appears in its permit.

Although July 1, 1977 constitutes in most cases the date for compliance with final effluent limitations, the Clean Water Act sets out no uniform statutory deadline which will apply in all situations. This legal structure has a number of consequences for enforcement. First, any POTW not in compliance with final effluent limits by the date specified in its permit (even if it is 1977) is in violation of the Act. (See pages 6-8 of the attached memorandum from the Office of General Counsel, dated April 11, 1984.)

In the National Municipal Policy, the Agency recognized that many POTWs were in violation of the Act long after 1977, and that sound policy after promulgation of the 1981 Clean Water Act Amendments required these POTWs to come into compliance as soon as possible. The Policy called for the development of compliance schedules for municipalities affected by the Policy. As a policy matter, the Agency selected July 1, 1988 as the latest date to be included in such schedules (unless a POTW could demonstrate extraordinary circumstances). The date seemed a sensible choice, in part because §301(i) Congress authorized permit extensions up to no later than 1988. However, it must be remembered that the legal, statutory-based deadline for compliance for each POTW is and will remain the deadline in its NPDES permit, which will be July 1, 1988 or earlier.

ISSUE NO. 2

As a general matter, EPA has clear authority to sue a POTW which will not meet the July 1, 1988, deadline only if that POTW is violating or has violated applicable permit requirements.

The second consequence for enforcement is a corollary of the first. As a general matter, a POTW in compliance with its permit is in compliance with the Act. Section 402(k) of the Act states this expressly. Therefore, in the absence of compelling circumstances, the Agency typically should not sue a POTW because it will not complete construction by July 1, 1988, if it is and has been in compliance with all its present permit requirements.

ISSUE NO. 3

As a legal matter, administrative or judicial orders establishing enforcement compliance schedules lasting beyond July 1, 1988, are not "extensions" of final compliance deadlines. Although such orders may have the effect of staying further enforcement action, the legal deadline is still in effect.

Section 309 is the basis for Agency enforcement of most of the provisions of the Clean Water Act, and NPDES permit provisions. Section 309 authorizes the Administrator, upon finding a violation, to issue an administrative order or file

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a lawsuit. Therefore, an administrative order issued under Section 309(a)(5)(A) setting a date for compliance for a POTW which is later than the date in its permit is an enforcement remedy, not an extension of the POTW's legal deadline. The same is true for a comparable judicial order.

As indicated above, a POTW can obtain an extension of its legal deadline only by having its permit modified. The legal consequences of this distinction between a deadline in an administrative order and a permit modification are explained in more detail on pages 8-10 of the attached memorandum from the Office of General Counsel previously mentioned. The distinction between extensions and enforcement remedies also is relevant to the extent to which EPA establishes enforcement compliance schedules lasting beyond July 1, 1988. EPA does not in such instances establish a legal deadline beyond July 1, 1988. It merely establishes an additionally enforceable schedule without acquiescing in the underlying statutory violation. In fact, a recent federal decision handed down in the Boston Harbor litigation, the court held that the issuance of an administrative order did not constitute acquiescence in a violation. U.S. v. Metropolitan District Commission, et al, (D. Mass. Sept. 5, 1985, Civil Action Nos. 85-0489-MA and 83-1614-MA).

If you have any questions about the points raised above, please contact Patricia Mott of my office at FTS 475-8320.

Attachment

cc: Courtney Price
Richard Mays
Rebecca Hanmer
Bill Jordan
Regional Water Management Division Directors
Jim Hanlon
Bob Blanco
Colburn Cherney
David Buente, DOJ

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

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

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NATIONAL MUNICIPAL POLICY
ENFORCEMENT STRATEGY
August 1987

I. Background

Since issuance of the National Municipal Policy (NMP) in January 1984, EPA and the States have made substantial progress toward bringing noncomplying POTWs into compliance with the goals and requirements of the Clean Water Act (CWA). However, the results of the most recent NMP audit show that a significant number of facilities have not yet started construction, and, where construction has commenced, many facilities are in violation of the interim milestones in their schedules.

There are several different estimates of the number of major POTWs that will not meet the July 1, 1988 deadline: the Regions identified 229 major POTWs during the NMP audits; ASIWPCA reported 280 major POTWs (based on a 42 State survey); and OWEP estimates 300 - 400 major POTWs by next year. The estimates with respect to minor POTWs not meeting the deadline are even larger: the Regions reported 187 minor POTWs; ASIWPCA's survey identified 792 minor POTWs; and OWEP expects the number to reach 1000 (which is about one half of the universe of unconstructed NMP minors).

The NMP audit results show that, out of a total of 638 major facilities that were scheduled to start construction by 12/31/86, 82% had actually begun construction, leaving 114 facilities in violation of their start construction date. In addition, out of an audit sample of 252 facilities, the Regions/States had verified that 78% of the major POTWs scheduled to start construction had actually done so. Finally, there are a large number of major facilities (412) that were not scheduled to start construction by 12/31/86, which puts in doubt that these facilities will be able to complete construction by the July 1, 1988 deadline.

In addition to problems with schedule slippage, there are also some problems with the requirements and provisions in the enforceable schedules that are in place. Several States have recently initiated or settled cases involving NMP facilities that will not meet the July 1, 1988, deadline for compliance with applicable effluent limits: more than 65 cases have been settled in State courts to date, and another 40 cases have been referred to State Attorneys General for action. Based on an analysis of available settlements, it appears that many of the schedules allow far too much time for compliance without sufficient justification on either a technical or financial basis, extend well beyond the July 1, 1988 deadline, and/or are based on receipt of construction grants. In addition, very few States have been

collecting civil penalties or imposing equivalent sanctions for past violations.

II. The Regions' Approach to These Issues

At the recent National meeting of the Compliance and Permits Branch Chiefs, the Regional representatives from all Regions discussed the issues outlined above and how these problems might be handled. The discussion resulted in formulation of four basic questions, and, in a subsequent poll of all the Regions, the majority concluded the following:

1. Q: Should administrative orders (AOs) be used to establish schedules that extend beyond July 1, 1988 (majors and minors)?

   A: EPA and the States should not use AOs for major POTWs with schedules that extend beyond July 1, 1988; all such schedules should be contained in judicial orders. EPA should also consider judicial action for minor POTWs; where available resources preclude judicial action, EPA and the States should use AOs with penalties.

2. Q: How should EPA respond where States establish enforceable schedules that are unnecessarily long or that are based on receipt of grant funding?

   A: Where States establish inappropriate schedules (excessively long without a sound technical basis or based on receipt of a construction grant), EPA should initiate direct Federal action in order to obtain the most reasonable, expeditious schedule.

3. Q: How should EPA respond where State actions do not contain appropriate penalties or equivalent sanctions?

   A: Where States assess penalties that are grossly deficient or fail to impose equivalent sanctions, EPA should initiate direct Federal action in selected cases. Where resources preclude judicial action, Regions may also want to consider using their administrative penalty authority in certain cases.

4. Q: How should EPA respond to serious delays in schedules (judicial and nonjudicial), especially where such a delay jeopardizes the July 1, 1988 deadline? What warrants an escalation of enforcement response?

   A: Where there is significant slippage in meeting compliance schedules, EPA should escalate enforcement action (including situations in which the State does not take appropriate enforcement response). Significant delays are defined as: 90 days or more beyond the start construction date; and 120 day

or more beyond the end construction date. EPA should escalate enforcement by first exercising its administrative penalty authority, and later moving to judicial action if violations continue.

EPA should consider judicial action in all cases where schedule slippage for major POTWs jeopardizes the July 1, 1988 deadline (and for minors as resources allow).

III. Candidates and Priorities for Enforcement Action

CATEGORY A: MAJOR POTWS NOT YET ON SCHEDULES OR REFERRED. All major POTWs that are not yet on enforceable schedules should be considered candidates for judicial action except where there is a reasonable expectation that the POTW can meet the July 1, 1988 deadline. Regions and States should typically place low priority on action against §301(h) facilities, except where there are violations of requirements that will not be affected by the waiver process. Where a POTW does not have final effluent limits, that facility should be excluded from enforcement until resolution of applicable effluent limits.

CATEGORY 2: POTWs ON STATE NONJUDICIAL SCHEDULES PAST JULY 1, 1988. Where major POTWs are on State nonjudicial schedules that extend beyond July 1, 1988, especially where schedules appear to be excessively long, Regions should initiate judicial actions for those facilities with schedules that extend the farthest past the deadline. In other cases, especially where it appears that the facility will complete construction before the deadline but not achieve compliance until afterward, Regions should issue administrative orders for penalties.*

Regions should also initiate some judicial actions against minor POTWs in this category. Where resources preclude judicial action, Regions should use administrative orders for penalties.

CATEGORY C: POTWS WITH SERIOUS SCHEDULE DELAYS. Where major POTWs on Federal and State enforceable schedules are not making acceptable progress, Regions should escalate the enforcement response based on the length of delay in meeting key milestones. Where major POTWs are on administrative schedules and have missed their "start construction" date by more than 90 days and are likely to miss the July 1, 1988, deadline as a result, Regions and States should take judicial action; administrative orders for penalties may be used for some of the less serious cases involving major POTWs and for minor POTWs if resources are not sufficient to proceed with judicial action.* In cases where major and minor POTWs are on nonjudicial schedules and slippage of 90 days will not jeopardize meeting the July 1, 1988 deadline, Regions and States should issue administrative orders for penalties.

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* In these two cases, AOs for penalties only should be used rather than AOs to extend the schedule.

where any facility fails to comply with any milestone in a judicial order, Regions and States should demand stipulated penalties or impose sanctions as defined in the judicial order.

CATEGORY D: DEFICIENT STATE ACTIONS/REFERRALS THAT ARE NOT FILED IN A TIMELY MANNER: Where major POTWs are on State judicial orders that do not contain appropriate timetables and/or obtain a grossly deficient penalty or equivalent sanction EPA should initiate direct Federal action. Where cases have been referred but not filed in a timely manner, EPA should initiate direct Federal action. In making determinations regarding appropriate timetables, Regions should consider the following factors: schedules that do not appear to have a sound technical basis or financial justification; schedules that are significantly extended in order to allow a facility to obtain a construction grant; and schedules that depend on receipt of a construction grant and would be unenforceable in the event the grant is not awarded. With respect to penalties or equivalent sanctions, Regions should adhere to the National Oversight Guidance that calls for direct Federal action where a penalty (or equivalent sanction) is grossly deficient in the circumstances of a given case (page 19). With respect to timeliness of referrals, Regions should use the guidelines in the National Oversight Guidance that call for cases to move from referral to filing in 60 - 90 days (page 13).

In carrying out this entire enforcement strategy, Regions should be familiar with the "Guidance on State Actions Preempting Civil Penalty Actions," which was recently circulated in conjunction with the materials prepared to support implementation of the new WQA administrative penalty authorities.

Regional Comments on the Draft Enforcement Strategy

The primary comments on the strategy involved EPA's ability to assess administrative penalties when there are violations of administrative schedules. A strict reading of the statute shows that 309(g) administrative penalties may not be assessed directly for violations of a compliance schedule in an 309(a) administrative order. This, however, is not inconsistent with the enforcement strategy. A penalty assessment in such a case would be based on violations of the underlying permit limits (which were used as the basis for issuing the 309(a) order.) Essentially, a 309(a) order implies that EPA will refrain (informally) from enforcing the underlying permit violations if the permittee complies with the 309(a) administrative schedule. When the permittee violates the administrative schedule, the underlying permit violations are not (informally) 'excused' and are subject to further enforcement In this case, the enforcement is through assessment of an administrative penalty. The stated basis of a 309(g) penalty in these cases will always be the underlying permit violations, which is consistent with the guidance on administrative penalties.

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

SEP 2 1987

OFFICE OF WATER

MEMORANDUM

SUBJECT: NMP Enforcement Strategy

FROM: James R. Elder, Director
Office of Water Enforcement & Permits

TO: Water Management Division Directors
Regions I-X

Attached is the NMP Enforcement Strategy and the list of your Region's enforcement candidates that is the key to carrying out the final push to July 1, 1988. We have reviewed comments from nine Regions and have incorporated them into the final strategy. Regional responses were generally positive and supportive of the strategy. The draft strategy was also discussed with ASIWPCA's Compliance Task Force which agreed in principle. There were some concerns expressed over the proper use of §309(g) administrative penalties and these have been addressed in this strategy as well as the agency guidance on the subject. Each Region should work with its States to carry out this strategy. Approximately 60 POTWs in seven Regions have been targeted by either the Region or the State for enforcement action. In most cases, this will occur before the end of the first quarter FY 1988.

The Administrator is sending a memorandum to your Regional Administrators stating his interest and asking for support in achieving the goals of the Policy. The Enforcement Division will continue to track the progress of these candidates (and others) monthly and will keep the Adminstrator apprised of the status of the Policy throughout the year. The status information the Regions provided in response to our draft list of enforcement candidates gave evidence of good State oversight and we look forward to maintaining this level of knowledge. I encourage you and your staffs to work closely with my staff to make the best accounting possible of our achievements.

Attachments

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

SEP 22 1987

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: National Municipal Policy Enforcement

TO: Regional Administrators

Following the Office of Water's FY 1987 National Municipal Policy (NMP) Regional Audits and mid-year program evaluations, I received an update from Larry Jensen on EPA Regional and State progress in carrying out the Policy. I then discussed our progress with you at the June 25th Regional Administrator's meeting. I am convinced we must continue to demonstrate strong senior management support in the final phases of the NMP effort.

We have achieved a great deal since the Policy was signed in January 1984. At that time, about 41% of our major POTWs had not installed the treatment necessary to meet CWA requirements (over 1500 facilities). Since 1984, over 400 major POTWs have achieved compliance and all but 30 of the remaining majors are on enforceable schedules or have been referred for judicial action. Although this represents an early positive return on our efforts, I am still concerned about the remaining workload that must be addressed.

If we are to fulfill the objective of the Policy, we must continue to push for the settlement of more than 100 EPA and State referral actions as well as oversee and enforce over 100 EPA and State consent decree settlements or judicial actions. Further, and equally important, we must assure that wastewater treatment system construction for over 800 major POTWs on permits or administrative orders is completed in a timely manner to bring these facilities into compliance. Recently surfaced facts on construction schedule slippage are alarming. In the Office of Water FY 1987 NMP audits, the EPA Regions estimated 229 major POTWs with schedules past July 1, 1988 (96 with existing post-1988 schedules and 133 with anticipated schedule slippage past July 1988). The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) in a Spring 1987 survey covering forty-two States estimated 280 post-1988 schedules for major POTWs. ASIWPCA also estimated

over 750 minor POTWs will require schedules past July 1988. EPA and the States must act to set initial enforceable schedules for many facilities and take timely and appropriate enforcement action to stem the mounting number of violated schedules.

Given the size of the job and the time remaining until July 1, 1988, I ask that you become personally involved in seeing that your Region and States work together to: 1) maintain intensive oversight and tracking of remaining uncompleted POTWs, 2) enforce compliance schedules, and 3) assure that all Region and State actions are taken in a nationally consistent manner.

To assist in this final push toward July 1988, I have approved an enforcement strategy aimed at the following types of noncomplying POTWs:

- Majors not yet on enforceable construction schedules or referred.
- State nonjudicial construction schedules past July 1988.
- Construction schedules that are not making acceptable progress.
- Deficient State judicial actions and unfiled referrals.

This strategy has been transmitted to your Water Management Divisions along with a mutually developed list of candidates for enforcement action. I plan to monitor our progress regularly on the remaining workload. This activity will continue to be a focal point of our future meetings and I expect that you will keep this high on the agenda with your States. We must work together in the coming months to successfully complete implementation of the National Municipal Policy.

Lee M. Thomas

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

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

15/18

Remedial measures

For purposes of evaluating and initiating civil actions against POTW's, all referral packages should contain an analysis of the POTW's compliance deficiencies and the possible solutions to those problems. As explained in prior communications with your office */, our goal is to develop sufficient information to allow us to present a particularized plan of action for compliance, including practical alternatives, to the court. The need for such information is three-pronged: 1) development of an appropriate remedial program is important in these cases; 2) consideration of available remedies is vital to a financial capability evaluation; and 3) it is crucial that we demonstrate that compliance is reasonably attainable by the municipality.

In a memorandum dated December 14, 1982, former Associate Water Enforcement Counsel Louise Jacobs stated that municipal enforcement referrals should contain the following regarding remedy:

> Information about alternatives for solving the problem which are likely, in the opinion of an informed individual, to be successful. The informant should be someone who knows the plant, is familiar with the kind of violations occurring, is knowledgeable about sewage treatment systems in general, and is of the opinion that these particular violations are possible to solve by one of several alternatives posited. The

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*/ See memorandum of Stephen D. Ramsey dated January 3, 1983.

> informant should be identified in the referral. A JRB [diagnostic] report may ordinarily suffice to meet this requirement.

We concur with these criteria. Such information should overcome any threshhold concerns regarding whether compliance is reasonably attainable by the POTW.

At a minimum each referral should include the following information concerning compliance:

> 1. A technical explanation of the causes of the violations, including what equipment and/or management systems are inoperative or ineffective; problems caused by excessive hydraulic or organic loadings; causes of any bypasses of treatment or collection systems; and how the breakdown or deficiency relates to the particular violations.
>
> 2. A description of the types of corrective actions which will remedy the violations. This should include an analysis, based on knowledge of the treatment works and load characteristics, of whether the problems can be cured by changes in operation and maintenance practices, whether new equipment is needed, or whether some combination thereof is necessary.
>
> 3. Where construction appears warranted, a general description of the appropriate technology should be given, including information on whether any special or unique circumstances exist that would necessitate more elaborate equipment, construction problems, etc.
>
> 4. Where construction appears warranted, credible estimates of the costs involved and the time needed for implementation. This should include an evaluation of whether the 7/1/8[illegible] date can be met.

5. A full description of the POTW's past and current grant activities and future prospects, including documentation of significant events or agreements. This would include all funded projects or eligible projects under application.

Also, evidence and analysis of a recent plant inspection by EPA (or the State) should be included, which would document the violations and assess compliance problems. Also, we strongly urge that to the extent possible each referral be accompanied by a JRB report or other detailed diagnostic report. Such information quickly puts us in command of salient facts, aiding both trial preparation and settlement discussions. */

The information listed above should be included in all referrals, regardless of the potential for quick settlement. To evaluate the merits of settlement or to proceed with litigation of any referral, we need to have the background information necessary to support a fully-litigated case.

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*/ We suggest that, to the extent possible, the "informant" supplying this information be EPA or contractor personnel who presumably would be available for case preparation and trial purposes.

1530

Financial Capacity

We will contend in litigation that a municipality must comply with the Clean Water Act regardless of the availability of public grant funds or the existence of other municipal expenditures. Thus, as a matter of law, we argue that municipalities cannot raise financial impossibility as a defense to judicial enforcement actions. Nonetheless, municipalities frequently attempt to make showings of financial hardship, often with the sanction of the court.

Thus, where the region reasonably anticipates at the time of referral that the municipality may raise financial capability as an issue in litigation, civil referrals should include a threshhold financial evaluation. Financial evaluations are particularly necessary in those cases which will involve large capital outlays to finance large, long-term plant construction, expansion and/or rehabilitation projects by the municipality. Such projects typically require outside financing. Also, in cases where a large upfront penalty is sought or where sizeable amounts need to be spent to revamp operation and maintenance practices, financial information is necessary.

The analysis should allow a determination that a given remedy or range of remedial options, reasonably related to compliance, will not be impossible for the municipality to finance. Through such analysis we should be able to determine, for purposes of evaluating the litigation merits of a given

referral, that financial capacity issues will not be a bar to obtaining relief. This test would assure that the government can expect to rebut competently (at a later stage in the litigation) a showing by the municipality that it cannot afford to comply. This initial analysis would not approach the scope or detail of an evidentiary presentation necessary to rebut a well-presented financial hardship showing.

To facilitate a preliminary financial capability determination, we recommend that the regions gather and analyze two types of basic information: 1) financial condition and revenue-raising ability of the municipality and 2) cost of necessary remedial measures.

First, we understand that the Agency will use its Financial Capability Guidebook and other guidance materials to do a basic work-up of the municipality's financial picture. Information necessary for the analysis should be obtainable by the regions from local authorities and other sources. This basic evaluation would include the following information:

1. the current bond rating and capacity of the municipality;
2. the amount of outstanding indebtedness and other factors which may impinge on the municipality's ability to fund remedial programs;
3. population and income information;

4. grant eligibility and past grant experience;
5. state or local laws which limit the municipality's ability to raise funds for remedial programs; and
6. the presence or absence of user charges and whether increased user charges would be an effective fund-raising mechanism.

Second, the Agency should develop credible cost figures on the major components of the necessary remedial program. Such information should be generated as part of the remedial analysis of the referral. For purposes of preliminarily evaluating financial condition and preparing to rebut financial impossibility showings, we suggest an analysis of the "worst case" scenarios, i.e. the most expensive (but reasonable) compliance options. For such remedies, or anything less expensive, we can prepare to effectively rebut a hardship claim.

In this perspective, then, the referral can produce a rough-cut "snapshot" of the financial burden of a given project.

Should the municipality make claims of financial hardship in the litigation, we will need to develop this information further with the assistance of a municipal finance

expert. For NMP referrals, we understand that the Agency will also utilize the services of its outside financial consultants (who presumably would later be our expert witnesses as well) for this purpose. Such an expert should be retained before discovery commences to enable the expert to participate in developing discovery plan, interrogatories and requests for production on this issue.

UNITED STATES DISTRICT COURT
[ ] DISTRICT OF [ ]

UNITED STATES OF AMERICA, Plaintiff, v. [CITY OF / UTILITY AUTHORITY] and THE STATE OF [ ] Defendants.	)	CIVIL ACTION NO.

COMPLAINT

Plaintiff, the United States of America, by authority of the Attorney General of the United States, and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges as follows:

1. This is a civil action brought pursuant to Sections 309(b) and (d) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1319(b), (d) for injunctive relief and the assessment of a civil penalty against the [City of / Utility Authority] for violations of the Act and the [City's/Utility Authority's] National Pollutant Discharge Elimination System ("NPDES") Permit issued by [EPA /State of] pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and against the State of [ ] pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e).

2. This Court has jurisdiction over this action pursuant to Section 309(b) of the Act, 33 U.S.C § 1319(b),

and 28 U.S.C. § 1345. Plaintiff has notified the State of [ ] of the commencement of this action pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e), by naming the State of [ ] as a party.

3. Defendant [City of / Utility Authority] ("the City"/ "Utility Authority"), is a political subdivision of the State of [ ] within the [ ] District of [state] and is a "municipality" within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

4. Defendant State of [ ] is a party to this action for relief pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e).

5. At all relevant times the [City/Utility Authority] owned and operated, and continues to own and operate, a sewage treatment plant known as the [name] Sewage Treatment Plant ("[ ] STP"), a publicly-owned treatment works located in the City of [ ], [ ] County, [State]. The [name] STP treats and treated wastewater from residential, commercial, and industrial sources located in [city, state].

6. The [name] STP discharged and discharges pollutants into [receiving stream], thence into the [name] Fork of the [name] River, thence into Lake [name] of the [name] River Basin. These discharges were and are discharges of pollutants into navigable waters as defined by Sections 502(7) and (12) of the Act, 33 U.S.C. §§ 1362(7) and (12).

7. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant except in accordance with Section 301 of the Act, 33 U.S.C § 1311, and as authorized by and in compliance with a permit issued under Section 402 of the Act, 33 U.S.C. § 1342.

8. Section 308 of the Act, 33 U.S.C. § 1318, requires the owner or operator of a point source to monitor its discharges and make reports as mandated by a permit issued under Section 402 of the Act, 33 U.S.C. § 1342.

9. Sections 309(b) and (d) of the Act 33 U.S.C. §§ 1319(b) and (d), authorize the commencement of a civil action for injunctive relief and for civil penalties not to exceed by the Administrator $10,000 per day for each violation of Sections 301 or 308 of the Act, 33 U.S.C. §§ 1311 or 1318, or of any permit condition or limitation implementing Sections 301 or 308 of the Act, or of any violation of an administrative order issued pursuant to Section 309 of the Act.

FIRST CLAIM FOR RELIEF
(City of /Utility Authority)

10. Plaintiff realleges and incorporates herein paragraphs 1 through 9.

11. Effective [date], [EPA/State of] issued, pursuant to Section 402[(a) or (b)] of the Act, 33 U.S.C. § 1342[(a) or (b)], NPDES Permit No. [ ] to the [City /Utility Authority], setting effluent limitations and other conditions for the discharge of pollutants from the [ ] STP, with an expiration date of [date]. On or about [date],

[EPA/ State of] extended the permit administratively, and [EPA/ State of] reissued the permit effective [date], with an expiration date of [date]. [EPA/ State of] modified the permit, effective [date], The NPDES permit authorized the discharge of pollutants from the [name] STP to [receiving stream] subject to the terms and conditions of the permit.

12. On [date], pursuant to Section 309(a) of the Act, 33 U.S.C. § 1319(a), EPA issued Administrative Order [number] to the [City of / Utility Authority]. Administrative Order [number] found that the [City/Utility Authority] had failed to comply with the effluent limits contained in the permit, had failed to monitor correctly the effluent from the [name] STP, and had failed to notify EPA of permit violations. Administrative Order [number] ordered the [City / Utility Authority] to take, within [ ] days of the effective date of the order, whatever corrective action was necessary to comply with the NPDES permit.

13. The [City / Utility Authority] failed to comply with Administrative Order [number] within the time limit specified in the order. Thereafter, EPA issued Administrative Order [number] on [date]. This Administrative Order found that the [City/Utility Authority] had exceeded the effluent limits contained in the permit, had failed to monitor effluent discharges as frequently as required by the

permit, and had failed to operate and maintain the [name] STP properly. Administrative Order [number] directed the [City/ Utility Authority] to come into full compliance with its NPDES permit by [date]. The [City/Utility Authority] failed to comply with Administrative Order [number].

14. During the following periods, the [City/Utility Authority] discharged the following monthly (30-day) average and weekly (7-day) average concentrations of 5-day Biological Oxygen Demand ("BOD_5") from the [name] STP into the [receiving stream], in excess of the effluent limits for BOD_5 contained in NPDES Permit No. [ ]:

Period	30-day Average (mg/l)	7-day Average (mg/
a) [month/year]	[concentration]	[concentration]
b) [month/year]	[concentration]	[concentration]
etc.	etc.	etc.

15. During the following periods, the [City/Utility Authority] discharged the following monthly (30-day) average and weekly (7-day) average quantities of BOD_5 from the [name] STP into the [receiving stream], in excess of the effluent limits for BOD_5 contained in NPDES Permit No. [ ]:

Period	30-day Average (lbs)	7-day Average (lbs
a) [month/year]	[quantity]	[quantity]
b) [month/year]	[quantity]	[quantity]
etc.	etc.	etc.

16. During the following periods, the [City/ Utility Authority] discharged the following monthly (30-day) average and weekly (7-day) average concentrations of Total Suspended Solids ("TSS") from the [name] STP into the [receiving stream], in excess of the effluent limits for TSS contained in NPDES Permit No. [ ]:

Period	30-day Average (mg/l)	7-day Average (mg
a) [month/year]	[concentration]	[concentration
b) [month/year]	[concentration]	[concentration
etc.	etc.	etc.

17. During the following periods, the [City/ Utility Authority] discharged the following monthly (30-day) average and weekly (7-day) average quantities of TSS from the [name] STP into the [receiving stream], in excess of the effluent limits for TSS contained in NPDES Permit No. [ ]:

Period	30-day Average (lbs)	7-day Average (lb
a) [month/year]	[quantity]	[quantity]
b) [month/year]	[quantity]	[quantity]
etc.	etc.	etc.

18. During the following periods, the [City/Utility Authority] discharged the following monthly (30-day) average and weekly (7-day) average concentrations of Fecal Coliform from the [name] STP into the [receiving stream], in excess of the effluent limits for Fecal Coliform contained in NPDES Permit No. [ ]:

Period	30-day Average (mg/l)	7-day Average (mg
a) [month/year]	[concentration]	[concentration]
b) [month/year]	[concentration]	[concentration]
etc.	etc.	etc.

19. At relevant times the [City/Utility Authority]:

(a) discharged pollutants from the [name] STP into navigable waters on numerous occasions in a manner that bypassed the treatment plant;

(b) failed to adequately operate and maintain the [name] STP;

(c) failed to monitor effluent discharges as required by NPDES Permit No. [ ];

(d) failed to report monitoring results properly; and

(e) failed to notify EPA of permit violations as required by NPDES Permit No. [ ].

20. The discharges described in paragraphs 14 through 18 above violated Section 301 of the Act, 33 U.S.C. § 1311, and/or permit conditions or limitations implementing Section 301 of the Act. The discharges and omissions described in paragraphs 19(a) and (b) above violated permit conditions or limitations implementing Section 301 of the Act, 33 U.S.C. § 1311. The failure to comply with the monitoring requirements described in paragraphs 19(c) and (d) above violated permit conditions implementing Section 308 of the Act, 33 U.S.C. § 1318. The omissions described in paragraph 19(e) above violated

permit conditions implementing Section 308 of the Act, 33 U.S.C. § 1318. The discharges, omissions and violations described in paragraphs 14-18, and 19(b), (c), (d), and (e) above violated the Administrative Orders issued by the EPA pursuant to Section 309(a) of the Act, 33 U.S.C. § 1319(a).

21. Pursuant to Sections 301 and 309 of the Act, 33 U.S.C. §§ 1311 and 1319, the [City of / Utility Authority] is liable for the imposition of injunctive relief and the assessment of a civil penalty not to exceed $10,000 per day for each violation based on the [City's/Utility Authority's] violations of Sections 301 and 308 of the Act, 33 U.S.C. §§ 1311 and 1318, and/or of any permit condition or limitation implementing Sections 301 and 308 of the Act, or of any violation of the Administrative Orders. On information and belief, the [City/Utility Authority] may in the future continue to violate Sections 301 and 308 of the Act, 33 U.S.C. §§ 1311 and 1318, and the conditions and limitations of its permit implementing Sections 301 and 308 of the Act, unless the Court orders the relief sought herein.

SECOND CLAIM FOR RELIEF
(City of / Utility Authority)

22. Plaintiff realleges and incorporates herein paragraphs 1 through 21.

23. Pursuant to the National Municipal Policy on Publicly-owned Treatment Works ("POTW's") issued by EPA on January 23, 1984, 49 Fed. Reg. 3832 (Jan. 30, 1984), certain types of municipal wastewater treatment facilities, or POTW's, of which the [name] STP is one, were notified of

impending enforcement activities by EPA for failure to comply with statutory requirements and compliance deadlines in the Act. Under the Policy, affected municipalities would be required to submit to EPA either a Composite Correction Plan (for a municipality with a constructed POTW) or a Municipal Compliance Plan (where construction of new facilities was required), with schedules in either event requiring compliance as soon as possible but in no event later than the July 1, 1988 statutory deadline.

24. Implementing the National Municipal Policy, and citing the violations described in the United States' First Claim for Relief above, EPA on [date] issued Administrative Order [number] to the [City/Utility Authority] under Section 309(a) of the Act, 33 U.S.C. § 1319(a), requiring the [City/Utility Authority] to submit a [Municipal Compliance Plan/Composite Correction Plan], requiring compliance not later than [date], to EPA by [date]. The [City/Utility Authority] has failed to comply with Administrative Order [number].

25. Pursuant to Section 309 of the Act, 33 U.S.C. § 1319, the [City of / Utility Authority] is liable for the imposition of injunctive relief and the assessment of a civil penalty not to exceed $10,000 per day of violation based on the [City's/Utility Authority's] violation of Administrative Order [number]. On information and belief, the [City/Utility Authority] may in the future continue to violate

Administrative Order [number], unless the Court orders the relief sought herein.

THIRD CLAIM FOR RELIEF
(State of [ ])

26. Plaintiff realleges and incorporates herein paragraphs 1 through 25.

27. Pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e), the State of [ ] is joined as a party and is liable for the payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the [City of / Utility Authority] in this action to the extent that the laws of the State prevent the [City/Utility Authority] from raising revenues needed to comply with such judgment.

WHEREFORE, the United States of America prays that the Court order:

1. Defendant [City of / Utility Authority] to undertake a diagnostic study to (a) identify all aspects of noncompliance with the Act, the permit, and the Administrative Orders issued by EPA, (b) identify the causes of the violations, (c) evaluate fully the need to construct additional capacity or to take other steps to treat properly influent to the plant, and (d) to submit such study to EPA;

2. Defendant [City of / Utility Authority] to develop a [Municipal Compliance/Composite Correction] Plan for the [name] STP that describes the corrective actions

necessary to achieve compliance with the NPDES permit and the Act with respect to both current and projected future wastewater loadings and flows, and that provides a schedule for completing the required work and for achieving compliance at the earliest possible date but in no event later than July 1, 1988, and that the [City/Utility Authority submit such plan to EPA and make revisions to the plan as directed by EPA;

3. Defendant [City of / Utility Authority] to implement the [Municipal Compliance/Composite Correction] Plan including, as necessary, the construction of additional capacity to treat influent;

4. Defendant [City of / Utility Authority] to comply with the Act and the NPDES permit issued thereunder;

5. Defendant [City of / Utility Authority] be permanently enjoined from any and all discharges of pollutants except as authorized by the Act and the NPDES permit;

6. Defendant [City of / Utility Authority] be assessed, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), a civil penalty not to exceed ten thousand dollars ($10,000.00) per day for each violation of Sections 301 or 308 of the Act, 33 U.S.C. §§ 1311 or 1318, or of any permit condition or limitation implementing Sections 301 or 308 of the Act, or of the Administrative Orders issued by EPA;

7. This Court order relief as appropriate in favor the United States and against the State of [ ] pursuant to

Section 309(e) of the Act, 33 U.S.C. § 1319(e);

8. Defendants be ordered to reimburse the United States for the costs and disbursements of this action; and

9. This Court grant the United States such other relief as it may deem just and proper.

Respectfully submitted,

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 205530

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[ ]
[ ]

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

PRESS BRIEFING

MUNICIPAL COMPLIANCE WITH THE CLEAN WATER ACT JULY 27, 1988

LEE M. THOMAS
ADMINISTRATOR

OFFICE OF WATER
U. S. ENVIRONMENTAL PROTECTION AGENCY

MUNICIPAL COMPLIANCE WITH THE CLEAN WATER ACT

National Press Briefing

July 27, 1988

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  - Progress Meeting National Municipal Policy (NMP) Goals
  - Meeting the NMP Goal
  - Status of NMP Majors
  - State-by-State Compliance Achieved by Major Sewage Treatment Plants
  - Treatment Levels of Post 1988 Majors
  - Status of NMP Minors
  - Major vs. Minor
- Status Sheets
  - Summary Tables of National Status as of July 15, 1988 Majors and Minors
  - List of NMP Majors that met Clean Water Act Requirements
  - List of NMP Majors that did not meet Clean Water Act Requirements but which are on a Schedule
  - List of NMP Majors that did not meet all Clean Water Act Requirements and are not on Final Schedule
  - List of Federal Judicial Enforcement Cases
- Fact Sheets
  - Background on Municipal Treatment Plants and the Environmental Impact of Compliance with the Clean Water Act
  - Outreach Activities to Promote Compliance
  - Summaries of Key Enforcement Cases
- Questions and Answers

PRESS BRIEFING

MUNICIPAL COMPLIANCE WITH THE CLEAN WATER ACT JULY 27, 1988

GRAPHS AND CHARTS

- Progress Meeting NMP Goals
- Meeting the NMP Goal
- Status of the NMP Majors
- Status of the NMP Minors
- Treatment Levels of Post 1988 Majors
- State-by-State Compliance Achieved by Major Sewage Treatment Plants
- Major vs. Minor

DEFINITION OF TERMS

NMP - National Municipal Policy which was signed in January 1984 and is discussed in the press release.

Majors - generally those sewage treatment plants which provide service to a population of 10,000 or more persons or have a flow of one million gallons or more per day.

Minors - all sewage treatment plants other than the majors which provide service to a population of under 10,000 or a flow of under one million gallons per day.

Treatment Levels - primary treatment, secondary treatment and advanced wastewater treatment processes; for a detailed discussion please see the Fact Sheets in this package.

OFFICE OF WATER
U. S. ENVIRONMENTAL PROTECTION AGENCY

United States
Environmental Protection
Agency

Office of
Public Affairs (A-107)
Washington DC 20460

EPA

Environmental News

FOR RELEASE: WEDNESDAY, JULY 27, 1988

Dave Ryan (202) 382-2981

EPA ANNOUNCES SIGNIFICANT PROGRESS IN MEETING U.S. CLEAN WATER DEADLINES

Eighty-seven percent of all publicly-owned sewage treatment plants in the country met the congressionally-established July 1, 1988, deadline for legally-required pollution cleanup, EPA Administrator Lee Thomas announced today. As a result, 95 percent of the total sewage processed in the United States receives secondary or better treatment. Secondary treatment protects public health from the disease potential of human waste and also protects fish and other aquatic life.

Thomas cited both voluntary compliance and federal and state enforcement efforts as reasons for achievement of the 87-percent compliance figure. Municipal compliance with water pollution control laws has been an EPA priority since 1984, when the agency established its National Municipal Policy (NMP). The NMP required municipal compliance by July 1, 1988, whether or not a city got federal funding for sewage treatment plant construction.

The 87 percent which achieved compliance with their water pollution control permit requirements serve 108 million people nationwide. Of the remaining 13 percent of sewage treatment plants in the United States, most are on enforceable timetables leading to compliance or are in some stage of a judicial process leading to the establishment of these timetables.

Speaking at a joint Washington press briefing with Roger Marzulla, U.S. Justice Department Assistant Attorney General for Land and Natural Resources, and Roberta Savage, Executive Director of the Association of State and Interstate Water Pollution Control Administrators

Thomas praised the cooperative federal and state effort that made this compliance success possible:

"Under the landmark 1972 Amendments to the federal Clean Water Act, Congress set for a pollution-plagued nation the formidable goal of making most U.S. waters fishable and swimmable again," Thomas said. "A large part of this task was cleaning up wastewater from our often overloaded and overworked municipal sewage treatment plants. To meet this challenging goal, Congress mandated a joint federal-state cooperative effort in pollution cleanup. Since 1972, EPA has provided over $45 billion in federal grants to help local communities build and upgrade sewage treatment facilities, with state and local governments contributing an additional $15 billion in matching funds. Although the majority of municipalities have met the nation's clean water goals, there has been recalcitrance, but EPA, the U.S. Justice Department and state officials have been aggressive in bringing these cities into compliance. More than 125 lawsuits have been filed by the federal government against municipalities since 1984 to obtain compliance under the NMP. The 87 percent compliance rate of U.S. sewage treatment plants is a success story of which state and federal environmental officials can truly be proud."

The vast majority of Americans are served by publicly-owned (taxpayer supported) sewage treatment plants (POTWs). Of the rivers and streams in the United States that do not meet their state water quality standards, 17 percent are failing because of pollution from POTW's. For estuaries, 11 percent are not meeting their standards because of POTW's.

For Treatment plants, meeting the July 1 deadline meant complying with permit requirements to provide at least secondary treatment of wastes. Secondary treatment is the second stage of sewage treatment, in which bacteria is used to eliminate organic human waste. (The first step in sewage treatment is called primary treatment, in which screens and sedimentation tanks are used to remove most materials that float or settle.) Secondary treatment protects communities from the disease potential of untreated human waste and removes materials that can rob waters of oxygen necessary for aquatic life. For some treatment plants, the July 1 deadline was tied to permits requiring more advanced waste treatment that significantly reduces materials like nitrogen and phosphorus, which can also choke and kill water bodies and their fish.

The National Municipal Policy, established in January 1984, grew out of congressional, federal and state concern in the early 1980's that many cities were not making expected progress in treatment-plant construction. The original deadline in the 1972 Amendments for plants to meet their permit requirements was 1977; Congress later extended this deadline for some cities to 1983, and then to July 1, 1988.

Also, diminishing federal funding of the program raised the question at that time of whether cities would be required to comply with discharge limits. Since 1977, the courts had ruled that treatment plants had to comply with their discharge limits, regardless of the availability of federal money.

The NMP made it clear that, with or without federal funding, EPA and the states would be pushing municipalities to meet their permit requirements by July 1, 1988, or sooner if possible. The sole exceptions were those cities that could prove they were physically or financially unable to complete construction by this deadline; however, they generally would have to abide by court-enforceable schedules to achieve compliance as quickly as possible.

There are about 15,500 publicly-owned treatment plants in the United States. About 3700 are what EPA calls "majors," defined generally as plants designed to serve 10,000 or more people and to process one million gallons or more of wastewater a day. The rest, which EPA calls "minors," total about 11,800.

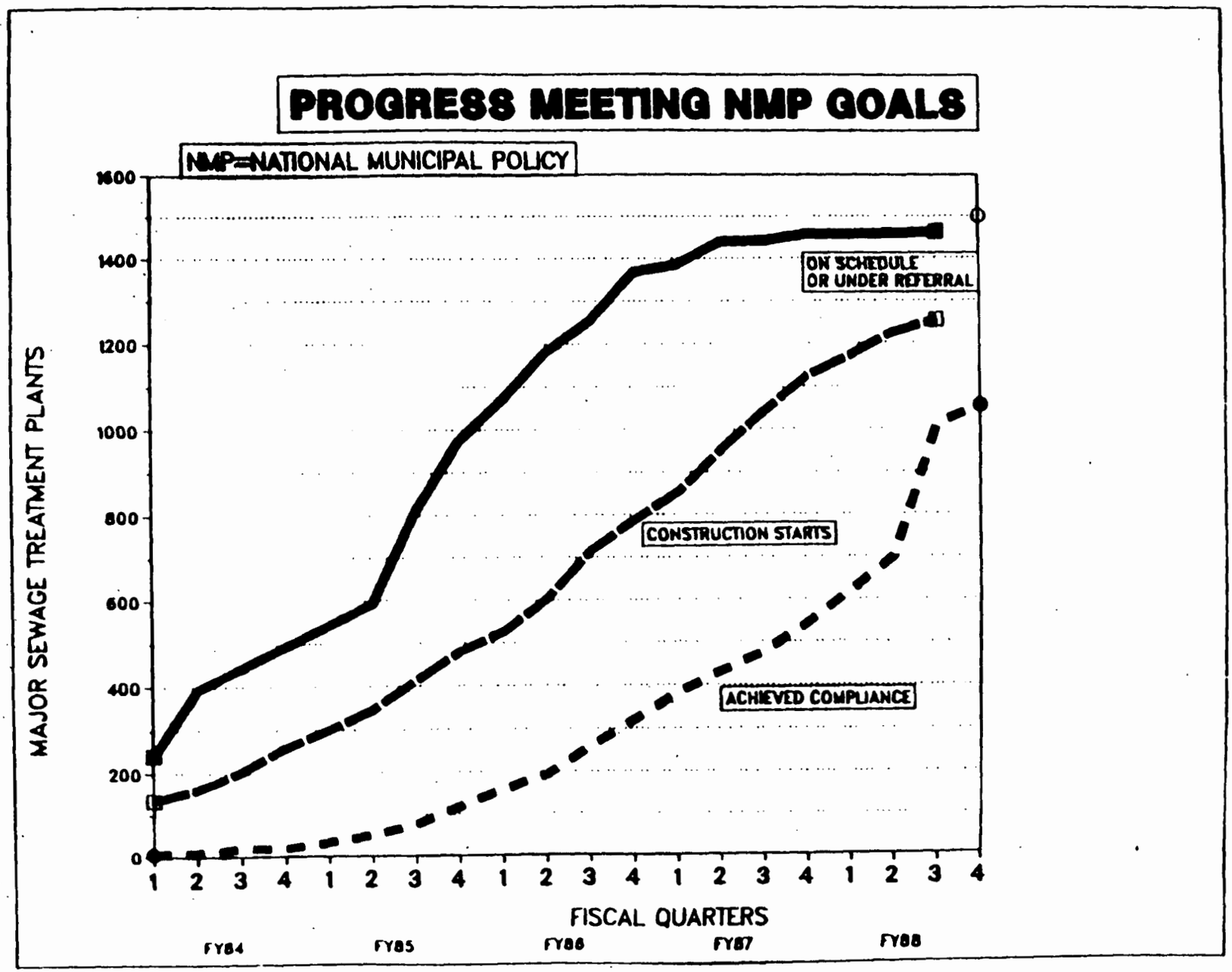
Of the 3,700 total majors, 2,200 had achieved compliance by 1984. The NMP focused on the remaining 1,500 major sewage treatment plants which had not achieved compliance as of 1984. As of the July 1, 1988, deadline, over 1000 achieved compliance. Of those not achieving compliance, the majority are on enforceable court schedules or are the subject of federal or state judicial actions. Further, over 60 percent of the remaining NMP majors not in compliance already provide secondary treatment or better.

Of the 11,800 total minors, 9,300 had achieved compliance by 1984. The NMP focused on the remaining 2,500 minor sewage treatment plants which had not achieved compliance as of 1984. As of the July 1, 1988, deadline, over 800 have achieved compliance. Of the rest, approximately 1,500 are on enforceable schedules or are the subject of federal or state enforcement actions.

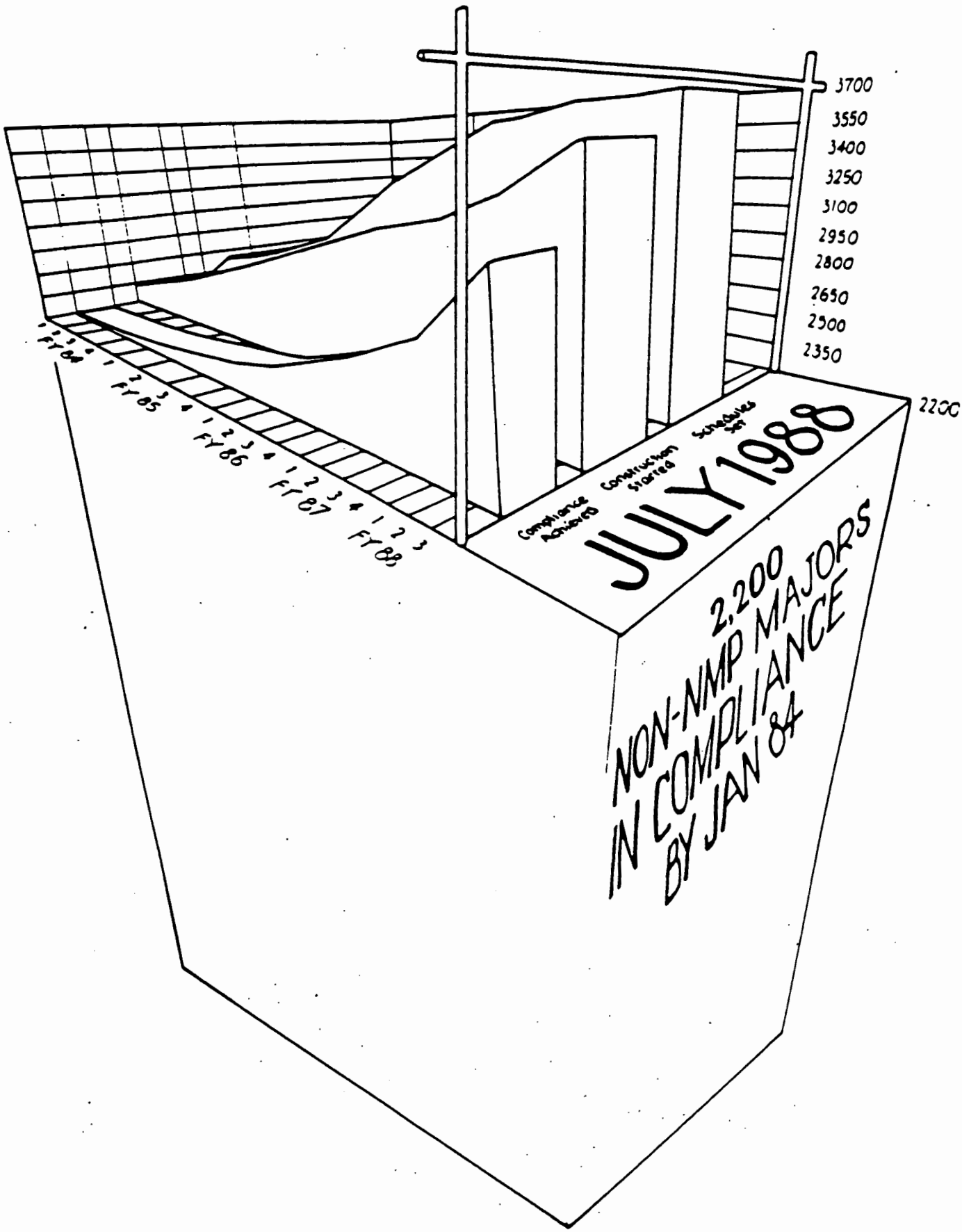
"As impressive as these figures are," said Thomas, "EPA and the states have no intention of slacking up on our enforcement efforts. We are reaffirming our commitment to bring all sewage treatment plants in this country into compliance with the law and to make sure these plants remain in compliance. Together, we will ensure that all plants currently on enforceable compliance schedules stay on those timetables and that those plants not yet on schedules are put on them as soon as possible. I want to make it absolutely clear that EPA is prepared to take additional enforcement actions against cities that refuse to cooperate in protecting the environment and health of their citizens."

* * *

R-131

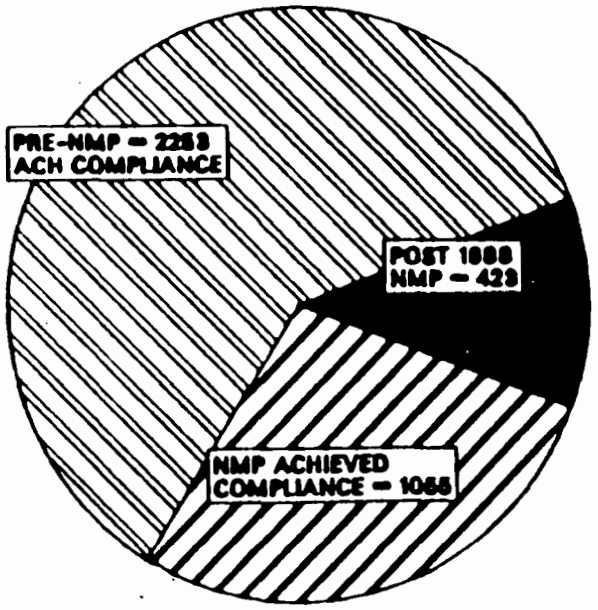

PROGRESS MEETING NMP GOALS
NMP=NATIONAL MUNICIPAL POLICY
MAJOR SEWAGE TREATMENT PLANTS
1600
1400
1200
1000
800
600
400
200
0
ON SCHEDULE
OR UNDER REFERRAL
CONSTRUCTION STARTS
ACHIEVED COMPLIANCE
1 2 3 4 1 2 3 4 1 2 3 4 1 2 3 4 1 2 3 4
FISCAL QUARTERS
FY84
FY85
FY86
FY87
FY88

Progress Meeting NMP Goals



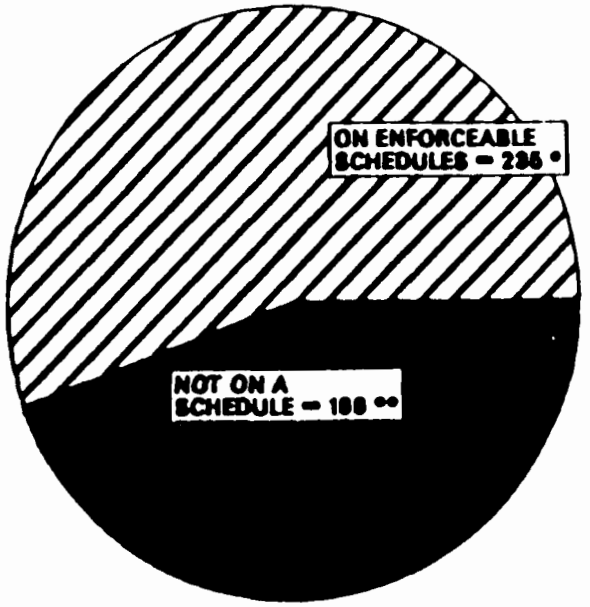
STATUS OF NMP MAJORS

ALL MAJORS



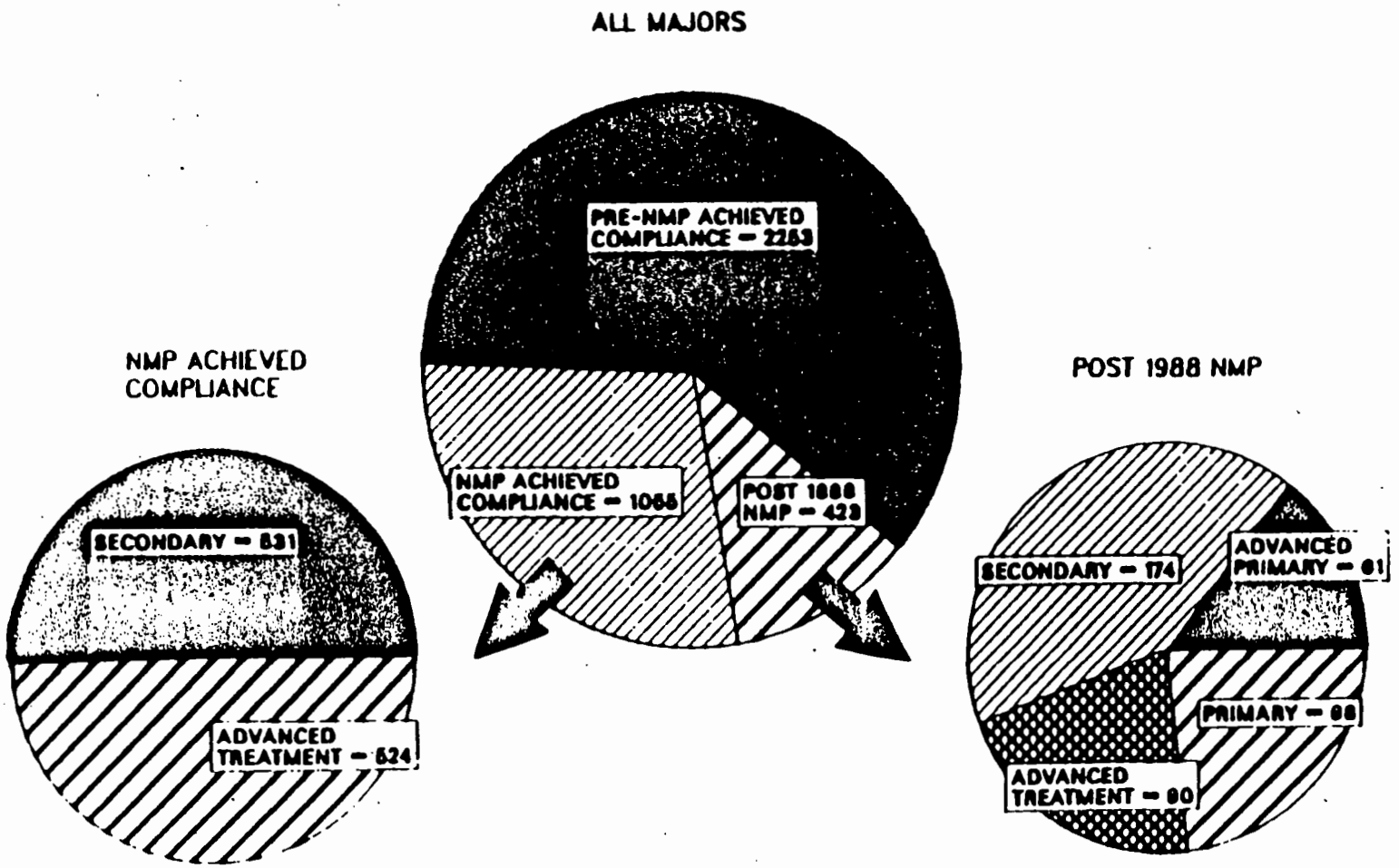
TOTAL MAJORS UNIVERSE — 3731(2253 PRE-NMP)
TOTAL NMP MAJORS UNIVERSE — 1478
ACHIEVED COMPLIANCE — 2253+1065 (88% OF ALL MAJORS)
POST 1988 NMP — 423 (11% OF ALL MAJORS)

POST 1988 NMP



• JUDICIAL — 185
ADMINISTRATIVE — 40
•• FILED — 80
REFERRED BUT NOT YET FILED — 90
PLANNED REFERRAL OR OTHER ACTION — 28

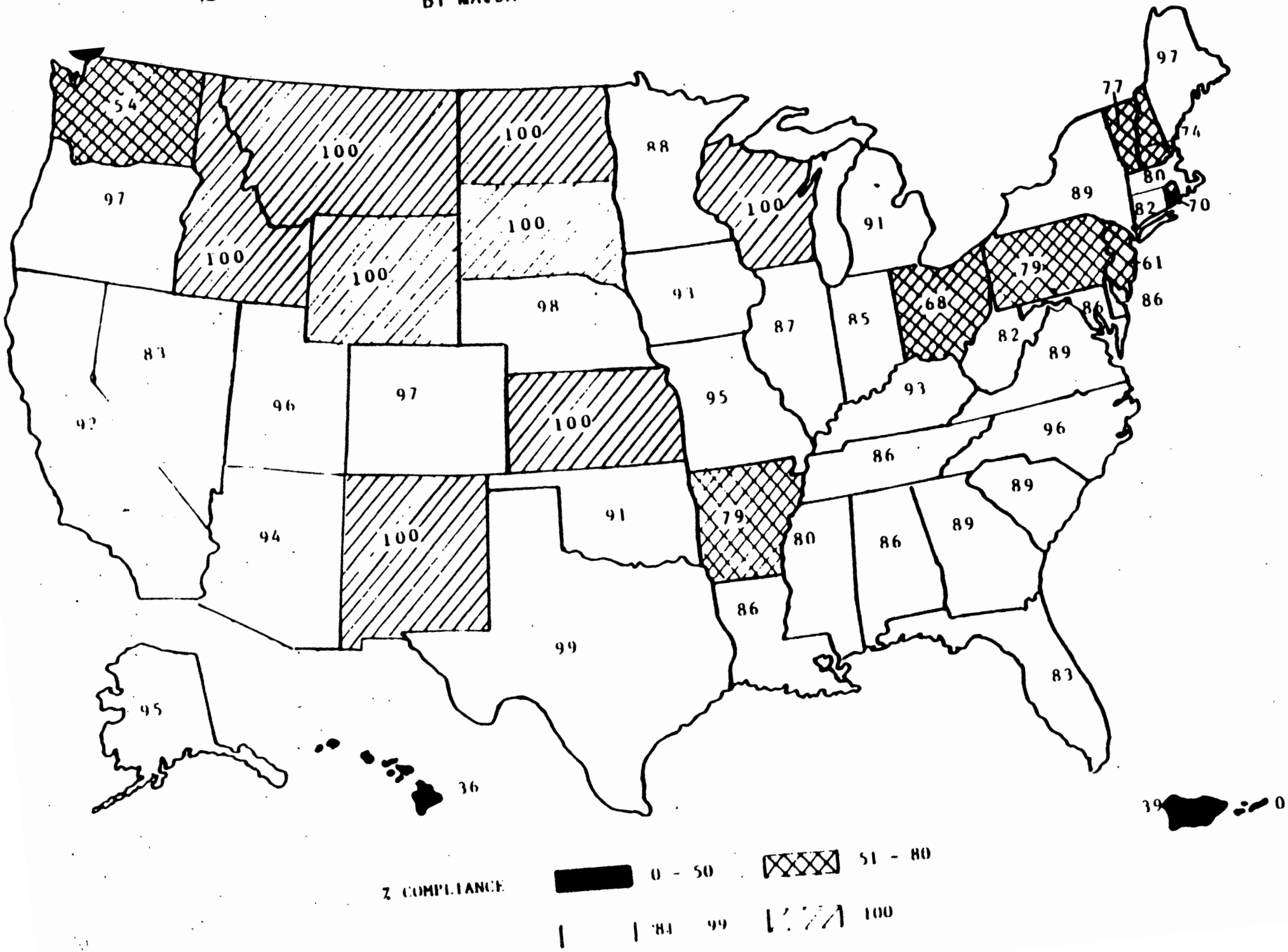
TREATMENT LEVELS OF POST 1988 MAJORS



TOTAL POTW'S SECONDARY OR GREATER – 3574 (86% TOTAL POTW)
PRE-NMP – 2253
NMP ACHIEVED COMPLIANCE – 1055
POST 1988 NMP – 264 (174 SEC./80 AT.)

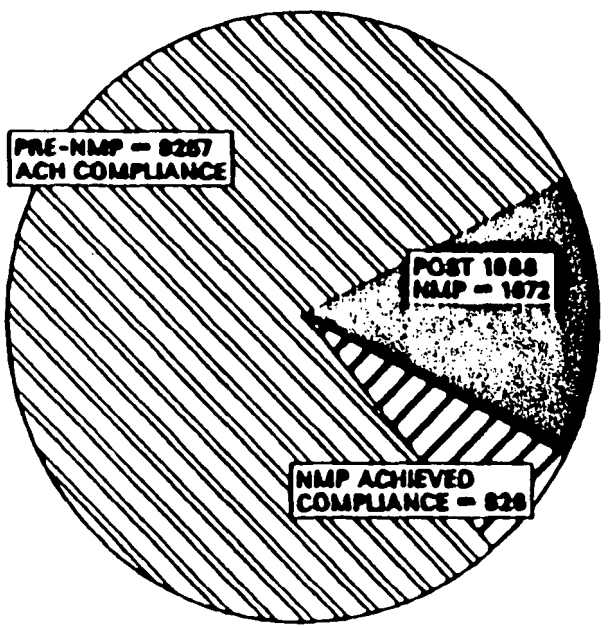
STATE BY STATE COMPLIANCE ACHIEVED

BY MAJOR SEWAGE [redacted] TMENT PLANTS



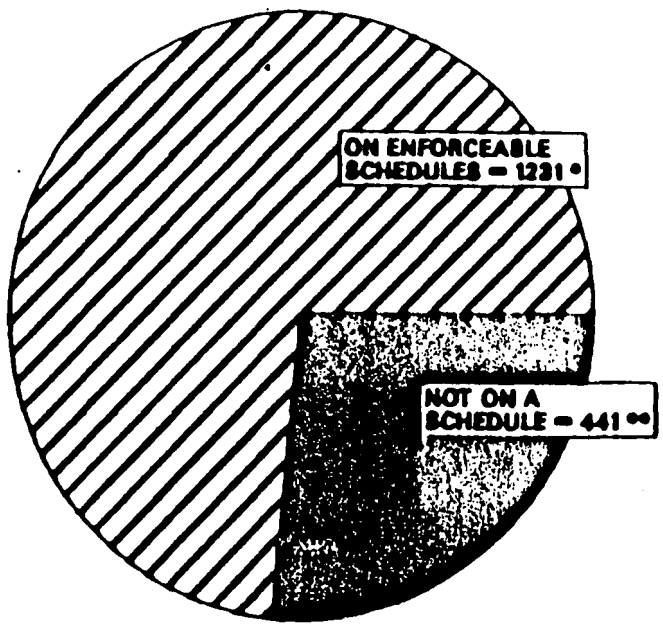
STATUS OF NMP MINORS

ALL MINORS



TOTAL MINORS UNIVERSE — 11755(8257 PRE-NMP)
TOTAL NMP MINORS UNIVERSE — 2498
ACHIEVED COMPLIANCE — 8257+826 (86% OF ALL MINORS)
POST 1988 NMP — 1672 (14% OF ALL MINORS)

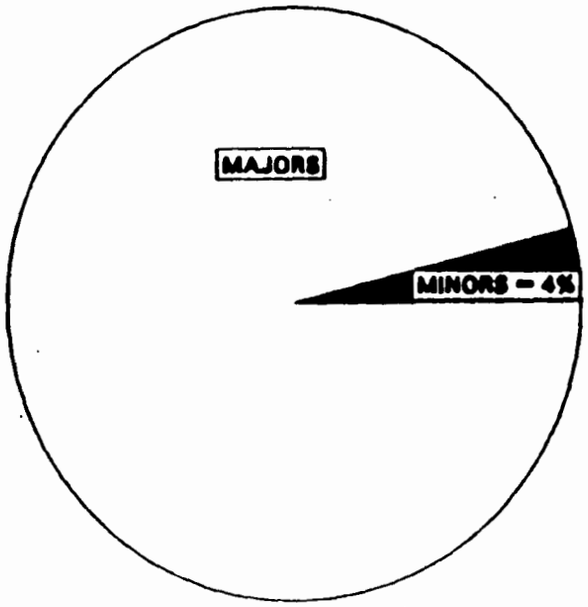
POST 1988 NMP



* JUDICIAL — 252
ADMINISTRATIVE — 979
** REFERRED — 259
PLANNED REFERRAL OR OTHER ACTION — 182

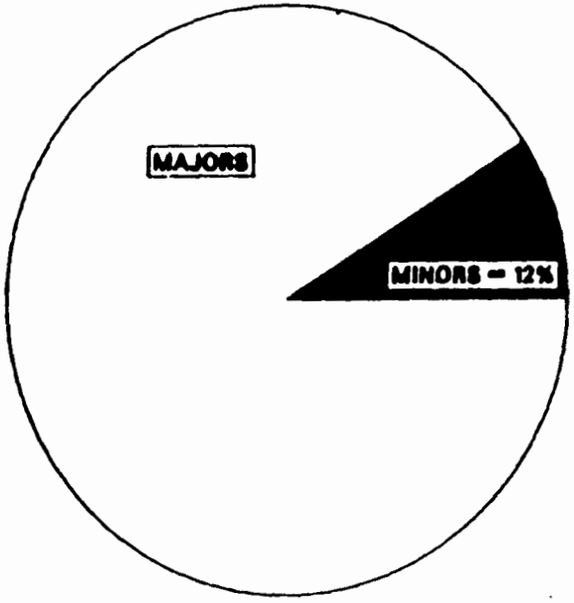
MAJOR VS MINOR

TOTAL SEWAGE TREATMENT FLOW



TOTAL SEWAGE TREATMENT FLOW - 30,000 MGD
MINOR SEWAGE TREATMENT FLOW - 1,214 MGD

POPULATION SERVED



TOTAL POPULATION SERVED - 140 MILLION
MINOR POPULATION SERVED - 16.7 MILLION

PRESS BRIEFING

MUNICIPAL COMPLIANCE WITH THE CLEAN WATER ACT JULY 27, 1988

STATUS SHEETS

OFFICE OF WATER
U. S. ENVIRONMENTAL PROTECTION AGENCY

Municipal Compliance
with the
Clean Water Act

National Municipal Policy

(Issued January 1984)

Total Major Sewage Treatment Plants:		3731	2253 majors met CWA by Jan 1984. (NMP Date)
Affected by the Policy:		1478	40% Needed Construction as of Jan 1984.
Met CWA Requirements:		1055*	71% (of NMP) 89% (of all Majors)
Have Not Met CWA Requirements:		423	
On Enforceable Schedules:		235	
° Judicial	195		
° Administrative	40		
Not On Schedules:		188	
° Judicial Referrals:	150		
° Planned Referrals	28		
° Other	10		

* Figure includes 90 POTWs that have <u>either</u> completed construction and are operational, but whose effluent data have not been verified, <u>or</u> who will achieve compliance by the end of September.

Municipal Compliance
with the
Clean Water Act

National Municipal Policy

(Issued January 1984)

Total Minor Sewage Treatment Plants:		11755	9257 minors (79%) met CWA by Jan 1984. (NMP Date)
Affected by the Policy:		2498	21% Needed Construction as of Jan 1984.
Met CWA Requirements:		826	33% (of NMP) 86% (of all Minors)
Have Not Met CWA Requirements:		1672	
On Enforceable Schedules:		1231	
° Judicial	252		
° Administrative	979		
Not On Schedules:		441	
° Judicial Referrals:	259		
° Awaiting Action:	182		

PRESS BRIEFING

MUNICIPAL COMPLIANCE WITH THE CLEAN WATER ACT JULY 27, 1988

MAJOR MUNICIPAL FACILITIES

LIST A :	NMP Majors Sewage Treatment Plants that have met requirements	3308 (2253 Pre-NMP, 1055 NMP)
LIST B :	NMP Majors that did not meet all CWA requirements and final schedule is established	235
LIST C :	NMP Major that did not meet all CWA requirements and final schedule not establisned or other unresolved issues	188

NOTE: The National Municipal Policy majors are presented in Lists A, B, and C which follow.

(See Fact Sheets for definition of treatment level)

OFFICE OF WATER
U. S. ENVIRONMENTAL PROTECTION AGENCY

CLEAN WATER ACT - NATIONAL MUNICIPAL POLICY

MODEL LITIGATION REPORT OUTLINE

I. SYNOPSIS OF CASE

Brief summary of referral, nature of violations, relief requested and EPA efforts to gain compliance.

II. REGULATORY PROGRAM

Description of the statutory and legal authority by which POTW's are required to comply with secondary treatment or water-quality based standards, and a description of the permitting process. Include summary of National Municipal Policy.

III. FACTUAL NARRATIVE

A. Facility Description - Age of plant, design capacity, type, of process, industrial users, discharge point(s) description of stream or river to which discharged, etc.

B. Effluent and Other Violations - List NPDES permit limitations and effluent violations as indicated by discharge monitoring reports and inspection reports. Summarize on-site inspections. Describe other violations, i.e. bypasses, monitoring deficiencies, etc.

C. Construction Grant Status - Provide details on any outstanding grants or applications, including all pertinent documentation, and evaluate prospects for future grants as may affect case.

D. Environmental Harm - Information on known or suspected impact of discharges to receiving waters.

IV. INFORMATION IDENTIFYING DEFENDANT

A. Name

B. Location and Judicial District

C. Size of plant (MGD), industrial usage (number and percentage) and population served.

D. Agent for service of process

E. Name and address of appropriate state official for service of process

V. ELEMENTS OF PROOF

A. Elements of Violation - identify each element of each claim.

B. For each claim and each element:
1. Summarize evidence (facts, documents, expert opinions), including table of violations
2. Identify documents
3. Identify witnesses

VI. ENFORCEMENT HISTORY

Include discussions of:

A. Contacts with POTW, including pertinent contacts in grant areas (update with current contacts if appropriate);

B. Administrative orders issued and responses;

C. Recalcitrance;

D. EPA attempts to resolve prior to referring case;

E. State activities;

F. 301(i) status.

VII. REMEDY AND COMPLIANCE SCHEDULE

A. Injunctive Relief

1. Available Control Technology and Remedial Action - describe what is needed for compliance (new construction, O&M improvements, both?). Include details and status of any facilities plan. Break down critical elements and cost of remedial options. (See DOJ Memo on Remedial Issues). Specify POTW's likelihood of meeting 7/1/88 deadline, and whether outside expert will be needed on this point.

2. Compliance schedule - with and without grant funding.

3. Prohibitory relief - e.g. enjoin new sewer connections.

4. Economic feasibility - showing that reasonable compliance measures <u>not impossible</u> to finance. Provide limited analysis of financial capabilities, identify who prepared the analysis (see DOJ Memo on Financial Capability), and state whether outside expert will be needed on this point. Summarize grant prospects.

B. Penalty -

Include anticipated penalty request at trial, suggested negotiating figure and bottom-line settlement figure (based on known facts and litigation risks), and explanation of basis for calculation of penalty. Discuss known aggravating and mitigating factors.

VIII. ANTICIPATED DEFENSES AND OTHER ISSUES

A. Legal defenses

B. Equitable problems

C. Precedential issues/policy issues

D. Evidence or other matters favorable to defendant, or other significant litigation risks

IX. ATTACHMENTS

A. Current NPDES permit plus any application for renewal or modification

B. Facility diagram

C. Discharge Monitoring Reports

D. Inspection or other evaluative reports

E. Correspondence and other contacts with POTW

F. Administrative Orders and response

G. Draft complaint

H. Table of effluent and other violations

U.S. Department of Justice

DTB:RWN:ar
90-5-1-0

Washington, D.C. 20530

October 25, 1985

Glenn L. Unterberger, Esq.
Associate Enforcement Counsel
for Water (LE-134W)
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

J. William Jordan
Director, Enforcement Division (EN-338)
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: National Municipal Policy Enforcement Initiative

Dear Glenn and Bill:

As promised, enclosed please find materials we have prepared to aid in processing and initiating NMP referrals. These materials include a model complaint, model litigation report outline and memoranda on remedial and financial capability issues.

In addition, we have enclosed a proposed filing schedule for the approximately twelve NMP cases currently on target for the initiative. The proposed schedule shows a single, coordinated filing date as was initially planned; however, recent conversations with your staffs indicate we may wish to consider a rolling series of filings as cases become ready, cumulating in a comprehensive media event. I suggest we discuss this possibility further in the next few weeks. Also, it appears a second group of ten or so NMP referrals may come to Headquarters by mid-December. We should discuss the structure and timing of a "second wave" in the near future.

We were pleased by the effort and enthusiasm reflected in the regional conference calls last week, and it appears the initiative is on the right track. We look forward to continuing this endeavor with you.

Very truly yours,

Assistant Attorney General
Land and Natural Resources Division

By: Reed W. Neuman

REED W. NEUMAN
Senior Attorney
Environmental Enforcement Section
Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

cc: EPA Regional Counsels, Regions I-III, V-VIII
David Buente
Carol Green
Ken Reich
John Wittenborn
Bruce Buckheit
Wayne Walters
Sheila Jones
Ross Connealy
Robert Oakley
David Hackett
Eva Heffernan
Ellen Mahan
Mary Ellen Leahy
Alan Miller
Bruce Berger

PCS DELAY CODES: LEGEND

Column 1: Status Codes

O = Unresolved state water quality standard(s)

V = Variance (pending Section 301(h) decision)

W = Unfinished wasteload allocations

X = Administrative order issued requiring submission of MCP

Y = Other delay

Z = Enforcement action under development

Column 2: Financial Factors

0 = Unknown

1 = Affordability not an issue

2 = Affordabiliy is an issue

3 = Under construction P.L. 92-500 funds

4 = Under construction other funds

Column 3: Quarter Code

A, B, and C = Second, third and fourth fiscal quarters, 1984

D, E, F, and G = Fiscal year 1985 fiscal quarters

H, I, J, and K = Fiscal year 1986 fiscal quarters

L, M, N, and O = Fiscal year 1987 fiscal quarters

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

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

DEC 23 1986

MEMORANDUM

SUBJECT: National Municipal Policy Litigation

FROM: James R. Elder, Director JIM E.
Office of Water Enforcement and Permits

Glenn L. Unterberger Glenn
Associate Enforcement Counsel
for Water

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

In this memorandum, we re-emphasize the need for continued and firm effort on municipal enforcement litigation on the part of enforcement staffs at EPA and the Department of Justice. Obtaining municipal compliance remains the Agency's highest Clean Water Act priority. In addition, this memorandum identifies some specific actions which we are pursuing at Headquarters and DOJ and others which we suggest the Regions take to aid the national municipal enforcement effort.

Obtaining municipal compliance remains the Agency's highest Clean Water Act priority. We have made considerable progress in implementing the National Municipal Policy (NMP), but much work remains. Although the Agency's non-litigative efforts will continue, civil actions against publicly owned treatment works will remain an important part of obtaining cities' compliance with their permits.

The Agency has achieved considerable success in its municipal lawsuits to date. Currently the universe of municipals which most urgently need to be addressed includes two categories, as follows:

1. Major POTWs which have not been placed on enforceable schedules achieving compliance by July 1, 1988. (See attached a list of approximately 63 facilities as of the end of the fourth quarter of FY 86, derived from data in the national tracking system.)

1515

2. POTWs not complying with milestones in enforceable schedules that will prevent compliance by July 1, 1988.

Headquarters/National Activities

The two categories of POTWs listed above which have current priority under the NMP should produce a considerable number of potential cases. To deal expeditiously with this litigative load, Headquarters will pursue a concerted effort at the national level to support municipal litigation.

The Agency has informed Department of Justice managers that NMP cases should be given their highest Clean Water Act priority. Department officials have agreed to participate in efforts to expedite cases.

We will continue to meet on approximately a monthly basis with Department officials to review the national docket of referred and filed cases. The focus of the meetings will be to identify issues track progress of cases and where necessary break logjams to move cases along.

We and DOJ have agreed to the following trigger dates to flag cases for closer management attention, with the understanding that they are subject to further consideration at our monthly meetings.

- 35 days for OECM to act on a municipal referral received from the Regions (typically, to refer the case to the Department).
- 60 days from referral to the Department to filing in the appropriate court.
- 6 months from filing to a motion for summary judgment on liability.
- One year and a half from filing to conclusion.

We understand that many Regional water program managers feel that 3 months or less for summary judgment filing and 1 year for case resolution would be more appropriate as action-oriented goals for these activities, and will strive toward these goals where possible.

The Office of Enforcement and Compliance Monitoring and the Office of Water will issue quarterly activity reports on NMP implementation and litigation. In the report, we will track the progress of scheduling activity, the filing and conclusion of cases, and any issues of interest.

The Office of Water will continue to provide expert services on financial and technical issues through in-house capability and national contracts.

Finally, we are close to agreement, along with the Department, on ways to expand the Region VI pilot project for using a limited period to pursue prefiling settlement negotiations as an option for other Regions.

Matters Requiring Regional Attention

To support this national emphasis, we need help from the Regions in several specific areas.

Regional compliance and enforcement staffs should continue to track noncompliance and to target, consistent with NMP priorities, municipal violators for enforcement action. We wish to emphasize the importance of selecting for judicial enforcement those municipalities that further the NMP or lend credibility to the national effort.

When Regions forward a case against a POTW to Headquarters for review and referral to the Department, the case should be ready for immediate filing. To ensure that the Department can file or prosecute a proposed case on an expedited basis consistent with the time-frames set out above, the Regions must pay increased attention to providing certain basic information in its litigation reports, including the following:

- information on the POTW's financial capabilities for funding necessary compliance work which is at least sufficient to provide EPA and DOJ with a reasonable basis for a position on the issue at the outset of the case and settlement negotiations.

- the grants history of the potential defendant, including applications; past funding; and, if applicable, current status on the state priority list, current status of any present projects, or future prospects for funding.

- a complete list of EPA and state contacts with defendant POTWs on issues relating to compliance.

- a summary of violations reported in the potential defendant's Discharge Monitoring Reports. Inclusion of the Discharge Monitoring Reports themselves will enable the Department to file a motion for summary judgment most expeditiously.

- a bottom-line settlement amount consistent with the Agency's penalty policy.

- a target final compliance date and schedule.

Recent litigation reports have lacked information in these areas in some instances. Absence of this information has impeded the government's ability to file and prosecute municipal cases expeditiously. We attach existing guidance on municipal case litigation reports to assist in their preparation.

To support the development of litigation reports for cases which are readily filed, Headquarters will strive to better the above target dates in support of municipal referrals which are complete in all these respects. Conversely, we will take a hard look at whether to return referrals to the Regions for further development where significant pieces of requisite information are still incomplete, or where the Region prefers to conduct pre-filing settlement discussions with the POTW on anything other than a strict timetable.

On occasion, the Regions have conducted administrative negotiations with a POTW with the result that a POTW might expect a non-judicial resolution of its compliance problems. Where a Region decides that such negotiations are at an end for whatever reason, the Region should indicate to the POTW that judicial action is under consideration. This will help us avoid complaints from a POTW that EPA unfairly "blindsided" it with a lawsuit.

Finally, we must stress that it is crucial for the Regions to continue both their support of cases once referred by assisting in the firm and prompt prosecution of cases through to closure. It is through broadened success in completed prosecutions that the national enforcement effort is most likely to ensure broadscale POTW responsiveness to compliance requirements of the Clean Water Act.

Conclusion

We believe that the above measures will result in the expeditious filing and prosecuting of municipal cases. Developing these streamlined procedures and case management techniques ought to assist in working through the present case load as well as to prepare the Agency and the Department to deal with the expected burden of future NMP enforcement. We ask the Regions to contact us with any suggestions they have regarding improved support for our mutual efforts on Clean Water Act municipal litigation. We thank you for your cooperation and significant investment of time and resources in this effort.

Attachments

cc: F. Henry Habicht
David Buente
Scott Fulton
Sheila Jones
Lawrence Jensen
Rebecca Hamner
Richard Mays
Thomas Adams

1278

B. PRETREATMENT

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

1586

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

NOV 29 1978

MEMORANDUM

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

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

Deputy Assistant Administrator for Water Enforcement (EN-335)

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

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

Identification of POTWs Required to Develop a Program

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

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

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

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

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

Application for Construction Grants Amendment

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

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

Reissuance of Permits to Include Pretreatment Requirements

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

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

Enforcement of POTW Pretreatment Programs

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

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

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

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

John T. Rhett

Jeffrey G. Miller

Attachments

cc: Regional S&A Division Directors
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ATTACHMENT A

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

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

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

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

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

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

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

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

ATTACHMENT B

GUIDANCE ON PREPARING COMPLIANCE SCHEDULES FOR

DEVELOPING POTW PRETREATMENT PROGRAMS

GENERAL COMMENTS:

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

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

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

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

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

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

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

DEVELOPMENT OF THE PRETREATMENT COMPLIANCE SCHEDULE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* See footnote, page 3

MODEL PRETREATMENT COMPLIANCE SCHEDULE LANGUAGE

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

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

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

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

7 Submit specific POTW effluent limitations for prohibited pollutants (as defined by 40 CFR 403.5) contributed to the POTW by industrial users. _____

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

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

Quarterly Reporting

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

Removal Allowances

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

CHART

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

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

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

DOCUMENT C

Explanation of Procedural/Funding Requirements
for State Pretreatment Programs

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

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

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

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

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

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

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

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

2. <u>Procedures/Funding to Notify POTWs of Pretreatment Requirements</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JAN 28 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

n-80-3

TO: Regional Enforcement Division Directors
Regional Permits Branch Chiefs

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

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

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

BACKGROUND

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

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

* As defined by section 403.8(a)

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

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

CURRENT STATUS AND NECESSARY ACTIONS

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

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

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

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

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

CONCLUSION

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

- Your current count of the number of POTWs or POTW Authorities which are required to develop pretreatment programs.

- Of those POTWs or POTW Authorities required to develop programs, how many have pretreatment compliance schedules? How many have modification clauses?

- How many POTWs or POTW Authorities, required to develop pretreatment programs, do not yet have either a compliance schedule or a modification clause?

- How do you plan to deal with those POTWs or POTW Authorities with neither a compliance schedule nor a modification clause, in a manner that will allow them sufficient time to develop a program prior to the July 1, 1983 deadline?

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

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

Leonard A. Miller

Leonard A. Miller

Attachments

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

4 MAR 1983

RECEIVED
3-18-83
R
OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

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

FROM: Robert M. Perry
Associate Administrator
and General Counsel

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

ISSUE

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

ANSWER

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OFFICE OF WATER

SEP 22 1983

MEMORANDUM

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

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

TO: Water Management Division Directors

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

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

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

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

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

Attachments

cc: Pretreatment Coordinators

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STANDARDIZED LANGUAGE FOR MODIFYING
NPDES PERMITS FOR PRETREATMENT PROGRAM APPROVAL

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

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

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

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

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

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

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

- Documentation of POTWs' Compliance with Approved Programs.

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

- Documentation of the Effectiveness of POTW Programs.

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

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

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

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

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

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

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

SUGGESTED PRETREATMENT LANGUAGE
FOR NPDES PERMITS

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

Industrial Pretreatment Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>Special Conditions (Case-by-Case)</u>

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

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

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

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

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

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

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

Implementation of G-J Town Pretreatment Program

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

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

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

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

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

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

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

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

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

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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 29th 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_____

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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 _____.

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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.

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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.

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A. OTHER REQUIREMENTS

1. Contributing Industries and Pretreatment Requirements

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

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

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

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

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

2. Compliance action taken by the City, and

3. Current compliance status.

STATE OF GEORGIA
DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION

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

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

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

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

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

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

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

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

B. INDUSTRIAL PRETREATMENT STANDARDS

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

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

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

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

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

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

Information Resources Center
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