U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office of Regulatory Enforcement, Multimedia Enforcement Division

GENERAL ENFORCEMENT POLICY COMPENDIUM

December 1994

The General Enforcement Policy Compendium is a collection of enforcement policies and guidances that apply to more than one program. Medium-specific policies are found in their respective statute-specific compendiums. All the documents contained in this Compendium are releasable to the public in their entirety.

The enforcement program established the Compendium in 1982. At that time, it contained only 11 documents. By 1993, the Compendium included 90 documents numbered from GM-1 through GM-90. The Office of Enforcement and Compliance Assurance (OECA) revised and redesigned the Compendium in 1994. As part of this effort, OECA developed a new numbering system for the documents in the Compendium. In order to allow for continuity, those documents retained from the previous version of the Compendium have both the old and new document numbers.

The Compendium consists of three parts. The first is the Table of Contents, which is a list of documents divided into fifteen subject headings. The second is a new Descriptive Index, containing capsule summaries of each of the documents contained in the Compendium. The third part consists of the actual documents themselves.

If you are searching for a document but do not know its title, we suggest you first look in the Table of Contents in the appropriate section. Once you find a document that you think might provide the needed guidance, read the summary in the Descriptive Index to make sure it is the appropriate one. Some document titles may not effectively indicate the contents of those documents. After you think you have the correct document, locate it in the Compendium in the appropriate section.

OECA has widely circulated The Table of Contents and Descriptive Index electronically and through hard copies. Copies of the full Compendium can be found in the following locations: EPA Libraries in Headquarters, the Regional Offices, Regional Laboratories and DOJ; Regional Counsels; Regional Environmental Services Divisions (those located outside the main Regional Offices); Office Directors and Division Directors in OECA (including NEIC in Denver); Special Agents in Charge; and Office of General Counsel.

If you have any questions about the General Enforcement Policy Compendium, please contact Jonathan Libber of the Multimedia Enforcement Division at (202) 564-6011.

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[1]This policy is to be transferred to the CERCLA Policy Compendium after a generic policy is developed to take its place.

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GENERAL ENFORCEMENT POLICY COMPENDIUM

DESCRIPTIVE INDEX

I. REFERRALS (RF)

A. RF.1 General Procedures and Goals

(GM-3) (RF.1-1)

Memorandum of Understanding Between Department of Justice and the Environmental Protection Agency (June 15, 1977)

The Department of Justice (DOJ) conducts the civil litigation of the EPA. This document is a Memorandum of Understanding (MOU) that clarifies the roles of DOJ and EPA attorneys. This memorandum contains 19 clauses, the first 15 of which are the more substantive. They are:

(1) the Attorney General (AG) has control over all cases to which EPA or the Administrator is a party;

(2) the Administrator may request that the AG permit Agency attorneys to participate in cases;

(3) EPA attorneys shall not file any documents in a court proceeding without prior approval of the AG;

(4) the AG has control over the conduct of all litigation and allocates tasks among the attorneys employed by DOJ and Agency participating attorneys;

(5) if DOJ and EPA attorneys disagree over the conduct of a case, the Administrator may obtain a review of the matter by the AG;

(6) settlement of any case where DOJ represents EPA requires the concurrence of the Administrator and the AG;

(7) EPA and DOJ conduct a joint annual review of DOJ's and EPA's personnel requirements for Agency litigation;

(8) DOJ must file cases within 60 days or report why complaints have not been filed;

(9) if DOJ hasn't filed within 120 days, the Administrator can request DOJ to file within 30 days;

(10) all requests for litigation shall be submitted by EPA through the General Counsel or the Asst. Administrator for Enforcement to the Asst. AG for the Land and Natural Resources Division, and shall be accompanied by a standard litigation report;

(11) EPA shall make the file of any matter that is the subject of litigation available to DOJ attorneys;

(12) the Administrator shall review the Agency's procedures for preparing the record in cases involving direct review in the Courts of Appeal;

(13) negotiation of any agreement to be filed in court requires the authorization and concurrence of the AG;

(14) the AG shall defer to the Administrator's interpretation of scientific and technical matters in conducting litigation for EPA; and

(15) this agreement doesn't affect the authority of the Solicitor General to carry out his functions with regard to appeals or petitions.

(GM-8) (RF.1-2)

Draft Department of Justice/Environmental Protection Agency Litigation Procedures (April 8, 1982)

These procedures were the result of a DOJ/EPA meeting to strengthen enforcement efforts. It is divided into two main parts: a discussion of EPA enforcement goals and objectives, and the Quantico Guidelines for Enforcement Litigation (reached as a result of the meeting).

Three EPA enforcement goals and objectives are stated: (1) to support and advance the regulatory policies of EPA through the use of all available enforcement means to ensure compliance, deter unlawful conduct, and remove incentives of noncompliance; (2) to give the regulated community fair notice of EPA's policies and the requirements they impose on the regulated community; and (3) to establish regulatory policies and enforcement goals, priorities and procedures to effectuate its policy initiatives and to guide the Dept. of Justice [DOJ] in its role as EPA's litigation counsel. The Quantico Guidelines are divided into five parts: (a) goals & purposes; (b) general observations; (c) DOJ and EPA commitments; (d) process [procedures]; and (e) specific issues discussed (Superfund national strategy guidelines and existing consent decrees).

(GM-48) (RF.1-3)

Model Litigation Report Outline and Guidance (January 30, 1986)

This guidance has two purposes: (a) to create a common understanding among Agency personnel and Dept. of Justice attorneys as to what the litigation report needs to cover; and

(b) to make the litigation report's form consistent. This guidance is a two-part document. First comes the Model Litigation Report - Outline. The Model Litigation Report - Guidance follows the Outline, addressing and explaining in detail most of the items in the Outline.

The Outline includes: (1) cover page; (2) table of contents; (3) synopsis of the case; (4) statutory bases of referral; (5) description of the defendant; (6) nature of the violations; (7) enforcement history of the defendant and pre-referral negotiations; (8) injunctive relief; (9) penalties; (10) major issues; (11) significance of referral; (12) litigation strategy; and (13) attachments.

(GM-12) (RF.1-4)

General Operating Procedures for EPA's Civil Enforcement Program (July 6, 1982)

This document describes the roles and relationships of the various EPA offices which participate in enforcement activities. Seventeen sections follow the introduction, the last three of which are housekeeping clauses. The substantive sections are, in order of their appearance: enforcement objectives; roles and relationships; delegations and concurrence requirements; reporting requirements and Office of Legal and Enforcement Counsel oversight; reviewing compliance and determining responses; escalation; case development process; referral process; Headquarters review of case development; post-referral procedures; negotiations; enforcing consent decrees and final orders; appeals; and communications/press relations. The section on roles and responsibilities is further separated into Regional Administrators, Assistant Administrators, the Regional Counsel, Enforcement Counsel matters, General Counsel matters, DOJ and U.S. Attorneys' offices, policy coordination, coordination with states, and EPA's accountability system.

These procedures do not apply in any respect to the development and referral of criminal cases.

(GM-35) (RF.1-5)

Implementing Nationally Managed or Coordinated Enforcement Actions (January 4, 1985)

This guidance addresses how EPA shall handle administrative and judicial civil enforcement cases which are managed or coordinated at the EPA Headquarters level. The policy was developed to ensure that such actions are identified, developed, and concluded in a manner consistent with the principles set forth in the Policy Framework for State/EPA Enforcement Agreements.

The guidance covers: (1) the criteria for nationally managed or coordinated enforcement cases; (2) roles and responsibilities in the process for identifying nationally managed or coordinated cases; (3) roles and responsibilities in case development; and (4) press releases and major communications.

(GM-63) (RF.1-6)

Policy on Invoking Section 9 of the EPA/DOJ Memorandum of Understanding (August 20, 1987)

This policy states EPA policy on the authority of EPA attorneys to represent the Agency in litigation. Primary responsibility for litigating all EPA judicial cases is assigned under the Memorandum of Understanding (MOU) to the Dept. of Justice [DOJ] upon referral from EPA. If a complaint is not filed within 120 days of the referral, EPA can request the Attorney General to file within 30 days. If DOJ does not comply, EPA may represent itself in court by invoking Section 9 of the MOU.

The policy first describes the MOU in detail, then discusses current (1987) experiences, stating that EPA has rarely notified DOJ of its intention to invoke Section 9 of the MOU and appoint Agency attorneys to represent itself, although a number of cases have fallen within its scope. Next, the memo presents considerations affecting invoking Section 9: (a) the reason(s) why the case remains unfiled; (b) the Agency interest to be served by assuring filing of the case sooner; (c) the ability of EPA to handle the litigation without DOJ involvement and support; (d) the desire to maintain DOJ involvement in cases; and (e) the likelihood of filing a complaint in the near future if Section 9 is not invoked and whether or not invoking Section 9 is likely to accelerate filing. The GM then describes the procedures for invoking Section 9 -- who, what cases, and how. It concludes by stating that the Office of Regional Counsel has the primary responsibility to provide legal support to prosecute and manage a case where the Agency has invoked Section 9.

(GM-26) (RF.1-7)

Headquarters Review and Tracking of Civil Referrals (March 8, 1984)

This policy clarifies the relationship between the Office of Compliance Monitoring and the Regional offices with regard to the handling of civil enforcement litigation. GM-26 is composed of the following: (1) Classification of Referrals; (2) Evaluation of Direct Referrals; (3) Tracking All Referrals in the Computer Docket; (4) Referrals Requiring Concurrence; and (5) Managing the Civil Enforcement Docket.

The first section, "Classification of Referrals," lists the four classes of cases in the Agency's civil enforcement program and briefly describes the appropriate roles of Headquarters and the Regional offices for each class.

The next section, "Evaluation of Direct Referrals," addresses the review criteria for direct referrals. It explains the appropriateness of direct referrals, the format of the cover memorandum, and the substantive adequacy of direct referral packages. In addition, the procedures to be followed in cases of erroneous direct referrals are briefly explained.

The third and fourth sections are extremely succinct. The third describes the procedures for the tracking of referrals in the computer docket and the fourth discusses how to handle referrals requiring concurrence. The last section explains the duties of Enforcement Counsels.

B. RF.2 Direct Referrals

(GM-69) (RF.2-1)

Expansion of Direct Referral of Cases to DOJ (January 14, 1988)

EPA and the Dept. of Justice [DOJ] agreed to expand the categories of civil judicial cases to be referred directly to DOJ from EPA Regional offices without the concurrence of the Asst. Administrator for the Office of Enforcement [OE]. This memorandum offers guidance to EPA personnel regarding procedures to follow in implementing the expanded referral agreement.

The section covering procedures is divided into six parts. First, the guidance addresses cases subject to direct referral. Second, the memorandum explains preparation and distribution of referral packages (which require a cover letter summarizing eight listed elements of the case, the litigation report, and the documentary file supporting the litigation report). Third, the guidance discusses identification and resolution of significant legal and policy issues (Region has the initial responsibility to identify the issues, OE and Headquarters [HQ] program office review them, and DOJ reviews them and consults with OE and Region). Next, the memorandum discusses case quality and strategic value. Withdrawal of cases prior to filing and maintenance of the Agency-wide Case Tracking System are discussed last.

There are four attachments: (1) the EPA-DOJ agreement of January 5, 1988; (2) an outline of the direct civil referral process as the Agency intends to implement it; (3) a list of types of cases which will continue to be referred through HQ; and (4) RF.2-2 (Implementation of Direct Referrals for Civil Cases).

(GM-18) (RF.2-2)

Implementation of Direct Referral for Civil Cases (December 1, 1983)

This document guides EPA Headquarters and Regional personnel regarding procedures to follow in implementing the 9/29/83 EPA-DOJ direct referral agreement. The major part of the guidance addresses procedures for cases subject to direct referral. The other two parts briefly discuss cases not subject to direct referral (which go through the Office of Enforcement [OE] with a target 21-day turnaround) and measuring the efficacy of the direct referral agreement.

The attached agreement lists categories of cases which can be referred directly from the Regional Administrator to the Dept. of Justice [DOJ]; all others must continue to be reviewed by Headquarters OE and referred by the Asst. Administrator for OE to DOJ. The major part of this implementation guidance first addresses the contents of a referral package: a cover letter including a summary of eight listed elements, the litigation report, and the documentary file supporting the litigation report. This part next addresses DOJ responsibilities under the agreement, then explains Headquarters OE responsibilities. The major part concludes with a section discussing settlements in cases subject to direct referral, where the Asst. Administrator for OE shall continue to approve all settlements and consent decree modifications, even in direct referrals.

C. RF.3 Delays in Filing Cases

(GM-78) (RF.3-1)

DOJ Procedures for Returning Certain Unfiled Cases EPA for Further Processing (November 12, 1987).

This policy briefly explains 1987 Department of Justice (DOJ) procedures to clear its enforcement docket of EPA cases that remain unfiled at DOJ for more than sixty days after referral while the Region is negotiating a consent decree or compiling additional information to support its filing.

It continues to describe four ways that cases returned under this procedure could be reactivated by DOJ. DOJ will reactivate the case if the Region: (1) provides the requested additional information necessary for filing; (2) forwards a signed consent decree for processing; (3) notifies the Office of Enforcement and DOJ that the progress of the negotiations no longer justifies further delay in the filing of the complaint and requests that a complaint be filed; or (4) EPA resolves and internal policy conflict affecting the filing.

(GM-90) (RF.3-2)

Procedures for "Hold Action" Requests (November 16, 1990)

This policy gives detailed procedures by which Regional Counsel and Enforcement Counsel may request that the Department of Justice (DOJ) delay filing of a case which has been referred to DOJ. It begins by stating that such requests are generally disfavored. In order to reduce the need for such requests, EPA is urged to use pre-referral negotiation procedures. The GM grants non-delegable authority to request a hold on a referred civil case to the Regional Counsel. The authority is limited to circumstances where additional time is needed to pursue pre-filing settlement negotiations, to add other counts or defendants, or to where unspecified realities of litigation militate in favor of a brief filing delay.

In all cases, the cumulative delay limit on each case held is sixty days. Any hold beyond sixty days (individual or cumulative) may be requested solely by the Asst. Administrator for Enforcement.

II. PENALTIES (PT)

A. PT.1 General Procedures and Goals

(GM-21) (PT.1-1)

Policy on Civil Penalties (February 16, 1983)

This policy provides the basic rationale for why penalties are critical to effective EPA administrative and judicial enforcement actions. The goals of penalty assessment include: (1) deterrence; (2) fair and equitable treatment of the regulated community; and (3) swift resolution of environmental problems.

This document is divided into the following six sections: (1) Introduction; (2) Applicability; (3) Deterrence; (4) Fair and Equitable Treatment of the Regulated Community; (5) Swift Resolution of Environmental Problems; and (6) Intent of Policy and Information Requests for Penalty Calculations.

A Framework for Statute-Specific Approaches to Penalty Assessments (PT.1-2), the companion document to this policy, is to be utilized for developing penalty guidance appropriate for the user's particular program. In order to achieve the policy goals, the Policy on Civil Penalties directs that all administratively imposed penalties and settlements of civil penalty actions should be consistent, whenever possible, with the methods enunciated in the Framework.

Although this document does not address the mechanisms for achieving the policy goals, it does indicate when new versus old program-specific policies are to be followed. In addition, it lists several statutes that are not subject to this policy.

(GM-22) (PT.1-2)

A Framework for Statute-Specific Approaches to Penalty Assessments (February 16, 1984)

This policy provides assistance to persons using the Policy on Civil Penalties (PT.1-1) to develop a medium-specific penalty policy. This framework applies to administratively imposed penalties and to settlements of administrative and judicial penalty actions. The Framework document is divided into two main sections. The first of these offers brief instructions on how to write a medium-specific policy. The second, an appendix, gives detailed guidance on implementing each section of the instructions from the first section and explains how the instructions are intended to further the goals of the policy.

Part I, writing a program specific policy, addresses the following elements of the penalty: (1) developing a penalty figure; (2) calculating a preliminary deterrence amount; (3) adjusting the preliminary deterrence amount to derive the initial penalty target figure (prenegotiation adjustment); (4) adjusting the initial penalty target during negotiations; (5) use of the policy in litigation; and (6) use of the policy as a feedback device.

The Appendix has three sections of its own. The first focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty that reflects the seriousness of the violation. The second provides adjustment factors so that the action will result in both a fair and equitable penalty and a swift resolution of the environmental problem. The third presents some "practical advice" on the use of the penalty figures generated by the policy.

(GM-88) (PT. 1-3)

Documenting Penalty Calculations and Justifications in EPA Enforcement Actions (August 9, 1990)

This policy institutes a uniform system for documenting penalty calculations and explaining how they are consistent with applicable penalty policy in all EPA enforcement actions.

First, every settlement package transmitted from a Region to Headquarters for concurrence must include a written "penalty justification" explaining how the penalty (economic benefit and

gravity components) was calculated and discussing the justification for any mitigation. When the rationale for mitigation is litigation risk, the justification should state the probable outcome of litigation and offer specific legal and factual analysis supporting that conclusion. The justification is prepared for circulation within the Office of Regional Counsel and for signature of the Asst. Administrator. It must not be circulated to the presiding agency official (as it could constitute an ex parte communication). All case files are required by the GM at all times during the course of the enforcement action to contain documentation of the current bottom line penalty agreed upon by the litigation team. The bottom line may change, but any modification must be justified by a documented change of conditions.

(GM-38) (PT. 1-4)

Remittance of Fines and Civil Penalties (April 15, 1985)

This policy provides information on the remittance procedure instituted by the EPA Office of the Comptroller. EPA adopted the Nationwide Lockbox System for receipt of payments on debts owed to the Agency in order to improve the process. The list attached to GM-38 shows for each Region and for EPA Headquarters the lockbox address to which payments of penalties owed the Agency should be sent. In addition, it lists the address to which remittances for Superfund billings nationwide should be sent.

(GM-33) (PT. 1-5)

Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment (November 5, 1984)

This guidance amplifies the material in the Appendix of the "Framework for Statute-Specific Approaches to Penalty Assessment," (PT.1-2) describing how to calculate the economic benefit of noncompliance as part of developing a civil penalty. The guidance introduces BEN, the computer model, in terms of how this model resolves the identified problems related to the use of the prior model, CIVPEN. It points out the circumstances under which BEN can and cannot be used in calculating a civil penalty. The exhibit attached to this document summarizes BEN. In addition, the guidance explains the new civil penalty policy approach, how to use BEN to calculate economic benefit of noncompliance, and the advantages of BEN over other calculation methods.

(GM-45) (PT. 1-6)

Division of Penalties with State and Local Governments (October 30, 1985)

State and local governments may share in civil penalties that result from their participation in federal environmental enforcement actions, to the extent that penalty division is permitted by federal, state, and local law and is appropriate under the circumstances of the individual case. This policy briefly describes how penalty divisions advance federal enforcement goals, some concerns with penalty divisions, and the factors to be considered in deciding if penalty division is appropriate.

B. PT.2 Mitigation

(GM-56) (PT. 2-1)

Guidance on Determining a Violator's Ability to Pay a Civil Penalty (December 16, 1986)

This document offers guidance on when and how to adjust a penalty target figure when a violator claims that paying a civil penalty would cause extreme financial hardship.

The memorandum begins by discussing when to apply the ability to pay factor and the methodology for applying that factor using the ABEL computer model. This guidance follows this with sections discussing: (a) a violator's options for paying a civil penalty; (b) information necessary to determine ability to pay; (c) confidentiality of financial information provided to EPA; (d) a four-step process to apply the ability to pay factor; and (e) the financial computer program (ABEL).

The guidance includes two narrative hypotheticals in Exhibit 1, one assuming that the violator is financially healthy and the other assuming that the violator is not financially healthy. Also included in the document is Attachment A, data for an ABEL example.

(GM-77) (PT. 2-2)

Policy on the Use of Supplemental Environmental Projects in EPA Settlements (February 12, 1991)

This policy describes the theory behind supplemental environmental projects (SEPs) and the conditions under which they might be considered. According to the document, EPA may approve a supplemental project so long as that project furthers the Agency's statutory mandates to clean the environment and deter violations of the law. The SEPs may be considered if the violations are corrected through actions to ensure future

compliance, deterrence objectives are served, and there is an appropriate relationship (vertical or horizontal nexus) between the nature of the violation and the environmental benefits to be derived from the supplemental project.

The document is divided into twelve sections, some of which are very detailed. First, five categories of projects are suggested as potential SEPs: (1) pollution prevention projects; (2) pollution reduction projects; (3) projects remedying adverse public health or environmental consequences; (4) environmental auditing projects; and (5) enforcement-related environmental public awareness projects. Next, the document offers three examples of projects not permissible as SEPs. It goes on to define the required nexus of the SEP to the violation. The other nine sections follow in this order: status of the enforcement action; main beneficiary of a SEP; extent to which the final assessed penalty can reflect a SEP; SEPs for studies; substitute performance of a SEP; level of concurrence of affected Regions; oversight and tracking; documenting approval of SEP proposals; and coverage of this policy.

(GM-51) (PT. 2-3)

Guidance on Calculating After Tax Net Present Value of Alternative Payments (October 28, 1986)

This guidance provides a methodology for calculating the after tax net present value (ATNPV) of an environmentally beneficial project proposed by a violator to mitigate a portion of a civil penalty. The document first discusses the basis of mitigation, the 1984 uniform civil penalty policy (PT.1-1 and PT.1-2), which permits EPA to accept, under specified conditions, a violator's investment in environmentally beneficial projects for mitigation. (Those conditions are contained in the Policy on the Use of Supplemental Environmental Projects in EPA Settlements (PT.2-2)). EPA cannot mitigate the civil penalty to an extent greater than the ATNPV of the alternative payment. This policy then explains use of the BEN computer model to calculate the ATNPV of alternative payments. (By January of 1995, a new model, PROJECT, will be available to do this calculation.) Attachment A closes the guidance with an example of a proposed alternative payment project with the BEN computer model output showing the ATNPV of the investment.

C. PT.3 Stipulated Penalties

(GM-75) (PT. 3-1)

Use of Stipulated Penalties in EPA Settlement Agreements (January 24, 1990)

This document provides relatively specific guidance on the

use of stipulated penalties in the settlement of enforcement actions. It addresses multiple issues and gives a preferred approach and its rationale. This guidance does not supersede an existing medium-specific policy, "Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees" (9/21/87). It applies to judicial settlements and to administrative cases where EPA has legal authority to assess stipulated penalties. The asserted primary goal of stipulated penalties is to provide an effective deterrent to violation of the settlement agreement.

This guidance is divided into six sections: (1) Types of Requirements to Which Stipulated Penalties Should Apply; (2) Level of Stipulated Penalties; (3) Method of Collection; (4) Timing of Enforcement Responses; (5) Reservation of Rights; and (6) Collection of Stipulated Penalties.

The penalties can apply to any clearly definable event. This document lists six criteria to apply to set the level of the penalty: (1) initial civil penalties imposed; (2) economic benefit of non-compliance; (3) source's ability to pay; (4) gravity of the violation; (5) source's history of compliance; and (6) an escalating schedule for the length of the violation.

The guidance provides two methods of collection: the preferred method, viz., the penalty automatically becomes due upon [non]occurrence of a specified even, or the penalty is payable on demand by the government. For additional guidance, the EPA Manual on Monitoring & Enforcing Administrative and Judicial Orders should be consulted. The document concludes by stressing the necessity of reserving all rights to the government to pursue any other enforcement responses for violation of consent agreement provisions (see Guidance for Drafting Judicial Consent Decrees (OR.1-1) for model language of a consent decree), and by urging prompt action to collect stipulated penalties that are due.

(GM-67) (PT. 3-2)

Procedures for Assessing Stipulated Penalties (January 11, 1988)

This guidance clarifies procedures for assessing stipulated penalties on account of consent decree violations. Unless the consent decree provides otherwise, letters to defendants demanding payment of stipulated penalties should be sent by the Department of Justice (DOJ). This memo lists the following steps to enlist DOJ assistance: (1) Region sends letter to DOJ requesting DOJ to issue a demand letter, containing a summary of relevant facts, issues, and proposed solutions; (2) DOJ sends Region and Office of Enforcement any response to the demand letter; (3) if the response is unsatisfactory, Region sends

direct referral package to DOJ, requesting that DOJ enforce the unresolved consent decree violations; (4) DOJ takes action to enforce the original consent decree with full participation by Region; and (5) when the defendant pays a stipulated penalty to the government without receiving a demand letter, Region notifies the appropriate Associate Enforcement Counsel. This document concludes with a paragraph on making appropriate entries in the SPMS (now STARS) Consent Decree Tracking Measure.

D. PT.4 Confidential Information (Summaries of BEN and ABEL Case Memoranda not contained in Compendium

(GM-no) (PT. 4-1)

Summaries of BEN and ABEL Case Memos not contained in Compendium

This enforcement sensitive case memorandum reviews all the case law in the area of measuring and recapturing of economic benefit. It is designed for environment enforcement professionals at the Federal, State and local level. It examines the issue by topic and uses the cases to illustrate the major points. The current memorandum is dated August 1, 1993. It is usually updated on an annual basis. Government enforcement personnel can obtain copies from Jonathan Libber at (202) 564-6011.

(GM-no) (PT. 4-2)

Ability to Pay --For-Profit Entities: An Analysis of Judicial and Administrative Interpretation

This enforcement sensitive case memorandum reviews all the case law in the area of establishing and proving a violator's claim of inability to afford compliance, clean-ups or civil penalties. It is designed for environment enforcement professionals at the Federal, State and local level. It examines the issue by topic and uses the cases to illustrate the major points. The current memorandum is dated August 1, 1993. It is usually updated on an annual basis. Government enforcement personnel can obtain copies from Jonathan Libber at (202) 564-6011.

III. CONTRACTOR LISTING (CL)

A. CL.1 General Listing Procedures

(GM-no) (CL.1-1)

US Environmental Protection Agency Contractor Listing Procedures and Guidance (May 1993)

This document sets forth the procedures for the Contractor Listing Program (CLP). It addresses both listing and removal procedures for both mandatory and discretionary listing. This document contains:

1) a summary of the legal authority for the contractor listing program, including the statutory and regulatory authorities governing the CLP;

2) a detailed description of the procedures followed by the Listing Official (LO) in processing both mandatory and discretionary recommendations to list;

3) a detailed description of the procedures the LO follows with processing automatic removals and requests for removal from the EPA List of Violating Facilities (the List).

4) a description of the roles in the process of EPA staff in both the Regions and Headquarters; and

5) procedures for publishing confirmations of listing and removal from the List.

In addition, the document contains a number of attached documents which can be used as guidance when drafting the documents called for under the CLP's procedures. The attachments also include Federal regulations governing the listing program and copies of policy documents and case decisions pertaining to the listing program.

B. CL.2 Discretionary Listing

(GM-53) (CL. 2-1)

Guidance on Implementing the Discretionary Contractor Listing Program (November 26, 1986)

This guidance establishes Agency policy and procedures for implementing the discretionary contractor listing program in EPA enforcement proceedings. After the statement of purpose and the background sections, this document covers multiple topics as they apply to contractor listing.

First of all, certain statutes and Executive Order 11738 authorize EPA to prohibit facilities from obtaining federal government contracts, grants, or loans, as a consequence of criminal or civil environmental violations. The policy describes appropriate cases for discretionary listing recommendations: (1) violations of consent decrees; (2) continuing or recurring violations following filed civil judicial actions; (3) violations of administrative orders; (4) multi-facility noncompliance within a single company; and (5) other circumstances. The document then recites the required standard of proof in listing proceedings. It also addresses fairness concerns in EPA use of contractor listing, press releases on contractor listing actions, coordination with the Department of Justice, applicability of contractor listing to municipalities, use of listing in administrative orders, obtaining information concerning government contracts held by a facility under consideration for listing, and Headquarters assistance in preparing and processing listing recommendations.

This listing guidance includes an appendix entitled "The Listing Program and Final Revisions to 40 CAR Part 15." Also included are five attachments: (A) Model Listing Recommendation Based on Administrative Enforcement Action; (B) Model Listing Recommendation Based on Judicial Enforcement Action; (C) attachment to B; (D) Model Letter to a Facility Violating the Clean Water Act Requesting a List of its Federal Contracts, Grants, and Loans; and (E) [same as D for the Clean Air Act].

C. CL.3 Asbestos

(GM-No) (CL. 3-1)

Asbestos Contractor Listing (June 30, 1988)

The subject of this policy is the application of contractor listing regulations to the specific circumstances of a violation of a NESHAP by an asbestos demolition and renovation (D&R) company. It discusses the issues of listing: (1) where a company has repeated violations of short duration, (2) when it is appropriate to designate the company rather than the demolition site as the "facility", and (3) when actions satisfy the requirement of "correction of conditions giving rise to listing".

(GM-No) (CL. 3-2)

Defining the "Violating Facility" for Purposes of Listing Asbestos Demolition and Renovation Companies Pursuant to Section 306 of the Clean Air Act (March 11, 1988)

A "facility" includes "any...location or site of operations...to be used i the performance of a contract, grant or

loan" under the definition in Section 15.4 of the Clean Air Act. This policy confirms that the business address or the address of some other property used by an asbestos demolition and renovation (D&R) company may be used to identify the "violating facility". This is in addition to the address of the particular site involved in the violating activity (e.g., the place of business of a customer). Based upon this interpretation of facility, EPA can place a D&R company on the List of Violating Facilities, so long as the business address of the contractor is fairly associated with the activity which is the violating conduct.

D. CL.4 Mandatory Listing

(GM-32) (CL. 4-1)

Implementation of Mandatory Contractor Listing (August 8, 1984)

The proposed revisions to 40 CAR Part 15 require that the List of Violating Facilities automatically include any facility which gives rise to a criminal conviction of a person under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. This document describes the procedures for mandatory listing and the procedures for removal from the mandatory list.

(GM-No) (CL. 4-2)

EPA Policy Regarding the Role of Corporate Attitude, Policies, Practices, and Procedures in Determining Whether to Remove a Facility from the EPA List of Violating Facilities Following a Criminal Conviction (October 31, 1991)

This policy discusses the AA's determination and the EPA Case Examiner's decision in Valmont Industries, which established the principle that the presence of a poor corporate attitude regarding compliance with environmental standards, thus creating a climate facilitating the likelihood of a violation, may be part of the condition giving rise to the conviction which must be corrected prior to removal of the facility from the List. Then it clarifies the extent to which corporate attitude may be a relevant factor for determining correction in cases involving knowing or negligent criminal conduct, where evidence of willful falsification or deception itself is not involved.

Criteria are provided which will be applied by EPA in determining whether the condition giving rise to a conviction has been corrected in a given case. Factors which EPA will consider include, without limitation: (1) the establishment of an effective program to prevent and detect environmental problems

and violations of the law (in this regard, six steps are enumerated which, taken together, satisfy at least minimally the requirement of the exercise of due diligence); (2) the relation of the precise actions included in the program to the size, nature of business, and prior history of the organization; and (3) any voluntary environmental cleanup or compliance activities, or pollution prevention or reduction measures performed.

IV. SETTLEMENTS (SE)

A. SE.1 Procedures

(GM-42) (SE. 1-1)

Form of Settlement in Civil Judicial Cases (July 24, 1985)

In response to a situation in which a case was settled without a consent decree and the defendant later refused to abide by the terms of the informal settlement, the Office of Enforcement decided to place in writing the Agency's general policy regarding the form of settlement of civil judicial enforcement cases.

This policy directs that after a complaint is filed, all civil judicial cases should be settled only by consent decree, or where appropriate, by stipulation of dismissal. The "where appropriate" in the latter option refers to situations where the settlement requires payment of a penalty and the penalty has been paid in full at the time of settlement.

In cases involving "extraordinary and compelling circumstances" in which EPA, in consultation with the Dept. of Justice, decides to settle without a consent decree or stipulation of dismissal, the Agency attorneys should obtain advance concurrence from the Asst. Administrator for Enforcement.

(GM-62) (SE. 1-2)

Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases (August 14, 1987)

According to this guidance, EPA intends to use the Alternative Dispute Resolution [ADR] process to efficiently resolve enforcement actions with results similar to those the Agency reaches through litigation and negotiation. This guidance seeks to: (1) establish policy; (2) describe methods; (3) formulate case selection procedures; (4) establish qualifications; and (5) formulate case management procedures.

First, the document describes the methods of ADR, such as

mediation, arbitration, fact-finding, and mini-trials. Then it discusses characteristics of enforcement cases suitable for ADR. Such traits include impasse (actual or potential), resource considerations, and remedies affecting parties not subject to an enforcement action (local/state government, citizen group, etc.). The document next prescribes the procedure for approval of cases for ADR -- integrating selection of cases for ADR into the existing enforcement case selection process and creating decision points and contacts in the Regions, Headquarters, and the Dept. of Justice to determine whether to use ADR in particular actions.

Following those sections, the guidance discusses procedures for selection of a qualified Third Party Neutral. Then, other miscellaneous issues are discussed, such as memorialization of agreements, fees for Third Party Neutrals, confidentiality of records and communications arising from ADR, and the relationship of ADR to "timely and appropriate" and "significant noncompliance" requirements. It concludes with a section detailing procedures for the management of ADR cases, with illustrative attachments for each of the various ADR techniques.

(GM-73) (SE. 1-3)

Process for Conducting Pre-Referral Settlement Negotiations on Civil Enforcement Cases (April 13, 1988)

This document is (1) an EPA-DOJ agreement on the process for conducting pre-referral settlement negotiations of non-Superfund civil judicial enforcement cases and (2) an attached set of protocols establishing a process for providing a Regional office with pre-authorization to negotiate settlement with potential defendants before resorting to the full-scale referral/litigation process. The document is divided into five main sections providing guidance and a flow chart with a timeline for achieving the procedures set out in the text.

First, to initiate the process, the Regional Administrator shall send to the Office of Enforcement (OE), Headquarters (HQ) Program Compliance Office, and the Department of Justice (DOJ) a mini-litigation report/case summary addressing eleven listed topics and a proposed draft consent decree. Second, DOJ, OE, and HQ Program Office provide comments on the proposed case, national issues, terms of settlement, further contact points, and negotiation/litigation strategy. Third, the EPA HQ must either approve or disapprove the signed consent decree for civil settlements. Simultaneously, DOJ must review the decree and approve or disapprove. Finally, if approved, DOJ moves the court to enter the consent decree.

(GM-39) (SE. 1-4)

Enforcement Settlement Negotiations (May 22, 1985)

The Office of Enforcement (OE) drafted this document as a result of several Regions submitting settlements for OE approval that had been communicated to and tentatively agreed upon with defendants without Headquarters' (HQ) knowledge, involvement, or approval. This policy emphasizes that a copy of all draft settlement agreements should be transmitted by the Regional Counsel to the appropriate Enforcement Counsel before it is presented to the defendant. In addition, the policy briefly explains the rationale behind this policy and how in the future OE will handle cases in which Regions have concluded settlements without prior consultation with HQ.

(GM-34) (SE. 1-5)

Policy Against "No Action" Assurances (November 16, 1986)

This policy reaffirms EPA policy against giving definitive assurances, either written or oral, outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or other legal requirement.

The policy briefly explains the reasons for not making "no action" promises, the types of requested assurances to which this policy applies, exceptions to this policy, and how the policy relates to state and local enforcement efforts. In addition, guidance is given on how to proceed in cases of definitive written or oral no action commitments.

B. SE.2 Terms of Settlement

(GM-80) (SE. 2-1)

Multi-media Settlements of Enforcement Cases (February 6, 1990)

The purpose of this document is to provide guidance which explains (a) EPA disfavor of case settlements which include releases of potential enforcement claims under statutes not named in the complaint and not serving as the basis for any EPA enforcement action, and (b) the procedure for approval for any multi-media settlements of enforcement claims in civil judicial enforcement claims.

Since standard EPA policy dictates that releases should be no broader than the causes of action asserted in the complaint, EPA should grant a multi-media release only in exceptional single

media enforcement cases. This guidance lists three factors to consider in granting such a release: (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 relief; (2) whether the settlement provides adequate consideration for the broader release; and (3) whether the settling party is in bankruptcy. It also prohibits releasing any cause of action not based on an EPA federal statute.

The next section is procedural. Approval for the release must be secured from the appropriate EPA official. There must be cross-media consultation and investigation among all affected Regional Program Offices. The Regional Administrator must give Headquarters notice of the release and an explanation of the Region's decision. Finally, the Office of Enforcement division with the lead in the settlement must ensure that other affected divisions don't object to the multi-media release.

(GM-79) (SE. 2-2)

Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements (February 25, 1991)

This policy offers Agency enforcement personnel a generic interim policy and guidelines for including pollution prevention and recycling provisions in administrative or judicial settlement agreements. After stating its purpose and giving some background on the EPA's definition of pollution prevention, the document is split into two sections.

First, the document states the interim policy: EPA favors pollution prevention and recycling as a means of achieving and maintaining compliance and of correcting outstanding violations when negotiating enforcement settlements (civil or criminal and with all entities). It continues, offering four situations which favor the use of pollution prevention conditions in the settlements. Then it explains the use of pollution prevention as a means of correcting a violation and pollution prevention conditions "incidental" to the correction of a violation.

The last part of the policy details specific elements of the interim policy. It provides factors for establishing timeliness for implementing the conditions: (a) seriousness of the violation; (b) aggregate gain in "extra" pollution prevention; (c) reliability/availability of the technology; (d) applicability of the technology; and (e) compliance-related considerations. It goes on to discuss general considerations for assessing penalties and more specific guidelines for supplemental environmental projects. GM-79 concludes with a brief discussion of tracking and assessing compliance with settlement terms, delegations and

level of concurrence, and organizational issues.

Attached to this document are a list of seventeen target chemicals, the Policy on the Use of Supplemental Environmental Projects in EPA Settlements (PT.-2-2), and a memo (Attachment B) announcing the creation of an Agency workgroup on multi-media enforcement.

(GM-52) (SE. 2-3)

Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (November 14, 1986)

This document provides 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.

The first major section of the guidance provides the statement of policy and suggests that environmental auditing provisions are most likely to be proposed in settlement negotiations when there is a pattern of violations attributable to the absence of an environmental management system, or when the type of violations indicates the likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity. This section goes on to discuss the scope of the audit requirement (which type of audit to propose), EPA oversight of the audit process, EPA requests for audit-related documents, stipulated penalties for audit-discovered violations, and the effect of auditing on EPA inspection and enforcement. EPA employees are instructed in the last major section of the auditing guidance to follow Implementing Nationally Managed or Coordinated Enforcement Actions (RF.1-5) and the Revised Policy Framework for State/EPA Enforcement Agreements (SF.1-2) when negotiating over facilities located in more than one EPA region.

There are several attachments to the auditing guidance:

A - Environmental auditing policy statement;

B - Representative sample of environmental auditing settlements achieved to date;

C - Model environmental compliance audit provision, with requirement for certification of compliance;

D - Model environmental compliance audit provision, with requirement for submission of plan for improvement of environmental management practices;

E - Model environmental compliance and management audit provision with all audit results submitted to EPA;

F - Model environmental compliance and management audit provision with extensive Agency oversight; and

G - Model emergency environmental management reorganization provision.

V. CRIMINAL ENFORCEMENT POLICIES THAT IMPACT CIVIL ENFORCEMENT (CP)

A. CP.1 Parallel Proceedings

(GM-no) (CP.1-1)

Parallel Proceedings Policy (June 21, 1994)

The purpose of this policy is to define and explain by whom, why, when, and to what purpose EPA uses parallel proceedings to maximize results and minimize legal risks for all enforcement actions and to preserve limited enforcement resources. The document states five principles that guide EPA enforcement personnel as to when to use parallel civil and criminal proceedings. I then lists some procedures to follow when during parallel proceedings.

B. CP.2 Case Management Procedures

(GM-no) (CP.2-1)

The Exercise of Investigative Discretion (January 12, 1994).

This policy has been issued by the Director of OCE to give EPA Special Agents guidance in assessing and evaluating their cases for potential criminal referral and prosecution. It combines expressions of Congressional intent and OCE experience in operating under existing criminal/civil Regional case-screening criteria, incorporating by reference GM-85 (recodified as CM.1-2), "Regional Enforcement Management: Enhanced Regional Case Screening" (December 3, 1990). This policy acquaints civil enforcement personnel with the criteria under which OCE its cases so that appropriate referrals are made from civil to criminal within EPA.

Congressional intent regarding case selection is summarized as follows: criminal enforcement authority should target the most egregious and significant cases. EPA's case selection process for identifying the most worthy cases for criminal case development focuses on 1) significance of environmental harm and 2) culpable conduct. The two selection criteria further enumerate factors to weigh culpable conduct and seriousness of

the environmental harm. Emphasis is placed on equal application of the criteria and factors to corporations and individuals alike, based on the evidence of culpability in each case. Emphasis is also placed on the consideration of administrative and civil remedies as appropriate alternatives for less flagrant violations, and correctly distinguishing these latter cases from appropriate criminal cases in practice.

(GM-no) (CP.2-2)
Referral of Criminal Cases for Prosecutive Action (March 2, 1993).

This policy redelegates authority for criminal case referrals to DOJ from the Director of OCE to the Director of the Criminal Investigation Division, to be accomplished in consultation with the Director of the Criminal Enforcement Counsel Division. The policy also incorporates the "Regional Enforcement Management: Enhanced Regional Case Screening" (GM-85 recodified as CM.1-2) as the starting point of the referral process, to consider whether violations would be best addressed by administrative, civil-judicial, and/or criminal investigation and prosecution. The role of the Regional Criminal Enforcement Counsel (RCEC) in the process is to assess the legal soundness of the case, provide appropriate liaison functions, and assist DOJ when warranted in prosecuting the cases.

The policy sets out a system of case initiation and review beginning with the Special Agent-in-Charge, the RCEC, and finally the Director of the Criminal Investigations Division. All cases receive this review prior to referring the case to the appropriate United States Attorney's Office for assistance in investigation, grand jury action, and/or prosecution.

VI. PUBLICITY (PB)

A. PB.1 Civil Enforcement

(GM-46) (PB. 1-1)
Policy on Publicizing Enforcement Activities (November 21, 1985)

This document establishes EPA policy on informing the public of Agency enforcement activities, since publicity is an element of the EPA's program to deter environmental noncompliance.

The memorandum begins with a statement of policy: press releases are to be issued for judicial and administrative enforcement actions, including settlements and successful rulings and other significant enforcement program activities. The main part of this policy, implementation of the policy, is divided

into five subsections. First, it discusses when to use press releases. Next, it covers approval of press releases. Then it addresses coordination among various EPA offices, the Dept. of Justice [DOJ], and the states. Distribution of press releases to the local and national media and to targeted trade press and mailing lists is discussed in the fourth subsection. The GM concludes by exploring use of publicity other than press releases.

An Addendum of August 4, 1987, is an attached guidance on how to address the issue of the "penalty gap" that occurs where the difference between the proposed and final penalty is appreciable. The addendum also provides standard text to be included in EPA press releases.

B. PB.2 Criminal Enforcement

(GM-no) (PB.2-1)

Policy on Responding to Public or Media Inquiries Regarding Criminal Cases (December 22, 1989).

Criminal investigations are managed in EPA's criminal law enforcement program by trained law enforcement personnel (Special Agents). When cases warrant criminal prosecution they are systematically referred to criminal prosecutors in the Department of Justice for action. However, public inquiries regarding criminal cases are not directed only to OCE or the Department of Justice, but may come to other EPA employees who are not in the criminal program. On those occasions when the public or news media contact any Agency personnel seeking information about (or even to verify the existence or determine the nature of) a criminal case, all EPA personnel, whether in a civil or criminal program, should respond: "EPA has a policy to neither confirm or deny the existence of a criminal investigation". EPA personnel may further explain that the purpose of that response is to protect the Constitutional rights of the parties being investigated, as well as to preserve the integrity of the Agency's and the Department of Justice's criminal investigation, which are conducted under strict Federal rules of criminal procedure for those reasons.

VII. REGULATORY DEVELOPMENT (RG)

A. RG.1 General Procedures and Goals

(GM-58) (RG. 1-1)

Issuance of Enforcement Considerations for Drafting and Reviewing Regulations & Guidelines for Developing New or Revised Compliance and Enforcement Strategies (August 15, 1985)

This document is a two-part directive. Part I addresses enforcement considerations for drafting and reviewing regulations. Part II presents guidelines for developing new or revised compliance and enforcement strategies.

Part I is intended to provide guidance in the form of a checklist of minimum considerations for workgroup members to use during the process of developing a "major rule" or a "significant rule" that may have enforcement ramifications as well as any other rule with enforcement implications. A checklist of thirty-four questions follows, dividing the major concerns into: preamble; definitions; scope and applicability of regulation; performance standards; monitoring and inspection; record keeping/ recording requirements; and demonstrating compliance with performance standards.

Part II is structured similarly, providing a guidance checklist to evaluate the need for new or revised compliance and enforcement strategies, to assess the appropriate timing for completing these strategies, and to determine the scope of strategies that need to be developed. The checklist applies to developing new or revised strategies for: (1) new Agency program initiatives; (2) new statutory responsibilities delegated to the Agency; (3) revisions to existing regulations that a program office determines will have a significant effect on an ongoing program; and (4) programs with existing strategies that are not producing adequate environmental results.

(GM-47) (RG. 1-2)

A Summary of OE's Role in the Agency's Regulatory Review Process (January 27, 1986)

This guidance describes the Office of Enforcement's (OE) role and responsibilities in the EPA regulatory process and sets forth procedures for OE staff to follow in reviewing and concurring in regulation packages.

The first part of the memorandum, OE's role in the Agency's regulation review process, is divided into sections discussing participation in Steering Committee meetings, Start Action Request (SAR) review, Agency-wide work groups, Steering Committee review, and red border review (the final interoffice review). The second part of this document contains procedures for concurrence on regulation packages under OE review, first describes procedures under the old system, then describes revisions to the procedures, and explains in greater detail the procedures currently followed by OE.

Appendix 1 provides three charts outlining the regulation review process. Chart 1 is the old system, and Charts 2 & 3 are the new system. Appendix 2 summarizes EPA's regulation

development and review process as managed by the Office of Policy, Planning, and Evaluation (OPPE).

(GM-59) (RG. 1-3)

The Regulatory Development Process: Change in Steering Committee Emphasis and OE Implementation (February 6, 1987)

EPA issued this directive to prevent situations where major issues or concerns are raised at the last minute before a Steering Committee meeting. The document is divided into two sections and several attachments.

The first section provides a background sketch and statement of purpose. The second section proffers two procedures to follow: (1) at the conclusion of a Steering Committee meeting, a draft agenda for the next meeting is distributed; and (2) each Enforcement Counsel should review that draft agenda for matters applicable to his or her program area and then provide a one page summary for any issues that should be voiced to the Committee with respect to each agenda topic.

Attachment 1 is the memo announcing this change. Attachment 2 outlines changes and roles in the regulatory development process, including how the process will work, responsibilities of workgroup chairs, and roles and responsibilities of Steering Committee members. Attachment 3 is a prototype "Working Group Format" with several "Fact Sheets."

(GM-4) (RG. 1-4)

Ex Parte Contacts in EPA Rulemaking (August 4, 1977)

This document presents guidelines all EPA employees should follow in discussing the merits of proposed rules with interested persons outside the Agency during the period between proposal and promulgation.

First, during the period between proposal and promulgation of a rule, all employees should respond to inquiries about the rule, explain how it would work, and attend public meetings of interested groups. Second, during this period, EPA employees may meet with interested persons for the purpose of better understanding any technical, scientific, and engineering issues involved or discussing the broader questions involved.

In all cases, a written summary of the significant points made at the meetings must be placed in the comment file. All new data or significant arguments presented should be reflected in the summary. This requirement applies to every form of discussion with outside interested persons as long as the

discussion is significant

VIII. STATE/FEDERAL AGREEMENTS (SF)

A. SF.1 General Procedures and Goals

(GM-41) (SF. 1-1)

Revised Policy Framework for State/EPA Enforcement Agreements (August 25, 1986 - originally issued June 26, 1984)

The document is the Agency's policy framework for implementing an effective state/federal enforcement relationship through national program guidance and regional/state agreements. This document was intended to reinforce the Guidance for FY 1987 Enforcement Agreements Process (4/15/86), and to serve as a guide for negotiations and implementation of the Enforcement Agreements. The revisions incorporate into the Policy Framework addenda developed between 1984 and 1986 in the areas of oversight of state civil penalties, involvement of the state attorneys general in the enforcement process, and implementation of nationally managed/coordinated cases.

The policy framework is divided into six sections. The first section, State/Federal Enforcement Agreements: Form, Scope and Substance, sets forth the form and scope of the agreements as well as the degree of flexibility the Regions have in tailoring national policy to individual states.

The second section, Oversight Criteria and Measures: Defining Good Performance, outlines the criteria and measures for defining a quality program whether the compliance or enforcement program is administered by EPA or a state. According to this section, the criteria are intended to serve only as guidance and are not to be adopted word-for-word. Criterion #5 is a new section which deals with the definition of what constitutes timely and appropriate enforcement response.

The next section, Oversight Procedures and Protocols, sets forth principles on how EPA should conduct its oversight function. This section discusses the approach, the process, and the follow-up and consequences of oversight.

Criteria for Direct Federal Enforcement in Delegated States, the fourth section, explains the circumstances under which EPA takes direct enforcement action in a delegated state. It also covers the manner in which EPA should take action so that state programs are being strengthened simultaneously.

Section five, Advance Notification and Consultation, deals with EPA's policy of "no surprises." It explains what measures

must be taken with each state in order to ensure that the policy is effectively carried out.

The final section, State Reporting, reviews key reporting and recordkeeping requirements for management of data and public reporting on compliance and enforcement program accomplishments. It lists seven measures for EPA to use to manage and oversee performance by Regions and states.

(GM-57) (SF. 1-2)
Guidance for the Fy 1989 State/EPA Enforcement Agreements Process (June 20, 1988)

This guidance introduces the regional enforcement strategies process as a means of addressing state and regional priorities and reiterates the importance of timely and appropriate enforcement responses and federal facilities compliance.

Attachment 1, the main part of the guidance, covers five topics: (1) maintaining the enforcement agreements process; (2) improved management and tracking of enforcement responses (for enforcement responses that are timely and appropriate & for tracking and follow-through on cases); (3) inspector training and development; (4) up front agreements on penalty sharing; and (5) working with states to improve federal facilities compliance.

IX. ORDERS AND DECREES (OR)

A. OR.1 Drafting and Modifying Orders and Decrees

(GM-17) (OR. 1-1)
Guidance for Drafting Judicial Consent Decrees (October 19, 1993)

This document provides guidance on the provisions EPA should include when drafting a settlement agreement covering a civil enforcement action for which the federal government has decided that judicial remedies are appropriate. The GM explains each step in drafting a settlement agreement and accompanies the text with examples for each part of an agreement.

First, the guidance explains standard front end provisions, which provide the factual and legal background for the consent decree, including the parties, the cause(s) of action, and the procedural history. Next, the GM explains the transitional clause. This clause signals the end of the introductory portions of the decree and the beginning of the court's order.

The majority of the guidance is a detailed explanation of

provisions that may be included in the court's order. These are: (a) jurisdiction and statement of the claim; (b) applicability clause; (c) public interest provision; (d) definitions section; (e) compliance provisions -- generally/for repeat violators/ performance bonds; and (f) thirteen provisions defining other responsibilities of the parties to the decree. Appendix A presents a consent decree checklist. Appendix B is a sample consent decree.

(GM-68) (OR. 1-2)

Procedures for Modifying Judicial Consent Decrees (January 11, 1988)

This document clarifies procedures for modifying consent decrees and other judicial orders in EPA enforcement cases. The memorandum defines a consent decree "modification" as changes to the consent decree proposed jointly by the government and the defendant to address circumstances that arose since the entry of the consent decree. The policy then prescribes four steps: (1) when the need to modify is discovered, Region sends a letter to the Enforcement Counsel and to the Dept. of Justice [DOJ] notifying them of the intent to open negotiations with the defendant and summarizing relevant facts, issues, and proposed solutions; (2) Region proceeds to negotiate a modification in the manner described in the letter; (3) the Office of Enforcement [OE] retains authority for approving modifications on behalf of EPA, and DOJ retains the same for the U.S.; (4) after OE and DOJ approve the modification, DOJ presents the proposed consent decree modification to an appropriate court for approval. The document concludes with a paragraph on appropriate reporting in the SPMS (now STARS) Consent Decree Tracking Measure.

B. OR.2 Monitoring and Enforcing Orders and Decrees

(GM-86) (OR. 2-1)

Manual on Monitoring & Enforcing Administrative and Judicial Orders (February 6, 1990)

This Manual is a large collection of text and appendices intended to guide EPA enforcement staff on their roles and responsibilities in monitoring and enforcing final order requirements. The Manual applies to all regulatory enforcement programs except CERCLA (Superfund). In general, the Manual outlines the process for working with EPA Financial Management Offices and the Department of Justice (DOJ) in monitoring and collecting penalties.

Chapter One (Monitoring and Reporting the Status of Final Orders) includes a section defining final administrative and judicial orders and sections on drafting enforceable orders,

monitoring systems, reporting requirements, and additional oversight requirements for administrative orders and for judicial orders.

Chapter Two (Collection of Administrative Penalties) discusses authority for administrative penalty collection, financial management collection procedures, and organizational roles and responsibilities.

Chapter Three (Collection of Judicial Penalties) includes sections on payment depositories, organizational roles and responsibilities, distribution of final orders, monitoring payments, EPA enforcement reporting of payment status, coordination of DOJ and EPA accounts receivable reporting systems, pursuit of outstanding penalty debts, and termination of judicial penalty debts by various means.

Chapter Four (Enforcing Final Orders) provides information on enforcing administrative and judicial orders, with subsections on modifications, stipulated penalties, motions to enforce, and contractor listing.

Compendium documents RF.2-2, OR.2-2, PT.3-1, TK.1-1 and TK.1-2 are attached. Also included are appendices entitled: (1) Model System for Administrative Penalty Collection; (2) Procedures for Modifying Judicial Decrees; (3) Procedures for Notifying DOJ of Stipulated Penalties; and (4) Contractor Listing in Cases of Non-compliance with Administrative or Judicial Orders.

(GM-27) (OR. 2-2)

Guidelines for Enforcing Federal District Court Orders (April 18, 1984)

This guidance outlines how to ensure enforcement of federal court orders. The purpose of the guidelines is to establish uniform Agency objectives in preparing for and in responding to violations of court orders. The guidelines apply to the enforcement of consent decrees and nonconsensual orders entered in federal district court that remedy violations of any of EPA's laws or regulations.

The guidelines explain in some detail how to draft orders to ensure enforceability. The guidelines also address how to select responses to violations of court orders. Finally, other matters, such as who should sign a consent decree and what types of timetables should be established for responding to certain violations are briefly discussed.

X. FEDERAL FACILITIES (FF)

A. FF.1 Compliance Monitoring and Enforcement

(GM-25) (FF. 1-1)

Federal Facilities Compliance Strategy (November 8, 1988)

EPA developed the new Federal Facilities Compliance Strategy in order to "ensure that federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and major municipal facilities." The document, also known as the "Yellow Book," establishes a comprehensive and proactive approach to achieving and maintaining high rates of compliance at all federal facilities.

The Yellow Book was written: (1) to serve as guidance for EPA Headquarters and Regional staff; (2) to clarify state and federal compliance monitoring and enforcement roles; (3) to inform federal agencies of EPA's strategy and identifying procedures to be followed when violations have been discovered; and (4) to communicate EPA's approach for addressing compliance problems at federal facilities to Congress, the public, and concerned interest groups.

The Yellow Book is comprised of eight chapters which set out the basic framework for EPA's media programs to follow in ensuring that federal facilities are fully integrated into federal and state compliance monitoring and enforcement activities. The chapters are: (1) Introduction; (2) Summary of Relevant Environmental Statutes and Executive Orders; (3) Identification of the Regulated Community; (4) Compliance Promotion, Technical Assistance, and Training; (5) Compliance Monitoring; (6) Enforcement Response to Compliance Problems and Violations of Environmental Laws at Federal Facilities; (7) Role of the States in Responding to Federal Facilities Violations; and (8) EPA Roles and Responsibilities for Program Implementation.

XI. TRACKING ENFORCEMENT ACTIVITIES (TK)

A. TK.1 General Procedures and Goals

(GM-76) (TK. 1-1)

Agency Judicial Consent Decree Tracking and Follow-Up Directive (January 11, 1990)

This policy specifies EPA requirements for how Regional Offices track compliance with judicial consent decree requirements and for how Regions select and document decisions on appropriate EPA follow-up responses to consent decree violations.

The document prescribes requirements for: (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; (5) maintaining data on the current status of EPA consent decrees; and (6) termination of consent decrees and closing cases.

The policy first provides some general background information on the allocation of consent decree tracking responsibilities between regional program divisions and Offices of Regional Counsel. It then expands on each of the six requirements listed above. The fourth section details the criteria for determining the appropriate EPA response to violations: the environmental harm caused, the duration of the violation, the compliance history of the defendant, the deterrence value, the defendant's ability to respond, and the economic gain of non-compliance.

The policy also includes a sample Consent Decree Violation and Follow-Up Form.

(GM-74) (TK. 1-2)

Guidance on Certification of Compliance with Enforcement Agreements (July 25, 1988)

Verification of settlement agreements which require specific performance to achieve or maintain compliance with a regulatory standard is key to EPA enforcement. The Office of Enforcement issued this guidance to assist drafters of settlement agreements in the effort to make the agreements more easily verifiable and enforceable.

The guidance achieves its purpose through two elements: (1) certification of compliance by a responsible corporate official, and (2) documentation to verify compliance. The section explaining the first element states that a "responsible official" must sign the compliance reports (under threat of criminal or civil contempt sanctions for intentionally deceiving or misleading the EPA) and that certification is especially important for entities with a history of non-compliance. The other section discusses why documentation to verify compliance should be identified in settlement agreements.

Attachment A provides a suggested checklist for documentation purposes.

(GM-40) (TK. 1-3)

Revised Regional Referral Package Cover Letter and Data Sheet (May 30, 1985)

In order to streamline the civil judicial case referral process, a new standard referral package cover letter and data sheet were formulated. (See attached copy of the Cover Letter and Model Data Sheet.) Most of the case information is to be provided on the data sheet so that it is easier to track referrals. The cover letter and data sheet contain eleven elements designed to provide a brief, but thorough summary of the case to the reviewer.

(GM-19) (TK. 1-4)

Consent Decree Tracking System Guidance (December 20, 1983)

This document offers guidance on the use of the tracking system to enable EPA to track the compliance of consent decrees for all media on a national basis.

This guidance begins by defining the scope of the system: information on all court-entered judicial consent decrees to which EPA is a party, as well as the status of compliance efforts required by these decrees. The memorandum next discusses the tracking system's objectives. Then, the document explains the key tracking system components: (1) the Repository (a collection of physical copies of EPA consent decrees); (2) the Consent Decree Library (an automated management information system to store summaries of each EPA consent decree on file in the Repository); (3) compliance monitoring (source reporting and/or on-site inspections); and (4) compliance tracking (gathering and compiling compliance information). Next, the GM briefly discusses tracking system operation. It concludes by defining the office responsibilities of the NEIC, Regional Administrators, and Office of Enforcement Headquarters. Included in this guidance are Attachment A, a sample prospective quarterly report, and Attachment B, a sample retrospective quarterly report.

(GM-60) (TK. 1-5)

Procedures and Responsibilities for Updating and Maintaining the Enforcement Docket (March 10, 1987)

This policy declares that an accurate and current docket data base depends on the initial entry of cases and on the regular monthly review and case update by the Headquarters (HQ) and Regional attorneys assigned to the case. The memo lists eight steps in the process of maintaining the docket (and states who performs them and when): (1) prepare Case Data and Facility Data Forms for the initial entry of cases; (2) enter all new

cases; (3) prepare monthly case updates; (4) enter monthly case updates; (5) run reports to verify overall accuracy of Docket and distribute for verification; (6) verify accuracy and make corrections; (7) enter corrections; and (8) run accounting reports and complete SPMS (now STARS) reporting instruction forms.

The policy continues, offering a further explanation of the initial entry of a case, major milestone event dates, overall status, HQ review time, the "Referral Indicator," concluded cases, HQ Division, and law/section violated and cited in the complaint.

(GM-61) (TK. 1-6)

Enforcement Docket Maintenance (April 8, 1988)

This guidance provides detailed procedures to ensure that all parties understand their responsibilities for entering cases into the Docket and for the regular monthly review and update of the Case Status Report. The memo first discusses the definition of a case, then initial case entry, followed by case status review procedures, and concludes with quality assurance.

The first section covers DOCKET design, assigning a case number, amendments to ongoing cases, and use of DOCKET for SPMS (now STARS), accountability, and with the Workload Model. The second part of the document, initial case entry, directs the regional attorney to enter the case into the system as soon as he or she begins case development. It then instructs the regional attorney to complete: (1) a Case Data form [appendix A]; (2) a Facility Data form [appendix B]; and (3) a Case Summary [appendix C].

The third section, case status review procedures, explains that the lead EPA attorney has primary responsibility for monthly review and update of all active cases, particularly concentrating on: (a) case information; (b) major milestones and miscellaneous events; (c) staff and attorney names; (d) results; (e) penalties; and (f) case status comments. The final section concisely addresses quality assurance, which results from OE HQ monthly review of the overall DOCKET for accuracy and completeness.

Appendix D gives an example of the nature and method of entering status comments. Appendix E charts roles and responsibilities (who, what, when, and how). Appendix F provides summary "case code" tables.

(GM-no) (TK.1-7)

Support of the Enforcement DOCKET for Information Management in OECA (October 3, 1994)

This policy adds formal administrative enforcement actions to the DOCKET information system. Prior to this, only judicial actions were officially tracked. In addition it states that Regional Counsels have the primary responsibility for entering and maintaining enforcement data. Although it recognizes a role for the Division Directors in ORE. The policy further states that OECA will examine the feasibility of including all formal administrative orders in DOCKET.

XII. CASE MANAGEMENT (CM)

A. CM.1 General Procedures and Goals

(GM-71) (CM. 1-1)

Case Management Plans (March 11, 1988)

This document offers a mechanism to enhance the effectiveness of the environmental enforcement program by providing a road map for bringing a case from initiation to conclusion. The primary elements of the mechanism are organizing the tasks to be performed, assigning the persons to perform those tasks, and outlining the dates by which those tasks are to be completed. The mechanism is supposed to cover both litigation and negotiation elements, as well as legal and technical tasks.

The guidance gives general procedural directions leading up to the Department of Justice (DOJ) attorney having a case plan in place by the date of filing of the complaint. The case plan addresses the roles of DOJ, the Assistant U.S. Attorney, and Regional and Headquarters legal and technical staff. The case plans are to be updated on a quarterly basis to maintain their effectiveness.

A two-page form, "Preliminary Case Plan," is attached.

(GM-85) (CM. 1-2)

Regional Enforcement Management: Enhanced Regional Case Screening (December 3, 1990)

This guidance is divided into five sections. First, it explains the objectives of case screening, including the strategic value of undertaking federal enforcement, the appropriate enforcement response, the appropriate considered use of innovative settlement conditions or tools, the encouragement of potential multi-media and cross-statutory action, and the effective integration of criminal and civil enforcement. The second section lays out the requirements for a regional case screening capability. It lists criteria for an acceptable case screening process, explains the attached case screening worksheet

to help assess what further screening might be necessary and to help identify early on how an enforcement case should be developed. This section offers five ways in which Regions can phase in and focus enhanced case screening, and it requires coordination and review before and during criminal investigations in cases of ongoing releases or discharges.

The third section and attached charts 1a, 1b, and 1c explain the OE recommended case screening approach. It recommends continued reliance on initial screening on a single media basis using the case worksheets, detailed monthly review by a multi-media screening committee of cases identified as having a multi-media concern, and a third level of committee reviewing violations identified through the civil enforcement process for criminal enforcement potential and review of criminal leads and investigations for priority. The fourth section declares that, through strategic planning, the Region can target investigation and enforcement for a number of factors. The final section provides general oversight directions to help the Office of Enforcement evaluate implementation to help meet EPA's goals for criminal enforcement and multi-media cases.

Three charts are attached. A sample case screening worksheet is also attached. Four narrative appendices are also attached discussing: (1) choosing between administrative and judicial enforcement; (2) identifying candidates for innovative settlement terms or enforcement tools; (3) ensuring a multi-media case screening perspective; and (4) integrating civil and criminal enforcement activities.

(GM-20) (CM. 1-3)

Guidance on Evidence Audit of Case Files (December 30, 1983)

This guidance discusses the evidence audit system, which is designed to establish an overall case document control system, to provide quick and complete access to records, and to provide a means for assuring admissibility of the evidence.

After the introduction, which discusses the purposes and advantages of evidence audits, the guidance addresses the proposed procedure. Under this section, the roles of the Regional Administrator and the Asst. Administrator for the Office of Enforcement are first discussed. Then the required elements of an evidence audit are listed and briefly explained. These are: (1) document assembly; (2) document organization and review; (3) evidence profiles (graphic or narrative presentations of the history and chain of custody of evidence from the time of collection through final disposition); and (4) document storage and retrieval. The document concludes with an operational outlook narrative, explaining how to get assistance from the NEIC

Evidence Audit Unit.

XIII. INSPECTIONS (IN)

(GM-5) (IN. 1-1)

Conduct of Inspections After the Barlow's Decision (April 11, 1979)

This document offers guidance to the Regions in the conduct of inspections in light of *Marshall v. Barlow's Inc.*, and the need to obtain warrants and other process for inspections pursuant to EPA-administered acts. The guidance focuses on the preparation for and conduct of inspections, including (1) how to proceed when entry is denied, (2) under what circumstances a warrant is necessary, and (3) what showing is necessary to obtain a warrant.

The section titled "Conduct of Inspections" is divided into seven parts. Preparation, including seeking a warrant before inspection, administrative inspections v. criminal inspections, the use of contractors to conduct inspections, and inspections conducted by state personnel, comes first. Next, aspects of entry are discussed, such as consensual entry, withdrawal of consent, when entry is refused, and Headquarters notification. Then, the guidance discusses areas where a right of warrantless entry still exists: emergency situations, FIFRA inspections, and "open fields" and "in plain view" situations. A section on securing a warrant follows.

Next, the Barlow's guidance explains standards and bases for the issuance of administrative warrants in three contexts: civil specific probable cause warrants, civil probable cause based on a neutral administrative inspection scheme, and criminal warrants. Guidance on inspecting with a warrant and returning the warrant close out the section. Two conclusions are drawn: (a) *Barlow's* requires EPA to formalize its neutral inspection schemes; and (b) *Barlow's* generally precludes initiating civil and/or criminal actions for refusal to allow warrantless inspections.

Three attachments are included. Attachment 1 is a warrant application, affidavit, and warrant to conduct an inspection, where the Agency has specific probable cause to believe that a civil violation of an EPA regulation or Act has occurred. Attachment 2 is the same three documents, in which the establishment to be inspected has been selected under a neutral administrative inspection scheme. Attachment 3 is a neutral administrative scheme for CFC inspections.

(GM-1) (IN. 1-2)

Visitor's Releases and Hold Harmless Agreement as a Condition to Entry to EPA Employees on Industrial Facilities (November 8, 1972)

Certain firms had required EPA employees to sign agreements purporting to release the firms from tort liability as a precondition to granting entry. This guidance responds to three issues this practice presents.

First, while EPA employees can probably release the entities from tort liability to themselves, the employees are instructed not to sign such releases under any circumstances. Signing jeopardizes the government's right of subrogation under the Federal Employees Compensation Act. Second, while any agreement to make the government responsible for employee-caused injuries is probably invalid, employees are instructed not to sign any agreement purporting to do so. Rather than sign an agreement, this guidance directs the EPA employee to cite the statutory authority granting the right of entry, without mentioning any civil/criminal penalties. If access is denied, the employee is to inform the Office of General Counsel, which will decide how to proceed.

XIV. COMMUNICATIONS (CO)

CO. Communications with Litigants

(GM-6) (CO. 1-1)

Contracts with Defendants and Potential Defendants in Enforcement Litigation (October 7, 1981)

This policy is a short memorandum on five requirements governing contact with actual or potential defendants in enforcement litigation. First, EPA needs to consult with the Dept. of Justice (DOJ) before contacting defendants in enforcement litigation or potential defendants in cases referred to DOJ for filing. Second, EPA must give DOJ an opportunity to participate in any meetings with such persons or firms to review their compliance status. Third, EPA must give DOJ notice of and opportunity to attend meetings requested by potential defendants or their counsel. Fourth, EPA shall coordinate ground rules with DOJ in advance of any meetings. Fifth, EPA must provide follow-up information to DOJ promptly after the conclusion of any meetings.

(GM-7) (CO. 1-2)

"Ex Parte" Rules Covering Communications Which Are the Subject of Formal Adjudicatory Hearings (December 10, 1981)

This policy guides EPA staff in recognizing and avoiding improper ex parte communications and in taking remedial steps if an improper ex parte communication occurs. Sections I - III define ex parte contacts and describe the rules governing them. Section IV describes measures for minimizing the adverse legal impact of such communications when they occur.

The first section discusses why rules about ex parte contacts exist and to what they apply, listing nine areas where EPA conducts formal adjudicative hearings and listing Administrative Procedure Act (APA) requirements. The next section addresses what an ex parte communication is, providing the APA definition and a "working" definition. The third section discusses the rules governing ex parte communications, including what kinds of communications concern "the merits" of a hearing, what communications within EPA are prohibited, and what communications with persons outside EPA are prohibited. The final section addresses ways to minimize ex parte communications and actions to take if they should occur. In this section are five illustrations of preventive measures to lessen the likelihood of problems as well a curative measure, viz., to make the content and circumstances a part of the official record of the proceeding and give the parties a chance to respond on the record.

(GM-43) (CO. 1-3)

Enforcement Document Release Guidelines (September 16, 1985)

The Guidelines are intended to assist program personnel and enforcement attorneys in their decisions on whether to withhold or release enforcement documents requested by the public. They are designed to provide Agency-wide consistency in the release of enforcement related documents and to promote fairness to all public interests. The guidance clearly states that it is intended to provide only interpretive guidelines and general principles, and that decisions to release documents will vary with each case depending on each program's statutory and programmatic needs.

The goal, scope, and general principles of the Guidelines are briefly described. Next, the Guidelines address releasing general enforcement documents. These include enforcement policy documents, enforcement strategic planning documents, management/ administrative documents, deliberative support documents, reference files, and documents containing attorney-client

communications.

The last section discusses releasing case-specific documents. The first part of this section looks at the release of case files. It begins with a discussion of the release of case files in general and then goes on to specifically address the release of attorney work product and attorney-client materials, settlement documents, and other documents such as law enforcement documents which discuss unique investigative techniques not generally known outside the government. The second half discusses the release of case status reports.

The Appendix briefly describes several statutes and regulations which place constraints on the Agency's discretion to release documents to the public.

XV. MISCELLANEOUS (MI)

(GM-66) (MI. 1-1)

Assertion of the Deliberative Process Privilege (October 3, 1984)

The purpose of this guidance is to prevent disclosure of certain materials containing personal advice, recommendations, or opinions relating to the development of Agency policy, rulemaking, use of enforcement discretion, settlement of cases, etc., in response to depositions, motions to compel discovery, and questions posed at a trial or hearing. The guidance explains when, who can, and how to assert the privilege.

Section I discusses the application of the privilege and some of its limitations (with supporting case citations). Section II explains when to assert the privilege. The Agency will not assert the privilege in every case where it applies; therefore, the materials should be released, except where: (a) release may cause harm to the public interest; (b) the materials are subject to another privilege justifying nondisclosure; or (c) release would be unlawful. Section III explains that, in general, the head of the office responsible for development of the material in question should assert the privilege. Finally, Section IV addresses how to assert the privilege, detailing six procedural steps that must be undertaken.

Attached to this guidance are Delegation 1-49 of 10/3/84 (This is the actual delegation of authority from the Administrator to assert the privilege.) and two short memoranda from the General Counsel on procedures for obtaining concurrence.

(GM-89) (MI. 1-2)

Strengthening the Agency's Administrative Litigation Capacity (May 3, 1989)

This policy provides a mechanism to decide whether or not to appeal adverse Administrative Law Judge (ALJ) decisions and how to reply to Respondent appeals to the Chief Judicial Officer of favorable decisions. Its purpose is to assure, at minimum cost, national program input and regional consistency in a timely manner. First, the Regional Office must fax a copy of the decision and a brief summary to the Office of Enforcement Branch Chief, the appropriate Office of General Counsel Branch Chief, and the Office of Regional Counsel standing contacts. A conference call follows. The call provides an opportunity to identify issues for appeal, identify what support will be available to assist the lead office, and incorporate both a national and a regional perspective into the briefs.

(GM-2) (MI. 1-3)

Professional Obligations of Government Attorneys (GM-2) (April 14, 1976)

This guidance discusses some of the obligations of EPA attorneys, both under the Canons of Professional Ethics and under various provisions of law. The five main areas covered are: (1) confidential commercial or financial information; (2) Civil or criminal investigations; (3) attorney-client communications; (4) commitments on behalf of EPA; and (5) ex parte communications. Under the broader heading of attorney-client communications are communications with the Dept. of Justice, legal advice, support of Agency positions, and dealing with outside parties represented by an attorney.

(GM-28) (MI. 1-4)

Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under CERCLA (GM-28 (June 13, 1984)[1]

This policy identifies the extent to which corporate shareholders and successor corporations may be held liable under the law for response costs arising from the release of a hazardous substance from an abandoned hazardous waste facility. The first section address the extent of liability of corporate shareholders, and the second section examines the liability of successor corporations. Each of the two sections follows the same format.

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[1] This Policy is to be transferred to the CERCLA Policy Compendium after a generic policy is development to take its place.

First, a short background is provided on whether there is any statutory language in CERCLA which makes either corporate shareholders or successor corporations responsible for cleanup costs for the release of a hazardous substances from an abandoned hazardous waste facility. In the case of corporate shareholders, the background section also explains why EPA may want to extend liability to include corporate shareholders and whether traditional corporate law allows for such an extension.

The issue of the particular section is set out and then a short summary section answers the issue in general terms. Each discussion section explains in detail what is advanced in the summary. In addition, the discussion doctrine of sections pertaining to each issue review the courts' traditional approach to limited liability and the current evolving standards, specifically as to "piercing the corporate veil." The discussion section on corporate shareholder liability also explains how the "piercing the corporate veil" is applied by federal courts, in contrast to how it is applied by state courts. Each section ends with a short conclusion as to how the Agency should proceed in cases involving corporate shareholders or successor corporations.

(GM-no) (MI. 1-5)

Interim Guidance on Review of Indian Lands Enforcement Actions (October 21, 1992) with attachment, EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984)

The EPA policy which announces, inter alia, as its eighth principle, that Assistant Administrators, Regional Administrators and the General Counsel should work cooperatively with Tribal governments to achieve compliance with environmental statutes and regulations on Indian reservations, consistent with the principle of Indian self-government. The policy states:

- Where tribally owned or managed facilities do not meet Federally established standards, the Agency will endeavor to work with the Tribal leadership to enable the Tribe to achieve compliance.

- Where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as EPA does to noncompliance by the private sector outside reservations.

- Direct EPA actions against Tribal facilities through the judicial or administrative process will be

> considered where the Agency determines, in its judgment, that (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

The policy is attached to Interim Guidance, which assigns the responsibility to coordinate policy and management issues, and legal issues in consultation with the Office of General Counsel, to the Senior Legal Advisor of the Office of Federal Programs (OFA). That person will make appropriate recommendations, and the AA will be advised of enforcement options. Until the Indian Policy Implementation Guidance is formally revised, all future direct EPA enforcement actions against tribal facilities, except for emergency situations, should be submitted to the AA. The AA will act in consultation with the OFA, including its Senior Legal Advisor, and the General Counsel.

12/1/94

GENERAL ENFORCEMENT POLICY COMPENDIUM

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Key:

R = Recodified in New Compendium (New Number in Parentheses)
T = Transfered to the Criminal Enforcement Compendium
D = Deleted

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Key:

R = Recodified in New Compendium (New Number in Parentheses)
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90	R (RF.3-2)

Key:

R = Recodified in New Compendium (New Number in Parentheses)
T = Transfered to the Criminal Enforcement Compendium
D = Deleted

RF.1

Smith, French

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

RF.1-1
GM #3

AUG 21 1981

THE ADMINISTRATOR

Honorable William French Smith
The Attorney General
Washington, D.C. 20530

RE: Memorandum of Understanding Between the Department of Justice And the Environmental Protection Agency

Dear Mr. Attorney General:

Under Paragraph 10 of the Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency dated June 15, 1977 (copy enclosed), EPA's General Counsel and Assistant Administrator for Enforcement, EPA, were given authority to request civil litigation from the Department of Justice.

On July 1, 1981, the Environmental Protection Agency underwent an internal reorganization which resulted, in part, in the abolishment of the Office of Enforcement as well as the position of Assistant Administrator for Enforcement. In addition, the Office of General Counsel was placed under an Associate Administrator for Legal Counsel and and Enforcement.

The principal enforcement authorities previously delegated to the Assistant Administrator for Enforcement were redelegated to the Associate Administrator for Legal Counsel and Enforcement on July 14, 1981. Therefore, the authority previously vested in the Assistant Administrator for Enforcement under the above referenced memorandum now resides in the Associate Administrator for Legal Counsel and Enforcement.

[illegible]/67503/8-4-31

Accordingly, requests to the Department of Justice for routine civil litigation under the terms of the Memorandum of Understanding will now come from the Associate Administrator for Legal Counsel and Enforcement. The present Associate Administrator for Legal Counsel and Enforcement is Mr. Frank A. Shepherd.

This reorganization and redelegation does not, of course, affect the authority of Regional Administrators who may continue to request litigation under Paragraph 10 of the Memorandum of Understanding in matters requiring an immediate temporary restraining order.

Sincerely yours,

Anne M. Gorsuch

cc: Assistant Attorney General
Land and Natural Resources Division

Assistant Attorney General
Civil Division

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE DEPARTMENT OF JUSTICE
AND
THE ENVIRONMENTAL PROTECTION AGENCY

WHEREAS, the Department of Justice conducts the civil litigation of the Environmental Protection Agency;

WHEREAS, the conduct of that litigation requires a close and cooperative relationship between the attorneys of the Department of Justice and of the Environmental Protection Agency;

WHEREAS, the achievement of a close and cooperative relationship requires a clarification of the respective roles of the attorneys of the Department of Justice and of the Environmental Protection Agency;

WHEREAS, the Attorney General may decline to represent the Agency in particular civil actions, in which case the Agency may be represented by its own attorneys; and

WHEREAS, most challenges to and enforcement of regulatory standards and procedures adopted by the Environmental Protection Agency involve scientific, technical, and policy issues and determinations developed in lengthy rulemaking proceedings in which the Agency's attorneys have been involved and can provide the necessary expertise.

NOW, therefore, the following memorandum of understanding is entered into between the Attorney General of the United States and the Administrator of the Environmental Protection Agency for the purpose of promoting the efficient and effective handling of civil litigation involving the Environmental Protection Agency;

1. The Attorney General of the United States (hereinafter referred to as the "Attorney General") shall have control over all cases to which the Environmental Protection Agency (hereinafter referred to as the "Agency") or the Administrator of the Environmental Protection Agency (hereinafter referred to as the "Administrator") is a party.

2. When requested by the Administrator, the Attorney General shall permit attorneys employed by the Agency (hereinafter referred to as "Agency participating attorneys") to participate in cases involving direct review in the Courts of Appeal and shall also permit such attorneys to participate in other civil cases to which either the Agency or the Administrator are a party, provided, however, that:

(a) the Administrator or his delegate shall designate a specific Agency participating attorney for each case and shall communicate the name of such attorney in writing to the Attorney General;

(b) such Agency participating attorney shall be subject to the supervision and control of the Attorney General; and

(c) if required by the Attorney General, an Agency participating attorney shall be appointed as a Special Attorney or Special Assistant United States Attorney and take the required oath prior to conducting or participating in any kind of Court proceedings.

3. Agency attorneys shall not file any pleadings or other documents in a court proceeding without the prior approval of the Attorney General.

4. It is understood that participation by Agency attorneys under this memorandum includes appearances in Court, participation in trials and oral arguments, participation in the preparation of briefs, memoranda and pleadings, participation in discussions with opposing counsel, including settlement negotiations, and all other aspects of case preparation normally associated with the responsibilities of an attorney in the conduct of litigation; provided, however, that the Attorney General shall retain control over the conduct of all litigation. Such control shall include the right to allocate tasks between attorneys employed by the Department of Justice and Agency participating attorneys. In allocating tasks between the Department's and the Agency's attorneys, the Attorney General shall give due consideration to the substantive knowledge of the respective attorneys of the matter at issue so that the Government's resources are utilized to the best advantage.

5. In the event of any disagreement between attorneys of the Department of Justice and of the Agency concerning the conduct of any case, the Administrator may obtain a review of the matter in question by the Attorney General. The Attorney General shall give full consideration to the views and requests of the Agency and shall make every effort to eliminate disagreements on a mutually satisfactory basis. In carrying out such reviews, the Attorney General shall consult with the Administrator. In implementing this provision, it is understood that the Attorney General will not be expected by the Administrator to interfere with the direction of any trial in progress.

6. The settlement of any case in which the Department of Justice represents the Agency or the Administrator shall require consultation with and concurrence of both the Administrator and the Attorney General.

7. The Administrator and the Attorney General shall make an annual review of both the Department's and the Agency's personnel requirements for Agency litigation. The Attorney General and the Administrator will cooperate in making such appropriation requests as are required to maintain their respective staffs at a level adequate to the needs of the Agency's litigation.

8. The Attorney General shall establish specific deadlines, not longer than 60 days, within which the Department's Attorneys must either file complaints in Agency cases

or report to the Attorney General why any such complaint has not been filed. In the event any Department Attorney does not file a complaint, he shall thereafter submit further periodic reports to the Attorney General until the complaint is filed or a decision is reached that it shall not be filed. Copies of the reports required by this section shall be provided to the Agency if requested.

9. If the Attorney General fails to file a complaint within 120 days of the referral of a request for litigation and a litigation report by the Agency to the Attorney General, then the Administrator may request the Attorney General to file a complaint within 30 days. Failure of the Attorney General to thereafter file a complaint within the said 30 days may be considered by the Administrator or his delegate to be a failure of the Attorney General to notify the Administrator within a reasonable time that he will appear in litigation for purposes of Section 305 of the Clean Air Act, 42 U.S.C. 1857h-3, Section 506 of the Federal Water Pollution Control Act, 33 U.S.C. 1366, or Section 1450 of the Safe Drinking Water Act, 42 U.S.C. 300j-9; provided, however, that the failure of the Attorney General to file a complaint within the time period requested by the Administrator in a case in which the Administrator requested immediate action under Sections 311(e) and 504 of the Federal Water Pollution Control Act, 33 U.S.C. 1321, 1364; Section 303 of the Clean

Air Act, 42 U.S.C. 1857h-1; or Section 1431 of the Safe Drinking Water Act, 42 U.S.C. 300i; to protect public health may also be considered by the Administrator to be a failure of the Attorney General to so notify the Administrator under Section 305 of the Clean Air Act, 506 of the Federal Water Pollution Control Act or Section 1450 of the Safe Drinking Water Act.

10. All requests of the Agency for litigation shall be submitted by the Agency through its General Counsel or its Assistant Administrator for Enforcement to the Assistant Attorney General for the Land and Natural Resources Division or for the Civil Division, except matters requiring an immediate temporary restraining order may be submitted by regional Administrators of the Agency simultaneously to a United States Attorney and the appropriate Assistant Attorney General. All requests for litigation shall be accompanied by a standard litigation report which shall contain such information as shall be determined from time-to-time by the Attorney General to be necessary in order to prosecute Agency litigation. Similar reports shall also be provided for suits in which the Agency or the Administrator is a defendant, as requested by the Attorney General.

11. The Agency shall make the relevant file of any matter that is the subject of litigation available to attorneys for the Department of Justice at a convenient

location when a request for litigation is submitted or when the Department is required to defend the Agency or the Administrator.

12. The Administrator shall undertake to review the Agency's procedures for the preparation of the record in cases involving direct review in the Courts of Appeal, including analyses of such matters as assembly, indexing, pagination, timing of preparation, and the allocation of tasks between the Agency and the Department. The Administrator shall consult with the Attorney General on the re-examination of these procedures.

13. The negotiation of any agreement to be filed in court shall require the authorization and concurrence of the Attorney General.

14. In conducting litigation for the Administrator, the Attorney General shall defer to the Administrator's interpretation of scientific and technical matters.

15. Nothing in this agreement shall affect any authority of the Solicitor General to authorize or decline to authorize appeals by the Government from any district court to any appellate court or petitions to such courts for the issuance of extraordinary writs, such as the authority conferred by 28 CFR 0.20, or to carry out his traditional functions with regard to appeals to or petitions for review by the Supreme Court.

16. In order to effectively implement the terms of this Memorandum, the Attorney General and the Administrator will

transmit copies of this Memorandum to all personnel affected by its provisions. This Memorandum shall not preclude the Department and the Agency from entering into mutually satisfactory arrangements concerning the handling of a particular case.

17. This Agreement shall apply to all cases filed on or after the date of approval of this Agreement by the Attorney General and the Administrator.

18. The Attorney General and the Administrator may delegate their respective functions and responsibilities under this Agreement.

19. The Department and the Agency shall adjust the conduct of cases arising before the effective date of this Agreement in a manner consistent with the spirit of this Agreement.

Griffin B. Bell

GRIFFIN B. BELL
Attorney General

Date: June 15, 1977

DOUGLAS M. COSTLE
Administrator
Environmental Protection Agency

Date:

RF. 1-2
GM #8

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

APR 3 1992

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Draft DOJ/EPA Litigation Procedures

FROM: Robert M. Perry
Associate Administrator for Legal and Enforcement
Counsel and General Counsel

TO: Associate Administrator
Assistant Administrators
Regional Administrators
Office Directors
Regional Counsels

In furtherance of the Administrator's policy to strengthen and improve this Agency's enforcement capability, particularly with regard to litigation, a meeting with the Department of Justice to discuss these matters occurred yesterday at Quantico, Virginia. I am pleased to report that it was highly productive and successful. Attached is a summary of the matters discussed, the recommendations produced and a process that will strengthen our enforcement efforts. Each of you has a critical role to insure the success of this vital endeavor, and I look forward to discussing it with you and receiving any comments you may have.

Attachment

ENFORCEMENT GOALS AND OBJECTIVES

of

OFFICE OF LEGAL AND ENFORCEMENT COUNSEL
U. S. ENVIRONMENTAL PROTECTION AGENCY

1. The role of enforcement is to support and advance the regulatory policies of EPA through use of all available enforcement means; to insure compliance with applicable laws and regulations; to deter unlawful conduct and to remove any incentive to non-compliance.

2. The regulated community is entitled to fair notice of EPA's policies and the requirements they impose on the regulated community. All members of the regulated community should expect that they will be treated in a consistent, fair manner which removes any competitive advantage gained by non-compliance.

3. EPA is responsible for establishing regulatory policies and enforcement goals, priorities and procedures to effectuate its policy initiatives. These policies and priorities are what guide the Department of Justice in its role as EPA's litigation counsel. This litigation will be conducted pursuant to the Quantico Guidelines for Enforcement Litigation developed between the Environmental Protection Agency and the Department of Justice.

QUANTICO GUIDELINES FOR ENFORCEMENT LITIGATION

1. GOALS AND PURPOSES

For EPA

To achieve compliance with applicable law through effective enforcement.

To inform the regulated communities, Congress and the public that EPA will enforce the statutues it administers in a prompt, fair and even-handed manner.

For DOJ

To provide the litigation support necessary to aid EPA in the accomplishment of these goals.

2. GENERAL OBSERVATIONS

A. Emphasis will be placed on bringing meaningful enforcement cases, particularly hazardous waste cases, criminal cases and enforcement of existing consent decrees;

B. Especially with regard to recently-enacted statutes, DOJ needs policy guidance from EPA to give direction on enforcement activity and to maintain consistency;

C. Regional offices of EPA will be the lynch-pin of the agency for identifying and developing enforcement matters;

D. Assistant Administrators and Regional Administrators play key roles in the enforcement process which are being clarified;

E. States, where possible, should be given the opportunity and incentive to initiate enforcement cases. Effectiveness of state enforcement actions will be considered;

F. While national enforcement priorities are necessary, flexibility is desirable for region-by-region determinations;

G. Criminal enforcement priorities and processes are being developed separately from civil matters;

H. United States Attorneys play a critical role and should be involved wherever possible;

I. Between EPA Headquarters and the regions, areas of responsibility will be identified to allow regional flexibility.

J. Focused use of administrative discovery powers is necessary for effective investigation of the factual/technical basis for cases.

3. RESPECTIVE COMMITMENTS

A. On enforcement policy formulation, EPA will seek, where appropriate, to confer and coordinate with DOJ concerning potential impacts on litigation;

B. Policy guidance given to R.A.'s and R.C.'s will also be provided to DOJ;

C. Informal working groups in all media will continue (or be established) to provide DOJ/EPA-OGC input to address legal issues;

D. Associate Administrator Perry and Assistant Attorney General Carol E. Dinkins will be available to discuss new enforcement guidance with R.A.'s and R.C.'s in D.C. To be discussed will be R.A. accountability and commitment to a sustained, orderly enforcement program that includes litigation as a desirable component;

E. Associate Administrator Perry will meet with Assistant Administrators on enforcement policy, to clarify roles and secure commitments from program side for sufficient technical support;

F. Assistant Attorney General Dinkins will make similar presentations to United States Attorneys on policies, processes and roles;

G. Violations will be discovered through self-reporting, regular inspections, citizen complaints, administrative discovery and trained criminal investigators;

H. Administrative powers, to be used for investigatory purposes, should be delegated to regions by eliminating need for Headquarter's concurrence;

I. Once a case is referred, the government will remain open to negotiation but will continue to move the case to trial.

4. PROCESS

A. DOJ attorneys assigned on a regional basis to handle all media;

B. EPA regional enforcement attorneys are media-specific;

C. A lead agency attorney (generally an attorney from the region) will be designated to manage the case for the agency and coordinate with DOJ;

D. Regular, monthly meetings will be held in the regions, attended by DOJ and EPA attorneys, with technical staff present and AUSA's invited to discuss:

1. general enforcement actions, including EPA administrative processes and investigations exclusive of criminal matters;

2. cases targeted by EPA as likely candidates for litigation, to determine

a. whether DOJ assistance prior to referral would be helpful; and

b. adequacy of agency development of case;

3. cases previously discussed as matters to be identified for case development to DOJ;

4. separate meetings will be held in the regions with program heads to discuss program enforcement priorities and concerns;

E. Following discussions at monthly meetings regarding potential matters for case development, when region determines that matter is a potential civil enforcement case, R.C. requests DOJ assistance for case development

1. team is formalized at this point, in anticipation of litigation;

2. technical support is committed;

3. goal is resolution through negotiated settlement or final judgment;

F. When a case has matured, the regional administrator requests the Associate Administator to refer the case to DOJ for litigation;

G. Some cases will be referred directly to DOJ without forming a case development team.

H. For true emergencies, telephonic authorization to file will suffice;

I. A new referral package format, more stream-lined and appropriate to the case development process identified above will be produced;

J. For cases referred before monthly meetings begin, DOJ and EPA will confer informally prior to referral;

K. Associate Administrator Perry and Assistant Attorney General Dinkins are available for dispute resolution if difficulties or disputes cannot be handled at intermediate levels;

L. Coordination for all of these efforts will include

1. Perry and Dinkins visits to regions;
2. Perry and Dinkins bi-weekly meetings with staff;
3. Perry and Dinkins monthly meetings without staff:
4. regular monthly meetings at staff level in regions;
5. working groups in D.C. on DOJ input into policy formulation re litigation impact;

6. Basic understanding by both agency and DOJ lawyers of their respective roles and the need for a cooperative spirit.

5. SPECIFIC ISSUES DISCUSSED

A. EPA is establishing guidelines for Superfund national strategy including especially criteria for which injunctions are appropriate and whether the regions or headquarters has the initiative for Superfund enforcement;

B. Existing Consent Decrees

1. collection and analysis of compliance status of all existing consent decrees to be accelerated;

2. uniform policy to be adopted on modification of existing decrees through judicial action;

3. violations of existing consent decrees are a top priority for enforcement;

4. collection of stipulated penalties.

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

RF. 1-3
GM #48

JAN 30 1986

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Model Litigation Report Outline and Guidance

FROM: Richard Mays
Senior Enforcement Counsel

TO: Associate Enforcement Counsels
Headquarters Program Enforcement Division
Directors
Regional Counsels
Regional Program Division Directors

Attached are the Model Litigation Report Outline and the Model Litigation Report Guidance. All litigation reports referred to OECM or the Department of Justice after March 1, 1986, should follow the Outline in regard to format and the Guidance in regard to content. The purposes of these two documents are (1) to create a common understanding among Agency personnel and DOJ attorneys as to what the report needs to cover and (2) to make the litigation report's form consistent. These two documents have been prepared by a workgroup consisting of Jack Winder, OECM-Water; Bill Quinby, OECM-Policy; Mike Vaccaro, Region III; Robert Schaefer, Region V; and Tom Speicher, Region VIII. They also reflect extensive review and input from the Regions, OECM, and the Environmental Enforcement Section of the Department of Justice.

While we anticipate that the Model Guidance will be particularly useful to the less experienced attorney, it will also serve as a reference for the experienced attorney. The Outline will be of use to all Agency enforcement personnel as it will serve as a checklist to determine if all the parts of the package are complete and in the correct format. By utilizing the models in preparing litigation referral reports, we will be able to expedite the referral process.

If you have any questions regarding these two documents, please contact Bill Quinby of the Legal Enforcement Policy Division. He can be reached on FTS 475-8781, his mail code is LE-130A, and his E-Mail Box is 2261.

cc: Chief, Land and Natural Resources Division, DOJ

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

Model Litigation Report - Outline

Any section of this outline may be addressed in the litigation report by the entry of "not applicable (N/A)" if the section is not relevent to the referral, or by "see section _____" if the specific information requested in the outline has been fully supplied in another section. In addition, this outline is not applicable to §107 CERCLA cost recovery cases; to CERCLA §106, TSCA §7 or RCRA §7003 cases.

1. Cover Page:
    a. Region, Act involved and judicial district.
    b. Name and address of defendant.
    c. Name and address of facility.
    d. Regional contacts (program/legal).
    e. Stamp date Region refers report on cover page.
2. Table of Contents.
3. Synopsis of the Case.
4. Statutory Bases of Referral:
    a. Applicable statutes; cross-media coordination.
    b. Enforcement authority; jurisdiction and venue.
    c. Substantive requirements of law.
5. Description of Defendant:
    a. Description of facility.
    b. State of incorporation of defendant.
    c. Agent for service of process.
    d. Defendant's legal counsel.
    e. Identity of other potential defendants.
6. Description of Violations:
    a. Nature of violations.

b. Date and manner violations identified.

c. Dates and duration of violations.

d. Pending regulatory changes.

e. Environmental consequences (past, present and future).

7. Enforcement History of Defendant and Pre-referral Negotiations:

a. Recent contacts with defendant by EPA/Region, (e.g., AOs, permits, grants).

b. Pre-referral negotiations.

c. Contacts with defendant by state, local agencies and citizens, and actions taken.

d. Prior enforcement history of defendant.

8. Injunctive Relief:

a. Steps to be taken by defendant to achieve compliance.

b. Feasible alternatives.

c. Cost and technology considerations.

9. Penalties:

a. Proposed civil penalty and legal authority.

b. Penalty analysis/calculation.

c. Present financial condition of defendant.

10. Major Issues:

a. Issues of national or precedential significance.

b. Bankruptcy Petitions.

11. Significance of Referral:

a. Primary justification for referral.

b. Program strategy.

c. Agency priority.

d. Program initiatives outside of stated strategy.

e. Relation of referral to previous or concurrent cases or actions.

12. Litigation Strategy:

a. Settlement potential/plan for settlement.

b. Need for interrogatories and requests for admissions.

c. Potential for summary judgment.

d. Need for preliminary injunction.

e. Identity of potential witnesses.

f. Elements of proof and evidence and need for additional evidentiary support.

g. Anticipated defenses (legal and equitable) and government responses.

h. Resource commitments.

i. New evidence.

13. Attachments, where applicable:

a. Index to attachments.

b. Draft complaint.

c. Draft discovery.

d. Draft consent decree.

e. Draft motions.

f. Table of Violations.

g. Documentation of violations.

h. Permits and contracts.

i. Significant correspondence between EPA, defendant and/or state.

j. Penalty analysis/calculation; BEN printout.

k. Diagram of facility.

l. Case Plan.

m. Dun and Bradstreet report; SEC Form 10K; Annual Report; Papers relating to corporate status from Secretary of State's office; ABEL printouts and legal description of property, as necessary and if obtainable.

n. Other relevant information.

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

Model Litigation Report - Guidance

Any section of this outline may be addressed in the litigation report by the entry of "not applicable (N/A)" it the section is not relevent to the referral, or by "see section _____" if the specitic information requested in the outline has been fully supplied in another section. In addition, this guidance is not applicable to §107 CERCLA cost recovery cases; to CERCLA §106, TSCA §7 or RCRA §7003 cases.

1. Cover Page:

   a. Region, Act involved and judicial district.

   b. Name and address of detendant.

      Include names, addresses and telephone numbers ot all detendants (corporate/individual).

   c. Name and address of facility.

      Include names, addresses and telephone numbers of all facilities subject to the referral. Include county for venue purposes.

   d. Regional contacts (program/legal).

      Include names, addresses and telephone numbers of the regional program-technical and legal contacts who prepared the report.

   e. Stamp date Region refers report on cover page.

2. Table of Contents:

   Include headings, all sub-headings and page numbers.

3. Synopsis of the Case:

   Limit this synopsis to two pages (double-spaced), when possible.

The synopsis should contain a summary or brief description of (1) the facts (causes) which led to the violation, (2) the legal basis of the violation and its environmental seriousness, and (3) the proposed relief. Indicate need for expedited filing here.

4. Statutory Bases of Referral: 1/

   a. Reference all applicable federal statutes by USCA citation and by section of the Act. State whether coordination across media has occurred. Discuss reasons for including or omitting cross media claims.

   b. Summarize the enforcement authority and the jurisdiction and venue provisions of applicable statutes. If there is reason to file the action in a district other than where the facility is located, note each available district and indicate the reasons for filing there.

   c. Present the substantive requirements of the law (federal/state) and applicable regulations and permits. Pertinent excerpts from federal/state laws and regulations should

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1/ Careful cross-media regional review should ensure that all available causes of action are included. OECM recognizes that in some cross-media cases, the initial cause(s) of action may be ready for referral, but that a secondary cause of action under a different statute may be a low priority matter or require substantial development before the case is ready for referral. Where the secondary cause of action is minor, or where the case development will take a substantial amount of time, the case should be referred with the excluded secondary cause of action clearly identified. However, if the secondary cause of action is major, or if development will not unreasonably delay the referral, all such causes of action should generally be referred together.

be indentified and set forth here or attached to the report.

5. Description of Defendant:

a. Description of facility.

1) Describe the violating corporation or individual and the particular facility in question. Note any relevant corporate or personal interrelationships or subsidiaries. Indicate it the violator is a governmental entity. If there is a question as to whether the corporation has been dissolved or subsumed into a different entity, ascertain status of corporation and attach Dun and Bradstreet report and corporation papers from Secretary of State's office under section 13 m.

2) Briefly discuss the business of the defendant, providing details about the facility in question. When the defendant is a manufacturer, describe what is produced. Emphasis should be on the particular process that is causing the problem. Describe the plant and processes used. Include legal description of the property under section 13 m., it needed. Reference and attach diagrams to the litigation report. Photographs and video tapes of the source may be helpful in that they often improve the "show" quality of a case should it reach court.

If defendants include corporate officers, discuss facts indicating participation of the corporate officers in the activities resulting in the violations.

b. State of incorporation of defendant.

Include state of incorporation and the principal place of business.

c. Agent for service of process.

Include name, address and telephone number of agent for service of process.

d. Defendant's legal counsel.

Include full name, address and telephone number of legal counsel. If corporate counsel, so state.

e. Identity of other potential defendants.

If it is not immediately clear who should be named defendants, discuss all potential defendants including the state, and their relation to other potential defendants and to their potential liability for the violations that give rise to the referral. Cover all of the facts having a bearing on which potential defendants should be named and evaluate all reasonable options.

6. Description of Violations:

a. Nature of violations.

Discuss the types of pollutants being discharged. Also indicate the sources of the pollutants, their

nature, quantity or size, and the relation to the statutory, regulatory or permit provisions violated.

b. Date and manner violations identified.

Indicate earliest date when violation became known to EPA and manner in which it was discovered (e.g., inspection, notice from state, etc.).

c. Identify dates and duration of violations, any mitigating actions by defendant to reduce or correct violations and any recalcitrance. Include Table of Violations at section 13 f.

Describe all EPA/State site inspections, sampling and other investigative activities, the dates of the activities and the conclusions drawn. Attach inspection reports under 13 g.

State present compliance status of the defendant: in compliance, in violation, unknown.

d. Pending regulatory changes.

Identify pending regulatory changes which do or may impact the enforcement action, e.g., requests for SIP revisions, variance applications, pending revisions to NPDES permits, pending RCRA permit applications or challenges to applicable regulations.

e. Environmental consequences (past, present and future).

Indicate briefly what environmental damage, if measurable, has occurred in the past, is now happening or will occur in the future if not abated. Include

reasonable estimates of total damage to human health and to the environment as a consequence of the violations.

Although the seriousness of the violation is not technically a requirement of proof in enforcement of certain statutes, it is sometimes relevant to the assessment of penalties and equitable relief.

Consider the following factors in assessing the seriousness of the violation (a) the release of toxics or mutagens or carcinogens is more serious than the release of so-called conventional pollutants; (b) the release of large quantities of pollutants is more significant than the release of small quantities; (c) bioaccumulative wastes posing long-term threats are more serious than biodegradable wastes; (d) the release of pollutants in an area not attaining primary ambient air quality standards is more significant than the release in an area not meeting secondary standards; (e) the release of pollutants which directly and demonstrably affect health or the environment is more serious than those which have no direct or obvious effect; (f) ongoing present violations which the government seeks to stop are more significant than episodic violations which have ceased, and (g) a violation which undermines the ability of the Agency to make sound regulatory judgments (e.g., the submission of fraudulent toxicity data in support of a pesticide registration) is more serious than a single instance of false reporting.

7. Enforcement History of Defendant and Pre-referral Negotiations:

Attach copies of relevent documents referenced below, if available, under section 13 g.

a. Recent contacts with defendant by EPA/Region and actions taken including administrative actions.

Indicate recent contacts and enforcement actions taken by EPA/Region, e.g., letters, oral communications, administrative requests/orders, etc. Include recent actions in all media and under all statutes. Include any related or pending administrative enforcement proceedings e.g., (CAA §120, TSCA §16(a), RCRA §3008, FIFRA §§13 or 14(a), and MPRSA §105(a) proceeding). State defendant's responses.

Also indicate recent contacts by/with permits and grants staff, if any. With regard to grants, indicate likelihood source will obtain grant, compliance schedule associated with proposed grants, relationship of grants to financial capability and any problems in grant history that may affect injunctive relief or penalties.

b. Pre-referral negotiations.

Include a brief summary of all attempts at negotiating a settlement prior to referral of the case, including attempts by state. Fully describe attempts at compromise and why process failed. Consider use of Alternative Dispute Resolution (third party neutrals) as method of resolving case.

c. Contacts with defendant by state, local agencies and citizens, and actions taken.

Include recent contacts or actions taken or anticipated by state, local agencies and citizens. In particular discuss history of state involvement including any state civil or criminal enforcement actions taken or pending, if state met timely and appropriate criteria, and if state anticipates additional enforcement actions.

d. Prior enforcement history of defendant, if available and practical.

This item relates to all prior actions and results other than those noted above taken by any governmental entity against the violator. (Include citizens' suits or notices of intent to file.) In some cases compilation of this history will be impractical. If so, include only the most recent or most significant actions taken under any environmental statute.

8. Injunctive Relief:

a. Steps to be taken by defendant to achieve compliance.

Indicate in general terms what affirmative relief should be requested. Consider use of an environmental audit (compliance and management) as an element of the remedy. If a series of acts are required, so state. Also include basic but not elaborate technical information, if available, to support the proposed remedy.

Specify technology which will meet regulatory requirements, and indicate the time requirements for a schedule of compliance which considers time necessary for design, contracting, construction and start-up. (This is not inconsistent with EPA policy of not prescribing specific compliance technologies. This information may be necessary in court to illustrate what remedy will bring the source into compliance and/or to demonstrate technical feasibility if contested by the defendant.) If no known technology can assure compliance, describe what in particular EPA expects the source to do, including plant closure where applicable. Indicate if another source has adopted the recommended control technology.

b. Feasible alternatives.

Describe alternative remedies if appropriate and discuss why the primary remedy and/or sanction was selected. Consider "studies" by defendant as a remedy where a precise course of action cannot be defined at time of referral.

c. Cost and technology considerations.

Indicate cost of compliance of the remedy. Base these costs on the Region's best estimates. Indicate technological feasibility problems.

9. Penalties:

a. Proposed civil penalty and legal authority.

1) Bottom line and opening negotiation figure.

Include two figures here (1) the proposed bottom line or the amount for which EPA will agree to settle. Calculate this figure by use of the appropriate medium-specific penalty policy (see section b. below.), and (2) the proposed figure with which EPA will open any negotiations or settlement talks. This second figure will be higher than the bottom line figure but will be related to it.

2) Statutory maximum amount.

Include amount, how calculated and legal authority for the statutory maximum amount.

b. Penalty analysis/calculation.

Include here a brief summary of the penalty analysis and calculation, including a specific estimate (based on BEN) of economic benefit of non-compliance. Attach the actual detailed analysis and calculations using the appropriate medium-specific penalty policy under section 13 j.

c. Present financial condition of defendant.

Indicate known financial condition of defendant, ability to pay penalties and meet other objectives of litigation and source of information. ABEL, a computer model that evaluates a defendant's financial ability to comply and pay penalties, may be of assistance here. The model will be available in the spring of 1986. Include necessary bonding requirements and reasons

therefor, if applicable. If there is a question as to defendant's financial capability, include Dun and Bradstreet report, ABEL computer printouts, SEC Form 10K and Annual Report, if obtainable, under section 13 m.

10. Major Issues:

a. Issues of national or precedential significance.

Indicate if referral is case of first impression or has other legal, national or precedential significance.

b. Bankruptcy Petitions.

Describe the status of bankruptcy petition, if any, including (1) whether Chapter 7, 11 or 13, (2) whether reorganization plan filed, and (3) bar date for proof of claim.

11. Significance of Referral:

a. Primary justification for referral.

If a case does not present obvious "serious" health effects or environmental harm, but is compelling for some other reason, e.g., deterrence of continued, blatant violations of the law, this should be indicated. A defendant with a history of violations is usually more worthy of attention than a first time offender.

b. Program strategy.

Indicate if the case is part of the national program's stated strategy and briefly show how it fits into that strategy. Indicate if violator is in SNC.

c. Agency priority.

Indicate briefly if the violator is of a class listed in the program strategy for priority monitoring, and if

the violation is of a class listed in the strategy for priority case action in fiscal year operating guidance.

d. Program initiatives outside of stated strategy.

Indicate briefly the initiative such as (1) enforcing a new or existing provision, regulation or statute for the first time, (2) actions against municipalities for pretreatment violations, (3) targeting a geographic area or industry, or (4) "batch or cluster" cases against one type of industry or violator.

e. Relation of referral to previous or concurrent cases or actions.

Indicate briefly if this case relates to any concurrent or previous case or action (administrative or judicial) brought by the Agency or by a state.

If there is or has been a state or federal criminal proceeding pending against the defendant involving the same or a related matter, indicate the nature of the proceeding, its relationship to this case, and state reasons for a parallel civil proceeding.

If this referral involves overfiling of a state enforcement action, indicate this and state reasons for overfiling.

12. Litigation Strategy:

a. Settlement potential/plan for settlement.

1) Indicate if there is a realistic potential for settlement, and if so, what that settlement plan

is. Include present contacts with defendant by EPA, DOJ or the U.S. Attorney's office.

2) Present negotiating posture and comparison of this posture with "bottom-line" settlement figure from section 9 a.

b. Need for interrogatories and requests for admissions.

Indicate need for interrogatories and/or requests for admissions. Include potential names and addresses, if available.

c. Potential for summary judgment.

Indicate if case has potential for summary judgment, and if so, briefly describe why, and how case can be prepared for filing. Include draft motion with supporting memorandum and affidavits, if possible. Attach under section 13 e.

d. Need for preliminary injunction.

Emphasize urgency and reasons for requesting preliminary injunction and time frame, if applicable.

e. Identity of potential witnesses.

1) Government's case

Indicate witnesses and witness needs both as to liability and remedy.

Identify all lay witnesses and any already known expert witnesses by name, address, place of employment and business phone. Include substance of anticipated/actual testimony and if statements

are attached or are on file. For expert witnesses include (1) field of expertise and qualifications, (2) past cases where retained, (3) if under EPA contract, and (4) if not under EPA contract, which office/contract will be available to retain the expert.

Indicate whether any further investigation is necessary to identify lay witnesses. Indicate any additional expert witnesses needed beyond those already known by area of expertise and testimony needed and state which office/contract will be available to retain the experts. In particular, indicate if expert witnesses will be necessary to analyze and/or testify in regard to environmental consequences, technological remedy development or financial capability.

2) Defendant's case.

Identify all lay or expert defense witnesses anticipated, including their employment addresses, expertise and likely content of testimony.

f. Elements of proof and evidence and need for additional evidentiary support.

1) List the necessary elements of proof to establish the violation under each statute/section involved.

2) Present a detailed, objective, factual analysis of the strength or weakness of all available real,

documentary and testimonial evidence corresponding to each necessary element of proof set forth in the above list. New or stale evidence is relevant, as is the dependability of testing techniques and legal status of test methods. Therefore, spell out any assumptions made as to the quality of this evidence. Identify missing facts and holes in data.

3) Identify and indicate location of all real evidence. Identify all documentary evidence, and if possible, attach (or state location of) each item of documentary evidence under section 13 g. Include a list of all ongoing and planned evidence gathering efforts; e.g., ongoing DMR analysis, new stack tests, CEM data, or RCRA information request for further inspection.

4) If evidence will be obtained at a later date, state how and when.

5) If evidence is to be made available by discovery, suggest discovery plan. Indicate (1) type of evidence to be developed, (2) person or organization currently in possession of evidence, and (3) draft of initial discovery to be used. Identify areas where swift action on discovery is needed. To preserve testimony or records attach initial draft discovery documents under section 13 c.

g. Anticipated defenses (legal and equitable) and government responses.

1) Indicate all actual or anticipated legal and equitable defenses favorable to the defendant, and briefly set forth the government's response thereto. For defenses such as governmental estoppel, laches or affirmative defenses based on Rule 12 of the Federal Rules of Civil Procedure, EPA need only identify the defense and the underlying facts and merits. The DOJ attorneys will usually be familiar with the legal issues. On the other hand, EPA attorneys are usually more familiar with defenses based on Agency statutes, regulations and policies, or Agency involvement in matters central to the case. For these defenses the Region should not only identify the defenses and underlying facts, but fully discuss their legal bases and merits.

2) Include all technical data and test results favorable to the violator both as to prima facie case and defenses. Indicate any relevant or mitigating factors that may bear adversely on the government's contentions. Reference defense witnesses under section 12 e. 2.

h. Resource commitments.

Describe estimated case budget; indicate what resource commitments both budgetary and personnel will be required and if the Region is prepared to provide

them. If not, state where they will be obtained. Include here costs for experts and additional testing.

i. New evidence.

Update all new evidence and information and forward it to Headquarters, DOJ and/or the U.S. Attorney, as it becomes available.

13. Attachments, where applicable:

a. Index to attachments.

List attachments and use tabs if possible for ease of reference.

b. Draft complaint.

Include draft complaint. Headquarters and DOJ consider the complaint a useful document, although at a later date the complaint may change.

c. Draft discovery.

If discovery is needed, include initial interrogatories and request for production, etc., as appropriate or known.

d. Draft consent decree.

Unless the case is straightforward, minor or negotiations have reached a productive stage, inclusion of a draft consent decree at this point in the case development would not be practical or advisable. If attached, indicate the stipulated penalties.

e. Draft motions.

Inclusion of draft motions depends somewhat on the urgency, complexity and litigation strategy of the case. Include when necessary and appropriate.

f. Table of Violations.

The Table of Violations should specify dates for each alleged violation, and for each, the statutory/ regulatory provisions involved.

g. Documentation of violations.

Include here documentation of violations and enforcement history of defendant referenced in section 7. Include copies of inspection reports. Also include here documentary evidence referenced under section 12 f. 3.

h. Permits and contracts.

Include copies of all applicable permits and contracts.

i. Significant correspondence between EPA, defendant and/or state.

Attach all correspondence relative to the violation/case.

j. Penalty analysis/calculation; BEN printout.

This attachment is a detailed analysis of the brief summary in 9 b. above. Indicate the proposed bottom line settlement figure (based on the appropriate penalty policy) and an opening negotiation position.

The settlement figure should briefly discuss how the bottom line figure was determined, particularly in regard to any economic benefit contained in this figure. The proposed opening negotiating position should contain a brief statement why that particular figure is appropriate. Attach BEN printout.

k. Diagram of facility.

Include any official or unofficial diagram of the facility, or the actual workings (drawings) of the violation. Any diagram, if not misleading or factually incorrect, will be useful. The diagram need not be to scale or one made by a professional artist or draftsman. State if video tapes were made and where located.

l. Case Plan.

Attach a case plan here if prepared by the Region.

m. Dun and Bradstreet report; SEC Form 10K; Annual Report; Papers relating to corporate status from Secretary of State's office; ABEL printouts and legal description of property, as necessary and if obtainable.

n. Other relevant information.

This is a catch-all category and includes all other relevent documents, technical data and information, etc., which may aid the AECs, DOJ and the U.S. Attorney in preparation and prosecution of the case. Please list in the Index to Attachments all such documents included here.

12/1/94

REVISER'S NOTE

General Operating Procedures for the Civil Enforcement Program (RF.1-4)

There have been many changes in the structure and function of the Agency's enforcement program since the Agency issued this memorandum. While the approach stated in this document is still valid in many areas, it must be read in conjunction with more current descriptions of the structure and function of the enforcement program.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

RF. 1-4
GM #12

JUL 6 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: General Operating Procedures for the Civil Enforcement Program

FROM: Robert M. Perry
Associate Administrator for Legal and Enforcement Counsel and General Counsel

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

I. Introduction

This memorandum provides general guidance regarding EPA's enforcement process, consistent with new Regional and Headquarters structures. The memorandum describes the respective roles and relationships of the various EPA offices which participate in enforcement activities.

I greatly appreciate the contributions which you and your respective staffs have made in participating in the development of this general guidance. This guidance has reached the point at which it has received the consensus support of all affected Agency offices on virtually all matters which it addresses. More detailed guidance on operating procedures for each media-specific program will be forthcoming from the responsible Assistant Administrators and myself.

The guidance contained in this document on responsibilities and working relationships of all offices involved in the enforcement process (which includes both enforcement compliance activities and enforcement legal activities) has received a strong endorsement from the Administrator. The prescribed procedures provide explicit guidance for implementing the Administrator's general policies on these matters and are consistent with

- The Administrator's June 12, 1981 announcement of a new Headquarters structure;

- The Administrator's September 15, 1981 memorandum regarding a new regional organization structure;

- My May 7, 1982 memorandum regarding the reorganization of the Offices of Regional Counsel;

- The June, 1977 Memorandum of Understanding between the Department of Justice and EPA.

The operating procedures specified in this document are designed to help accomplish the following objectives of the Regional reorganizations stated in the Administrator's September 15, 1981 memorandum:

"Reorganization Objectives. Regional organization decisions include consideration of the following objectives:

- Clarifying accountability for regional programs.

- Facilitating communication links between related Headquarters and regional components.

- Improving regional policy and management decision-making.

- Placing functions in organizations where they can best be integrated with related activities.

- Favoring fewer and larger organizations to avoid subsequent further consolidation and reorganization in a time of declining resources.

". . . . Major features of the authorized organization include the following:

"1. Enforcement functions of permit issuance and related compliance monitoring are assigned to the appropriate program divisions. This includes issuance of notices of violation and administrative orders, after consulting with the Office of Regional Counsel. (Permit coordination functions and placement are optional.)

"2. Legal work associated with enforcement litigation and current Regional Counsel functions will be performed in newly structured and expanded Offices of Regional Counsel reporting to the [Associate Administrator for Legal and Enforcement Counsel and] General Counsel with the following provisions:

"a. Regional Counsels will provide the Regional Administrator[s] with legal advice and assistance for all program areas in an attorney client relationship.

"b. The Regional Administrator will continue to initiate enforcement actions. These actions will be based upon guidance from the [Associate Administrator for Legal and Enforcement Counsel and General Counsel, through] the Enforcement Counsel . . . . and with legal concurrence of the Regional Counsel. 1/

"c. As in the past the Regional Administrators will participate in and concur with the [Associate Administrator for Legal and Enforcement Counsel and] General Counsel in selections, promotions, awards and disciplinary actions for Regional Counsels. Regional Administrators will be a party to performance agreements for and will participate in the performance ratings of Regional Counsels by the [Associate Administrator for Legal and Enforcement Counsel and] General Counsel.

"d. The Regional Administrator will also continue to manage the resources of the Office of Regional Counsel and will provide certain administrative support such as space allocations, processing of personnel actions, and the management of travel and training accounts."

1/ Note that the Regional Counsel's formal concurrence responsibility for enforcement actions as referenced in paragraph 2(b) (when read in conjunction with paragraph 1 of this excerpt) arises at the point at which the Regional Administrator is prepared to initiate a case referral by forwarding a case to the Office of Legal and Enforcement Counsel for subsequent referral to the Department of Justice. For further specifics on these procedures, please see Section IX below. Note also that enforcement actions (i.e. actions responding to specific instances of detected violations), and enforcement activities generally, also should be consistent with relevant guidance from Headquarters program offices.

The guidance in this memorandum on the enforcement process applies to the internal Agency working relationships and processes involved in identifying and resolving violations using informal, administrative and judicial enforcement activities. It does not apply in any respect to the development and referral of criminal cases, which is being addressed in a separate memo on general operating procedures for the criminal enforcement program. Moreover, any existing program-specific guidance on enforcement operating procedures remains in effect until it can be expressly superseded by new guidance which is consistent with the policies and procedures articulated in this document.

II. Enforcement Objectives

This guidance prescribes operating procedures which the the Adminstrator has endorsed as vital to assist EPA in discharging its responsibility to administer a strong, aggressive, and fair enforcement program. The procedures described here also are designed to achieve the following enforcement objectives along with the general objectives associated with the Regional reorganizations:

- Establishing an enforcement program which deters unlawful conduct and advances the regulatory policies of EPA through use of all available enforcement means.

- Maintaining a credible enforcement program which encourages prompt, voluntary compliance, but deals firmly with significant violations which cannot be resolved cooperatively and includes the use of litigation where appropriate.

- Directing all enforcement activities towards the achievement of maximum environmental benefits.

In order to help achieve these objectives, these procedures emphasize:

- Continuing close and cooperative relationships among the Office of Legal and Enforcement Counsel (OLEC), which includes the Regional Counsel offices, the Department of Justice (DOJ), and all EPA program offices with enforcement responsibilities.

- Working closely with States as partners in the enforcement process. 2/

III. Roles and Relationships

EPA's enforcement program is intended to induce regulated parties to meet environmental requirements and to rectify instances of noncompliance. In order to accomplish these goals, EPA's enforcement effort includes both compliance-oriented activities and legal-oriented activities. The compliance activities are primarily the responsibility of EPA's program offices, while the legal activities are primarily charged to OLEC (including the Offices of Regional Counsel).

While there are certain enforcement activities in which lead responsibility is clear, there are other EPA activities which include both compliance and legal elements. Moreover, different activities for which a given office has lead responsibility can call for varying degrees of involvement with other EPA offices. It is crucial to the success of the Agency's enforcement program that OLEC and the program offices work closely together in developing policies, establishing coordination procedures and implementing actions in areas where both elements are present. Similarly, it is important that both OLEC and the program offices diligently coordinate activities in their respective areas of primary responsibility to ensure that EPA appropriately focuses all phases of its enforcement program on achieving common objectives.

In the area of enforcement policy development, Assistant Administrators have the lead in developing policies governing compliance activities, while the Adminstrator has assigned me to take the lead in developing policies governing legal matters. OLEC and the Assistant Administrators are responsible for working together in developing enforcement policy regardless of who has the lead, and should jointly issue those policies which significantly involve both of their respective areas of primary responsibility. The Administrator has decided that I shall be responsible for ensuring that all enforcement policies which EPA develops are capable of being applied effectively and are consistent with the goals of the Administrator under Federal law. The Associate Administrator for Policy and Resource Management is responsible for overseeing the formulation of all Agency policy.

2/ For a more specific discussion on coordinating enforcement activity with States, see Section III(H) below.

Program offices in Headquarters and the Regions are responsible for identifying and establishing priorities for handling instances of noncompliance within their respective areas of authority, evaluating the technical sufficiency of actions designed to remedy violations, identifying for formal action those cases which cannot be resolved less formally, and providing the technical support necessary for developing cases and conducting litigation.

OLEC (including the Offices of Regional Counsel) serves EPA's respective program offices in enforcement matters in an attorney-client relationship. This means that OLEC is responsible as legal counsel for providing client program offices with support for informal and formal administrative resolution of violations, for the conduct of litigation (which includes identifying evidence needed to support litigation), for interpreting statutes, regulations and other legal precedent covering EPA's activities, and for advising program managers on the legal implications of alternative courses of action.

Close cooperation among all parties (including DOJ) during the case development process is critical to a successful and legally supportable enforcement program. Early and frequent consultation of Regional Counsels by the Regional programs is vital in case identification and development. Moreover, a close working relationship with program or technical staff is vital to the Regional Counsels to ensure that the Regional Counsels can serve the clients' interests.

Regional Counsels are responsible for consulting with the Associate Administrator for Legal and Enforcement Counsel and General Counsel, through the Enforcement Counsel, and with DOJ, where appropriate, to ensure that unresolved legal issues do not subsequently become impediments to litigation. Similarly, Regional Administrators are responsible for consulting early with Assistant Administrators on program policy matters to resolve expeditiously any issues that may cause problems in developing a case for litigation. Representatives of EPA and DOJ offices with enforcement responsibilities will work as a case development team on a particular matter to coordinate their efforts and to minimize or eliminate all problems prior to the Regional Counsel's concurrence in a civil referral.

Finally, OLEC will develop management procedures to ensure that Enforcement Counsel and General Counsel attorneys work closely together to identify and resolve expeditiously any legal issues pertaining to enforcement matters, and thus enable EPA to speak with one legal voice.

The following synopsis of roles and relationships state in more detail the respective organizational responsibilities regarding enforcement matters:

A. Regional Administrators. The Administrator's September 15, 1981 memorandum makes clear that Regional Administrators have responsibility (consistent, as explained in Section IV below, with applicable delegations of authority and concurrence requirements) for enforcement compliance functions such as issuing permits, monitoring compliance, collecting compliance information according to Headquarters' guidance, and issuing notices of violation and administrative orders. They are also responsible for initiating enforcement legal actions arising out of these functions. In executing these functions, the Regional Administrator's responsibilities include building relationships with State compliance programs, identifying violations of Federal environmental laws, resolving those violations in a timely fashion and a cooperative manner whenever possible, handling administrative enforcement actions and referring cases to Headquarters when judicial action is necessary. Because the Regional Administrators are primarily responsible and accountable for the successful operation of Regional enforcement programs, they are the principal clients in enforcement matters.

Notices of violation, administrative orders, administrative civil penalty complaints, and many intermediate decisions are actions with legal consequences. Since the Regional Administrators must bear the responsibility for the legal sufficiency of their actions, they should consult with their respective Offices of Regional Counsel prior to taking these actions, as indicated in the Administrator's September 15, 1981 memorandum. In addition, because the Regional Administrators also are responsible for the technical sufficiency of their actions, they are further responsible for budgeting and supplying the necessary technical resources and support, or otherwise arranging for that support (e.g., from a Headquarters program office or the National Enforcement Investigation Center), to permit the Agency to develop and pursue enforcement actions, including litigation where appropriate. The Regional Administrators are also responsible for obtaining adequate Regional Counsel participation in preparing a case (including final formal concurrence of the Regional Counsel) prior to forwarding the case to Headquarters for formal referral to DOJ.

The Regional Administrators will be responsible for ensuring that they follow all policy directives from an Assistant Administrator. The Regional Administrators must ensure early in the case development process that proposed enforcement actions in response to specific instances of noncompliance are consistent with national program policy directives established by the responsible Assistant Administrator(s), and that Assistant Administrators have the opportunity to participate in and review case development activity. The Regional Administrators also must ensure that they satisfy any national program review or concurrence requirements, consistent with Section IV below. OLEC normally will not take responsibility for those program concurrences or reviews, although staff attorneys will be available to assist throughout the review process.

Regional Administrators also are responsible for following up on enforcement actions (including litigation) to ensure that violations remain corrected and that regulated parties are complying with the requirements which those enforcement actions impose.

B. The Assistant Administrators. As the national program managers, the Assistant Administrators are responsible for establishing enforcement compliance priorities, providing overall direction to and developing accountability measures for their respective Regional enforcement compliance programs, keeping compliance statistics (based on input as necessary from Regional offices), providing technical support (including appropriate Headquarters technical support for litigation activity), providing resources in Regional program budgets to support enforcement activities, taking the lead role in preparing guidance and policy decisions on enforcement compliance issues, and concurring as necessary on enforcement actions at as early a stage in the case development process as possible. In addition, Assistant Administrators may retain responsibility for issuing civil administrative complaints and other administrative orders in cases of first impression, overriding national significance, or violations by any entity in more than one region.

The Assistant Administrators are responsible for developing and implementing program policies, and should rely on OLEC to help them put enforceable, defensible programs in place. The Assistant Administrators also are responsible for participating with OLEC in handling enforcement legal issues and for preparing joint guidance for areas in which compliance and legal issues overlap.

OLEC acts as attorney to the Assistant Administrator and the Headquarters program offices on enforcement matters. OLEC attorneys are available to consult with program staff during the development of program regulations, policies and guidance in order to ensure the legal sufficiency of decisions and documents relating to enforcement matters.

C. OLEC: The Regional Counsel (Enforcement Functions). In accordance with the Administrator's September 15, 1981 memorandum and the May 7, 1982 memorandum regarding reorganization of the Offices of Regional Counsel, the Regional Counsels are to provide the Regional Administrators and Regional program managers with legal advice and assistance for all program areas in the attorney-client relationship. Thus, for example, in enforcement matters the Regional Counsels are available to assist the Regional program managers in drafting or reviewing the terms and conditions of permits, notices of violation, administrative orders, or administrative complaints (particularly where new or unique matters are involved). Because the Regional Administrators and Regional program managers are responsible for ensuring the enforceability and defensibility of documents with legal effects, they should not hesitate to seek to involve Regional Counsels in developing these documents.

The Regional Counsels also provide assistance throughout the case development process, participate in litigation activities under the EPA/DOJ Memorandum of Understanding, and formally concur on civil referrals prior to signature by the Regional Administrator. Regional Counsels' formal concurrence ensures that any legal issues associated with the referral have been addressed appropriately and that these referrals are consistent with OLEC guidance. Regional Counsels also are available to assist in negotiating enforcement matters and should be present whenever outside parties are represented by counsel in those negotiations.

Regional Counsel attorneys normally serve as lead Agency counsel in handling specific enforcement actions, consistent with the discussion of that concept in Section VII(B) of the May 7, 1982 memorandum on regional reorganization. As lead Agency attorney, the Regional attorney is responsible for managing an enforcement case for EPA and for coordinating case development and litigation activity with DOJ as discussed in Section VIII below. The Regional Counsels should establish practices to coordinate the participation

of DOJ and Headquarters Enforcement Counsel attorneys so as to resolve any potential legal problems for litigation as early in the case development process as possible. Regional Counsels also provide legal representation for the Agency in administrative hearings originating in the region, including NPDES evidentiary hearings, and administrative appeals from those hearings.

Let me emphasize that in all these matters the Regional Counsels must make every effort to ensure that they continue to maintain the close working relationships with their counterparts in the Regional program offices, and that they also maintain clear and open lines of communication.

D. OLEC: Enforcement Counsel Matters. Consistent with attorney-client relationships, the Associate Administrator for Legal and Enforcement Counsel and General Counsel provides, through the Enforcement Counsel, legal advice regarding enforcement matters to the Assistant Administrators to assist them in performing their programmatic functions, including advice on enforcement activities for which Headquarters program offices are responsible. The Associate Administrator for Legal and Enforcement Counsel and General Counsel, through the Enforcement Counsel, also develops legal enforcement policies and guidance; confers, where appropriate, with DOJ on the potential impact of enforcement policy on litigation; and cooperates with the Assistant Administrators in the development of enforcement policies which involve both enforcement compliance and enforcement legal activities.

The Enforcement Counsel checks both cases forwarded from the Regions for referral to DOJ and consent decrees prior to submitting them for approval to the Associate Administrator for Legal and Enforcement Counsel and General Counsel to ensure that they are complete and that they identify and properly address all precedential or nationally significant questions. (See Section X below.) Enforcement Counsel attorneys may be assigned a more active role in case development or litigation-related activities in a limited number of actions involving precedential or overriding nationally significant issues as described in Section VII(B) in the May 7, 1982 OLEC memorandum on regional reorganization. Otherwise, Regional Counsel attorneys will assume the Agency lead, and Enforcement Counsel attorneys will function in a supporting role by keeping apprised of the issues from the start of the case development process as OLEC's Headquarters representatives and by coordinating legal activity and the contribution of case information to the case development effort from Headquarters and the Regions.

The National Enforcement Investigation Center (NEIC), which reports to the Enforcement Counsel, is a national technical resource with special expertise in matters asociated with investigations, case development, litigation support, and evidence. The Regional Administrators and Assistant Administrators, in support of enforcement compliance and case development activities, may draw upon the NEIC's resources as they deem necessary, consistent with priorities which OLEC establishes regarding NEIC's availability. Regional and Assistant Administrators should give closest consideration to involving NEIC in cases which have precedential implications, national significance, or are multi-Regional in nature, as opposed to cases which involve more routine matters.

E. OLEC: General Counsel Matters. Within the Agency, the Associate Administrator for Legal and Enforcement Counsel and General Counsel, through the Deputy General Counsel, will continue to be responsible for interpreting statutes and regulations, reviewing proposed policy for consistency with national law, providing national legal interpretations, and assisting in resolving legal issues which arise in connection with policies and regulations, in order to assure that the Agency speaks with one legal voice. Consistent with present practices and existing guidance, the Associate Administrator for Legal and Enforcement Counsel and General Counsel will manage, through the Deputy General Counsel, all matters resulting from judicial appeals (with either General Counsel attorneys or Regional attorneys acting as lead Agency counsel, depending on the nature of the matter). The Regional Counsels will manage the Agency's legal role in hearings and administrative appeals of actions originating in the Regions, including proceedings relating to permits and administrative civil penalty actions.

F. The Department of Justice and the U.S. Attorneys' Offices. The Agency's working relationship with the Department of Justice and the U.S. Attorneys continues to be governed by the June 1977 Memorandum of Understanding. DOJ's and the U.S. Attorneys' primary roles will normally be that of conducting judicial enforcement matters and participating in case development activities as described in Section VIII below. OLEC's Headquarters and Regional components are expected to use their best efforts to ensure that they maintain constructive working relationships with DOJ in these areas.

G. Policy Coordination. As indicated above, the Assistant Administrators and I should work closely together during the formulation of all policies which affect enforcement to make sure that the Agency conducts its enforcement activity in a credible and legally supportable manner. The Administrator has affirmed my responsibility to take the lead in coordinating

work on establishing systematic procedures for developing and tracking Agency enforcement policy. As part of this effort, I am planning to propose the joint development with each of the Assistant Administrators of a comprehensive set of enforcement operating procedures for each program, in order to provide consistent guidance for all stages of the case development process. Program guidance which is currently in effect remains operative except to the extent it is inconsistent with the operating procedures prescribed in this document and is not superseded by future guidance.

As policy or guidance documents affecting Regional enforcement programs are developed, Regional offices should be consulted or otherwise receive an opportunity to be involved at an early stage to make sure that the final guidance documents can be implemented effectively.

H. Coordination with States. Coordination with States is normally the responsibility of the Regional Administrator, subject to national guidance. Because this responsibility encompasses many areas in addition to enforcement, this memorandum does not cover general issues associated with the Region-State relationship.

On enforcement matters, however, Regional Administrators should maintain close working relationships with appropriate State program officials. As part of enforcement planning activities independent of the case development process, Regional offices (with participation from Headquarters program offices and consistent with national guidance) should consult with States to develop general strategies for handling noncompliance, for promoting local resolution of noncompliance problems, and for facilitating open lines of communication by

- Consulting on which enforcement actions States should manage and which Regional Offices should manage.
- Agreeing on appropriate time frames and parameters for case resolution.
- Agreeing on circumstances under which EPA may assume the lead on a case from the State.
- Coordinating activity on tracking the progress of enforcement actions.
- Following up on the application of agreed-upon strategies to ensure their effectiveness.

On legal matters specifically, the Office of Regional Counsel should develop a close working relationship with State Attorneys General and/or other appropriate legal authorities in each State in order to support the Regional Administrator in coordinating activity with that State. The Office of Regional Counsel is also available to consult with the Regional program managers regarding delegations, the legal sufficiency of State remedies, or other legal aspects of State actions.

National environmental laws do assign major roles to the States for administering pollution control programs. Those laws also place ultimate responsibilities for effective enforcement on the Federal Government. The States' respective abilities to enforce environmental requirements can vary according to the statutory authorities, personnel, or other resources available to them. It is the Administrator's policy to uphold the environmental statutes which EPA administers, and the Regional Administrators are responsible for complementing State efforts with Federal action in order to achieve compliance with those laws in a timely manner.

I. EPA's Accountability System. EPA's accountability system, overseen by the Associate Administrator for Policy and Resource Management, monitors the performance of the Agency's entire enforcement program, including both compliance and legal activities. It is the Administrator's policy that pursuant to national program direction from the Assistant Administrators, Regional Administrators will establish specific measures of compliance and enforcement performance for which they will be held accountable in the accountability system. As the Agency's "law firm", OLEC will be similarly accountable for providing consistent legal advice, decisions and policies; for expediting all referrals; and for reducing backlogs of cases which have already been filed or referred to the Department of Justice.

IV. Delegations and Concurrence Requirements.

The Administrator has endorsed an initiative to streamline the enforcement process through a high-priority review of both existing delegations of authority and concurrence requirements imposed through those delegations or through other actions. Each of the Assistant Administrators and OLEC should expeditiously review all delegations and concurrence requirements relating to enforcement activities in their respective areas of responsibility to identify requirements which are unnecessary or inconsistent with a streamlined approach to enforcement. Until the Administrator has an opportunity to act on the recommendations resulting from

this review, existing delegations (with any conditions) remain in effect and should be followed until appropriate changes are approved to implement the guidance provided in this document. The Assistant Administrators and I shall announce any changes of specific enforcement concurrence requirements in our respective areas of responsibility.

V. Reporting Requirements and OLEC Oversight

OLEC's Enforcement Counsel will keep to a minimum requests for case development records and reports from Regional or program offices. Enforcement Counsel staff will place priority on direct access to files or tracking and reporting systems for case information to minimize additional information collection and reporting burdens. I expect the Regional Counsels to continue to update the automated enforcement docket for cases which will be or which already have been referred from the Regional offices, and to provide periodic updates on all cases as necessary.

Consistent with historical practices, Regional Counsels must keep complete records of recommendations, decisions and documents relating to the legal aspects of all cases, including cases which are in early stages of development. This requirement is intended to ensure that an adequate legal record exists for each case that the Agency ultimately refers for judicial action and to facilitate evaluations of Regional Counsels' performance on enforcement matters.

The Regional Counsel should work closely with the Regional Administrator to assist the Regional Administrator in following similar recordkeeping practices to ensure that maintained files are legally sufficient.

VI. Reviewing Compliance and Determining Responses.

The process of identifying violations and conducting Federal compliance activities is the responsibility of the Regional Administrator, consistent with national guidance and statutory authorities and with applicable working agreements with States. This process includes the following activities:

- Identifying noncomplying sources and potential enforcement targets.

- Coordinating enforcement actions with States, as appropriate.

- Determining the appropriate Agency response to violations, including:

    - Requests for information (formal or informal).

    - Informal discussions with the source.

    - Warning letters or notices of violation.

    - Administrative orders or administrative civil penalty complaints.

    - Referrals to Headquarters for civil judicial action.

- Participating in a client's role in settlement discussions to resolve administrative or judicial proceedings.

Throughout the process, the Regional Counsel will act as attorney to the Regional program client. Since the Regional Administrator must make decisions and take actions with legal consequences, the Regional Administrator should ensure that the Regional Counsel is consulted as appropriate throughout the process, particularly with regard to the legal consequences of selecting alternative enforcement tools. Attorneys are available to ensure that all enforcement documents, especially administrative orders and administrative civil penalty complaints, meet all Agency legal requirements and are enforceable. Regional program officers should avail themselves of Regional Counsel attorney participation in discussions with an outside party who is represented by counsel.

As the likelihood increases that judicial remedies will become necessary to resolve a case, the importance of attorney involvement also increases. This includes meaningful coordination with DOJ attorneys at early stages of the case development process consistent with the procedures specified in Section VIII below. Rigorous standards of evidence and conduct will apply in any adjudicative proceeding; thus, it is crucial that cases be built from the outset in a legally supportable way. This memorandum discusses in more detail in subsequent sections the referral process and the conduct of settlement negotiations.

VII. Escalation

The Regional Administrator is responsible for the timeliness of informal solutions to violations of environmental laws and for initiating the case development process. This concept is central to a credible enforcement program. The Regional Administrator (subject to Headquarters program office guidance) and OLEC share responsibility for achieving timely resolution of cases once the case development process begins.

Responses to violations should be meticulously tracked within each Region to make sure that each violation is responsibly resolved as expeditiously as practicable. Time deadlines or goals should be established within each Region as optimum response times; in some areas, these deadlines or goals have already been established in national guidance.

The Administrator has given strong general support to the use of reasonable "deadline" dates in conducting negotiations to ensure that negotiations do not become a means for delay. In any particular case, the Regional Administrator (in consultation with the Regional Counsel) should always be prepared to escalate to the next-most-serious response, when necessary, to avoid protracted negotiations resulting in unreasonably delayed remedial action.

It remains the Administrator's policy to take formal enforcement action when negotiations or other efforts fail. I shall accept--and the Administrator will encourage--well-documented civil judicial referrals from Regional Administrators whenever, in their judgement, such action is necessary to ensure continued progress toward compliance, even though active negotiations still may be underway.

VIII. The Case Development Process

A group from OLEC (including Regional Counsel representatives) has been conferring with DOJ for the purpose of, among other things, formulating a process for developing cases for civil litigation. This process involves periodic meetings in the Regions, at which EPA attorneys and technical staff will meet with DOJ attorneys (and invite Assistant U.S. Attorneys) to:

-- discuss approaches to developing cases targeted as likely candidates for litigation;

-- review appropriate ways to handle developments relating to cases discussed at prior meetings;

-- provide information on program enforcement issues and priorities;

-- refine procedures for handling enforcement actions generally; and

-- form litigation teams and assign case preparation and responsibilities where the Region has identified matters which require a litigation enforcement response.

Once the Regional Administrator determines that a case has a strong potential for referral, the Region will form a case development team consisting of the lead Agency attorney and representatives from the Regional program staff and DOJ. 3/ The goal of this team is to reach a resolution of the enforcement action, based on the technical support of the Regional Administrator, through negotiated settlement or final judgement in litigation.

For each case, EPA will designate a lead Agency attorney. As stated in the May 7, 1982 memorandum regarding reorganization of the Office of Regional Counsel, the lead Agency attorney will normally be a Regional attorney, but may be a Headquarters attorney under some circumstances. Section VII(B) of that memorandum provides a more detailed discussion of circumstances in which a Headquarters attorney might be assigned the Agency lead (for example, in cases of overriding national significance or in some cases in which the Agency is involved in enforcement and defensive litigation). The lead Agency attorney will coordinate case development activities with DOJ.

3/ Headquarters program and Enforcement Counsel staff may participate more actively in the case development process if precedential or nationally significant issues are involved, especially under newly developing programs.

IX. The Referral Process

Consistent with the Administrator's September 15, 1981 memorandum, the Regional Administrator will initiate referrals of enforcement cases in which settlement negotiations outside the context of litigation either have been unsuccessful or are otherwise inappropriate due, e.g., to the need to halt the violation quickly. The Regional Administrator initiates a referral by forwarding a case to me with a recommendation to refer that case to DOJ for litigation. The Regional Counsel's formal concurrence shall ensure that the initiated referral is legally sufficient and consistent with national guidance. Early involvement by appropriate EPA and DOJ staff, through the case development procedures articulated in Section VIII above, is important to the successful development of a judicial referral. This early involvement will reduce the need for development and review of documents in a formal referral package late in the case development process. Regional Administrators are responsible for supporting this practice within their programs.

As the initiator of the referral, the Regional Administrator is ultimately responsible for the completeness and quality of the development of the forwarded case. This includes conformance with all applicable national guidance and policies established by OLEC and by the appropriate program office.

Inasmuch as a case developed for referral can require the drafting of important legal documents (e.g. complaint, consent decree, memoranda on points of law), it is highly advisable that the Regional Administrator assign the actual task of preparing those documents in conjunction with DOJ to the lead Agency attorney on the litigation team. A case developed for referral will rely upon technical information and support from the Regional program office and, where appropriate, from the Headquarters program office. This method is likely to ensure the legal sufficiency of the case when the Regional Administrator initiates the referral. Every request for judicial action must have the formal concurrence of the Regional Counsel before the Regional Administrator initiates referral by forwarding the case to Headquarters.

To support a referral, the Regional Administrator must be in a position to identify all technical assistance needed to bring the case to successful completion. The act of forwarding the case to Headquarters for referral constitutes the Regional Administrator's commitment to ensure that this technical assistance and technical support which may later be identified is available when needed.

X. Headquarters Review of Case Development

Under the June 1977 EPA/DOJ Memorandum of Understanding, the Associate Administrator for Legal and Enforcement Counsel is responsible for formally transmitting a civil referral to the DOJ. 4/ Headquarters attorneys will conduct a limited final legal review on my behalf of cases forwarded for referral from the Regions primarily to ensure completeness, consistent application of law and enforcement policy, and appropriate development of legal precedent. For some cases involving important precedent or issues of overriding national significance, Headquarters attorneys also may be assigned a more active role in the case development process.

Again, Regional Counsel lead attorneys must undertake early consultation with Headquarters and DOJ attorneys through the case development team format as cases are being prepared. In this manner, case development teams can identify precedential or nationally significant issues early and can reduce the likelihood that DOJ or the U.S. Attorney will raise concerns late in the referral process regarding the advisability of pursuing civil litigation.

4/ The term "Assistant Administrator for Enforcement" in the Memorandum was changed to "Associate Administrator for Legal and Enforcement Counsel" by letter of the Administrator to the Attorney General, in order to reflect the Agency's new organizational structure.

Similarly, close coordination by the lead Agency attorney with technical personnel in the Regional program office (who in turn should work closely with the Headquarters program office) and any NEIC participants is also essential in order to achieve early agreement on appropriate remedies, schedules, and other technical aspects of the case prior to referral. Headquarters program review of case development on behalf of Assistant Administrators also will begin early in the process to identify and resolve problems quickly and will focus on ensuring technical completeness and appropriate application of program policy. In this area as well, Headquarters program officials may be assigned a more active role in cases involving important precedent, overriding national program significance, or activity in more than one region. Headquarters program officials must ensure that they perform their review function in a manner that avoids impeding the expeditious referral of cases to DOJ once the Regional Administrators have forwarded those cases to Headquarters.

XI. After EPA Refers a Case to DOJ

Following the referral of a case to DOJ, the lead Agency attorney on the case will be responsible for coordinating responses to all requests for supplemental information by the Department or by the U.S. Attorney's Office. Program office staff will be responsible for providing needed technical support. The lead Agency attorney is responsible for keeping program officials and other previously involved Agency attorneys apprised of case developments after referrals.

XII. Negotiations

The Regional Administrators will normally be responsible for ensuring a sound technical and scientific basis for resolutions of identified violations. Prior to EPA referring an enforcement case to DOJ, the Regional Administrators normally will be responsible for directing or conducting informal settlement negotiations (subject to the program-specific guidance which will be forthcoming). The Regional Counsel should be present at discussions in which outside parties are represented by counsel. Once the case has been referred, DOJ normally is responsible for managing settlement discussions, with the active participation of Regional personnel, in the context of an attorney-client relationship. Regional Counsels will make every effort to identify resources needed for negotiations in close consultation with program managers.

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 of 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.

In the event of inquiries from Congress, OLEC will work closely with the Regional Administrators, the appropriate Assistant Administrator, and the Congressional Liaison Office prior to releasing any information or making any public statements.

XVI. Reservation

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of government personnel. They 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 to litigation with the United States Environmental Protection Agency. The Agency reserves the right to take any action alleged to be at variance with these policies and procedures or not in compliance with internal office procedures that may be adopted pursuant to these materials.

XVII. Delegation of Authority

Through a memorandum issued as a cover to this document, the Administrator is delegating to me the authority to construe, interpret or amend the guidance prescribed here. She similarly has delegated to me the authority for issuing any follow-up guidance for implementing the general operating procedures prescribed here, unless the follow-up guidance is limited to matters for which a single Assistant Administrator or Regional Administrator is solely responsible. Of course, I shall work closely with affected Assistant or Regional Administrators in deciding how to exercise these delgated authorities, and in appropriate cases shall issue national guidance jointly with the relevant national program managers.

XVIII. Superseded Policy

These procedures supersede the policies and procedures issued by the Enforcement Counsel on February 26, 1982, which are revoked in their entirety.

RF.1-5
GM #35

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

JAN 4 1985

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Implementing Nationally Managed or Coordinated Enforcement Actions: Addendum to Policy Framework for State/EPA Enforcement Agreements

FROM: Alvin L. Alm
Deputy Administrator

TO: Assistant Administrators
Regional Administrators
Regional Enforcement Contacts
Steering Committee on the State/Federal Enforcement Relationship
Associate Administrator for Regional Operations

I am pleased to transmit to you a copy of EPA's policy statement on Implementing Nationally Managed or Coordinated Enforcement Actions, as an addendum to the Agency's Policy Framework for State/EPA Enforcement Agreements, issued on June 26, 1984.

The policy statement was developed at the request of Courtney Price and myself by an OECM work group with representatives from the Headquarters Program Offices and Regions. The draft policy statement was reviewed by the Steering Committee on the State/Federal Enforcement Relationship. This final policy statement reflects the Steering Committee's comments.

I think this policy is an important addition to our efforts to build both a more effective national enforcement program and a strong working relationship with the States. Coordinated case preparation will have an increasingly important role in establishing precedent for our new programs, in creating a greater deterrent effect when dealing with numerous small sources and in addressing recurring patterns

of noncompliance within regulated entities. This policy clarifies not only the circumstances under which nationally managed or nationally coordinated cases are appropriate, but most important, it clarifies the roles and relationships among EPA headquarters, Regions and State or local governments with delegated programs.

This additional policy guidance, in concert with the recently completed State/EPA Enforcement Agreements, should provide a consistent framework for enhancing our joint Federal and State efforts to achieve a strong and effective national enforcement presence.

Attachment

EPA POLICY ON IMPLEMENTING NATIONALLY MANAGED OR COORDINATED ENFORCEMENT ACTIONS

This policy addresses how EPA will handle the small subset of federal civil enforcement cases, both administrative and judicial, which are managed or coordinated at the EPA Headquarters level. The policy was developed to ensure these actions are identified, developed and concluded consistent with the principles set forth in the Policy Framework for State/EPA Enforcement "Agreements." It covers the criteria and process for deciding what cases might best be managed or coordinated nationally; the roles and relationships of EPA Headquarters and regional offices and the States; and protocols for active and early consultation with the involved States and Regions.

A. Criteria for Nationally Managed or Coordinated Enforcement Cases

Most enforcement cases are handled at the state, local or EPA regional level for reasons of efficiency and effectiveness and in view of the primary role that States and local governments have in enforcement under most of the major environmental statutes. The Policy Framework identifies several instances in which direct enforcement actions may be taken by EPA, which in most instances will be handled by EPA Regions pursuant to the State/EPA Enforcement "Agreements." However, some of those cases may most appropriately be managed or coordinated at the national level by EPA Headquarters.

In addition to instances in which an EPA Region requests Headquarters assistance or lead in an enforcement case, these "national" cases will usually arise within the context of three of the criteria for direct EPA action mentioned in the Policy Framework:

-- National Precedent (legal or program precedent): the degree to which the case is one of first impression in law or the decision is fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis.

-- Repeat Patterns of Violations and Violators: the degree to which there are significant patterns of repeat violations at a given facility or type of source or patterns of violations within multi-facility regulated entities. The latter is of particular concern where the noncompliance is a matter of national (e.g., corporate) policy or the lack of sound environmental management policies and practices at a national

level which can best be remedied through settlement provisions which affect such national policies and practices.

-- Interstate Issues (multiple States or Regions): the degree to which a case may cross regional or state boundaries and requires a consistent approach. This is particularly important where there may be a potential for interregional transfers of pollution problems and the case will present such issues when EPA Regions or States are defining enforcement remedies.

EPA's response to any of these circumstances can range from increased headquarters oversight and legal or technical assistance, to close coordination of State and Regional enforcement actions, to direct management of the case by Headquarters.

There are essentially two types of "National" cases. A nationally managed case is one in which EPA Headquarters has the responsibility for the legal and/or technical development and management of the case(s) from the time the determination is made that the case(s) should be nationally managed in accordance with the criteria and process set forth in this policy. A nationally coordinated case(s) is one which preserves responsibility for lead legal and technical development and management of the cases within the respective EPA regions and/or state or local governments. This is subject, however, to the oversight, coordination and management by a lead Headquarters attorney and/or program staff on issues of national or programmatic scope to ensure that all of the cases within the scope of the nationally coordinated case are resolved to achieve the same or compatible results in furtherance of EPA's national program and enforcement goals.

Section C below describes more fully the roles and relationships of EPA headquarters and regional and state personnel, both legal and technical, in either nationally managed or nationally coordinated cases.

There are several factors to apply to assess whether, in addition to the normal Headquarters oversight, a case should be handled as: (1) nationally managed; or (2) nationally coordinated. None of these factors may necessarily be sufficient in themselves but should be viewed as a whole. These factors will include:

-- availability or most efficient use of State or EPA Regional or Headquarters resources.

-- ability of the agency to affect the outcome through alternative means. One example is issuance of timely policy guidance which would enable the States, local governments or EPA Regions to establish the appropriate precedent through independent action.

-- favorable venue considerations.

-- environmental results which could be achieved through discrete versus concerted and coordinated action, such as potential for affecting overall corporate environmental practices.

-- location of government legal and technical expertise at EPA Headquarters or in the Regions, recognizing that expertise frequently can be tapped and arrangements be made to make expertise available where needed.

To the extent possible, where cases warrant close national attention, EPA Headquarters will coordinate rather than directly manage the case on a national basis thereby enabling Regions and States to better reflect facility-specific enforcement considerations.

B. Process for Identifying Nationally-Managed or Coordinated Cases -- Roles and Responsibilities

EPA recognizes the importance of anticipating the need for nationally managed or coordinated cases to help strengthen our national enforcement presence; and of widely sharing information both on patterns of violations and violators and on legal and program precedent with EPA Regions and States. To do this:

Headquarters program offices, in cooperation with the Office of Enforcement and Compliance Monitoring should use the Agency's Strategic planning process to help identify upcoming enforcement cases of national precedence and importance. They also should develop and disseminate to Regions information on anticipated or likely patterns or sources of violations for specific industries and types of facilities.

Regional offices are responsible for raising to Headquarters situations which pose significant legal or program precedent or those in which patterns of violations are occurring or which are likely to be generic industry-wide or company-wide which would make national case management or coordination particularly effective.

State and local officials are encouraged to raise to EPA Regional Offices situations identified above which would make national case management or coordination particularly effective.

Whether a case will be managed or coordinated at the national level will be decided by the Assistant Administrator for Enforcement and Compliance Monitoring after full consultation with the affected program Assistant Administrators, Regional Administrators and state or local governments with approved or delegated programs in what is intended to be a consensus building process. There will be a full discussion among all of the parties of all of

the ramifications for the program and a review of all of the important criteria involved in the decision. In the event of a lack of consensus as to whether the case should be managed or coordinated at the national level, the AA for OECM shall make the determination, with an opportunity for a hearing and timely appeal to the Administrator or Deputy Administrator by the Regional or other EPA Assistant Administrator.

The Regions will be responsible for communicating with any affected States using mechanisms established in the State/EPA Enforcement "Agreements," to raise the possibility of national case management or coordination and to ensure that timely information on the status of any independent state, local or regional enforcement actions can and would be factored into the decisions regarding: (1) whether to manage the case nationally; (2) whether to coordinate the case nationally; (3) what legal and technical assistance might be provided in a State lead case; and (4) what facilities to include in the action.

C. Case Development -- Roles and Responsibilities

Nationally managed cases are those that are managed out of EPA Headquarters with a lead headquarters enforcement attorney and a designated lead headquarters program contact. Notwithstanding headquarters lead, in most instances, timely and responsive Regional office legal and technical support and assistance is expected in developing and managing the case. In these instances, the Regions will receive credit for a case referral (on a facility basis) for this effort. The decision on the extent of Regional office involvement and case referral credit will be made at the time of decision that the case should be nationally managed. Regions which play a significant role in the development and/or prosecution of a case will be involved in the decision-making process in any case settlement proceedings and the Regional Administrator will have the opportunity to formally concur in any settlement.

Nationally coordinated cases are those that are coordinated out of EPA Headquarters with lead regional and/or state or local attorneys and associated program office staff. The headquarters attorney assigned to the case(s) and designated headquarters program office contact have clear responsibility for ensuring national issues involved in the case which require national coordination are clearly identified and developed and in coordinating the facility-specific actions of the regional offices to ensure that the remedies and policies applied are consistent. This goes beyond the normal headquarters oversight role. The headquarters officials have both a facilitator role in coordinating information exchange and a policy role in influencing the outcome for the identified issues of national concern.

Whether a case is nationally managed or nationally coordinated, as a general rule if EPA is managing a case, States will be invited to participate fully in case development and to formally join in the proceedings if they so desire by attending meetings and planning sessions. States will be consulted on settlement decisions but will be asked to formally concur in the settlement only if they are parties to the litigation.

On a case-by-case basis, the National Enforcement and Investigations Center (NEIC) may be asked to play a role in either type of national case to coordinate evidence gathering, provide needed consistency in technical case development and policy, witnesses and chain of custody, and/or to monitor consent decree compliance.

D. Press Releases and Major Communications

A communications plan should be developed at an early stage in the process. This should ensure that all of the participating parties have an opportunity to communicate their role in the case and its outcome. Most important, the communications plan should ensure that the essential message from the case, e.g., the anticipated precedents, gets sufficient public attention to serve as a deterrent for potential future violations.

All regional and state co-plaintiffs will be able to issue their own regional, state-specific or joint press releases regarding the case. However, the timing of those releases should be coordinated so that they are released simultaneously, if possible.

It is particularly important that the agencies get maximum benefit from the deterrent effect of these significant national cases through such mechanisms as:

-- more detailed press releases to trade publications i.e., with background information and questions and answers
-- development of articles
-- interviews with press for development of more in-depth reporting
-- press conferences
-- meetings with public/environmental groups -- including meetings on the settlement of national cases which have generated intense local or national interest
-- speeches before industry groups about actions
-- communications with congressional committees

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

RF. 1-6
GM #63

AUG 20 1987

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy on Invoking Section 9 of the EPA/DOJ Memorandum of Understanding

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators
Regions I-X

Section 9 of the EPA/DOJ Memorandum of Understanding concerning civil litigation provides authority to the Administrator to appoint Agency attorneys to represent the Agency in certain circumstances. This is an important but virtually unused authority. The lack of use to date may be due, in part, to the absence of a policy and procedure for invoking Section 9.

We anticipate greater use of Section 9 in the future on a selected basis to carry out its intended purpose. To facilitate its future use, we have developed the attached policy. We look forward to working closely with you in its implementation.

If you have any questions about the policy, please feel free to call Ed Reich at FTS 382-3050.

Attachment

cc: Deputy Regional Administrators, Regions I-X
Regional Counsels, Regions I-X

POLICY INVOKING SECTION 9 OF THE EPA/DOJ MEMORANDUM OF UNDERSTAND

Background

In June 1977, EPA and the Department of Justice entered into a Memorandum of Understanding concerning the conduct of environmental litigation. The MOU was intended to ensure that Federal court civil litigation under EPA statutes was effectively conducted to the best interests of the government and the public. It was also intended to resolve differing views of the appropriate roles of DOJ and Agency attorneys and establish a close and cooperative relationship between the attorneys of the two agencies. The MOU dealt specifically with civil litigation under the Clean Air Act, the Federal Water Pollution Control Act, and the Safe Drinking Water Act, although it has become the model for litigation under other environmental statutes as well. The MOU received legislative sanction in 1977 when Congress specifically incorporated the MOU in Section 305(b) of the Clean Air Act.

Primary Responsibilities Under the MOU

The MOU creates a number of important responsibilities for each agency, reflecting the roles and areas of expertise of each. The major provisions of the MOU can be summarized as follows:

(1) The Attorney General "shall have control over" all cases to which EPA is a party.

(2) When requested by the Administrator, the Attorney General shall permit Agency attorneys to participate in cases "subject to the supervision and control of the Attorney General."

(3) The Attorney General retains the right to allocate tasks between attorneys, giving "due consideration to the substantive knowledge of the respective attorneys of the matter at issue so that the Government's resources are utilized to the best advantage."

(4) Settlement of any case in which DOJ represents the Agency requires the concurrence of both the Administrator and the Attorney General (or their delegatees).

(5) The Attorney General shall establish specific deadlines, not longer than 60 days, by which time DOJ attorneys must either file complaints or report to the Attorney General why such complaint has not been filed.

(6) If a complaint is not filed within 120 days of referral, the Administrator may request the Attorney General to file a complaint within 30 days. Failure to thereafter file within said 30 days may be considered by the Agency as a failure of the Attorney General to notify the Administrator within a reasonable time that he will appear in litigation for the purposes of Section 305 of the Clean Air Act, Section 506 of the Federal Water Pollution Control Act, or Section 1450 of the Safe Drinking Water Act. (Under such circumstances, the Administrator is authorized by the cited statutory provisions to appoint Agency attorneys to appear and represent him.)

(7) Failure to file a complaint within the time period requested by the Administrator in cases seeking immediate action under the emergency provisions of the three statutes also would constitute a failure to so notify the Administrator, also authorizing Agency attorneys to assume representation.

(8) In conducting litigation, the Attorney General shall defer to the Administrator's interpretation of scientific and technical matters.

Current Experience

Experience has shown that the 60 day target for filing cases has not been consistently met. There are a number of explanations for the disparity between the 60-day deadline created by the MOU and the actual performance in implementing it. In some instances, the complexity of the case makes review and filing within 60 days an unrealistic target. In other cases, further pre-filing preparation is required or the case is held after referral at EPA's request for reasons of litigative strategy or to conduct pre-filing settlement negotiations. However, cases may also be delayed in filing for reasons relating purely to management and utilization of DOJ resources and DOJ's own sense of priorities. Certain cases may be important to EPA because of the principle involved and yet may be viewed by DOJ attorneys as being only marginally worth their time, thus affecting the relative priority such cases receive. In a few cases, differences in statutory or regulatory interpretation or unresolved policy issues can also delay filing.

An analysis of unfiled cases pending at DOJ shows that a number of cases fall within the scope of Section 9 of the MOU, affecting cases unfiled after 120 days. However, the Agency has only rarely notified DOJ of its intention to invoke that section and appoint Agency attorneys to represent itself, let alone actually appoint such attorneys under that section.

Consideration Affecting Invoking Section 9

Section 9 is clearly intended to give the Agency the discretion to assume responsibility for representing itself in cases unfiled after 120 days, after 30 days notice to DOJ. There are a wide variety of considerations that go into deciding whether it is appropriate to invoke the MOU.

The threshold consideration relates to the reasons for the case remaining unfiled. Obviously, if the case is unfiled because EPA agrees that further pre-filing preparation is required or because EPA has asked for a delay for litigative strategy reasons or to conduct pre-filing settlement negotiations, invoking Section 9 would be inappropriate and unwarranted.

However, if a case is unfiled simply due to unavailability of DOJ resources, consideration of invocation may be appropriate. Further, if DOJ believes that a case should not be filed due to technical deficiencies in the evidence but EPA does not agree, consideration should be given to invoking Section 9 in light of DOJ's failure to defer to the Agency's expertise in accordance with Section 14 of the MOU. Finally, if the delay is due to differences over interpretation and application of Agency policy or priorities, and DOJ does not defer to the Agency's proper role in establishing, interpreting, and implementing policy or priorities, consideration of Section 9 would also be appropriate.

Even within the classes of cases identified in the previous paragraph, invoking the MOU should be viewed as an unusual action when other attempts to resolve the problems in a case have proven fruitless. Within these classes of cases, the Agency must weigh such additional factors as:

(a) the Agency interest to be served by assuring filing of the case in a more timely fashion. Where the case is necessary to validate an Agency policy objective, this may be a particularly important consideration;

(b) the ability of the Agency, both in terms of attorney availability and experience levels, to handle the litigation without DOJ involvement and support;

(c) the desire to maintain, as much as possible, DOJ involvement in cases since combined use of Agency and DOJ resources normally provides the most effective government representation; and

(d) the likelihood of filing of the complaint within the near future if the MOU is not invoked, and whether invoking the MOU is likely to accelerate filing by DOJ.

(Note that invoking Section 9 in the sense of sending a letter to the Attorney General requesting him to file within 30 days does not, in itself, commit the Agency to assume the lead after that period.)

Procedures for Invoking Section 9

Section 9 may be invoked only by the Assistant Administrator for Enforcement and Compliance Monitoring. It may be invoked at his own initiative, upon the request of a Regional Administrator or his delegatee, or at the request of the Assistant Administrator for Air and Radiation for cases arising under Sections 203 and 211 of the Clean Air Act.

A request by the Region*/ to invoke Section 9, which would normally involve enforcement litigation, should be in memorandum form and should be directed to the Assistant Administrator for OECM. The memorandum should briefly summarize the facts of the case, especially any relevant information not previously contained in the referral package, and the appropriateness of invoking Section 9 in light of the criteria discussed in this memorandum. The memorandum should detail, to the best of the Region's knowledge, the reasons for the case remaining unfiled, and all efforts made to get the case filed. If DOJ had asked for any additional information before filing, the memorandum should detail specifically what was requested and how the Agency responded. The request should also contain a proposed case management plan, a recommendation as to which EPA lawyers should be designated to represent the Agency, and a commitment by the Region to provide the resources (technical and legal) necessary to prosecute the action.

Upon receipt and review of the memorandum, or after discussion with the Regional Administrator and the Regional Counsel or their delegatees where the Assistant Administrator raises the issue on his own initiative, the Assistant Administrator may decide to invoke Section 9. If so, prior to the Agency's sending a letter under Section 9, the Deputy Assistant Administrator - Civil Enforcement and the appropriate Associate Enforcement Counsel will meet with the Chief, Environmental Enforcement Section to see if an acceptable resolution can be achieved or if any circumstances exist of which the Agency may not be aware. The appropriate Regional Counsel, or designee, will be given notice and opportunity to

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*/ As used in this section, the terms "Region" and "Regional Administrator and Regional Counsel" shall mean, for cases under Sections 203 and 211 of the Clean Air Act, the Office of Air and Radiation and the Assistant Administrator for Air and Radiation, respectively.

attend any such meeting. Assuming the matter is not acceptably resolved in this manner, the Assistant Administrator shall send a letter to the Assistant Attorney General, Land and Natural Resources Division requesting him to file within 30 days in accordance with Section 9.

During this 30-day period, the Agency will continue to make all reasonable efforts to obtain the filing of the complaint. If at the end of the 30-day period the case remains unfiled, the Assistant Administrator will again discuss the case with the Regional Administrator and Regional Counsel to determine the appropriate action. If determined to be appropriate, the Assistant Administrator shall appoint Agency attorneys to represent the Agency in the case and so notify the Assistant Attorney General in writing of this action.

Support of Cases Where Agency Invokes Section 9

It is primarily the responsibility of the Office of Regional Counsel to provide the legal support to prosecute and manage a case where the Agency appoints its own attorneys under Section 9. This consideration should be factored into both the recommendation to invoke Section 9 and in the case management plan. However, if the Regional Counsel so requests, the appropriate Associate Enforcement Counsel in OECM will endeavor to provide assistance to supplement Regional resources available for the case.

Where a case is to be nationally-managed in accordance with existing guidance, the appropriate Associate Enforcement Counsel will be primarily responsible for providing legal support. For cases arising under Sections 203 and 211 of the Clean Air Act, attorneys in the Field Operations and Support Division of the Office of Air and Radiation will exercise primary responsibility.

RF. 1-7
GM #26

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).

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

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 referra

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

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 should 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

INDEX OF ATTACHMENTS

1. Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring to Regional Administrators, Regional Counsel, Associate Enforcement Counsels and OEM Office Directors (November 28, 1983) (concerning implementation of direct referrals beginning December 1, 1983).

2. Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring to Regional Counsels (November 23, 1983) (concerning further instructions for maintenance of the enforcement docket system).

3. Letter from Alvin L. Alm, Deputy Administrator, U.S. EPA to F. Henry Habicht, II, Acting Assistant Attorney General, US Department of Justice (September 29, 1983) (concerning direct referral of classes of cases).

4. Memorandum from Courtney M. Price, Assistant Administrator and General Counsel to Associate Enforcement Counsels, Regional Counsels, OLEC Office Directors and Correspondence Control Unit (April 21, 1983) (concerning procedures for maintenance of enforcement docket system).

5. Enforcement Docket System Case Data and Facility Data Forms.

Attachment 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

NOV 28 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983

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

TO: Regional Administrators, Regions I - X
Regional Counsels, Regions I - X
Associate Enforcement Counsels
OECM Office Directors

I. BACKGROUND

On September 29, 1983, the Environmental Protection Agency (EPA) and the Land and Natural Resources Division of the Department of Justice (DOJ) entered into an agreement which, beginning on December 1, 1983, allows certain categories of cases to be referred directly to DOJ from EPA Regional offices without my prior concurrence. A copy of that agreement is attached to this memorandum.

This memorandum provides guidance to EPA Headquarters and Regional personnel regarding procedures to follow in implementing this direct referral agreement. Additional guidance will be issued as required.

II. PROCEDURES FOR CASES SUBJECT TO DIRECT REFERRAL

The attached agreement lists those categories of cases which can be referred directly by the Regional Administrator to DOJ. All other cases must continue to be reviewed by Headquarters OECM and will be referred by me to DOJ. Cases which contain counts which could be directly referred and counts which require Headquarters concurrence should be referred to EPA Headquarters. If you are uncertain whether a particular case may be directly referred, you should contact the appropriate Associate Enforcement Counsel for guidance.

Many of the procedures for direct referral cases are adequately explained in the September 29th agreement. However, there are some points I want to emphasize.

Referral packages should be addressed to Mr. F. Henry Habicht, II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington, D.C. 20530, Attention: Stephen D. Ramsey. The time limitations set forth in the agreement for review and initial disposition of the package will commence upon receipt of the package in the Land and Natural Resources Division, and not at the DOJ mailroom. Delivery of referral packages to the Land and Natural Resources Division will be expedited by use of express mail, which is not commingled with regular mail in DOJ's mailroom.

The contents of a referral package (either direct to DOJ or to EPA Headquarters) should contain three primary divisions: (1) a cover letter; (2) the litigation report; (3) the documentary file supporting the litigation report.

The cover letter should contain a summary of the following elements:

(a) identification of the proposed defendant(s);

(b) the statutes and regulations which are the basis for the proposed action against the defendant(s);

(c) a brief statement of the facts upon which the proposed action is based;

(d) proposed relief to be sought against the defendant(s);

(e) significant or precedential legal or factual issues;

(f) contacts with the defendant(s), including any previous administrative enforcement actions taken;

(g) lead Regional legal and technical personnel;

(h) any other aspect of the case which is significant and should be highlighted, including any extraordinary resource demands which the case may require.

A referral to DOJ or to Headquarters EPA is tantamount to a certification by the Region that it believes the case is sufficiently developed for the filing of a complaint, and that the Region is ready, willing and able to provide such legal and technical support as might be reasonably required to pursue the case through litigation.

As provided in the September 29, 1983, agreement, information copies of the referral package may be provided to the U.S. Attorney for the appropriate judicial district in which the proposed case may be filed. These information packages should be clearly labelled or stamped with the following words: "Advance Copy -- No Action Required At This Time". Also, information copies should be simultaneously provided to the appropriate OECM division at Headquarters. It is important that the directly referred cases be tracked in our case docket system and Headquarters oversight initiated. Copies of the referral cover letter will be provided to OECM's Office of Management Operations for inclusion in the automated case docket system when Headquarters informational copy is received at OECM's Correspondence Control Unit.

Department of Justice Responsibilities

DOJ shares our desire to handle these cases as expeditiously as possible. To that end, DOJ has agreed that, within thirty days of receipt of the package in the Land and Natural Resources Division at DOJ Headquarters, it will determine whether Headquarters DOJ or the U.S. Attorney will have the lead litigation responsibilities on a specific case. DOJ will notify the Regional offices directly of its determination in this regard, with a copy to the appropriate OECM division. Although USA offices will have lead responsibilities in many cases, the Land and Natural Resources Division will continue to have oversight and management responsibility for all cases. All complaints and consent decrees will continue to require the approval of the Assistant Attorney General for the division before the case can be filed or settled.

DOJ has reaffirmed the time frame of the Memorandum of Understanding, dated June 15, 1977, for the filing of cases within 60 days after receipt of the referral package, where possible. Where it is not possible, DOJ will advise the Region and Headquarters of any reasons for delays in filing of the case. However, when DOJ determines that the USA should have the lead responsibilities in a case, DOJ will forward the case to the USA within thirty days of referral to the extent feasible.

DOJ can request additional information from a Region on a case or return a case to a Region for further development. In order to avoid these delays, referral packages should be as complete as possible and the Regions should work closely with DOJ to develop referral packages.

The Deputy Administrator has expressed concern in the past on the number of cases returned to the Regions or declined by EPA or DOJ. I have assured the Deputy Administrato that I will closely track the number of cases declined by DOJ or returned to the Regions and the reasons for the declination or return as indications of whether direct referrals are a feasible method of handling EPA's judicial enforcement program.

Headquarters OECM Responsibilities

Although OECM will not formally concur on cases directly referred to DOJ, OECM will still review these packages and may offer comments to the Regions and DOJ. DOJ is free to request EPA Headquarters assistance on cases, as DOJ believes necessary. EPA Headquarters review will help to point out potential issues and pinpoint areas where future guidance should be developed. OECM will also be available as a consultant to both DOJ and the Regions on these cases. OECM will be available to address policy issues as they arise and, as resources permit, may be able to assist in case development or negotiation of these cases. Any request from a Regional office for Headquarters legal assistance should be in writing from the Regional Administrator to me, setting forth the reasons for the request and the type of assistance needed.

OECM also maintains an oversight responsibility for these cases. Therefore, Regional attorneys must report the status of these cases on a regular basis through use of the automated case docket. All information for the case required by the case docket system must appear in the docket and be updated in accordance with current guidance concerning the automated docket system.

Settlements in Cases Subject to Direct Referral

I will continue to approve and execute all settlements in enforcement cases, including those in cases subject to direct referral and amendments to consent decrees in these cases. This is necessary to ensure that Agency policies and enforcement activities are being uniformly and consistently applied nationwide. After the defendants have signed the settlement, the Regional Administrator should forward a copy of the settlement to me (or my designee) with a written analysis of the settlement and a request that the settlement be signed and referred for approval by the Assistant Attorney General for the Land and Natural Resources Division and for entry. The settlement will be reviewed by the appropriate OECM Enforcement Division for consistency with law and Agency policy.

Attachment 1

Within twenty-one days from the date of receipt of the settlement by the appropriate OECM division, I will either sign the settlement and transmit it to DOJ with a request that the settlement be entered, or transmit a memorandum to the Regional Office explaining factors which justify postponement of referral of the package to DOJ, or return the package to the Region for changes necessary before the agreement can be signed.

Obviously, we want to avoid the necessity of communicating changes in Agency settlement positions to defendants, especially after they have signed a negotiated agreement. To avoid this, the Regional office should coordinate with Headquarters OECM and DOJ in development of settlement proposals. A copy of all draft settlement agreements should be transmitted by the Regional Counsel to the appropriate Associate Enforcement Counsel for review before it is presented to the defendant. The Associate Enforcement Counsel will coordinate review of the settlement with the Headquarters program office and respond to the Regional office, generally, within ten days of receipt of the draft. The Regional office should remain in contact with the Headquarters liaison staff attorney as negotiations progress. Failure to coordinate settlement development with appropriate Headquarters offices may result in rejection of a proposed settlement which has been approved by the defendant(s) and the Regional office.

I will also continue to concur in and forward to DOJ all requests for withdrawal of cases after referral. In addition, I will review and concur in any delay in the filing or prosecution of a case after referral. This is appropriate because cases which are referred to DOJ should be expeditiously litigated to conclusion, unless a settlement or some other extraordinary event justifies suspending court proceedings. The review of reasons for withdrawal or delay of cases after expenditure of Agency and DOJ resources is an important function of OECM oversight. Therefore, should the Regional offices desire to request withdrawal or delay of a case which has been referred to DOJ, a memorandum setting forth the reasons for such a request should be forwarded to the appropriate OECM division, where it will be reviewed and appropriate action recommended to me.

III. CASES NOT SUBJECT TO DIRECT REFERRAL

Those cases not subject to direct referral will be forwarded by the Regional Administrator to the Office of Enforcement and Compliance Monitoring for review prior to referral to DOJ. OECM has committed to a twenty-one day turn-around time for these cases. The twenty-one day review period starts when the referral is received by the appropriate OECM division.

Within this twenty-one day period, OECM will decide whether to refer the case to DOJ (OECM then has fourteen additional days to formally refer the case), to return the case to the Region for further development, or to request additional information from the Region.

Because of this short OECM review period, emphasis should be placed on developing complete referral packages so that delay occassioned by requests for additional information from the Region will be rare. OECM may refer a case to DOJ which lacks some information only if the referral can be supplemented with a minimum of time and effort by information available to the Regional office which can immediately be gathered and transmitted to DOJ. However, this practice is discouraged. In the few instances in which a case is referred to DOJ without all information attached, the information should, at a minimum, be centrally organized in the Regional office and the litigation report should analyze the completeness and substantive content of the information.

A referral will be returned to the Region, with an explanatory memorandum, if substantial information or further development is needed to complete the package. Therefore, the Regions should work closely with OECM attorneys to be certain referral packages contain all necessary information.

IV. MEASURING THE EFFICACY OF THE DIRECT REFERRAL AGREEMENT

I will use EPA's case docket system, OECM's quarterly Management Accountability reports and DOJ's responses to the referral packages to review the success of the direct referral agreement. OECM will review the quality of the litigation reports accompanying directly referred cases and discuss the general quality of referrals from each Regional office at case status meetings held periodically with DOJ's Environmental Enforcement Section.

If you have any questions concerning the procedures set out in this memorandum, please contact Richard Mays, Senior Enforcement Counsel, at FTS 382-4137.

Attachment

Attachment 3

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

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;

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

(v) referrals to collect administrative spill penalties 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 no responsibility 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 routine oversight of the progress and management of the case consistent with applicable present and future guidance. OECM shall, however, retain final authority to approve settlements on behalf of EPA 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.

(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

Attachment 5

~~APPENDIX A~~

ENFORCEMENT CASE DATA FORM

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

* CASE NAME: _____

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

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

* 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: ___/___/___ (Civil)
DATE ISSUED: ___/___/___ (Adj. Adm.)
DATE CONCLUDED: ___/___/___

* REFERRAL INDICATOR ___ RH: Region to HQ
___ RD: Region to DOJ (Direct Referral)
Direct Referral Lead: DOJ_____ USA____

DATE VIOLATION DETERMINED: ___/___/___

DATE DOCUMENTS RECEIVED BY ORC:____/____/____

PROPOSED PENALTY: _____

* Required fields - must be filled out for case entry

Attachment 5

~~Appendix~~

FACILITY DATA FORM

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

*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

SIC CODE(s): _____ , _____ , _____ , _____
(one required)

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

PARENT COMPANY: _____

NPDES PERMIT NO. _____

SUPERFUND SITE: _____ (Y or N)

LATITUDE: _____ _____ _____

LONGITUDE: _____ _____ _____

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

RF. 2-1
GM #69

JAN 14 1988

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Expansion of Direct Referral of Cases to the Department of Justice

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators, Regions I - X
Deputy Regional Administrators, Regions I - X
Regional Counsels, Regions I - X
Assistant Administrators
Associate Enforcement Counsels
OECM Office Directors

I. BACKGROUND

During the past year, my office has worked closely with the Regions, the Headquarters program offices, and the Land and Natural Resources Division of the U.S. Department of Justice (DOJ) to expand the use of direct referral of cases. On January 5, 1988, EPA and DOJ entered into an agreement which expanded the categories of civil judicial cases to be referred directly to DOJ Headquarters from the EPA Regional offices without my prior concurrence. In entering into this agreement, EPA has taken a major step towards streamlining the enforcement process and more fully utilizing our Regional enforcement capabilities.

On January 13, 1988, the Administrator signed an interim delegations package which will allow the Agency to immediately implement expanded direct referrals to DOJ. A final delegations package is now being prepared for Green Border review.

This memorandum provides guidance to EPA Headquarters and Regional personnel regarding procedures to follow in implementing the expanded direct referral agreement. Prior guidance on direct referrals appears in a November 28, 1983, memorandum from Courtney Price entitled "Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983." That guidance is superseded to the extent that the current guidance replaces or changes procedures set forth therein; otherwise the 1983 document remains in effect.

II. SUMMARY

Effective immediately for non-CERCLA cases, and effective April 1, 1988, for CERCLA cases, the Regions will directly refer to the Department of Justice all civil cases other than those listed in the attachment to this memorandum entitled "Cases Which Will Continue to be Referred Through Headquarters." This attachment lists cases in new and emerging programs and a few, highly-selected additional categories of cases where continued referral through EPA Headquarters has been determined to be appropriate. EPA Headquarters will have 35 days to review the case simultaneously with DOJ. EPA Headquarters will focus its review primarily on significant legal or policy issues. If major legal or policy issues are raised during this review, EPA Headquarters will work with the Region to expedite resolution.

Attached is a copy of the agreement between EPA and DOJ, which is incorporated into this guidance. Many of the procedures for direct referral of cases are adequately explained in the agreement. However, there are some points I would like to emphasize.

III. PROCEDURES

A. CASES SUBJECT TO DIRECT REFERRAL

The attached agreement lists those categories of cases which must continue to be referred through the Office of Enforcement and Compliance Monitoring (OECM). All other cases should be referred directly by the Regional Office to DOJ Headquarters, with the following two exceptions:

(1) cases which contain counts which could be directly referred and counts which require prior EPA Headquarters review should be referred through EPA Headquarters, and

(2) any referral which transmits a consent decree should be referred through EPA Headquarters, except where existing delegations provide otherwise.

If you are uncertain whether a particular case may be directly referred, you should contact the appropriate Associate Enforcement Counsel for guidance.

B. **PREPARATION AND DISTRIBUTION OF REFERRAL PACKAGES**

The contents of a referral package (either direct to DOJ or to EPA Headquarters) should contain three primary divisions: (1) a cover letter; (2) the litigation report; (3) the documentary file supporting the litigation report.

The cover letter should contain a summary of the following elements:

(a) identification of the proposed defendant(s);

(b) the statutes and regulations which are the basis for the proposed action against the defendant(s);

(c) the essential facts upon which the proposed action is based, including identification of any significant factual issues;

(d) proposed relief to be sought against defendant(s);

(e) significant or precedential legal or policy issues;

(f) contacts with the defendant(s), including any previous administrative enforcement actions taken;

(g) lead Regional legal and technical personnel;

(h) any other aspect of the case which is significant and should be highlighted, including any extraordinary resource demands which the case may require.

A direct referral to DOJ is tantamount to a certification by the Region that it believes the case is sufficiently developed for filing of a complaint, and that the Region is ready, willing and able to provide such legal and technical support as might be reasonably required to pursue the case through litigation.

Referral packages should be addressed to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington D.C. 20530. Attention:

Chief, Environmental Enforcement Section. Copies of all referral packages should also be sent to the Assistant Administrator for OECM and the appropriate Headquarters program office.

DOJ has reaffirmed the time frame of the Memorandum of Understanding, dated June 15, 1977, for the filing of cases within 60 days after receipt of the referral package, where possible. DOJ can request additional information from a Region on a case or return a case to a Region for further development. In order to avoid these delays, referral packages should be as complete as possible and the Regions should work closely with DOJ to develop referral packages.

C. IDENTIFICATION AND RESOLUTION OF SIGNIFICANT LEGAL AND POLICY ISSUES

A major element in assuring the success of the expanded direct referral program is an efficient process to identify and resolve significant legal and policy issues. This should be done as early as possible to assure that unresolved issues not delay a referral. Early identification and resolution will also help the Agency to avoid devoting significant Regional resources to preparing a litigation report for a case which will ultimately be considered inappropriate for referral.

The procedures make clear that the Regional office has the initial responsibility for identification of significant legal and policy issues. Such issues should be identified to OECM and the appropriate Headquarters program office as soon as a decision is made to proceed with litigation. All parties should then work to address the issues as quickly as possible, preferably before the referral package is sent to Headquarters.

The agreement with DOJ also outlines procedures for Headquarters review of referral packages to determine whether any significant legal or policy issues exist which would impact filing, and the process for resolution of such issues. If an issue surfaces during the 35-day Headquarters review period, OECM will work for quick resolution of the issue, with escalation as necessary to top Agency management. This should serve primarily as a "safety valve" for those few issues not previously identified, rather than as the point at which issues are first raised.

Finally, if DOJ raises a significant legal or policy issue during its review, OECM will work with the Region and the Headquarters program office to expedite resolution of the issue. If DOJ makes a tentative determination to return a

referral, DOJ will consult with OECM and the Regional Office in advance of returning the referral.

D. **CASE QUALITY/STRATEGIC VALUE**

OECM will evaluate Regional performance as to the quality and strategic value of cases on a generic basis. While OECM will not request withdrawal of an individual referral based on concerns about quality or strategic value, it will consider these factors during the annual audits of the Offices of Regional Counsel and the annual Regional program office reviews. Concerns relative to issues of quality or strategic value will also be raised informally as soon as they are identified.

E. **WITHDRAWAL OF CASES PRIOR TO FILING**

Cases should be fully developed and ready for filing at the time they are referred to DOJ Headquarters. Thus, case withdrawal should be necessary only under the most unusual circumstances. If, after consultation with OECM, withdrawal is determined to be appropriate, the Regions may request that DOJ withdraw any directly referred case prior to filing. Copies of the Region's request should be sent to the Assistant Administrator for OECM and the appropriate program office.

F. **MAINTENANCE OF AGENCY-WIDE CASE TRACKING SYSTEM**

In order to assure effective management of the Agency's enforcement program, it is important to maintain an accurate, up-to-date docket and case tracking system. Regional attorneys must continue to report the status of all cases, including directly referred cases, on a regular basis through use of the national Enforcement Docket System. All information for the case required by the case docket system must appear in the docket and be updated in accordance with current guidance concerning the automated docket system.

If you have any questions concerning the procedures set forth in this memorandum, please contact Jonathan Cannon, Deputy Assistant Administrator for Civil Enforcement, at FTS 382-4137.

Attachment

cc: Hon. Roger J. Marzulla
David Buente
Nancy Firestone
Assistant Section Chiefs

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

... 24

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Honorable Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
Washington, D.C. 20530

Dear Roger:

As you know, the Agency has been considering changes in existing procedures to increase the effectiveness of its enforcement program. One change, which we discussed at our recent meeting with you, is a major expansion of the direct referral program for civil judicial enforcement actions, whereby such cases are referred directly from the Regional Administrators to your office.

We believe the past successes of this program and the increased maturity of Regional staff warrant adopting direct referrals as the basic mode of operation. Thus, with your acceptance, we intend to utilize direct referrals to your office for virtually all civil cases other than those relating to certain new statutory authorities or emerging programs where judicial enforcement experience is limited. As such programs mature, we will expand the scope of direct referrals to cover them. In addition, as new programs are implemented under new statutory or regulatory requirements, we contemplate an initial period of referrals through Headquarters for these cases prior to their incorporation into the direct referral process.

Based on discussions within the Agency and with your staff, we would propose that direct referrals cover all civil cases but those listed in Attachment A. This list includes cases in new and emerging programs and a few, highly-selected additional categories of cases where continued referral through Headquarters has been determined to be appropriate. This would allow direct referral of the vast majority of civil cases, including those which would still require significant national coordination to assure a consistent approach (such as auto coating VOC air cases). For this reason, the procedures applicable to this small subset of cases as outlined in the memorandum entitled "Implementing Nationally Managed or Coordinated Enforcement Actions: Addendum to Policy Framework for State/EPA Enforcement Agreements" dated January 4, 1985 will remain in effect.

For all but CERCLA cases, this expansion would be effective on January 1, 1988. For CERCLA cases, direct referrals would take effect on April 1, 1988. We anticipate joint issuance by our offices of the model CERCLA litigation report prior to that date.

Also attached (Attachment B) is the outline of the direct civil referral process as the Agency intends to implement it. This outline refines current direct referral procedures by more clearly focusing authority and accountability within the Agency.

Under these modified procedures, the Regional Office has the lead on direct referrals. The Region will be solely responsible for the quality of the referral. In this context, quality encompasses both the completeness and accuracy of the litigation report and the strategic value of the case. Any problems involving case quality should be raised directly with the Region.

OECM will evaluate Regional performance as to the quality and strategic value of cases on a generic basis. While OECM will not request withdrawal of an individual referral on the basis of concerns about quality or strategic value, we are committed to working with the Regional Offices to assure that current standards are maintained or even exceeded in future referrals. We welcome your input on Agency performance to assist us in this regard.

As the procedures detail, OECM (as well as the appropriate Headquarters office) will continue to be actively involved in identification and resolution of significant legal and policy issues. Such issues normally should be raised and resolved prior to the actual referral. If such an issue surfaces during the 35-day Headquarters review period, we will work for quick resolution of the issue, with escalation as necessary to top Agency management. During the period required for resolution, DOJ will treat the referral as "on hold". In the unusual circumstance where an issue is still unresolved after 60 days from the date of referral, we would contemplate withdrawal of the referral by the Agency pending resolution unless a formal "hold" letter has been submitted in accordance with the procedures contained in the memorandum entitled "Expanded Civil Judicial Referral Procedures" dated August 28, 1986.

If a significant policy or legal issue is raised by DOJ during its review, OECM remains committed to work with the Regional and program offices to assure expedited resolution of the issue. Obviously, these procedures are not intended to inhibit discussions between our offices to facilitate a resolution. In addition, if DOJ makes a tentative determination to return a referral, we understand that you will consult with OECM and the Regional Office in advance of returning the referral.

We believe this expansion in use of direct referrals represent a major advance in streamlining the Agency's enforcement process and appreciate your support in its implementation. This letter, upon your acceptance, will supersede the letters of September 29, 1983, October 28, 1985, and August 28, 1986 on this subject and constitute an amendment to the June 15, 1977 Memorandum of Understanding between our respective agencies.

I appreciate your continuing cooperation and support in our mutual efforts to make our enforcement process more effective. I hope this letter meets with your approval. If so, please sign in the space provided below and return a copy of the letter to me for distribution throughout the Agency.

Sincerely,

Thomas L. Adams, Jr.
Assistant Administrator

Attachments

Approved:

JAN 05 1988

Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

Date

RESPONSIBILITIES AND PROCEDURES FOR DIRECT REFERRALS OF CIVIL JUDICIAL ENFORCEMENT ACTIONS TO THE DEPARTMENT OF JUSTICE

(1) Regional Offices have the lead on direct referrals to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice (DOJ); Regions will be responsible for the quality of referrals.

(2) Regions will identify any significant legal/policy issues as soon as the decision is made to proceed with litigation. Such issues will be raised in writing for consideration by OECM and the appropriate Headquarters program office. All parties will attempt to resolve such issues as early as possible, preferably before the referral package is sent to Headquarters. Regions will also flag such issues in the cover memo transmitting the referral.

(3) At the same time the referral is sent to DOJ, it will be sent to OECM and the appropriate Headquarters program office for a simultaneous and independent review to determine whether any other significant policy/legal issues exist which would impact filing.

(4) Headquarters offices will complete their reviews within 35 days of receipt of the referral. Each Headquarters office will notify the Region in writing of any significant issues identified or that no such issues have been identified. A copy of this memorandum will be sent to DOJ. The Headquarters offices will coordinate their reviews and, to the extent possible, provide a consolidated response.

(5) If significant issues are identified and not readily resolved, Headquarters (the Assistant Administrator for OECM), after consultation with the program office Assistant Administrator, may request the Regional Administrator to withdraw the case. If the Regional Administrator and the Assistant Administrator for OECM (and, as applicable, the program office Assistant Administrator) are unable to agree on the appropriate resolution of the issue, the issue would be escalated to the Deputy Administrator.

(6) If a significant issue is not resolved within 60 days of the date of referral, the case will normally be withdrawn pending resolution unless an appropriate "hold" letter is sent to DOJ in accordance with the procedures contained in the memorandum entitled "Expanded Civil Judicial Referral Procedures" dated August 28, 1986 (document GM-50 in the General Enforcement Policy Compendium.)

(7) Headquarters will NOT request withdrawal of a referral package for any of the following reasons:

-- overall quality of referral package
-- strategic value of case
-- adequacy of documentation

(8) If DOJ makes a tentative decision to return a referral to EPA, it will consult with the Regional Office and OECM prior to making a final decision to return the case.

(9) Headquarters will evaluate on a generic basis (e.g., trends or repeated concerns) the quality/strategic value of a Region's referrals. Concerns relative to issues of quality or strategic value will be raised informally as soon as they are identified.

(10) Headquarters oversight will be accomplished primarily through annual program and OGC/OECM reviews, or ad hoc reviews as problems are identified in a given Region.

Note: Where a referral also transmits a signed consent decree for Headquarters approval, the procedures applicable to processing settlements shall apply in lieu of these procedures.

CASES WHICH WILL CONTINUE TO BE REFERRED THROUGH HEADQUARTERS

ALL MEDIA:

Parallel Proceedings -- Federal civil enforcement matters where a criminal investigation of the same violations is pending

RCRA/CERCLA:

UST enforcement

Enforcement of RCRA land ban and minimum technology regulations

Enforcement of administrative orders for access and penalty cases for failure to comply with requests for access (Section 104)

Referrals to enforce Title III of SARA, the Community Right-to-Know provisions

TSCA/FIFRA:

Referrals to compel compliance with or restrain violations of suspension orders under FIFRA Section 6(c)

FIFRA actions for stop sales, use, removal, and seizure under Section 13

Referrals to enforce Title III of SARA, the Community Right-to-Know provisions

Injunctive actions under Section 7 of TSCA (actions for injunctive relief to enforce the regulations promulgated under Section 17 or Section 6 could be directly referred)

WATER:

Clean Water Act pretreatment violations --failure of a POTW to implement an approved local pretreatment program

Clean Water Act permit violations relating to or determined by biological methods or techniques measuring whole effluent toxicity

PWSS cases to enforce against violations of administrative orders which were not issued using an adjudicatory hearing process

WATER (contd.)	Cases brought under the Marine Protection, Research and Sanctuaries Act (MPRSA)
	UIC cases[1]
AIR:	Smelter cases

[1] The ten cases referred to date indicate that the regulations raise interpretive issues of continuing national significance. There also appears to be a need for greater experience at gathering the facts necessary to prove violations and support appropriate relief. For this reason, the first 3 UIC cases from each Region shall be referred through Headquarters. Once the Associate Enforcement Counsel for OECM determines that the Region has completed three successful referrals, the Region may proceed to refer these cases directly to DOJ.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

GM-18

NOV 28 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983

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

TO: Regional Administrators, Regions I - X
Regional Counsels, Regions I - X
Associate Enforcement Counsels
OECM Office Directors

I. BACKGROUND

On September 29, 1983, the Environmental Protection Agency (EPA) and the Land and Natural Resources Division of the Department of Justice (DOJ) entered into an agreement which, beginning on December 1, 1983, allows certain categories of cases to be referred directly to DOJ from EPA Regional offices without my prior concurrence. A copy of that agreement is attached to this memorandum.

This memorandum provides guidance to EPA Headquarters and Regional personnel regarding procedures to follow in implementing this direct referral agreement. Additional guidance will be issued as required.

II. PROCEDURES FOR CASES SUBJECT TO DIRECT REFERRAL

The attached agreement lists those categories of cases which can be referred directly by the Regional Administrator to DOJ. All other cases must continue to be reviewed by Headquarters OECM and will be referred by me to DOJ. Cases which contain counts which could be directly referred and counts which require Headquarters concurrence should be referred to EPA Headquarters. If you are uncertain whether a particular case may be directly referred, you should contact the appropriate Associate Enforcement Counsel for guidance.

Many of the procedures for direct referral cases are adequately explained in the September 29th agreement. However, there are some points I want to emphasize.

Referral packages should be addressed to Mr. F. Henry Habicht, II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington, D.C. 20530, Attention: Stephen D. Ramsey. The time limitations set forth in the agreement for review and initial disposition of the package will commence upon receipt of the package in the Land and Natural Resources Division, and not at the DOJ mailroom. Delivery of referral packages to the Land and Natural Resources Division will be expedited by use of express mail, which is not commingled with regular mail in DOJ's mailroom.

The contents of a referral package (either direct to DOJ or to EPA Headquarters) should contain three primary divisions: (1) a cover letter; (2) the litigation report; (3) the documentary file supporting the litigation report.

The cover letter should contain a summary of the following elements:

(a) identification of the proposed defendant(s);

(b) the statutes and regulations which are the basis for the proposed action against the defendant(s);

(c) a brief statement of the facts upon which the proposed action is based;

(d) proposed relief to be sought against the defendant(s);

(e) significant or precedential legal or factual issues;

(f) contacts with the defendant(s), including any previous administrative enforcement actions taken;

(g) lead Regional legal and technical personnel;

(h) any other aspect of the case which is significant and should be highlighted, including any extraordinary resource demands which the case may require.

A referral to DOJ or to Headquarters EPA is tantamount to a certification by the Region that it believes the case is sufficiently developed for the filing of a complaint, and that the Region is ready, willing and able to provide such legal and technical support as might be reasonably required to pursue the case through litigation.

As provided in the September 29, 1983, agreement, information copies of the referral package may be provided to the U.S. Attorney for the appropriate judicial district in which the proposed case may be filed. These information packages should be clearly labelled or stamped with the following words: "Advance Copy -- No Action Required At This Time". Also, information copies should be simultaneously provided to the appropriate OECM division at Headquarters. It is important that the directly referred cases be tracked in our case docket system and Headquarters oversight initiated. Copies of the referral cover letter will be provided to OECM's Office of Management Operations for inclusion in the automated case docket system when Headquarters informational copy is received at OECM's Correspondence Control Unit.

Department of Justice Responsibilities

DOJ shares our desire to handle these cases as expeditiously as possible. To that end, DOJ has agreed that, within thirty days of receipt of the package in the Land and Natural Resources Division at DOJ Headquarters, it will determine whether Headquarters DOJ or the U.S. Attorney will have the lead litigation responsibilities on a specific case. DOJ will notify the Regional offices directly of its determination in this regard, with a copy to the appropriate OECM division. Although USA offices will have lead responsibilities in many cases, the Land and Natural Resources Division will continue to have oversight and management responsibility for all cases. All complaints and consent decrees will continue to require the approval of the Assistant Attorney General for the division before the case can be filed or settled.

DOJ has reaffirmed the time frame of the Memorandum of Understanding, dated June 15, 1977, for the filing of cases within 60 days after receipt of the referral package, where possible. Where it is not possible, DOJ will advise the Region and Headquarters of any reasons for delays in filing of the case. However, when DOJ determines that the USA should have the lead responsibilities in a case, DOJ will forward the case to the USA within thirty days of referral to the extent feasible.

DOJ can request additional information from a Region on a case or return a case to a Region for further development. In order to avoid these delays, referral packages should be as complete as possible and the Regions should work closely with DOJ to develop referral packages.

The Deputy Administrator has expressed concern in the past on the number of cases returned to the Regions or declined by EPA or DOJ. I have assured the Deputy Administrator that I will closely track the number of cases declined by DOJ or returned to the Regions and the reasons for the declination or return as indications of whether direct referrals are a feasible method of handling EPA's judicial enforcement program.

Headquarters OECM Responsibilities

Although OECM will not formally concur on cases directly referred to DOJ, OECM will still review these packages and may offer comments to the Regions and DOJ. DOJ is free to request EPA Headquarters assistance on cases, as DOJ believes necessary. EPA Headquarters review will help to point out potential issues and pinpoint areas where future guidance should be developed. OECM will also be available as a consultant to both DOJ and the Regions on these cases. OECM will be available to address policy issues as they arise and, as resources permit, may be able to assist in case development or negotiation of these cases. Any request from a Regional office for Headquarters legal assistance should be in writing from the Regional Administrator to me, setting forth the reasons for the request and the type of assistance needed.

OECM also maintains an oversight responsibility for these cases. Therefore, Regional attorneys must report the status of these cases on a regular basis through use of the automated case docket. All information for the case required by the case docket system must appear in the docket and be updated in accordance with current guidance concerning the automated docket system.

Settlements in Cases Subject to Direct Referral

I will continue to approve and execute all settlements in enforcement cases, including those in cases subject to direct referral and amendments to consent decrees in these cases. This is necessary to ensure that Agency policies and enforcement activities are being uniformly and consistently applied nationwide. After the defendants have signed the settlement, the Regional Administrator should forward a copy of the settlement to me (or my designee) with a written analysis of the settlement and a request that the settlement be signed and referred for approval by the Assistant Attorney General for the Land and Natural Resources Division and for entry. The settlement will be reviewed by the appropriate OECM Enforcement Division for consistency with law and Agency policy.

Within twenty-one days from the date of receipt of the settlement by the appropriate OECM division, I will either sign the settlement and transmit it to DOJ with a request that the settlement be entered, or transmit a memorandum to the Regional Office explaining factors which justify postponement of referral of the package to DOJ, or return the package to the Region for changes necessary before the agreement can be signed.

Obviously, we want to avoid the necessity of communicating changes in Agency settlement positions to defendants, especially after they have signed a negotiated agreement. To avoid this, the Regional office should coordinate with Headquarters OECM and DOJ in development of settlement proposals. A copy of all draft settlement agreements should be transmitted by the Regional Counsel to the appropriate Associate Enforcement Counsel for review before it is presented to the defendant. The Associate Enforcement Counsel will coordinate review of the settlement with the Headquarters program office and respond to the Regional office, generally, within ten days of receipt of the draft. The Regional office should remain in contact with the Headquarters liaison staff attorney as negotiations progress. Failure to coordinate settlement development with appropriate Headquarters offices may result in rejection of a proposed settlement which has been approved by the defendant(s) and the Regional office.

I will also continue to concur in and forward to DOJ all requests for withdrawal of cases after referral. In addition, I will review and concur in any delay in the filing or prosecution of a case after referral. This is appropriate because cases which are referred to DOJ should be expeditiously litigated to conclusion, unless a settlement or some other extraordinary event justifies suspending court proceedings. The review of reasons for withdrawal or delay of cases after expenditure of Agency and DOJ resources is an important function of OECM oversight. Therefore, should the Regional offices desire to request withdrawal or delay of a case which has been referred to DOJ, a memorandum setting forth the reasons for such a request should be forwarded to the appropriate OECM division, where it will be reviewed and appropriate action recommended to me.

III. CASES NOT SUBJECT TO DIRECT REFERRAL

Those cases not subject to direct referral will be forwarded by the Regional Administrator to the Office of Enforcement and Compliance Monitoring for review prior to referral to DOJ. OECM has committed to a twenty-one day turn-around time for these cases. The twenty-one day review period starts when the referral is received by the appropriate OECM division.

Within this twenty-one day period, OECM will decide whether to refer the case to DOJ (OECM then has fourteen additional days to formally refer the case), to return the case to the Region for further development, or to request additional information from the Region.

Because of this short OECM review period, emphasis should be placed on developing complete referral packages so that delay occassioned by requests for additional information from the Region will be rare. OECM may refer a case to DOJ which lacks some information only if the referral can be supplemented with a minimum of time and effort by information available to the Regional office which can immediately be gathered and transmitted to DOJ. However, this practice is discouraged. In the few instances in which a case is referred to DOJ without all information attached, the information should, at a minimum, be centrally organized in the Regional office and the litigation report should analyze the completeness and substantive content of the information.

A referral will be returned to the Region, with an explanatory memorandum, if substantial information or further development is needed to complete the package. Therefore, the Regions should work closely with OECM attorneys to be certain referral packages contain all necessary information.

IV. MEASURING THE EFFICACY OF THE DIRECT REFERRAL AGREEMENT

I will use EPA's case docket system, OECM's quarterly Management Accountability reports and DOJ's responses to the referral packages to review the success of the direct referral agreement. OECM will review the quality of the litigation reports accompanying directly referred cases and discuss the general quality of referrals from each Regional office at case status meetings held periodically with DOJ's Environmental Enforcement Section.

If you have any questions concerning the procedures set out in this memorandum, please contact Richard Mays, Senior Enforcement Counsel, at FTS 382-4137.

Attachment

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

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;

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

(v) referrals to collect administrative spill penalties 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 no responsibility 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 routine oversight of the progress and management of the case consistent with applicable present and future guidance. OECM shall, however, retain final authority to approve settlements on behalf of EPA 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 representativ

(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:

_____

RF.2-2

GM #18

IMPLEMENTATION OF DIRECT REFERRALS FOR CIVIL CASES

EPA GENERAL ENFORCEMENT POLICY # GM - 18

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: DEC 1 1983

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

NOV 28 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983

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

TO: Regional Administrators, Regions I - X
Regional Counsels, Regions I - X
Associate Enforcement Counsels
OECM Office Directors

I. BACKGROUND

On September 29, 1983, the Environmental Protection Agency (EPA) and the Land and Natural Resources Division of the Department of Justice (DOJ) entered into an agreement which, beginning on December 1, 1983, allows certain categories of cases to be referred directly to DOJ from EPA Regional offices without my prior concurrence. A copy of that agreement is attached to this memorandum.

This memorandum provides guidance to EPA Headquarters and Regional personnel regarding procedures to follow in implementing this direct referral agreement. Additional guidance will be issued as required.

II. PROCEDURES FOR CASES SUBJECT TO DIRECT REFERRAL

The attached agreement lists those categories of cases which can be referred directly by the Regional Administrator to DOJ. All other cases must continue to be reviewed by Headquarters OECM and will be referred by me to DOJ. Cases which contain counts which could be directly referred and counts which require Headquarters concurrence should be referred to EPA Headquarters. If you are uncertain whether a particular case may be directly referred, you should contact the appropriate Associate Enforcement Counsel for guidance.

Many of the procedures for direct referral cases are adequately explained in the September 29th agreement. However, there are some points I want to emphasize.

Referral packages should be addressed to Mr. F. Henry Habicht, II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington, D.C. 20530, Attention: Stephen D. Ramsey. The time limitations set forth in the agreement for review and initial disposition of the package will commence upon receipt of the package in the Land and Natural Resources Division, and not at the DOJ mailroom. Delivery of referral packages to the Land and Natural Resources Division will be expedited by use of express mail, which is not commingled with regular mail in DOJ's mailroom.

The contents of a referral package (either direct to DOJ or to EPA Headquarters) should contain three primary divisions: (1) a cover letter; (2) the litigation report; (3) the documentary file supporting the litigation report.

The cover letter should contain a summary of the following elements:

(a) identification of the proposed defendant(s);

(b) the statutes and regulations which are the basis for the proposed action against the defendant(s);

(c) a brief statement of the facts upon which the proposed action is based;

(d) proposed relief to be sought against the defendant(s);

(e) significant or precedential legal or factual issues;

(f) contacts with the defendant(s), including any previous administrative enforcement actions taken;

(g) lead Regional legal and technical personnel;

(h) any other aspect of the case which is significant and should be highlighted, including any extraordinary resource demands which the case may require.

A referral to DOJ or to Headquarters EPA is tantamount to a certification by the Region that it believes the case is sufficiently developed for the filing of a complaint, and that the Region is ready, willing and able to provide such legal and technical support as might be reasonably required to pursue the case through litigation.

As provided in the September 29, 1983, agreement, information copies of the referral package may be provided to the U.S. Attorney for the appropriate judicial district in which the proposed case may be filed. These information packages should be clearly labelled or stamped with the following words: "Advance Copy -- No Action Required At This Time". Also, information copies should be simultaneously provided to the appropriate OECM division at Headquarters. It is important that the directly referred cases be tracked in our case docket system and Headquarters oversight initiated. Copies of the referral cover letter will be provided to OECM's Office of Management Operations for inclusion in the automated case docket system when Headquarters informational copy is received at OECM's Correspondence Control Unit.

Department of Justice Responsibilities

DOJ shares our desire to handle these cases as expeditiously as possible. To that end, DOJ has agreed that, within thirty days of receipt of the package in the Land and Natural Resources Division at DOJ Headquarters, it will determine whether Headquarters DOJ or the U.S. Attorney will have the lead litigation responsibilities on a specific case. DOJ will notify the Regional offices directly of its determination in this regard, with a copy to the appropriate OECM division. Although USA offices will have lead responsibilities in many cases, the Land and Natural Resources Division will continue to have oversight and management responsibility for all cases. All complaints and consent decrees will continue to require the approval of the Assistant Attorney General for the division before the case can be filed or settled.

DOJ has reaffirmed the time frame of the Memorandum of Understanding, dated June 15, 1977, for the filing of cases within 60 days after receipt of the referral package, where possible. Where it is not possible, DOJ will advise the Region and Headquarters of any reasons for delays in filing of the case. However, when DOJ determines that the USA should have the lead responsibilities in a case, DOJ will forward the case to the USA within thirty days of referral to the extent feasible.

DOJ can request additional information from a Region on a case or return a case to a Region for further development. In order to avoid these delays, referral packages should be as complete as possible and the Regions should work closely with DOJ to develop referral packages.

The Deputy Administrator has expressed concern in the past on the number of cases returned to the Regions or declined by EPA or DOJ. I have assured the Deputy Administrator that I will closely track the number of cases declined by DOJ or returned to the Regions and the reasons for the declination or return as indications of whether direct referrals are a feasible method of handling EPA's judicial enforcement program.

Headquarters OECM Responsibilities

Although OECM will not formally concur on cases directly referred to DOJ, OECM will still review these packages and may offer comments to the Regions and DOJ. DOJ is free to request EPA Headquarters assistance on cases, as DOJ believes necessary. EPA Headquarters review will help to point out potential issues and pinpoint areas where future guidance should be developed. OECM will also be available as a consultant to both DOJ and the Regions on these cases. OECM will be available to address policy issues as they arise and, as resources permit, may be able to assist in case development or negotiation of these cases. Any request from a Regional office for Headquarters legal assistance should be in writing from the Regional Administrator to me, setting forth the reasons for the request and the type of assistance needed.

OECM also maintains an oversight responsibility for these cases. Therefore, Regional attorneys must report the status of these cases on a regular basis through use of the automated case docket. All information for the case required by the case docket system must appear in the docket and be updated in accordance with current guidance concerning the automated docket system.

Settlements in Cases Subject to Direct Referral

I will continue to approve and execute all settlements in enforcement cases, including those in cases subject to direct referral and amendments to consent decrees in these cases. This is necessary to ensure that Agency policies and enforcement activities are being uniformly and consistently applied nationwide. After the defendants have signed the settlement, the Regional Administrator should forward a copy of the settlement to me (or my designee) with a written analysis of the settlement and a request that the settlement be signed and referred for approval by the Assistant Attorney General for the Land and Natural Resources Division and for entry. The settlement will be reviewed by the appropriate OECM Enforcement Division for consistency with law and Agency policy.

Within twenty-one days from the date of receipt of the settlement by the appropriate OECM division, I will either sign the settlement and transmit it to DOJ with a request that the settlement be entered, or transmit a memorandum to the Regional Office explaining factors which justify postponement of referral of the package to DOJ, or return the package to the Region for changes necessary before the agreement can be signed.

Obviously, we want to avoid the necessity of communicating changes in Agency settlement positions to defendants, especially after they have signed a negotiated agreement. To avoid this, the Regional office should coordinate with Headquarters OECM and DOJ in development of settlement proposals. A copy of all draft settlement agreements should be transmitted by the Regional Counsel to the appropriate Associate Enforcement Counsel for review before it is presented to the defendant. The Associate Enforcement Counsel will coordinate review of the settlement with the Headquarters program office and respond to the Regional office, generally, within ten days of receipt of the draft. The Regional office should remain in contact with the Headquarters liaison staff attorney as negotiations progress. Failure to coordinate settlement development with appropriate Headquarters offices may result in rejection of a proposed settlement which has been approved by the defendant(s) and the Regional office.

I will also continue to concur in and forward to DOJ all requests for withdrawal of cases after referral. In addition, I will review and concur in any delay in the filing or prosecution of a case after referral. This is appropriate because cases which are referred to DOJ should be expeditiously litigated to conclusion, unless a settlement or some other extraordinary event justifies suspending court proceedings. The review of reasons for withdrawal or delay of cases after expenditure of Agency and DOJ resources is an important function of OECM oversight. Therefore, should the Regional offices desire to request withdrawal or delay of a case which has been referred to DOJ, a memorandum setting forth the reasons for such a request should be forwarded to the appropriate OECM division, where it will be reviewed and appropriate action recommended to me.

III. CASES NOT SUBJECT TO DIRECT REFERRAL

Those cases not subject to direct referral will be forwarded by the Regional Administrator to the Office of Enforcement and Compliance Monitoring for review prior to referral to DOJ. OECM has committed to a twenty-one day turn-around time for these cases. The twenty-one day review period starts when the referral is received by the appropriate OECM division.

Within this twenty-one day period, OECM will decide whether to refer the case to DOJ (OECM then has fourteen additional days to formally refer the case), to return the case to the Region for further development, or to request additional information from the Region.

Because of this short OECM review period, emphasis should be placed on developing complete referral packages so that delay occassioned by requests for additional information from the Region will be rare. OECM may refer a case to DOJ which lacks some information only if the referral can be supplemented with a minimum of time and effort by information available to the Regional office which can immediately be gathered and transmitted to DOJ. However, this practice is discouraged. In the few instances in which a case is referred to DOJ without all information attached, the information should, at a minimum, be centrally organized in the Regional office and the litigation report should analyze the completeness and substantive content of the information.

A referral will be returned to the Region, with an explanatory memorandum, if substantial information or further development is needed to complete the package. Therefore, the Regions should work closely with OECM attorneys to be certain referral packages contain all necessary information.

IV. MEASURING THE EFFICACY OF THE DIRECT REFERRAL AGREEMENT

I will use EPA's case docket system, OECM's quarterly Management Accountability reports and DOJ's responses to the referral packages to review the success of the direct referral agreement. OECM will review the quality of the litigation reports accompanying directly referred cases and discuss the general quality of referrals from each Regional office at case status meetings held periodically with DOJ's Environmental Enforcement Section.

If you have any questions concerning the procedures set out in this memorandum, please contact Richard Mays, Senior Enforcement Counsel, at FTS 382-4137.

Attachment

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

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, 1988 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;

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

(v) referrals to collect administrative spill penalties 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 no responsibility 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 routine oversight of the progress and management of the case consistent with applicable present and future guidance. OECM shall, however, retain final authority to approve settlements on behalf of EPA 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.

(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

RF.3

GM-18
RF. 3-1

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

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

NOV 12 1987

MEMORANDUM

SUBJECT: DOJ Procedures for Returning Certain Unfiled Cases to EPA for Further Processing

FROM: Jonathan Z. Cannon
Deputy Assistant Administrator for Civil Enforcement

TO: Deputy Regional Administrators, Regions I - X
Regional Counsels, Regions I - X

The Department of Justice (DOJ), Environmental Enforcement Section, is instituting new procedures to clear its enforcement docket of EPA cases that remain unfiled at DOJ for more than sixty days after referral (or beyond any additional period covered by a hold letter) while the region is negotiating a consent decree or compiling additional information to support filing. For record keeping purposes, rather than declining these referrals, DOJ will return these cases to the region for "further Agency processing" but will retain all files on these cases and continue to work with EPA towards resolving them.

The return of these cases will be made by a letter from the Chief of the Environmental Enforcement Section or the Environmental Defense Section, as warranted. This letter will be addressed to or copy the Deputy Assistant Administrator for Civil Enforcement, the appropriate Associate Enforcement Counsel, and the Regional Counsel. Cases returned to the region for further Agency processing will be identified in EPA's enforcement computer docket as "returned to region." OECM Compliance and Evaluation Branch Chief Ranelle Rae will insure appropriate treatment of these cases under SPMS.

Cases returned to the region under these circumstances would be reactivated by Justice if the region (1) provides the requested additional information necessary for filing; (2) forwards a signed

consent decree for processing by OECM and DOJ[1]; (3) notifies OECM and DOJ that the progress of the negotiations no longer justifies further delay in the filing of the complaint and requests that a complaint be filed; or (4) EPA resolves an internal policy conflict affecting the filing. The Agency would not have to prepare a new referral package or litigation report.[2] In cases in which a filing is requested because negotiations have been unproductive and there is no consent decree, concurrence by OECM is not required to reactivate the case. However, written notice of the region's request to reactivate should be given to OECM to insure proper tracking.

cc: David Buente
Margaret Strand
Associate Enforcement Counsels
Headquarters Program Office Enforcement Division Directors
Renelle Rae, OCAPO

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[1] The Region should keep the DOJ and OECM attorneys informed of the progress of negotiations and obtain the approval of DOJ and OECM before a written consent decree is transmitted to the defendant.

[2] If new violations had occurred or were discovered during the period of negotiations, the Region would need to provide DOJ with adequate evidence of such violations.

GM - 90
RF.3-2

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

NOV 16 1990

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: "Hold Action" Requests

FROM: James M. Strock
Assistant Administrator

TO: Regional Counsels

At the Regional Counsels meeting in Seattle, we discussed the problem of cases whose filing was being delayed by informal staff-level "hold action" requests. To deal with this problem, and strengthen our management of this process, Ed Reich sent to you on August 27 a draft of the new procedures for such requests. Based on your positive comments, and the support of the Department of Justice (see attached), I am adopting these procedures effective immediately.

Please assure that all Regional Counsel Staff are aware of, and comply with, these procedures.

Attachment

cc: Edward E. Reich
Scott Fulton
Associate Enforcement Counsels

Procedures for "Hold Action" Requests

1. "Hold action" requests (requests to delay filing of a complaint) are generally disfavored. When EPA refers a case to the Department of Justice, it should be with the intent to get it filed as quickly as possible, and the case should be fully prepared for filing. The Department seeks to file a complaint within 60 days of receipt of a referral.

2. Use of prereferral negotiation procedures in cases where pre-filing negotiations are desired should reduce the need for "hold action" requests.

3. The following procedures are adopted to better manage the "hold action" request process.

   A. Authority to request a hold on a referred civil case for up to sixty days is hereby delegated to the Regional Counsels. This authority is non-delegable, but may be exercised by an Acting Regional Counsel. This delegated authority is limited to circumstances in which additional time is needed either: (1) to pursue pre-filing settlement negotiations (where settlement is viable); (2) to allow for the addition of other counts or defendants or (3) where litigation practicalities, recognized by both the Regions and DOJ, militate in favor of a brief filing delay. The Regional Counsel can request more than one short hold if necessary but the cumulative time of all such holds for any case is strictly limited to sixty days.

   B. Any hold beyond 60 days, individually or cumulatively, can be requested only by the AA for Enforcement. The Regional Counsel would initiate this request, where appropriate, by preparing a letter to the Assistant Attorney General, Environment and Natural Resources Division for the signature of the Assistant Administrator for Enforcement and sending this letter and an appropriate transmittal memorandum to the AA.

PT.1-1
GM-21

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

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.

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, at a minimum, 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.

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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.)

PT. 1-2
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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Appendix (Con't)

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 portions 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 request 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

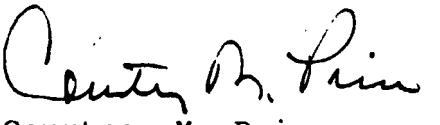
Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

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.



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Attachment

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 to 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

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 Methology 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. Adjustments in the $\pm$ 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 can 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.

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 reduction 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 the 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 violations under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these violations 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 uniform approaches for applying adjustment factors to arrive at an initial 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 adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the Policy on Civil Penalties.

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.

GM-88
PT.1-3

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

DEC 9 1987

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.

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,

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

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

PT. 1-4
GM #38

APR 15 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING.

MEMORANDUM

SUBJECT: Remittance of Fines and Civil Penalties

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

TO: Associate Enforcement Counsels
Director, Office of Compliance Analysis and Program Operations
Regional Counsels

This is to inform you of a new Agency remittance procedure instituted by the EPA Office of the Comptroller. The procedure applies to payments on all debts owed EPA, including civil penalties assessed by the Agency.

All EPA orders requiring payment of fines or civil penalties--or letters transmitting those orders--will include language consistent with the new procedure, which is described below.

EPA has adopted the Department of Treasury's Nationwide Lockbox System for receipt of payments on debts owed to the Agency. Under the Lockbox System, debtors are directed to remit payments to the Post Office Box address used by the designated EPA lockbox bank. Payments received at that "lockbox" are deposited immediately by the responsible bank, and the Agency receives a copy of the remittance and all accompanying documents within one working day. Users of the system have found that the lockbox has several benefits: Improved cash management, increased physical security for the checks, stronger internal controls, and a reduced administrative burden.

For your information, I have attached a listing that shows, for each region and for EPA Headquarters, the lockbox address to which payments of penalties owed the Agency will be sent. (Remittances for Superfund billings nationwide are sent to a single lockbox address.)

Chief Administrative Law Judge Edward Finch is directing all Agency administrative law judges and hearing clerks to implement this new procedure.

The new procedure supersedes the requirement in the Consolidated Rules of Practice (CROP), 40 CFR §22.31(b), that payment is to be forwarded directly to the regional hearing clerk. This paragraph in the CROP will be formally revised in the near future. Because this revision is procedural only, it may be implemented prior to the completion of formal rulemaking.

Under the new procedure, the servicing financial management offices will contact the appropriate hearing clerk as soon as they receive notification of a remittance, and will provide the hearing clerk with a copy of the check and accompanying documents. Accordingly, questions concerning the status of a civil penalty may be directed to either of those offices. In addition, the headquarters Financial Reports and Analysis Branch (FTS 382-5131) maintains a computerized record of civil penalty receivables and collections nationwide.

More detailed procedures for penalty collections are being developed by EPA's Office of the Comptroller. In the meantime, any questions concerning the lockbox procedure should be directed to your financial management office.

Attachment

cc: General Counsel
Edward B. Finch, Chief Administrative Law Judge
Assistant Administrators
Associate Administrators
Regional Administrators
C. Morgan Kinghorn, Comptroller

LOCKBOX DEPOSITORIES

REGION	LOCKBOX BANK	ADDRESS FOR REMITTING PAYMENT
Region 1 - Boston	Mellon Bank	EPA - Region 1 (Regional Hearing Clerk) P.O. Box 360197M Pittsburgh, PA 15251
Region 2 - New York	Mellon Bank	EPA - Region 2 (Regional Hearing Clerk) P.O. Box 360188M Pittsburgh, PA 15251
Region 3 - Philadelphia	Mellon Bank	EPA - Region 3 (Regional Hearing Clerk) P.O. Box 360515M Pittsburgh, PA 15251
Region 4 - Atlanta	The Citizens and Southern National Bank	EPA - Region 4 (Regional Hearing Clerk) P.O. Box 100142 Atlanta, GA 30384
Region 5 - Chicago	The First National Bank of Chicago	EPA - Region 5 (Regional Hearing Clerk) P.O. Box 70753 Chicago, IL 60673
Region 6 - Dallas	Mellon Bank	EPA - Region 6 (Regional Hearing Clerk) P.O. Box 360582M Pittsburgh, PA 15251
Region 7 - Kansas City	Mellon Bank	EPA - Region 7 (Regional Hearing Clerk) P.O. Box 360748M Pittsburgh, PA 15251
Region 8 - Denver	Mellon Bank	EPA - Region 8 (Regional Hearing Clerk) P.O. Box 360859M Pittsburgh, PA 15251

Region 9 - San Francisco	Mellon Bank	EPA - Region 9 (Regional Hearing Clerk) P.O. Box 360863M Pittsburgh, PA 15251
Region 10 - Seattle	Mellon Bank	EPA - Region 10 (Regional Hearing Clerk) P.O. Box 360903M Pittsburgh, PA 15251
Headquarters - Washington, D.C.	Mellon Bank	EPA - Washington (Hearing Clerk) P.O. Box 360277M Pittsburgh, PA 15251
All Superfund Billings	Mellon Bank	EPA - Superfund P.O. Box 371003M Pittsburgh, PA 15251

PT. 1-5
GM # 33

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

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

PT. 1-6
GM# 45

OCT 30 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Division of Penalties with State and Local Governments

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

TO: Regional Administrators
Associate Enforcement Counsels
Program Enforcement Division Directors
Regional Counsels

This memorandum provides guidance to Agency enforcement attorneys on the division of civil penalties with state and local governments, when appropriate. In his "Policy Framework for State/EPA Enforcement Agreements" of June 26, 1984, Deputy Administrator Al Alm stated that the EPA should arrange for penalties to accrue to states where permitted by law. This statement generated a number of inquiries from states and from the Regions. Both the states and the Regions were particularly interested in what factors EPA would consider in dividing penalties with state and local governments. In addition, the issue was raised in two recent cases, U.S. v Jones & Laughlin (N.D. Ohio) and U.S. v Georgia Pacific Corporation (M.D. La.). In each case, a state or local governmental entity requested a significant portion of the involved penalty. Consequently, OECM and DOJ jointly concluded that this policy was needed.

EPA generally encourages state and local participation in federal environmental enforcement actions. State and local entities may share in civil penalties that result from their participation, to the extent that penalty division is permitted by federal, state and local law, and is appropriate under the circumstances of the individual case. Penalty division advances federal enforcement goals by:

1) encouraging states to develop and maintain active enforcement programs, and

2) enhancing federal/state cooperation in environmental enforcement.

However, penalty division should be approached cautiously because of certain inherent concerns, including:

1) increased complexity in negotiations among the various parties, and the accompanying potential for federal/state disagreement over penalty division; and

2) compliance with the Miscellaneous Receipts Act, 31 U.S.C. §3302, which requires that funds properly payable to the United States must be paid to the U.S. Treasury. Thus any agreement on the division of penalties must be completed prior to issuance of and incorporated into a consent decree.

As in any other court-ordered assessment of penalties under the statutes administered by EPA, advance coordination and approval of penalty divisions with the Department of Justice is required. Similarly, the Department of Justice will not agree to any penalty divisions without my advance concurrence or that of my designee. In accordance with current Agency policy, advance copies of all consent decrees, including those involving penalty divisions, should be forwarded to the appropriate Associate Enforcement Counsel for review prior to commencement of negotiations.

The following factors should be considered in deciding if penalty division is appropriate:

1) The state or local government must have an independent claim under federal or state law that supports its entitlement to civil penalties. If the entire basis of the litigation is the federal enforcement action, then the entire penalty would be due to the federal government.

2) The state or local government must have the authority to seek civil penalties. If a state or local government is authorized to seek only limited civil penalties, it is ineligible to share in penalties beyond its statutory limit.

3) The state or local government must have participated actively in prosecuting the case. For example, the state or local government must have filed complaints and pleadings, asserted claims for penalties and been actively involved in both litigating the case and any negotiations that took place pursuant to the enforcement action.

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.

PT.2

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

DEC 16 1986

PT. 2-1
GM # 56

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Determining a Violator's Ability to Pay a Civil Penalty

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

TO: Assistant Administrators
Regional Administrators

I. PURPOSE

This guidance amplifies the discussion in the Uniform Civil Penalty Policy on how to adjust a penalty target figure when a violator claims paying a civil penalty would cause extreme financial hardship. This guidance was developed to meet the commitment made in the Uniform Civil Penalty Policy issued February 16, 1984, and in response to Regional Office requests for amplification of the "Framework for Statute-Specific Approaches to Penalty Assessments" (GM-22).

II. APPLICABILITY

This guidance applies to the calculation of civil penalties under medium-specific policies issued in accordance with the Uniform Civil Penalty Policy that EPA imposes on:

1. **For-profit** publicly or closely held entities; and

2. **For-profit** entities owned by not-for-profit entities.

This guidance does not apply to:

1. The calculation of civil penalties that EPA imposes on municipalities and other not-for-profit entities; or

2. A violator who files for bankruptcy or is in bankruptcy proceedings after EPA initiates the enforcement action.

III. SCOPE

This guidance only gives a general evaluation of the financial health of a violator and the possible effects of paying a civil penalty for the purpose of settlement negotiations. It describes when to apply the ability to pay factor and provides a methodology for applying the factor using a computer program, ABEL.

The guidance does not prescribe the amount by which EPA may reduce a civil penalty if the ability to pay factor is applied. The methodology in this guidance will not calculate a specific dollar amount that a violator can afford in civil penalties nor does it provide a way to predict whether paying a certain amount for a civil penalty will cause an already financially troubled firm to go out of business.

For an ability to pay analysis, EPA needs specific financial information from a violator (see section V). EPA includes the financial data in a litigation report only when the data are requested by the Department of Justice or offered by the violator.

IV. THE ABILITY TO PAY FACTOR

Under the Uniform Civil Penalty Policy, EPA may consider using the ability to pay factor to adjust a civil penalty when the assessment of a civil penalty may result in extreme financial hardship. Financial hardship cannot be expressed in absolute terms. Any limitation on a violator's ability to pay depends on how soon the payments must be made and what the violator has to give up to make the payments. A violator has several options for paying a civil penalty:

1. Use cash on hand;

2. Sell assets;

3. Increase debt by commercial borrowing;

4. Increase equity by selling stock;

5. Apply toward a civil penalty for a period of time what would otherwise be distributed as profit; or

6. Use internally-generated future cash flows by deferring or eliminating some planned future investments.

Each of these options will affect a for-profit violator's operations to some degree. EPA must decide whether to adjust

a proposed penalty amount and by how much, taking into account the gravity of the violation and other criteria in medium-specific guidance.

V. INFORMATION TO DETERMINE ABILITY TO PAY

If ability to pay is at issue, EPA may request from a violator any financial information the Agency needs to evaluate the violator's claim of extreme financial hardship. A violator who raises the issue has the burden of providing information to demonstrate extreme financial hardship.

Financial information to request from for-profit entities may include the most recent three to five years of:

1. Tax returns;

2. Balance sheets;

3. Income statements;

4. Statements of changes in financial position;

5. Statements of operations;

6. Retained earnings statements;

7. Loan applications, financing agreements, security agreements;

8. Annual reports; or

9. Business services, such as Compustat, Dun and Bradstreet, or Value Line.

Tax returns are the most complete and in the most consistent form for analysis. Tax returns also provide financial information in a format for direct input into ABEL. Annual reports are the most difficult to analyze and may require the assistance of a financial analyst.

When requesting information informally or through interrogatories or discovery, EPA should ask for three to five years of tax returns along with all other financial information that a violator regularly maintains as business records. If a violator refuses to give EPA the information to evaluate the violator's ability to pay, EPA should seek the full calculated penalty amount under the assumption that the violator can pay.

VI. CONFIDENTIALITY OF FINANCIAL INFORMATION

A violator can claim confidentiality for financial information submitted to EPA. In accordance with the regulations on confidential business information, 40 CFR 2.203, EPA must give notice to a violator that the violator may assert a business confidentiality claim. EPA's notice must contain the information required in 40 CFR 2.203. The notice must include a statement that if the violator submits financial information without a confidentiality claim, EPA may release the information without further notice to the violator.

The violator can make a claim of confidentiality for financial information in a cover letter accompanying the information. Information in published annual reports would not be entitled to confidential treatment.

VII. APPLYING THE ABILITY TO PAY FACTOR

Under the terms of a consent decree, a violator pays a civil penalty in addition to making any capital investment necessary to come into compliance. EPA considers the costs of attaining compliance when applying the ability to pay factor to a civil penalty calculation.

EPA determines whether to apply the ability to pay factor using a four-step process:

1. Determine, if possible, whether a violator plans to claim extreme financial hardship;

2. Determine whether criteria in the Uniform Civil Penalty Policy and medium-specific guidance require consideration of ability to pay;

3. Evaluate the overall financial health of a violator's operations by analyzing financial information provided by a violator or from other sources, such as business services; and

4. Project the probabilities of a violator having future internally-generated cash flows to evaluate how paying a proposed civil penalty may affect a violator's financial decisions.

VIII. FINANCIAL COMPUTER PROGRAM

EPA's computer program, ABEL, assists in evaluating the financial health of for-profit entities, based on the estimated strength of internally-generated cash flows. ABEL uses financial information on a violator to evaluate the overall financial health of a violator (step 3 above). The program uses standard

financial ratios to evaluate a violator's ability to borrow money and pay current and long-term operating expenses.

ABEL also projects the probable availability of future internally-generated cash flows to evaluate some of a violator's options for paying a civil penalty (step 4 above). EPA is developing a user's manual to provide self instruction in the use of ABEL in addition to the documentation and help aids in the computer program.

Exhibit 1 is a hypothetical use of ABEL to evaluate a violator's financial health. If the ABEL analysis indicates that a violator may not be able to finance a civil penalty with internally-generated cash flows, EPA should check all available financial information for other possible sources of cash flows for paying a civil penalty.

For example, in corporate tax returns, item 26 of Schedule A (cost of goods sold) sets forth deductions for entertaining, advertising, and professional dues. Schedule E shows the compensation of officers. In Schedule L (balance sheets), item 8 sets forth investments that may include certificates of deposit or money market funds. These types of assets and expenses do not directly affect operations and may vary considerably from year to year without adversely affecting the violator's operations. Because a civil penalty should be viewed as a one-time expense, these kinds of assets and expenses could be sources of cash for a civil penalty.

Using the sources of financial information from the example above, liquid assets such as certificates of deposit and money market funds could be used to pay a penalty. Expenses for advertising, entertaining, or professional dues could be reduced for a short period to pay a civil penalty. A corporate officer might even be willing to take less compensation for a short period. A combination of options like these may produce enough cash flow to pay a civil penalty without causing the violator extreme financial hardship in meeting operating expenses.

Attachment

EXHIBIT 1

Assumption that Violator is Financially Healthy

Assume that EPA has calculated an economic benefit for Company X of $140,000 and a gravity component of $110,000 for a total proposed penalty of $250,000. EPA presents the proposed penalty after several negotiation sessions, and the CEO for Company X then claims that the company cannot afford to pay that much. In support of the claim, the CEO produces accounting statements showing that the firm paid no income taxes for the previous three years and had less than $100,000 in net income for those years.

EPA requests tax returns and other financial information for the most recent three years of Company X. EPA enters the tax return information in ABEL and receives the output in Attachment A. The Phase 1 analysis from ABEL is not dispositive of the issue, so EPA performs a Phase 2 analysis.

The Phase 2 analysis indicates that Company X can finance a civil penalty of $250,000 from internally-generated cash flows, even after planning for $400,000 in pollution control investments and $50,000 for annual O&M expenses. The table in Phase 2 shows a 99 percent probability that Company X will have future cash flows with a net present value of $370,061 available to pay a civil penalty.

Assumption that Violator Is Not Financially Healthy

Assume again that EPA has calculated a total penalty amount of $250,000. Company Z claims extreme financial hardship. If the ABEL analysis indicates that Company Z would have little probability of generating $250,000 in cash flows during the next five years, EPA would go back to the financial data supplied by the violator and look for items that may indicate a source of cash, including loans outstanding to corporate officers, entertainment expense deductions, company cars or airplanes, amount of compensation for corporate officers, compensation for relatives of corporate officers who do not have clearly defined duties.

If the ABEL Phase 1 analysis indicates that Company Z may have additional debt capacity (debt/equity ratio), EPA would look in the tax returns for the amount of long term debt the violator is carrying and analyze any loan applications the violator submitted in response to EPA's request for financial information. Frequently, firms can borrow additional money for operations and free up cash flow to pay civil penalties.

Even a firm on the verge of bankruptcy may choose to settle an enforcement action with a civil penalty provision in the consent decree. EPA should always seek some civil penalty. ABEL and other financial analysis provide a range of penalty amounts for the purpose of settlement negotiations.

DATA FOR ABEL EXAMPLE

ANALYSIS DATE: NOVEMBER 24, 1986

DEBT EQUITY RATIOS

1985	0.58	A RATIO LESS THAN 1.5 INDICATES THE FIRM MAY HAVE ADDITIONAL DEBT CAPACITY
1984	2.91	A RATIO GREATER THAN 1.5 INDICATES THE FIRM MAY HAVE DIFFICULTY BORROWING
1983	1.59	A RATIO GREATER THAN 1.5 INDICATES THE FIRM MAY HAVE DIFFICULTY BORROWING

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

CURRENT RATIOS

1985	1.10	A RATIO LESS THAN 2.0 MAY INDICATE LIQUIDITY PROBLEMS
1984	1.20	A RATIO LESS THAN 2.0 MAY INDICATE LIQUIDITY PROBLEMS
1983	1.03	A RATIO LESS THAN 2.0 MAY INDICATE LIQUIDITY PROBLEMS

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

BEAVER'S RATIOS

1985	0.22	A RATIO GREATER THAN 0.20 INDICATES HEALTHY SOLVENCY
1984	0.20	A RATIO BETWEEN 0.10 AND 0.20 IS INDETERMINATE
1983	0.30	A RATIO GREATER THAN 0.20 INDICATES HEALTHY SOLVENCY

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

TIMES INTEREST EARNED

1985	1.02	A RATIO LESS THAN 2.0 MAY INDICATE SOLVENCY PROBLEMS
1984	1.64	A RATIO LESS THAN 2.0 MAY INDICATE SOLVENCY PROBLEMS
1983	1.30	A RATIO LESS THAN 2.0 MAY INDICATE SOLVENCY PROBLEMS

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

ABEL INTERPRETS THE OVERALL RESULTS OF THE FINANCIAL RATIOS AS FOLLOWS:

ALTHOUGH THE FIRM MAY FACE CURRENT CASH (OR LIQUIDITY) CONSTRAINTS, ITS LONG-TERM PROSPECTS ARE GOOD AND IT SHOULD BE ABLE TO FINANCE PENALTIES AND INVESTMENTS. A PHASE TWO ANALYSIS IS RECOMMENDED.

ABEL NOTES THAT THE FIRM'S MOST RECENT DEBT-EQUITY RATIO IS SUBSTANTIALLY BETTER THAN ITS HISTORIC AVERAGE.

ABEL NOTES THAT THE FIRM'S MOST RECENT TIMES INTEREST EARNED IS SUBSTANTIALLY POORER THAN ITS HISTORIC AVERAGE.

DO YOU WISH TO CONTINUE WITH THE PHASE TWO ANALYSIS (Y OR N)?

DO YOU WISH TO ANALYZE A CIVIL PENALTY (P) OR A NEW INVESTMENT (I)?

PLEASE INPUT THE INITIAL PROPOSED SETTLEMENT PENALTY AMOUNT IN CURRENT DOLLARS (E.G., 5000); IF THERE IS NO TARGETED PENALTY, ENTER 0.

250000

BEFORE PROCEEDING WITH THE CIVIL PENALTY ANALYSIS, ABEL WILL REQUIRE CERTAIN ADDITIONAL INFORMATION REGARDING ANY INVESTMENTS WHICH MAY BE REQUIRED IN ORDER FOR THE FIRM TO ACHIEVE COMPLIANCE.

ENTER THE DEPRECIABLE CAPITAL COST OF THE NEW INVESTMENT (E.G., 1000.00); IF THERE IS NO NEW INVESTMENT, ENTER 0

200000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN (E.G., 1984)

1985

ENTER ANY NON-DEPRECIABLE, NON-TAX DEDUCTIBLE COSTS ASSOCIATED WITH THE NEW INVESTMENT. IF THERE IS NO COST THAT MEETS THIS REQUIREMENT PLEASE ENTER 0.

100000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN (E.G., 1984)

1985

ENTER ANY NON-DEPRECIABLE, BUT TAX
DEDUCTIBLE COSTS ASSOCIATED WITH THE NEW INVESTMENT.
IF THERE IS NO COST THAT MEETS THIS REQUIREMENT
PLEASE ENTER 0.

100000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN
(E.G., 1984)

1985

ENTER THE ANNUAL O&M COST OF THE NEW INVESTMENT.
IF THERE IS NO O&M COST, ENTER 0

50000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN
(E.G., 1984)

1985

THE FOLLOWING STANDARD VALUES ARE USED IN THIS SECTION OF
ABEL:
1. REINVESTMENT RATE = 0.0
2. NOMINAL DISCOUNT RATE =13.69%
3. INFLATION RATE = 4.41%
4. MARGINAL INCOME TAX RATE =50.00%
5. INVESTMENT TAX CREDIT =10.00%

DO YOU WISH TO HAVE THESE ITEMS EXPLAINED (Y OR N)?

N

DO YOU WISH TO CHANGE ANY OF THESE INPUTS (Y OR N)?

N

ABEL IS READY TO PROVIDE OUTPUT. YOU HAVE THE CHOICE
OF THREE OUTPUT OPTIONS:

1. PRINT ONLY THE POSSIBILITY OF THE PRESENT VALUE
OF THE FIRM'S FIVE YEAR PROJECTED CASH FLOW EXCEEDING
EITHER AN INITIAL PROPOSED SETTLEMENT PENALTY OR A REQUIRED
INVESTMENT.

2. PRINT A TABLE SHOWING THE NET AVAILABLE CASH FLOW
WITH AN ANALYSIS OF THE TABLE.

3. PRINT A DETAILED TABLE SHOWING THE COMPONENTS OF THE
FIRM'S CASH FLOWS. THIS OPTION MAY BE HELPFUL TO FINANCIAL
ANALYSTS BUT IS NOT RECOMMENDED FOR MOST USERS.

PLEASE ENTER YOUR CHOICE (1,2 OR 3).

2

THERE IS A 99.9 % CHANCE THAT THE FIRM CAN FINANCE THE PROPOSED SETTLEMENT PENALTY OF $ 250000.00BASED ON THE STRENGTH OF INTERNALLY GENERATED CASH FLOWS FOR THE NEXT FIVE YEARS. THE ANALYSIS AT THIS POINT DOES NOT DEMONSTRATE CONCLUSIVELY THE FIRM'S ABILITY TO PAY THE PROPOSED PENALTY. TO MAKE A DETERMINATION, ONE MUST LOOK AT THE FIRM'S OTHER OPTIONS, INCLUDING INCREASING EQUITY, SELLING ASSETS, OR LEVERAGING UNLEVERED ASSETS.

ABEL IS READY TO BEGIN OUTPUT. IF YOU WISH, PLEASE POSITION YOUR PRINTER TO THE START OF A NEW PAGE. PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

DATA FOR ABEL EXAMPLE

ANALYSIS DATE: NOVEMBER 24, 1986

PROBABILITY	NET PRESENT VALUE AVAILABLE	EQUIVALENT ANNUAL CHARGE
50.0	716944.31	280891.31
60.0	679230.25	266115.37
70.0	638832.69	250288.00
80.0	591428.31	231715.62
90.0	525839.50	206018.06
95.0	471726.56	184817.56
99.0	370061.81	144986.37

THE ABOVE DATA ARE PRESENTED IN CURRENT-YEAR DOLLARS

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

THIS TABLE SHOWS THE PROBABILITY THAT THE VIOLATOR CAN FINANCE CIVIL PENALTIES OF A GIVEN AMOUNT. FOR EXAMPLE, THERE IS A 95.00 % CHANCE OF FINANCING A LUMP SUM PENALTY OF UP TO $ 471726.56 BASED ON THE STRENGTHS OF PROJECTED INTERNALLY GENERATED CASH FLOWS. THIS IS EQUIVALENT TO ALLOWING THE FIRM TO MAKE THREE EQUAL ANNUAL PAYMENTS OF $ 184817.56. THE ANALYSIS AT THIS POINT DOES NOT DEMONSTRATE CONCLUSIVELY THE FIRM'S ABILITY TO PAY THE PROPOSED PENALTY. TO MAKE A DETERMINATION, ONE MUST LOOK AT THE FIRM'S OTHER OPTIONS, INCLUDING INCREASING EQUITY, SELLING ASSETS, OR LEVERAGING UNLEVERED ASSETS.

DO YOU WISH TO PERFORM THE PHASE TWO ANALYSIS FOR THIS CASE AGAIN (Y OR N)?

N

DO YOU WISH TO ANALYZE ANOTHER CASE (Y OR N)?

N

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

PT.2-2
GM-77

FEB 12 1991

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Policy on the Use of Supplemental Environmental Projects in EPA Settlements

FROM: James M. Strock
Assistant Administrator

TO: Regional Administrators
Deputy Regional Administrators
Regional Counsels
Regional Program Division Directors
Assistant Administrators
General Counsel
Program Compliance Directors
Associate Enforcement Counsels

This memorandum transmits the new Agency policy on the use of "supplemental environmental projects" in Agency consent orders and decrees. It amends GM-22, "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (issued February 16, 1984), by replacing and superseding the section on "Alternative Payments" on pages 24-27 of that document. Please note that this policy amends only the section on "alternative payments" and that all other sections of GM-22 remain in effect.

In the past, the Agency has used several terms to describe substantive settlement conditions (usually projects or activities), other than those required as injunctive relief to correct the underlying violation, which the defendant/respondent may undertake in exchange for a reduction in the amount of the assessed civil penalty. In GM-22, these conditions are called "alternative payments." They also have periodically been referred to as "mitigation projects" or "environmentally beneficial expenditures." The Agency's past experience with these projects has sometimes been problematic, in part because GM-22 did not fully describe the kinds of projects that are appropriate for penalty reduction, the situations under which they should be considered, and the amount by which the penalty demand can be reduced.

The Agency believes that these projects, if carefully crafted and executed, provide useful environmental benefits beyond what can be secured solely through injunctive relief. We particularly believe they can be a useful vehicle in promoting pollution prevention. Last year, the Office of Enforcement explored with the Environmental Management Counsel major issues relating to the use of "alternative payments," and since then has worked closely with the Environment and Natural Resources Division of the Department of Justice to develop this new policy on the systematic use of these projects. This policy applies to both administrative and judicial settlements.

In order to provide a common term of reference, this policy replaces the term "alternative payment" with the general term "supplemental environmental project." The policy describes five specific categories of projects which the Agency will consider as supplemental environmental projects in a settlement: pollution prevention; pollution reduction; environmental restoration; environmental auditing; and public awareness. It also provides a number of specific examples of supplemental projects.

I am confident that this new policy on "supplemental environmental projects" will enable the Agency to secure additional protection of human health and the environment while avoiding the difficulties which occasionally characterized their past use. This policy takes effect immediately, and media-specific policies will be modified to conform to this policy as quickly as possible. Any questions you have regarding its implementation should be addressed to Ed Reich, the Deputy Assistant Administrator for Enforcement or to Scott Fulton, Senior Enforcement Counsel.

Attachment

cc: Deputy Administrator
Associate Deputy Administrator

EPA POLICY ON THE USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS IN ENFORCEMENT SETTLEMENTS

February 12, 1991

Supplemental Environmental Projects

A. Introduction

In settlement of environmental enforcement cases, the United States will insist upon terms which require defendants to achieve and maintain compliance with Federal environmental laws and regulations. In certain instances, additional relief in the form of projects remediating the adverse public health or environmental consequences of the violations at issue may be included in the settlement to offset the effects of the particular violation which prompted the suit. As part of the settlement, the size of the final assessed penalty may reflect the commitment of the defendant/respondent to undertake environmentally beneficial expenditures ("Supplemental Environmental Projects").

Even when such conditions serve as a basis for considering a Supplemental Environmental Project, the Agency's penalty policies will still require the assessment of a substantial monetary penalty according to criteria described in A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (GM-22), generally at a level which captures the defendant/respondent's economic benefit of noncompliance plus some appreciable portion of the gravity component of the penalty. Each administrative settlement in which a "horizontal" Supplemental Environmental Project or substitute performance is proposed (see below) must be approved by the Assistant Administrator for Enforcement, and, where required by the Agency's delegations policy, the media Assistant Administrator. Judicial settlements, including any of the projects described herein, will continue to require the approval of the Assistant Administrator for Enforcement and also be approved by the Assistant Attorney General for the Environment and Natural Resources Division.

EPA will expand its approach to Supplemental Environmental Projects while also maintaining a nexus (relationship) between the original violation and the supplemental project. EPA may approve a supplemental project so long as that project furthers the Agency's statutory mandates to clean up the environment and deter violations of the law.[1] Accordingly, supplemental projects

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[1] A supplemental project cannot be used to resolve violations at a facility other than the facility or facilities which are the subject of the enforcement action. This would run counter to deterrence objectives, since it would effectively give a company a penalty "break" for violations at one facility for undertaking what amounts to legally required compliance efforts at another facility. Such a scenario would operate to reward recalcitrance, poor-management practices, and non-compliance.

may be considered if: (1) violations are corrected through actions to ensure future compliance; (2) deterrence objectives are served by payment of a substantial monetary penalty as discussed above; and (3) there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to be derived from the supplemental project.

All supplemental projects must improve the injured environment or reduce the total risk burden posed to public health or the environment by the identified violations. The five categories of permissible supplemental activities are pollution prevention, pollution reduction, environmental restoration, environmental auditing projects, and public awareness projects which are directly related to addressing compliance problems within the industry within which the violation took place. EPA negotiators should make it clear to a defendant/respondent interested in proposing a supplemental project that the Agency is looking only for these types of projects (cf. section F, below).

Under no circumstances will a defendant/respondent be given additional time to correct the violation and return to compliance in exchange for the conduct of a supplemental project.

B. Categories of Supplemental Environmental Projects

Five categories of projects will be considered as potential Supplemental Environmental Projects, subject to meeting the additional criteria described in succeeding sections.

1. Pollution Prevention Projects

Consistent with the Agency's forthcoming Pollution Prevention Policy Statement and Pollution Prevention Strategy, a pollution prevention project substantially reduces or prevents the generation or creation of pollutants through use reduction (i.e., by changing industrial processes, or by substituting different fuels or materials) or through application of closed-loop processes. A project which substantially reduces the discharge of generated pollutants through innovative recycling technologies may be considered a pollution prevention project if the pollutants are kept out of the environment in perpetuity.

2. Pollution Reduction Projects

A pollution reduction project is defined as a project which goes substantially beyond compliance with discharge limitations to further reduce the amount of pollution that would otherwise be discharged into the environment. Examples include a project that reduces the discharge of pollutants through more effective end-of-pipe or stack removal technologies; through improved operation

and maintenance; or recycling of residuals at the end of the pipe.[2]

Sometimes an acceptable pollution reduction project may encompass an "accelerated compliance project". For instance, assuming there is a statutory or regulatory schedule for pollution phaseout or reduction (or is likely to be proposed in the foreseeable future, e.g., an upcoming rulemaking), if a defendant/respondent proposes to complete a phaseout or reduction at least 24 months ahead of time, and such proposal for accelerated compliance can be demonstrated to result in significant pollution reduction (i.e., one can objectively quantify a substantial amount of pollution reduction due to the accelerated compliance) then such a proposal may proceed to be evaluated according to the rest of the appropriateness criteria below. In addition, if the defendant/respondent substitutes another substance for the one being phased out, he has the burden to demonstrate that the substance is non-polluting, otherwise no supplemental environmental project will be allowed and, indeed, additional liability may accrue.

3. Projects Remediating Adverse Public Health or Environmental Consequences (Environmental Restoration Projects)

An environmental restoration project is defined as a project that not only repairs the damage done to the environment because of the violation, but which goes beyond repair to enhance the environment in the vicinity of the violating facility.

4. Environmental Auditing Projects

Environmental Auditing that represents general good business practices are not acceptable supplemental projects under this policy (cf. Section E).[3] However, such a project may be considered by the Agency if the defendant/respondent undertakes additional auditing practices designed to seek corrections to

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[2] Where the obligation to reduce the pollution is already effective, or is subject to an "as soon as practicable" or comparable standard, a proposal to further reduce pollution would not fulfill the definition of a pollution reduction project, and would not be appropriate.

[3] It should be noted that the Agency has the authority to require an environmental audit as an element of injunctive relief when it deems it appropriate given the fact pattern surrounding the violation subject to the usual limits on the scope of injunctive relief.

existing management and/or environmental practices whose deficiencies appear to be contributing to recurring or potential violations. These other potential violations may encompass not only the violating facility, but other facilities owned and operated by the defendant/respondent, in order to identify, and correct as necessary, management or environmental practices that could lead to recurring or future violations of the type which are the basis for the enforcement action.[4]

Audit projects which fall within the scope of this policy can be justified as furthering the Agency's legitimate goal of encouraging compliance with and avoiding, as well as detecting, violation of federal environmental laws and regulations. Such audits will not, however, be approved as a supplemental project in order to deal with similar, obvious violations at other facilities.

5. Enforcement-Related Environmental Public Awareness Projects

These projects are defined as publications, broadcasts, or seminars which underscore for the regulated community the importance of complying with environmental laws or disseminate technical information about the means of complying with environmental laws. Permissible public awareness projects may included sponsoring industry-wide seminars directly related to correcting widespread or prevalent violations within an industry, e.g., a media campaign funded by the violator to discourage fuel switching and tampering with automobile pollution control equipment or one which calls for the defendant/respondent to organize a conference or sponsor a series of public service announcements describing how violations were corrected at a facility through the use of innovative technology and how similar facilities could also implement these production changes.

Public Awareness Projects directly serve Agency deterrence objectives and contribute indirectly to Agency enforcement efforts. Though they are not subject to the nexus requirement applicable to other supplemental environmental projects, they must be related to the type of violations which are/were the subject of the underlying lawsuit. Defendants/respondents who fund or implement a public awareness project must also agree to publicly state in a prominent manner that the project was undertaken as part of the settlement of a lawsuit brought by the Agency or a State. These projects will be closely scrutinized to ensure that they fulfill the legitimate objectives of this policy in all respects.

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[4] Of course, this requirement is subject to the qualifications of footnote 1.

6. Projects Not Allowed as Supplemental Projects

Several types of projects, which have been proposed in the past, would no longer be approveable Supplemental Environmental Projects. Examples of projects that would not be eligible include:

1. general educational or environmental awareness-raising projects (e.g., sponsoring public seminars about, or inviting local schools to tour, the environmental controls at a facility; promoting recycling in a community);

2. contribution to research at a college or university concerning the environmental area of noncompliance or concerning any other area of environmental study;

3. a project unrelated to the enforcement action, but otherwise beneficial to the community e.g., contribute to local charity).

C. "Nexus" (Relationship) of Supplemental Environmental Project to the Violation

The categories of Supplemental Environmental Projects described above (except for Public Awareness Projects) may be considered if there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to be derived from the type of supplemental project. For example, the "nexus" between the violation and an environmental restoration project exists when it remediates injury caused by the same pollutant at the same facility giving rise to the violation. Such projects must further the Agency's mission as defined by appropriate statutory mandates, including the purpose sections of the various statutes under which EPA operates. The Agency will evaluate whether the required "nexus" between the pollutant discharge violation and the project exists.

1. Requirements for Remediation Projects

Examples of circumstances presenting an appropriate nexus include:

a. A project requiring the purchase of wetlands which then act to purge pollutants unlawfully discharged in receiving waters. In this example, EPA will evaluate whether the required "nexus" between the pollutant discharge violations and the wetlands to be purchased can be established. EPA will evaluate the nexus between the project and the violation in terms of both

geography and the pollution treatment benefits of the wetlands.

b. A project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges, in order to replace the environmental services lost by reason of such injury.

c. A "restoration" project, such as a stream sediment characterization or remediation program to determine the extent and nature of pollution caused by the violation and to formulate and implement a plan for remediating sediment near the facility. Such a stream sediment characterization or restoration project, if obtainable as injunctive relief pursuant to the statutory provisions of the Clean Water Act in the particular case, would not be approveable as a supplemental project.

2. Nexus for Pollution Prevention/Pollution Reduction/ Environmental Restoration/Environmental Auditing Projects

The "nexus" for pollution prevention, pollution reduction, environmental restoration and environmental auditing projects may either be vertical or horizontal, as described below.

a. Vertical "Nexus"

A "vertical" nexus exists when the supplemental project operates to reduce pollutant loadings to a given environmental medium to offset earlier excess loadings of the same pollutant in the same medium which were created by the violation in question. Even if the violations are corrected by reducing pollutant loadings to the levels required by law, further reductions may be warranted in order to alleviate the risk to the environment or public health caused by past excess loadings. Typically, such projects follow a violation back into the manufacturing process to address the root cause of the pollution. Such reductions may be obtained from the source responsible for the violation or, in appropriate cases, may be obtained from another source, either upstream, up gradient or upwind of the responsible source.

For example, if pollutants were discharged in violation of the Clean Water Act from a facility at a certain point along a river, an acceptable pollution reduction project would be to reduce discharges of that same pollutant at an upstream facility on the same river. Another classic example of a "vertical" pollution prevention activity is the alteration of a production process at a facility which handles a portion of the manufacturing process antecedent to that which caused the

violation of the regulatory requirement in a way that yields reductions or total elimination of the residual pollutant discharges to the environmental media assaulted by the violation. Both of these examples present the necessary nexus between the violation and the supplemental project.

b. Horizontal "Nexus"

A "horizontal" nexus exists when the supplemental project involves either (a) relief for different media at a given facility or b) relief for the same medium at different facilities. The nexus between supplemental projects in this category and the violation must be carefully scrutinized. The nexus will be met only if the supplemental project would reduce the overall public health or environmental risk posed by the facility responsible for the violation or enhances the prospects for reducing or eliminating the likelihood of future violations substantially similar to those which are the basis for the enforcement action. Approval of such projects is appropriate only where the terms of the settlement insure that the defendant/respondent will be subject to required injunctive relief prescribed by the compliance and deterrence policies stated in the various Acts and their implementing regulations. In those circumstances, the Agency believes the required nexus to the statutory goals has been met.

Following are examples of approveable projects demonstrating a "horizontal" nexus to the violation:

1. Violations of the Resource Conservation and Recovery Act (RCRA) or the Clean Water Act may have exposed the neighboring community to increased health risks because of drinking water contamination. In addition to correcting these violations, it may be appropriate to reduce toxic air emissions from the same facility in order to compensate for the excess health risk to the community which resulted from the RCRA or CWA violations.

2. A supplemental project is proposed which reduces pollutant discharges at a defendant/respondent's other facilities within the same air quality basin or water shed as at the facility which violated legal requirements applicable to releases of the same pollutant. In this case, the overall supplemental project would be designed to reduce the overall health or environmental risk posed by related operations to the environment or to the health of residents in the same geographic vicinity by reducing pollutant discharges to the air basin or watershed and to compensate for past excess discharges.

3. A supplemental project is proposed which reduces pollutant discharges at a defendant/respondent's other (non-violating) facility(ies). Such a project would be approveable where the violating and non-violating facilities are engaged in the same production activities and use the same production processes, where appreciable risks of violations and legal requirements applicable to releases of that same pollutant substantially similar to those at the violating facility are posed by the non-violating facility(ies), and where the defendant/respondent can establish that significant economies of scale would be achieved by incorporating pollution prevention process changes at both the violating and non-violating facilities. Alternatively, the settlement could call for the defendant/respondent to substitute input chemicals across all such facilities (e.g., replace higher toxic solvents with lower toxic solvents at all paint manufacturing plants) or to reduce the emissions loadings of particular emissions at all such facilities as part of a NESHAPS settlement. Such projects would, therefore, reduce the overall health or environmental risk posed by such operations to the environment or to the health of residents in the same geographic vicinity.

4. In settlement of a Toxic Substances Control Act (TSCA) PMN (premanufacture notification) violation for manufacturing a polymer without providing formal advance notice at a facility, the defendant/respondent could establish a closed loop recycling system to reduce the amount of that facility's product manufacturing waste which must be sent to a RCRA Subtitle C landfill. Operating the facility in violation of TSCA created a risk of unwarranted health or environmental injury. If TSCA penalty and injunction requirements have been met, then the supplemental project could be justified on the grounds that it would compensate for this unwarranted risk by reducing the overall health or environmental risk presented by the facility.

After the project category and "nexus" criteria have been met, a potential supplemental project must also meet the criteria described in the following sections, below. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before a supplemental project may be accepted.

D. <u>Status of the Enforcement Action/Compliance History of Defendant/Respondent</u>

Any defendant/respondent against whom the Agency has taken an enforcement action may propose to undertake a supplemental project at any time prior to resolution of the action, although

the Agency should consider both the status of the litigation/ administrative action and the resources that have been committed to it before deciding whether to accept it. In addition, the respondent's enforcement history and capability to successfully complete the project must be examined during evaluation of a supplemental project proposal.

The Agency negotiators must also consider whether the defendant/respondent has the technical and economic resources needed to successfully implement the supplemental project. In addition, a respondent who is a repeat offender may be a less appropriate respondent from which to receive and evaluate a supplemental project proposal than a first time violator.

E. Main Beneficiary of a Supplemental Environmental Project

The Federal Government's sole interest in considering supplemental projects is to ameliorate the adverse public health and/or environmental impacts of violations. Projects are not intended to reward the defendant/respondent for undertaking activities which are obviously in his economic self-interest (e.g., update or modernize a plant to become more competitive). Therefore, as a general rule, these projects will usually not be approved when they represent a "sound business practice" , i.e., capital expenditures or management improvements for which the Federal negotiators may reasonably conclude that the regulated entity, rather than the public, is likely to receive the substantial share of the benefits which accrue from it.

The only exception to the prohibition against acceptance of a supplemental project which represents a "sound business practice" is for a pollution prevention project. Although a pollution prevention project can be viewed as a "sound business practice" since (by definition) it is designed both to make production more efficient and reduce the likelihood of noncompliance, it also has the advantage of potentially providing significant long-term environmental and health benefits to the public. Therefore, the "sound business practice" limitation will be waived only for pollution prevention projects if the Federal negotiators decide, after due consideration and upon a clear demonstration by the defendant/respondent as to what the public health and/or environmental benefits would be, that those benefits are so substantial that the public interest would be best served by providing additional incentives to undertake the project.

F. Extent to Which the Final Assessed Penalty can Reflect a Supplemental Environmental Project

Although supplemental projects may directly fulfill EPA's

goal of protecting and restoring the environment, there is an important countervailing enforcement goal that penalties should have the strongest possible deterrent effect upon the regulated community. Moreover, the Agency's penalty policies require the assessment of a substantial monetary penalty according to criteria described in "Implementing EPA's Policy on Civil Penalties" (GM-22), generally at a level which captures the defendant/respondent's economic benefit[5] of noncompliance plus some appreciable portion of the gravity component of the penalty.[6]

In addition, 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. EPA should calculate the net present after tax value of the supplemental project at the time that the assessed penalty is being calculated. If a supplemental project is approved, a portion of the gravity component of the penalty may be mitigated by an amount up to the net present after-tax cost of the supplemental project, depending on the level of environmental benefits to the public.

G. Supplemental Environmental Projects for Studies

Supplemental Environmental Projects for studies will not be allowed without an accompanying commitment to implement the results. First, little or no environmental benefit may result in the absence of implementation. Second, it is also quite possible that this type of project is one which the violator could reasonably be expected to do as a "sound business practice".

Pollution prevention, pollution reduction and environmental restoration studies, as well as environmental audits, are defined narrowly for purposes of meeting Supplemental Environmental Project policy guidelines. They will only be eligible as supplemental projects if they are a part of an Agency-approved set of actions to reduce, prevent, or ameliorate the effects of pollution at the respondent's facility (e.g., a comprehensive

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[5] Where a violation is found which did not confer a significant economic benefit, e.g. a failure to notify, the settlement must still include payment of a penalty which at least captures a portion of the proposed gravity component.

[6] If a defendant/respondent can establish through use of documents and affidavits sworn under penalty of perjury that it cannot afford to pay the civil penalty derived from use of the appropriate civil penalty policy, the Agency will consider entering into an "ability to pay settlement" for less than the economic benefit of non-compliance.

waste minimization or emissions reduction program). The amount attributable to a supplemental project may include the costs of necessary studies. Nonetheless, a respondent's offer to conduct a study, without an accompanying commitment to implement the results, will not be eligible for penalty reduction. In considering the applicability of a proposed study, the Agency negotiators will consider the likelihood of success, i.e., substantial pollution reduction or prevention, in making a determination.

While studies are not by themselves eligible supplemental environmental projects, to encourage pollution prevention, EPA will make a limited exception to this general approach for pollution prevention studies. Such studies will be eligible for a penalty offset when they are part of an Agency-approved set of pollution prevention activities at a facility and are designed to correct the violation (e.g., a recycling feasibility study, waste minimization opportunity assessment, or waste reduction audit).

The size of the penalty offset may include the costs of the studies. The commitment to conduct the study also must be tangible (e.g., the project completed on schedule, etc.). The U.S. must have the authority to review the completed study to decide whether it is technologically and/or economically feasible to implement the results. Should the U.S. decide that the results can be implemented but the defendant/ respondent is unwilling to do so, the "offset" for the pollution prevention study will be rescinded and the final assessed penalty must be paid in full (cf. Section J. on payment assurance).

H. Substitute Performance of Supplemental Environmental Projects

A supplemental environmental project which meets the other criteria of this policy may consist in part or whole of substitute performance by an entity or entities other than the violator. Such a substitute must bear a reasonable geographical or media-specific relationship to the underlying violation. This substitute performance must be assured through agreements which are enforceable by EPA, and may consist of agreements for emissions limits, process design or input changes, natural resource preservation or conservation easements, or other means of achieving compliance with the terms of the proposed supplemental environmental project. In the event a violator proposes acceptable substitute performance, EPA will credit the violator with an amount up to the net after tax cost of the project as if it were being performed by the violator. The violator, will, however, remain responsible for the performance of the project or the payment of the penalty offset if substitute performance is not completed.

I. Level of Concurrence

There may be practical problems in administering cross-media and/or cross-regional projects. Staff allocations for oversight requirements will necessarily increase, as will the level of resources needed for tracking purposes since tracking a supplemental project is more complex than tracking whether a payment is made. In addition, the likelihood of new issues emerging due to noncompliance with the conditions of the project is significant.

The extent of coordination/concurrence for a supplemental project which involved more than one Region will vary according to the nature and complexity of the proposal. All affected Regions must be notified about a supplemental project which would have only a modest impact on facilities in those Regions (e.g., a commitment to undertake an environmental audit at all of the defendant/respondent's facilities across the country). However, all affected Regions would have to concur in a proposed supplemental project which would involve significant oversight resources or activities (e.g., a pollution prevention activity which required major construction or process changes). Also, all affected EPA parties must be consulted on their respective oversight responsibilities. As stated previously, judicial settlements, including any of the projects described herein, will continue to require the approval of the Assistant Administrator for Enforcement and also be approved by the Assistant Attorney General for the Environment and Natural Resources Division.

Each proposed administrative settlement which has a "horizontal" nexus to the violation or which involves substitute performance also must be approved by the Assistant Administrator for Enforcement and, where required by the Agency's delegations policy, the media Assistant Administrator.

J. Oversight/Tracking

Supplemental Environmental Projects may require third-party oversight. In such cases, these oversight costs should be borne by the respondent, and it must agree as a part of the settlement to pay for an independent, third-party auditor to monitor the status of the supplemental project. The auditor will be required by the settlement to submit specific periodic reports, including a final report evaluating the success or failure of the supplemental project, and the degree to which the project satisfied these guidelines. All reports must be submitted to EPA. Upon request, EPA may provide copies of the reports, or copies of portions of the reports, to the respondent. The timing and amount of reports released to the defendant/respondent shall be at EPA's sole discretion.

Obviously, a certain amount of government oversight will be required to monitor compliance with the terms of an agreement that contains a supplemental project. "Horizontal" pollution prevention or pollution reduction supplemental projects which involve more than one Region (e.g., production changes at more than one facility) may require additional oversight, and the estimated amount of time and resources required for effective oversight is another criteria which the negotiators should use to determine whether to include the project in the settlement agreement.

The consent order or decree shall specify overall timeliness and milestones to be met in implementing the supplemental project. If the defendant/respondent does not comply satisfactorily with the terms of the supplemental project, he shall be liable for the amount by which the assessed penalty was reduced (with applicable interest). The consent order or decree should contain a mechanism for assuring prompt payment, e.g., through stipulated penalties consistent with the other sections of this policy or, if appropriate, the posting of a bond (in the amount by which the assessed penalty was reduced) to be forfeited if the supplemental project is not fully implemented.

K. Documenting Approval Of Supplemental Environmental Project Proposals

In all cases where supplemental projects are approved as part of the settlement, the case file should contain documentation showing that each of the appropriateness criteria listed above have been met in that particular case. A copy of the evaluation and approval document shall be sent to the Office of Enforcement and the National Compliance Officer concurrent with the approval of the Regional Administrator, or other authorized approving official, and to the Assistant Attorney General for the Environment and Natural Resources Division.

L. Coverage of this Policy

This document revises and supercedes the appropriate sections of the Agency's general civil penalty policy (GM-22), and constitutes Agency policy relating to supplemental environmental projects. Media-specific penalty policies will be revised as soon as possible to be consistent with it. During this interim period, in the event of any conflict between this general policy and a media-specific policy, this policy is controlling.

PT. 2-3
GM #51

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

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 the date of settlement.

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

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 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 =	$ 500000 1986 DOLL
3.	ONE TIME NONDEPRECIABLE EXPENDITURE =	$ 0
4.	ANNUAL O&M EXPENSE=	$ 7000 1986 DOLL
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 YEA
9.	INVESTMENT TAX CREDIT RATE =	10.00
10.	MARGINAL INCOME TAX RATE =	50.0
11.	ANNUAL INFLATION RATE=	6.00
12.	DISCOUNT RATE =	10.00
13.	AMOUNT OF LOW INTEREST FINANCING	0

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	$	358172
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 YE
9.	INVESTMENT TAX CREDIT RATE =	10.0
10.	MARGINAL INCOME TAX RATE=	50.0
11.	ANNUAL INFLATION RATE=	6.00
12.	DISCOUNT RATE =	18.00 %
13.	AMOUNT OF LOW INTEREST FINANCING =	$ 0

GM-75

PT.3-1

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

JAN 24 1990

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Use of Stipulated Penalties in EPA Settlement Agreements

FROM: James M. Strock JMS
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

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 pér 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.

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 Divisions Directors

Mary T. Smith, Acting Director
Field Operations and Support Division
Office of Mobile Sources

David Buente, Chief
Environmental Enforcement Section
U.S. Department of Justice

Associate Enforcement Counsels

Workgroup Members

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

January 11, 1988

PT. 3-2
GM #67

MEMORANDUM

SUBJECT: Procedures for Assessing Stipulated Penalties

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

TO: Regional Administrators
Regional Enforcement Contacts
Regional Counsels
Regional Program Division Directors
Program Office Enforcement Directors

The purpose of this memorandum is to clarify procedures for assessing stipulated penalties for consent decree violations.

As discussed in my August 23, 1986 memo on Expanded Civil Judicial Referral Procedures, the direct referral process will be followed to enforce the terms of a judicial decree for payment of penalties agreed to as part of the settlement on the original violation. Stipulated penalties (i.e. penalties due and owing because of a violation of the consent decree terms) are not covered under the above direct referral procedures. The procedure described below will be used for enforcing the payment of stipulated penalties.

Unless the consent decree specifies otherwise, letters to defendants demanding payment of stipulated penalties should be sent by DOJ. The following procedures apply for enlisting DOJ's assistance:

- The Region sends a letter to DOJ (copy to OECM) requesting DOJ to issue a demand letter. The letter to DOJ should contain summary information sufficient to apprise DOJ of relevant facts, issues and proposed solutions.

- DOJ copies the Region and OECM with any response to the demand letter.

- o If the response is unsatisfactory, the Region will send a direct referral package to DOJ (copy to OECM). The referral package should request that DOJ enforce against the unresolved consent decree violations, include any relevant new information arising since the demand letter request, and specify the extent of the relief which EPA wishes to pursue.

- o DOJ takes appropriate action to enforce the original consent decree with full participation by the Region.

- o When the defendant pays stipulated penalties to the Federal government without receiving a demand letter (e.g. if the consent decree establishes stipulated penalties which are automatically due when certain events happen and the defendant pays such sums to EPA or the U.S. Attorneys Office), the Region should notify the appropriate Associate Enforcement Counsel of that fact in writing or by telephone. OECM is currently developing procedures for tracking and collecting civil penalties which may change the notification requirement in the future.

SPMS CONSENT DECREE TRACKING MEASURE

Under the SPMS consent decree measure, a demand letter is not considered a "formal enforcement response." A penalty payment must be received or a direct referral package sent to DOJ (copy to OECM) before the violation is considered addressed. Where a demand letter has been sent, the Region should report the decree in the "in violation with action planned" category. When a direct referral is sent to DOJ to address the non-payment of a stipulated penalty, the Region should report the decree in the "in violation with action commenced" category.

If you have any questions regarding these procedures, please contact Lisa Oyler, Compliance Evaluation Branch, OECM, at 475-6113.

cc: Roger J. Marzulla, DOJ
David Buente, DOJ
Gerald A. Bryan, OCAPO
Thomas Gallagher, NEIC
Deputy Assistant Administrators, OECM
Associate Enforcement Counsels, OECM

ENFORCEMENT SENSITIVE AND CONFIDENTIAL

August 1, 1993

MEMORANDUM

Subject: Economic Benefit from Non-Compliance: An Analysis of Judicial and Administrative Interpretation

From: Craig Spencer, Student Intern*
Program Development and Training Branch

Matthew Azrael, Student Intern
Program Development and Training Branch

To: Jonathan Libber, BEN & ABEL Coordinator
Program Development and Training Branch

Government personnel may contact Jonathan Libber for a copy of this document. He may be reached at (202) 564-6011.

*Jason Grinnell, another law student, played a key role in updating this memorandum.

PT 4-2

ENFORCEMENT SENSITIVE AND CONFIDENTIAL

August 1, 1993

MEMORANDUM

Subject: Ability to Pay -- For-Profit Entities: An Analysis of Judicial and Administrative Interpretation

From: Craig Spencer, Student Intern*
Program Development and Training Branch

Matthew Azrael, Student Intern
Program Development and Training Branch

To: Jonathan Libber, BEN & ABEL Coordinator
Program Development and Training Branch

Government personnel may contact Jonathan Libber for a copy of this document. He may be reached at (202) 564-6011.

*Jason Grinnell, another law student, played a key role in updating this memorandum.

CL.1

CL.1-1

U.S. Environmental Protection Agency
Contractor Listing Procedures and Guidance

Office of Enforcement

Contractor Listing Program

May 1993

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APPENDIX

Attachment O: Sample Regional Administrator's Recommendation to Remove Facility From the EPA List of Violating Facilities, Exxon Bayway Refinery, Bayonne Terminal and Inter-Refinery Pipeline, November 6, 1991. [DELIBERATIVE PROCESS DOCUMENT: DO NOT RELEASE]

Attachment P: Sample Regional Administrator's Recommendation Not to Remove Facility From the EPA List of Violating Facilities, East Honolulu Community Service Treatment Plant, March 11, 1993. [DELIBERATIVE PROCESS DOCUMENT: DO NOT RELEASE]

Attachment Q: Assistant Administrator's Decision, Valmont Industries, Inc., January 12, 1990.

Attachment R: Case Examiner's Decision, Valmont Industries, Inc., June 5, 1990.

Attachment S: General Counsel's Decision, Big Apple Wrecking Corporation, August 15, 1991.

Attachment T: Assistant Administrator's Decision, The Bill L. Walters Companies, May 11, 1991.

Attachment U: Assistant Administrator's Determination Regarding Petition For Determination of Independent Facilities, Exxon Corporation (Exxon Bayway), September 30, 1991.

Attachment V: Assistant Administrator's Determination, East Honolulu Community Service Treatment Plant, April 19, 1993.

Attachment W: "EPA's Contractor Listing Program: A List You Do Not Want To Make," Jonathan S. Cole, Federal Facilities Environmental Journal, Summer 1991.

Attachment X: "Contractor Listing: EPA's Hidden Enforcement Program,", Jonathan S. Cole, Journal of Environmental Permitting, Winter 1992/93.

Attachment XX: "Independent Verification That Requirements For Removal Have Been Met in Mandatory Listing Cases," from EPA Contractor Listing Protocols.

Attachment YY: "Definition, for Purposes of Removal, of the 'Condition' That Gives Rise to Mandatory Listing," from EPA Contractor Listing Protocols.

Attachment Z: Discretionary Listing Caselaw:

a. United States v. Interlake, Inc., 432 F. Supp. 987 (N.D. Ill. 1977);

b. United States v. U.S. Steel Corp., 10 E.R.C. 1751 (N.D. Ill. 1977);

c. United States v. Del Monte de Puerto Rico, 9 E.R.C. 1495 (D.P.R. 1976).

LIST OF ABBREVIATIONS

The following abbreviations are used in the Contractor Listing Procedures.

AA	Assistant Administrator for Enforcement
CAA	Clean Air Act
CE	Case Examiner
CFR	Code of Federal Regulations
CID	Criminal Investigation Division, Ofc. of Criminal Enforcement
CLP	Contractor Listing Program
CWA	Clean Water Act
DCE	Director of Civil Enforcement
DOCE	Director, Office of Criminal Enforcement
EC(s)	Enforcement Counsel for Air or Water, or Both
ECS-DOJ	Environmental Crimes Section, Department of Justice
EPA	Environmental Protection Agency
GSA	General Services Administration
List	The EPA List of Violating Facilities
LO	Listing Official
OCAPO	Office of Compliance Analysis and Program Operations
OCE	Office of Criminal Enforcement
OGC	Office of General Counsel
OPA	Office of Public Affairs
ORC	Office of Regional Counsel
RA	Regional Administrator

Contractor Listing Procedures and Guidance

I. INTRODUCTION

This document sets forth the procedures that the Contractor Listing Program (CLP) and the Listing Official (LO), or his or her designee, use in administering the contractor listing legal authority. (Clean Air Act § 306, 42 U.S.C. § 7606; Clean Water Act § 508, 33 U.S.C. § 1368; Executive Order 11738; and 40 CFR Part 15). It addresses both listing and removal procedures and identifies the nature of the assistance that will be required from all EPA offices supporting the listing program.

This document includes a summary of the legal authority for the contractor listing program, including the statutory and regulatory authorities governing the contractor listing program. It contains a detailed description of the procedures followed by the LO in processing mandatory listing actions and discretionary recommendations to list. It also provides a detailed description of the procedures the LO follows when processing automatic removals and requests for removal from the EPA List of Violating Facilities (the List). It describes the essential roles of EPA staff in the Region and at Headquarters in carrying out the listing program. It also describes the procedures for publishing confirmations of listing and removal from the List in the GSA "Lists of Parties Excluded From Federal Procurement and Nonprocurement Programs."

In addition to describing in detail the procedures to be followed when processing listing and removal actions, this document contains numerous documents which can be used as guidance when drafting the documents called for under the CLP's procedures. The attachments also include the federal regulations governing the listing program and copies of policy documents and case decisions pertaining to the listing program.

Although this document provides detailed procedures for processing listing and removal actions, it does not attempt to prescribe the circumstances under which listing should be used as an enforcement tool.

For questions or further information on any aspect of the contractor listing program, please call the CLP at (202) 260-8781.

II. BACKGROUND AND LEGAL AUTHORITY

The Clean Air Act (CAA), Section 306, and the Clean Water Act (CWA), Section 508, as implemented by Executive Order 11738 [38 FR 25161, September 12, 1973] and 40 CFR Part 15, automatically prohibit facilities from being used in the performance of any Federal contract, grant or loan (including subcontracts, subgrants, and subloans), where a person who owned,

* The policies and procedures set forth 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. EPA reserves the right to act at variance with these policies and procedures, and to amend them at any time without public notice.

leased, or supervised the facility at the time of the violation has been convicted under CWA § 309(c) or CAA § 113(c). The 1990 CAA amendments added a sentence to CAA § 306. This sentence provided explicit authority for the Administrator to list additional facilities of a convicted company. This amendment is a formal legislative statement of authority which already existed under EPA policy and EPA's inherent contract administration authority. This amendment is discussed in more detail below. The legal authorities also permit EPA to list facilities on the basis of certain civil violations of the CWA or CAA, under its discretionary listing authority.

Two executive orders were signed subsequent to passage of the CWA and CAA. Both are substantially the same and reiterate the language of statutes, as well as stating the policy behind the contractor listing provisions, delegating authority to the Administrator, requiring cooperation from each Federal Agency, and stating the duty of the Administrator to circulate the List of Violating Facilities and to issue rules that are, to the maximum extent feasible, uniform with respect to the listing of CAA and CWA violators.

Pursuant to Executive Order 11738, EPA promulgated 40 CFR Part 15 (40 Fed. Reg. 17124) to provide procedures for ensuring that Executive branch agencies conduct their procurement and assistance programs in accordance with the President's responsibility for ensuring compliance with CAA and CWA standards. On February 5, 1979, EPA appended to these regulation a procedural statement explaining the decisionmaking process within EPA relating to placement of facilities on the list. Revision and amendments to the contractor listing regulations were promulgated on September 5, 1985 (50 FR 36188). Draft amendments and revisions have been prepared pursuant to the 1990 Clean Air Act Amendments, and promulgation of these is scheduled for mid-1993.

Several sections of the legislative history of the CWA and CAA have specific references to contractor listing. Some of the more significant language in the legislative history is as follows:

1. "This section [CWA § 508] would be limited, whenever feasible and reasonable to contracts affecting only the facility not in compliance, rather than an entire corporate entity or operations division. There might be cases where a plant could not participate in a Federal contract due to a violation but another plant owned by the same company might bid and transfer other work to the first plant. This type of action would circumvent the intent of this provision. In this case, the company's second facility should also be barred from bidding until the first plant returns to compliance... " Legislative history of Federal Water Pollution Control Act, 1972, Senate Report, p.3749.

2. "It [the amendment] also addresses situations where determining the definition of the facility is problematic - such as asbestos demolition and renovation companies who move their operations from building to building. This amendment clarifies that in such situations EPA can define the facility to be the office of the convicted company ... Discretionary rather than mandatory listing of additional facilities provides the flexibility necessary for the EPA to consider variations in the structure of violating industries." CAA Amendments, Report on Environment and Public Works, United States Senate, December 20, 1989. pp. 371-372.

Facilities prohibited from receiving federal contracts or assistance under this authority are placed on the Environmental Protection Agency's (EPA) List of Violating Facilities. The statutes, their legislative histories, the Executive Order and the regulations identify two purposes for the listing program: (1) to protect the government's proprietary interest; and (2) to ensure compliance with the CAA and CWA.

Facilities owned, leased, or operated (at the time of the violation) by persons[2] found guilty of certain criminal convictions are subject to automatic (i.e., mandatory) listing upon conviction. Facilities are subject to discretionary listing, after following procedures contained in the regulations, as a result of certain civil and criminal violations of the CAA or CWA, or state or local criminal convictions for violating clean air or clean water standards. Although CAA and CWA violations which have been the subject of criminal or civil enforcement activities are the basis for listing a facility, listing is an administrative function which is independent of the underlying enforcement action. Listing provides EPA with an effective administrative tool to obtain compliance with the CAA and CWA where an administrative or judicial action identified in 40 CFR § 15.11(a)(1) - (6) has already been initiated against a facility, or where its owner, operator, or supervisor has been convicted of an offense under CAA § 113(c) or CWA § 309(c).

III. LISTING PROCEDURES

A. Computation of Time. Unless otherwise stated, in computing any period of time prescribed or allowed in the protocols, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or a legal holiday, the stated time period shall be extended to include the next business day. Failure to take action in a timely fashion may result in the loss of rights, termination of a listing or removal action, or a decision to proceed with the listing or removal action without the participation of the nonresponding party.

B. Mandatory Listing. The facility that is the source of the CAA or CWA violations is automatically placed on the List if it is owned, leased, or supervised (at the time of the violation) by a person convicted under CAA § 113(c) or CWA § 309(c), for those violations. § 15.10[3] Even though a facility is automatically listed if it is the source of a CAA or CWA violation that leads to the conviction of the owner, operator, or supervisor of the facility, the LO follows the steps listed below to process the mandatory listing action.

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[2] Throughout this document, references to "persons" are understood to include all entities defined as a "person" in 40 CFR § 15.4.

[3] Throughout this document, references to the regulations are to 40 CFR Part 15, unless otherwise indicated. Thus, 40 CFR § 15.10 is cited as § 15.10.

1. Maintain File of Pending Criminal Cases. The Contractor Listing Program (CLP), with assistance from the Office of Criminal Enforcement, Criminal Investigation Division (CID), develops and maintains a compilation of the indictments, informations, and other charging documents that evidence potential criminal charges that may lead to mandatory listing of a facility.

2. Obtain Notice of Convictions. It is the responsibility of CID to notify the LO of criminal convictions, see § 15.13(a), and to supply copies of the informations, indictments, or other charging documents, and judgments of conviction, to the LO. Notice of the conviction should be sent to the LO prior to sentencing, even though the judgment of conviction may not be filed until some time later. The CLP may also request case documents directly, e.g., from the court or from the U.S. Attorney's Office.

3. Review the Convictions. The LO determines whether listing is warranted under the regulations by reviewing the documents associated with the conviction to ensure that: (a) the conviction occurred under CAA § 113(c) or CWA § 309(c), § 15.10.; and (b) that the facility to be listed was owned, leased or supervised, at the time of the violation giving rise to the conviction, by the person convicted under CAA § 113(c) of CWA § 309(c), § 15.10.

   These determinations may require the LO to review the following documentation, obtained with the assistance of CID: (1) documentation of the charges filed against the defendant, as evidenced by the signed and dated indictment, information, or other charging document(s) (original and as finally amended); (2) documentation of the circumstances of the conviction, as evidenced by court-filed documents, such as the signed and dated final plea agreement(s), dismissal(s) of counts, and sentencing report(s) and memoranda; (3) documentation that the final conviction or guilty plea has been entered by the court; (4) documentation that the sentence has been imposed, as evidenced by court documents, such as the signed and dated final Judgment and Commitment/Probation Order; and (5) documentation evidencing the underlying technical data, evidence of violation or corrective action, or other relevant information.

4. Notify Facility and Public of Listing. Once the LO determines that a facility meets the criteria for mandatory listing (see § III.D. below ("Defining The Violating Facility")), the LO:

a. Places the facility on the List as of the date of conviction (i.e., the date of the judgment order of conviction);

b. Assigns a docket number to the facility and places the case on the listing docket;

c. Notifies the Assistant Administrator for Enforcement (AA); the Director, OCAPO; the Director of Civil Enforcement (DCE); the Director, Office of Criminal Enforcement (DOCE); the owner, operator, or supervisor of the facility; the Enforcement Counsel (EC) for Air, or Water, or both; the Regional Administrator, Office or Regional Counsel, and regional program office; the Chief Counsel, Environmental Crimes Section, Department of Justice (ECS-DOJ); the Director, Criminal Investigation Division, Office of Criminal Enforcement (CID); and the Assistant United States Attorney (AUSA) in the criminal action. § 15.16(a);

d. Notifies the General Services Administration (GSA) that the facility is to be added to the "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs."

e. Provides the EPA Office of Public Affairs (OPA) with the information necessary to prepare a press release or press advisory,[4] where appropriate.

5. EPA Guidance On Implementation of Mandatory Listing

a. Summary of Memorandum

On August 8, 1984, the Assistant Administrator for Enforcement issued a memorandum setting forth policy and procedures for Mandatory Listing. The main points of this memorandum are:

1. Facilities owned, operated or supervised by convicted violators of the CWA or CAA will be automatically placed on the List of Violating Facilities.

[4] Use of Press Releases. The LO works with the regional press office and EPA Office of Public Affairs to see that press releases concerning listing actions are issued, as appropriate, to the national press, local media in the area where the violations occurred, and the trade press of the affected industry. (See *Guidance on Implementing the Discretionary Contractor Listing Program* (November 26, 1986, GM-53).

2. Only criminal convictions in Federal court will result in listing. State court convictions do not result in mandatory listing[5].

3. Verification of conviction (entry of guilty verdict or guilty plea) by the Associate Enforcement Counsel for Criminal Enforcement (now the Director of Criminal Enforcement) triggers listing. (NOTE: This policy has been superseded; signing of the judgment order triggers listing, and the date of entry of judgment is the date upon which the automatic statutory ineligibility of the violating facility is effective.)

4. Removal procedures

b. Discussion

As noted above, OE's policy is to confirm a mandatory listing when a judgment order of conviction has been signed in a criminal case. This policy was instituted because a guilty plea or verdict can be modified prior to sentencing and entry of judgment, affecting the consequent listing. The current practice ensures that listing decisions, including determining what is the "condition giving rise to the conviction," are made with reference to the appropriate final judicial order in the criminal case.

The procedures outlined in the 1984 memorandum have been, for all practical purposes, superseded by the contractor listing protocols (adopted October 1987, revised 1991), although the concepts, except as noted above, remain valid. Other features of the CLP as set forth in this memorandum have also been changed: confirmations of listing and removal are no longer published in the Federal Register. The GSA list is used instead. The CLP receives notices of convictions from the CID upon receipt by the CID.

EPA recognizes the potential for confusion within the Federal government contracting community if issuance of a Confirmation of Listing is delayed, for example, because the CLP did not receive timely notification of a criminal conviction in a case that results in mandatory listing. Consequently, it is important for the CLP to be notified of pending cases as soon as possible, prior to conviction, so that it can be prepared to issue prompt confirmation of listing after the conviction. The CLP has recently established procedures by which other

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[5] However, state court convictions may be the basis for discretionary listing, or for debarment or suspension by EPA's Office of Grants and Debarment, Debarment and Suspension Division, pursuant to the Federal Acquisition Regulation, 48 CFR Part 9, or EPA's Nonprocurement Debarment and Suspension Regulation, 40 CFR Part 32. For information on these authorities contact the EPA Debarment and Suspension Division (OARM, Office of Grants and Debarment)(Mail Code PM-216F) at (202) 260-8025.

Federal investigative agencies, e.g., the Federal Bureau of Investigation and the Naval Investigative Service, will provide to the CLP information about CAA and CWA criminal cases in which EPA is not involved.

It is EPA's intention that the AA will make necessary listing decisions (e.g., in certain cases, what is the violating facility), within 10 days of the CLP's receipt of a Judgment Order of conviction. In some cases, however, it will be necessary, due to the complexity of the case, to obtain additional information concerning the violation that led to the criminal conviction and consequent mandatory listing. In such cases, it is EPA's intention that the AA will make necessary listing decisions within 10 days after the CLP has the information necessary to make such determinations.

6. Plea Agreements.

The statutory ineligibility that results from a criminal conviction under CAA § 306 or CWA § 508 is automatic and is self-executing. It is a Congressionally mandated restriction on using appropriated Federal funds for contracts, grants or loans which are to be performed using a facility which was owned, operated or supervised at the time of the violation, by a convicted CAA or CWA violator.

Neither EPA nor other Federal authorities (e.g., U.S. Attorneys) may agree not to apply the mandatory prohibition of CAA § 306 and CWA § 508. Defendants in criminal cases may attempt to seek such assurances from the U.S. Attorney's Office, or from EPA. It is EPA's position that such assurances should not be given, nor should EPA agree to substitute a charge which will not result in mandatory listing for a CAA or CWA criminal charge (if justified by the facts) which would result in mandatory listing (for example, if a Clean Water Act criminal charge is readily provable, then it is inappropriate to agree to substitute a Rivers and Harbors Act (Refuse Act) count in place of the CWA charge, to avoid mandatory listing.) Plea agreements also should not contain assurances as to either the timing or the result of a request for removal from the List of Violating Facilities in cases involving mandatory listing.

The CLP is available for consultation in cases involving attempts by defendants to negotiate mandatory listing issues. The CLP has drafted model plea agreement language which may be used in such cases.

C. Discretionary Listing. The discretionary listing process begins with the filing of a recommendation to list a facility. A facility will be listed under the discretionary listing process if EPA determines that the facility has a record of continuing or recurring noncompliance with clean air or clean water standards, and has been the subject of one of the enforcement activities described in §

15.11(a)(1)-(6). See Guidance on Implementing the Discretionary Contractor Listing Program, § III (November 26, 1986)(GM-53), for guidance on selecting discretionary listing cases.

A recommendation to list may be submitted by a "recommending person", defined in § 15.4 as the "Regional Administrator, the Associate Enforcement Counsel for Air or the Associate Enforcement Counsel for Water or their successors, the Assistant Administrator for Air and Radiation or the Assistant Administrator for Water or their successors, a Governor, or a member of the public. The Regions will have primary responsibility for selecting cases for EPA-initiated listing actions. The Enforcement Counsels (ECs) for Air and Water and the Assistant Administrators for Air and Water will rarely initiate listing recommendations.

Each recommendation to list will be processed by representatives from the Office of Regional Counsel, the regional program office, the EC for Air or Water, or both, and the LO. The regional representatives will act as advocates for the Region's position on the recommendation to list. The representatives of the ECs will act as counsel to both the Region and the LO. The adjudicative function will be conducted by the LO assigned to the case. Each representative will be responsible for ensuring that his or her office completes its responsibilities under the Protocols in a timely fashion, and that all necessary reviews by policy level officials within his or her office are obtained.

Under the regulations, a recommending person may withdraw a recommendation to list at any time before the conclusion of the listing proceeding. A recommending person is obligated to withdraw the recommendation to list if he or she determines that the conditions which gave rise to the recommendation to list have been corrected, or the facility is on an EPA-approved plan for compliance which will ensure that the conditions that gave rise to the recommendation to list will be corrected, § 15.11(d). See also paragraph III.C.7., pp. 16-17). Thus, as a practical matter, if the facility corrects fully the condition which is the basis for the listing action, and the recommending person withdraws the recommendation to list, the listing process is terminated. The steps for processing a discretionary listing action are set forth below.

1. LO Receives Recommendation To List. The discretionary listing process begins when the LO receives a recommendation to list, § 15.11(b). It is anticipated that most recommendations will be prepared by the Regions and that they will have lead responsibility for preparing EPA-initiated recommendations. The Guidance on Implementing the Discretionary Contractor Listing Program (November 26, 1986)(GM-53), includes model discretionary listing recommendations based on both administrative and judicial enforcement actions. The Regions will also act as the

Agency's primary contact for processing State or citizen initiated listing recommendations.

2. Review Recommendation. As soon as a recommendation to list is received, the LO transmits a copy to the appropriate ECs, and, if the Region did not submit the recommendation to list, the LO transmits the recommendation to list to the Regional Administrator (RA), Office of Regional Counsel (ORC), and regional program office, to review and submit comments on the recommendation to the LO within 10 days.

During the same period, the LO reviews the recommendation to list, § 15.11(c), to ensure that it contains: (a) the name, address, and telephone number of the person filing the recommendation, § 15.11(b)(1); (b) a description of the facility, including its name and address, § 15.11(b)(2); (c) a description of the alleged continuing or recurring noncompliance, and supporting data, § 15.11(b)(3); and (d) a description of the criminal, civil, or administrative action or conviction which is pertinent to the facility and the alleged continuing or recurring violations, § 15.11(b)(4).

If, after reviewing the recommendation to list and the comments on the recommendation, the LO determines that additional documentation is needed, the LO returns the recommendation to the recommending person, identifying in writing the specific information required. Resubmitted recommendations must be processed according to the procedures for processing an original recommendation, as set forth in paragraph III.C. (p. 8 et seq.).

3. LO Briefs AA On Listing Recommendation. When the LO is satisfied that the recommendation to list meets the requirements of the regulations, the LO does the following:

a. The LO Dockets The Case. The LO assigns a docket number to the facility and places the case on the listing docket.

b. The LO Prepares A Briefing Memorandum. The LO prepares a briefing memorandum and transmits it and a copy of the recommendation to list to the AA. The briefing memorandum should: (i) summarize the status of the listing recommendation; (ii) review for the AA the pros and cons of proceeding with the listing action at this point, based upon the comments received from the Region and the EC(s); and (iii) offer the AA the opportunity to have an oral briefing on the listing recommendation. If an oral briefing is requested, the LO schedules the briefing and arranges

for representatives of the EC(s), OCE and OCAPO to be present, and offers the RA, ORC, and regional program offices an opportunity to be present, in person or by telephone. At the briefing, staff will advise the AA of the basis for the recommendation to list.

4. AA Declines To List. If, after being briefed ont he listing recommendation, the AA decides to decline the recommendation to list, the LO does the following:

   a. The LO Prepares A Statement Of Reasons. The LO prepares a brief statement for the AA's signature, explaining the AA's reasons for the decision not to proceed with the listing action. This statement will be included in the record of the listing action and will be provided to the recommending person and the owner, operator, or supervisor of the facility. Consequently, the statement should exclude all information which the Agency would seek to withhold under the Enforcement Document Release Guidelines, GM-43 (September 15, 1985).

   b. The LO Submits The Statement For Headquarters Review. The LO submits the draft statement for review by (1) the EC(s) for Air, Water, or both; (2) the DCE; and, to prevent conflict with potential criminal actions, (4) the DOCE.

   c. The LO Transmits The Statement To The AA To Sign. At the conclusion of the review by appropriate Headquarters staff, the LO transmits the statement to the AA for his signature.

   d. The LO Notifies Owner. Once the AA has approved and signed the statement of reasons, the LO notifies the owner, operator, or supervisor of the facility that a recommendation to list the facility has been filed, and encloses a copy of the recommendation to list and the statement of reasons for not proceeding with the recommendation with the notice letter. The LO also sends a copy of the notice letter and enclosures to the recommending person.

5. AA Decides To Proceed With Proposed Listing, LO Notifies Facility and Prepares Draft Determination. After the LO has briefed the AA on the recommendation to list and the AA has decided to proceed with the recommendation to list, the LO does the following:

   a. The LO Notifies Owner. The LO notifies the owner, operator, or supervisor of the facility that a recommendation to list the facility

has been filed and encloses a copy of the recommendation to list with the notice letter. The notice will also advise the owner, operator, or supervisor that he or she may request a listing proceeding before a Case Examiner (CE) to determine the propriety of the proposed listing, § 15.12(a). A copy of this notice is sent to the listing case staff representatives and to the recommending person.

b. The LO Transmits The Recommendation To The Region. The LO prepares a transmittal memorandum, and transmits to ORC the recommendation to list and any comments received from the AA, EC(s), RA, and regional program office, requesting that ORC prepare and return to the LO within 15 days, a detailed summary of the documentation regarding the recommendation to list, and copies of any documents necessary for the LO to prepare a draft determination. Unless the Regional Administrator or Deputy Regional Administrator have previously reviewed the recommendation to list, one of these officials must acknowledge in writing that he or she has reviewed the recommendation to list and has attached any comments to the recommendation.

c. The LO Drafts The Determination. Upon receipt from the Region of the recommendation to list and summary of documentation regarding the recommendation, and after the 30-day period for requesting a listing proceeding has expired, the LO drafts a determination for the AA's signature, and revises the summary of documentation to include any materials available at Headquarters.

d. The LO Submits The Draft Determination For Headquarters Review and Comment. Once the draft determination to list has been prepared, the LO acknowledges that he or she has reviewed it. The draft determination is then transmitted for review and comment, along with the summary of documentation, to: (1) the EC(s) for Air, Water, or both; (2) the Director, OCAPO; and (3) the DCE and the DOCE.

6. Final Agency Action Taken On The Recommendation to List. After the LO has notified the facility that a recommendation to list has been filed and transmitted to the AA for decision, final Agency action on the recommendation will occur as a result of one of the following processes:

a. AA Decides (Listing Proceeding Not Held). At any point before a listing proceeding is held, the AA may, in his or her discretion, decline to list the facility, § 15.11(c). If a facility does not request

a listing proceeding within 30 days of receiving notice that a recommendation to list has been filed, the AA must decide whether to list the facility. In such a case, the AA's determination on the recommendation to list is final Agency action, § 15.12(d).

After all of the EPA personnel identified in paragraph III.C.5.d. have reviewed the draft determination and commented on it, the LO prepares a transmittal memorandum, and sends to the AA a draft determination, any comments from the EC(s) or the Region, the summary of supporting documentation, and a briefing memorandum that summarizes: (i) the history of the case; (ii) the status of the case; (iii) the reasons for the recommended determination; (iv) whether the RA, ORC, and regional program office have expressed comments in agreement with the draft determination; and (v) any special problems or considerations.

If an oral briefing is requested, the LO schedules the briefing and arranges for representatives of the EC(s), OCE and OCAPO to be present, and offers the RA, DRA, ORC, and regional program offices an opportunity to be present, in person or by telephone.

Based upon the AA's decision on the recommendation to list, the LO does the following:

(1) AA Decides To List. If the AA decides to list, his or her decision is final Agency action on the recommendation to list, and the LO follows the steps set forth in the Listing Official's Discretionary Listing Checklist found in Table One.

(2) AA Declines To List. If the AA decides not to list, the LO notifies the owner, operator, or supervisor of the facility, the EC(s), OCE, and the RA, ORC, and program office, that the recommendation to list has been declined. The AA's decision not to list is final Agency action on the listing recommendation.

b. Listing Proceeding Requested. If the owner, operator, or supervisor of the facility requests a listing proceeding within 30 days of receiving notice that a recommendation to list has been filed, the LO does the following:

(1) AA Designates A Case Examiner. The AA designates a Case Examiner for the listing proceeding, § 15.12(a). The Case Examiner should be an EPA attorney who has subject matter expertise, who is not involved in the underlying enforcement action or listing action, and who is not supervised or employed by the person recommending listing (i.e., the CE should be from a different EPA region). The LO will consult with the EC(s) to identify appropriate persons to act as Case Examiners in listing proceedings.

(2) Case Examiner Schedules Listing Proceeding. The CE schedules the listing proceeding and notifies the recommending person, the owner, operator, or supervisor of the facility, the LO, and the listing case representatives (see paragraph III.C. above) of the date, time, and place of the listing proceeding, § 15.12(b). That notice letter also informs all parties of their obligation to provide to all other parties at least 7 days prior to the listing proceeding, any papers which they intend to submit at the listing proceeding.

It is the responsibility of the CE and the LO to attempt to arrange the timing and location of the listing proceeding so that it is convenient for all parties to attend. The CE determines whether the listing proceeding should be adjourned for good cause shown, as provided in paragraph III.C.8.a. (page 17).

(3) CE Obtains Court Reporter. The CE retains the services of a court reporter, § 15.13(b)(2), paid for by EPA.

(4) Listing Proceeding Held. The listing proceeding is conducted in accordance with § 15.13(b). Regardless of who files the recommendation to list, EPA will be represented at the listing proceeding by the EPA regional or headquarters attorney responsible for the underlying enforcement action, unless that attorney is unavailable, in which case ORC will select an attorney to represent EPA.

(5) LO Obtains Decision of CE. The Case Examiner issues his or her written decision on whether to list the facility and files it with the LO within 30 days of the conclusion of the

listing proceeding, and any supplementation of record allowed by the Case Examiner, § 15.13(c).

c. LO Sends Notice of CE's Decision And Opportunity For OGC Review. After the CE files his or her decision with the LO, the LO is responsible for notifying the appropriate parties of the CE's decision, as follows:

(1) CE Decides To List. The LO notifies the owner, operator, or supervisor of the facility, the recommending person, the EC(s), the DCE and DOCE, the RA, ORC, the regional program office, and the Director, OCAPO, of the CE's decision to list the facility and of the facility's opportunity to have OGC review that decision if such review is requested within 30 days, § 15.13(d).

(2) CE Decides Not To List. The LO notifies the owner, operator, or supervisor of the facility, the recommending person, the EC(s), the DCE and DOCE, the RA, ORC, the regional program office, and the Director, OCAPO, of the CE's decision denying the recommendation to list the facility. The Case Examiner's decision not to list is final Agency action on the recommendation to list, § 15.14(d).

d. OGC Review Not Requested. If the CE decides to list the facility, the facility may request that OGC review the CE's decision. The request for review must be made in writing and must be received by the LO within 30 days of the date on which notice of the CE's decision was received by the facility.

If the LO does not receive a timely request for OGC review, then the CE's decision granting the recommendation to list stands as final Agency action, § 15.14(d), and the LO follows the steps set forth in the Listing Official's Discretionary Listing Checklist, found in Table One.

e. OGC Review Requested. If the facility files a timely request with the LO for OGC review, the LO does the following:

(1) The LO Transmits The Request For OGC Review To ORC. The LO transmits to ORC a copy of the request for OGC review. ORC is responsible for obtaining comments from the EC(s) and recommending person (if the recommendation to list was not filed by EPA). ORC must

then prepare and return to the LO, within 14 days of receiving the request for OGC review, a reply brief stating the Agency's response to the facility's claims in the request for OGC review. Generally, the attorney who represented EPA at the listing proceeding should prepare the reply brief.

(2) LO Transmits Request To OGC. When the LO receives the reply brief responding to the request for OGC review, the LO transmits to OGC: (i) the CE's decision; (ii) the request for review; (iii) the reply brief; (iv) the comments of the EC(s) and the recommending person; and (v) the entire record of the listing action.

(3) OGC Reviews CE's Decision. OGC reviews the CE's decision based on the record of the listing proceeding, considered as a whole, and issues a final decision within 30 days or as soon as practicable, § 15.14(c).

f. The LO Obtains OGC's Decision. When OGC files its decision with the LO, it becomes final Agency action on the recommendation to list, § 15.14(c). The LO then does the following:

(1) OGC Affirms The Case Examiner. If OGC affirms the CE's decision to list, listing is effective when OGC's decision is filed with the LO. The LO follows the steps in the Listing Official's Discretionary Listing Checklist, found in Table One.

(2) OGC Reverses The Case Examiner. If OGC reverses the CE, the LO notifies the owner, operator, or supervisor of the facility, the recommending person, the AA, the DCE and DOCE, the Director, OCAPO, the EC(s), the RA, ORC, and regional program office, that the recommendation to list has been denied on the basis of OGC's decision on review.

7. Withdrawal Of A Recommendation To List. The recommending person may withdraw his or her recommendation to list under the following circumstances:

a. Prior To The Conclusion Of The Listing Proceeding. At any time before the CE issues his or her written decision concluding the

listing proceeding, the recommending person may withdraw the recommendation to list for any reason. However, a request to withdraw the recommendation must be made in writing and must state the reason for withdrawing the request. A recommending person must withdraw a recommendation to list if he or she determines that the facility has corrected the condition which gave rise to the recommendation to list, § 15.11(d).

b. After the Conclusion of the Listing Proceeding.
After the CE has issued his or her decision at the conclusion of the listing proceeding, a recommendation to list may be withdrawn only if the recommending person determines that the facility has corrected the condition which gave rise to the recommendation to list, § 15.11(d). The request to withdraw the recommendation to list must be made in writing and must state the reason for withdrawing the recommendation. A recommending person must withdraw a recommendation to list if he or she determines that the facility has corrected the condition which gave rise to the recommendation to list, § 15.11(d).

8. Stays Of A Discretionary Listing Action. All stays of listing actions are presumed to be prejudicial to the proceedings. Consequently, a stay of a discretionary listing action may be granted only under the following circumstances:

a. Prior To The Listing Proceeding. The LO may grant a stay of the discretionary listing action (1) for a period not to exceed 60 days, (2) upon timely notice, (3) for good cause shown, (4) on the record, and (5) after consideration of the prejudice to the parties or the proceeding.

b. During The Listing Proceeding. The Case Examiner may grant a stay of the listing proceeding (1) for a period not to exceed 60 days, (2) to permit any party to obtain evidence, or (3) for any other reason that will advance the proceedings, (4) giving due consideration to the prejudice to the parties.

c. After The Listing Proceeding. The LO may grant a stay of the discretionary listing action (1) for a period not to exceed 60 days, (2) upon timely notice, (3) for good cause shown, (4) on the record, and (5) after consideration of the prejudice to the parties. Any stay shall not extend the time in which a party must request review by the EPA General Counsel of a Case Examiner's decision in a listing proceeding.

9. EPA Guidance On Implementing Discretionary Listing

a. Summary of policy

On November 26, 1986, the AA for Enforcement issued guidance on implementing discretionary listing program. Some of the main points and subjects of this memorandum are:

1. Discretionary listing process is effective in achieving more expeditious compliance and case settlements.

2. Recommendations to list should be considered for all cases of noncompliance with consent decrees, all civil cases where violations are ongoing, violations of administrative orders, multifacility noncompliance within a single company. (p.2-3)

3. Standard of proof in listing proceedings. "Record must show by a preponderance of the evidence that there is a record of continuing or recurring non-compliance. (p.4)

4. Fairness and discussion of contractor listing with opposing parties in settlement negotiations. Case must involve clearly applicable standard; distinguishing between recommendations and final decisions. (p.5)

5. Coordination with DOJ. Making sure listing activity does not compromise litigation. (p.5)

6. Requesting information from facilities about government contracts during a civil case. Model letters. (p.6)

b. Use of Discretionary Listing

1. Discretionary listing continues to be an underutilized component of the contractor listing program. There are however several examples of situations where discretionary listing has been a powerful tool.

Ex 1. Frequently, merely sending a letter pursuant to CAA§ 114 or CWA § 308 requesting information on the company's Federal contract can assist in the settlement of civil suits.

Ex 2. In the Wheeling Pittsburgh case, EPA was faced with an intransigent company during settlement negotiations of a Clean Air

Act civil suit involving three facilities. Institution of a discretionary listing procedure resulted in a settlement of the civil suit within a month.

10. Big Apple Wrecking Corporation Case

On August 15, 1991, the Office of General counsel issued a decision In the Matter of: Big Apple Wrecking Corporation. In this decision on appeal from a Case Examiner's decision to list Big Apple Wrecking Corp.'s Bronx, NY facility, the General Counsel vacated the Case Examiners decision to list respondent's facility. Citing the preamble to the 1984 contractor listing regulations, the General Counsel ruled that continuing or recurring violations must be evaluated on case by case basis (evidence of two or more violations is not enough by itself). It was held that the listing decision must contain an explanation of the Agency's reasons for concluding that a particular series of violations presents a proper occasion for invoking the listing remedy. The Agency must decide whether listing the particular facility with continuing of recurring violations is appropriate "in light of the policies and purposes which underlay the listing remedy," namely to "undertake procurement and assistance activities in manner that will result in effective enforcement of the Clean Air Act, and not to favor businesses which cut cost by failing to comply with environmental laws."

The General Counsel also upheld the policy concerning the definition of "facility" as it applies to asbestos removal operations, noting that defining the business address as the violating facility was not only appropriate, but to do otherwise would gut the effectiveness of the listing program.

D. Defining The Violating Facility

1. Introduction

The CWA § 508 and CAA § 306 do not define "facility." Defining this important term has been accomplished through rulemaking. 40 CFR Part 15 defines facility as:

> any building, plant, installation, structure, mine, vessel or other floating craft, location or site of operation owned, leased, or supervised by an applicant, contractor, grantee, or borrower to be used in the performance of a contract, grant, or loan.

This apparently straightforward definition is generally applied without difficulty. However, cases arise where application of the definition presents a challenge. For example: If a facility where NPDES violations occur is supervised by contractors and the contractors are convicted, should the contractor's place of business be listed as the facility? What is constitutes the "facility" where the oil pipe running between a shipping terminal and storage tanks ruptures? What should be listed where CWA violations occur when oil is discharged from the hull of ship that has run aground.

2. Role of Regional Counsel, Regional Program and CID.

In certain cases, the conditions which gave rise to the criminal conviction that results in mandatory listing may affect more than the site of the violation, and the violating facility may, therefore, be the company's business address, or an operating unit of the company. When such cases arise, and these situations are not expressly addressed by existing guidance or policy (e.g., the policy that states that for asbestos violators, the business address is the violating facility), Regional counsel, Regional program staff, and CID agents play a very important role in providing the CLP, and the AA, information on which to base the determination of what is the violating facility.

In all cases which may result in mandatory listing, the Regional attorney(s) handling the enforcement action against the facility should contact the CLP as soon as possible, so that relevant information can be provided to assist in determining the identity of the violating facility. These determinations must be made before the time of the conviction, or as soon after as is practicable. This is especially important in cases where there may be an issue concerning determining what is the violating facility, so early contact with the CLP is extremely important.

3. Guidance Document: Defining the "Violating Facility" for Purposes of Listing Asbestos Demolition and Renovation Companies Pursuant to Section 306 of the Clean Air Act, March 11, 1988.

This policy statement stands for the proposition that the business address used by an asbestos demolition and renovation company may be used to identify the "violating facility," rather than the address of the particular site involved in the violating activity. The basis for this view is that the Congress intended, as evidenced by the legislative history, for the Administrator to ban other facilities owned by a convicted company where the other facilities are circumventing the listing of the violating facility; the definition in Part 15 of "facility" includes the business address of company and there is no requirement under CAA § 306 or CWA § 508 that business address of the facility coincide with the address of the sites where the violation occurred.

In the Big Apple Wrecking case this policy was utilized and upheld by the General Counsel. Other cases where this policy has been invoked include, e.g., a wetlands filling case.

4. Contractors

In addition to asbestos removal cases, certain convictions involve the conviction of corporations and/or their employees who are responsible for criminal violations under the CWA or CAA at facilities owned by other entities, such as municipalities (such as municipally owned POTW), or the Federal government. Similar to the asbestos removal cases, the issue arises as to whether the contractor's operating office/division or headquarters should be listed. Unlike asbestos removal cases, these cases are frequently complex and present unique factual circumstances in terms of the relationship of the contractor to the facility. Consequently, no single policy or position by OE can achieve a fair and equitable result in all cases. Accordingly, a flexible analysis/procedure is described below for determining whether the contractor's place of business should be listed.

The following is nonexclusive list of factors that are considered and weighed in such cases. These factors are weighed in conjunction with the concepts stated in the memorandum discussed above regarding listing asbestos contractors.

* If the convicted party is a contractor, whether the contractor has an address separate from the facility.

* If the convicted party is contractor, whether the contractor continues to do business in the field for which its employees were convicted.

* If the convicted party is a contractor, the degree of culpability on the part of the owner of facility.

* Degree of knowledge/involvement of the contractor at the contractor's division\HQ level.

* Extent to which interests of government will be unprotected if only the site or facility where the violations took place is listed.

* Extent to which other violations exist at other contractor operated facilities.

5. Independent Facilities

The definition of "facility", § 15.4, includes the following proviso: Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Assistant administrator determines that independent facilities are located in one geographical area."

This provision has been invoked once in the course of a removal petition. On September 30, 1991, in In the Matter of Exxon Corporation (Exxon Company, USA, Linden and Bayonne, N.J.) (Contractor Listing ML Docket No. 02-91-L034), the Assistant Administrator issued a Determination Regarding Exxon Company USA's Petition for Determination of Independent Facilities: Inter-Refinery Pipeline, Bayway Refinery, and Bayonne Terminal.

The Assistant Administrator determined that petitioner's terminal, refinery, and connecting pipeline were not independent facilities. The pipeline ends were physically located at the terminal and refinery respectively; management and employees at each were intertwined; and the pipeline oil flow was controlled by both facilities. The three locations were held to serve a unitary purpose.

IV. PROCEDURES FOR REMOVAL FROM THE LIST

A facility may be removed from the List in one of four ways. A facility may be removed automatically if the conviction which was the basis for mandatory listing, or the decision in the underlying enforcement action that was the basis for discretionary listing, is reversed, or after one year on the List in some discretionary listing cases. A facility may also be removed from the List following final Agency action as a result of a favorable decision by the AA on the facility's request for removal; a favorable decision by a CE following the AA's denial of the request to remove the facility from the List; or a favorable decision by the Administrator if the CE denies the removal request.

Requests for removal will be processed by representatives of the EC(s), the ORC, the regional program office, and the LO. The regional representatives acts as advocates for the Region's position on the removal request. The representative(s) of the EC(s) will act as counsel to both the Region and the LO. The LO is responsible for the adjudicative function and is the recommending official to the decisionmaker, the AA. Each representative will be responsible for ensuring that his or her office completes its responsibilities in a timely fashion, and that all necessary reviews and acknowledgements from policy level officials within his or her office are obtained.

A. Automatic Removal

1. Mandatory Listing

a. Reversal Of Conviction. The owner, operator, or supervisor of the facility is responsible for informing the LO if any criminal conviction which resulted in listing is overturned, and must provide a certified copy of the judgment order reversing the conviction.

Upon receipt of such an order and upon confirmation that a legal basis for mandatory listing no longer exists, the LO follows the steps set forth in the Listing Official's Removal Checklist, found in Table Two. If there is a dispute concerning the effect of a court order purportedly reversing a conviction, the dispute shall be resolved by deeming the request to be a request for removal based upon correcting the condition that gave rise to listing. The procedures set forth at paragraph IV.B.4. (page 27) apply to such requests. A further appeal which leads to reinstatement of the judgment of conviction shall result in automatic relisting.

2. Discretionary Listing

a. Reversal Of Underlying Order. The owner, operator, or supervisor of the facility is responsible for informing the LO if any order which was the basis for a determination to list has been reversed, and must provide a certified copy of the document evidencing the reversal of the prior order.

Upon confirmation that a legal basis for discretionary listing no longer exists, the LO follows the steps set forth in the Listing Official's Removal Checklist (Table Two). If there is a dispute concerning the effect of a court order purportedly reversing a prior order which was the sole basis for a discretionary listing determination, the dispute shall be resolved by deeming the request to be a request for removal based upon correcting the condition that gave rise to listing. The procedures set forth at paragraph IV.B.4. (page 27) apply to such requests. A further appeal which leads to reinstatement of the judgment of conviction shall result in automatic relisting.

b. Expiration Of One Year. A facility listed under §§ 15.11(a)(4), (5), or (6), is eligible to be removed from the List after one year, unless, within that one year period, the LO is informed that: (1)

a basis for mandatory listing exists as a result of the conviction of the owner, operator, or supervisor of the facility for violating CAA § 113(c) or CWA § 309(c); or (2) a basis for discretionary listing exists as a result of the facility's continuing or recurring noncompliance with clean air or clean water standards, and: (a) a state or local court has convicted any person who owns, operates, or supervises the facility of a criminal offense on the basis of noncompliance with clean air or clean water standards, § 15.11(a)(2); or (b) a federal, state, or local court has issued an order or civil ruling as a result of noncompliance with clean air or clean water standards, § 15.11(a)(3).

If, after a facility has remained on the List for one year, the LO determines that the facility is entitled to removal from the List, the LO follows the steps in the Listing Official's Removal Checklist (Table Two).

B. Requests For Removal. Regardless of the underlying basis for removal, and regardless of whether listing was the result of the mandatory or discretionary listing process, the removal process can be initiated by filing a request for removal with the LO. The original recommending person, or any person who owns, operates, or supervises a listed facility may file a request for removal with the LO, § 15.22(a).

45-DAY PERIOD. As soon as the request is received, the LO: (i) notes on the listing docket the date on which the request for removal was filed; (ii) reviews the request to determine the basis upon which removal is sought; and (iii) sends a letter to the person requesting removal that acknowledges receipt of the request. The letter also notifies the person requesting removal that the failure of EPA to respond to the request for removal within 45 days of the date that EPA has all information necessary to determine whether or not the request should be granted (i.e., within 45 days after the administrative record is complete) constitutes a denial of the request for removal, at which point a removal hearing before a Case Examiner may be requested.

The Agency's goal is to process each request for removal before this 45-day period expires. The 45-day period does not begin to run until the administrative record is complete in order to permit EPA sufficient time to analyze the often complex factual, technical and legal issues involved in a request for removal. This interpretation also ensures that a petitioner provides a complete removal request before it may presume that EPA has denied its petition, and invoke its right to a hearing before a Case Examiner, based on the passage of the 45-day decision period. It is based

upon the Agency's interpretation that the Assistant Administrator should be able to make a decision based on a complete administrative record, before subsequent stages of administrative review are sought.

1. Removal Of Underlying Court Order. If the request for removal is based upon the reversal of the court order which was the basis for listing, then the LO follows the procedures in paragraphs IV.A.1. (p. 22) or IV.A.2.a. (p. 23) above.

2. Expiration Of One Year (Discretionary Listing Only). If the request for removal is based upon the expiration of one year in a discretionary listing case under §§ 15.11(a)(4), (5), or (6), then the LO follows the procedures in paragraphs IV.A.2.b. (p. 23) above.

3. Plan For Compliance (Discretionary Listing Only). If the request for removal is based upon the facility's establishing a plan for compliance which is acceptable to the AA, then the LO follows the procedures described below.

   a. Requests Filed By The Regional Office. If the request for removal was filed by the regional office, the LO transmits the request to the EC(s), the owner, operator, or supervisor of the listed facility, and the original recommending person in the discretionary listing case, asking them to submit their comments on the request for removal and plan for compliance, to the LO within 10 days.

   b. Requests Filed By Others. If the request for removal was filed by some person other than the staff of an EPA regional office, the LO transmits a copy of the request for removal to the EC(s), the RA, ORC, regional program office, the owner, operator, or supervisor of the listed facility, and the original recommending person in the discretionary listing case[6].

      The LO notifies the Regional Counsel by telephone that a removal request has been filed, and the Regional Counsel designates a Regional attorney to represent the

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[6] The LO notifies the Regional Counsel by phone that a removal request has been filed and the Regional Counsel designates a Regional attorney to represent the Agency o the removal request; the LO informs the ECs and the owner, operator or supervisor of the listed facility (or its attorney) of who has been designated to represent the Agency in regard to the removal request. The LO requests the ECs to submit their comments on the request for removal and the plan for compliance to the designated Regional attorney within 10 days.

Agency on the removal request; the LO informs the ECs and the owner, operator, or supervisor of the listed facility (or their attorney) who has been designated to represent the Agency in regard to the removal request. The LO requests the EC(s) to submit their comments on the request for removal and plan for compliance to the designated Regional attorney within 10 days.

c. Regional Office Prepares Formal Recommendation. At the end of 10 days, the LO reviews all comments that have been received, forwards copies of them to the regional office for the region in which the facility is located, and ask ORC to prepare and return to the LO within 15 days:

(1) a formal recommendation based on the regional office's assessment of whether the request for removal should be granted or denied, in light of the facility's proposed plan for compliance;

(2) a memorandum summarizing the supporting documentation for the formal recommendation; and

(3) the written acknowledgement of the Regional Administrator or Deputy Regional Administrator indicating that he or she has reviewed the formal recommendation and submitted any comments on it to the LO.

NOTE: Both Regional and HQ program staff for the appropriate medium (air or water) play an important role in advising on technical and factual issues, and should be involved in the listing process, where appropriate.

d. Verification of Correction of Conditions Which Gave Rise To The Conviction: EPA policy requires that the Agency verify in every case that the violating facility has corrected the condition which gave rise to the conviction. This may involve, for example, a compliance inspection by a delegated state under the NPDES program, an inspection by a local air control board under the asbestos NESHAPS program, or an inspection by EPA's own personnel. The EPA Regional attorney who represents the Agency in each removal case should determine what type of inspection will

be necessary promptly after receiving the removal request. The CLP staff is available to assist in determining what type of inspection will be appropriate, and regional staff are encouraged to contact the CLP for assistance in this area.

e. LO Drafts Determination. At the end of the 15-day period, the LO receives the region's formal recommendation on the request for removal and plan for compliance, and the summary of supporting documentation, confirms that the recommendation has been reviewed by the Regional Administrator or Deputy RA, and drafts a determination for the AA's signature.

f. Headquarters Review and Comment. After the draft determination has been prepared, the LO transmits it for review and comment, along with the summary of supporting documentation, to: (1) the EC for Air, or Water, or both; (2) the DCE, or DOCE, or both. Each office must acknowledge that it has reviewed the document and made any necessary comments before returning the draft determination to the LO.

NOTE: The HQ program office (for air or water enforcement, as appropriate) is also given the opportunity to review and provide comments to the EC and to the LO concerning the draft determination.

g. Decision By The AA. After the appropriate Headquarters staff have reviewed and commented on the draft determination, and any necessary revisions have been made, the LO prepares a transmittal memorandum and briefing memorandum that summarizes: (i) the history of the case; (ii) the status of the case; (iii) the reasons for the recommended determination; (iv) whether the RA, ORC, and regional program office have expressed comments agreeing with the draft determination; and (v) any problems or special considerations. The LO sends the briefing memorandum, the draft determination, and the summary of supporting documentation, to the AA for his or her decision.

If an oral briefing is requested, the LO schedules the briefing, arranges for representatives of the EC(s),

DOCE and OCAPO to be present, and offers the RA, DRA, ORC, and regional program office an opportunity to be present at the briefing, in person or by telephone.

(1) AA Grants Removal Based Upon Plan For Compliance. If the AA approves the plan for compliance, the LO follows the steps set forth in the Listing Official's Removal Checklist (Table Two).

(2) AA Denies Removal. If the AA does not approve the plan for compliance and denies the request for removal, the LO notifies the owner, operator, or supervisor of the facility, and the recommending person, EC(s), RA, ORC, regional program office, the Director, OCAPO, and the DCE and DOCE, that the request for removal has been denied, and notifies the facility of the opportunity to request, within 30 days, a hearing before a Case Examiner, §§ 15.22(c), 15.23(a).

4. The Condition Giving Rise To Listing Has Been Corrected. If the request for removal is based on the facility having corrected the condition that gave rise to listing, the LO follows the procedures described below.

a. Requests Filed By The Regional Office. If the request for removal was filed by the regional office, the LO transmits the request to the EC(s), the owner, operator, or supervisor of the listed facility, and the original recommending person in discretionary listing cases, or the OCE in mandatory listing cases. The LO informs the EC(s) and the owner, operator, or supervisor of the listed facility, (or their attorney), who has been designated to represent the Agency in regard to the removal request. The LO requests the EC(s) to submit their comments on the request for removal to the designated Regional attorney within 10 days.

b. Requests Filed By Others. If the request for removal was filed by some person other than the staff of an EPA regional office, the LO transmits a copy of the request for removal to the EC(s), the RA, ORC, regional program office, the owner, operator, or supervisor of the listed facility, and the original recommending person in

discretionary listing cases, or the OCE in mandatory listing cases. The LO notifies the EC(s) and the owner, operator, or supervisor of the listed facility, (or their attorney), of who has been designated to represent the Agency in regard to the removal request. The LO requests the EC(s) to submit their comments on the request for removal to the designated Regional attorney within 10 days.

c. Region Prepares Formal Recommendation. The LO reviews all comments that have been received, forwards copies of them to the regional office for the Region in which the listed facility is located, if necessary, and asks the ORC to prepare and return to the LO:

(1) A formal recommendation, based upon the regional office's assessment of whether the request for removal should be granted or denied.[7] The formal recommendation must contain: (i) a background section that summarizes the history and proposed resolution of the case; (ii) specific factual findings covering all major events in the case, and technical tests that support the determination from the date of the original violation to the present time, and all expected events and test results, including any environmental cleanup under a compliance plan approved by EPA (any consent decree, probation order, administrative order, performance guarantee, or permit evidencing the compliance schedule should be attached to the recommendation); and (iii) a conclusion setting forth the recommendation.

(2) A document summarizing the supporting documentation for the recommendation. The summary of supporting documentation must: (i) identify the source of all information available for making the determination; (ii) identify all inspections made and state whether they satisfy the policy on independent verification; (iii) identify, in accordance with the policy defining the condition, the specific condition(s) that gave rise to listing and

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[7] See "EPA Policy Regarding the Role of Corporate Attitude, Policies, Practices, and Procedures In Determining Whether To Remove A Facility From The EPA List of Violating Facilities Following A Criminal Conviction", October 31, 1991, 52 Fed. Reg. 64785 (Dec. 12, 1991).

the manner in which the condition has been or is being corrected; (iv) describe the status of the facility's efforts to correct the condition; and (v) ensure that any comments by state or local authorities are reflected; and

(3) The acknowledgment of the Regional Administrator or Deputy RA that he or she has reviewed the formal recommendation and summary of documentation, and has made any necessary comments.

NOTE: Both Regional and HQ program staff for the appropriate medium (air or water) play an important role in advising on technical and factual issues, and should be involved in the listing process, where appropriate.

d. LO Drafts Determination. The LO receives the formal recommendation on the request for removal and the summary of supporting documentation, confirms that he recommendation has been reviewed by the RA or DRA, notes on the summary of supporting documentation any materials available at Headquarters, and prepares a draft determination for the AA's signature.

e. Headquarters Review. Once the draft determination has been prepared, the LO transmits it for review and comment, along with the summary of supporting documentation, to the EC for Air, or Water, or both, and the OCE. After each of these offices has acknowledged that it has reviewed and commented upon the draft determination and summary of documentation, those documents are returned to the LO for any revisions the LO deems necessary. The LO requests the ECs to respond with their comments and concurrence within 3-5 business days of receiving the draft determination.

NOTE: The HQ program office (for air or water enforcement, as appropriate) is also given the opportunity to review and provide comments to the EC and to the LO concerning the draft determination.

f. Decision By The AA. After the appropriate Headquarters staff have reviewed and commented on the draft determination, and any necessary revisions have been made, the LO prepares a transmittal memorandum and briefing memorandum that summarizes: (i) the history of the case; (ii) the status of the case; (iii) the reasons for the recommended determination; (iv) whether the RA, ORC, and regional program office have expressed comments agreeing with the draft determination; and (v) any problems or special considerations. The LO sends the briefing memorandum, the draft determination, and the summary of supporting documentation to the AA for his or her decision. The goal is for the AA to issue a decision or request an oral briefing within 3-5 days of receiving the draft determination.

If an oral briefing is requested, the LO schedules the briefing, arranges for representatives of the EC(s), OCE, and OCAPO to be present, and offers the RA, DRA, ORC, and regional program office an opportunity to be present at the briefing, in person or by telephone.

(1) AA Grants Removal. If the AA approves the request for removal, the LO removes the facility from the List; notifies the owner, operator, or supervisor of the facility, the recommending person (in discretionary listing cases), the EC(s), the OCE (in mandatory listing cases), the RA, ORC, and regional program office, of the effective date of removal, pursuant to § 15.27; the LO also notifies the General Services Administration (GSA) that the facility is to be removed from the "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs."

(2) AA Denies Removal. If the AA denies the request for removal, the LO notifies the owner, operator, or supervisor of the facility, the recommending person, EC(s), RA, ORC, regional program office, the Director, OCAPO, and the DCE and DOCE, that the request for removal has been denied. The LO also notifies the facility of the opportunity to

request, within 30 days, a hearing before a Case Examiner, §§ 15.22(c), 15.23(a).

5. Removal Hearing. The owner, operator, or supervisor of a listed facility, or the original recommending person in the case of a facility listed under the discretionary listing process, my file with the LO; within 30 calendar days after the decision of the AA denying removal, a written request for a removal hearing, § 15.23(a).

   a. Removal Hearing Not Requested. If the LO does not receive a request for a removal hearing within 30 calendar days after the decision of the AA, the LO notifies: the owner, operator, or supervisor of the facility; the original recommending person; the AA; the Director, OCAPO; the DOCE; the EC(s); and the RA, ORC, and regional program office, that the decision of the AA is final Agency action on the request for removal, and that any person who may make a request for removal may file a new request for removal, based upon new information, § 15.23(b).

   b. Removal Hearing Requested. If the LO receives a request for a removal hearing within 30 days after the decision of the AA, the LO does the following:

      (1) AA Designates A Case Examiner. The AA designates a Case Examiner, § 15.24. The Case Examiner may be any EPA employee who has subject matter expertise, and who was not involved in the underlying enforcement action or listing action (except that the Case Examiner who served in the listing proceeding involving the facility may serve as Case Examiner in the removal hearing). The LO will consult with the EC(s) to determine appropriate persons to act as Case Examiners in removal hearings.

      (2) Case Examiner Schedules Removal Hearing. The CE schedules the removal hearing and notifies the owner, operator, or supervisor of the facility, the LO, the original recommending person, the federal, state, or local authority responsible for enforcement of clean air or clean water standards, and the listing case representatives (see § IV) of the date, time, and place of the listing proceeding.

      That notice letter also informs all parties of their obligation to provide to all other parties at least 7 days prior to the removal hearing, copies of all documents which

they intend to submit at the removal hearing. It is the responsibility of the CE to attempt to arrange the timing and location of the listing proceeding so that it is convenient for all parties to attend.

(3) CE Obtains Court Reporter. The LO retains the services of a court reporter, § 15.24(a)(2), paid for by EPA.

(4) Removal Hearing Held. The removal hearing is conducted in accordance with §§ 15.24(a)-(c). EPA will be represented at the removal hearing by the EPA regional or headquarters attorney responsible for the underlying enforcement action.

(5) LO Obtains Decision Of CE. The Case Examiner issues his or her written decision on whether to grant the request for removal and files it with the LO as soon as practicable, with a target of filing the decision no later than 30 days after the conclusion of the removal hearing and any supplementation of the record allowed by the CE, § 15.24(c).

c. LO Sends Notice Of CE's Decision. The LO is responsible for sending written notice of the CE's decision to the owner, operator, or supervisor of the facility, the original recommending person, the EC(s), the RA, ORC, and regional program office, and the federal, state, or local authority responsible for enforcement of clean air or clean water standards.

(1) If the Case Examiner grants removal, the LO removes the facility from the List; notifies the owner, operator, or supervisor of the facility, the recommending person (in discretionary listing cases), the EC(s), the OCE (in mandatory listing cases), the RA, ORC, and the regional program office, of the effective date of removal, pursuant to § 15.27. The LO also notifies the General Services Administration (GSA) that the facility is to be removed from the "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs."

(2) If the Case Examiner denies removal, the LO notifies the owner, operator, or supervisor of the facility, the original recommending person, the EC(s), the RA, ORC, and the regional program office, and the federal, state, or local

authority responsible for the enforcement of clean air or clean water standards, of the decision. The LO also advises the facility of the opportunity to request the Administrator to review the CE's decision, § 15.24(d), if a written request for such review is filed with the LO within 30 days after the date of the Case Examiner's decision, § 15.25(a).

d. Administrator's Review Not Requested. If the LO does not receive a written request for review within 30 days after the date of the Case Examiner's decision, the LO sends a notice to the owner, operator, or supervisor of the facility, the original recommending person, the DCE and DOCE, the Director, OCAPO, the EC(s), the RA, ORC, and regional program office, and the federal, state, or local authority responsible for the enforcement of clean air or clean water standards, informing them that the CE's decision stands as final Agency action on the request for removal, § 15.25(c), and that any person who may file a request for removal may file a new request for removal based upon new information.

e. Administrator's Review Requested. If the LO receives a timely written request to have the decision of the Case Examiner reviewed by the Administrator:

(1) The LO Transmits The Request For Administrator's Review To ORC. The LO transmits a copy of the request for Administrator's review to ORC. ORC is responsible for obtaining comments from the EC(s) and the original recommending person (if the recommendation to list was filed by someone other than EPA), and any federal, state, or local authority responsible for the enforcement of clean air or clean water standards. Within 14 days of receiving the copy of the request for Administrator's review, ORC must prepare and return to the LO a reply brief, stating the Agency's response to the facility's claims in the request for Administrator's review. Generally, the attorney who represented EPA at the removal hearing should prepare the reply brief.

(2) LO Transmits Request To The Administrator. After the reply brief has been received, the LO transmits to the Administrator: (i) the Case Examiner's decision; (ii) the

request for review; (iii) the reply brief; (iv) the comments received; and (v) the entire record of the removal action.

(3) The Administrator Reviews The CE's Decision. The Administrator reviews the Case Examiner's decision, based upon the record of the removal hearing considered as a whole, and issues a final decision as soon as practicable, § 15.25(b). The Administrator's decision is final Agency action. Id.

f. The LO Obtains The Administrator's Decision. The Administrator files his decision with the LO following review of the Case Examiner's decision. Once filed with the LO, the Administrator's decision is final Agency action on the request for removal, and the LO does the following:

(1) If the Administrator affirms the CE's decision denying removal, the LO notifies the owner, operator, or supervisor of the facility, the original recommending person, the EC(s), the RA, ORC, regional program office, and the federal, state, or local authority responsible for the enforcement of clean air or clean water standards, that the Administrator's decision affirming the Case Examiner stands as final Agency action denying the request for removal, § 15.25(b), and that any person who may file a request for removal may file a new request for removal based on new information, § 15.25(d).

(2) If the Administrator reverses the Case Examiner and grants the request for removal, the LO removes the facility from the List; notifies the owner, operator, or supervisor of the facility, the recommending person (in discretionary listing cases), the EC(s), the OCE (in mandatory listing cases), the RA, ORC, and the regional program office, of the effective date of removal, pursuant to § 15.27; and notifies the General Services Administration (GSA) that the facility is to be removed from the "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs."

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

CL.2-1
GM #53

NOV 26 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Implementing the Discretionary Contractor Listing Program

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

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
General Counsel
Inspector General
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X

I. Purpose

This document establishes Agency policy and procedures for implementing the discretionary contractor listing program in EPA enforcement proceedings. It should be read in conjunction with the final revisions to the contractor listing regulations (40 CFR Part 15, 50 FR 36188, September 5, 1985), and the guidance document, "Implementation of Mandatory Contractor Listing" (General Enforcement Policy No. GM-32, August 8, 1984). The procedures to be followed in all contractor listing actions are contained in the rule and are summarized in an Appendix to this document. This policy applies only to discretionary listing proceedings and supersedes the "Guidance for Implementing EPA's Contractor Listing Authority" (General Enforcement Policy No. GM-31, July 18, 1984).

The revisions to the contractor listing regulations, together with this guidance document and other management initiatives, should encourage greater use of the Agency's listing authority and should expedite the process for listing a facility.

II. Background

The Clean Air Act (CAA), Section 306, and the Clean Water Act (CWA), Section 508, as implemented by Executive Order 11738, authorize EPA to prohibit facilities from obtaining federal government contracts,

grants or loans (including subcontracts, subgrants and subloans), as a consequence of criminal or civil violations of the CAA or CWA. Commonly called "contractor listing," this program provides EPA with an effective administrative tool to obtain compliance with the CAA and CWA where administrative or judicial action against a facility has failed to do so.

On July 31, 1984, EPA proposed revisions to the contractor listing regulations (40 CFR Part 15 (49 FR 30628)) to simplify and clarify the procedural opportunities which EPA will provide to parties to listing or removal actions and to provide for mandatory (i.e., automatic) listing of facilities which give rise to criminal convictions under Section 113(c)(1) of the CAA or Section 309(c) of the CWA. Final rules were promulgated on September 5, 1985 (50 FR 36188).

III. Appropriate Cases for Discretionary Listing Recommendations

In numerous cases, initiation of a listing action has proved to be effective in achieving more expeditious compliance and case settlements. While regional offices should consider making contractor listing recommendations in every case where the criteria of 40 CFR Part 15 are met, listing is a tool to be used in conjunction with other enforcement actions. (See IV. Standard of Proof in Listing Proceedings, page 4.) The circumstanc surrounding each case will dictate whether a listing action should be initiated. In particular, use of listing may be appropriate in the following cases:

A. Violations of Consent Decrees

Regional offices should strongly consider making listing recommendations for all cases of noncompliance with consent decrees under the CAA or CWA. The recommendation should be prepared at the earliest possible time after the Region learns of noncompliance with the decree, but no later than the filing of a motion to enforce the decree. Initiation of the listing action should be supplementary to, and not in lieu of, a motion to enforce the decree. Where a consent decree covers CAA or CWA violations as well as violations of other environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) or the Toxic Substances Control Act (TSCA) (where EPA does not have contractor listing authority), a listing recommendation also should be considered.

B. Continuing or Recurring Violations Following Filed Civil Judicial Actions

Where EPA has filed a civil judicial enforcement action, the Regional Office should initiate a listing action at the earliest possible time after it determines that: (1) noncompliance is ongoing, (2) the defendant is not making good faith efforts to

comply, and (3) an expeditious settlement does not appear likely. For example, a defendant may make a firm settlement offer that is far below the economic savings it realized from its noncompliance, making settlement unlikely.

Similarly, where EPA initiates a multi-media civil enforcement action against violations under the CAA or CWA and other environmental statutes (such as RCRA or TSCA), and continuing water or air compliance problems exist without good faith corrective efforts, the Region should consider bringing a listing action. Therefore, it is important that all CAA and CWA counts be included in a multi-media enforcement action.

C. Violations of Administrative Orders

Where noncompliance continues after an administrative order has been issued under the CAA or CWA, and the Regional Office determines that the facility is not making sufficient efforts to come into compliance, a listing recommendation should be considered. Initiation of a listing action generally should not be in lieu of filing a civil judicial action to enforce the administrative order, but should support the civil action. The Regional Office should consider initiating a listing action at the same time that it files the civil judicial action.

D. Multi-Facility Noncompliance within a Single Company

Contractor listing can be an effective tool to address a pattern of noncompliance within a single company. Where continuing or recurring CAA or CWA violations occur at two or more facilities within the same company, and EPA previously has taken an enforcement action against each, the Regional Office should consider making listing recommendations in all such cases.

While each facility's continuing or recurring noncompliance must be proved separately (i.e., one may not use one violation from branch facility A and one violation from branch facility B to constitute the minimum two violations required), one listing recommendation describing noncompliance at two or more facilities may be submitted to the Assistant Administrator for the Office of Enforcement and Compliance Monitoring (OECM). A joint listing proceeding may be held concerning all facilities. Joint consideration of two or more facilities' violations will require fewer Agency resources than listing each facility separately. It will also discourage companies from switching government contracts from a listed facility to another facility without taking steps to correct the violations which gave rise to the listing.

To accomplish this, the Regional Office, with headquarters staff support, should review the EPA enforcement docket to see if a potential listing candidate has committed CAA or CWA violations at other company facilities. Note that a company's facilities may be known by the parent company name or by the names of company

subsidiaries. Regional offices may obtain information on other company facilities from Charlene Swibas, Chief, Information Services Section, NEIC (FTS 776-3219), who will search EPA's Facility Index System which lists this information for all EPA regions, or provide a Dunn and Bradstreet report containing this information.

The Region may also request data on administrative orders issued against a company under the headquarters Permit Compliance System (for CWA violations) and the Compliance Data System (for CAA violations). In some cases EPA has issued administrative orders and filed civil enforcement actions against company facilities which are located in more than one region. Such multi-regiona inquiries may be coordinated with the Headquarters participating attorney and the Agency's Listing Official.

E. Other Circumstances Where Listing is Appropriate

The regulation provides two other situations where listing may be appropriate. First, EPA can list a facility after it has issued a Notice of Noncompliance under Section 120 of the CAA. The threat of listing in combination with noncompliance penalties can impose a sufficiently severe economic cost on a facility to encourage efforts to achieve both compliance and quicker settlements. Second, Regiona Offices may recommend listing when a state or local court convic any person who owns, operates, or leases a facility of a crimina offense on the basis of noncompliance with the CAA or the CWA. They also may recommend listing when a state or local court has issued an injunction, order, judgement, decree (including consent decrees), or other civil ruling as a result of noncompliance with the CAA or CWA.

IV. Standard of Proof in Listing Proceedings

It will be the responsibility of the Office of Regional Counsel to represent the Agency at any listing proceeding (where one is requested by the affected facility). According to 40 CFR Section 15.13(c), "[t]o demonstrate an adequate basis for listing a facility, the record must show by a preponderance of the evidence that there is a record of continuing or recurring non-compliance at the facility named in the recommendation to list and that the requisite enforcement action has been taken."

"Requisite enforcement action" can be established by reference to an issued administrative or court order, or a filed civil judicia action. "Continuing or recurring" violations are understood to mean two or more violations of any standard at a facility, which violations either occur or continue to exist over a period of time. Such a violation occurs even when different standards are violated and time has elapsed between violations. Thus, in a listing proceeding, it is not necessary to prove all violations of CAA or CWA standards alleged in the underlying enforcement action. Nonethel

the regional attorney must carefully review the sufficiency of the evidence and evaluate anticipated defenses.

V. Fairness Concerns in EPA Use of Contractor Listing

It is the intent of this guidance document to encourage the use of the Agency's contractor listing authority in appropriate cases. However, it must be recognized that listing is a severe sanction. Before making a recommendation in any case, the Regional Office should determine that the continuing or recurring noncompliance involves clearly applicable CAA or CWA standards. Likewise, Agency enforcement personnel must be careful in using listing terminology during discussions with defendants. During settlement negotiations, for example, it is certainly proper for EPA to advise a defendant of the range of available EPA enforcement authorities, including contractor listing. However, EPA personnel must distinguish between a listing recommendation (made by a "recommending person," usually the Regional Administrator, to the Assistant Administrator for OECM), a notice of proposed listing by the Agency to the affected facility (which is sent by the Listing Official after a preliminary decision to proceed is made by the Assistant Administrator for OECM), and a final decision to list which is made either by an Agency Case Examiner at the end of a listing proceeding, or by the Assistant Administrator for OECM if no listing proceeding is requested. Where appropriate, EPA personnel should explain that the Regional Administrator's listing recommendation does not constitute a final Agency decision to list.

VI. Press Releases on Contractor Listing Actions

EPA will use press releases and other publicity to inform existing and potential violators of the CAA and the CWA that EPA will use its contractor listing authority in appropriate situations. The November 21, 1985, "Policy on Publicizing Enforcement Activities" (GM-46), states that "[i]t is EPA policy to issue press releases when the Agency: (1) files a judicial action or issues a major administrative order or complaint (including a notice of proposed contractor listing and the administrative decision to list)...." As discussed in that policy, the press release should be distributed to both the local media in the area of the violative conduct and the trade press of the affected industry.

VII. Coordination with the Department of Justice

To ensure that information presented during a listing proceeding will not compromise the litigation posture of any pending legal action against a party, EPA will coordinate with the Department of Justice (DOJ) before a recommendation to list is made to the Assistant Administrator for OECM. If the recommending party is an EPA regional office official, he or she shall coordinate with the appropriate DOJ attorney before a recommendation is submitted to the Listing Official. He or she shall also provide the DOJ attorney's comments to the Listing Official as part of the recommendation

package. If the recommending party is not an EPA official, the Listing Official shall coordinate with the EPA Office of Regional Counsel and the appropriate DOJ attorney before a recommendation to list is presented to the Assistant Administrator for OECM.

VIII. Applicability of Contractor Listing to Municipalities

Municipalities are subject to listing under appropriate circumstances. State and local governments and other municipal bodies are specifically identified by 40 CFR §15.4 as "persons" whose facilities may be listed. The standards for recommending that a municipal facility be listed are the same as those for listing other facilities. Listing may not be the most effective enforcement tool in many municipal cases because often the only federal funds received by a municipal facility are grant funds to abate or control pollution, which are exempted from the listing sanction by 40 CFR §15.5. However, listing still should be considered in cases where a municipal facility receives nonexempt funds or where the principles underlying the listing authority otherwise would be furthered by a recommendation to list.

IX. Use of Listing in Administrative Orders

Enforcement offices may wish to inform violating facilities early in the enforcement process of the possibility of being listed. Many facilities do not know about the listing sanction; such knowledge may provide additional impetus for a facility to take steps to come into compliance. For example, some EPA regions notify facilities whose violations make them potential candidates for listing of this possibility in the cover letter which accompanies an administrative order requiring them to take action to correct their noncompliance.

X. Obtaining Information Concerning Government Contracts Held by a Facility Under Consideration for Listing

After an EPA recommending person, usually the Regional Administrator, has submitted a listing recommendation to the Listing Official, the regional office attorney handling the case may require the facility to provide a list of all federal contracts, grants, and loans (including subcontracts, subgrants, and subloans). To insure that such a requirement is not imposed prematurely, the regional office attorney should require this information from a facility only after advising the Listing Official of his or her intention to do so. Requiring this information from the facility is not a prerequisite for listing a facility.

Requiring this information from a facility may be accomplished by telephone or through a letter similar to the models provided in Attachments D and E. Attachment D is a model letter requesting information from a facility which is violating an administrative order issued under the authority of the Clean

Water Act for violating its National Pollutant Discharge Elimination System (NPDES) permit. Attachment E is a letter to a facility which EPA and the Department of Justice have filed a civil suit against for violating the Clean Air Act. Regional office attorneys may elect to have such a request letter serve as notification to the facility that EPA is considering instituting a listing action, or they may wish to inform the facility before sending such a letter. Which approach is taken will depend on the regional office attorney's judgment of the notification's effects on the overall case against the facility.

XI. Headquarters Assistance in Preparing and Processing Listing Recommendations

In order to encourage the use of the contractor listing authority in appropriate cases, OECM staff have been directed to assist regional offices in preparing listing recommendations. Attached are model listing recommendations indicating the level of detail and support that should be provided with recommendations. (See Attachments A, B, and C for model listing recommendations.) Where a listing recommendation is sufficient, the Assistant Administrator for OECM will decide whether to proceed with the listing action under Section 15.11(c) (i.e., by directing the Listing Official to issue a notice of proposed listing to the affected facility) within two weeks after receiving the recommendation. Questions concerning contractor listing may be directed to the Agency Listing Official, Cynthia Psoras, LE-130A, FTS 475-8785, E-Mail Box EPA2261.

Attachments

cc: John Ulfelder
Senior Enforcement Counsel
Associate Enforcement Counsel for Air
Associate Enforcement Counsel for Water
Director, Office of Water Enforcement and Permits
Director, Stationary Source Compliance Division
Director, Office of Compliance Analysis and Program Operations
Director, NEIC
Director, Water Management Division (Regions I-X)
Director, Air Management Division (Regions I, III, V and IX)
Director, Air and Waste Management Division (Regions II and VI)
Director, Air, Pesticides and Toxics Management Divisi
(Region IV)
Director, Air and Toxics Division (Regions VII, VIII and X)
David Buente, Department of Justice (DOJ)
Nancy Firestone, DOJ

The Listing Program and Final Revisions to 40 CFR Part 15

A. Mandatory Listing

If a violation at a facility gives rise to a criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, listing of the facility is mandatory (and effective upon conviction under 40 CFR Section 15.10). As soon as a conviction occurs, the Director of the Office of Criminal Enforcement, within the Office of Enforcement and Compliance Monitoring (OECM), must verify the conviction and notify the Listing Official. The Listing Official sends written notification to the facility and to the Federal Register. Both documents must state the basis for and the effective date of the mandatory listing.

Removal from the mandatory list may occur only if: (1) the Assistant Administrator certifies that the facility has corrected the condition that gave rise to the criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, or (2) a court has overturned the criminal conviction. The August 8, 1984, memorandum, "Implementation of Mandatory Contractor Listing," (GM-32) discusses the procedures for mandatory listing in more detai

B. Discretionary Listing

1. Basis for Discretionary Listing

The following enforcement actions may serve as a basis for discretionary listing if there is also a record of continuing or recurring noncompliance at a facility:

a. A federal court finds any person guilty under Section 113(c)(2) of the CAA, if that person owns, leases, or supervises the facility.

b. A state or local court convicts any person of a criminal offense on the basis of noncompliance with clean air or clean water standards if that person owns, leases, or supervises the facility.

c. A federal, state, or local court issues an injunction, order, judgment, decree (including consent decrees), or other form of civil ruling as a result of non compliance with the CWA or CWA at the facility.

d. The facility is the recipient of a Notice of Noncompliance under Section 120 of the CAA.

e. The facility has violated an administrative order under:

- CAA Section 113(a)
- CAA Section 113(d)
- CAA Section 167
- CAA Section 303
- CWA Section 309(a)

f. The facility is the subject of a district court civil enforcement action under:

- CAA Section 113(b)
- CAA Section 167
- CAA Section 204
- CAA Section 205
- CAA Section 211
- CWA Section 309(b)

2. The Discretionary Listing Process

a. Listing Recommendation and Notice of Proposed Listing

The discretionary listing process begins when a "recommending person" files a listing recommendation with the Listing Official. Recommending persons may include any member of the public, Regional Administrators, the Assistant Administrator for Air and Radiation, the Assistant Administrator for Water, the Associate Enforcement Counsel for Air, the Associate Enforcement Counsel for Water, and the Governor of any State. The recommendation to list: (1) states the name, address, and telephone number of the recommending person; (2) identifies the facility to be listed, and provides its street address and mailing address; and (3) describes the alleged continuing or recurring noncompliance, and the requisite enforcement action (see 40 CFR Section 15.11(b)). The recommendation to list should describe the history of violations in detail, including the specific statutory, regulatory, or permit requirements violated. In addition, regional offices may include as attachments to the listing recommendation documents prepared for other purposes, such as complaints, litigation reports, and other explanatory material which describes the nature of the violations. (See Attachments for model listing recommendations.)

The Listing Official must determine whether the recommendation meets the requirements of Section 15.11(b). If the recommendation is sufficient and the Assistant Administrator for OECM decides to proceed under Section 15.11(c), the listing official will contact the regional office to ensure that it still wishes to proceed. If the decision is made to proceed, the listing official provides notice of the proposed listing to the owner or operator of the affected facility and provides the owner or operator of the facility 30 days to request a listing proceeding. A listing proceeding is not a formal hearing; rather, it is an informal administrative proceeding presided over by an Agency Case Examiner. If the facility's owner or operator requests a listing proceeding, the Listing Official must schedule it and notify the recommending person and

the owner or operator of the date, time, and location of the proceeding. The Assistant Administrator designates a Case Examiner to preside over the listing over the listing proceeding.1/

b. Listing Proceeding

The Federal Rules of Civil Procedure and Evidence are not used during listing proceedings. The Agency and the facility may be represented by counsel and may present relevant oral and written evidence. With the approval of the Case Examiner, either party may call, examine, and cross-examine witnesses. The Case Examiner may refuse to permit cross-examination to the extent it would: (1) prematurely reveal sensitive enforcement information which the government may legally withhold, or (2) unduly extend the proceedings in light of the usefulness of any additional information likely to be produced (see Section 15.13(b)). A transcript of the proceeding along with any other evidence admitted in the proceeding constitutes the record. The Agency must prove each element of a discretionary listing by a preponderance of the evidence (see Section 15.13(c)).

The Case Examiner must issue a written decision within 30 calendar days after the proceeding. The party adversely affected may appeal the decision to the General Counsel. The appeal, which is filed with the Listing Official, must contain a statement of: (1) the case and the facts involved, (2) the issues, and (3) why the decision of the Case Examiner is not correct based on the record of the proceeding considered as a whole. The General Counsel must issue a final decision, in writing, as soon as practicable after reviewing the record. The Listing Official then must send written notice of the decision to the recommending person and to the facility, and must publish the effective date of the listing in the Federal Register if the General Counsel upholds the Case Examiner's decision to list.

c. Removal from the List of Violating Facilities

Removal from the List of Violating Facilities can occur in any of the following circumstances:

- 1. Upon reversal or other modification of the criminal conviction decree, order, judgment, or other civil ruling or finding which formed the basis for the discretionary listing, where the reversal or modification removes the basis for the listing;

1/ If the owner or operator of the facility does not make a timely request for a listing proceeding, the Assistant Administrator will determine whether to list the facility based upon the recommendation to list and any other available information.

2. If the Assistant Administrator for OECM determines that the facility has corrected the condition(s) which gave rise to the listing;

3. Automatically if, after the facility has remained on the discretionary list for one year on the basis of Section 15.11(a)(4) or Section 15.11(a)(5) and a basis for listing under Sections 15.11(a)(1), (2), or (3) does not exist; or

4. If the Assistant Administrator for OECM has approved a plan for compliance which ensures correction of the condition(s) which gave rise to the discretionary listing.

The original recommending person or the owner or operator of the facility may request removal from the list. The Assistant Administrator for OECM then must review the request and issue a decision as soon as possible. The Listing Official then must transmit the decision to the person requesting removal.

If the Assistant Administrator for OECM denies a request for removal, the requesting person may file a written request for a removal proceeding to be conducted by a Case Examiner designated by the Assistant Administrator. The Federal Rules of Civil Procedure and Evidence are not used during a removal proceeding. The Case Examiner's written decision must be based solely on the record of the removal proceeding.

Within 30 calendar days after the date of the Case Examiner's decision, the owner or operator of the facility may file with the Listing Official a request for review by the Administrator. The Administrator will determine if the Case Examiner's decision is correct based upon the record of the removal proceeding considered as a whole. The Administrator then must issue a final written decision.

Attachment A

MODEL LISTING RECOMMENDATION
BASED ON ADMINISTRATIVE ENFORCEMENT ACTION

DATE: 10/01/86

SUBJECT: Recommendation to List Violating Facility

FROM: Regional Administrator, Region XI

TO: Cynthia Psoras
Listing Official
Legal Enforcement Policy Division (LE-130A)

The purpose of this memorandum is to recommend that the [name of facility and type of operations conducted at the facility] owned and operated by John Doe at [street address, city and state] be placed on the EPA List of Violating Facilities because of violations of clean air standards. Information concerning the recurring violations and the history of action taken thus far by the Agency is set forth below. Copies of pertinent supporting materials are attached. [Attach technical documents describing the violation, the administrative order, and other documents describing the enforcement action taken.]

This plant is subject to the New Source Performance Standards (NSPS) for Asphalt Concrete Plants. 40 CFR Part 60, Subpart I (1986).

On July 5, 1985, the Region XI Director, Air Management Division, notified [owner and operator] that on the basis of performance tests conducted December 19, 1984, the facility was in violation of 40 CFR 60.92(a)(1), in that it was discharging gases into the atmosphere, and those gases contained 256.5 milligrams of particulate matter per dry standard cubic meter (0.114 grain per dry standard cubic foot) The allowable discharge of particulate matter into the atmosphere is 90 milligrams per dry standard cubic meter (0.04 grain per dry standard cubic foot).

On August 14, 1985, the Region XI Regional Administrator issued an Administrative Order pursuant to Section 113(a)(3) of the Clean Air Act. That order required, in part, that [name of facility] operate its [specific portion of the plant or processes causing the violations] in compliance with the NSPS for Asphalt Concrete Plants, 40 CFR Part 60, Subpart I, and to conduct performance tests for emissions of particulate matter within sixty days following the effective date of the Administrative Order.

Performance tests were completed on September 1, 1985, and the particulate emissions were 373.5 milligrams per dry standard cubic meter (0.166 grain per dry standard cubic foot). Thus, [name of facility] is not in compliance, and has violated the Administrative Order. Further, the violation

of the NSPS has been a continuing violation in that the particulate emissions have been greater than the permissible limits since the December 19, 1985, test date.

The recommending person for this listing recommendation is Regional Administrator, Region XI, EPA, Government Office Building, City, 51st State; her telephone number is (FTS) 123-4567.

This action is authorized under discretionary listing, 40 CFR 15.11(a)(4) (1986). It meets the regulations' two requirements that: there is "continuing or recurring noncompliance with clean air standards ... at the facility recommended for listing" and that the facility has violated an administrative order issued under Section 113(a) of the Clean Air Act.

If you have any questions, please contact Attorney, at (FTS) 123-4568, or Engineer, at (FTS) 123-4569.

Attachments
[technical documents, Administrative Order, documents describing the previous enforcement actions taken]

Attachment B

MODEL LISTING RECOMMENDATION BASED ON JUDICIAL ENFORCEMENT ACTION

MEMORANDUM

SUBJECT: Recommendation for Listing

FROM: Regional Administrator, EPA Region 12

TO: Cynthia Psoras
Listing Official
Legal Enforcement Policy Division, LE-130A

This is a recommendation that the [facility name and address] be placed on the EPA List of Violating Facilities, pursuant to Section 306 of the Clean Air Act, Executive Order 11738, 40 CFR Part 15, and the October 1986 guidance from the Assistant Administrator for Enforcement and Compliance Monitoring. This action is authorized under 40 CFR 15.11(a)(6) (1986). This recommendation is based on violations alleged in the civil action currently being pursued against [facility name] in the United States District Court for the Fifty Second State. [Facility name] operates four coal-fired boilers (boilers nos. 2-5) at the [facility] without adequate air pollution control equipment.

As indicated in the attached counterclaim, motion for partial summary judgment, and affidavits, [facility name] has been in violation of the Federal New Source Performance Standards (NSPS) for particulate emissions since startup of the boilers, more than five years ago. The United States issued a notice of violation to [facility name] regarding mass emission violations at the [facility name] boilers nos. 2-5 on May 30, 1981. [Facility name] has not substantially modified the particulate emission control system for these four boilers since that time. Particulate stack testing conducted as recently as January 1986 shows continuing violations of the boilers. The complaint, attached to this memo, was filed by defendant on June 15, 1985. The United States then filed a counterclaim on August 1, 1985. The Government's Motion for Partial Summary Judgment as to liability, filed on or about December 12, 1985, was granted in part on April 8, 1986, wherein the court denied [facility name's] claim that the four boilers were not covered by NSPS. The remainder of the Motion, requesting judgment on the counterclaim for enforcement, is pending before the court.

The [facility name] plant is located in [City and State] which is a secondary nonattainment area for Total Suspended Particulates.

The attached affidavits contain summaries of mass violations at the [facility name's] boilers nos. 2-5. All data summarized

were obtained from stack tests performed on the [facility name] boilers by the [owner and operator corporation] and stack tests performed by a consultant retained by the [owner and operator corporation].

Based on the information contained above and in the attachments to this recommendation, I request that the Assistant Administrator for Enforcement and Compliance Monitoring find that there is adequate evidence of continuing or recurring violations of Clean Air Act standards at the [facility name] and place this facility on the EPA List of Violating Facilities pursuant to the procedures set forth in 40 CFR Part 15.

For further information please contact Attorney on (FTS) 987-654 or Technical Specialist (FTS) 987-655.

(Signed)

Regional Administrator

Attachments

[technical documents, consultant's report, documents describing the judicial enforcement action]

ATTACHMENT TO MODEL LISTING RECOMMENDATION
BASED ON JUDICIAL ENFORCEMENT ACTION

MEMORANDUM

SUBJECT: Attachment to Recommendation for Listing

FROM: Regional Administrator, EPA Region 12

TO: Cynthia Psoras
Listing Official
Legal Enforcement Policy Division (LE-103-A)

Description of Violations

The four coal-fired boilers at [facility name] are subject to 40 CFR part 60, Subpart D, "Standards of Performance for Fossil-Fuel-Fired Steam Generators for which Construction is Commenced after August 17, 1971," and 40 CFR part 60, Subpart A, "General Provisions," which are applicable to all categories of sources for which New Source Performance Standards (NSPS) have been promulgated.

Subpart D includes emission limits for particulate matter, opacity, sulfur dioxide and nitrogen oxides (40 CFR §60.42). It also requires installation, calibration, maintenance and operation of continuous emission monitoring ("CEM") systems for opacity, sulfur dioxide and nitrogen oxides (40 CFR §45(a)). Each of the facility's boilers nos. 2, 3, 4, and 5 is subject to these emission limitations and CEM requirements. When [owner and operator] constructed the facility's boilers 2-5 between 1978 and 1980, it equipped each of the boilers with a double alkali venturi scrubber for combined control of sulfur dioxide and particulate matter. These scrubbers successfully control sulfur dioxide emissions but they have never achieved the Subpart D particulate emission limit, 40 CFR §60.42(a)(1). [Owner and operator] also equipped the boilers with continuous monitoring systems for opacity, sulfur dioxide and oxygen (it was exempt from the NOX CEM requirement, pursuant to 40 CFR §60.45(b)(3)). The sulfur dioxide monitoring system has never operated properly.

Subpart A includes requirements related to operation and maintenance of CEM systems (40 CFR §60.13); notification and recordkeeping (40 CFR §60.7) and performance testing (40 CFR §60.8k). Under 40 CFR §60.13, all CEM systems installed under applicable subparts must:

a. be installed and operational prior to conducting performance tests (emissions tests) - §60.13(b);

b. Undergo a performance evaluation (monitor

certification test) during or within 30 days of the performance tests - §60.13(c);

c. undergo regular calibration and maintenance - §60.13(d)(1).

[Facility name] violated all these provisions. It never performed a monitor performance evaluation on, and has never operated and maintained, its sulfur dioxide CEM system.

Under 40 CFR §60.7, owners and operators of NSPS sources must:

a. Notify EPA of the anticipated date of initial start-up of an affected facility postmarked not less than 30 days prior to such date -.§60.7(a)(2);

b. Notify EPA of the actual date of initial start-up postmarked within 15 days of such date §60.7(a)(3);

c. Submit quarterly reports of "excess emissions" (emissions exceeding applicable emission limits) as measured by continuous monitoring systems - §60.7(c).

[Facility name] failed to notify EPA of the anticipated or actual start-up of boilers 4 and 5. [Facility name] has never submitted any excess emissions reports to EPA.

Under 40 CFR §60.8, owners/operators are required to conduct performance tests of affected facilities not later than 180 days after initial start-up. [Facility name] violated this provision with respect to boilers 4 and 5.

It is [facility name's] customary practice to operate one or more of the boilers during the winter heating season. The steam that is generated is used for space heating and production. The boilers are not operated, or are operated using only natural gas as fuel, in the warmer months. E ch heating season since the NOV was issued (in August 1980), boilers 2 and 3 have been regularly operated. Each day a boiler is operated, particulate emissions from that boiler exceed the limit, and violations of the CEM regulations occur because the sulfur dioxide CEM remains inoperative. This winter, [facility name] has informed us that they will not operate the boilers using coal for fuel and will only use natura gas. However, they have made no commitment to permanently cease operating the boilers using coal.

The Motion for Summary Judgment

On September 25, 1985, the District Court for the Central District of the Fifty Second State ruled on EPA's motiion for partial summary judgment with respect to the Agency's counterclaim for enforcement. EPA's motion dealt only with the alleged violations of the subpart D particulate emissions limit. It did not deal with the monitoring, notification and reporting violations. EPA introduced into evidence six stack tests conducted on boilers nos. 2-5, all of which showed the tested boiler to be exceeding the limit. The court ruled that on the six days on which those tests occurred, [facility name] violated the subpart D particulate standard. Enclosed is a copy of the transcript of the September 26, 1985, hearing on the Motion for Summary Judgment. Judge X ruled from the bench following oral argument by the parties. See pages 21-25. The judge stated that he would issue a written order, but he has not done so yet. We will furnish you with a copy upon receipt.

An evidentiary hearing is scheduled for March 1, 1985, to establish days of violation other than the six stack test days.

(signed)

Regional Administrator

Attachment D

MODEL LETTER TO A FACILITY VIOLATING THE CLEAN WATER ACT REQUESTING A LIST OF ITS FEDERAL CONTRACTS, GRANTS, AND LOANS

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John Smith
President
XYZ Corporation
1000 Corporate Lane
Fifty Second State 12345

Dear Mr. Smith:

The XYZ Corporation was issued National Pollutant Discharge Elimination System (NPDES) permit number FS0100524 by the Regional Administrator of EPA, Region XI, pursuant to Title 33, United States Code, Section 1342. This permit authorizes the discharge of pollutants into the Blue River in accordance with the effluent limitations, monitoring requirements, and other provisions of the permit. On May 6, 1986, EPA issued Administrative Order #86-1570 to the XYZ Corporation pursuant to the authority granted under Title 33, United States Code, Section 1319(a)(3) for exceeding the effluent limitations for biochemical oxygen demand and total suspended solids. As discussed in our letter to you of July 6, 1986 you are currently in violation of this Administrative Order.

Under the provisions of Title 33, United States Code, Section 1368(a), a facility owned, leased, or supervised by a "person" (defined to include a corporation such as XYZ Corporation) who commits "continuing or recurring" violations of the Clean Water Act may be placed on a "List of Violating Facilities" and prohibited from receiving Federal contracts, grants and loans. The prohibition under Title 33, United States Code, Section 1368(a) is implemented by the Environmental Protection Agency (EPA) under regulations promulgated at Title 40 of the Code of Federal Regulations Part 15, entitled "Administration of The Clean Air Act and Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans." These regulations state that a facility may be placed on the "List of Violating Facilities" for a violation of an administrative order under Title 33, United States Code, Section 1319(a).

Under Title 33, United States Code, Section 1318, EPA has authority to require the owner or operator of any point source to make such reports and to provide such other information as are deemed reasonably necessary to carry out the

objectives of the Clean Water Act, Title 33, United States Code, Section 1251 et seq.

Accordingly, for the purposes of implementing Title 33, United States Code, Section 1368(a), EPA hereby invokes its authority under Title 33, United States Code, Section 1318, and requires XYZ Corporation, as the owner and operator of a point source, identified in NPDES permit number FS0100524, to provide the information specified below no later than 15 calendar days from receipt of this letter. The submittal should be addressed to:

Regional Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region XI

Information to be Submitted to EPA

1. Identify, by contract number, contracting agency and contract date, all Federal contracts held by the facility for the procurement of personal property or nonpersonal services, for which XYZ Corporation is either the prime contractor or subcontractor.

2. Identify, by grant number, granting agency, and grant date, all Federal grants received by the facility, including grants-in-aid, for which XYZ Corporation is either the grantee (prime recipient of a grant) or a subgrantee (the holder of an agreement or an arrangement under which any portion of the activity or program is being assisted under the grant).

3. Identify, by loan number, lending agency, and loan date, all Federal loans for which XYZ Corporation is a borrower or subborrower.

4. Identify, by bid number, agency and date, all bids submitted by XYZ Corporation for future Federal contracts or subcontracts.

5. Identify, by grant application number, agency and date, all grant applications submitted by XYZ Corporation for any future Federal grant or subgrant.

6. Identify, by loan application number, agency and date, all loan applications submitted by XYZ Corporation for future Federal loans or subloans.

7. Identify, by percentage estimate, the extent to which XYZ Corporation's business is connected, in any degree, to Federal contracts, grants and loans.

8. Identify the effect, if any, of the prohibition of Title 33, United States Code, Section 1368(a), upon the business of XYZ Corporation.

This inquiry does not constitute an official notification that XYZ Corportion is under consideration for placement on the "List of Violating Facilities." If deemed appropriate, such a notice will be initiated by the Listing Official, Office of Enforcement and Compliance Monitoring, EPA.

Under Title 33, United States Code, Section 1318(b), XYZ Corporation may assert a business confidentiality claim with respect to part or all of the information submitted to EPA in the manner described at 40 C.F.R. § 2.203(b). Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to XYZ Corporation.

Care should be taken in ensuring that the response to this letter is complete and accurate because Title 33, United States Code, Section 1319(c)(2) provides criminal penalties for knowingly or willfully submitting false information to EPA in any report required by the Clean Water Act. In addition, Title 18, United States Code, Section 1001 provides criminal penalties for knowingly or willfully submitting false information to a federal official.

This information request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, Title 44 United States Code, Sections 3501 et seq.

Should you have any questions, please contact me at (123) 456-7890.

Sincerely yours,

Regional Attorney
Region XI

Attachment E

MODEL LETTER TO A FACILITY VIOLATING THE CLEAN AIR ACT REQUESTING A LIST OF ITS FEDERAL CONTRACTS, GRANTS, AND LOANS

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John Smith
President
ABC Corporation
1000 Corporate Lane
Fifty Third State 12345

Dear Mr. Smith:

On May 5, 1986, in the Southern District of the Fifty Third State, the Department of Justice instituted a civil suit against the ABC Corporation for continuing and recurring violations of Title 42, United States Code, Section 7413(b).

Title 40 of the Code of Federal Regulations, Part 15, entitled "Administration of The Clean Air Act and Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans," promulgated pursuant to Title 42, United States Code, Section 7606(a) and Executive Order 11738 (38 FR 25161, September 12, 1973) authorize EPA to establish a "List of Violating Facilities." Facilities on this List are prohibited from receiving Federal contracts, grants, and loans. A facility who commits "continuing or recurring" violations of the Clean Air Act may be placed on the List. These regulations state that a facility may be placed on the List after EPA, through the Department of Justice, has filed a civil enforcement action in federal court under Title 42, United States Code, Section 7413(b).

Under Title 42, United States Code, Section 7414(a), EPA has authority to require the owner or operator of any emission source to make such reports and to provide such other information as are deemed reasonably necessary to carry out the objectives of the Clean Air Act, Title 42, United States Code, Section 7401 et seq.

Accordingly, for the purposes of implementing Title 42, United States Code, Section 7606(a), EPA hereby invokes its authority under Title 42, United States Code, Section 7414, and requires ABC Corporation as the owner and operator of a emission source, to provide the information specified below no later than 15 calendar days from receipt of this letter.

The submittal should be addressed to:

Regional Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region XI

Information to be Submitted to EPA

1. Identify, by contract number, contracting agency and contract date, all Federal contracts held by this facility for the procurement of personal property or nonpersonal services, for which ABC Corporation is either the prime contractor or subcontractor.

2. Identify, by grant number, granting agency, and grant date, all Federal grants received by this facility, including grants-in-aid, for which ABC Corporation is either the grantee (prime recipient of a grant) or a subgrantee (the holder of an agreement or an arrangement under which any portion of the activity or program is being assisted under the grant)

3. Identify, by loan number, lending agency, and loan date, all Federal loans for which ABC Corporation is a borrower or subborrower.

4. Identify, by bid number, agency and date, all bids submitted by ABC Corporation for future Federal contracts or subcontracts.

5. Identify, by grant application number, agency and date, all grant applications submitted by ABC Corporation for any future Federal grant or subgrant.

6. Identify, by loan application number, agency and date, all loan applications submitted by ABC Corporation for future Federal loans or subloans.

7. Identify, by percentage estimate, the extent to which ABC Corporation's business is connected, in any degree, to Federal contracts, grants and loans.

8. Identify the effect, if any, of the prohibition of Title 42, United States Code, Section 7606(a), upon the business of ABC Corporation.

This inquiry does not constitute an official notification that ABC Corportion is under consideration for placement on the "List of Violating Facilities." If deemed appropriate, such a notice will be initiated by the Listing Official, Office of Enforcement and Compliance Monitoring, EPA.

Under Title 42, United States Code, Section 7414(c), ABC Corporation may assert a business confidentiality claim with respect to part or all of the information submitted to EPA in the manner described at 40 C.F.R. § 2.203(b). Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to ABC Corporation.

Care should be taken in ensuring that the response to this letter is complete and accurate because Title 42, United States Code, Section 7413(c)(2) provides criminal penalties for knowingly submitting false information to EPA in any report required by the Clean Air Act. In addition, Title 18, United States Code, Section 1001 provides criminal penalties for knowingly or willfully submitting false information to a federal official.

This information request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, Title 44 United States Code, Sections 3501 et seq.

Should you have any questions, please contact me at (123) 456-7890.

Sincerely yours,

Regional Attorney
Region XI

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

JUN 30 1988 CL.3-1

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Asbestos Contractor Listing

FROM: John S. Seitz, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: James T. Wilburn
Deputy Director
Air, Pesticides and Toxics Management Division
Region IV

I am writing in response to your April 1, 1988 memo about the asbestos contractor listing policy. You raised the concern that an asbestos contractor may not remain in violation for long enough to be listed, or may not stay listed for very long since a contractor can petition for de-listing upon demonstration of compliance. You pointed out that most asbestos violations are short lived. Since other air compliance staff may share your concern, I am sending copies of this response to all air management division directors.

We discussed this problem in developing the new asbestos contractor listing policy. We believe that the short duration of most violations will not preclude EPA from using the contractor listing sanction effectively against those companies which have repeated violations. Under 40 C.F.R. § 15.11 EPA may place a facility on the list if EPA "determines that there is a record of continuing or recurring noncompliance with clean air (or water) standards. . ." (emphasis added).

If the facility violating the NESHAP is an asbestos demolition and renovation (D&R) company, then the "facility" to be listed is that asbestos D&R company. Contractor listing is an appropriate sanction to use against asbestos D&R companies with a history of several violations over a period of time.

These violations may be at different demolition sites, as long as the same company "facility" is responsible for the violations.1/ Such a company has a "record of recurring noncompliance" for the purposes of a listing action.

If an asbestos company has been placed on the list in a discretionary listing action and then petitions to be removed from the list, § 15.21 requires the Listing Official to remove the facility from the list if the Assistant Administrator has determined that "the condition(s) which gave rise to the discretionary listing have been corrected" or "the facility is on a plan for compliance which will insure that the condition(s) which gave rise to the discretionary listing will be corrected." The Office of Enforcement and Compliance Monitoring has issued a policy about what constitutes "correcting the condition giving rise to listing".2/

In the case of an asbestos D&R company which has repeatedly violated the asbestos NESHAP, we would not consider that the company had demonstrated that it had "corrected the condition giving rise to the listing" merely by sending proper notice on its next job and/or using proper work practices the next time an inspector visits the site. One day or moment of compliance is no guarantee that the contractor will be in compliance the next day or moment nor does it guarantee correction of the conditions giving rise to the listing. Where there have been recurring violations in the past, EPA should require the company to demonstrate that it has taken adequate steps to ensure that violations do not occur in the future.

To illustrate this point, consider a power plant that may have repeated, but not continuous, particulate violations. The compliance provisions of a consent decree for a power plant might require that the company install an ESP or bag-house and, in addition, require that certain operation and maintenance measures be taken and that quarterly reports of CEM data be submitted to EPA to demonstrate that the power plant is now operating in continuous compliance with the standard.

1/ For a more complete discussion defining asbestos D&R company "facility", see "Defining 'Violating Facility' for the Purpose of Listing Asbestos Demolition and Renovation Companies," March 11, 1988 at 11-13.

2/ "Policy on Correcting the Condition Giving Rise to Listing under the Contractor Listing Program", Attachment WW to the Contractor Listing Protocols, October 8, 1987.

Similarly, with an asbestos D&R company, we should require a demonstration that steps have been taken to ensure that the systemic problems which caused recurring violations have been solved. Depending on the particular requirements of the asbestos NESHAP that the company has been violating, EPA could require the asbestos D&R company to do one or more of the following:

- Institute new office procedures which assure that the required notices are sent out on time. Demonstrate that this has been done by maintaining records of all notices which have been sent and agree to an EPA audit of these records.

- Develop or have developed a written asbestos control program such as the one in the attached model consent decree provision II.

- Develop and implement a training program for asbestos D&R workers, and have every worker (including managers) take the training course. Keep records of which workers have taken the course.

- Demonstrate to EPA that the company has the equipment needed to comply with the NESHAP regulations, such as water tank trucks with hoses and spray equipment and metal drums for storing and disposing of asbestos.

Attached is a model consent decree with the language and programs we suggest to demonstrate compliance. If you have any suggestions for improvements, we would welcome them.

A discretionary listing action always has a prerequisite enforcement action. If the defendant and EPA have agreed to the terms of a consent decree which incorporates the needed remedies before the company is listed, the recommending Regional office may withdraw the Recommendation to List. Once a company has been notified of a proposed listing, a listing action is resolved only by a determination that the conditions giving rise to the listing have been corrected.

This determination may be based on a certification by the Regional program office that the facility has taken all necessary remedial action and is now in compliance, or it may be based on a signed consent decree which obligates the company to take the needed remedial action in the future.

I hope this discussion has addressed your concerns. If you still have some questions about the asbestos D&R company listing program, you may want to talk to Tracy Gipson in the Contractor Listing Program (FTS 475-8780) or Charlie Garlow or Justina Fugh in the Air Enforcement Division (FTS 475-7088 or 382-2864).

Attachments

Policy on Correcting the Condition Giving Rise to Listing under the Contractor Listing Program

Model Consent Decree Provisions

cc: Air and Waste Management Division Director
Region II

Air Management Division Directors
Regions I, III, and IX

Air and Radiation Division Director
Region V

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

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

1987 Contractor Listing Protocols Attachment WW,

Policy on Correcting the Condition Giving Rise to Listing Under the Contractor Listing Program,

(Thomas L. Adams, Jr. AA)

HAS BEEN SUPERCEDED

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. AMALGAMATED PROPERTY OWNERS, INC. and XYZ DEMOLITION CONTRACTORS, INC., Defendants	Civil Action No.

CONSENT DECREE

Plaintiff, United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), having filed a Complaint alleging violations of the National Emission Standard for Hazardous Air Pollutants ("NESHAP") for asbestos, codified at 40 C.F.R. §61.140 et seq., and the Clean Air Act, 42 U.S.C. §7401 et seq., and requesting permanent injunctive relief and civil penalties;

And Defendant having duly filed an Answer denying the claims of the plaintiff; [if appropriate]

And Plaintiff and Defendant having agreed that settlement of this action is in the public interest and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this action and thus avoiding protracted litigation costs and expenses;

And Plaintiff and Defendant having moved this Court tc this Consent Decree, subject to the provisions of 28 C.F.R.

NOW THEREFORE, before the taking of any testimony, upc pleadings, without adjudication of any issue of fact or la with no finding or admission of liability against or by th Defendant, and upon consent of the parties to this Consent it is hereby Ordered, Adjudged, and Decreed as follows:

I.
JURISDICTION

This Court has jurisdiction over the subject matter o action under 28 U.S.C. §§1331, 1345, and 1355, and 42 U.S. §7413(b) and over the parties consenting to this Consent D Venue is proper in this Court. The Complaint states a cla which relief may be granted against the Defendant.

II.
DEFINITIONS AND PARTIES

A. "Defendants" shall mean Amalgamated Property Owne.., Inc., and XYZ Demolition Contractors, Inc.

B. "Plaintiff" shall mean the United States of America and the United States Environmental Protection Agency.

C. Terms used in this Consent Decree which are defi 42 U.S.C. §7412(a), 42 U.S.C. §7602, 40 C.F.R. §61.02, an C.F.R. §61.141 shall have the meanings contained therein.

D. Defendant Amalgamated Property Owners, Inc. (APO) is a corporation organized under the laws of the State of Delaware. APO owns property in several states, including the facility identified in the Complaint in this action.

E. Defendant XYZ Demolition Contractors, Inc. (XYZ) is a corporation organized under the laws of the State of Louisiana. The company is engaged in the business of demolition throughout various states including Louisiana. XYZ "operated" the facility identified in the Complaint in that XYZ performed demolition activities at the site.

F. Defendants are "persons" within the meaning of Section 302(e) of the Clean Air Act, 42 U.S.C. §7602(e).

III.
APPLICABILITY

A. The undersigned representatives of each party to this Consent Decree certifies that he or she is fully authorized by each party whom he or she represents to enter into the terms and conditions of this Decree, and to execute and legally bind that party to it.

B. The provisions of this Consent Decree shall apply to and be binding upon the Defendants, as well as their officers, directors, agents, servants, employees, successors, and assigns, and all persons, firms and corporations having notice of this Consent Decree and who are, or will be, acting pursuant to this Consent Decree, or on behalf of, in concert with or in participation with the Defendant to this action in furtherance of this Decree.

C. The provisions of this Consent Decree shall apply to all of Defendant APO's facilities in all states, territories, and possessions of the United States of America.

D. The provisions of this Consent Decree shall apply to all of Defendant XYZ's demolitions or renovations in all states, territories, and possessions of the United States of America.

E. Defendants shall condition any and all contracts for demolitions or renovations subject to this Decree during its effective period on compliance with the terms of this Decree.

IV.
ALLEGATIONS

A. Plaintiff alleged that APO hired XYZ to demolish a scotch tape store at 1000 Main Street in Plain Dealing, Louisiana. The facility contained in excess of 80 linear meters of friable asbestos material as defined in 40 C.F.R. §61.141, and therefore the demolition operation was subject to the asbestos NESHAP, 40 C.F.R. §61.140 et seq.

B. Plaintiff alleged that XYZ commenced demolition of the facility on or about March 17, 1987, without either Defendant having submitted notice of the operation to EPA, in violation of 40 C.F.R. §61.146. Plaintiff further alleged that the Defendants failed to comply with certain work practice requirements set forth in 40 C.F.R §§61.147 and 61.152.

V.

COMPLIANCE PROGRAM

A. Defendants shall comply with the requirements of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos in 40 C.F.R §61.140 et seq. Defendants shall submit written notification for demolition or renovation operations to be postmarked or delivered at least ten (10) days before each demolition or renovation begins if the amount of asbestos is as stated in 40 C.F.R §61.145(a), or at least twenty (20) days before each demolition or renovation begins if the amount of asbestos is as stated in 40 C.F.R. §61.145(b).

B. In the case of an emergency renovation as defined in 40 C.F.R. §61.141, Defendants shall provide written notice to the appropriate EPA regional office and the appropriate delegated state or local air pollution control agency as early as possible prior to the commencement of any renovation operation involving asbestos. [Optional]

C. Defendant XYZ shall, on and after the date of entry of the Consent Decree, implement the office procedure set forth as Attachment 1 to this Consent Decree to ensure compliance with the notice requirements for demolition and renovation operations subject to the asbestos regulations, and shall use the notification format set forth as Attachments 2 and 3 to comply with this Consent Decree. [Optional, but suggested if there have been notice violations.]

D. All notifications required by this Consent Decree shall be sent by certified mail or hand delivery to the appropriate EPA Regional office and the appropriate delegated state or local air pollution control agency. Defendants shall maintain records of said notifications together with proof of mailing by certified mail for the duration of this Decree.

E. This Consent Decree in no way affects the Defendant's responsibility to comply with any State, Federal or local laws or regulations or any Order by the Court, including compliance with all applicable NESHAPS requirements, and enforcement of any such NESHAP requirements made applicable by reason of any revision of the Clean Air Act and its implementing regulations.

[Optional provisions. Sections II (Notification), III (Asbestos Control Program), and IV (Asbestos Training Program) of the Geppert decree, attached, are recommended as targets for settlement with contractors where appropriate, such as multiple violations or situations in which the contractor has a large number of work crews and inadequate centralized management of them.]

VI.
CIVIL PENALTY

Defendants shall pay a total civil penalty (penalty in accord with penalty policy). Said payment shall be in full satisfaction of Plaintiff's claims alleged in the Complaint in this action. Payment shall be made by cashier's or certified check payable to "Treasurer of the United States of America" and tendered within 30 days after final entry of this Decree to the United States Attorney for the Middle District of Louisiana, [Address]. Defendants shall send a copy of the check to the Office of Regional Counsel [Address], and to the Land and Natural Resources Division, U.S. Department of Justice [Address]. Civil penalty payments under this decree are not tax deductible.

[Optional provisions. Sections VI.B, VI.C, VIII, and IX of the PC&J decree, attached, are recommended if it is necessary to provide for an installment schedule for payment of civil penalties, particularly if there is any concern about the solvency of the defendant.]

VII.
CONTRACTOR DEBARMENT AND SUSPENSION

[Optional provision. Section VII of the PC&J decree, attached, may be a useful negotiating tool against contrac which do business with the Federal government. However, t Office of Inspector General, Suspension and Debarment Brar 475-8960) should be consulted prior to making any commitme regarding suspension or debarment proceedings.]

VIII.
STIPULATED PENALTIES

[Applicable to items other than violations of the regulat such as the training program r asbestos control program Geppert decree.]

A. Defendant XYZ shall pay stipulated penalties of per day for each day of noncompliance with any provision Sections ____ of this Consent Decree.

B. All payments of stipulated penalties shall be made within thirty (30) days of the date of noncompliance by cashiers's or certified check made payable to the "Treasurer of the United States" and mailed to the United States Attorney for the Middle District of Louisiana. A copy of the letter forwarding : check, together with a brief description of the noncompl shall be mailed to the Office of Regional Counsel, EPA R and to the Land and Natural Resources Division, U.S. Dep_ of Justice.

C. Nothing contained herein shall be construed to prevent or limit the rights of the plaintiff to obtain any other remedy, sanction, or relief which may be available to it by virtue of Defendant's failure to comply with this Consent Decree, the Clean Air Act, or the asbestos NESHAP.

IX.
FORCE MAJEURE

[Optional - may be inserted if demanded by Defendants. Section IX of the Geppert decree, attached, is recommended.]

X.
TERMINATION

This Consent Decree shall terminate 3 years from the date of its entry, provided the Defendant has complied with its terms. The United States shall have the right to seek extension of this period in the event of any violation of the Decree. The Court will retain jurisdiction over this matter to enforce the provisions of this Decree.

XI.
PUBLIC NOTICE

Each party consents to entry of this Consent Decree, subject to the public notice and comment requirements of 28 C.F.R. §50.7.

XII.
COSTS

Each party shall bear its own costs.

For Plaintiff - United States of America:

_____ Dated: _____

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice

_____ Dated: _____

THOMAS L. ADAMS, JR.
Assistant Administrator for
Enforcement and Compliance Monitoring
United States Environmental Protection
Agency

_____ Dated: _____

Assistant United States Attorney
Middle District of Louisiana

_____ Dated: _____

Trial Attorney
Land and Natural Resources Division
Environmental Enforcement Section
United States Department of Justice

_____ Dated: _____

For Defendant XYZ Demolition
Contractors, Inc.

_____ Dated: _____

For Defendant Amalgamated Property
Owners, Inc.

ENTRY OF THE COURT

Judgment entered in accordance with the foregoing Consent Decree this ____ day of _____, 1987.

BY THE COURT:

_____
United States District
Judge

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

CL.3-2

MAR 11 1988

MEMORANDUM

SUBJECT: Listing Asbestos Demolition and Renovation Companies Pursuant to Section 306 of the Clean Air Act

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

John S. Seitz, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

Terrell E. ~~Hunt, Director~~
Office of Enforcement Policy
Office of Compliance Analysis and Program Operations

TO: Addressees

We urge you to consider listing, under Section 306 of the Clean Air Act, contractors who are violators of the asbestos demolition and renovation (D&R) standards, 40 C.F.R. Part 61, Subpart M. Since significant amounts of federal money are involved in asbestos removal, we think that you will find that contractor listing can be an effective sanction against recalcitrant violators. It will deprive them of the privilege of contracting or subcontracting with federal agencies or with any other entity which has received federal grants or loans for asbestos removal.

Contractors convicted of criminal violations under § 113 (c)(1) will be automatically listed under the Mandatory Listing provisions, 40 C.F.R. § 15.10. Under 40 C.F.R. § 15.11, EPA has the discretion to list contractors who

- have violated an administrative order under § 113(a) or (d), § 167 or § 303,
- have been issued a Notice of Noncompliance under § 120,
- have been issued any form of civil ruling by a federal, state or local court, as a result of noncompliance with clean air standards,

- have been convicted by a state or local court of any criminal violations of the CAA or by a federal court for criminal violations under § 113(c)(2) (for making false statements, records or reports); or

- have had a civil judicial enforcement action filed against them in federal district court for CAA violations.

Asbestos D&R contractors differ from the traditional "stationary sources" of air pollution, because each job is done at a different construction site, generally owned by someone other than the asbestos D&R company. Therefore, the enclosed legal memorandum was prepared to clarify the application of the contractor listing regulations to asbestos D&R contractors.

This memorandum addresses the question of whether the business address of an asbestos D&R company may be listed as the "violating facility" when placing an asbestos D&R company on the List of Violating Facilities under Section 306 of the Clean Air Act. It concludes that the business address of an asbestos D&R company, rather than the address of the demolition site, should be used to identify the "violating facility" when placing an asbestos D&R company on the List of Violating Facilities.

We need your help to make this program a success. To get off to a good start, establishing some clear precedents, we need your nomination of candidates for listing. We hope to start with contractors with both egregious substantive violations and notice violations. If a nationwide or very large contractor has distinct regional or other sub-divisions, you should consider whether naming the smaller unit as the "listed facility" is more appropriate (cf. page 6 of the enclosed legal memorandum for a discussion of this aspect). Please contact Rich Biondi in SSCD (382-2826) or Charlie Garlow (475-7088) or Justina Fugh (382-2864) in OECM-Air to consult about potential candidates for listing before sending a formal recommendation to list to Headquarters.

Addressees:

Regional Counsels
Regions I-X

Air Management Division Directors
Regions I, III, & IX

Air and Waste Management Division Director
Region II

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

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

Air and Radiation Division Director
Region V

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

MAR 11 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Defining the "Violating Facility" for Purposes of Listing Asbestos Demolition and Renovation Companies Pursuant to Section 306 of the Clean Air Act

QUESTION PRESENTED: Can EPA use the business address or the address of some other property used by an asbestos demolition and renovation company to identify the "violating facility" when placing the company on the List of Violating Facilities?

ANSWER PRESENTED: The business address or the address of some other property used by an asbestos demolition and renovation company may be used to identify the "violating facility," rather than the address of the particular site involved in the violating activity, when placing an asbestos demolition and renovation company on the List of Violating Facilities. Under the definition in § 15.4, the "facility" includes "any ... location or site of operations ... to be used in the performance of a contract, grant or loan."

DISCUSSION

Background

Section 306(a) of the CAA (42 U.S.C. § 7606(a)) prohibits federal agencies from entering into any contract for goods, materials or services with a person who has been convicted of certain violations of the CAA if the contract is to be performed at "any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased or supervised by such person." This section provides the statutory authority for mandatory listing of CAA violators.

Section 306(c) of the CAA (42 U.S.C. § 7606(c)) is the statutory basis for the discretionary listing of CAA violators. It directs the President to issue an order:

> (1) requiring each Federal Agency ... to effectuate the purpose and policy of [the CAA] in such contracting or assistance activities, and (2) setting forth procedures, sanctions, penalties, and such other provisions ... necessary to carry out such requirement.

Section 508(c) of the Clean Water Act (CWA) (33 U.S.C. § 1368) as amended on October 18, 1982, by Pub. L. 95-500, §2, contained an almost identical provision.

These provisions were implemented by Executive Order 11,738, issued on September 12, 1973 (38 Fed. Reg. 25,161). The Order states that it is the policy of the Federal Government

> to assure that each Federal agency empowered to enter into contracts for the procurement of goods, materials, or services and each Federal agency empowered to extend Federal assistance ... shall undertake such procurement

> and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the [Clean Water Act].

Exec. Order No. 11,738, 35 Fed. Reg. 25,161 (1973)

On April 16, 1975, EPA promulgated regulations at 40 C.F.R. Part 15 (40 Fed. Reg. 17,124) which provide procedures for insuring that Executive Branch agencies conduct their procurement and assistance programs in accordance with the President's responsibility for ensuring compliance with CAA and CWA standards. These regulations authorize EPA to suspend or bar "facilities" which are violating the CAA or the CWA from receiving Federal contracts or subcontracts, grants or loans, by placing them on a List of Violating Facilities. The regulations require mandatory listing of violating "facilities" after the owner or operator is convicted for criminal violations under § 113(c)(1) of the CAA or § 309(c) of the CWA. They provide for discretionary listing of facilities where there are continuing and recurring civil violations of the CAA or CWA.

The EPA List of Violating facilities is published in the Federal Register twice a year and is updated in the Federal Register whenever a facility is added to the list or removed from the list. The List is also transmitted to Federal agencies with assistance responsibilities and to the General Services Administration, which publishes a consolidated list of barred, suspended or ineligible contractors.

1/ These regulations were revised on September 5, 1985 (50 Fed. Reg. 36,188).

The Problem

The question which this memorandum addresses is what is the "facility" to be placed on the List in the case of an asbestos demolition and renovation company which has a history of continuing and recurring violations of the National Emission Standard for Asbestos (hereafter the Asbestos NESHAP) or which is owned or operated by a person who has been convicted of a criminal violation of the Asbestos NESHAP.2/ Since asbestos demolition and renovation companies provide services, it is sometimes more difficult to identify the "facility" of an asbestos demolition and renovation company than it is to identify the "facility" of a company which produces goods. Goods are generally produced in one or more buildings owned or leased by the producer. Sometimes services are provided at a location owned or leased by the provider. In other cases, services are provided at a location owned or leased by the purchaser of the service.

Asbestos demolition and renovation companies which violate the asbestos NESHAP regulations generally do so in the course of performing a contract to demolish or renovate a building which is owned or leased by someone else. If the contractor violates the asbestos regulations, the violations are most likely to occur at the demolition or renovation site. Listing

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2/ Asbestos NESHAP regulations, issued pursuant to § 112 of the Clean Air Act, are codified at 40 C.F.R. Part 61, § 61.140 et seq.

the address of the property at which the demolition or renovation work occurred as the "violating facility" would not accurately identify the asbestos demolition and renovation company which performed the work and, therefore, would not accomplish the intended purpose of CAA § 306(a) -- to assure that persons or corporations convicted of a knowing violation of CAA standards or limitations are ineligible to enter into Federal contracts until the continuing or recurring violation has been corrected.3/

The issue is whether CAA § 306 and the regulations promulgated to implement this section, 40 C.F.R. Part 15, permit EPA to list, as a "facility", the executive office (or similar address) of the person (or company) providing the services and taking the action that violated the CAA.

Definition of Facility

EPA regulations implementing the Contractor Listing Program are found at 40 C.F.R. Part 15. Section 15.11 authorizes the Listing Official to "place a facility on the List" under stated conditions. Section 15.4 defines "facility":

> "Facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location or site of operations owned, leased or supervised by an applicant, contractor, grantee, or borrower to be used in the performance of a contract grant or loan. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility,

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3/ Of course, in cases where the owner of the building which was renovated or demolished has also violated the asbestos NESHAP, the building may also be listed as a "violating facility".

> except where the Assistant Administrator determines that independent facilities are located in one geographic area. (emphasis added).

For the purposes of the Contractor Listing Program, the "facility" of a company includes any location used by the company to produce the particular goods or provide the particular services which the government may wish to purchase or assist others to purchase under a particular contract.4/ To determine whether a particular "building, plant, installation ... location or site" is part of a "facility" at which a violation giving rise to a criminal conviction occurred, or is part of a "facility" which has a record of continuing or recurring noncompliance with clean air (or water) standards, one should look at the relationship of the "building, plant, installation ... location or site," to the production of the goods or services which the government might procure or assist others in procuring. Depending on circumstances, the relevant "facility" may or may not include all locations owned by a company. If several different locations are involved in manufacturing a particular product or

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4/ A different definition of "facility" is used in the Asbestos NESHAP, 40 C.F.R. § 61.141. That definition should be used for the purpose of determining whether the owner or operator an of an asbestos demolition and renovation company complies with the NESHAP. If the Agency determines that the owner or operator of the company violated any of the requirements of the NESHAP, then the definition in 40 C.F.R. § 15.4 should be used to determine what the "violating facility" is.

in supplying a particular service, all of those locations together make up the "facility".5/

The Legislative History

This definition of "facility" is consistent with the purpose of § 306, which was designed to be a sanction available to EPA against those who would provide goods and services to the Federal government using noncomplying facilities. Section 306 of the CAA is derived from Senate bill S. 4358. Section 306(a) of the Senate bill read as follows:

> Sec. 306(a) Any person (1) required to comply with an order issued by a Federal court pursuant to this Act who fails to comply within the time period specified in such order, or (2) convicted by a Federal court for knowing violation of any applicable schedule or timetable of compliance, emissions requirement, prohibition, emission standard, or standard of performance, shall be ineligible to enter into any contract with any Federal agency for the procurement of goods, materials, and services to perform such work at or with any facilities subject to such action by the court which are owned, leased or supervised by such person. Such ineligibility shall continue until the Secretary [of HEW] certifies compliance with such order, or that the conviction giving rise to the violation has been corrected. (emphasis added).

S. 4358, 91st Cong., 2d Sess. § 306 (1970).

5/ Where a company has several different divisions or factories or regional offices, each producing particular goods or services independently from each other, each would be a separate facility; and if one of those divisions or factories or regional offices is violating the CAA or the CWA, that particular unit of the company is the only one that would be placed on the List of Violating Facilities.

The Senate Committee on Public Works issued a report to accompany S. 4358, in which the following explanation of Section 306 was given:

> The Committee considered proposals offered by Senator Muskie and Senator Cook to assure that the Federal Government does not patronize or subsidize polluters in its procurement practices and policies.
>
> Section 306 would make any person or corporation who fails to comply with a court order issued under this Act or who is convicted of a knowing violation of any schedule or timetable of compliance, emission requirement, prohibition, emission standard, or standard of performance, ineligible for a Federal contract for any work to be done at the polluting facility....
>
> This section would be limited, whenever feasible and reasonable, to contracts affecting only the facility not in compliance, rather than the entire corporate entity or operating division.
>
> There might be cases where a plant could not participate in a Federal contract due to a violation but another plant owned by the same company might bid and transfer other work to the first plant. This type of action would circumvent the intent of this provision. In this case, the company's second facility should also be barred from bidding until the first plant returns to compliance.
>
> There would also be instances where a second plant within a corporation was seeking a contract unrelated to the violation at the first plant. In such a case, the unrelated facility should be permitted to bid and receive Federal contracts. (emphasis added).

S. Rept. No. 1196, 91st Cong., 2d Sess. 39 (1970).

Section 306 of S. 4358 was passed by the Senate without change. A companion bill in the House, H.R. 17255, 91st Cong., 2d Sess. (1970), had no provision about procurement policies. In conference, the provision making persons convicted of knowing violations of the CAA ineligible for Federal contracts or assis-

tance was retained. In lieu of the provision of the Senate bill extending ineligibility to persons subject to, but not complying with, court orders, the conference committee substituted a more general requirement that "the President shall cause to be issued an order (1) requiring each Federal agency ... to effectuate the purpose and policy of this chapter in such contracting and assistance activities,..."6/

The Executive Order

The President complied with this mandate by issuing Executive Order No. 11,602 on June 29, 1971. E.O. No. 11,602 was superseded by Executive Order No. 11,738, on September 10, 1973.7/ Exec. Order 11,738 sets forth the following Federal

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6/ When the CAA amendments were reported out of the conference committee, the conference report on Section 306 stated:

> The conference substitute is more limited than the Senate provision. It provides that persons convicted of a knowing violation of standards or limitations shall be ineligible to enter into Federal contracts until the Administrator certifies that the violation has been corrected. The remainder of the conference substitute follows the Senate amendment by requiring the President to issue an order requiring Federal agencies (1) to assist in the implementation of this act and (2) to establish sanctions for noncompliance.

Conference Report No. 1783 (to accompany H.R. 17255), 91st Cong. 2d Sess. (Dec. 17, 1970), reprinted in 1970 U.S. Code Cong. & Ad. News 5356, 5389.

7/ Exec. Order No. 11,738, 38 Fed. Reg. 25,161 (1973), amended Exec. Order 11,602, 36 Fed. Reg. 12,475 (1971), by adding the words "Federal Water Pollution Control Act" to § 1 and changing references to "the Act" in §§ 2, 4, 6 and 9 to "the Air Act" and adding references to "the Water Act." Exec. Order 11,738 also adds § 11, which requires that regulations issued pursuant to CWA § 508 shall be uniform with regulations issued pursuant to CAA § 306 to the maximum extent possible.

procurement policy:

> Section 1. Policy. It is the policy of the Federal Government to improve and enhance environmental quality. In furtherance of that policy, the program prescribed in this Order is instituted to assure that Federal agencies are empowered to enter into contracts for the procurement of goods, materials or services or to extend Federal assistance by way of grants or contracts in such a manner that will result in effective enforcement of the Clean Air Act ... and the Federal Water Pollution Control Act. ... (emphasis added).

Section 2 of the Order states, in part:

> (b) In carrying out his responsibilities under this Order, the Administrator shall ... designate facilities which have given rise to a conviction for an offense under section 113(c)(1) of the Air Act ... [and] publish and circulate ... lists of those facilities, together with the names and addresses of the persons who have been convicted of such offenses ... (emphasis added).

Section 3 prohibits any Federal agency from entering into any contract with or extending any assistance to any facility which has been listed pursuant to CAA § 306. Section 4 requires that all Federal procurement regulations

> ... issued by any agency of the Executive Branch shall ... be amended to require ... inclusion of a provision requiring compliance with the Air Act, the Water Act, and standards issued pursuant thereto in the facilities in which the contract is to be performed, or which are involved in the activity or program to receive assistance. (emphasis added).

Section 5 authorizes the Administrator of the Environmental Protection Agency "to issue such rules, regulations, standards and guidelines as he may deem necessary and appropriate to carry out the purposes of this Order." Sections 1 and 5 of

Exec. Order 11,738, together with § 306(c) of the CAA (and § 508(c) of the CWA), provide the authority for the discretionary listing program. EPA's Contractor Listing regulations, codified at 40 C.F.R. Part 15, implement the Executive Order.

Discussion

As defined in 40 C.F.R. § 15.4, a "facility" includes any building, location, or site to be used in the course of performing the contract or loan. While the buildings or sites at which work is performed are often also the buildings or sites at which a violation occurs, the fact that the violation may occur "off-site", i.e., at a location owned or operated by a customer, does not mean that such locations are not part of the "facility" "to be used in the performance of" a contract. The "facility" of a contractor also includes the business address which the company uses in its contracts, even if the business address is simply a post office box.

As Congress recognized, a company may be violating the CAA or CWA at one "facility" and have other complying "facilities" which are not involved in the production of the same goods and services. Congress differentiated between entirely uninvolved "facilities", on the one hand, and involved "facilities", e.g., where a sister "facility" "B" was used to circumvent a ban on goods or services produced at "facility" "A".

The definition of "facility" in § 15.4 implements that concept. If an asbestos demolition and renovation company has

two or more divisions which operate independently of each other, each division would, at least presumptively, be a separate "facility" under the definition found in § 15.4. If only one of the divisions is convicted of criminal violations of the asbestos NESHAP or if only one of the divisions has a record of continuing or recurring noncompliance with the asbestos NESHAP, only that division of the company would be placed on the List of Violating Facilities, absent the kind of situation described by Congress.

This is the only way that an asbestos demolition and renovation "facility" can be defined which is consistent with the intent of the statutes, the executive orders, and the regulations. A contrary interpretation would fail to "effectuate the purpose and policy of [the CAA] in [the government's] contracting and assistance activities" as required by § 306. The "facility" concept is intended to carry out, not to thwart, the intent of § 306. While the business address of the "facility" will often coincide with the address of the site where violations occurred, there is no requirement in § 306 that it do so. Listing is intended broadly to sanction "persons" who continue to violate the CAA by depriving them of access to Federal contracts for goods and services and to federal grants and loans. Congress did not intend to limit this sanction to contractors who engage in violative conduct on property that they happen to own or control. So long as the business address of the asbestos

demolition and renovation company is fairly associated with the activity which is the violating conduct, that address may be used to identify the "facility" to be placed on the List, notwithstanding that additional, related work (and the actual violations) occurred elsewhere.

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

CL.4-1
GM #32

AUG 08 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Implementation of Mandatory Contractor Listing

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

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
Associate Enforcement Counsel for Air Enforcement
Associate Enforcement Counsel for Water Enforcement
Associate Enforcement Counsel for Criminal Enforcement
Assistant Attorney General for Land and Natural Resources
Regional Counsels I-X

Introduction and Purpose

Pursuant to statutory requirements, the proposed revisions to 40 CFR Part 15 require that the List of Violating Facilities ("the List") automatically include any facility which gives rise to a criminal conviction of a person under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. Any facility on the List is ineligible to receive any non-exempt Federal government contract, grant, or loan. Removal of a facility from the List occurs only if I certify that the condition giving rise to the conviction has been corrected or if a court reverses or vacates the conviction. This memorandum establishes the procedure to implement the mandatory portion of the contractor listing program. 1/

1/ Guidance on implementation of the discretionary listing authority issued on July 18, 1984.

Procedure for Mandatory Listing

I. A federal district court must enter a guilty verdict or guilty plea of a person under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. The convicted person must own, operate, lease, supervise or have a financial interest in the facility which gave rise to the conviction. Note that criminal convictions under Section 113(c)(2) of the Clean Air Act and criminal convictions entered by a State or local court do not qualify a facility for mandatory listing.

II. Upon notification of an entry of a guilty verdict or guilty plea by the clerk of the district court, the Department of Justice must immediately notify the Associate Enforcement Counsel for Criminal Enforcement (LE-134E). This notification must occur even if the defendant still awaits sentencing, has moved for a new trial or a reduced sentence, or has appealed the conviction.

III. The Associate Enforcement Counsel for Criminal Enforcement must independently verify that the court has entered the guilty verdict or guilty plea.

IV. Upon such verification, the Associate Enforcement Counsel for Criminal Enforcement shall notify EPA's Listing Official (LE-130A) in writing, of the name and location of the facility and of the condition giving rise to the guilty verdict or guilty plea.

V. The Listing Official shall then update the List by publishing a notice in the Federal Register, and shall notify the Associate Enforcement Counsel for Air or Water; the appropriate Regional Counsel; the Compliance Staff, Grants Administration Division, Office of Administration and Resource Management; the General Services Administration, and the facility. A facility remains on the mandatory List indefinitely until it establishes a basis for removal.

Procedure for Removal from the Mandatory List

I. Any person who owns, operates, leases, supervises, or has a financial interest in the listed facility may file with the Listing Official a request to remove that facility from the List. The request must establish one of the following grounds for removal:

   A. The condition at the facility that gave rise to the conviction has been corrected.

   B. The conviction (not just the sentence) was reversed or vacated.

II. The Listing Official must transmit the request for removal to the Assistant Administrator for OECM.

III. The Assistant Administrator for OECM, or her or his designee, shall review the request for removal and shall consult the appropriate Regional Counsel to determine whether the condition at the facility giving rise to the conviction has been corrected, or if the conviction has been reversed or vacated.

IV. The Assistant Administrator for OECM shall determine as expeditiously as practicable whether to remove the facility from the list.

V. If the Assistant Administrator for OECM decides to remove the facility from the list, a written notification of such determination shall be sent to the facility and to the Listing Official who shall promptly publish a notice of removal in the Federal Register.

VI. If the Assistant Administrator for OECM decides not to remove the facility from the List, the Listing Official shall send written notice of the decision to the person requesting removal. The notice shall inform the person owning, operating, leasing, supervising or having a financial interest in the facility of the opportunity to request a removal hearing before a Case Examiner (See 40 CFR Part 15 for the selection and duties of the Case Examiner).

VII. If the Case Examiner, or the Administrator upon appeal of the Case Examiner's decision, decides to remove the facility from the List, the Listing Official shall be notified. The Listing Official shall then promptly remove the facility from the List. If the Case Examiner or the Administrator upon appeal, decides not to remove the facility from the list, then the Listing Official shall send written notice of the decision to the person requesting removal.

It is important to note that any decision regarding the listing or removal of a facility from the List does not affect any other action by any government agency against such a facility, including debarment from government contracting.

I believe these procedures will enable us to conduct the mandatory listing program in an efficient manner. If you have any questions, please contact EPA's Listing Official, Allen J. Danzig, at (FTS) 475-8777.

cc: Stephen Ramsey, DOJ
Belle Davis, GAD/OARM
Judson W. Starr,/DOJ

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

CL.42

OCT 31 1991

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: EPA Policy Regarding The Role of Corporate Attitude, Policies, Practices, and Procedures, In Determining Whether To Remove A Facility From The EPA List of Violating Facilities Following A Criminal Conviction

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Assistant Administrator and General Counsel
Assistant Administrator for Air and Radiation
Assistant Administrator for Water
Regional Administrators
Regional Counsels
Regional Air & Water Division Directors
Enforcement Counsels for Air and Water
Director, Office of Criminal Enforcement

I. Introduction

This guidance memorandum clarifies EPA policy concerning the role of corporate attitude[1], policies, practices, and procedures in determining whether, in mandatory contractor listing cases[2], the condition giving rise to a criminal conviction has been corrected. Clean Air Act ("CAA") § 306 and Clean Water Act ("CWA") § 508 require correction of the condition

[1] The term "corporate attitude" refers to all organizational defendants, not only to incorporated entities

[2] Although discretionary listing is outside the scope of this guidance, evaluation of corporate attitude, policies, practices, and procedures may be applied appropriately in discretionary listing cases as well.

giving rise to the conviction as a prerequisite for removal of a facility owned, operated, or supervised by a convicted person from the EPA List of Violating Facilities ("the List").

II. Background

In 1990, EPA formally recognized that the condition leading to a conviction under CWA § 309(c) or CAA § 113(c) could include a convicted environmental violator's corporate attitude, policies, practices, and procedures regarding environmental compliance. In the Matter of Valmont Industries, Inc., (ML Docket No. 07-89-LO68, Jan. 12, 1990) ("Valmont"). In Valmont, the decisions of both the Assistant Administrator for Enforcement (AA) and the EPA Case Examiner established the principle that the presence of a poor corporate attitude regarding compliance with environmental standards, thus creating a climate facilitating the likelihood of a violation, may be part of the condition giving rise to the conviction which must be corrected prior to removal of the facility from the List. 40 CFR § 15.20.

Valmont was convicted of crimes of falsification and deception. The AA determined that not only was Valmont required to correct the physical conditions which led to its conviction, but that it also was required to demonstrate that it had implemented appropriate corporate policies, practices, and procedures, designed to ensure that the mere appearance of compliance with environmental standards was not put above actual compliance with those standards. The Case Examiner later affirmed the use of the corporate attitude standard in determining whether the condition leading to listing has been corrected.

Following Valmont, EPA has applied the corporate attitude test in other cases where facilities have requested removal from the List, including cases involving knowing or negligent conduct, not involving deliberate deception. See, Colorado River Sewage System Joint Venture,

(ML Docket No. 09-89-LO47, August 20, 1991); Zarcon Corp. (ML Docket No. 09-89-LO58, Aug. 1, 1990); Sellen Construction Co. (ML Docket No. 10-89-LO73, June 13, 1990). This memorandum clarifies the extent to which corporate attitude may be a relevant factor in cases involving knowing or negligent criminal conduct, which does not involve willful falsification or deception. It also clarifies the criteria which will be applied by EPA in determining whether the condition giving rise to a conviction has been corrected in a given case.

The purposes of this guidance are to inform the public and the regulated community, thereby facilitating greater compliance with environmental standards; to formally restate criteria applied in EPA contractor listing cases over the past two years; and to provide EPA personnel with a readily available summary of EPA policies which will enable them to evaluate contractor listing cases.

III. Scope of Application

The corporate attitude, policies, practices, and procedures of a listed facility's owner, operator, or supervisor will always be relevant when a facility that has been listed as the result of a criminal conviction requests removal from the List. How significant a factor the corporate attitude, policies, practices, and procedures will be depends upon the degree of intent involved in the violation at issue. The degree of intent shall be determined (for purposes of removal from the List) by the AA[3], with reference to the facts of, and the nature of the conduct involved in,

[3] The Assistant Administrator will, as in all contractor listing removal cases, give considerable weight to the recommendation of the EPA Region in which the listed facility is located.

each case. This shall not be determined solely by the nature or title of the crime[4], or by the terms or language contained in any plea agreement.

In every case involving fraud, concealment, falsification, or deliberate deception, proof of change of corporate attitude must be demonstrated over an appropriate and generally substantial period of time, commensurate with the seriousness of the facts involved in the violation(s) (see Section IV).

In most cases involving knowing misconduct, proof of change of corporate attitude must also be demonstrated over an appropriate period of time, commensurate with the seriousness of the facts involved in violation(s) (even if there was not affirmative fraud or concealment). There may be some extremely rare cases in which knowing conduct (not involving affirmative fraud or concealment) may be deemed to be relatively minor. In such rare cases, proof of change of corporate attitude may not be a significant factor.

In cases involving criminal negligence, proof of change in corporate attitude may be significant as it relates to ensuring prevention of further negligent violations. (E.g., in a negligent discharge case, proof of change of corporate attitude may be demonstrated by educating and training employees on proper treatment and disposal requirements and practices). In cases of serious negligence[5], more significance may be placed on demonstrating proof of

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[4] E.g., a conviction for "negligent discharge" of pollutants under Clean Water Act § 309(c) may be a minor violation requiring minimal proof of change of corporate attitude, or it may be a significant violation reflecting knowing or deliberate conduct, requiring more substantial proof of such change. The determination will be made on the facts of each case. Criminal defendants and prosecutors frequently agree to enter a plea to a misdemeanor, rather than go to trial on more serious felony charges which may be supported by the facts.

[5] Cases involving convictions for criminal negligence may include a wide range of conduct, from relatively minor, e.g., accidental spillage of a can of paint, up to potentially disastrous, e.g., failure to train employees properly and to respond to oil leak detection systems, which results in a massive oil spill. The label of "negligence" alone does not adequately describe the nature and severity of the criminal conduct in a given case.

change of corporate attitude, before a facility will be removed from the List. In other cases of negligent violations[6], a limited set of minor violations may exist which constitute criminal conduct resulting in conviction, but in which minimal significance will be placed on demonstrating proof of change of corporate attitude, policies, practices, and procedures.

In addition, a case may arise in which the violations which gave rise to listing occurred considerably before the request for removal. Nevertheless, as set forth at section IV., infra, to warrant removal, proof of change of corporate attitude for an appropriate continuing period of time, until the removal request is granted, is required if the crime involved fraud, or deliberate falsification or concealment, knowing misconduct (unless minor), or serious negligent violations.

If a listed facility is sold (after the conduct which gave rise to the conviction or listing), the new owner of that facility is obligated to demonstrate that appropriate and effective corporate policies, practices, and procedures are in place, in accordance with the criteria and factors outlined in this guidance, before the facility will be removed from the List.

IV. Criteria For Demonstrating Proof Of Change in Corporate Attitude

In cases where proof of change of corporate attitude is relevant to determining whether the condition giving rise to a criminal conviction has been corrected, factors to which EPA will look include, but are not limited to, the following[7]:

> A. Whether the owner, operator, or supervisor of the [listed facility] has put in place an effective program to prevent and detect environmental problems and violations of the law. An "effective program to prevent and detect environmental problems and violations of the law" means a program that has been reasonably designed, implemented, and enforced so that it will be effective in preventing and detecting environmental problems or violations, and criminal conduct.

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[6] E.g., accidental spillage of paint into a storm sewer.

[7] These criteria are adapted from the proposed U.S. sentencing guidelines for organizational defendants.

The hallmark of an effective program is that the organization exercises due diligence in seeking to prevent and detect environmental problems or violations, or criminal conduct. Due diligence requires, at a minimum, that the organization has taken at least the following types of steps to assure compliance with environmental requirements.

1. The organization must have written policies defining the standards and procedures to be followed by its agents or employees[8].

2. The organization must have specific high-level persons, not reporting to production managers, who have authority to ensure compliance with those standards and procedures.

3. The organization must have effectively communicated its standards and procedures to agents and employees, e.g., by requiring participation in training programs and by the dissemination of publications.

4. The organization must establish or have established an effective program for enforcing its standards, e.g., monitoring and auditing systems designed to prevent or detect noncompliance; and a well-publicized system, under which agents and employees are encouraged to report, without fear of retaliation, evidence of environmental problems or violations, or criminal conduct within the organization.

5. The standards referred to in paragraph 1, above, must have been consistently enforced through appropriate disciplinary mechanisms.

6. After an offense or a violation has been detected, the organization must immediately take appropriate steps to correct the condition giving rise to the listing (even prior to the conviction or listing). The organization must also take all reasonable steps to prevent further similar offenses or violations, including notifying appropriate authorities of such offenses or violations, making any necessary modifications to the organization's program to prevent and detect environmental problems or violations of law, and discipline of individuals responsible for the offense or violation. This may include conducting an independent environmental audit to ensure that there are no other environmental problems or violations at the facility.

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[8] Although specifics will be determined on a case-by-case basis, with reference to the conduct underlying the violation, examples include, but are not limited to, training on company rules, EPA requirements, ethical standards and considerations, and standards of criminal liability.

B. The precise actions necessary for an effective program to prevent and detect environmental problems or violations of law will depend upon a number of factors. Among the relevant factors are:

1. Size of organization: The requisite degree of formality of a program to prevent and detect violations of law or environmental problems will vary with the size of the organization; the larger the organization, the more formal the program should typically be.

2. Likelihood that certain offenses may occur because of the nature of its business: If, because of the nature of an organization's business, there is a substantial risk that certain types of offenses or violations may occur, management must have taken steps to prevent and detect those types of offenses or violations. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are handled properly at all times.

3. Prior history of the organization: An organization's prior history may indicate types of offenses or violations that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.

An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law or environmental problems.

C. EPA will also consider additional voluntary environmental cleanup, or pollution prevention or reduction measures performed, above and beyond those required by environmental statutes or regulations, and voluntary compliance with pending environmental requirements significantly before such compliance is actually required.

In cases where probation is imposed by the sentencing court, the term of probation will be presumed to be an appropriate period of time for demonstrating a change of corporate attitude, policies, practices, and procedures[9]. This presumption may be rebutted by either the owner, operator, or supervisor of the listed facility, or by the government, upon a demonstration

[9] The presumption is derived from the determination, which will already have been made by the sentencing court, that the convicted person's criminal conduct justifies a period of supervision and oversight by the court, i.e., probation.

that the probation term is not an appropriate time in which to demonstrate such change. If probation is not imposed in the criminal case, the AA shall determine, after a request for removal from the List is filed, what is an appropriate period of time in which to demonstrate that the condition leading to conviction has been corrected. This determination shall be based upon the facts of each case.

The time required to demonstrate a change of corporate attitude, policies, practices, and procedures shall be presumed to be an appropriate period, as determined by the AA, commensurate with (a) the nature, extent, and severity of the violations (including the length of time during which the violations occurred), and (b) the complexity and extent of remedial action necessary to ensure that appropriate policies, practices, and procedures (including, but not limited to, any necessary employee education or training programs) have been completed. At a minimum, the period of time shall be sufficient to demonstrate successful performance, consistent with those policies, practices, and procedures, including consideration of steps which were taken prior to conviction or listing.

The policies and procedures set out in this document are intended for the guidance of government personnel and to inform the public. 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.

SE.1

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

SE.1-1

JUL 24 1985 GM # 42

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Form of Settlement of Civil Judicial Cases

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

TO: Regional Counsels
Associate Enforcement Counsels

This memorandum is intended to confirm the Agency's general policy regarding the form of settlement of civil judicial enforcement cases. The need for a statement of Agency policy on the form of settlement recently arose because a case had been settled without a consent decree, and the defendant later refused to abide by the terms of the informal settlement. In order to make sure that the problem does not recur, OECM is reducing this policy to writing.

Agency policy is that after a complaint is filed, all civil judicial cases should be settled only (1) by consent decree, or (2) where appropriate, by a stipulation of dismissal. This second approach should be utilized only when the settlement requires payment of a penalty, and the penalty has been paid in full at the time of settlement. In such cases, the continued jurisdiction provided by a consent decree is not needed or required. This form of settlement policy is the established practice of the Department of Justice, and all EPA enforcement attorneys should continue to abide by it.

Extraordinary and compelling circumstances may arise when EPA, in consultation with DOJ, might wish to settle a case without the use of a consent decree or a stipulation of dismissal. If such a situation arises, then the involved Agency attorneys should obtain my advance concurrence before representing to the defendants any willingness to settle a case without either a consent decree or stipulation of dismissal.

Regardless of which form of settlement is used, a copy of the settlement documents should be provided to the Docket Control Office following my concurrence in the settlement so that the appropriate data can be entered.

cc: F. Henry Habicht, II

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

AUG 14 1987

5E.1-2
GM-62

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions

TO: Assistant Administrators
Regional Administrators

I. Purpose

Attached is the final guidance on the use of alternative dispute resolution (ADR) techniques in enforcement actions. This guidance has been reviewed by EPA Headquarters and Regional offices, the Department of Justice, as well as by representatives of the regulated community. We have also sought the advice of leading ADR professionals, including many of the renowned participants at a recent Colloquium on ADR sponsored by the Administrative Conference of the United States.

The reaction to the draft guidance has been overwhelmingly favorable and helpful. In response to comments, the guidance more clearly distinguishes the uses of binding and non-binding techniques, emphasizes the need to protect the confidentiality of conversations before a neutral, and includes model agreements and procedures for the use of each ADR technique.

II. Use of ADR

As the guidance explains, ADR involves the use of third-party neutrals to aid in the resolution of disputes through arbitration, mediation, mini-trials and fact-finding. ADR is being used increasingly to resolve private commercial disputes. EPA is likewise applying forms of ADR in various contexts: negotiated rulemaking, RCRA citing, and Superfund remedial actions. ADR holds the promise of lowering the transaction costs to both the Agency and the regulated community of resolving applicable enforcement disputes.

I view ADR as a new, innovative and potentially more effective way to accomplish the results we have sought for years using conventional enforcement techniques. We retain our strict adherence to the principle that the regulated community must comply with the environmental laws. The following tasks will be undertaken to enable the Agency to utilize ADR to more effectively and efficiently foster compliance:

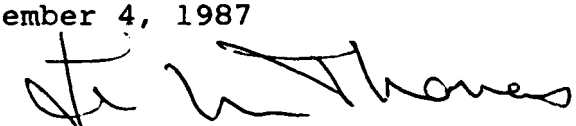
Training. Some within the Agency may fear that using less adversarial techniques to resolve enforcement actions implies that the agency will be seeking less rigorous settlements. This is not the case. We must train our own people in what ADR is, what it is not, and how it can help us meet our own compliance objectives. We plan to accomplish this by making presentations at national program and regional counsel meetings, and by consulting on particular cases.

Outreach. We must also make an affirmative effort to demonstrate to the regulated community that EPA is receptive to suggestions from them about using ADR in a given case. Nominating a case for ADR need not be viewed as a sign of weakness in either party. After we have gained experience, we plan to conduct a national conference to broaden willingness to apply ADR in the enforcement context.

Pilot Cases. Ultimately, the value of ADR must be proven by its successful application in a few pilot cases. ADR is being used to resolve an important municipal water supply problem involving the city of Sheridan, Wyoming. Two recent TSCA settlements also utilized ADR to resolve disputes which may arise in conducting environmental audits required under the consent agreements. Beyond these, however, we need to explore the applicability of ADR to additional cases.

III. Action and Follow-Up

I challenge each of you to help in our efforts to apply ADR to the enforcement process. I ask the Assistant Administrators to include criteria for using ADR in future program guidance, and to include discussions of ADR at upcoming national meetings. I ask the Regional Administrators to review the enforcement actions now under development and those cases which have already been filed to find cases which could be resolved by ADR. I expect each Region to nominate at least one case for ADR this fiscal year. Cases should be identified and nominated using the procedure set forth in the guidance by September 4, 1987



Lee M. Thomas

Attachment

cc: Regional Enforcement Contacts
Regional Counsels

GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

United States Environmental Protection Agency

TABLE OF CONTENTS

Guidance on the Use of Alternative Dispute Resolution (ADR) in EPA Enforcement Cases

GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

I. INTRODUCTION

To effect compliance with the nation's environmental laws, the United States Environmental Protection Agency (EPA) has developed and maintained a vigorous judicial and administrative enforcement program. Cases instituted under the program must be resolved, either through settlement or decision by the appropriate authority, as rapidly as possible in order to maintain the integrity and credibility of the program, and to reduce the backlog of cases.

Traditionally, the Agency's enforcement cases have been settled through negotiations solely between representatives of the Government and the alleged violator. With a 95 percent success rate, this negotiation process has proved effective, and will continue to be used in most of the Agency's cases. Nevertheless, other means of reaching resolution, known collectively as alternative dispute resolution (ADR), have evolved. Long accepted and used in commercial, domestic, and labor disputes, ADR techniques, such as arbitration and mediation, are adaptable to environmental enforcement disputes. These ADR procedures hold the promise for resolution of some of EPA's enforcement cases more efficiently than, but just as effectively as, those used in traditional enforcement. Furthermore, ADR provisions can also be incorporated into judicial consent decrees and consent agreements ordered by administrative law judges to address future disputes.

EPA does not mean to indicate that by endorsing the use of ADR in its enforcement actions, it is backing away from a strong enforcement position. On the contrary, the Agency views ADR as merely another tool in its arsenal for achieving environmental compliance. EPA intends to use the ADR process, where appropriate, to resolve enforcement actions with outcomes similar to those the Agency reaches through litigation and negotiation. Since ADR addresses only the process (and not the substance) of case resolution, its use will not necessarily lead to more lenient results for violators; rather, ADR should take EPA to its desired ends by more efficient means.

ADR is increasingly becoming accepted by many federal agencies, private citizens, and organizations as a method of handling disputes. The Administrative Conference of the United States has repeatedly called for federal agencies to make greater

use of ADR techniques, and has sponsored numerous studies to further their use by the federal government. The Attorney General of the United States has stated that it is the policy of the United States to use ADR in appropriate cases. By memorandum, dated February 2, 1987, the Administrator of EPA endorsed the concept in enforcement disputes, and urged senior Agency officials to nominate appropriate cases.

This guidance seeks to:

(1) Establish Policy - establish that it is EPA policy to utilize ADR in the resolution of appropriate civil enforcement cases.

(2) Describe Methods - describe some of the applicable types of ADR, and the characteristics of cases which might call for the use of ADR;

(3) Formulate Case Selection Procedures - formulate procedures for determining whether to use ADR in particular cases, and for selection and procurement of a "third-party neutral" (i.e., mediators, arbitrators, or others employed in the use of ADR);

(4) Establish Qualifications - establish qualifications for third-party neutrals; and

(5) Formulate Case Management Procedures - formulate procedures for management of cases in which some or all issues are submitted for ADR.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS

ADR mechanisms which are potentially useful in environmental enforcement cases will primarily be mediation and nonbinding arbitration. Fact-finding and mini-trials may also be helpful in a number of cases. A general description of these mechanisms follows. (See also Section VIII, below, which describes in greater detail how each of these techniques works.) Many other forms of ADR exist, none of which are precluded by this guidance. Regardless of the technique employed, ADR can be used to resolve any or all of the issues presented by a case.

A. Mediation[1] is the facilitation of negotiations by a person not a party to the dispute (herein "third-party neutral") who has no power to decide the issues, but whose function is to

[1] For further information on the mediation role of Clean Sites Inc., see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

assist the parties in reaching settlement. The mediator serves to schedule and structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and serves as an assessor - but not a judge - of the positions taken by the parties during the course of negotiations. With the parties' consent, the mediator may take on additional functions such as proposing solutions to the problem. Nevertheless, as in traditional negotiation, the parties retain the power to resolve the issues through an informal, voluntary process, in order to reach a mutually acceptable agreement. Having agreed to a mediated settlement, parties can then make the results binding.

B. Arbitration involves the use of a person -- not a party to the dispute -- to hear stipulated issues pursuant to procedures specified by the parties. Depending upon the agreement of the parties and any legal constraints against entering into binding arbitration, the decision of the arbitrator may or may not be binding. All or a portion of the issues -- whether factual, legal or remedial -- may be submitted to the arbitrator. Because arbitration is less formal than a courtroom proceeding, parties can agree to relax rules of evidence and utilize other time-saving devices. For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues.

C. Fact-finding entails the investigation of specified issues by a neutral with subject matter expertise, and selected by the parties to the dispute. The process may be binding or nonbinding, but if the parties agree, the material presented by the fact-finder may be admissible as an established fact in a subsequent judicial or administrative hearing, or determinative of the issues presented. As an essentially investigatory process, fact-finding employs informal procedures. Because this ADR mechanism seeks to narrow factual or technical issues in dispute, fact-finding usually results in a report, testimony, or established fact which may be admitted as evidence, or in a binding or advisory opinion.

D. Mini-trials permit the parties to present their case, or an agreed upon portion of it, to principals who have authority to settle the dispute (e.g., vice-president of a company and a senior EPA official) and, in some cases as agreed by the parties, to a neutral third-party advisor. Limited discovery may precede the case presentation. The presentation itself may be summary or an abbreviated hearing with testimony and cross-examination as the parties agree. Following the presentation, the principals reinstitute negotiations, possibly with the aid of the neutral as mediator. The principals are the decisionmakers while the third-party neutral, who usually has specialized subject matter expertise in trial procedures and evidence, acts as an advisor on potential rulings on issues if the dispute were to proceed to trial. This ADR mechanism is useful in narrowing factual issues

or mixed questions of law and fact, and in giving the principals a realistic view of the strengths and weaknesses of their cases.

III. CHARACTERISTICS OF ENFORCEMENT CASES SUITABLE FOR ADR

This section suggests characteristics of cases which may be most suitable for use of ADR. These characteristics are necessarily broad, as ADR may theoretically be used in any type of dispute. Enforcement personnel can use these characteristics to make a preliminary assessment of whether ADR should be considered for use in a particular case, including a discrete portion or issue in a case.

ADR procedures may be introduced into a case at any point in its development or while pending in court. However, it is preferable that ADR be considered as early as possible in the progress of the case to avoid the polarizing effect which frequently results from long and intense negotiations or the filing of a lawsuit. ADR should, therefore, be considered prior to referral of a case to DOJ. Indeed, the threat of a referral may be used as an incentive to convince the other parties to utilize an appropriate ADR technique.

Notwithstanding the preference for consideration and use of ADR at an early stage in the progress of a case, there are occasions when ADR should be considered after a case has been referred and filed in court. This is particularly true when the parties have reached an apparent impasse in negotiations, or the court does not appear to be willing to expeditiously move the case to conclusion through establishing discovery deadlines, conducting motions hearings or scheduling trial dates. In such cases, introduction of a mediator into the case, or submission of some contested facts to an arbitrator may help to break the impasse. Cases which have been filed and pending in court for a number of years without significant movement toward resolution should be scrutinized for prospective use of ADR.

In addition to those circumstances, the complexity of legal and technical issues in environmental cases have resulted in a recent trend of courts to appoint special masters with increasing frequency. Those masters greatly increase the cost of the litigation and, while they may speed the progress of the case, the parties have little direct control over the selection or authority of the masters. The government should give careful consideration to anticipating a court's desire to refer complex issues to a master by proposing that the parties themselves select a mediator to assist in negotiations or an arbitrator to determine some factual issues.

The following characteristics of cases which may be candidates for use of some form of ADR are not intended to be exhaustive. Agency personnel must rely upon their own judgment and experience to evaluate their cases for potential applications of ADR. In all instances where the other parties demonstrate their willingness to use ADR, EPA should consider its use. Sample characteristics of cases for ADR[2]:

A. Impasse or Potential for Impasse

When the resolution of a case is prevented through impasse, EPA is prevented from carrying out its mission to protect and enhance the environment, and is required to continue to commit resources to the case which could otherwise be utilized to address other problems. It is highly desirable to anticipate and avoid, if possible, the occurrence of an impasse.

Impasse, or the possibility for impasse, is commonly created by the following conditions, among others:

(1) Personality conflicts or poor communication among negotiators;

(2) Multiple parties with conflicting interests;

(3) Difficult technical issues which may benefit from independent analysis;

(4) Apparent unwillingness of a court to rule on matters which would advance the case toward resolution; or

(5) High visibility concerns making it difficult for the parties to settle such as cases involving particularly sensitive environmental concerns such as national parks or wild and scenic rivers, issues of national significance, or significant adverse employment implications.

In such cases, the involvement of a neutral to structure, stimulate and focus negotiations and, if necessary, to serve as an intermediary between personally conflicting negotiators should be considered as early as possible.

B. Resource Considerations

All enforcement cases are important in that all have, or should have, some deterrent effect upon the violator and other members of the regulated community who hear of the case. It is, therefore, important that EPA's cases be supported with the

[2] ADR is not considered appropriate in cases where the Agency is contemplating criminal action.

level of resources necessary to achieve the desired result. Nevertheless, because of the size of EPA's enforcement effort, it is recognized that resource efficiencies must be achieved whenever possible to enable EPA to address as many violations as possible.

There are many cases in which utilizing some form of ADR would achieve resource efficiencies for EPA. Generally, those cases contain the following characteristics:

(1) Those brought in a program area with which EPA has had considerable experience, and in which the procedures, case law and remedies are relatively well-settled and routine; or

(2) Those having a large number of parties or issues where ADR can be a valuable case management tool.

C. Remedies Affecting Parties not Subject to an Enforcement Action

Sometimes, the resolution of an underlying environmental problem would benefit from the involvement of persons, organizations or entities not a party to an impending enforcement action. This is becoming more common as EPA and the Congress place greater emphasis on public participation in major decisions affecting remedies in enforcement actions. Such cases might include those in which:

(1) A state or local governmental unit have expressed an interest, but are not a party;

(2) A citizens group has expressed, or is likely to express an interest; or

(3) The remedy is likely to affect not only the violator, but the community in which the violator is located as well (e.g., those cases in which the contamination is wide-spread, leading to a portion of the remedy being conducted off-site).

In such cases, EPA should consider the use of a neutral very early in the enforcement process in order to establish communication with those interested persons who are not parties to the action, but whose understanding and acceptance of the remedy will be important to an expeditious resolution of the case.

IV. PROCEDURES FOR APPROVAL OF CASES FOR ADR

This section describes procedures for the nomination of cases for ADR. These procedures are designed to eliminate confusion regarding the selection of cases for ADR by: (1) integrating the

selection of cases for ADR into the existing enforcement case selection process; and (2) creating decision points and contacts in the regions, headquarters, and DOJ to determine whether to use ADR in particular actions.

A. Decisionmakers

To facilitate decisions whether to use ADR in a particular action, decision points in headquarters, the regions and DOJ must be established. At headquarters, the decisionmaker will be the appropriate Associate Enforcement Counsel (AEC). The AEC should consult on this decision with his/her corresponding headquarters compliance division director. At DOJ, the decisionmaker will be the Chief, Environmental Enforcement Section. In the regions, the decisionmakers will be the Regional Counsel in consultation with the appropriate regional program division director. If the two Regional authorities disagree on whether to use ADR in a particular case, then the Regional Administrator (RA) or the Deputy Regional Administrator (DRA), will decide the matter. This decisionmaking process guarantees consultation with and concurrence of all relevant interests.

B. Case Selection Procedures

Anyone in the regions, headquarters, or DOJ who is participating in the development or management of an enforcement action, or any defendant or PRP not yet named as a defendant, may suggest a case or selected issues in a case for ADR.[3] Any suggestion, however, must be communicated to and discussed with the appropriate regional office for its consent. The respective roles of the AECs and DOJ are discussed below. After a decision by the Region or litigation team to use ADR in a particular case, the nomination should be forwarded to headquarters and, if it is a referred case, to DOJ. The nominations must be in writing, and must enumerate why the case is appropriate for ADR. (See Section III of this document which describes the characteristics for selection of cases for ADR.) Attachments A and B are sample case nomination communications. Attachment A pertains to nonbinding ADR, and Attachment B pertains to binding ADR.

Upon a determination by the Government to use ADR, Government enforcement personnel assigned to the case (case team) must approach the PRP(s) or other defendant(s) with the suggestion. The case team should indicate to the PRP(s) or defendant(s) the factors which have led to the Agency's recommendation to use

[3] Nomination papers should always be deemed attorney work product so that they are discovery free.

ADR, and the potential benefits to all parties from its use. The PRP(s) or other defendant(s) should understand, nevertheless, that the Government is prepared to proceed with vigorous litigation in the case if the use of a third-party neutral fails to resolve the matter. Further, for cases which are referrable, the defendant(s) should be advised that EPA will not hesitate to refer the matter to DOJ for prosecution.

1. Nonbinding ADR

For mediation, mini-trials, nonbinding arbitration, and other ADR mechanisms involving use of a third-party neutral as a nonbinding decisionmaker, regions should notify the appropriate AEC and, if the case is referred, DOJ of: (1) its intent to use ADR in a particular case, and (2) the opportunity to consult with the Region on its decision. Such notification should be in writing and by telephone call. The AEC will consult with the appropriate headquarters program division director. The Region may presume that the AEC and DOJ agree with the selection of the case for ADR unless the AEC or DOJ object within fifteen (15) calendar days of receipt of the nomination of the case. If either the AEC or DOJ object, however, the Region should not proceed to use ADR in the case until consensus is reached.

2. Binding ADR

For binding arbitration and fact-finding, and other ADR mechanisms involving the use of third-party neutrals as binding decisionmakers, the appropriate AEC must concur in the nomination of the case by the Region. In addition, DOJ must also concur in the use of binding ADR in referred cases. Finally, in non-CERCLA cases which may involve compromise of claims in excess of $20,000 or where the neutral's decision will be embodied in a court order, DOJ must also concur. Without the concurrence of headquarters and DOJ under these circumstances, the Region may not proceed with ADR. OECM and DOJ should attempt to concur in the nomination within fifteen (15) days of receipt of the nomination.

Under the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, §122(h)(2)(1986), EPA may enter into binding arbitration for cost recovery claims under Section 107 of CERCLA, provided the claims are not in excess of $500,000, exclusive of interest. Until regulations are promulgated under this section, EPA is precluded from entering into binding arbitration in cost recovery actions. Accordingly, Attachment C is not yet appropriate for use in cases brought under this section. It is, however, available for use in nonbinding arbitration.

V. SELECTION OF A THIRD-PARTY NEUTRAL

A. Procedures for Selection

Both the Government and all defendants must agree on the need

for a neutral in order to proceed with ADR. In some situations (e.g., in a Superfund case), however, the parties may proceed with ADR with consensus of only some of the parties depending on the issue and the parties. Once agreed, the method for selecting the neutral and the actual selection in both Superfund and other cases will be determined by all parties involved with the exception of cases governed by §107 of CERCLA. To help narrow the search for a third-party neutral, it is useful, although not required, for the parties to agree preliminarily on one or more ADR mechanisms. OECM is available to help at this point in the process, including the procurement of in-house or outside persons to aid the parties in selecting an appropriate ADR mechanism.

In Section VIII below, we have indicated some of the situations where each ADR mechanism may be most appropriate. Of course, the parties are free to employ whichever technique they deem appropriate for the case. Because the ADR mechanisms are flexible, they are adaptable to meet the needs and desires of the parties.

The parties can select a third-party neutral in many ways. Each party may offer names of proposed neutrals until all parties agree on one person or organization. Alternatively, each party may propose a list of candidates, and allow the other parties to strike unacceptable names from the list until agreement is reached. For additional methods, see Attachments C, D, and E. Regardless of how the parties decide to proceed, the Government may obtain names of qualified neutrals from the Chief, Legal Enforcement Policy Branch (LEPB) (FTS 475-8777, LE-130A, E-Mail box EPA 2261), by written or telephone request. With the help of the Administrative Conference of the U.S. and the Federal Mediation and Conciliation Service, OECM is working to establish a national list of candidates from which the case team may select neutrals. In selecting neutrals, however, the case team is not limited to such a list.

It is important to apply the qualifications enumerated below in section V.B. in evaluating the appropriateness of a proposed third-party neutral for each case. Only the case team can decide whether a particular neutral is acceptable in its case. The qualifications described below provide guidance in this area.

At any point in the process of selecting an ADR mechanism or third-party neutral, the case team may consult with the Chief, LEPB, for guidance.

B. Qualifications for Third-Party Neutrals

The following qualifications are to be applied in the selection of all third-party neutrals who may be considered for service in ADR procedures to which EPA is a party. While a

third-party neutral should meet as many of the qualifications as possible, it may be difficult to identify candidates who possess all the qualifications for selection of a third-party neutral. Failure to meet one or more of these qualifications should not necessarily preclude a neutral who all the parties agree would be satisfactory to serve in a particular case. The qualifications are, therefore, intended only as guidance rather than as pre-requisites to the use of ADR. Further, one should apply a greater degree of flexibility regarding the qualifications of neutrals involved in nonbinding activities such as mediation, and a stricter adherence to the qualifications for neutrals making binding decisions such as arbitrators.

1. Qualifications for Individuals

a. Demonstrated Experience. The candidate should have experience as a third-party neutral in arbitration, mediation or other relevant forms of ADR. However, other actual and active participation in negotiations, judicial or administrative hearings or other forms of dispute resolution, service as an administrative law judge, judicial officer or judge, or formal training as a neutral may be considered. The candidate should have experience in negotiating, resolving or otherwise managing cases of similar complexity to the dispute in question, e.g., cases involving multiple issues, multiple parties, and mixed technical and legal issues where applicable.

b. Independence. The candidate must disclose any interest or relationship which may give rise to bias or the appearance of bias toward or against any party. These interests or relationships include:

(a) past, present or prospective positions with or financial interests in any of the parties;

(b) any existing or past financial, business, professional, family or social relationships with any of the parties to the dispute or their attorneys;

(c) previous or current involvement in the specific dispute;

(d) past or prospective employment, including employment as a neutral in previous disputes, by any of the parties;

(e) past or present receipt of a significant portion of the neutral's general operating funds or grants from one or more of the parties to the dispute.

The existence of such an interest or relationship does not necessarily preclude the candidate from serving as a neutral, particularly if the candidate has demonstrated sufficient independence by reputation and performance. The neutrals with

the most experience are most likely to have past or current relationships with some parties to the dispute, including the Government. Nevertheless, the candidate must disclose all interests, and the parties should then determine whether the interests create actual or apparent bias.

c. Subject Matter Expertise. The candidate should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, assist the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that all possible avenues and alternatives to settlement are explored, and otherwise serve in the most effective manner as a third-party neutral. Depending on the case, it may also be helpful if the candidate has specific expertise in the issues under consideration.

d. Single Role. The candidate should not be serving in any other capacity in the enforcement process for that particular case that would create actual or apparent bias. The case team should consider any prior involvement in the dispute which may prevent the candidate from acting with objectivity. For example, involvement in developing a settlement proposal, particularly when the proposal is developed on behalf of certain parties, may preclude the prospective neutral from being objective during binding arbitration or other ADR activities between EPA and the parties concerning that particular proposal.

Of course, rejection of a candidate for a particular ADR activity, such as arbitration, does not necessarily preclude any role for the candidate in that case. The candidate may continue to serve in other capacities by, for example, relaying information among parties and presenting offers on behalf of particular parties.

2. Qualifications for Corporations and Other Organizations.[4] Corporations or other entities or organizations which propose to act as third-party neutrals, through their officers, employees or other agents, in disputes involving EPA, must:

(a) like unaffiliated individuals, make the disclosures listed above; and

(b) submit to the parties a list of all persons who, on behalf of the corporation, entity or organization, will or may be significantly involved in the ADR procedure. These representatives should also make the disclosures listed above.

[4] For further guidance regarding Clean Sites Inc., see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

In selecting a third-party neutral to resolve or aid in the resolution of a dispute to which EPA is a party, Agency personnel should remain at all times aware that the Agency must not only uphold its obligation to protect public health, welfare and the environment, but also develop and maintain public confidence that the Agency is performing its mission. Care should be taken in the application of these qualifications to avoid the selection of third-party neutrals whose involvement in the resolution of the case might undermine the integrity of that resolution and the enforcement efforts of the Agency.

VII. OTHER ISSUES:

A. Memorialization of Agreements

Just as it would in cases where ADR has not been used, the case team should memorialize agreements reached through ADR in orders and settlement documents and obtain DOJ and headquarters approval (as appropriate) of the terms of any agreement reached through ADR.

B. Fees For Third-Party Neutrals

The Government's share of ADR costs will be paid by Headquarters. Contact LEPB to initiate payment mechanisms. Because such mechanisms require lead time, contact with LEPB should be made as early as possible after approval of a case for ADR.

It is EPA policy that PRPs and defendants bear a share of these costs equal to EPA except in unusual circumstances. This policy ensures that these parties "buy in" to the process. It is important that the exact financial terms with these parties be settled and set forth in writing before the initiation of ADR in the case.

C. Confidentiality

Unless otherwise discoverable, records and communications arising from ADR shall be confidential and cannot be used in litigation or disclosed to the opposing party without permission. This policy does not include issues where the Agency is required to make decisions on the basis of an administrative record such as the selection of a remedy in CERCLA cases. Public policy interests in fostering settlement compel the confidentiality of ADR negotiations and documents. These interests are reflected in a number of measures which seek to guarantee confidentiality and are recognized by a growing body of legal authority.

Most indicative of the support for non-litigious settlement of disputes is Rule 408 of the Federal Rules of Evidence which

renders offers of compromise or settlement or statements made during discussions inadmissable in subsequent litigation between the parties to prove liability. Noting the underlying policy behind the rule, courts have construed the rule to preclude admission of evidence regarding the defendant's settlement of similar cases.[5]

Exemption protection under the Freedom of Information Act (FOIA), 15 U.S.C. §552, could also accommodate the interest in confidentiality. While some courts have failed to recognize the "settlement negotiations privilege,"[6] other courts have recognized the privilege.[7]

In addition to these legal authorities and policy arguments, confidentiality can be ensured by professional ethical codes. Recognizing that promoting candor on the parties' part and impartiality on the neutral's part is critical to the success of ADR, confidentiality provisions are incorporated into codes of conduct as well as written ADR agreements (See Attachment D). The attachment provides liquidated damages where a neutral reveals confidential information except under court order.

Furthermore, confidentiality can be effected by court order, if ADR is court supervised. Finally, as many states have done

5 See Scaramuzzo v. Glenmore Distilleries Co., 501 F.Supp. 727 (N.D. Ill. 1980), and to bar discovery, see Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981). Courts have also construed labor laws to favor mediation or arbitration and have therefore prevented third-party neutrals from being compelled to testify. See, e.g., N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980) (upholding N.L.R.B.'s revocation of subpoena issued to mediator to avoid breach of impartiality).

6 See, e.g., Center for Auto Safety v. Department of Justice, 576 F.Supp. 739, 749 (D.D.C. 1983).

7 See Bottaro v. Hatton Associates, 96 F.R.D. 158-60 (E.D.N.Y 1982) (noting "strong public policy of favoring settlements" and public interest in "insulating the bargaining table from unnecessary intrusions"). In interpreting Exemption 5 of the FOIA, the Supreme Court asserted that the "contention that [a requester could] obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. ...We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." United States v. Weber Aircraft, 104 S.Ct. 1488, 1494 (1984).

statutorily, EPA is considering the promulgation of regulations which further ensure the confidentiality of ADR proceedings.

D. Relationship of ADR to Timely and Appropriate and Significant Noncompliance Requirements

The decision to use ADR would have no particular impact under the "timely and appropriate" (T&A) criteria in a case where there is already an administrative order or a civil referral since the "timely and appropriate" criteria would have been met by the initiation of the formal enforcement action. In the case of a civil referral, the 60-day period by which DOJ is to review and file an action may be extended if ADR is used during this time.

The decision to use ADR to resolve a violation prior to the initiation of a formal enforcement action, however, would be affected by applicable "timely and appropriate" criteria (e.g., if the violation fell under a program's Significant Noncompliance (SNC) definition, the specific timeframes in which compliance must be achieved or a formal enforcement action taken would apply). The use of ADR would not exempt applicable "T&A" requirements and the ADR process would normally have to proceed to resolve the case or "escalate" the enforcement response. However, since, "T&A" is not an immutable deadline, that ADR is being used for a particular violation would be of central significance to any program management review of that case (e.g., the Deputy Administrator's discussion of "timely and appropriate" enforcement during a regional review would identify the cases in which ADR is being used.)

VIII. PROCEDURES FOR MANAGEMENT OF ADR CASES

This section elaborates on the various ADR techniques: How they work, some problems that may be encountered in their use, and their relationship to negotiation and litigation. For each ADR technique, we have provided, as an attachment to this guidance, an example of procedures reflecting its use. These attachments are for illustrative purposes only, and do not represent required procedures. The specific provisions of the attachments should be adapted to the circumstances of the case or eliminated if not applicable.

A. Arbitration

1. Scope and Nature

As stated in Section II, above, arbitration involves the selection by the parties of a neutral decisionmaker to hear selected issues and render an opinion. Depending on the parties' agreement, the arbitrator's decision may or may not be binding.

For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues. Included as Attachment C are draft generic arbitration procedures for formal arbitration. To conduct less formal proceedings, the parties may modify the procedures.

2. Use

Arbitration is most appropriate in resolving routine cases that do not merit the resources required to generate and process a civil judicial referral. It may aid in resolving technical disputes that are usually submitted to the courts or administrative law judges (ALJs), which disputes require subject-matter expertise which federal district court judges and ALJs may lack.[8]

B. Mediation

1. Scope and Nature

Mediation, an informal process, is entered into voluntarily by the parties to a dispute and in no way binds them beyond their own agreement. More than the other ADR processes, mediation is best viewed as an extension of the direct negotiation process begun by the parties. As in direct negotiation, the parties continue to control the substance of discussions and any agreement reached. In mediation, however, the mediator directs and structures the course of discussions.

The mediation format varies with the individual style of the mediator and the needs of the parties. Initially, the mediator is likely to call a joint meeting with the parties to work out ground rules such as how and when meetings will be scheduled. Included as Attachment D are generic mediation protocols for use and adaptation in all EPA mediations. Most of the items covered in the attachment would be useful as ground rules for most EPA enforcement negotiations. Ordinarily, mediators will hold a series of meetings with the parties in joint session, as well as with each party. In joint meetings, the mediator facilitates discussion. In separate caucuses, the mediator may ask questions or pose hypothetical terms to a party in order to clarify its position and identify possible areas for exchange and agreement with the opposing party. Some mediators will be more aggressive than others in this role; they may even suggest possible settlement alternatives to resolve deadlocks between the parties. In general, however, the mediator serves as a facilitator of discussions and abstains from taking positions on substantive points.

[8] Arbitration is specifically authorized under Section 107 of CERCLA for cost recovery claims not in excess of $500,000, exclusive of interest.

There are no external time limits on mediation other than those imposed by the parties or by external pressures from the courts, the community or public interest groups. In all cases, the Government should insist on a time limit for the mediation to ensure that the defendants do not use mediation as a stalling device. The Government should also insist on establishing points in the process to evaluate progress of the mediation. As the parties approach settlement terms through mediation, final authority for decisionmaking remains the same as during direct negotiations, i.e., requirements for approval or concurrence from senior managers are applicable.

2. Use of Mediation

Mediation is appropriate for disputes in which the parties have reached or anticipate a negotiation impasse based on, among other things, personality conflicts, poor communication, multiple parties, or inflexible negotiating postures. Additionally, mediation is useful in those cases where all necessary parties are not before the court (e.g., a state which can help with the funding for a municipality's violation). Mediation is the most flexible ADR mechanism, and should be the most widely used in Agency disputes.

3. Withdrawal from Mediation

As a voluntary and unstructured process, mediation proceeds entirely at the will of the parties and, therefore, may be concluded by the parties prior to settlement. A determination to withdraw from mediation should be considered only when compelling factors militate against proceeding. If the mediation has extended beyond a reasonable time period (or the period agreed upon by the parties) without significant progress toward agreement, it may be best to withdraw and proceed with direct negotiations or litigation. Withdrawing from mediation might also be considered in the unlikely event that prospects for settlement appear more remote than at the outset of the mediation. Finally, inappropriate conduct by the mediator would warrant concluding the mediation effort or changing mediators.

4. Relation to Litigation

In the ordinary case, prior to referral or the filing of an administrative complaint, the time limits for mediation could be the same as those for negotiation. In contrast to normal negotiations, however, the parties may agree that during the time period specified for mediation, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended. In filed civil judicial cases, where the court imposes deadlines, it will be necessary to apprise the

court of the parties' activities and to build ADR into the court's timetable. For agreements relating ADR activities to ongoing litigation, see paragraph 17 of Attachment E.

C. Mini-Trial

1. Scope and Nature

Like other ADR techniques, the mini-trial is also voluntary and nonbinding on the parties. In the mini-trial, authority for resolution of one or more issues rests with senior managers who, representing each party in the dispute, act as decisionmakers. In some cases a neutral referee is appointed to supervise the proceedings and assist the decisionmakers in resolving an issue by providing the parties with a more realistic view of their case. In addition, the neutral's presence can enhance public acceptability of a resolution by effectively balancing the interests of the Government and the defendant.

The scope and format of the mini-trial are determined solely by the parties to the dispute and are outlined in an initiating agreement. Because the agreement will govern the proceedings, the parties should carefully consider and define issues in advance of the mini-trial. Points that could be covered include the option of and role for a neutral, issues to be considered, and procedural matters such as order and schedule of proceedings and time limits. Attachment E is a sample mini-trial agreement.

The mini-trial proceeds before a panel of decisionmakers representing the parties and, in some cases, a neutral referee. Preferably, the decisionmakers will not have participated directly in the case prior to the mini-trial. The defendant's representative should be a principal or executive of the entity with decisionmaking authority. EPA's representative should be a senior Agency official comparable in authority to the defendant's representative. In some cases, each side may want to use a panel consisting of several decisionmakers as its representatives. The neutral referee is selected by both parties and should have expertise in the issues under consideration.

At the mini-trial, counsel for each side presents his or her strongest and most persuasive case to the decisionmakers in an informal, trial-like proceeding. In light of this structure, strict rules of evidence do not apply, and the format for the presentation is unrestricted. Each decisionmaker is then afforded the unique opportunity to proceed, as agreed, with open and direct questioning of the other side. This information exchange allows the decisionmakers to adjust their perspectives and positions in light of a preview of the case. Following this phase of the mini-trial, the decisionmakers meet, with or without counsel or the neutral referee, to resolve the issue(s) or case presented, through negotiation.

2. Role of the Neutral

The neutral referee may serve in more than one capacity in this process, and should be selected with a clearly defined concept of his or her role. The most common role is to act as an advisor to the decisionmakers during the information exchange. The neutral may offer opinions on points made or on adjudication of the case in litigation, and offer assistance to the decision-makers in seeing the relative merits of their positions. The neutral's second role can be to mediate the negotiation between the decisionmakers should they reach an impasse or seek assistance in forming an agreement. Unless otherwise agreed by the parties, no evidence used in the mini-trial is admissible in litigation.

3. Use

As with mediation, prior to referral or the filing of an administrative complaint, the time limits for a mini-trial would be the same as those for negotiation. The parties usually agree, however, that during the time period specified for a mini-trial, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended except as otherwise agreed. In general, mini-trials are appropriate in cases involving only a small number of parties, and are most useful in four kinds of disputes:

1. Where the parties have reached or anticipate reaching a negotiation impasse due to one party's overestimation, in the view of the other party, of the strength of its position;

2. Where significant policy issues exist which would benefit from a face-to-face presentation to decisionmakers (without use of a neutral);

3. Where the issues are technical, and the decisionmakers and neutral referee have subject-matter expertise; or

4. Where the imprimatur of a neutral's expertise would aid in the resolution of the case.

D. Fact-finding

1. Scope and Nature

Binding or nonbinding fact-finding may be adopted voluntarily by parties to a dispute, or imposed by a court. It is most appropriate for issues involving technical or factual disputes. The primary purpose of this process is to reduce or eliminate conflict over facts at issue in a case. The fact-finder's role is to act as an independent investigator, within the scope of the authority delegated by the parties. The findings may be used in reaching settlement, as "facts" by a judge or ALJ in litigation,

or as binding determinations. Like other ADR processes involving a neutral, a resolution based on a fact-finder's report will have greater credibility with the public.

The neutral's role in fact-finding is clearly defined by an initial agreement of the parties on the issue(s) to be referred to the fact-finder and the use to be made of the findings or recommendations, e.g., whether they will be binding or advisory. Once this agreement is framed, the role of the parties in the process is limited and the fact-finder proceeds independently. The fact-finder may hold joint or separate meetings or both with the parties in which the parties offer documents, statements, or testimony in support of their positions. The fact-finder is also free to pursue other sources of information relevant to the issue(s). The initial agreement of the parties should include a deadline for receipt of the fact-finder's report. Attachment F is a sample fact-finding agreement.

The fact-finder issues a formal report of findings, and recommendations, if appropriate, to the parties, ALJ or the court. If the report is advisory, the findings and recommendations are used to influence the parties' positions and give impetus to further settlement negotiations. If the report is binding, the parties adopt the findings and recommendations as provisions of the settlement agreement. In case of litigation, the findings will be adopted by the judge or ALJ as "facts" in the case.

2. Relation to Litigation

Decisions regarding pursuit of litigation when fact-finding is instituted are contingent upon the circumstances of the case and the issues to be referred to the fact-finder. If fact-finding is undertaken in connection with an ongoing settlement negotiation, in most cases it is recommended that the parties suspend negotiations on the issues requiring fact-finding until the fact-finder's report is received. If fact-finding is part of the litigation process, a decision must be made whether to proceed with litigation of the rest of the case or to suspend litigation while awaiting the fact-finder's report.

ATTACHMENT A

MEMORANDUM

SUBJECT: Nomination of U.S. v. XYZ Co. for Non-binding Alternative for Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel
for Hazardous Waste Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum is to nominate U.S. v. XYZ Co. for alternative dispute resolution (ADR). The case is a CERCLA enforcement action involving multiple PRPs as well as a number of complex technical and legal issues. The RI/FS and the record of decision have both been completed. We anticipate that the PRPs are interested in settling this matter and, we believe, a trained mediator will greatly aid negotiations. The members of the litigation team concur in this judgment.

We understand that if you object within 15 days of the receipt of this letter, we will not proceed with ADR in this case without your approval. We do believe, however, that ADR is appropriate in this action. We look forward to working with your offices in this matter.

ATTACHMENT B

MEMORANDUM

SUBJECT: Nomination of United States v. ABC Co. for Binding Alternative Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel for Water Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum requests concurrence in the use of a binding fact-finding procedure in United States v. ABC Co. The case involves the following facts:

ABC Co. owns and operates a specialty chemical production and formulation facility. Wastewater streams come from a variety of production areas which change with product demand. Because of these diverse processes, the company's permit to discharge wastewater must be based on the best professional judgment of the permit writer as to the level of pollution control achievable.

The company was issued an NPDES permit in 1986. The permit authorizes four (4) outfalls and contains limits for both conventional and toxic organic pollutants. The effluent limitations of the permit incorporate the Best Available Technology requirements of the Clean Water Act (CWA).

EPA filed a civil lawsuit against the company for violating effluent limits of the 1986 permit. As part of the settlement of the action, the company was required to submit a compliance plan which would provide for modification of its existing equipment, including institution of efficient operation and maintenance procedures to obtain compliance with the new permit. The settlement agreement provides for Agency concurrence in the company's compliance plan.

The company submitted a compliance plan, designed by in-house engineers, which proposed to slightly upgrade their existing activated sludge treatment system. The company has claimed that this upgraded system provides for treatment adequate to meet the permit limits. EPA has refused to concur in the plan because EPA experts believe that additional treatment modifications to enhance pollutant removals are required to meet permit limits on a continuous basis. This enhancement, EPA believes, is possible with moderate additional capital expenditures.

A fact-finding panel, consisting of experts in utility, sanitation and chemical engineering, is needed to assess the adequacy of the treatment system improvements in the compliance plan in satisfying permit requirements. Resolution of this issue by binding, neutral fact-finding will obviate the expenditure of resources needed to litigate the issue.

We request your concurrence in the nomination of this case for fact-finding within fifteen (15) days. We look forward to hearing from you.

ATTACHMENT C

ARBITRATION PROCEDURES*

SUBPART A - GENERAL

1. Purpose

This document establishes and governs procedures for the arbitration of EPA disputes arising under [insert applicable statutory citations].

2. Scope and Applicability

The procedures enunciated in this document may be used to arbitrate claims or disputes of the EPA regarding [insert applicable statutory citations and limitations on scope, if any.]

SUBPART B - JURISDICTION OF ARBITRATOR, REFERRAL OF CLAIMS, AND ARBITRATOR SELECTION

1. Jurisdiction of Arbitrator

(a) In accordance with the procedures set forth in this document, the Arbitrator is authorized to arbitrate [insert applicable categories of claims or disputes.]

(b) The Arbitrator is authorized to resolve disputes and award claims within the scope of the issues presented in the joint request for arbitration.

2. Referral of Disputes

(a) EPA [insert reference to mechanism by which EPA has entered into dispute, e.g., after EPA has issued demand letters or an administrative order], and one or more parties to the case may submit a joint request for arbitration of [EPA's claim, or one or more issues in dispute among the parties] _____ [a group authorized to arbitrate such matters, e.g., the National Arbitration Association (NAA)] if [restate any general limitations on scope]. The joint request shall include: A statement of the matter in dispute; a statement of the issues to be submitted for resolution; a statement that the signatories consent to arbitration of the dispute in accordance with the procedures established by this document; and the appropriate filing fee.

(b) Within thirty days after submission of the joint request for arbitration, each signatory to the joint request shall individually submit to the National Arbitration Association

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* Regulations applicable to section 112 of SARA are currently being prepared.

two copies of a written statement which shall include:

(1) An assertion of the parties' positions in the matter in dispute;

(2) The amount of money in dispute, if appropriate;

(3) The remedy sought;

(4) Any documentation which the party deems necessary to support its position;

[(5) A statement of the legal standard applicable to the claim and any other applicable principles of law relating to the claim;]

(6) The identity of any known parties who are not signatories to the joint request for arbitration; and

(7) A recommendation for the locale for the arbitral hearing.

A copy of the statement shall be sent to all parties.

3. Selection of Arbitrator

(a) The NAA has established and maintains a National Panel of Environmental Arbitrators.

(b) After the filing of the joint request for arbitration, the NAA shall submit simultaneously to all parties to the dispute an identical list of ten [five] names of persons chosen from the National Panel of Environmental Arbitrators. Each party to the dispute shall have seven days from the date of receipt to strike any names objected to, number the remaining names to indicate order of preference, and return the list to the NAA. If a party does not return the list within the time specified, all persons named shall be deemed acceptable. From among the persons who have been approved on all lists, and if possible, in accordance with the designated order of mutual preference, the NAA shall invite an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the NAA shall make the appointment from among other members of the Panel without the submission of any additional lists. Once the NAA makes the appointment, it shall immediately notify the parties of the identity of the Arbitrator and the date of the appointment.

(c) The dispute shall be heard and determined by one Arbitrator, unless the NAA decides that three Arbitrators should be approved based on the complexity of the issues or the number of parties.

(d) The NAA shall notify the parties of the appointment of the Arbitrator and send a copy of these rules to each party. A signed acceptance of the case by the Arbitrator shall be filed with the NAA prior to the opening of the hearing. After the Arbitrator is appointed, all communications from the parties shall be directed to the Arbitrator.

(e) If any Arbitrator should resign, die, withdraw, or be disqualified, unable or refuse to perform the duties of the office, the NAA may declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this Section, and unless the parties agree otherwise, the matter shall be reheard.

4. Disclosure

(a) A person appointed as an Arbitrator under the above section shall, within five days of receipt of his or her notice of appointment disclose to the NAA any circumstances likely to affect impartiality, including [those factors listed in section V.B. of the accompanying guidance]

(b) Upon receipt of such information from an appointed Arbitrator or other source, the NAA shall on the same day communicate such information to the parties and, if it deems it appropriate, to the Arbitrator and others.

(c) The parties may request within seven days of receipt of such information from the NAA that an Arbitrator be disqualified.

(d) The NAA shall make a determination on any request for disqualification of an Arbitrator within seven days after the NAA receives any such request. This determination shall be within the sole discretion of the NAA, and its decision shall be final.

5. Intervention and Withdrawal

(a) Subject to the approval of the parties and the Arbitrator, any person [insert applicable limitations, if any, e.g. any person with a substantial interest in the subject of the referred dispute] may move to intervene in the arbitral proceeding. Intervening parties shall be bound by rules that the Arbitrator may establish.

(b) Any party may for good cause shown move to withdraw from the arbitral proceeding. The Arbitrator may approve such withdrawal, with or without prejudice to the moving party, and may assess administrative fees or expenses against the withdrawing party as the Arbitrator deems appropriate.

SUBPART C - HEARINGS BEFORE THE ARBITRATOR

1. Filing of Pleadings

(a) Any party may file an answering statement with the NAA no later than seven days from the date of receipt of an opposing party's written statement. A copy of any answering statement shall be served upon all parties.

(b) Any party may file an amended written statement with the NAA prior to the appointment of the Arbitrator. A copy of the amended written statement shall be served upon all parties. After the Arbitrator is appointed, however, no amended written statement may be submitted except with the Arbitrator's consent.

[(c) Any party may file an answering statement to the amended written statement with the NAA no later than seven days from the date of receipt of an opposing party's amended written statement. A copy of any answering statement shall be served upon all parties.]

2. Pre-hearing Conference

At the request of one or more of the parties or at the discretion of the Arbitrator, a pre-hearing conference with the Arbitrator and the parties and their counsel will be scheduled in appropriate cases to arrange for an exchange of information, including witness statements, documents, and the stipulation of uncontested facts to expedite the arbitration proceedings. The Arbitrator may encourage further settlement discussions during the pre-hearing conference to expedite the arbitration proceedings. Any pre-hearing conference must be held within sixty days of the appointment of the Arbitrator.

3. Arbitral Hearing

(a) The Arbitrator shall select the locale for the arbitral hearing, giving due consideration to any recommendations by the parties.

(b) The Arbitrator shall fix the time and place for the hearing.

(c) The hearing shall commence within thirty days of the pre-hearing conference, if such conference is held, or

within sixty [thirty] days of the appointment of the Arbitrator, if no pre-hearing conference is held. The Arbitrator shall notify each party by mail of the hearing at least thirty days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

(d) Any party may be represented by counsel. A party who intends to be represented shall notify the other parties and the Arbitrator of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other parties, such notice is deemed to have been given.

(e) The Arbitrator shall make the necessary arrangements for making a record of the arbitral hearing.

(f) The Arbitrator shall make the necessary arrangements for the services of an interpreter upon the request of one or more of the parties, and the requesting parties shall assume the cost of such service.

(g) The Arbitrator may halt the proceedings upon the request of any party or upon the Arbitrator's own initiative.

(h) The Arbitrator shall administer oaths to all witnesses before they testify at the arbitral hearing.

(i) (1) A hearing shall be opened by the recording of the place, time, and date of the hearing, the presence of the Arbitrator and parties, and counsel, if any, and by the receipt by the Arbitrator of the written statements, amended written statements, if any, and answering statements, if any. The Arbitrator may, at the beginning of the hearing, ask for oral statements clarifying the issues involved.

(2) The EPA shall then present its case, information and witnesses, if any, who shall answer questions posed by both parties. The Arbitrator has discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material or relevant information.

(3) Exhibits, when offered by any party, may be received by the Arbitrator. The names and addresses of all witnesses, and exhibits in the order received, shall be part of the record.

(j) The arbitration may proceed in the absence of any party which, after notification, fails to be present or fails to obtain a stay of proceedings. If a party, after notification, fails to be present, fails to obtain a stay, or fails to present information, the party will be in default and will have waived the right to be present at the arbitration. A decision shall not be made solely on the default of a party. The Arbitrator shall require the parties who are present to submit such information as the Arbitrator may require for the making of a decision.

(k) Information and Evidence

(1) The parties may offer information as they desire, subject to reasonable limitations as the Arbitrator deems appropriate, and shall produce additional information as the Arbitrator may deem necessary to an understanding and determination of the dispute. The Arbitrator shall be the judge of the relevancy and materiality of the information offered, and conformity to legal rules of evidence shall not be necessary.

(2) All information shall be introduced in the presence of the Arbitrator and all parties, except where any of the parties has waived the right to be present pursuant to paragraph (j) of this section. All information pertinent to the issues presented to the Arbitrator for decision, whether in oral or written form, shall be made a part of the record.

(l) The Arbitrator may receive and consider the evidence of witnesses by affidavit, interrogatory or deposition, but shall give the information only such weight as the Arbitrator deems appropriate after consideration of any objections made to its admission.

(m) After the presentation of all information, the Arbitrator shall specifically inquire of all parties whether they have any further information to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearing closed and minutes thereof shall be recorded.

(n) The parties may provide, by written agreement, for the waiver of the oral hearing.

(o) All documents not submitted to the Arbitrator at the hearing, but arranged for at the hearing or by subsequent agreement of the parties, shall be filed with the Arbitrator.

All parties shall be given an opportunity to examine documents.

4. Arbitral Decision

(a) The Arbitrator shall render a decision within thirty [five] days after the hearing is declared closed except if:

(1) All parties agree in writing to an extension; or

(2) The Arbitrator determines that an extension of the time limit is necessary.

(b) The decision of the Arbitrator shall be signed and in writing. It shall contain a brief statement of the basis and rationale for the Arbitrator's determination. At the close of the hearing, the Arbitrator may issue an oral opinion which shall be incorporated into a subsequent written opinion.

(c) The Arbitrator may grant any remedy or relief within the scope of the issues presented in the joint request for arbitration.

(d) The Arbitrator shall assess arbitration fees and expenses in favor of any party, and, in the event any administrative fees or expenses are due the NAA, in favor of the NAA.

(e) If the dispute has been heard by three Arbitrators, all decisions and awards must be made by at least a majority, unless the parties agree in writing otherwise.

(f) If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon the parties' request, may set forth the terms of the agreed settlement.

(g) The Arbitrator shall mail to or serve the decision on the parties.

(h) The Arbitrator shall, upon written request of any party, furnish certified facsimiles of any papers in the Arbitrator's possession that may be required in judicial proceedings relating to the arbitration.

SUBPART D - APPEALS, FEES AND OTHER PROVISIONS

1. Appeals Procedures

(a) Any party may appeal the award or decision within thirty days of notification of the decision. Any such appeal

shall be made to the [insert "Federal district court for the district in which the arbitral hearing took place" or "Chief Judicial Officer, U.S. Environmental Protection Agency"].

(b) The award or decision of the Arbitrator shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, abuse of discretion, other misconduct by any of the parties, or mutual mistake of fact. [Insert "No court shall" or "The Chief Judicial Officer shall not"] have jurisdiction to review the award or decision unless there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, abuse of discretion, other misconduct, or mutual mistake of fact.

(c) Judgment upon the arbitration award may be entered in any Federal district court having jurisdiction. The award may be enforced in any Federal district court having jurisdiction.

(d) Except as provided in paragraph (c), no award or decision shall be admissible as evidence of any issue of fact or law in any proceeding brought under any other provision of [insert applicable statutory acronyms] or any other provision of law, nor shall any prearbitral settlement be admissible as evidence in any such proceeding. Arbitration decisions shall have no precedential value for future arbitration, administratiave or judicial proceedings.

2. Administrative Fees, Expenses, and Arbitrator's Fee

(a) The NAA shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of filing or the time of refund shall be applicable. The filing fee shall be advanced by the parties to the NAA as part of the joint request for arbitration, subject to apportionment of the total administrative fees by the Arbitrator in the award. If a matter is withdrawn or settled, a refund shall be made in accordance with the Refund Schedule.

(b) Expenses of witnesses shall be borne by the party presenting such witnesses. The expense of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies, unless otherwise agreed by the parties, or unless the Arbitrator assesses such expenses or any part thereof against any specified party in the award.

(c) The per diem fee for the Arbitrator shall be agreed upon by the parties and the NAA prior to the commencement of any activities by the Arbitrator. Arrangements for compensation of the Arbitrator shall be made by the NAA.

(d) The NAA may require an advance deposit from the parties to defray the Arbitrator's Fee and the Administrative Fee, but shall render an accounting to the parties and return any balance of such deposit in accordance with the Arbitrator's award.

3. Miscellaneous Provisions

(a) Any party who proceeds with the arbitration after knowledge that any provision or requirement of this Part has not been complied with, and who fails to object either orally or in writing, shall be deemed to have waived the right to object. An objection, whether oral or written, must be made at the earliest possible opportunity.

(b) Before the selection of the Arbitrator, all oral or written communications from the parties for the Arbitrator's consideration shall be directed to the NAA for eventual transmittal to the Arbitrator.

(c) Neither a party nor any other interested person shall engage in ex parte communication with the Arbitrator.

(d) All papers connected with the arbitration shall be served on an opposing party either by personal service or United States mail, First Class, addressed to the party's attorney, or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party.

ATTACHMENT D

MEDIATION PROTOCOLS

I. PARTICIPANTS

A. Interests Represented. Any interest that would be substantially affected by EPA's action in _____ [specify case] may be represented. Parties may group together into caucuses to represent allied interests.

B. Additional Parties. After negotiations have begun, additional parties may join the negotiations only with the concurrence of all parties already represented.

C. Representatives. A representative of each party or alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes is appropriate to represent his/her interest, but only the designated representative will have the privilege of sitting at the negotiating table and of speaking during the negotiations, except that any representative may call upon a technical or legal adviser to elaborate on a relevant point.

II. DECISIONMAKING

A. Agendas. Meeting agendas will be developed by consensus. Agendas will be provided before every negotiating session.

B. Caucus. A caucus can be declared by any participant at any time. The participant calling the caucus will inform the others of the expected length of the caucus.

III. SAFEGUARDS FOR THE PARTIES

A. Good Faith. All participants must act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and prejudiced statements are unacceptable.

B. Right to Withdraw. Parties may withdraw from the negotiations at any time without prejudice. Withdrawing parties remain bound by protocol provisions on public comment and confidentiality.

C. Minutes. Sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept.

D. Confidentiality and the Use of Information

(1) [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it and the reason for not providing it directly.]

(2) [Parties will provide information called for by this paragraph as much in advance of the meetings as possible.]

(3) The entire process is confidential. The parties and the mediator will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree. The process shall be treated as compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. The mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation. Failure to meet the confidentiality or press requirements of these protocols is a basis for exclusion from the negotiations.

(4) The mediator agrees that if he/she discloses information regarding the process, including settlement terms, to third parties without the participants' agreement, except as ordered by a court with appropriate jurisdiction, he/she agrees to the following as liquidated damages to the parties:

(a) Removal from the case;

(b) Removal from any EPA list of approved neutrals; and

(c) Payment of an amount equal to _____ [at a minimum, the amount of the mediator's fee].

IV. SCHEDULE

A. Time and location. Negotiating sessions will initially be held _____ [insert how often]. The first negotiating session is scheduled for _____. Unless otherwise agreed upon, a deadline of _____ months for the negotiations will be established. The location of the meetings will be decided by the participants.

B. Discontinue if unproductive. The participants may discontinue negotiations at any time if they do not appear productive.

V. Press

A. [Joint Statements. A joint press statement shall be agreed to by the participants at the conclusion of each session. A joint concluding statement shall be agreed to by the participants and issued by the mediator at the conclusion of the process. Participants and the mediator shall respond to press inquires within the spirit of the press statement agreed to at the conclusion of each session.]

B. [Meetings with the Press. Participants and the mediator will strictly observe the protocols regarding confidentiality in all contacts with the press and in other public forums. The mediator shall be available to discuss with the press any questions on the process and progress of the negotiations. No party will hold discussions with the press concerning specific offers, positions, or statements made during the negotiations by any other party.]

VI. MEDIATOR

A neutral mediator will work with all the parties to ensure that the process runs smoothly.

VII. APPROVAL OF PROPOSALS

A. Partial Approval. It is recognized that unqualified acceptance of individual provisions is not possible out of context of a full and final agreement. However, tentative agreement of individual provisions or portions thereof will be signed by initialing of the agreed upon items by the representatives of all interests represented. This shall not preclude the parties from considering or revising the agreed upon items by mutual consent.

B. Final Approval. Upon final agreement, all representatives shall sign and date the appropriate document. It is explicitly recognized that the representatives of the U.S. EPA do not have the final authority to agree to any terms in this case. Final approval must be obtained from _____ [insert names of proper officials].

VIII. EFFECTIVE DATE

These protocols shall be effective upon the signature of the representatives.

For the U.S. Environmental Protection Agency

_____ _____
Signature Date

For _____ [Name of violator]

_____ _____
Signature Date

Attachment E

AGREEMENT TO INSTITUTE MINI-TRIAL PROCEEDINGS

The United States Environmental Protection Agency (EPA) and XYZ Corporation, complainant and respondent, respectively, in the matter of XYZ Corp., Docket No. _____, agree to the alternative dispute resolution procedure set forth in this document for the purpose of fostering the potential settlement of this case. This agreement, and all of the actions that are taken pursuant to this agreement, are confidential. They are considered to be part of the settlement process and subject to the same privileges that apply to settlement negotiations.

1. The parties agree to hold a mini-trial to inform their management representatives of the theories, strengths, and weaknesses of the parties' respective positions. At the mini-trial, each side will have the opportunity and responsibility to present its "best case" on all of the issues involved in this proceeding.

2. Management Representatives of both parties, including an EPA official and an XYZ official at the Division Vice President level or higher, will attend the mini-trial. The representatives have authority to settle the dispute.

3. A mutually selected "Neutral Advisor" will attend the mini-trial. The Neutral Advisor will be chosen in the following manner. By _____, [insert date] the parties shall exchange a list of five potential Neutral Advisors selected from the list of candidates offered by _____ [insert neutral organization]. The potential candidates shall be numbered in order of preference. The candidate who appears on both lists and who has the lowest total score shall be selected as the Neutral Advisor. If no candidate appears on both lists, the parties shall negotiate and shall select and agree upon a Neutral Advisor by _____ [insert date].

4. The fees and expenses of the Neutral Advisor will be borne equally by both parties. [However, if the Neutral Advisor provides an opinion as to how the case should be resolved, and a party does not follow the recommended disposition of the Neutral Advisor, that party shall bear the Advisor's entire fees and expenses.]

5. Neither party, nor anyone on behalf of either party, shall unilaterally approach, contact or communicate with the Advisor. The parties and their attorneys represent and warrant that they will make a diligent effort to ascertain all prior contact between themselves and the Neutral Advisor, and that all such contacts will be disclosed to counsel for the opposing party.

6. Within 10 days after the appointment of the Neutral Advisor, mutually agreed upon basic source material will be jointly sent to the Neutral Advisor to assist him or her in familiarizing himself or herself with the basic issues of the case. This material will consist of neutral matter including this agreement, the complaint and answer, the statute, any relevant Agency guidance, a statement of interpretation and enforcement policy, the applicable civil penalty policy, and any correspondence between the parties prior to the filing of the complaint.

7. All discovery will be completed in the _____ [insert number] working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation, including any subsequent hearing before [a federal judge or administrative law judge] in the event this mini-trial does not result in a resolution of this dispute. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual regarding the same or additional subject matter for a later hearing.

8. By _____, [insert date] the parties shall exchange all exhibits they plan to use at the mini-trial, and send copies at the same time to the Neutral Advisor. On the same date the parties also shall exchange and submit to the Neutral Advisor and to the designated trial attorney for the opposing side: (a) introductory statements no longer than 25 double-spaced pages (not including exhibits), (b) the names of witnesses planned for the mini-trial, and (c) all documentary evidence proposed for utilization at the mini-tial.

9. Two weeks before the mini-trial, if he or she so desires and if the parties agree, the Neutral Advisor may confer jointly with counsel for both parties to resolve any outstanding procedural questions.

10. The mini-trial proceeding shall be held on _____, and shall take ____ day(s). The morning proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at _____ p.m. and continue until _____ p.m. A sample two day schedule follows:

Day 1

8:30 a.m. -	12:00 Noon	EPA's position and case presentation
12:00 Noon -	1:00 p.m.	Lunch*
1:00 p.m. -	2:30 p.m.	XYZ's cross-examination
2:30 p.m. -	4:00 p.m.	EPA's re-examination
4:00 p.m. -	5:00 p.m.	Open question and answer period

Day 2

8:30 a.m -	12:00 Noon	XYZ's position and case presentation
12:00 Noon -	1:00 p.m.	Lunch*
1:00 p.m. -	2:30 p.m.	EPA's cross-examination
2:30 p.m. -	3:00 p.m.	XYZ's re-examination
3:00 p.m. -	4:30 p.m.	Open question and answer period
4:30 p.m. -	4:45 p.m.	EPA's closing argument
4:45 p.m. -	5:00 p.m.	XYZ's closing argument

*Flexible time period for lunch of a stated duration.

11. The presentations at the mini-trial will be informal. Formal rules of evidence will not apply, and witnesses may provide testimony in the narrative. The management representatives may question a witness at the conclusion of the witness' testimony for a period not exceeding ten minutes per witness. In addition, at the conclusion of each day's presentation, the management repesentatives may ask any further questions that they deem appropriate, subject to the time limitations specified in paragraph 10. Cross-examination will occur at the conclusion of each party's direct case presentation.

12. At the mini-trial proceeding, the trial attorneys will have complete discretion to structure their presentations as desired. Forms of presentation include, but are not limited to, expert witnesses, lay witnesses, audio visual aids, demonstrative evidence, and oral argument. The parties agree that there will be no objection by either party to the form or content of the other party's presentation.

13. In addition to asking clarifying questions, the Neutral Advisor may act as a moderator. However, the Neutral Advisor will not preside like a judge or arbitrator, nor have the power to limit, modify or enlarge the scope or substance of the parties' presentations. The presentations will not be recorded, but either party may take notes of the proceedings.

14. In addition to counsel, each management representative may have advisors in attendance at the mini-trial, provided that all parties and the Neutral Advisor shall have been notified of the identity of such advisors at least ten days before commencement of the mini-trial.

15. At the conclusion of the mini-trial, the management representatives shall meet, by themselves, and shall attempt to agree on a resolution of the dispute. By agreement, other members of their teams may be invited to participate in the meetings.

16. At the request of any management representative, the Neutral Advisor will render an oral opinion as to the likely outcome at trial of each issue raised during the mini-trial. Following that opinion, the management representatives will again attempt to resolve the dispute. If all management representatives agree to request a written opinion on such matters, the Neutral Advisor shall render a written opinion within 14 days. Following issuance of any such written opinion, the management representatives will again attempt to resolve the dispute.

17. If the parties agree, the [adminstrative law judge or federal district court judge] may be informed in a confidential communication that an alternative dispute resolution procedure

is being employed, but neither party shall inform the [administrative law judge or federal district court judge] at any time as to any aspect of the mini-trial or of the Advisor. Furthermore, the parties may file a joint motion to suspend proceedings in the _____ [appropriate court] in this case. The motion shall advise the court that the suspension is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings. Written and oral statements made by one party in the course of the mini-trial proceedings cannot be utilized by the other party and shall be inadmissible at the hearing of this matter before the [administrative law judge or federal district court judge] for any purpose, including impeachment. However, documentary evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

18. Any violation of these rules by either party will seriously prejudice the opposing party and be prima facie grounds for a motion for a new hearing; and to the extent that the violation results in the communication of information to the [administrative law judge or federal district court judge] contrary to the terms of this agreement, it shall be prima facie grounds for recusal of the [administrative law judge or federal district court judge]. Moreover, notwithstanding the provisions of Paragraph 4 above, any violation of these rules by either party will entitle the opposing party to full compensation for its share of the Neutral Advisor's fees and expenses, irrespective of the outcome of any administrative or court proceeding.

19. The Neutral Advisor will be disqualified as a hearing witness, consultant, or expert for either party, and his or her advisory response will be inadmissible for all purposes in this or any other dispute involving the parties. The Neutral Advisor will treat the subject matter of the presentations as confidential and will refrain from disclosing any trade secret information disclosed by the parties. After the Advisor renders his or her opinion to the parties, he or she shall return all materials provided by the parties (including any copies) and destroy all notes concerning this matter.

Dated: _____ Dated: _____

By: _____
Attorney for United States Environmental Protection Agency

By: _____
Attorney for XYZ Corporation

Affirmation of Neutral Advisor:

I agree to the foregoing provisions of this Alternative Dispute Resolution Agreement.

Dated: _____

Signed: _____
Neutral Advisor

ATTACHMENT F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	)	
	)	
XYZ Corporation,	)	Docket No.
	)	
Respondent	)	

AGREEMENT TO INSTITUTE FACT-FINDING PROCEDURES

A. General Provisions

1. Purpose
2. Definitions

B. Guidelines for Conduct of Neutral Fact-finding

1. Scope and Applicability
2. Jurisdiction of Neutral Fact-finder
3. Selection of Neutral Fact-finder
4. Information Regarding Dispute
5. Determination of Neutral Fact-finder
6. Confidentiality
7. Appeals Procedures
8. Administrative Fees, Expenses, and Neutral Fact-finder's Fee
9. Miscellaneous Provisions

A. GENERAL PROVISIONS

1. Purpose

This agreement contains the procedures to be followed for disputes which arise over _____ [state issue(s)].

2. Definitions

Terms not defined in this section have the meaning given by _____ [state applicable statute(s) and section(s)]. All time deadlines in these alternative dispute resolution (ADR) procedures are specified in calendar days. Except when otherwise specified:

(a) "Act" means [state applicable statute(s) and citation in U.S. Code].

(b) "NAO" means any neutral administrative organization selected by the parties to administer the requirements of the ADR procedures.

(c) "Neutral Fact-finder" means any person selected in accordance with and governed by the provisions of these ADR procedures.

(d) "Party" means EPA and the XYZ Corporation.

B. GUIDELINES FOR CONDUCT OF NEUTRAL FACT-FINDING

1. Scope and Applicability

The ADR procedures established by this document are for disputes arising over _____ [state issue(s)].

2. Jurisdiction of Neutral Fact-finder

In accordance with the ADR procedures set forth in this document, the Neutral Fact-finder is authorized to issue determinations of fact regarding disputes over [state _____ issue(s)], and any other issues authorized by the parties.

3. Selection of Neutral Fact-finder

The Neutral Fact-finder will be chosen by the parties in the following manner.

(a) The parties shall agree upon a neutral administrative organization (NAO) to provide services to the parties as specified in these ADR procedures.

The parties shall jointly request the NAO to provide them with a list of three to five (3-5) potential Neutral Fact-finders. Either party may make recommendations to the NAO of qualified individuals. Within ten (10) days after the receipt of the list of potential Neutral Fact-finders, the parties shall numerically rank the listed individuals in order of preference and simultaneously exchange such rankings. The individuals with the three (3) lowest combined total scores shall be selected as finalists. Within ten (10) days after such selection, the parties shall arrange to meet with and interview the finalists. Within ten (10) days after such meetings, the parties shall rank the finalists in order of preference and exchange rankings. The individual with the lowest combined total score shall be selected as the Neutral Fact-finder.

(b) The NAO shall give notice of the appointment of the Neutral Fact-finder to each of the parties. A signed acceptance by the Neutral Fact-finder shall be filed with the NAO prior to the initiation of fact-finding proceedings.

(c) If the Neutral Fact-finder should resign, die, withdraw, or be disqualified, unable, or refuse to perform the duties of the office, the NAO may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this section, and the dispute shall be reinitiated, unless the parties agree otherwise.

4. Information Regarding Dispute

(a) Within ten (10) days after the selection of the Neutral Fact-finder, basic source material shall be jointly submitted to the Neutral Fact-finder by the parties. Such basic source material shall consist of:

1) an agreed upon statement of the precise nature of the dispute,

2) the position of each party and the rationale for it,

3) all information and documents which support each party's position, and

4) _____ [describe additional material].

(b) Thereafter, for a period of _____ days, the Neutral Fact-finder shall conduct an investigation of the issues in dispute. As part of such investigation, the Neutral Fact-finder may interview witnesses, request additional

documents, request additional information by written questions, and generally use all means at his or her disposal to gather the facts relevant to the disputes as he or she determines. The Neutral Fact-finder shall be the sole determiner of the relevancy of information. Conformity to formal rules of evidence shall not be necessary.

5. Determination of Neutral Factfinder

(a) The Neutral Fact-finder shall render a determination within _____ days of the time limitation specified in Section B. 4(b) above, unless:

(1) Both parties agree in writing to an extension; [or

(2) The Neutral Fact-finder determines that an extension of the time limit is necessary.]

(b) The determination of the Neutral Fact-finder shall be signed and in writing. It shall contain a full statement of the basis and rationale for the Neutral Fact-finder's determination.

(c) If the parties settle their dispute prior to the determination of the Neutral Fact-finder, the Neutral Fact-finder shall cease all further activities in regard to the dispute upon receipt of joint notice of such settlement from the parties.

(d) The parties shall accept as legal delivery of the determination the placing of a true copy of the decision in the mail by the Neutral Fact-finder, addressed to the parties' last known addresses or their attorneys, or by personal service.

(e) After the Neutral Fact-finder forwards his or her determination to the parties, he or she shall return all dispute-specific information provided by the parties (including any copies) and destroy notes concerning this matter.

6. Confidentiality

(a) The determination of the Neutral Fact-finder, and all of the actions taken pursuant to these ADR procedures, shall be confidential and shall be entitled to the same privileges that apply generally to settlement negotiations.

(b) The Neutral Fact-finder shall treat the subject matter of all submitted information as confidential, and shall refrain from disclosing any trade secret or confidential business information disclosed as such by the parties. [If XYZ has previously formally claimed information as confidential business information (CBI), XYZ shall specifically exclude the information from such CBI classification for the limited purpose of review by the Neutral Fact-finder.]

(c) No determination of the Neutral Fact-finder shall be admissible as evidence of any issue of fact or law in any proceeding brought under any provision of [state statute] or any other provision of law.

7. Appeals Procedures

(a) Any party may appeal the determination of the Neutral Fact-finder within thirty days of notification of such determination. Any such appeal shall be made to the [Chief Judicial Officer, U.S. Environmental Protection Agency, or district court judge].

(b) The determination of the Neutral Fact-finder shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, other misconduct by the Neutral Fact-finder or by any of the parties, or mutual mistake of fact. The [administrative law judge or federal district court judge] shall not have jurisdiction to review the determination unless there is a verified complaint with supporting affidavits filed by one of the parties attesting to specific instances of such fraud, misrepresentation, other misconduct, or mutual mistake of fact.

8. Administrative Fees, Expenses, and Neutral Fact-finder's Fee

(a) The fees and expenses of the Neutral Fact-finder, and of the NAO, shall be borne equally by the parties. The parties may employ additional neutral organizations to administer these ADR procedures as mutually deemed necessary, with the fees and expenses of such organizations borne equally by the parties.

(b) The NAO shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of the joint request for fact-finding shall be applicable. The filing fee, if required, shall be advanced by the parties to the NAO as part of the joint request for fact-finding. If a matter is settled, a refund shall be made in accordance with the Refund Schedule.

(c) Expenses of providing information to the Neutral Fact-finder shall be borne by the party producing such information.

(d) The per diem fee for the Neutral Fact-finder shall be agreed upon by the parties and the NAO prior to the commencement of any activities by the Neutral Fact-finder. Arrangements for compensation of the Neutral Fact-finder shall be made by the NAO.

9. Miscellaneous Provisions

(a) Before the selection of the Neutral Fact-finder, all oral or written communications from the parties for the Neutral Fact-finder's consideration shall be directed to the NAO for eventual transmittal to the Neutral Fact-finder.

(b) All papers connected with the fact-finding shall be served on the opposing party either by personal service or United States mail, First Class.

(c) The Neutral Fact-finder shall be disqualified from acting on behalf of either party, and his or her determination pursuant to these ADR procedures shall be inadmissible for all purposes, in any other dispute involving the parties.

(d) Any notification or communication between the parties, or with and by the Neutral Fact-finder shall be confidential and entitled to the same privileges that apply generally to settlement negotiations.

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

SE.1-3
GM#73

APR 13 [illegible]

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Process for Conducting Pre-Referral Settlement Negotiations on Civil Judicial Enforcement Cases

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

TO: Regional Administrators
Deputy Regional Administrators
Regional Counsels
Associate Enforcement Counsels
HQ Compliance Office Directors

This memorandum transmits to you an agreement between EPA and the Department of Justice on an authoritative process for conducting pre-referral settlement negotiations of non-Superfund civil judicial enforcement cases. A separate process, reflecting the same basic concepts but recognizing the unique features of Superfund, is being developed jointly by OECM, OWPE and the Department of Justice.

This agreement addressess one of the judicial enforcement streamlining initiatives identified by EPA's newly-formed Enforcement Management Council at recent meetings in Easton, MD. The major objective of this initiative is to promote efficient and expeditious resolution of civil enforcement cases on appropriate terms. The mechanism developed for doing this is the attached set of protocols, which establish a process for providing a Regional office with pre-authorization to negotiate settlement with a potential defendant on behalf of the United States before resorting to the full-scale referral/litigation process. Typically, a Region will have the option of deciding whether to invoke this procedure for a given case or to proceed immediately to the referral process.

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

MAR - 9 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Honorable Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Roger:

This letter requests your concurrence in the enclosed "Process for Conducting Pre-Referral Settlement Negotiations" which EPA and the Department of Justice will employ as part of our joint efforts to streamline the United States' civil judicial environmental enforcement program.

This initiative is intended to build on successes we have seen in pilot projects using pre-referral settlement negotiations. More specifically, the primary intent of establishing in a formal manner these joint procedures is:

1. to expedite the resolution of civil enforcement cases on satisfactory terms which support the public interest, and

2. to allow the United States to accomplish this objective in a resource-efficient manner.

To these ends, the procedures established here identify appropriate milestones and timetables for conducting pre-referral settlement negotiations which are reasonable management targets in straightforward environmental enforcement cases.*/ The more routine the case (i.e., no complicated factual issues or unusual terms of settlement), the more likely the government will be able to apply this framework for expeditious, efficient case resolution.

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*/ This process does not apply to Superfund cases. Pre-referral negotiations procedures, taking into account specific statutory requirements, will be developed separately. EPA and the Department have agreed to evaluate the potential for adapting these procedures to the Superfund context.

Please note that Regional Counsels will receive workload credit for a case which a Region has opened for negotiation with a mini-lit report under these protocols, even if EPA has not formally referred the case with a full-scale lit report to DOJ for filing. Regional Counsels, however, are responsible for having their docket clerks make appropriate case entries on EPA's Enforcement DOCKET system in the "Cases Opened" category. These cases would move to the "Cases Initiated" category once the Region forwards to DOJ a full lit report or settlement document for filing.

Naturally, as an Agency we will have to pay close attention to implementation of this process to ensure that it is successful in achieving settlements on appropriate terms more expeditiously. Thanks in advance for your cooperation as we move forward to implement these procedures.

Attachment

cc: Jim Barnes, EPA HQ
Roger Marzulla, DOJ
David Buente, DOJ
Jerry Bryan, EPA HQ
Tom Gallagher, EPA-NEIC
Sally Mansbach, EPA HQ

The guidance identifies the areas which a Region must address in a mini-lit report to initiate the pre-referral negotiation process. All participating offices will need to work together to strike an appropriate balance in deciding how much detail this information should cover to facilitate informed review or quick filing if negotiations break down, yet still allow for productive negotiations to commence quickly. In most cases, Regional submission of a draft consent decree based upon available program-specific models is likely to produce easier, quicker approval of proposed settlement terms and final consent decrees.

It will remain important for representatives of all participating offices to maintain continuous, open lines of communication to permit these procedures to attain their objectives. Offices still will work out their respective roles on a case-by-case basis, although this guidance sets out norms to help make these determinations. Furthermore, the appropriate Assistant Section Chief at DOJ will be responsible for working out the extent of U.S. Attorney involvement in pre-referral negotiation activities consistent with these procedures and time lines. In any event, it remains crucial for EPA and the Department to monitor the use of these procedures diligently to affirm that they indeed result in a more effective, efficient enforcement effort. We nevertheless understand that because we have pressed to institute these new procedures quickly, both EPA and the Department will need additional time to modify computer systems to track adequately adherence to these protocols.

Thank you for the Department's support of our mutual work in this area. Please indicate your approval of this process in the signature blank below and return a copy of your signed approval to me, or give me a call if you have any questions.

Sincerely,

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

Enclosure

I concur in the enclosed "Process for Conducting Pre-Referral Negotiations."

Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

[illegible] 1988
(Date)

PROCESS FOR CONDUCTING PRE-REFERRAL
SETTLEMENT NEGOTIATION

I. Should a Region wish to use this process, the RA or his/her delegate will initiate the process as is done presently for referrals by sending simultaneously to OECM, the HQ Program Compliance Office and DOJ a mini-lit report/case summary (typically 5-10 pages) which summarizes:

a. defendant and its enforcement history
b. summary of violation(s) at issue or cause of action (including known environmental impact)
c. summary of available evidence
d. noteworthy legal and equitable defenses
e. significant contacts with defendant (by EPA and/or the State)
f. any legal or other significant action by the State, local agencies, or citizen groups
g. proposed terms of settlement--present view of bottom line, (including up-front and stipulated penalties, scope of relief, compliance schedule and any releases of liability) supporting rationale, and penalty calculation in accordance with the penalty policies
h. legal, policy or other issues/strategic considerations of primary significance to the government or bearing on appropriate terms of settlement or the conduct of litigation
i. milestones for negotiation and filing, covering all parties to the lawsuit
j. potential for criminal prosecution or investigation
k. what participation the Region requests from HQ and DOJ in negotiations beyond what these procedures call for.

A proposed draft consent decree to use to open negotiations must accompany the mini-lit report. EPA's computer DOCKET system will begin tracking these cases once the Region sends its mini-lit report to HQ and DOJ.1/

1/ As an alternative to filing a mini-lit report at the start of this process and a full lit report later on if negotiations do not reach a timely settlement, a Region may choose instead to file a full lit report at the start of the process, and follow that with a simple update if pre-referral negotiations do not produce a settlement.

II. DOJ, OECM and the Program Office will provide comments on the proposed case, their interest in participating because of national issues, terms of settlement, further contact point, and negotiation/litigation strategy to the Region within 21 days[2/] of receipt. Participating offices should initially convey or subsequently confirm their comments in writing. If necessary, comments will also address whether unique circumstances in a case indicate that the proposed pre-referral settlement negotiation process is not appropriate for the case. HQ Offices will coordinate during their review and wherever possible, OECM will consolidate the comments into a coordinated response. A simultaneous discussion among all litigation team members may be particularly helpful to identify and resolve outstanding issues. Upon response, the Region will have authority to negotiate a settlement consistent with pre-approved terms.

a. The region will keep HQ and DOJ apprised of changes in the course of negotiations to the extent there is a desire to deviate from key pre-approved terms (e.g. bottom-line penalty, scope of relief, compliance schedule and requirements, releases of liability) and will circulate to the HQ and DOJ contacts for clearance successive re-drafts of the decree before forwarding these redrafts to opposing counsel, consistent with present practice for post-filing negotiations. HQ and DOJ contacts will have a seven-day target, but sooner if possible, for responding to re-drafts in which the Region has clearly identified changes from prior versions. Regions should also keep HQ and DOJ generally informed of the status of ongoing negotiations.

b. If settlement in principle is not reached within 90 days of the latter of DOJ/HQ responses to the mini-lit report, the Region will, within 30 days, submit a full lit report to DOJ (copy to OECM and HQ program office), unless otherwise agreed. The Regional Counsel, in consultation with the appropriate Regional Division Director, may invoke a 30-day extension to the 90-day period in exceptional cases upon consultation with the appropriate OECM Associate Enforcement Counsel. Moreover, at any point in this 90-day period, the Regional Counsel, in consultation with the appropriate Regional Division Director, may "remove" a case from this process for the purpose of placing it on a filing track. In such a situation, the case will be handled as a normal referral and the Region will submit the full litigation report.

2/ All time periods are in calendar days.

c. DOJ will have a management target of filing the case within 45 days of receipt of a complete lit report unless new issues emerge based upon more complete case development or unless the case is settled in principle before that deadline.

d. If settlement in principle is reached, the Region will within 20 days submit a final draft consent decree to HQ and DOJ for review. HQ/DOJ will review and comment to the Region within 15 days of receipt. Within 45 days of HQ/DOJ response (unless otherwise agreed), the Region will submit a signed consent decree with cover letter explaining the rationale supporting the settlement to HQ (copy to DOJ) for approval.

III. EPA HQ will, within 21 days from receipt of a signed consent decree with supporting documentation/rationale, act on (approve or disapprove) civil settlements which are within preapproved terms as initially set forth or as modified over the course of negotiations.

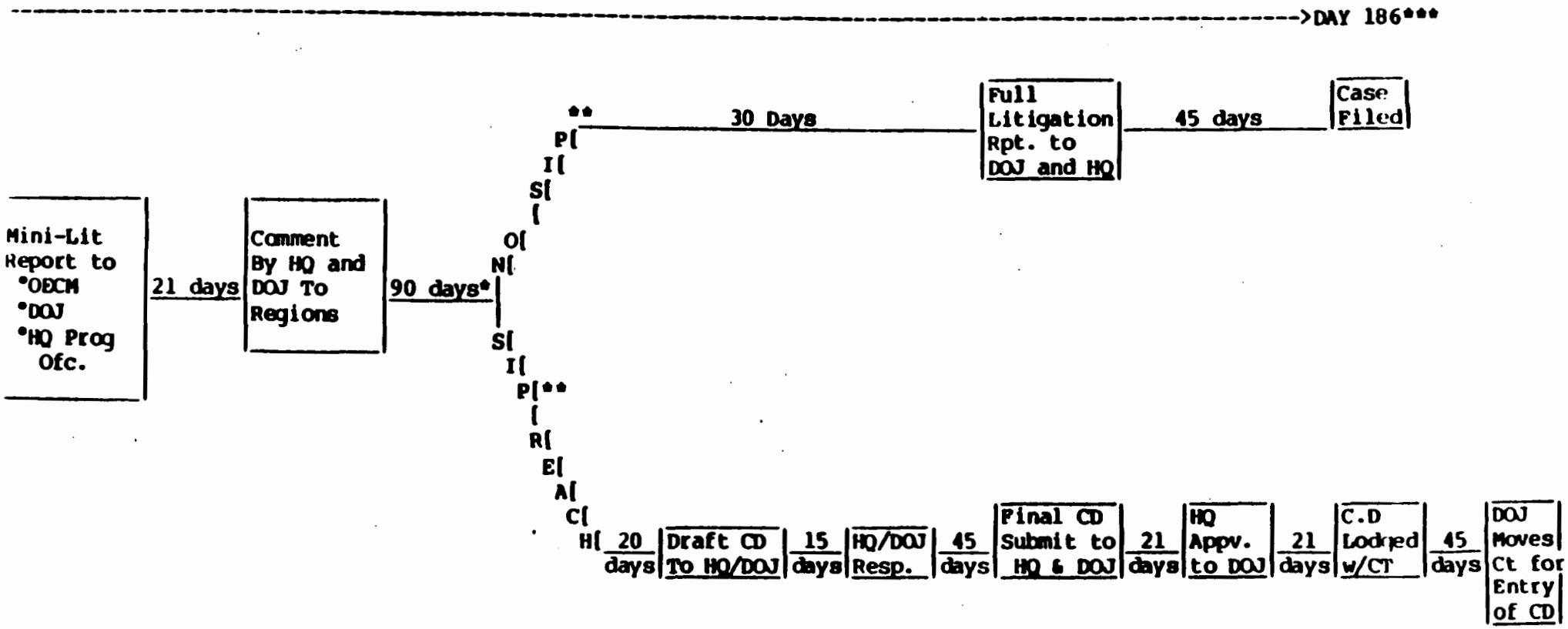
IV. Simultaneous with submission to EPA HQ, Regions will send a copy of the consent decree to DOJ to initiate a simultaneous review. DOJ will have a management target of 21 days from receipt of a signed consent decree from EPA HQ to act on (lodge or disapprove) civil settlements which are within pre-approved terms as initially set forth or modified over the course of negotiations.

V. DOJ will have a management target of 45 days from the date of lodging to move a court for entry of a consent decree, assuming no significant public comment. If 45 days cannot be met because of significant public comment, DOJ and EPA will agree on a process and timetable for response.

A flow chart of the proposed time lines is attached to assist the reader. The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and may not be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The United States reserves the right to act at variance with these procedures and to change them at any time without public notice.

Attachment

PRE-REFERRAL SETTLEMENT NEGOTIATIONS TIME LINE



*The Regional Counsel, in consultation with the appropriate Regional Division Director, may invoke a 30-day extension to this 90-day period in exceptional cases upon consultation with the appropriate Associate Enforcement Counsel

**SIP = Settlement in principle

***These total times do not account for the time it takes to transmit reports or final settlement documents between offices. The total times also may be extended by 30 days where an extension to the negotiating period is invoked.

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

SE.1-4
GM #39

MAY 22 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Enforcement Settlement Negotiations

FROM: Richard H. Mays
Senior Enforcement Counsel

TO: Regional Counsels

During the past year, a number of Regions have submitted settlements for OECM approval that had been communicated to and tentatively agreed upon with a defendant without Headquarters knowledge, involvement or approval. In some of these instances, defendants were told that the Region was willing to settle for no penalty, where a penalty was clearly in keeping with Agency policy.

A copy of all draft settlement agreements should be transmitted by the Regional Counsel to the appropriate Associate Enforcement Counsel for review before it is presented to the defendant. This policy has been set forth in two memoranda by the Assistant Administrator for Enforcement and Compliance Monitoring. See "Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983," and "Headquarters Review and Tracking of Civil Referrals."

The basis for this policy is the need for the Agency to speak with one voice which reflects a national as well as Regional perspective. This purpose is frustrated if individual staff members or Regional offices unilaterally establish an Agency negotiation settlement position which may be contrary to Agency policy or positions taken in other casess. OECM review ensures consistency of Agency positions in all settlements. Failure to follow that policy could also lead to potentially embarrassing changes of position in a case, since no enforcement settlement can be final until the Assistant Administrator for Enforcement and Compliance Monitoring has signed it.

A primary purpose of OECM review is to ensure that Agency policies and guidelines are being followed. It is not our purpose or desire to substitute our judgment for that of the Region or to "nitpick" the Region's product when it follows Agency policy. OECM will approve an Agency settlement position or draft decree that falls within existing, broad policy boundaries. In the absence of existing policy on a particular issue, OECM will approve a position that will promote -- or not hinder -- the Agency's enforcement efforts in other cases.

The vast majority of Regional recommendations conform to Agency guidance and are approved. Nevertheless, in the recent past a number of Regional settlement positions that had already been communicated to and tentatively agreed upon with the defendant have been presented to our office, placing OECM and the Region in a potentially embarrassing position. These cases are appearing with increasing frequency, and it is clear that they can interfere with the effectiveness of the Agency's enforcement effort, and create inconsistent results and precedents.

Consequently, OECM will not assign any weight to Regional recommendations that Headquarters should approve a settlement position made without prior authorization because it already had been communicated to the defendant. If such a proposed settlement contravenes Agency policy, if it would establish bad precedent for future cases, or if it would produce results inconsistent with those obtained in previously-approved settlements, it will be returned to the Region for further negotiations.

cc: Courtney M. Price, Assistant Administrator, OECM
Deputy Regional Administrators
Associate Enforcement Counsels
Regional Water Program Division Directors
Regional Waste Program Division Directors
Regional Air Program Division Directors
Headquarters Program Compliance Office Directors
David Buente, Department of Justice
Linda Fisher, Office of the Administrator
LaJuana Wilcher, Office of the Deputy Administrator

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

GM #34
SE. 1-5

NOV 16 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy Against "No Action" Assurances

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

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

This memorandum reaffirms EPA policy against giving definitive assurances (written or oral) outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or other legal requirement.

"No action" promises may erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. This credibility is vital as a continuing incentive for regulated parties to comply with environmental protection requirements.

In addition, any commitment not to enforce a legal requirement against a particular regulated party may severely hamper later enforcement efforts against that party, who may claim good-faith reliance on that assurance, or against other parties who claim to be similarly situated.

This policy against definitive no action promises to parties outside the Agency applies in all contexts, including assurances requested:

- both prior to and after a violation has been committed;
- on the basis that a State or local government is responding to the violation;

- on the basis that revisions to the underlying legal requirement are being considered;
- on the basis that the Agency has determined that the party is not liable or has a valid defense;
- on the basis that the violation already has been corrected (or that a party has promised that it will correct the violation); or
- on the basis that the violation is not of sufficient priority to merit Agency action.

The Agency particularly must avoid no action promises relating either to violations of judicial orders, for which a court has independent enforcement authority, or to potential criminal violations, for which prosecutorial discretion rests with the United States Attorney General.

As a general rule, exceptions to this policy are warranted only

- where expressly provided by applicable statute or regulation (e.g., certain upset or bypass situations)
- in extremely unusual cases in which a no action assurance is clearly neccessary to serve the public interest (e.g., to allow action to avoid extreme risks to public health or safety, or to obtain important information for research purposes) and which no other mechanism can address adequately.

Of course, any exceptions which EPA grants must be in an area in which EPA has discretion not to act under applicable law.

This policy in no way is intended to constrain the way in which EPA discusses and coordinates enforcement plans with state or local enforcement authorities consistent with normal working relationships. To the extent that a statement of EPA's enforcement intent is necessary to help support or conclude an effective state enforcement effort, EPA can employ language such as the following:

"EPA encourages State action to resolve violations of the _____ Act and supports the actions which __(State)__ is taking to address the violations at issue. To the extent that the State action does not satisfactorily resolve the violations, EPA may pursue its own enforcement action."

I am requesting that any definitive written or oral no action commitment receive the advance concurrence of my office. This was a difficult decision to reach in light of the valid concerns raised in comments on this policy statement; nevertheless, we concluded that Headquarters concurrence is important because the precedential implications of providing no action commitments can extend beyond a single Region. We will attempt to consult with the relevant program office and respond to any formal request for concurrence within 10 working days from the date we receive the request. Naturally, emergency situations can be handled orally on an expedited basis.

All instances in which an EPA official gives a no action promise must be documented in the appropriate case file. The documentation must include an explanation of the reasons justifying the no action assurance.

Finally, this policy against no action assurances does not preclude EPA from fully discussing internally the prosecutorial merit of individual cases or from exercising the discretion it has under applicable law to decide when and how to respond or not respond to a given violation, based on the Agency's normal enforcement priorities.

cc: Associate Enforcement Counsels
OECM Office Directors
Program Compliance Office Directors
Regional Enforcement Contacts

GM-SC
SE.2-1

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

FEB 5 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

[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 [redacted] 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

GM-79
SE.2-2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C 20460

FEB 25 1991

MEMORANDUM

SUBJECT: Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements

FROM: James M. Strock
Assistant Administrator

TO: Regional Administrators
Assistant Administrators
General Counsel

This memorandum transmits the final interim policy on the use of pollution prevention and recycling conditions in Agency consent orders and decrees (see Attachment). It reflects your extensive comments on the draft version distributed on September 25, 1990, as well as the subsequent work of the Pollution Prevention/Settlement Policy Workgroup.

This interim policy is part of the Agency's overall strategy to make pollution prevention a major component of all Agency programs. It encourages the use of pollution prevention and recycling conditions in enforcement settlements, either as injunctive relief or as "supplemental environmental projects" incidental to the correction of the violation itself. When a pollution prevention condition is considered as a supplemental project, this interim policy should be used in conjunction with the recently-issued Policy on the Use of Supplemental Enforcement Projects in EPA Settlements (February 12, 1991).

This interim policy is effective immediately and should be used whenever a pollution prevention condition is being considered as part of a consent order or decree. Each national media compliance program may decide whether to develop its own more specific pollution prevention settlement guidance or continue to use this general guidance. The Agency plans to develop final guidance in FY 1993, after gaining further experience in negotiating pollution prevention settlement conditions.

I am confident that this interim policy will help the Agency secure the additional protection of human health and the environment which pollution prevention offers. Any questions you or your staff may have regarding its implementation should be addressed to Peter Rosenberg, the Workgroup Chairperson (Office of Enforcement, 382-7550).

Attachment

cc: Deputy Administrator
Associate Deputy Administrator
Deputy Regional Administrators
Regional Counsels
Regional Program Division Directors
Program Compliance Directors
Associate Enforcement Counsels
OE Office Directors

INTERIM EPA POLICY ON THE INCLUSION OF POLLUTION PREVENTION AND RECYCLING PROVISIONS IN ENFORCEMENT SETTLEMENTS

I. Purpose

This document provides Agency enforcement personnel with a generic interim policy and guidelines for including pollution prevention and recycling provisions in administrative or judicial settlement agreements. It encourages pollution prevention and recycling both as a means of returning to compliance and as supplemental environmental projects by offering several incentives while preserving effective deterrence and accountability for compliance and environmental results.

II. Background

The Agency defines pollution prevention as the use of procedures, practices, or processes that reduce or eliminate the generation of pollutants and wastes at the source. Pollution prevention encompasses both the concepts of volume reduction and toxicity reduction. /1 Within the manufacturing sector, examples of pollution prevention include such activities as input substitution or modification, product reformulation, process modification, improved housekeeping, and on-site closed-loop recycling. The Agency's "hierarchy" of environmental protection practices consists of pollution prevention, followed by traditional recycling, treatment and control, respectively. /2

The Office of Enforcement's Pollution Prevention Action Plan (June 30, 1989), states that a strong enforcement program can promote pollution prevention goals by enhancing the desire of the regulated community to reduce its potential liabilities and resulting costs of resolving noncompliance. An emphasis on preventing pollution at the source can help reduce or eliminate

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1/ See the forthcoming Pollution Prevention Policy Guidance, especially pps. 3-6, for a full discussion of the considerations underlying the Agency's definition of pollution prevention. Both the Guidance and the Pollution Prevention Act of 1990 (P.L. 101 - 508) exclude "end of pipe" recycling from the formal definition of pollution prevention.

2/ Although non-closed loop (i.e., "end-of-pipe") recycling occupies the second tier of the "hierarchy" behind pollution prevention, it will, because of its environmental benefit, be included within the scope of this interim policy. All elements of this policy will apply to such recycling to the same extent as use and production substitution activities which constitute the formal definition of pollution prevention.

root causes of some violations and thereby increase the prospects for continuous compliance in the future. /3

In addition to this "indirect" incentive for pursuing pollution prevention, the Action Plan recognized that pollution prevention could be directly achieved by initiating enforcement actions against individual noncompliers. The Agency is constrained from requiring (i.e., imposing unilaterally) pollution prevention activities in the absence of statutory, regulatory, or permit language. Until the Agency commences an enforcement action, respondents are generally free to choose how they will comply with Federal environmental requirements. However, once a civil or administrative action has been initiated, the specific means of returning to compliance are subject to mutual agreement between the Agency and the respondent. 4/ The settlement process can be used to identify and implement pollution prevention activities consistent with the Agency's overall enforcement approach.

The Office of Enforcement chaired a workgroup, which included representation by the Program Compliance Offices and Regions III, IV, and VIII, to develop an interim policy on the use of pollution prevention conditions in enforcement settlements. In addition, OE and the Programs will receive funding from the Office of Pollution Prevention for technical support to develop and evaluate pollution prevention proposals in settlements in FY 1991-2 and to evaluate their utility for promoting long-term compliance and for permanently reducing the level of pollutants or toxic discharges into the environment.

III. Statement of Interim Policy

It shall be a policy of the Environmental Protection Agency to favor pollution prevention and recycling as a means of achieving and maintaining statutory and regulatory compliance and of correcting outstanding violations when negotiating enforcement settlements. While the use of pollution prevention conditions is not mandatory (for either a program/Region to propose or for a defendant/respondent to accept), Agency negotiators are strongly encoraged to try to incorporate pollution prevention conditions in single and multi-media settlements when feasible. The policy is applicable to both civil and criminal enforcement settlements involving private entities, Federal facilities or municipalities.

3/ Office of Enforcement Pollution Prevention Action Plan, page 2

4/ Note that some pollution prevention-related activities, e.g., environmental auditing, can be sought as injunctive relief in appropriate circumstances. See, Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52)

Among the types of situations which favor the use of pollution prevention conditions in enforcement settlements are:

a. recurring patterns of violations which are unlikely to be corrected by additional "add on" controls or improved operations and maintenance, and elimination or substitution offers the best prospects for the permanent return to compliance;

b. proposed solutions which do not create environmental problems in other media (i.e., have no negative cross-media impacts);

c. effluent emissions or discharges for which technically and economically feasible pollution prevention options have been identified;

d. violations which involve one or more pollutants listed on the target list of 17 chemicals the Agency will emphasize as part of the implementation of its Pollution Prevention Strategy (see appendix A for list of chemicals).

Pollution prevention settlement conditions can either be specific activities which correct the violation or activities which will be undertaken in addition to those necessary to correct the violation.

The interim policy should be implemented in concert with the Agency's new Pollution Prevention Guidance and Pollution Prevention Strategy, as well as Office of Enforcement policy documents, including the EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52); A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (GM-22,), and the newly issued Supplemental Environmental Projects Policy (February 12, 1991), which amends the "alternative payments" section of GM-22; the Office of Enforcement's Pollution Prevention Action Plan (6/30/89); and the Manual on Monitoring and Enforcing Administrative and Judicial Orders (2/14/90). /5

A. Pollution Prevention as a Means of Correcting the Violation

By definition, a use/source reduction or recycling activity which corrects the original violation will be media and facility specific. When conducting settlement negotiations, the Agency shall consider whether it is appropriate (e.g., technically and economically feasible) to correct the violation(s) through implementation of source reduction or recycling activities.

5/ These documents are available through the Office of Enforcement General Enforcement General Policy Compendium and/or the Enforcement Docket Retrieval System (EDRS).

Examples include compliance with permit requirements by switching from a high to a lower toxic solvent which reduces excessive emissions or discharges or by recycling effluent. /6

Pollution prevention conditions may be proposed by either the Agency or the respondent. Inclusion of any condition rests upon the outcome of mutual negotiations between the two sides.

B. Pollution Prevention Conditions "Incidental" to the Correction of the Violation

During negotiations to resolve the violation, the Agency also may consider as settlement conditions supplemental pollution prevention projects in addition to the specific actions or injunctive relief needed to correct the violation. Potential examples include phasing out a pollutant within a specific period of time or a commitment by a facility to change production technology at more than one facility.

Pollution prevention settlement conditions which do not by themselves correct the violation will usually be negotiated as "supplemental environmental projects" and, as such, are subject to the criteria described in the recently-issued policy on the use of supplemental projects which amends part of the Agencywide Framework for Civil Penalties (GM-22) /7. The decision to consider, accept, or reject such projects rests exclusively with the Agency.

IV. Specific Elements of the Interim Pollution Prevention Policy

A. Timelines for Implementing Pollution Prevention Conditions

EPA's enforcement policy calls for the "expeditious" return of the violator to compliance. /8 As a general rule,

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6/ A firm could theoretically return to compliance by reducing the scope of operations, i.e., by producing less and, therefore, reducing its discharge or emissions. Although this may return a facility to compliance, it is not "pollution prevention" within the Agency's definition nor the scope of this interim policy.

7/ The term "supplemental environmental project" replaces the term "alternative payments" used in GM-22. The Agency has recently issued a new policy on the use of these projects, Guidelines for Evaluating Supplemental Environmental Projects, which replaces the section on "alternative payments" on pps. 23-27 of GM-22. It provides detailed guidance on the "scope" of eligible supplemental projects, including ones which are related to pollution prevention. Also see Section IV B2, below.

8/ Civil Penalty Policy Framework (GM-22), page 13

there shall be no significant ("significant" to be defined by each program) extension of the "normal" time period for returning to compliance. Under no circumstances will a respondent be granted additional time to correct the violation in exchange for his conduct of a supplemental environmental project. (see IV B 2, below). For example, a facility which exceeds its effluent limit would have to return to compliance within the "normal" time period the NPDES program estimates for facilities of that size and type. This time period would not be extended if, as part of the overall settlement, the respondent also agreed to establish a sludge recycling system.

If a pollution prevention activity is presented as the means of correcting the violation, however, the Agency settlement team has some additional flexibility in negotiating an implementation schedule, given that pollution prevention alternatives sometimes add an element of complexity to a facility-specific compliance strategy, especially if it involves new or innovative technology.

The length of time which is deemed to be "expeditious" is ultimately a "best judgment" decision on the part of the EPA negotiators. It should be based upon their assessment of the ecological and public health-related risks and benefits involved in providing the additional time to return to compliance.

While Federal negotiators should consider the following factors in deciding whether to use innovative pollution prevention technology as injunctive relief at any time, they become even more relevant when deciding whether to extend the "normal" timeline for resolving a violation. If a decision is made to extend the timeline, the Federal negotiators should also establish interim milestones and controls to assure the adequate protection of public health and the environment while the pollution prevention relief is being implemented. (cf. Section C, below):

1. Seriousness of the Violation

Both the aggregate amount and toxicity of excess emissions or discharges affect the decision whether to extend the compliance timeline. Some violations (e.g., those which meet "imminent and substantial" endangerment definitions) must be corrected as quickly as possible, even when that involves foregoing a pollution prevention approach in favor of traditional treatment technology. Even when the violation has a much less potentially adverse impact, Federal negotiators should consider whether the risk allows a longer timeframe .

2. Aggregate Gain in "Extra" Pollution Prevention

Schedules should be extended only where there is an important net permanent reduction in the overall amount or

toxicity of the pollution as a result of a pollution prevention project which requires a longer timeline to implement than would "end-of-pipe" controls. (Note: This consideration is appropriate only when a longer compliance timeline is at issue since, "all other things being equal," the Agency would prefer a pollution prevention approach to traditional treatment and/or disposal.)

3. Reliability/Availability of the Technology

The pollution prevention technology being used to implement the injunctive relief should (ideally) have been successfully applied or tested at other facilities. While not intended to discourage the use of innovative prevention or reduction technologies, the more "experimental" or "untried" the technology, the more rigorous Federal negotiators should be about extending the "normal" compliance timeline. The technology should also avoid the cross-transfer of pollutants.

4. Applicability of the Technology

The Federal negotiators should be more willing to extend the compliance timeline if the pollution prevention technology is applicable to other facilities, so that, if successful, the lessons learned can be disseminated industry-wide.

5. Compliance-related Considerations

The pollution prevention approach offers the best prospects for a permanent return to compliance.

B. Penalty Assessments

1. General Considerations

Under EPA's general framework for assessing civil penalties (GM-22) and its program-specific applications, most formal enforcement actions are concluded with a penalty. The two elements of the penalty calculation are the gravity of the violation and the economic benefit of noncompliance. The former can be adjusted upward or downward depending several factors. The latter sets the penalty "floor." /9

The willingness of a respondent to correct the violation via a pollution prevention project can be one of the assessment factors used to adjust the "gravity" component of the penalty. The defendant/respondent's willingness to comply with permit requirements through pollution prevention activities can be seen as a "unique factor" (e.g., public policy

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9/ See OE's Guidance on Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment, (GM-33)
10/ GM-22 pps. 3-4

considerations) which may warrant an adjustment of the gravity-based penalty factor consistent with program-specific penalty policies.

Calculation of the economic benefit of noncompliance may have particular consequences for the inclusion of pollution prevention conditions in settlements. For example, two of the variables used by the BEN Model to calculate the penalty are the time expected to elapse from the date of the violation until the date of compliance (i.e., the estimated future date at which the facility would be expected to return to full compliance) and the expected cost of returning to compliance. /11. This calculation could create a disincentive for a respondent to correct the violation with pollution prevention technology (i.e., the longer the facility is expected to be out of compliance and the higher the cost of returning to compliance, the larger the economic benefit of noncompliance and, ultimately, the larger the penalty).

In order to eliminate this possible disincentive, the penalty amount should be calculated using the costs and timeframes associated with both the pollution prevention approach and the conventional way of correcting the violation. The final penalty will be the smaller of the two calculations, so long as the Federal negotiators have decided to allow the "longer" timeframe for returning to compliance. However, the settlement agreement should also provide for stipulated penalties in the event the violation is not corrected or exceeds its compliance schedule.

Several other criteria currently contained in GM-22 will continue to apply to pollution prevention projects. For example, a minimum cash penalty shall always be collected (subject to program-specific guidance), regardless of the value of the project, and it generally should not be less than the economic benefit of noncompliance.

2. Supplemental Environmental Projects

When settling an enforcement action, the Agency also may seek additional relief in the form of activities which remediate the adverse health or environmental consequences of the original violation. The size of the final assessed penalty may reflect the commitment of the defendant/respondent to undertake these "supplemental environmental projects".

As noted previously, the Agency's recently issued Policy on the Use of Supplemental Environmental Projects, which amends and supersedes GM-22's discussion on "alternative payments," identifies pollution prevention projects as one of five general

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11/ GM-22, pps. 6-10

categories of projects eligible for consideration. /12. In order to be part of the consent order or decree, a proposed supplemental pollution prevention project must meet all of the criteria discussed in the policy, including those which relate to the "scope" of the projects, the amount of penalty reduction, and oversight requirements.

One important criterion involves the "nexus" between the violation and the supplemental project. Nexus," which is defined as "an appropriate...relationship between the nature of the violation and the environmental benefits to be derived from the type of supplemental environmental project," helps assure that the supplemental project furthers the Agency's statutory mandate to clean up the environment and deter violations of the law. /13

The policy also states that while studies are generally not eligible mitigation projects, this prohibition will be modified slightly only for pollution prevention studies. 14/ The policy specifically exempt pollution prevention projects from the "sound business practices" limitation which are in effect for the four other categories of supplemental environmental projects./15

Federal negotiators who are considering the adoption of supplemental pollution prevention projects should refer specifically to the Policy on the Use of Supplemental Environmental Projects to make sure that the proposed pollution prevention project meets all applicable criteria.

C. Tracking And Assessing Compliance With the Terms of the Settlement

The Agency places a premium on compliance with the terms of its settlements and several documents exist which outline procedures for enforcing final orders and decrees, which may range from modification of the order to stipulated penalties and

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12/ The five categories cover pollution prevention, pollution reduction, environmental restoration, environmental auditing, and public awareness.

13/ Policy, p. 1. The extended discussion of "nexus" and example of supplemental projects which meet the "nexus" requirement are on pps. 5 - 8.

14/ Policy, p. 9

15/ Policy, pps. 8 - 9

motions to enforce the order and contempt of Court. /16

A more difficult situation arises when the respondent -- despite his best "good faith efforts" -- fails to successfully implement a pollution prevention activity which is required to correct the violation (e.g., is the injunctive relief). Ultimately, the respondent must be responsible for full compliance. If the pollution prevention approach does not work, he will be required to return to compliance through traditional means.

In order to make sure that the violation is corrected (as well as minimize any additional liabilities which may accrue to the defendant/respondent) the consent order or decree will state that any pollution prevention project which is used to achieve compliance with a legal standard must have a "fall-back" schedule requiring the use of an proven technology agreed to by all parties to the settlement and which will be implemented, if necessary, by a time certain. The settlement agreement also should establish a systematic series of short term milestones so that preliminary "warning signs" can be triggered promptly and issues raised. If the Agency decides that the "innovative" pollution prevention approach will not succeed, the "traditional" remedy must be implemented according to the set schedule. Under these circumstances, as long as the "fall-back" (traditional) remedy is implemented on schedule, the defendant/respondent will only have to pay an additional penalty equal to the economic benefit of the further delay in compliance, offset by the actual expenditures incurred as a result of the unsuccessful effort to comply through pollution prevention. If the actual expenditures on pollution prevention equal or exceed the incremental economic benefit of noncompliance using conventional controls, there would be no additional penalty.

D. Delegations and Level of Concurrence

Settlement conditions which involve more than one program or Region (e.g., a multi-media or multi-facility case) usually require additional oversight, and the estimated amount of time and resources required for effective oversight is one criteria which the Agency will use to determine whether to include the project in the settlement agreement. The respondent should shoulder as much of the direct costs as feasible. (e.g., pay for

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16/ The respondent's failure to carry out a pollution prevention activity which is a supplemental project shall be dealt with through procedures outlined in GM-22 and the Supplemental Environmental Projects Policy (e.g., reimposition of the full civil penalty and/or the assessment of stipulated penalties contained in the settlement once the Government determines that the conditions have not been fulfilled).

an independent auditor to monitor the status of the project and submit periodic reports, including a final one which evaluates the success or failure of the project).

Each Region should develop its own coordination procedures for negotiating and overseeing a multi-media pollution prevention condition which affects only that Region (i.e., applies only to the specific facility or other facilities within the Region).

The extent of coordination/concurrence required for a pollution prevention settlement which involves more than one Region will vary according to the nature and complexity of the proposal. The negotiation team should at a minimum notify and coordinate with other affected Regions about pollution prevention conditions which would have an impact on facilities in those Regions (e.g. an agreement for the respondent to conduct environmental audits; or an agreement for solvent substitution at other facilities not in violation).

However, the negotiation team would have to receive the concurrence of all affected Regions if the proposed pollution prevention condition involved significant oversight resources or activities (e.g., if it required major construction or process changes). For this type of situation, the settlement team must notify all affected Regions that it is considering the inclusion of such conditions as part of a proposed settlement prior to the completion of the negotiations. These Regions will then have the opportunity to comment on the substance and recommend changes to the scope of the proposal. Each entity will have to concur with the pollution prevention condition and agree to provide the necessary oversight in order for it to be included in the settlement agreement. The Programs and Regions must also agree on their respective tracking and oversight responsibilities before lodging the consent order or decree.

The Headquarters compliance programs and the Office of Enforcement will be available to help Regions coordinate this concurrence process, and to help the parties reach a consensus on oversight roles and responsibilities, where necessary. Concurrence by the Headquarters program office and the Office of Enforcement will be mandatory only where it is already required by existing delegations or for supplemental projects as described in the Supplemental Environmental Projects policy.

V. Organizational Issues

A. Copies of Settlements

The Regions should send copies of settlements with pollution prevention conditions to the respective national compliance officer (consent order) or Associate Enforcement Counsel (consent decree) for insertion to the Enforcement Docket Retrieval System

(EDRS). In addition, the Region should enter a brief descriptive summary of the settlement (1-2 pages) into the Pollution Prevention Information Clearinghouse (PPIC, 1-800-424-9346) enforcement settlement file which is being established. This will enable all the Programs and Regions to have "real time" information about pollution prevention settlements which have been executed, and will enable the Office of Enforcement and the programs to conduct an overall assessment of the impact of pollution prevention conditions in Agency settlements as part of the process of developing a final settlement policy in FY 1993.

B. Media-Specific Policies

The media programs and Regions have begun to implement their own pollution prevention strategies. Since they are still gaining experience in identifying and applying source reduction technologies to enforcement situations, and developing the technology and resources to track and evaluate these conditions, this interim policy adopts a phased approach that encourages, but does not require, them to try to incorporate pollution prevention conditions on a case-by-case basis where they enhance the prospects for long-term compliance and pollution reduction.

Each national program manager may decide whether to develop its own specific pollution prevention guidance (consistent with this interim guidance) or continue to use the general interim guidance. Program-specific guidance should discuss when to include pollution prevention conditions in settlements, and describe the categories of violations for which pollution prevention "fixes" are most encouraged and the specific types of source reduction or recycling activities considered appropriate for that program. The National Program Manager may also adopt additional reporting or concurrence requirements beyond those described in this interim policy. The Programs can develop specific policies on their own schedule, utilizing this general interim policy until they do so.

INDUSTRIAL TOXICS PROJECT

17 TARGET CHEMICALS

1988 TRI Reporting Year

(in Pounds)

Chemical Name	U.S. Production 1988 (in 000 lbs)	Imports 1988 (in 000 lbs)	Number of Facilities	Release to Air	Release to Water	Deep-Well Injection	Release to Land	Transfer to POTW	Other Transfer	Annual Total Release + Transfer
BENZENE	11,830,000 [a]	956,800 [b]	453	28,117,955	46,589	636,314	221,192	1,102,265	2,972,877	33,097,192
CADMIUM & COMPOUNDS	4,189 [c,1,2]	5,512 [c,1,2]	166	119,412	4,382	2,409	541,530	20,115	1,360,967	2,048,815
CARBON TETRACHLORIDE	747,000 [a]	111,000 [d]	84	3,683,121	15,667	98,054	14,759	5,014	1,186,781	5,003,396
CHLOROFORM	523,600 [a]	27,000 [b]	166	22,974,156	1,089,285	36,002	68,483	1,226,573	1,467,914	26,862,413
CHROMIUM & COMPOUNDS	291,000 [c,1,2]	912,700 [c,1,2]	1,882	1,181,482	389,475	101,180	28,125,080	2,107,561	24,060,834	56,865,612
CYANIDE & COMPOUNDS	417,600 [a,3]	26,800 [d,4]	355	1,981,210	193,456	7,460,999	106,299	1,147,862	2,915,637	13,805,563
DICHLOROMETHANE	504,100 [a]	25,000 [b]	1,525	126,796,287	347,336	664,750	156,647	2,584,199	22,885,336	153,434,555
LEAD & COMPOUNDS	2,216,000 [c,1,2]	374,800 [c,1,2]	1,277	2,587,790	237,014	2,755	27,494,165	207,732	28,177,731	58,707,187
MERCURY & COMPOUNDS	1,026 [c,1,2,5]	760 [c,1,2]	43	25,629	1,406	27	13,779	2,136	275,224	318,201
METHYL ETHYL KETONE	482,000 [a]	20,000 [b]	2,284	127,675,717	76,593	213,962	155,049	932,567	30,002,775	159,056,663
METHYL ISOBUTYL KETONE	205,300 [a]	20,000 [b]	933	30,523,897	762,108	121,650	31,912	1,508,530	10,760,598	43,708,695
NICKEL & COMPOUNDS	100,000 [c,1,2]	320,000 [c,1,2]	1,253	539,864	209,887	152,925	3,644,070	881,506	14,000,659	19,428,911
TETRACHLOROETHYLENE	497,700 [a]	119,000 [b]	680	32,277,372	33,284	72,250	105,644	586,138	4,428,398	37,503,086
TOLUENE	6,300,000 [a]	886,800 [b]	3,606	273,752,712	254,175	1,431,916	882,691	3,544,407	64,762,046	344,627,947
1,1,1-TRICHLOROETHANE	723,700 [a]	22,000 [b]	3,516	170,420,900	94,310	1,000	187,396	283,219	19,480,645	190,477,470
TRICHLOROETHYLENE	200,000 [b]	13,000 [b]	868	49,071,464	13,550	390	20,940	78,758	6,231,064	55,416,166
XYLENES	6,572,000 [a,6]	225,000 [b,7]	3,187	155,888,584	299,375	122,977	834,174	4,213,788	40,215,081	201,573,979

a. Synthetic Organic Chemicals. USITC, 1989, Publication #2219.
b. Mannsville Chemical Product Synopsis, Mannsville Chemical Products Corp
c. Mineral Commodity Summaries, U.S. Bureau of Mines, January, 1989
d. Chemical Economics Handbook, SRI International.
1. Production from primary & secondary refining, no mining data
   Production and import data does not include metal compounds
2. Metal content, except for gross weight of Chromium
3. Hydrogen Cyanide only.
4. Sodium Cyanide only, 1987 data.
5. Includes secondary Mercury released from Dept. of Energy stocks
6. Only ortho- and para Xylene reported
7. Only para Xylene reported

APPENDIX A

Supplemental Environmental Projects

A. Introduction

In settlement of environmental enforcement cases, the United States will insist upon terms which require defendants to achieve and maintain compliance with Federal environmental laws and regulations. In certain instances, additional relief in the form of projects remediating the adverse public health or environmental consequences of the violations at issue may be included in the settlement to offset the effects of the particular violation which prompted the suit. As part of the settlement, the size of the final assessed penalty may reflect the commitment of the defendant/respondent to undertake environmentally beneficial expenditures ("Supplemental Environmental Projects").

Even when such conditions serve as a basis for considering a Supplemental Environmental Project, the Agency's penalty policies will still require the assessment of a substantial monetary penalty according to criteria described in A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (GM-22), generally at a level which captures the defendant/respondent's economic benefit of noncompliance plus some appreciable portion of the gravity component of the penalty. Each administrative settlement in which a "horizontal" Supplemental Environmental Project or substitute performance is proposed (see below) must be approved by the Assistant Administrator for Enforcement, and, where required by the Agency's delegations policy, the media Assistant Administrator. Judicial settlements, including any of the projects described herein, will continue to require the approval of the Assistant Administrator for Enforcement and also be approved by the Assistant Attorney General for the Environment and Natural Resources Division.

EPA will expand its approach to Supplemental Environmental Projects while also maintaining a nexus (relationship) between the original violation and the supplemental project. EPA may approve a supplemental project so long as that project furthers the Agency's statutory mandates to clean up the environment and deter violations of the law.[1] Accordingly, supplemental projects

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[1] A supplemental project cannot be used to resolve violations at a facility other than the facility or facilities which are the subject of the enforcement action. This would run counter to deterrence objectives, since it would effectively give a company a penalty "break" for violations at one facility for undertaking what amounts to legally required compliance efforts at another facility. Such a scenario would operate to reward recalcitrance, poor-management practices, and non-compliance.

may be considered if: (1) violations are corrected through actions to ensure future compliance; (2) deterrence objectives are served by payment of a substantial monetary penalty as discussed above; and (3) there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to be derived from the supplemental project.

All supplemental projects must improve the injured environment or reduce the total risk burden posed to public health or the environment by the identified violations. The five categories of permissible supplemental activities are pollution prevention, pollution reduction, environmental restoration, environmental auditing projects, and public awareness projects which are directly related to addressing compliance problems within the industry within which the violation took place. EPA negotiators should make it clear to a defendant/respondent interested in proposing a supplemental project that the Agency is looking only for these types of projects (cf. section F, below).

Under no circumstances will a defendant/respondent be given additional time to correct the violation and return to compliance in exchange for the conduct of a supplemental project.

B. Categories of Supplemental Environmental Projects

Five categories of projects will be considered as potential Supplemental Environmental Projects subject to meeting the additional criteria described in the following sections.

1. Pollution Prevention Projects

Consistent with the Agency's forthcoming Pollution Prevention Policy Statement and Pollution Prevention Strategy, a pollution prevention project substantially reduces or prevents the generation or creation of pollutants through use reduction (i.e., by changing industrial processes, or by substituting different fuels or materials) or through application of closed-loop processes. A project which substantially reduces the discharge of generated pollutants through innovative recycling technologies may be considered a pollution prevention project if the pollutants are kept out of the environment in perpetuity.

2. Pollution Reduction Projects

A pollution reduction project is defined as a project which goes substantially beyond compliance with discharge limitations to further reduce the amount of pollution that would otherwise be discharged into the environment. Examples include a project that reduces the discharge of pollutants through more effective end-of-pipe or stack removal technologies; through improved operation

and maintenance; or recycling of residuals at the end of the pipe.[1]

Sometimes an acceptable pollution reduction project may encompass an "accelerated compliance project". For instance, assuming there is a statutory or regulatory schedule for pollution phaseout or reduction (or is likely to be proposed in the foreseeable future, e.g., an upcoming rulemaking), if a defendant/respondent proposes to complete a phaseout or reduction at least 24 months ahead of time, and such proposal for accelerated compliance can be demonstrated to result in significant pollution reduction (i.e., one can objectively quantify a substantial amount of pollution reduction due to the accelerated compliance) then such a proposal may proceed to be evaluated according to the rest of the appropriateness criteria below. In addition, if the defendant/respondent substitutes another substance for the one being phased out, he has the burden to demonstrate that the substance is non-polluting, otherwise no supplemental environmental project will be allowed and, indeed, additional liability may accrue.

3. Projects Remediating Adverse Public Health or Environmental Consequences (Environmental Restoration Projects)

An environmental restoration project is defined as a project that not only repairs the damage done to the environment because of the violation, but which goes beyond repair to enhance the environment in the vicinity of the violating facility.

4. Environmental Auditing Projects

Environmental Auditing that represents general good business practices are not acceptable supplemental projects under this policy (cf. Section E).[2] However, such a project may be considered by the Agency if the defendant/respondent undertakes additional auditing practices designed to seek corrections to

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[1] Where the obligation to reduce the pollution is already effective, or is subject to an "as soon as practicable" or comparable standard, a proposal to further reduce pollution would not fulfill the definition of a pollution reduction project, and would not be appropriate.

[2] It should be noted that the Agency has the authority to require an environmental audit as an element of injunctive relief when it deems it appropriate given the fact pattern surrounding the violation subject to the usual limits on the scope of injunctive relief.

existing management and/or environmental practices whose deficiencies appear to be contributing to recurring or potential violations. These other potential violations may encompass not only the violating facility, but other facilities owned and operated by the defendant/respondent, in order to identify, and correct as necessary, management or environmental practices that could lead to recurring or future violations of the type which are the basis for the enforcement action.*

Audit projects which fall within the scope of this policy can be justified as furthering the Agency's legitimate goal of encouraging compliance with and avoiding, as well as detecting, violation of federal environmental laws and regulations. Such audits will not, however, be approved as a supplemental project in order to deal with similar, obvious violations at other facilities.

5. Enforcement-Related Environmental Public Awareness Projects

These projects are defined as publications, broadcasts, or seminars which underscore for the regulated community the importance of complying with environmental laws or disseminate technical information about the means of complying with environmental laws. Permissible public awareness projects may included sponsoring industry-wide seminars directly related to correcting widespread or prevalent violations within an industry, e.g., a media campaign funded by the violator to discourage fuel switching and tampering with automobile pollution control equipment or one which calls for the defendant/respondent to organize a conference or sponsor a series of public service announcements describing how violations were corrected at a facility through the use of innovative technology and how similar facilities could also implement these production changes.

Public Awareness Projects directly serve Agency deterrence objectives and contribute indirectly to Agency enforcement efforts. Though they are not subject to the nexus requirement applicable to other supplemental environmental projects, they must be related to the type of violations which are/were the subject of the underlying lawsuit. Defendants/respondents who fund or implement a public awareness project must also agree to publicly state in a prominent manner that the project was undertaken as part of the settlement of a lawsuit brought by the Agency or a State. These projects will be closely scrutinized to ensure that they fulfill the legitimate objectives of this policy in all respects.

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* Of course, this requirement is subject to the qualifications of footnote 1.

6. Projects Not Allowed as Supplemental Projects

Several types of projects, which have been proposed in the past, would no longer be approveable Supplemental Environmental Projects. Examples of projects that would not be eligible include:

1. general educational or environmental awareness-raising projects (e.g., sponsoring public seminars about, or inviting local schools to tour, the environmental controls at a facility; promoting recycling in a community);

2. contribution to research at a college or university concerning the environmental area of noncompliance or concerning any other area of environmental study;

3. a project unrelated to the enforcement action, but otherwise beneficial to the community e.g., contribute to local charity).

C. "Nexus" (Relationship) of Supplemental Environmental Project to the Violation

The categories of Supplemental Environmental Projects described above (except for Public Awareness Projects) may be considered if there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to be derived from the type of supplemental project. For example, the "nexus" between the violation and an environmental restoration project exists when it remediates injury caused by the same pollutant at the same facility giving rise to the violation. Such projects must further the Agency's mission as defined by appropriate statutory mandates, including the purpose sections of the various statutes under which EPA operates. The Agency will evaluate whether the required "nexus" between the pollutant discharge violation and the project exists.

1. Requirements for Remediation Projects

Examples of circumstances presenting an appropriate nexus include:

a. A project requiring the purchase of wetlands which then act to purge pollutants unlawfully discharged in receiving waters. In this example, EPA will evaluate whether the required "nexus" between the pollutant discharge violations and the wetlands to be purchased can be established. EPA will evaluate the nexus between the project and the violation in terms of both

geography and the pollution treatment benefits of the wetlands.

b. A project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges, in order to replace the environmental services lost by reason of such injury.

c. A "restoration" project, such as a stream sediment characterization or remediation program to determine the extent and nature of pollution caused by the violation and to formulate and implement a plan for remediating sediment near the facility. Such a stream sediment characterizati- · restoration project, if obtainable as injuncti ..ef pursuant to the statutory provisions or the Clean Water Act in the particular case, would not be approveable as a supplemental project.

2. Nexus for Pollution Prevention/Pollution Reduction/ Environmental Restoration/Environmental Auditing Projects

The "nexus" for pollution prevention, pollution reduction, environmental restoration and environmental auditing projects may either be vertical or horizontal, as described below.

a. Vertical "Nexus"

A "vertical" nexus exists when the supplemental project operates to reduce pollutant loadings to a given environmental medium to offset earlier excess loadings of the same pollutant in the same medium which were created by the violation in question. Even if the violations are corrected by reducing pollutant loadings to the levels required by law, further reductions may be warranted in order to alleviate the risk to the environment or public health caused by past excess loadings. Typically, such projects follow a violation back into the manufacturing process to address the root cause of the pollution. Such reductions may be obtained from the source responsible for the violation or, in appropriate cases, may be obtained from another source, either upstream, up gradient or upwind of the responsible source.

For example, if pollutants were discharged in violation of the Clean Water Act from a facility at a certain point along a river, an acceptable pollution reduction project would be to reduce discharges of that same pollutant at an upstream facility on the same river. Another classic example of a "vertical" pollution prevention activity is the alteration of a production process at a facility which handles a portion of the manufacturing process antecedent to that which caused the

violation of the regulatory requirement in a way that yields reductions or total elimination of the residual pollutant discharges to the environmental media assaulted by the violation. Both of these examples present the necessary nexus between the violation and the supplemental project.

b. Horizontal "Nexus"

A "horizontal" nexus exists when the supplemental project involves either (a) relief for different media at a given facility or b) relief for the same medium at different facilities. The nexus between supplemental projects in this category and the violation must be carefully scrutinized. The nexus will be met only if the supplemental project would reduce the overall public health or environmental risk posed by the facility responsible for the violation or enhances the prospects for reducing or eliminating the likelihood of future violations substantially similar to those which are the basis for the enforcement action. Approval of such projects is appropriate only where the terms of the settlement insure that the defendant/respondent will be subject to required injunctive relief prescribed by the compliance and deterrence policies stated in the various Acts and their implementing regulations. In those circumstances, the Agency believes the required nexus to the statutory goals has been met.

Following are examples of s projects demonstrating a "horizontal" nexus to the violation:

1. Violations of the Resource Conservation and Recovery Act (RCRA) or the Clean Water Act may have exposed the neighboring community to increased health risks because of drinking water contamination. In addition to correcting these violations, it may be appropriate to reduce toxic air emissions from the same facility in order to compensate for the excess health risk to the community which resulted from the RCRA or CWA violations.

2. A supplemental project is proposed which reduces pollutant discharges at a defendant/respondent's other facilities within the same air quality basin or water shed as at the facility which violated legal requirements applicable to releases of the same pollutant. In this case, the overall supplemental project would be designed to reduce the overall health or environmental risk posed by related operations to the environment or to the health of residents in the same geographic vicinity by reducing pollutant discharges to the air basin or watershed and to compensate for past excess discharges.

3. A supplemental project is proposed which reduces pollutant discharges at a defendant/respondent's other (non-violating) facility(ies). Such a project would be approveable where the violating and non-violating facilities are engaged in the same production activities and use the same production processes, where appreciable risks of violations and legal requirements applicable to releases of that same pollutant substantially similar to those at the violating facility are posed by the non-violating facility(ies), and where the defendant/respondent can establish that significant economies of scale would be achieved by incorporating pollution prevention process changes at both the violating and non-violating facilities. Alternatively, the settlement could call for the defendant/respondent to substitute input chemicals across all such facilities (e.g., replace higher toxic solvents with lower toxic solvents at all paint manufacturing plants) or to reduce the emissions loadings of particular emissions at all such facilities as part of a NESHAPS settlement. Such projects would, therefore, reduce the overall health or environmental risk posed by such operations to the environment or to the health of residents in the same geographic vicinity.

4. In settlement of a Toxic Substances Control Act (TSCA) PMN (premanufacture notification) violation for manufacturing a polymer without providing formal advance notice at a facility, the defendant/respondent could establish a closed loop recycling system to reduce the amount of that facility's product manufacturing waste which must be sent to a RCRA Subtitle C landfill. Operating the facility in violation of TSCA created a risk of unwarranted health or environmental i[illegible] If TSCA penalty and injunction requirements have been met, then the supplemental project could be justified on the grounds that it would compensate for this unwarranted risk by reducing the overall health or environmental risk presented by the facility.

After the project category and "nexus" criteria have been met, a potential supplemental project must also meet the criteria described in the following sections, below. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before a supplemental project may be accepted.

D. <u>Status of the Enforcement Action/Compliance History of Defendant/Respondent</u>

Any defendant/respondent against whom the Agency has taken an enforcement action may propose to undertake a supplemental project at any time prior to resolution of the action, although

the Agency should consider both the status of the litigation/ administrative action and the resources that have been committed to it before deciding whether to accept it. In addition, the respondent's enforcement history and capability to successfully complete the project must be examined during evaluation of a supplemental project proposal.

The Agency negotiators must also consider whether the defendant/respondent has the technical and economic resources needed to successfully implement the supplemental project. In addition, a respondent who is a repeat offender may be a less appropriate respondent from which to receive and evaluate a supplemental project proposal than a first time violator.

E. Main Beneficiary of a Supplemental Environmental Project

The Federal Government's sole interest in considering supplemental projects is to ameliorate the adverse public health and/or environmental impacts of violations. Projects are not intended to reward the defendant/respondent for undertaking activities which are obviously in his economic self-interest (e.g., update or modernize a plant to become more competitive). Therefore, as a general rule, these projects will usually not be approved when they represent a "sound business practice" , i.e., capital expenditures or management improvements for which the Federal negotiators may reasonably conclude that the regulated entity, rather than the public, is likely to receive the substantial share of the benefits which accrue from it.

The only exception to the prohibition against acceptance of a supplemental project which represents a "sound business practice" is for a pollution prevention project. Although a pollution prevention project can be viewed as a "sound business practice" since (by definition) it is designed both to make production more efficient and reduce the likelihood of noncompliance, it also has the advantage of potentially providing significant long-term environmental and health benefits to the public. Therefore, the "sound business practice" limitation will be waived only for pollution prevention projects if the Federal negotiators decide, after due consideration and upon a clear demonstration by the defendant/respondent as to what the public health and/or environmental benefits would be, that those benefits are so substantial that the public interest would be best served by providing additional incentives to undertake the project.

F. Extent to Which the Final Assessed Penalty can Reflect a Supplemental Environmental Project

Although supplemental projects may directly fulfill EPA's

goal of protecting and restoring the environment, there is an important countervailing enforcement goal that penalties should have the strongest possible deterrent effect upon the regulated community. Moreover, the Agency's penalty policies require the assessment of a substantial monetary penalty according to criteria described in "Implementing EPA's Policy on Civil Penalties" (GM-22), generally at a level which captures the defendant/respondent's economic benefit[5] of noncompliance plus some appreciable portion of the gravity component of the penalty.[6]

In addition, 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. EPA should calculate the net present after tax value of the supplemental project at the time that the assessed penalty is being calculated. If a supplemental project is approved, a portion of the gravity component of the penalty may be mitigated by an amount up to the net present after-tax cost of the supplemental project, depending on the level of environmental benefits to the public.

G. Supplemental Environmental Projects for Studies

Supplemental Environmental Projects for studies will not be allowed without an accompanying commitment to implement the results. First, little or no environmental benefit may result in the absence of implementation. Second, it is also quite possible that this type of project is one which the violator could reasonably be expected to do as a "sound business practice".

Pollution prevention, pollution reduction and environmental restoration studies, as well as environmental audits, are defined narrowly for purposes of meeting Supplemental Environmental Project policy guidelines. They will only be eligible as supplemental projects if they are a part of an Agency-approved set of actions to reduce, prevent, or ameliorate the effects of pollution at the respondent's facility (e.g., a comprehensive

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[5] Where a violation is found which did not confer a significant economic benefit, e.g. a failure to notify, the settlement must still include payment of a penalty which at least captures a portion of the proposed gravity component.

[6] If a defendant/respondent can establish through use of documents and affidavits sworn under penalty of perjury that it cannot afford to pay the civil penalty derived from use of the appropriate civil penalty policy, the Agency will consider entering into an "ability to pay settlement" for less than the economic benefit of non-compliance.

waste minimization or emissions reduction program). The amount attributable to a supplemental project may include the costs of necessary studies. Nonetheless, a respondent's offer to conduct a study, without an accompanying commitment to implement the results, will not be eligible for penalty reduction. In considering the applicability of a proposed study, the Agency negotiators will consider the likelihood of success, i.e., substantial pollution reduction or prevention, in making a determination.

While studies are not by themselves eligible supplemental environmental projects, to encourage pollution prevention, EPA will make a limited exception to this general approach for pollution prevention studies. Such studies will be eligible for a penalty offset when they are part of an Agency-approved set of pollution prevention activities and are designed to correct the violation (e.g., a feasibility study, waste minimization opportunity assessment, or waste reduction audit).

The size of the penalty offset may include the costs of the studies. The commitment to conduct the study also must be tangible (e.g., the project completed on schedule, etc.). The U.S. must have the authority to review the completed study to decide whether it is technologically and/or economically feasible to implement the results. Should the U.S. decide that the results can be implemented but the defendant/ respondent is unwilling to do so, the "offset" for the pollution prevention study will be rescinded and the final assessed penalty must be paid in full (cf. Section J. on payment assurance).

H. Substitute Performance of Supplemental Environmental Projects

A supplemental environmental project which meets the other criteria of this policy may consist in part or whole of substitute performance by an entity or entities other than the violator. Such a substitute must bear a reasonable geographical or media-specific relationship to the underlying violation. This substitute performance must be assured through agreements which are enforceable by EPA, and may consist of agreements for emissions limits, process design or input changes, natural resource preservation or conservation easements, or other means of achieving compliance with the terms of the proposed supplemental environmental project. In the event a violator proposes acceptable substitute performance, EPA will credit the violator with an amount up to the net after tax cost of the project as if it were being performed by the violator. The violator, will, however, remain responsible for the performance of the project or the payment of the penalty offset if substitute performance is not completed.

I. Level of Concurrence

There may be practical problems in administering cross-media and/or cross-regional projects. Staff allocations for oversight requirements will necessarily increase, as will the level of resources needed for tracking purposes since tracking a supplemental project is more complex than tracking whether a payment is made. In addition, the likelihood of new issues emerging due to noncompliance with the conditions of the project is significant.

The extent of coordination/concurrence for a supplemental project which involved more than one Region will vary according to the nature and complexity of the proposal. All affected Regions must be notified about a supplemental project which would have only a modest impact on facilities in those Regions (e.g., a commitment to undertake an environmental audit at all of the defendant/respondent's facilities across the country). However, all affected Regions would have to concur in a proposed supplemental project which would involve significant oversight resources or activities (e.g., a pollution prevention activity which required major construction or process changes). Also, all affected EPA parties must be consulted on their respective oversight responsibilities. As stated previously, judicial settlements, including any of the projects described herein, will continue to require the approval of the Assistant Administrator for Enforcement and also be approved by the Assistant Attorney General for the Environment and Natural Resources Division.

Each proposed administrative settlement which has a "horizontal" nexus to the violation or which involves substitute performance also must be approved by the Assistant Administrator for Enforcement and, where required by the Agency's delegations policy, the media Assistant Administrator.

J. Oversight/Tracking

Supplemental Environmental Projects may require third-party oversight. In such cases, these oversight costs should be borne by the respondent, and it must agree as a part of the settlement to pay for an independent, third-party auditor to monitor the status of the supplemental project. The auditor will be required by the settlement to submit specific periodic reports, including a final report evaluating the success or failure of the supplemental project, and the degree to which the project satisfied these guidelines. All reports must be submitted to EPA. Upon request, EPA may provide copies of the reports, or copies of portions of the reports, to the respondent. The timing and amount of reports released to the defendant/respondent shall be at EPA's sole discretion.

Obviously, a certain amount of government oversight will be required to monitor compliance with the terms of an agreement that contains a supplemental project. "Horizontal" pollution prevention or pollution reduction supplemental projects which involve more than one Region (e.g., production changes at more than one facility) may require additional oversight, and the estimated amount of time and resources required for effective oversight is another criteria which the negotiators should use to determine whether to include the project in the settlement agreement.

The consent order or decree shall specify overall timeliness and milestones to be met in implementing the supplemental project. If the defendant/respondent does not comply satisfactorily with the terms of the supplemental project, he shall be liable for the amount by which the assessed penalty was reduced (with applicable interest). The consent order or decree should contain a mechanism for assuring prompt payment, e.g., through stipulated penalties consistent with the other sections of this policy or, if appropriate, the posting of a bond (in the amount by which the assessed penalty was reduced) to be forfeited if the supplemental project is not fully implemented.

K. Documenting Approval Of Supplemental Environmental Project Proposals

In all cases where supplemental projects are approved as part of the settlement, the case file should contain documentation showing that each of the appropriateness criteria listed above have been met in that particular case. A copy of the evaluation and approval document shall be sent to the Office of Enforcement and the National Compliance Officer concurrent with the approval of the Regional Administrator, or other authorized approving official, and to the Assistant Attorney General for the Environment and Natural Resources Division.

L. Coverage of this Policy

This document revises and supercedes the appropriate sections of the Agency's general civil penalty policy (GM-22), and constitutes Agency policy relating to supplemental environmental projects. Media-specific penalty policies will be revised as soon as possible to be consistent with it. During this interim period, in the event of any conflict between this general policy and a media-specific policy, this policy is controlling.

Attachment B

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

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Creation of an Agency Workgroup on Multi-media Enforcement

FROM: James M. Strock
Assistant Administrator

TO: Deputy Regional Administrators
Headquarters Compliance Office Directors
OE Headquarters Managers
Regional Counsels

In Fiscal Year 1990, the Agency set a new course for Enforcement in the Enforcement Four Year Strategic Plan. Several elements of that plan call for a more holistic, multi-media approach to enforcement. This included better targeting of enforcement resources on geographic areas, pollutants, industries or companies of concern, innovative enforcement settlement conditions which address broader environmental management and pollution prevention concerns and systematic screening of cases, employing new, integrated databases. This direction was given increased impetus by the Administrator's stated goal that 25% of enforcement activities include multi-media elements. Despite the broad consensus that EPA needs to adopt more of a multi-media perspective in its actions, our management systems are ill-suited to acknowledging the full benefits of these efforts.

The Deputy Administrator has directed the Office of Enforcement to lead an agency-wide workgroup to address implementation issues in the Agency's multi-media/cross-program enforcement approaches. The workgroup will play a vital role in helping the agency realize the vision set forth in the Enforcement Four Year Strategic Plan and the Administrator's goal that 25% of our enforcement activities have multi-media elements. The workgroup recommendations will be reviewed with the Enforcement Management Council. On an ongoing basis, the workgroup will also serve to maintain an awareness of the progress of the Regions and share results.

I. Mission

1- The workgroup will begin immediately to develop recommendations for implementation beginning next fiscal year, or sooner if appropriate, definitions, accountability, resource allocation and systems improvements to further foster multi-media enforcement. Issues that should be addressed include:

- Should we revise the definition of the Administrator's multi-media goal so that it drives us in the right direction? What changes or clarifications are needed?
- How should we further define the role of States in meeting the goal?
- What barriers must be eliminated to achieve the goal?
- How can we usefully assess how close we are to meeting the goal?
- How can we recognize and reward success?
- Do we have sufficient funding and resource incentives for conducting multi-media inspections? What funding incentives might be needed to foster more multi-media enforcement action?
- How can we credit Regions for different types of cases, (e.g. "weighted beans" not necessarily in a workload sense but in the sense of public accounting)?

The workgroup will review regional transition plans submitted at the end of February, and work closely with Regions throughout the year to identify both implementation and record-keeping issues they are encountering in trying to portray their progress. Ideas and approaches should be shared with other Regions.

2- In discharging its responsibility, the workgroup will review the end-of-year progress reports from each Region on how well they did in implementing the multi-media goal of the Agency.

3- The workgroup will establish criteria and a process for recognizing and rewarding exemplary Regional multi-media activity based upon the end of year progress reports.

4- The workgroup will help design a means of evaluating regional implementation of the case screening guidance and make recommendations for ensuring that: 1) the process is accomplishing its purpose without adverse impact on regional enforcement operations, and 2) it focuses multi-media attention on appropriate violations and sources.

II. Composition

Headquarters

Chair	Office of Compliance Analysis and Program Operations (3) representatives on budget, accountability and planning
	National Enforcement Investigations Center
	Associate Enforcement Counsels (2 Branch Chiefs)
	Office of Policy, Planning and Evaluation (Program Evaluation Division)
	Office of Water Enforcement and Permits
	Office of Waste Programs Enforcement
	Office of Compliance Monitoring
	Stationary Source Air Compliance Division

Regions

We will seek representative Branch Chiefs from Regional Counsel, Air, Water, Waste, Toxics, Management, and Environment Service Divisions, and are proposing this mix with representatives from all Regions. Individuals will be selected in consultation with our Lead Region, Region I, and with the approval of Regional Management.

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

SE.2-3
GM-52

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 wnere 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 23 (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.]

Federal Register

Wednesday
July 9, 1986

Part IV

Environmental Protection Agency

Environmental Auditing Policy Statement; Notice

ENVIRONMENTAL PROTECTION AGENCY

[E-FRL-3046-6]

Environmental Auditing Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards. EPA first published this policy as interim guidance on November 8, 1985 (50 FR 46504). Based on comments received regarding the interim guidance, the Agency is issuing today's final policy statement with only minor changes.

This final policy statement specifically:

- Encourages regulated entities to develop, implement and upgrade environmental auditing programs;
- Discusses when the Agency may or may not request audit reports;
- Explains how EPA's inspection and enforcement activities may respond to regulated entities' efforts to assure compliance through auditing;
- Endorses environmental auditing at federal facilities;
- Encourages state and local environmental auditing initiatives; and
- Outlines elements of effective audit programs.

Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its accelerated use by regulated entities to help meet the goals of federal, state and local environmental requirements. However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements. States are encouraged to adopt these similar and equally effective policies in order to advance the use of environmental auditing on a consistent, nationwide basis.

DATES: This final policy statement is effective July 9, 1986.

FOR FURTHER INFORMATION CONTACT:
Leonard Fleckenstein, Office of Policy, Planning and Evaluation, (202) 382-2726;
or
Cheryl Wasserman, Office of Enforcement and Compliance Monitoring, (202) 382-7550.

SUPPLEMENTARY INFORMATION:

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble

On November 8, 1985 EPA published an Environmental Auditing Policy Statement, effective as interim guidance, and solicited written comments until January 7, 1986.

Thirteen commenters submitted written comments. Eight were from private industry. Two commenters represented industry trade associations. One federal agency, one consulting firm and one law firm also submitted comments.

Twelve commenters addressed EPA requests for audit reports. Three comments per subject were received regarding inspections, enforcement response and elements of effective environmental auditing. One commenter addressed audit provisions as remedies in enforcement actions, one addressed environmental auditing at federal facilities, and one addressed the relationship of the policy statement to state or local regulatory agencies. Comments generally supported both the concept of a policy statement and the interim guidance, but raised specific concerns with respect to particular language and policy issues in sections of the guidance.

General Comments

Three commenters found the interim guidance to be constructive, balanced and effective at encouraging more and better environmental auditing.

Another commenter, while considering the policy on the whole to be constructive, felt that new and identifiable auditing "incentives" should be offered by EPA. Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives-based" environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the "incentives" most frequently mentioned in this context—are fraught with legal and policy obstacles.

Several commenters expressed concern that states or localities might use the interim guidance to *require* auditing. The Agency disagrees that the policy statement opens the way for states and localities to require auditing. No EPA policy can grant states or localities any more (or less) authority than they already possess. EPA believes that the interim guidance effectively encourages *voluntary* auditing. In fact, Section II.B. of the policy states: "because audit quality depends to a large degree on genuine management commitment to the program and its objectives, auditing should remain a voluntary program."

Another commenter suggested that EPA should not expect an audit to identify all potential problem areas or conclude that a problem identified in an audit reflects normal operations and procedures. EPA agrees that an audit report should clearly reflect these realities and should be written to point out the audit's limitations. However, since EPA will not routinely request audit reports, the Agency does not believe these concerns raise issues which need to be addressed in the policy statement.

A second concern expressed by the same commenter was that EPA should acknowledge that environmental audits are only part of a successful environmental management program and thus should not be expected to cover every environmental issue or solve all problems. EPA agrees and accordingly has amended the statement of purpose which appears at the end of this preamble.

Yet another commenter thought EPA should focus on environmental performance results (compliance or non-compliance), not on the processes or vehicles used to achieve those results. In general, EPA agrees with this statement and will continue to focus on environmental results. However, EPA also believes that such results can be improved through Agency efforts to identify and encourage effective environmental management practices, and will continue to encourage such practices in non-regulatory ways.

A final general comment recommended that EPA should sponsor seminars for small businesses on how to start auditing programs. EPA agrees that such seminars would be useful. However, since audit seminars already are available from several private sector organizations, EPA does not believe it should intervene in that market, with the possible exception of seminars for government agencies, especially federal agencies, for which EPA has a broad mandate under Executive Order 12088 to

provide technical assistance for environmental compliance.

Requests for Reports

EPA received 12 comments regarding Agency requests for environmental audit reports, far more than on any other topic in the policy statement. One commenter felt that EPA struck an appropriate balance between respecting the need for self-evaluation with some measure of privacy, and allowing the Agency enough flexibility of inquiry to accomplish future statutory missions. However, most commenters expressed concern that the interim guidance did not go far enough to assuage corporate fears that EPA will use audit reports for environmental compliance "witch hunts." Several commenters suggested additional specific assurances regarding the circumstances under which EPA will request such reports.

One commenter recommended that EPA request audit reports only "when the Agency can show the information it needs to perform its statutory mission cannot be obtained from the monitoring, compliance or other data that is otherwise reportable and/or accessible to EPA, or where the Government deems an audit report material to a criminal investigation." EPA accepts this recommendation in part. The Agency believes it would not be in the best interest of human health and the environment to commit to making a "showing" of a compelling information need before ever requesting an audit report. While EPA may normally be willing to do so, the Agency cannot rule out in advance all circumstances in which such a showing may not be possible. However, it would be helpful to further clarify that a request for an audit report or a portion of a report normally will be made when needed information is not available by alternative means. Therefore, EPA has revised Section III.A., paragraph two and added the phrase: "and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Another commenter suggested that (except in the case of criminal investigations) EPA should limit requests for audit documents to specific questions. By including the phrase "or relevant portions of a report" in Section III.A., EPA meant to emphasize it would not request an entire audit document when only a relevant portion would suffice. Likewise, EPA fully intends not to request even a portion of a report if needed information or data can be otherwise obtained. To further clarify this point EPA has added the phrase, "most likely focused on particular information needs rather than the entire report," to the second sentence of paragraph two, Section III.A. Incorporating the two comments above, the first two sentences in paragraph two of final Section III.A. now read: "EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission or the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Other commenters recommended that EPA not request audit reports under any circumstances, that requests be "restricted to only those legally required," that requests be limited to criminal investigations, or that requests be made only when EPA has reason to believe "that the audit programs or reports are being used to conceal evidence of environmental non-compliance or otherwise being used in bad faith." EPA appreciates concerns underlying all of these comments and has considered each carefully. However, the Agency believes that these recommendations do not strike the appropriate balance between retaining the flexibility to accomplish EPA's statutory missions in future, unforeseen circumstances, and acknowledging regulated entities' need to self-evaluate environmental performance with some measure of privacy. Indeed, based on prime informal comments, the small number of formal comments received, and the even smaller number of adverse comments, EPA believes the final policy statement should remain largely unchanged from the interim version.

Elements of Effective Environmental Auditing

Three commenters expressed concerns regarding the seven general elements EPA outlined in the Appendix to the interim guidance.

One commenter noted that were EPA to further expand or more fully detail such elements, programs not specifically fulfilling each element would then be judged inadequate. EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another, but which may still result in effective auditing programs. Accordingly, EPA does not plan to expand or more fully detail these auditing elements.

Another commenter asserted that states and localities should be cautioned not to consider EPA's auditing elements as mandatory steps. The Agency is fully aware of this concern and in the interim guidance noted its strong opinion that "regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs." While EPA cannot require state or local regulators to adopt this or similar policies, the Agency does strongly encourage them to do so, both in the interim and final policies.

A final commenter thought the Appendix too specifically prescribed what should and what should not be included in an auditing program. Other commenters, on the other hand, viewed the elements described as very general in nature. EPA agrees with these other commenters. The elements are in no way binding. Moreover, EPA believes that most mature, effective environmental auditing programs do incorporate each of these general elements in some form, and considers them useful yardsticks for those considering adopting or upgrading audit programs. For these reasons EPA has not revised the Appendix in today's final policy statement.

Other Comments

Other significant comments addressed EPA inspection priorities for, and enforcement responses to, organizations with environmental auditing programs.

One commenter, stressing that audit programs are *internal* management tools, took exception to the phrase in the second paragraph of section III.B.1. of the interim guidance which states that environmental audits can 'complement' regulatory oversight. By using the word 'complement' in this context, EPA does not intend to imply that audit reports must be obtained by the Agency in order to supplement regulatory inspections. 'Complement' is used in a broad sense of being in addition to inspections and providing something (i.e., self-assesament) which otherwise would be lacking. To clarify this point EPA has added the phrase "by providing self-assessment to assure compliance" after "environmental audits may complement inspections" in this paragraph.

The same commenter also expressed concern that, as EPA sets inspection priorities, a company having an audit program could appear to be a 'poor performer' due to complete and accurate reporting when measured against a

company which reports something less than required by law. EPA agrees that it ... important to communicate this fact to ...icy and state personnel and will do so. However, the Agency does not believe a change in the policy statement is necessary.

A further comment suggested EPA should commit to take auditing programs into account when assessing all enforcement actions. However, in order to maintain enforcement flexibility under varied circumstances, the Agency cannot promise reduced enforcement responses to violations at all audited facilities when other factors may be overriding. Therefore the policy statement continues to state that EPA may exercise its decretion to consider auditing programs as evidence of honest and genuine efforts to assure compliance, which would then be taken into account in fashioning enforcement responses to violations.

A final commenter suggested the phrase "expeditiously correct environmental problems" not be used in the enforcement context since it implied EPA would use an entity's record of correcting nonregulated matters when evaluating regulatory violations. EPA did not intend for such an inference to be made. EPA intended the term ...ironmental problems" to refer to the ...rlying circumstances which eventually lead up to the violations. To clarify this point, EPA is revising the first two sentences of the paragraph to which this comment refers by changing "environmental problems" to "violations and underlying environmental problems" in the first sentence and to "underlying environmental problems" in the second sentence.

In a separate development EPA is preparing an update of its January 1984 *Federal Facilities Compliance Strategy*, which is referenced in section III. C. of the auditing policy. The Strategy should be completed and available on request from EPA's Office of Federal Activities later this year.

EPA thanks all commenters for responding to the November 8, 1985 publication. Today's notice is being issued to inform regulated entities and the public of EPA's final policy toward environmental auditing. This policy was developed to help (a) encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management, and (b) guide internal EPA actions directly ...ed to regulated entities' ...onmental auditing programs. EPA will evaluate implementation of this final policy to ensure it meets the above goals and continues to encourage better environmental management, while strengthening the Agency's own efforts to monitor and enforce compliance with environmental requirements.

II. General EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic, documented, periodic and objective review by regulated entities [1] of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.[2]

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment, survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally have greater resources to devote to an internal audit team, while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental

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[1] "Regulated entities" include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local agencies as well as special-purpose organizations such as regional sewage commissions.

[2] See, e.g., "Current Practices in Environmental Auditing," EPA Report No. EPA-230-09-83-006, February 1984; "Annotated Bibliography on Environmental Auditing," Fifth Edition, September 1985, both available from: Regulatory Reform Staff, PM-223, EPA, 401 M Street SW, Washington, DC 20460.

performance of the facility lies with top management, which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below). Because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports [3] could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA, even if there is no explicit 'requirement' to generate that data.[4] Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g., Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirements, EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks, even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

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 management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus, while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2. Audit Provisions as Remedies in Enforcement Actions

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.[5] Environmental auditing provisions are most likely to be proposed in settlement negotiations where:

- 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.

[3] An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section II.A., of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

[4] See, for example, "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities," Environmental Law Institute report to EPA, final report, September 1985.

[5] EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

Through this consent decree approach other means, EPA may consider ... encourage effective auditing by ... owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy EPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing at Federal Facilities

EPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to EPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expeditiously develop schedules for remedial action.

To the extent feasible, EPA will ... vide technical assistance to help ... agencies design and initiate ... ograms. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility environmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to environmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* January 1984, update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office ... responsible state agencies, where ...riate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies, in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.
- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.
- When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.
- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements, etc.).
- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improve.

Dated: June 28, 1986.

Lee M. Thomas,

Administrator.

Appendix—Elements of Effective Environmental Auditing Programs

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (©1983, Walter Willborn, American Society for Quality Control) and "Standards for the Professional Practice of Internal Auditing" (©1981, The Institute of Internal Auditors, Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs, especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. *Explicit top management support for environmental auditing and commitment to follow-up on audit findings.* Management support may be demonstrated by a written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. *An environmental auditing function independent of audited activities.* The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. *Adequate team staffing and auditor training.* Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives. Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. *Explicit audit program objectives, scope, resources and frequency.* At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility; and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. *A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.* Information should be collected before and during an onsite visit regarding environmental compliance(*1*), environmental management effectiveness(*2*), and other matters (*3*) related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. *Sufficient* information is factual, adequate and convincing so that a prudent, informed person would be likely to reach the same conclusions as the auditor.

b. *Reliable* information is the best attainable through use of appropriate audit techniques.

c. *Relevant* information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. *Useful* information helps the organization meet its goals.

The audit process should include a periodic review of the reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. *A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.* Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identified problems. Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. *A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.* Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

(*1*) A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include:
Resource Conservation and Recovery Act
Federal Water Pollution Control Act
Clean Air Act
Hazardous Materials Transportation Act
Toxic Substances Control Act
Comprehensive Environmental Response, Compensation and Liability Act
Safe Drinking Water Act
Federal Insecticide, Fungicide and Rodenticide Act
Marine Protection, Research and Sanctuaries Act
Uranium Mill Tailings Radiation Control Act

In addition, state and local governments are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building, fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

(*2*) An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices regardless of whether they are part of the environmental system or the operating and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policies which: a. implement regulatory requirements; b. provide management guidance for environmental hazards not specifically addressed in regulations;

2. Train and motivate facility personnel to work in an environmentally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy;

3. Communicate relevant environmental developments expeditiously to facility and other personnel;

4. Communicate effectively with government and the public regarding significant environmental incidents;

5. Require third parties working for or on behalf of the organization to follow its environmental procedures.

8. Make proficient personnel available at
mes to carry out environmental-
ally emergency) procedures:
porate environmental protection
into written operating procedures:
9. Apply best management practices and
operating procedures, including "good
housekeeping" techniques:
9 Institute preventive and corrective
maintenance systems to minimize actual and
potential environmental harm:
10 Utilize best available process and
control technologies:
11 Use most-effective sampling and
monitoring techniques, test methods,
recordkeeping systems or reporting protocols
(and minimum legal requirements):
12 Evaluate causes behind any serious
environmental incidents and establish
procedures to avoid recurrence:
13 Exploit source reduction, recycle and
reuse potential wherever practical; and
14 Substitute materials or processes to
allow use of the least-hazardous substances
possible.

Visitors could also assess
environmental risks and uncertainties.

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A REPRESENTATIVE SAMPLE OF

ENVIRONMENTAL AUDITING SETTLEMENTS ACHIEVED TO DATE*

REGION II:

Crompton and Knowles Corporation, Consent Agreement and Final Order (CAFO), II TSCA-PCB-82-0108, 1/28/86. Compliance audit of 28 facilities, covering TSCA PCB requirements, with certification of compliance. EPA attorney: Randye Stein, FTS 264-8157.

REGION V:

BASF Wyandotte Corporation, CAFO, TSCA-V-C-410, 4/25/86. In settlement of a premanufacture notification action under TSCA, BASF agreed to conduct an audit (actually called a "review") of all chemicals subject to TSCA §5 inventory requirements that are produced, imported or used by 13 BASF facilities. BASF also agreed to certify that (1) all chemicals manufactured by or imported/purchased from its parent or an affiliate company are listed on the TSCA Chemical Substances Inventory; and (2) to the best of its knowledge, all chemicals purchased from unrelated parties are listed on the TSCA inventory. EPA attorney: Art Smith, FTS 886-4253.

Chemical Waste Management, Inc. (Vickery, Ohio facility), CAFO, TSCA-V-C-307, RCRA-V-85R-019, 4/5/85. Management audit covering all RCRA and TSCA requirements. Audit also addresses personnel training, spill response, operations and maintenance, interim stabilization, and quality control and assurance. EPA attorneys: Rodger Field, FTS 886-6726; Michael Walker, FTS 475-8697.

Detroit Metropolitan (Wayne County Airport), CAFO, TSCA-V-C-468, 7/30/86. PCB compliance audit of all facilities with certification of compliance and submission of inventory of each facility which specifies general location and quantity of all PCBs and PCB items subject to the requirements of 40 CFR Part 761. EPA attorney: Dorothy Attermayer, FTS 886-6776.

Michigan Department of Mental Health, CAFO, TSCA-V-C-231, 1/4/85. PCB compliance audit of all facilities, with certification of compliance. EPA attorney: Michael Walker, FTS 475-8697.

Michigan Department of Corrections, CAFO, TSCA-V-C-187, 10/9/83. PCB compliance audit of all facilities, with certification of compliance. EPA attorney: Michael Walker, FTS 475-8697.

Owens-Corning Fiberglas Corporation, CAFO, TSCA-V-C-101, 6/8/84. PCB compliance audit of 63 facilities, with certification of compliance. EPA attorney: Michael Walker, FTS 475-8697.

* Note: Some of the settlements identified herein may not fall within the strict definition of "environmental auditing" but contain requirements sufficiently similar to auditing to warrant their inclusion.

Potlatch Corporation, CAFO, TSCA-V-C-137, 8/31/83. PCB compliance audit of all facilities, with certification of compliance. EPA attorney: David Sims, FTS 353-2094.

Ren Plastics, an operating unit of Ciba-Geigy Corp. (E. Lansing, Michigan), CAFO, TSCA-V-C-411, 2/12/86. CAFO requires review of the chemicals manufactured by Ciba-Geigy plants with certification that all chemicals are on the TSCA inventory. Respondent also agreed to conduct an environmental seminar for plant personnel with a section on TSCA compliance; respondent intends to continue refining its employee training program. EPA attorney: Dorothy Attermeyer, FTS 886-6776.

REGION VI:

USA v. Georgia-Pacific Corporation, Nos. 84-457-B and 85-136-B (D.LA., entered 2/6/86). Clean Air Act Consent Decree requires implementation of compliance plan produced by presettlement audit, covering CAA National Emissions Standard for vinyl chloride. EPA attorney: Elliott Gilberg, FTS 382-2864.

REGION IX:

Chemical Waste Management, Inc. (Kettleman Hills, California facility), CAFO, RCRA-0984-0037, TSCA-09-84-0009, 11/7/85. Management audit covering all RCRA and TSCA requirements. Audit also addresses personnel training, spill response, operations and maintenance, interim stabilization, and quality control and assurance. EPA attorneys: Bill Wick, FTS 454-8039; Keith Onsdorff, FTS 382-3072.

REGION X:

Allstate Insurance Company, CAFO, X83-09-09-2614, 5/25/84. PCB audit of 140 buildings nationwide, formulation of PCB inspection plan and guidelines to be distributed to facility managers, and follow-up training conferences and review of program implementation. EPA attorney: Ted Rogowski, FTS 399-1185.

Bonneville Power Administration, Memorandum of Agreement with EPA, 2/20/85. MOA provides for: (1) training of personnel conducting TSCA inspections, CERCLA preliminary assessments, and site investigations; (2) conduct of environmental audits covering TSCA PCB requirements; (3) testing and evaluation of facilities to determine status of compliance with TSCA and to assess threatened or actual release of "hazardous substances" as defined by CERCLA; and (4) remedial actions to be taken based upon risk assessment that utilizes criteria and information in the National Contingency Plan. EPA attorney: Ted Rogowski, FTS 399-1185.

Chem Security Systems, Inc. (Arlington, OR), CAFOs, TSCA 1085-07-42-2615P, 12/26/85; and RCRA 1085-06-08-3008P, 12/2/85. Four compliance audits (performed quarterly over a one-year period), covering all RCRA requirements and PCB requirements under TSCA. EPA attorney: Barbara Lither, FTS 399-1222.

Crown Zellerbach Corporation, CAFO, X83-06-08-2614, 11/30/83. Settlement provides for refinement of existing corporate-wide compliance program for TSCA PCB requirements, including certification of compliance. EPA attorney: Ted Rogowski, FTS 399-1185.

Roseburg Lumber Company, CAFO, X83-05-02-2614, 1/10/85. Settlement provides for development of a training program and manual describing PCB compliance requirements and procedures; and a program to bring 12 facilities into full compliance with TSCA PCB requirements within one year of settlement. EPA attorney: Ted Rogowski, FTS 399-1185.

Washington State University, CAFO, X83-05-02-2614, 5/30/84. Settlement provides for development of guidance manual for employees regarding proper handling of PCBs, followed by training sessions to ensure employees' familiarity with PCB compliance procedures. EPA attorney: Ted Rogowski, FTS 399-1185.

HEADQUARTERS:

American Petrofina Company of Texas, Nos. 1217 and 1293, 9/5/85. Consolidated Clean Air Act Settlement Agreement requires institution of annual visitation program by Respondent to verify the existence of proper unleaded gasoline handling procedures at all branded gasoline retail outlets. EPA attorneys: Rich Kozlowski, FTS 382-2633; Rich Ackerman, FTS 382-4410.

Ashland Oil, Inc. (Catlettsburg, KY refinery), No. _____ (E.D. Kentucky, entered _____). Clean Water Act consent decree requires the performance of a "Wastewater Treatment System Engineering Study" by an independent party and the implementation of those recommendations agreed upon by the parties. Settlement also mandates the commencement of a "Best Management Practices Study" in order to minimize potential significant releases; includes the development of a toxicity testing and control plan and establishes a stipulated penalty schedule for daily and monthly violations of effluent limits contained in Defendant's NPDES permit. EPA attorney: Joseph Moran, FTS 475-8185.

BASF Systems Corporation, CAFO, TSCA-85-H-04, 5/28/86. Environmental management audit and development of procedures for handling chemical substances imported from BASF's German parent corporation. BASF will pay a stipulated penalty of $10,000 per "safe" chemical not listed on the TSCA Chemical Inventory. EPA will apply the TSCA PMN penalty policy to violations for unregistered "bad" chemicals discovered in the "review" process. EPA attorney: Michael Walker, FTS 475-8697.

Chapman Chem. Co., et al., FIFRA 529, et al., Filed 9/30/85. The industry parties to the settlement agreement agreed to implement and participate in a voluntary Consumer Awareness Program to provide users of treated wood products with use, handling, and precautionary information. The focus of the program is a Consumer Information Sheet which contains language approved by the Agency. Industry agreed to conduct an audit of the program within a year after settlement and to submit the results of the audit to EPA within 30 days of its completion. EPA attorney: Cara Jablon, FTS 382-2940.

Chemical Waste Management, Inc. (Emelle, Alabama facility), CAFO, TSCA-84-H-03, 12/19/84. Management audit covering all RCRA and TSCA requirements. Audit also addresses personnel training, spill response, operations and maintenance, interim stabilization, and quality control and assurance. EPA attorneys: Keith Onsdorff, FTS 382-3072; Alex Varela, FTS 475-8690; Arthur Ray, FTS 382-3050.

Conoco Inc. and Kayo Oil Company, CAA (211)-449, 520, 596, 709, and 710, 8/31/83. Settlement Agreement requires (or confirms): (1) revision of Conoco's Jobber Franchise Agreement to include provision for unleaded gasoline sampling on a quarterly basis at each Conoco Jobber retail outlet; (2) all drivers of Conoco company cars to certify that no tampering has occurred which would allow the introduction of leaded gasoline into a vehicle requiring unleaded gasoline; (3) posting of public information notices designed to inform Kayo customers of problems related to fuel switching; and (4) training to inform Kayo employees of EPA unleaded fuels regulations. EPA attorneys: Rich Kozlowski, FTS 382-2633; Rich Ackerman, FTS 382-4410.

Department of Defense, Federal Facility Compliance Agreement, 12/30/83. Agreement covers all DoD facilities where PCBs are stored for disposal; establishes compliance plan designed to achieve and maintain compliance with all applicable PCB storage and disposal requirements. EPA attorney: Deeohn Ferris, FTS 475-8690.

Diamond Shamrock Corporation, CAFO, TSCA-85-H-03, 7/15/85. Compliance audit of 43 facilities, covering all TSCA requirements. EPA attorneys: Deeohn Ferris, FTS 475-8690; Bob Pittman, FTS 475-8690.

General Electric Co. (Waterford, NY facility), No. 84-CV-681 (N.D.N.Y., entered _____). Clean Water Act consent decree requires the implementation of an engineering study to insure compliance with Defendant's N/SPDES permit. Settlement also requires monthly progress reports to be submitted to EPA with provisions for stipulated civil penalties for discharge violations. EPA attorney: Joseph Moran, FTS 475-8185.

Mac Oil Company d/b/a Circle Oil, No. FOSD-1908, 5/21/85. Clean Air Act Settlement Agreement requires: (1) institution of an unleaded gasoline sampling and testing program at all facilities receiving unleaded gasoline from Respondent; (2) inspections of the gasoline pumps at all facilities to which Respondent delivers gasoline to determine compliance with nozzle, label and warning sign requirements; and (3) maintenance of a company unleaded gasoline policy that informs all employees, agents and common carriers of gasoline handling and compartment labeling procedures. EPA attorney: Dean Uhler, FTS 382-2947.

National Convenience Stores, Inc. d/b/a Stop 'n Go, Nos. FOSD-1140 and FOSD-1404, 8/16/84. Consolidated Settlement Agreement requires: (1) institution of a program for compliance with EPA unleaded fuels regulations at all retail gasoline outlets that Respondent operates under any name, including periodic verification that nozzle requirements are met; and (2) submission to EPA of a Certificate of Compliance. EPA attorney: Rich Kozlowski, FTS 382-2633.

Phillips Petroleum Company, Consolidated Clean Air Act Settlement Agreement, 3/11/85. Settlement requires Phillips to: (1) establish, implement and maintain a program for unleaded gasoline quality assurance among its branded marketers and retailers; (2) conduct a threephase program of sampling unleaded gasoline at all branded retail outlets in the United States; (3) conduct annual inspections of ten percent of its branded retail outlets in the United States for compliance with EPA unleaded gasoline regulations; (4) at the time of contract renewal, review with its marketers and retailers their contractual obligations pertaining to the sale, handling, and distribution of unleaded gasoline; and (5) conduct a review of its Unleaded Gasoline Quality Assurance Program after the first year of operation and submit a written report to EPA assessing the program's effectiveness in improving the quality of unleaded gasoline and reducing the potential or actual number of violations of the regulatory limits for lead. EPA attorney: Rich Kozlowski, FTS 382-2633.

R.I. Marketing, Inc., No. FOSD-1611, 10/5/84. Clean Air Act Settlement Agreement requires institution of a fuel switching preventative action program, at each of approximately 200 retail outlets, designed to prevent leaded gasoline from being introduced into vehicles requiring unleaded fuel. EPA attorney: Rich Kozlowski, FTS 382-2633.

Savoca's Service Center, Inc., No. FOSD-2101, 10/17/85. Clean Air Act Settlement Agreement requires institution of a fuel switching preventative action program, at all retail outlets, designed to prevent leaded gasoline from being introduced into vehicles requiring unleaded fuel. EPA attorney: Rich Kozlowski, FTS 382-2633.

Union Carbide Corporation, CAFO, TSCA-85-H-06, 2/26/86. Settlement provides for development of a training program emphasizing pre-manufacture notification requirements under TSCA, followed by a test program to monitor responses for compliance with TSCA. EPA attorney: Alex Varela, FTS 475-8690.

United American Fuels, Inc., No. FOSD-1578, 12/18/84. Clean Air Act Settlement Agreement requires implementation of a fuel additive quality control and testing program. EPA attorney: Rich Kozlowski, FTS 382-2633.

USA v. Parma, Ohio, No. C-85-208, (N.D. Ohio, February 28, 1985). Clean Air Act Consent Judgment requires Defendant to: (1) replace catalytic converters that had been removed illegally; (2) inspect (periodically for two years) all city vehicles for tampering with emission controls; (3) tune-up and test (periodically for two years) all city vehicles for emissions; (4) report all tampering found to EPA and take appropriate remedial measures; (5) train mechanics in compliance with EPA standards; (6) distribute pamphlets discussing tampering and fuel switching to all households in Parma, Ohio; and (7) display for one year posters cautioning against tampering and fuel switching. EPA attorney: Debra Rosenberg, FTS 382-2649.

USA v. State of Maine, No. 84-0152-B (D. Maine, November 19, 1985). Clean Air Act Consent Decree requires State to (1) inspect all Maine Forest Service vehicles for tampering with emission control devices, and correct deficiencies; (2) inspect each gasoline fueling facility owned or operated by the Maine Department of Conservation for compliance with label, notice and nozzle size requirements, and correct deficiencies; (3) publicize to Maine Forest Service personnel and the public the importance of complying with mobile source requirements; and (4) implement fully the catalytic converter and inlet restrictor inspection program mandated by State law, and audit at least 90 percent of licensed inspection facilities to verify compliance. EPA attorney: Richard Friedman, FTS 382-2940.

Note: The settlements identified herein relating to mobile source enforcement under the Clean Air Act are representative of approximately 200 such settlements that have been achieved to date.

A Note Concerning Application of the Model Provisions

Attachments C-G represent model provisions for the incorporation of environmental auditing requirements within enforcement settlements. These models are based upon medium-specific settlements and necessarily reflect the circumstances surrounding those settlements. Accordingly, Agency negotiators should not hesitate to alter them as necessary to meet the needs of a particular case. An attempt has been made to fashion the models in such a manner that they can be used in any enforcement settlement; however, some language has been retained which applies to only one or two EPA programs. Even where specific language is found to be inapposite, the general headings under which such language is found should provide helpful guidance to Agency personnel in identifying the categories of issues which a particular type of auditing settlement should address.

Attachment C

MODEL ENVIRONMENTAL COMPLIANCE AUDIT PROVISION FOR CONSENT DECREES OR AGREEMENTS

A.1. Defendant/Respondent shall, within sixty days after the effective date of this Decree/Agreement [and where a continuing audit requirement is appropriate, add: and not less often than annually thereafter for a five-year period], audit the status of [applicable statutory] compliance at the [site of facility(ies)] and take prompt remedial action against all violations found.

A.2. Defendant/Respondent shall, within sixty days after completion of the compliance audit required by paragraph 1, submit to EPA's [name of EPA office overseeing compliance with Decree/Agreement] a certification that, to the best of its knowledge, Defendant/Respondent is in compliance with all [applicable statutory and regulatory] requirements or has developed a schedule for achieving compliance subject to EPA approval.

A.3. Nothing in this Decree/Agreement shall preclude EPA from instituting enforcement actions against Defendant/Respondent for any violations of [applicable statutory and regulatory] requirements which are not cited within the Complaint giving rise to this Decree/Agreement.

MODEL ENVIRONMENTAL MANAGEMENT AUDIT PROVISION FOR CONSENT DECREES OR AGREEMENTS

B.1. Defendant/Respondent shall propose to EPA's [name of EPA office overseeing compliance with Decree/Agreement] by written submittal to [name of Agency contact] within thirty (30) days of the effective date of this Decree/Agreement, the scope of work for the services of a [third party or internal] auditor who shall be expert in environmental auditing, environmental management systems and [applicable statutory program(s)] management operations. Such auditor shall be independent of and in no way responsible to production management. This scope of work and auditor shall be agreed upon by EPA and Defendant/Respondent in writing, prior to the auditor's commencing the performance of the professional services more fully set forth below. The auditor will be retained and the scope of work will be designed to review and make recommendations regarding the improvement of Defendant's/Respondent's environmental compliance and management policies, practices, and systems at the [site of facility(ies)] and in the Defendant's/Respondent's corporate offices having responsibility for supervision of compliance activities at such facility(ies).

2. Within one hundred twenty (120) days after agreement upon the scope of work and the auditor, the auditor shall submit a written Environmental Audit Report to the Defendant/ Respondent. This Report shall:

a. Identify and describe the existing facility environmental management operations and the corporate offices responsible for overall company-wide environmental compliance and management systems, policies and prevailing practices as they affect [applicable statutory and regulatory] compliance at the [site of facility(ies)].

b. Evaluate such operations and systems, practices and policies and identify and describe fully the perceived weaknesses in such operations and systems, practices and policies by comparing them, to the extent practicable, to:

i. their ability to promote compliance with [applicable statutory and regulatory] requirements;

ii. the existing practices, programs and policies of other [applicable industry] corporations operating within the continental United States, including consideration of the available literature and consultant's experience pertinent to regulatory compliance programs, practices and policies currently operative in the [applicable industry] in the continental United States;

iii. the history of [facility] operations in terms of the facility's(ies') compliance programs, compliance record

and environmental management practices over the previous five years [or longer if necessary or relevant].

The auditor shall apply its expertise and judgment to the foregoing information, using such factors as the auditor believes to be relevant and appropriate, which factors shall be stated in the report.

c. Based on the evaluation required in paragraphs 2.a. and b. above, the auditor shall identify and describe fully with supporting rationales the perceived areas, if any, where Defendant's/Respondent's environmental management systems, practices and policies may be improved as they affect the [facility(ies)] regarding [applicable statutory] compliance obligations, listing specific options for any improvements at the [facility(ies)] in the following areas:

i. environmental compliance program management operation, staffing, education and experience requirements.

ii. compliance management budget, lines of authority to Defendant's/Respondent's corporate offices responsible for overall company-wide environmental compliance and management systems, policies, and practices, and relationship to the operating facility(ies) manager.

iii. personnel training for individual employee compliance obligations and [applicable medium-specific activities].

iv. Operations and Maintenance (O&M) procedures for [applicable medium-specific pollution control] equipment.

v. evaluation of [applicable industry] operations and pollution control equipment in terms of adequacy of design and compatibility with [applicable medium-specific substances] being passed through such equipment.

vi. quality and thoroughness of implementation of all waste and wastewater [or other pollutant source] analysis plans for both incoming and outgoing waste [or other pollutant] streams, whether directly discharged, emitted, released to the ambient environment, or conveyed off-site in bulk shipments.

vii. preparation of Quality Assurance and Quality Control programs for sampling and analysis and for environmental testing procedures, including [facility(ies)] laboratories and contract laboratories for [facility(ies)].

viii. preparation of records needed to provide the [facility(ies)] management with an adequate data base to accurately determine compliance with all applicable statutory and regulatory requirements, with particular attention to waste [or other

pollutant] generation (including quantity and chemical composition), movements, treatment, and ultimate disposition by location of waste [or other pollutant] source, handling points and final disposition. This evaluation shall encompass proposals for state-of-the-art data management systems providing timely access to all of the above records to be maintained by an onsite computer.

ix. preparation of self-monitoring reports required to be filed with the State and EPA.

x. preparation and review of Incident Reports evaluating causes of [applicable medium-specific pollution control] equipment malfunctions, improper [applicable medium-specific substances] handling, or breakdowns, with specific recommendations for corrective steps and preventive O&M, along with procedures for reporting these recommendations to corporate headquarters.

3. Within 30 days after Defendant's/Respondent's receipt of the Audit Report, Defendant/Respondent shall submit to EPA that portion of the Audit Report which contains the recommendations of the auditor, together with a report of Defendant's/Respondent's good faith evaluation of each option it has selected for adoption and the reasons for rejecting other options. The report by Defendant/Respondent shall set forth the specific actions the company shall take and a schedule, not to exceed sixty (60) days [or longer if necessary] from the date that EPA receives and evaluates the schedule, for implementation of the recommendations adopted by Defendant/Respondent.

4. Any failure by Defendant/Respondent to meet the schedule for implementing the audit program set forth in this Decree/Agreement shall result in stipulated penalties of [$_____] (in addition to whatever sanctions the court/ALJ may impose for contempt), payable by Defendant/Respondent to the U.S. Treasury, for each day such schedule is not met.

B. Nothing in this Decree/Agreement shall preclude EPA from instituting enforcement actions against Defendant/Respondent for any violations of [applicable statutory and regulatory] requirements which are not cited within the Complaint giving rise to this Decree/Agreement.

MODEL ENVIRONMENTAL COMPLIANCE AND MANAGEMENT AUDIT PROVISION FOR CONSENT DECREES AND AGREEMENTS

C.1. Defendant/Respondent shall conduct environmental audits of its facility(ies) [of appropriate frequency and duration] in accordance with the Audit Workplan attached hereto as Exhibit B [company specific; not included]. The first such audit shall commence on or about three months from the effective date of this Decree/Agreement. Each of the audits shall be completed in accordance with the schedule set forth in the Audit Workplan.

2. The performance standard of each such audit is to complete a detailed and professional investigation as set forth in the Audit Workplan of the facility's recordkeeping practices and environmental management operations during the [applicable period]. In accordance with the Audit Workplan, the following audit reports shall be prepared and submitted, with copies of supporting documentation, to EPA within thirty days following the initiation of each such audit:

a. A report on all [pollutants] whose locations (as reported in the facility records) differ from their observed physical location or whose physical locations cannot be corroborated by existing records kept at the facility.

b. A report of all quantity variations (of 10% or more by volume or weight, or any variation in piece count) between [pollutants] received and [pollutants] disposed of at the facility.

c. A report on Defendant's/Respondent's activities at the facility in terms of whether or not they comply with the procedures required under the [Pollutant] Analysis Plan for [pollutant] acceptance. Defendant/Respondent shall include with this report the results of a minimum of three laboratory (including Defendant's/Respondent's laboratory) analyses of blind standards (i.e., pre-analyzed samples whose concentrations are unknown to the laboratories participating in the audit) to be provided by the audit team to evaluate Defendant's/Respondent's ability to quantify representative hazardous constituents in various media.

d. A report of any observed deviations from Defendant's/Respondent's written operating procedures, including documentation on any untimely response to the repair and/or replacement of deteriorating or malfunctioning [pollutant] containers, structures, or equipment.

e. Recommendations as to potential significant improvements and/or modifications which should be made to Defendant's/Respondent's operating procedures to achieve compliance with [applicable statutory and regulatory] requirements.

3. Nothing in this Decree/Agreement shall preclude EPA from instituting enforcement actions against Defendant/Respondent for any violations of [applicable statutory and regulatory] requirements which are not cited within the Complaint giving rise to this Decree/Agreement.

MODEL ENVIRONMENTAL COMPLIANCE AND MANAGEMENT AUDIT PROVISION FOR CONSENT DECREES AND AGREEMENTS*

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* This provision is only appropriate for a party with an extensive history of noncompliance. It requires a high level of Agency oversight. As an internally developed document that has not been subjected to the negotiation process, the provision is more susceptible than other model provisions to the give and take of negotiation. While the provision only addresses requirements under RCRA and TSCA, audit provisions under other statutes may be crafted by using as a framework the headings contained in this provision.

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MODEL ENVIRONMENTAL COMPLIANCE AND MANAGEMENT AUDIT PROVISION FOR CONSENT DECREES AND AGREEMENTS*

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* This provision is only appropriate for a party with an extensive history of noncompliance. It requires a high level of Agency oversight. Based on a draft settlement document, the provision reflects a pro-Agency bias and thus is more susceptible than other model provisions to the give and take of the negotiation process. While the provision only addresses requirements under RCRA and TSCA, audit provisions under other statutes may be crafted by using as a framework the headings contained in this provision.

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1. Purposes of Consent Decree/Agreement. In order to achieve the mutual goal of ensuring full compliance with applicable environmental laws, regulations, and permits by Defendant's/Respondent's active facilities in an efficient and coordinated manner, Defendant/Respondent and EPA hereby enter into a Consent Decree/Agreement under which:

(1) independent auditors to be retained by EPA and paid for by Defendant/Respondent shall, subject to EPA oversight, audit each facility and report to both parties on their assessment of Defendant's/Respondent's compliance with RCRA and TSCA and their implementing permits, rules and regulations;

(2) the independent auditors shall perform an analysis of Defendant's/Respondent's environmental management systems, practices and policies, as they affect inter-facility and intra-facility transactions (as defined in Paragraphs 5(11) and 5(12) of this Decree/Agreement);

(3) Defendant/Respondent shall pay penalties for violations of the aforementioned statutes, permits, rules and regulations according to the Penalty Schedule set forth as Appendix 2 to this Decree/Agreement; and

(4) EPA shall accept the penalties provided in Appendix 2 as full and complete settlement and satisfaction of any of its civil claims for violations detected by the audit firm (with certain exceptions as set forth in Paragraphs 23, 24, and 25 of this Decree/Agreement).

TERMS OF SETTLEMENT

DEFINITIONS

5. Whenever the following terms are used in this Decree/Agreement, the definitions specified herein shall apply:

(1) Compliance Report and Plan: A document to be submitted by Defendant/Respondent to EPA, pursuant to Paragraph 19 of this Decree/Agreement, which:

(a) describes in full detail every corrective action taken in response to a Facility Audit Report;

(b) in the case of violations which are not corrected within 60 days of submittal of the Facility Audit Report, describes every action to be taken in response to any

violations or findings in the Facility Audit Report; and

(c) certifies under oath the accuracy of information contained in the Compliance Report and Plan.

(2) Confidential Business Information (CBI)

(a) Information/Documents Determined Not to Be Entitled to CBI Protection. It is agreed between the parties that portions of documents containing the following information shall not be eligible for CBI treatment:

(i) The fact that any chemical waste was disposed of at any Defendant/Respondent facility.

(ii) The location of disposal of any chemical waste at any Defendant/Respondent facility.

(iii) Any information contained or referred to in any manifest for any chemical waste disposed of at any Defendant/Respondent facility.

(iv) The identity and quantity of any chemical waste disposed of at any Defendant/Respondent facility.

(v) Any monitoring data or analysis of monitoring data pertaining to disposal activities at any Defendant/Respondent facility, including monitoring data from any well, whether or not installed pursuant to 40 C.F.R. Part 265, Subpart F, or 40 C.F.R. Part 254, Subpart F (RCRA Groundwater Monitoring Requirements).

(iv) Any permit applications submitted to EPA or to any state pursuant to federal or state statute or regulation.

(vii) Any information regarding planned improvements in the treatment, storage or disposal of chemical wastes at any Defendant/Respondent facility.

(viii) Any hydrogeologic or geologic data.

(ix) Any groundwater monitoring data.

(x) Any contingency plans, closure plans, or post-closure plans.

(xi) Any waste analysis plans.

(xii) Any training and/or inspection manuals and schedules.

(xiii) Any point source discharge or receiving water monitoring data.

(b) The status of information not listed in Section (a) above shall be determined in accordance with 40 CFR Part 2, which provides for CBI treatment of information where:

(i) Defendant/Respondent has taken reasonable measures through the issuance and observance of companywide policies and procedures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(ii) The information is not, and has not been, reasonably obtainable without Defendant's/ Respondent's consent by other persons (other than governmental bodies which are bound by and observing Defendant's/ Respondent's claims of CBI as to that information) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

(iii) Disclosure of the information is likely to cause substantial harm to Defendant's/ Respondent's competitive position.

(3) Corporate Management Report and Plan: A document submitted by Defendant/Respondent to EPA, pursuant to Paragraph 27 of this Decree/Agreement, describing in full detail what actions Defendant/Respondent has taken or will take to implement the findings of the Corporate Management Systems Report.

(4) Corporate Management Systems Report: A fully integrated separate report prepared pursuant to the Corporate Management Systems Report Protocol set forth in Appendix 3 of this Decree/Agreement and submitted by Defendant/Respondent to EPA pursuant to Paragraph 26 of this Decree/Agreement.

(5) Corrective Action: Any action taken by Defendant/Respondent in order to come into compliance with any federal, state or local statutory or regulatory requirement for the treatment, storage, or disposal of any Hazardous Substance.

(6) Facility Audit Reports: Reports to be submitted by the Audit Firm to EPA, pursuant to Paragraph 19 of this Decree/Agreement, which:

(a) describe in detail the procedures followed in the facility audit, the facility itself, the regulatory history of the facility, and the facility's current compliance status;

(b) describe in detail each violation detected during the audit;

(c) provide any other information which, in the judgment of the Audit Firm, merits Agency review;

(d) for each violation reported, provide the relevant statutory or regulatory section; the particular area of the facility where the violation was found (if appropriate); the dates during which the violation occurred or existed (if it can reasonably be determined); and any other relevant or appropriate information.

(7) Hazardous Substances: Those materials meeting the definition contained in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601 et seq., §9601(14).

(8) Hazardous Wastes: Those materials meeting the definition contained in 42 U.S.C. §6903(5) and the regulations promulgated at 40 C.F.R. Part 261.

(9) Independent Audit Firm ("Audit Firm"): A firm selected by EPA, pursuant to Paragraph 6 of this Decree/Agreement, for the purpose of performing the Facility Compliance and Management Systems Audits described herein. For the purpose of this Decree/Agreement, the Independent Audit Firm must exercise the same independent judgment that a Certified Public Accounting firm would be expected to exercise in auditing a publicly held corporation. In addition, the Independent Audit Firm must:

(a) not own stock in Defendant/Respondent or any parent, subsidiary, or affiliated corporation;

(b) have no history of participation in any previous contractual agreement with Defendant/Respondent or any parent, subsidiary, or affiliated corporation; and

(c) have no other direct financial stake in the outcome of the Facility Compliance or Management Systems Audits outlined in this Decree/Agreement.

(10) Inter-facility Transactions: Any letters, contracts, memoranda, or other communications between two or more offices or facilities owned or operated by Defendant/Respondent.

(11) Intra-facility Transactions: Any letters, contracts, memoranda, or other communications between two or more locations or offices at a single Defendant/Respondent Facility.

(12) Manifest: The shipping document EPA form 8700-22 and, if necessary, EPA form 8700-22A (as required by 40 C.F.R. Part 262) or equivalent.

(13) New Violation: Any statutory or regulatory violation not reported in the Facility Inspection Report.

(14) Plaintiff: The United States of America, for the Administrator of the United States Environmental Protection Agency (collectively, "the Agency" or "EPA").

(15) Records: Any Defendant/Respondent or consultant report, document, writing, photograph, tape recording or other electronic means of data collection and retention which bears upon Defendant's/Respondent's compliance with EPA, state and local rules and regulations.

(16) Facility: Any facility which treats, stores, or disposes of hazardous waste as those terms are defined at 42 U.S.C. §§6903(3), 6903(33), and 6903(34).

(17) Uncorrected Violation: Any violation reported in a Facility Inspection Report which remains uncorrected for 60 days or more after the completion and submission of the Facility Inspection Report pursuant to Paragraph 19 of this Decree/Agreement.

GENERAL AUDIT PROCEDURES

6. Preliminary Matters

(1) Scope of Work

(a) Defendant/Respondent shall submit to the Agency within thirty (30) days of the effective date of this Decree/Agreement the Scope of Work for audits of the Defendant/Respondent facilities listed in Appendix 1 for RCRA and TSCA violations. EPA shall have thirty (30) days from the date of receipt of this Scope of Work and proposed Audit Firm to submit to Defendant/Respondent in writing any proposed modifications in the scope of work.

(b) Defendant/Respondent shall have fifteen (15) days from the date of receipt of EPA's proposed modifications within which to submit in writing its comments upon those proposed modifications.

(b) Within ten (10) days of receipt of Defendant's/Respondent's comments, the Agency shall issue its final decision as to the Scope of Work, which shall be binding upon Defendant/Respondent.

(2) Establishment of Trust

(a) Within thirty (30) days of the date of this Decree/Agreement, Defendant/Respondent shall establish an irrevocable trust fund ("Trust"), the form and text of which shall be approved by EPA. If no fund is approved by EPA within thirty (30) days of the date of this Decree/Agreement, a form supplied by EPA shall be used. The Trustee shall be a bank selected by Defendant/Respondent, which must be approved by EPA.

(b) The Administrator of EPA shall have special power of appointment (and the only power of appointment) over all income and all assets of the Trust. That power may be exercised only to make appointments of funds in accordance with this Decree/Agreement. If, at the conclusion of all tasks set forth in this Decree/Agreement, there remains trust income or assets which have not been appointed by exercise of such special power, then all such remaining unappointed assets shall be delivered forthwith to Defendant/Respondent. Defendant/Respondent shall fund the Trust by placing $_____ in the hands of the Trustee within forty-five (45) days after the date of this Decree/Agreement.

(3) Selection of Audit Firm

(a) Within forty-five (45) days after the date of this Decree/Agreement, EPA shall notify Defendant/Respondent of its selection of a proposed Audit Firm. Defendant/Respondent shall have fifteen (15) days from the date of receipt of EPA's proposed Audit Firm to accept, reject, or comment upon this selection. Reasons for which Defendant/Respondent may reject the proposed Audit Firm are limited to lack of sufficient national reputation; inexperience in performing environmental compliance and management audits; inadequate staffing levels; and failure to qualify as an Independent Audit Firm as defined in Paragraph 5(10) of this Decree/Agreement.

(b) In the event EPA and Defendant/Respondent are unable to agree on selection of an Audit Firm, the parties shall submit to Dispute Resolution as set forth in Paragraph 32 of this Decree/Agreement.

7. Audit Seminar. Before the Audit Firm begins the audits, and within 60 days of the date EPA and Defendant/Respondent agree upon the Scope of Work and Audit Firm as described above, the Agency shall conduct a seminar for employees of the Audit Firm who are to conduct the audits. This seminar shall serve the purpose of assuring that the Audit Firm employees who will be conducting the audits are familiar with all protocols required by Agency policies and procedures to be utilized in conducting compliance audits. The Agency may conduct the audit seminar at the National Enforcement Investigations Center (NEIC) near Denver, Colorado or at the Audit Firm's office. The Agency shall not be responsible for transportation, lodging or other costs associated with attendance by the audit firm employees at the seminar.

8. Observation of EPA Protocols. The Audit Firm shall be required by contract with Defendant/Respondent to observe the protocols presented at the audit seminar. Such protocols include but are not limited to: (1) NEIC's Multi-Media Compliance Audit Procedures; (2) the EPA Office of Administration's Environmental Auditing Protocol; (3) the NEIC Policy and Procedure Manual; and (4) the Corporate Management Systems Report Protocol provided in Appendix 3 of this Decree/Agreement (See Paragraph 26 below).

9. Review of Work Plan.

(1) Within 30 days of the Audit Seminar, the Audit Firm shall submit to Defendant/Respondent and EPA a proposed Work Plan which shall specify the Audit Firm's plan for implementing the Scope of Work. Said

Work Plan shall include the auditing protocols to be used by the Audit Firm; a schedule for conducting facility audits and completion of all other tasks set forth in the Scope of Work; and the names and resumes of those Audit Firm employees who will be primarily responsible for performance of the tasks set forth in the Scope of Work. The proposed Work Plan shall not specify the order of audits or otherwise provide Defendant/Respondent with advance notice of specific audits.

(2) EPA and Defendant/Respondent shall have 30 days from the date of receipt of the proposed Work Plan to submit in writing any proposed revisions to the proposed Work Plan.

(3) The Audit Firm shall have fifteen (15) days from the date of receipt of these revisions within which to submit in writing its comments on these proposed revisions.

(4) Within ten (10) days of receipt of the Audit Firm's comments, EPA shall issue its final decision as to the work plan, which shall be binding on both Defendant/Respondent and the Audit Firm.

(5) The provisions of this Paragraph shall also be set forth as provisions of the contract between Defendant/Respondent and the Audit Firm for the performance of the subject audits.

10. Facilities to be Audited. The Audit Firm shall, subject to the provisions set forth herein, conduct comprehensive RCRA/TSCA Compliance Audits (see Paragraphs 11 through 25) and a Management Systems Audit (see Paragraphs 26 and 27) of the facilities listed in Appendix 1 of this Decree/Agreement. The designation of RCRA/TSCA as the primary areas of audits shall not prohibit the Audit Firm from auditing and reporting violations of any other environmental statutes or regulations should those violations come to the attention of the Audit Firm audit team during the inspections. Notice of individual facility audits shall be provided to NEIC at least thirty (30) days prior to scheduled visits. Advance notice of individual facility inspections shall not be provided to Defendant/Respondent.

FACILITY COMPLIANCE AUDITS

Review of Records

11. Records to be Examined.

a. Records Relevant to Compliance with RCRA.

Facility audits may include a review of any facility record of Defendant/Respondent or its predecessors from November 1980. Other records pre-dating November 1980 which bear on the facility's compliance after November 1980 may also be examined, but only to the extent that they are necessary to render judgment regarding any event occurring after November 1980.

b. Records Relevant to Compliance with TSCA.

Facility audits may include a review of any facility record of Defendant/Respondent or its predecessors from April 1978 which is relevant to compliance with TSCA and its implementing regulations. Other records pre-dating April 1978 which bear on the facility's compliance after April 1978 may also be examined, but only to the extent that they are necessary to render judgment regarding any event occurring after April 1978.

c. Records to be Examined by the Audit Firm. Records to be examined include but are not limited to:

(1) all records required by federal, state or local law to be maintained by Defendant/Respondent.

(2) facility operating records, including but not limited to waste profile sheets, containing waste pre-acceptance data, receiving logs, analytical verification data, waste tracking data for intra-facility movement of received wastes or wastes generated on-site, waste storage data, waste treatment data, and data reflecting the disposition of received wastes.

(3) corporate and facility guidelines, policies and internal operating rules pertaining to facility operations, inspections, personnel training, and recordkeeping procedures.

(4) corporate guidelines, policies and internal operating rules pertaining to emergency response, site closure, and postclosure activities.

(5) applications, licenses, permits and approvals (including state permits and approvals), RCRA operation plans, or other regulatory documents pertaining to on-site activities at the facility.

(6) environmental monitoring plans for the facility.

(7) waste treatability studies.

(8) PCB operations plans, letters of approval, pumping logs, and records pertaining to the processing or handling of transformers, capacitors, and/or any other PCB articles, items and containers.

(9) manifests for wastes entering or leaving any Defendant/Respondent facility.

(10) records of use, maintenance and decommissioning of vehicles used on-site and/or off-site for the transportation of RCRA/TSCA wastes to, from, and within any Defendant/Respondent facility.

(11) vehicle washing records.

(12) any effluent data, including data on any direct discharge to surface water or any discharge to a publicly owned treatment facility, which Defendant/Respondent is required to keep pursuant to any federal, state, or local permit or regulation.

12. Access to Documents. The Audit Firm and representatives of the Agency, including contractors, shall have full, unfettered access to all documents bearing upon compliance with RCRA or TSCA kept at each facility or at Defendant's/Respondent's corporate headquarters, regardless of whether these records are deemed by Defendant/Respondent to constitute CBI or deemed by the Audit Firm to indicate or support a violation. The Defendant/Respondent shall retain and make available to EPA copies of any Defendant/Respondent document(s) examined by the Audit Firm which indicate or support any violation detected during the audit program. The Audit Firm shall prepare and provide to EPA a full and complete index of all documents that it examines to ensure that the Defendant/Respondent retains these records for subsequent EPA inspection.

13. Public Access to Records. Each document submitted by Defendant/Respondent to the Audit Firm or EPA pursuant to this Decree/Agreement shall be subject to public inspection unless it is determined by EPA (following a claim made by Defendant/Respondent) to be CBI in accordance with Paragraphs 5(2) and 14 of this Decree/Agreement.

14. Assertion of Confidential Business Information Claims.

a. Defendant/Respondent recognizes that EPA will treat as TSCA CBI only that information claimed confidential which EPA uses for purposes related to TSCA.

b. Claims that information is CBI shall be made on or before the date on which such information is provided to the Audit Firm or EPA.

15. Tentative Observance of CBI Claims. Any information claimed by Defendant/Respondent and asserted to meet the criteria set forth in Paragraph 5(2) will be treated by EPA as confidential in accordance with 40 C.F.R. §§2.201 through 2.215 and any relevant special confidentiality regulations at 40 C.F.R. §§2.301 et seq. pending any final determination that the information is not CBI.

16. Preservation of Records. Defendant/Respondent shall preserve all Records examined by the Audit Firm for three years after submission of its Corporate Management Report and Plan to EPA (See Paragraph 27 below). Nothing in this provision shall authorize destruction of any document required by law or regulation to be preserved for any period of time in excess of three years.

17. Examination of Groundwater Monitoring Information. The Audit Firm shall be required to examine and submit to EPA groundwater monitoring plans and data for each Defendant/Respondent facility listed in Appendix 1 of this Decree/Agreement.

18. Audit Schedule/Agency Access to Defendant's/Respondent's Facilities. All audits by the Audit Firm of the sites listed in Appendix 1 of this Decree/Agreement shall be completed within 180 days of EPA approval of the Work Plan as described in Paragraph 9 above. Representatives of the Agency, including contractors, may accompany audit teams from the Audit Firm on site audits performed by the Audit Firm and oversee the performance of the audits by the audit teams for the purpose of ensuring that the audit procedures and protocols required by the contract are followed.

19. Facility Audit Reports. As each separate facility audit is completed, the Audit Firm shall, no later than 30 days thereafter, simultaneously submit to Defendant/Respondent and the Agency a copy of a Facility Audit Report as defined in Paragraph 5(7). The failure of the Facility Audit Report to include all of the required information for any violation specified in the report shall not be grounds for avoidance of any penalty which is payable under the Penalty Schedule set forth in Appendix 2. The Agency shall not be bound by any

determination of the Audit Firm indicating that Defendant/ Respondent is in compliance with any applicable statutory or regulatory requirement.

20. Correction of Violations/Submission of Compliance Plans. In addition to paying the penalties set forth in the Penalty Schedule below, Defendant/Respondent shall:

(1) correct any violation indicated within a Facility Audit Report as soon as is physically possible.

(2) No later than 60 days after it has received an individual Facility Audit Report, submit to the Agency a Compliance Report and Plan.

The Agency shall not be bound by any Defendant/Respondent determination that it has achieved compliance, that the compliance was physically impossible to achieve, or that the times for corrective actions proposed by Defendant/Respondent to achieve compliance are reasonable. All corrective actions mandated by this Decree/ Agreement shall be undertaken in accordance with applicable federal, state and local law.

PENALTIES AND CORRECTIVE ACTION

21. For Missed Audit Deadlines. Defendant/Respondent shall pay the following stipulated penalties for any failure by Defendant/ Respondent to comply with any time requirement set forth in this Decree/Agreement:

Period of Failure to Comply	Penalty per Day of Delay
1st day through 14th day	$ 5,000.00
15th day through 44th day	$10,000.00
45th day and beyond	$15,000.00

For Violations of RCRA/TSCA

22. Payment of Penalties. For every violation of RCRA or TSCA reported in each Facility Audit Report, Defendant/ Respondent shall pay a penalty based on the Penalty Schedule provided as Appendix 2 of this Decree/Agreement. The listing of the violation in a Facility Audit Report shall be conclusive and binding on Defendant/Respondent, and the amount set forth in the Penalty Schedule shall be due and payable by certified check to the "Treasurer of the United States." The check shall be remitted to:

[appropriate EPA lockbox address]

within 30 days of receipt of the applicable Facility Inspection Report. Penalties shall accrue from the date the violation is determined to have begun to the date such violation is corrected

or abated. Subject to the rights reserved in Paragraph 25 below, EPA will not take further enforcement action on those violations for which penalties are paid and corrective action taken in compliance with this Decree/Agreement.

23. Unlisted Violations. In the event that the audit firm reports statutory or regulatory violations other than those listed in Appendix 2, Defendant/Respondent shall correct such violations as soon as is physically possible. In addition, the parties will, for a period of 60 days following receipt of the Facility Audit Report in which such unlisted violations are contained, attempt to settle by negotiation the appropriate remedy and penalties Defendant/Respondent shall pay for such unlisted violations. In such negotiations, the parties will compare each unlisted violation to the most similar listed violation, if possible. In the event of failure of the parties to achieve settlement of unlisted violations within 60 days, EPA shall be free to take any enforcement measure authorized by law.

24. Uncorrected or New Violations. Beginning on the date EPA receives a Facility Audit Report, Defendant/Respondent shall have sixty (60) days to correct violations cited therein. For any previously reported violation discovered to be uncorrected at the end of such sixty (60)-day-period, Defendant/Respondent shall pay a civil penalty of $25,000 per day for each day of continued noncompliance unless, within sixty (60) days, Defendant/Respondent has notified the Agency in accordance with Paragraph 20 that compliance is physically impossible and has obtained a final decision from the Agency verifying such physical impossibility. If, during the audit period or during the first post-audit inspection, the Agency discovers violations which were not reported to the Agency by the Audit Firm, for such violations Defendant/Respondent shall pay a civil penalty as set forth in the Penalty Schedule (Appendix 2). In addition, the Agency reserves the right to initiate civil or criminal action (or both) with regard to any previously reported and uncorrected violation and any violation not previously reported.

25. **Reservation of Rights.**

a. Reservation of States' and Local Governments' Right to Inspect Defendant's/Respondent's Facilities.

Nothing in this Decree/Agreement shall limit the authority of EPA or any state or local government to enter and inspect any Defendant/Respondent facility.

b. Reservation of Agency's Right to Seek Relief.

Except as provided in Sections 21 through 24 above, nothing in this Decree/Agreement shall be construed to limit the ability of the United States to take any enforcement action authorized by law.

MANAGEMENT SYSTEMS AUDIT

26. Corporate Management Systems Report. No later than 60 days after the last Facility Audit Report is submitted to Defendant/Respondent and EPA, the Audit Firm shall submit to Defendant/Respondent and EPA a Corporate Management Systems Report as defined in Paragraph 5(4) of this Decree/Agreement.

27. Corporate Management Report and Plan. No later than 90 days after it has received the Corporate Management Systems Report, Defendant/Respondent shall submit to the Agency its own Corporate Management Report and Plan describing in full detail what actions it has taken or will take to implement the findings of the Corporate Management Systems Report.

MISCELLANEOUS TERMS

28. Submission of Reports. Any reports produced by the Audit Firm, including Facility Audit Reports and the Corporate Management Systems Report, shall be submitted simultaneously to EPA and Defendant/Respondent. The Audit Firm shall not share draft copies of such reports with Defendant/Respondent unless such drafts are simultaneously submitted to EPA. The requirements of this Paragraph shall be set forth as a requirement in the contract between Defendant/Respondent and the Audit Firm for the performance of the audits described herein.

29. Effective Date of Decree/Agreement. This Decree/Agreement shall be considered binding and in full effect upon approval by the Federal district court judge/administrative law judge to whom this matter has been assigned.

30. Notice. All submissions and notices required by this Order shall be sent to the following address(es):

[insert address(es) of EPA office(s) overseeing Decree/Agreement]

31. Modification. This Decree/Agreement may be modified upon written approval of all parties hereto, and concurrence of the Federal District Court Judge/administrative law judge assigned to this matter.

32. Dispute Resolution.

(1) The parties recognize that a dispute may arise between Defendant/Respondent and EPA regarding plans, proposals or implementation schedules required to be submitted, regarding tasks required to be performed by Defendant/Respondent pursuant to the terms and provisions of this Decree/Agreement, or regarding whether Defendant/Respondent has incurred liability to pay stipulated penalties under Paragraphs 19 through 24. If such a dispute arises, the parties will endeavor to settle it by good faith negotiations among themselves. If the parties cannot resolve the issue within a reasonable time, not to exceed thirty (30) calendar days, the position of EPA shall prevail unless Defendant/Respondent files a petition with the court/administrative law judge setting forth the matter in dispute. The filing of a petition asking the court/administrative law judge to resolve a dispute shall not extend or postpone Defendant's/ Respondent's obligations under this Decree/Agreement with respect to the disputed issue.

(2) In presenting any matter in dispute to the court/ administrative law judge, Defendant/Respondent shall have the burden of proving that EPA's interpretation of the requirements of this Decree/Agreement are arbitrary, capricious, or otherwise not in accordance with the law.

33. Continuing Jurisdiction of the District Court/Administrative Law Judge. The district court/administrative forum in which this Decree/Agreement is entered shall retain jurisdiction until all obligations set forth herein are satisfied.

34. Relation to RCRA Permitting Process. Notwithstanding any other provision of this Decree/Agreement, EPA hereby reserves all of its rights, powers and authorities pursuant to the provisions of 42 U.S.C. §§6901 et seq. (RCRA) governing permits for facilities, and the regulations promulgated thereunder.

35. Violations Not Covered by RCRA or TSCA. No stipulated penalty or other remedy agreed to shall cover or apply to non-RCRA, non-TSCA violations. The parties shall be left to their respective rights, liabilities and defenses with regard to these matters.

36. Continuing Audit Requirement. For the five-year-period beginning on the date that Defendant/Respondent submits to the Agency the Corporate Management Report and Plan required by Paragraph VII. 27. of this Decree/Agreement, Defendant/Respondent shall conduct comprehensive audits not less often than annually of the compliance of its facilities with [applicable statutory and regulatory requirements]. After the initial audit by a third party consultant (as required by this Decree/Agreement), such audits may be conducted by such a consultant or by an independent audit staff of the company not responsible to production management. Reports of the results of such audits shall be furnished to the [appropriate corporate environmental official and plant manager]. Within thirty (30) days after completion of each final annual audit report, Defendant/Respondent shall submit to EPA a report of incidents of noncompliance identified by the audit and steps that will be taken to correct any continuing noncompliance and prevent future incidents of noncompliance.

Appendix 1

DEFENDANT'S/RESPONDENT'S FACILITIES

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Appendix 2

PENALTY SCHEDULE

	RCRA Violation	Penalty
I.	Groundwater Monitoring 40 C.F.R. §§ 264.91 and 265.91	$22,500.00 per missed sampling event
II.	Unsaturated Zone Monitoring 40 C.F.R. §§ 264.97 through 264.100 and 265.92 through 265.94	$22,500.00 per missed sampling event
III.	Waste Analysis Plans: Content and Implementation 40 C.F.R. §§ 264.13(a) and (b), and 265.13(a) and (b)	$25,000.00
IV.	Bulk Liquids in Landfill 40 C.F.R. §§ 264.314(a) and 265.314(a)	$22,500 per day of occurrence
V.	Containerized Liquids Disposal in Landfill 40 C.F.R. §§ 264.314(b) and 265.314(b)	$22,500.00 per day of occurrence
VI.	Waste Tracking within TSD facility 40 C.F.R. § 264.222	$25,500.00
VII.	Maintenance of Minimum Freeboard level for Surface Impoundment 40 C.F.R. § 264.226(c)	$6,500.00 per freeboard violation
VIII.	Ignitable/Reactive Disposal in Landfill 40 C.F.R. §§ 264.312 and 265.312	$9,500.00 per cell, per day
IX.	Land Disposal (direct application to unlined surface soils) of non-biodegradeable wastes 40 C.F.R. §§ 264.272(a) and 265.272(a)	$22,500.00 per day

	RCRA Violation	Penalty
X.	Trial test of waste compatibility prior to discharge into surface impoundment 40 C.F.R. § 265.225	$22,500.00 per day of event
XI.	Trial test of waste solidification process prior to landfill 40 C.F.R. §265.402	$22,500,00 per day
XII.	Failure to control wind dispersal of land treatment waste disposal zones 40 C.F.R. §§ 264.272(e) and 265.273(f)	$22,500.00 per unit
XIII.	Incompatible wastes placed into surface impoundment 40 C.F.R. §§ 264.230 and 265.230	$22,500.00 per day
XIV.	Unauthorized expansion of TSD facility during Interim status 40 C.F.R. §270.72	$20,000.00 per day or as needed to recapture all profits gained
XV.	Closure of Units w/o demonstration of compliance with facility closure plan 40 C.F.R. §§ 264.113 and 265.113	$25,000.00 per unit
XVI.	Inadequate closure/ post-closure inspection/maintenance plans 40 C.F.R. §§ 264.112 and 265.112	$15,000.00 per unit
XVII.	Absence of post-closure groundwater monitoring program 40 C.F.R. §§ 264.117(a)(1) and §265.117(a)(2)	$22,500.00 per day

	RCRA Violation	Penalty
XVIII.	Failure to update closure/ post closure plan cost estimates 40 C.F.R. §§ 264.144(c) and 265.114(c)	$3,000.00 per day
XIX.	No schedule included for closure activities 40 C.F.R. §§ 264.112(a) and 265.112(a)	$6,500.00 per plan milestone omitted
XX.	Inadequate Part A Applications, absence of identified operating units 40 C.F.R. §270.13	$9,500.00 per unit not properly identified
XXI.	Inadequate Part B Application 40 C.F.R. §270.14	$9,500.00 per unit not properly identified
XXII.	Absence of complete facility Inspection Plan, units omitted 40 C.F.R. §§ 264.15(b) and 265.15(b)	$2,250.00 per unit emitted, per day
XXIII.	Failure to record on facility inspections reports repairs or remedial measures taken 40 C.F.R. §§ 264.15(b) and 265.15(d)	$2,250.00 per omission
XXIV.	Failure to inspect freeboard levels of surface impoundments 40 C.F.R. §§ 264.226(b), (c) and 265.226(a)	$2,250.00 per occurrence
XXV.	Operating Record Omissions failure complete grid maps of landfilled lifts of waste 40 C.F.R. §§ 264.309 and 265.309	$2,250.00 per omission

	RCRA Violation	Penalty
XXVI.	Failure to record on-site generated hazardous wastes i.e. truck washing facility 40 C.F.R. § 262.41(b)	$9,500.00 per unrecorded event
XXVII.	No training provided to employee assigned to do waste analyses 40 C.F.R. §§ 264.16 and 265.16	$3,000.00 per untrained employee
XXVIII.	No analyses performed on materials added to on-site waste piles 40 C.F.R. § 265.252	$22,500.00 per event
XXIX.	Records not provided to Agency within 48 hours of request. 40 C.F.R. §§ 264.74 and 265.74	$6,500.00 per day of delay
XXX.	Fence not installed around all operating areas of TSD facility 40 C.F.R. §§ 264.14 and 265.14	$1,000.00
XXXI.	Emergency Contingency Plan Inadequacies 40 C.F.R. §§ 264.52 and 265.52	$2,225.00 per component deficiency
XXXII.	Failure to Meet Financial Responsibility Requirements 40 C.F.R. Part 264, Subpt. H and Part 265, Subpt. H	$25,000.00 per day of delay

	TSCA Violation	Penalty
XXXIII.	Improper Disposal of PCBs 40 C.F.R. §§ 761.60 (a)-(d).	
	--1,100 or more gallons or 750 or more cubic feet of PCB contaminated material.	$25,000.00 per day, per violation

	TSCA Violation	Penalty
	--220-1,000 gallons or 150-750 cubic feet of PCB contaminated material	$17,000.00 per day, per violation
	--less than 220 gallons or 150 cubic feet of PCB contaminated material	$5,000.00 per day, per violation
XXXIV.	Failure to Dispose of PCBs by Jan. 1, 1984. 40 C.F.R. § 761.65(a)	
	--1,100 or more gallons or 750 or more cubic feet of PCB contaminated material.	$25,000.00 per day, per violation
	--220-1,100 gallons or 150-750 cubic feet of PCB contaminated material.	$17,000.00 per day, per violation
	--less than 220 gallons or 150 cubic feet of PCB contaminated material.	$5,000.00 per day, per violation
XXXV.	Failure to Dispose of PCBs within one year of removal from service. 40 C.F.R. § 761.65(a)	
	--1,100 or more gallons or 750 or more cubic feet of PCB contaminated material.	$25,000.00 per day, per violation
	--220-1,100 gallons or 150-750 cubic feet of PCB contaminated material.	$17,000.00 per day, per violation
	--less than 220 gallons or 150 cubic feet of PCB contaminated material.	$5,000.00 per day, per violation
XXXVI.	Improper Processing of PCBs 40 C.F.R. § 761.20(a)	$20,000.00 per day, per violation

	TSCA Violation	Penalty
XXXVII.	Improper Distribution of PCBs (sale) in commerce. 40 C.F.R. § 761.20(a)	$20,000.00 per day, per violation
XXXVIII.	Improper treatment and testing of waste oils. 40 C.F.R. §§ 761.60(g)(2)(i) and (ii)	$25,000.00 per day, per violation
XXXIX.	Improper Use of PCBs 40 C.F.R. § 761.20(a)	$25,000.00 per day, per violation
XXXX.	Improper use of PCBs (road oiling; dust control; sealants) 40 C.F.R. § 761.20(d)	$25,000.00 per day, per violation
XXXXI.	Improper use of PCBs - Transformers 40 C.F.R. § 761.30(a) - Capacitors 40 C.F.R. § 761.30(1) - Heat transfer systems 40 C.F.R. § 761.30(d)	$20,000.00 per day, per violation
XXXXII.	PCB Storage Violations - 40 C.F.R. § 761.65(b) (facility criteria) - 40 C.F.R. § 761.65(c)(7)(ii) (spill plan development) - 40 C.F.R. § 761.65(c)(8) (management of liquids in storage)	$15,000.00 per day, per violation
XXXXIII.	Recordkeeping Violations (storage for disposal) 40 C.F.R. § 761.180(a)	$10,000.00 per day, per violation
XXXIV.	Recordkeeping violations (disposal facilities) Incinerators 40 C.F.R. § 761.180(c) Chemical waste landfills 40 C.F.R. § 761.180(d)	$15,000.00 per day, per violation

	TSCA Violation	Penalty
XXXXV.	Marking Violations 40 C.F.R. § 761.40(a)	$15,000.00 per day, per violation
XXXXVI.	Failure to Date PCB Items placed into storage 40 C.F.R. § 761.180(a)	$5,000.00 per day, per violation
XXXXVII.	Violation of any condition of a PCB chemical waste landfill (40 C.F.R. § 761.75) or incinerator (40 C.F.R. § 761.70) application approval.	$25,000.00 per day, per violation
XXXXVIII.	Failure to decontaminate PCB container, tanker trucks, etc. 40 C.F.R. § 761.79	$25,000.00 per day, per violation

CORPORATE MANAGEMENT SYSTEMS REPORT PROTOCOL

The Corporate Management Systems Report shall:

(1) Identify and describe the existing facility waste management operations and the Environmental Management Department's systems, policies and prevailing practices as they affect Defendant's/Respondent's corporate compliance with RCRA and TSCA.

(2) Evaluate such operations, systems, practices, and policies and identify and describe fully the perceived weaknesses in such operations, systems, practices, and policies by comparing them, to the extent practicable, to the existing practices, programs and policies of other RCRA and TSCA waste management corporations operating within the continental United States and to generally accepted corporate management practices.

(3) Based on the evaluation required in paragraphs (1) and (2) above, the consultant shall identify and describe fully with supporting rationales the perceived areas, if any, where Defendant's/Respondent's inter- and intra-facility waste management operations and corporate to operating level environmental management systems, practices and policies may be improved. The Corporate Management Systems Report shall list specific options for improvements in the following areas:

(a) Corporate data management practices pertaining to the following items:

i. compliance budgets;

ii. staffing;

iii. training;

iv. auditing;

v. incident reporting, including but not limited to manifest exception reports and any unpermitted disposal, release, or discharge;

vi. quality assurance test reporting;

vii. quality control reporting;

viii. generator waste profile reports, facility pre-acceptance reports, and acceptance analysis as these items compare to each facility's stated basis for accepting or rejecting individual waste loads; and

ix. facility mass balance records reflecting the internal disposition of all wastes received for final disposal.

(b) Corporate data evaluation practices, capabilities and policies pertaining to reports to and from compliance officers, internal and external environmental audits, regulatory agency notices of violation and all other compliance data documents which when evaluated may lead to changes in TSD operating procedures or directives by corporate management to modify any individual or multi-facility TSD facility operating procedures.

MODEL EMERGENCY ENVIRONMENTAL MANAGEMENT REORGANIZATION PROVISION FOR CONSENT DECREES OR AGREEMENTS

E.1. The objective of this provision is to provide a management structure at the corporate headquarters level that will ensure that comprehensive environmental policies and procedures are developed by top management and fully implemented company-wide at all facilities.

2. Defendant/Respondent shall propose to EPA's [name of EPA office overseeing compliance with Decree/Agreement] by written submittal to [name of Agency contact] within thirty (30) days of the effective date of this Decree/Agreement, a plan for reorganization of the corporate management structure with respect to environmental affairs. This reorganization proposal shall be agreed upon by EPA and Defendant/Respondent in writing, prior to implementation of the reorganization.

a. The management plan shall provide for the creation of a new position of Director, Environmental Affairs [or other appropriate title] to exercise the responsibilities set forth herein. The Director, Environmental Affairs shall report directly to [a corporate Vice President or other appropriate top management official not directly responsible for manufacturing/production activities]. The position shall at all times be filled by an experienced executive with a background in [appropriate industrial field] and in environmental management and compliance.

b. It shall be the responsibility of the Director, Environmental Affairs to develop appropriate corporate environmental policies and procedures and to oversee their implementation at all company facilities to ensure compliance with applicable Federal, State and local environmental statutes and regulations. In the development of such policies and procedures, the recommendations of the environmental audit conducted at the [facility] by an outside consultant as described herein shall be given full consideration.

c. Defendant/Respondent shall also establish such additional technical and support positions reporting directly to the Director, Environmental Affairs as are necessary to meet the objective of this provision. Neither the Director nor staff shall be assigned additional responsibilities not related to environmental compliance. Defendant/Respondent shall provide adequate budgetary support to the environmental staff.

3. Within ninety (90) days of EPA's approval of the environmental management plan, the company shall appoint the Director, Environmental Affairs and appropriately qualified staff.

4. Within two hundred seventy (270) days of EPA's approval of the environmental management plan, the Director, Environmental

Affairs shall complete development and begin the implementation of appropriate corporate environmental policies and procedures to meet the objective of this provision.

5. Within eighteen (18) months of the effective date of this Decree/Agreement, Defendant/Respondent shall fully implement the corporate environmental policies and procedures at all company facilities. This shall include any necessary organizational or personnel changes at the individual facility level.

6. Recognizing the corporate responsibility to maintain compliance with all applicable environmental statutes and regulations, Defendant/Respondent agrees to maintain a permanent corporate environmental management staff. The organization, makeup and functions of this staff may be modified from time to time as dictated by changes in corporate facilities or operations or the requirements of environmental statutes and regulations.